Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: April 16, 2021

CLAIM NO. 201879453

CARY DOBSON PETITIONER

VS. **APPEAL FROM HON. GRANT S. ROARK, ADMINISTRATIVE LAW JUDGE**

K & T SWITCHING AND
HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

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BEFORE: ALVEY, Chairman, STIVERS and BORDERS, Members.

BORDERS, Member. Cary Dobson ("Dobson") appeals from the November 30, 2020 Opinion, Order, and Award rendered by Hon. Grant Roark, Administrative Law Judge ("ALJ").

Dobson filed a Form 101 on February 8, 2019 alleging injuries to his right knee and low back, and claiming he developed floaters in his eyes, due to a

May 21, 2019 work injury while employed by K & T Switching ("K & T"). The case was initially bifurcated, and the ALJ rendered an Interlocutory Opinion and Award on August 25, 2019 determining the right knee condition and subsequent knee surgeries are compensable. On November 30, 2020, the ALJ rendered an Opinion, Order, and Award determining Dobson suffered a right knee injury as alleged, awarding him permanent partial disability ("PPD") benefits based on a 3% impairment rating, enhanced by the 3.4 multiplier. The ALJ further determined Dobson failed to prove his lumbar spine condition and alleged visual floaters were compensable, and that part of the claim was dismissed. No petition for reconsideration was filed. Dobson argues the ALJ committed reversible error in dismissing his low back claim. For reasons to be set forth, we affirm.

Dobson testified by deposition on April 8, 2019 and February 7, 2020, and at the hearings held June 27, 2019 and September 30, 2020. Dobson worked for K & T, a contractor for Ford, as a switcher driver. His work involved switching trailers every 15-20 minutes in the docks at Ford Motor Company's Louisville Assembly Plant. Dobson frequently climbed in and out of trucks. Dobson injured his right knee at work on May 31, 2018 while stepping down from a truck. Dobson normally drove a truck with three steps. However, on the date of the accident, he was using a truck that only had two steps. Thus, when stepping down, he anticipated another step and instead hit the ground hard with his feet. Dobson wrenched his right knee and jarred his body. He felt pain in his knee that "just went off the scale and I just felt like I was going to puke." Dobson initially treated at BaptistWorx Occupational Medicine and eventually was referred to Dr. Kittie

George who performed surgery in June 2018. He initially did well following surgery, but by January 2019, problems arose again with his right knee. Dr. George eventually performed a second right knee surgery for a recurrent meniscal tear.

Dobson stated he currently has restrictions of no kneeling, no heavy lifting, no squatting, or twisting. He walks short distances with a cane. He is unable to sit for a long time because his knee "freezes up, and I can't move." His knee is very painful, and he has trouble with steps. He has to prop his legs up every day. He has back pain from his mid back to his buttocks. His back pain causes problems with sleeping, limiting him to two to four and a half hours per night. Dobson applied for and received Social Security disability benefits.

Dobson denied any problem with his knee or back immediately prior to his injury. He had an incidence of discomfort in his knee a year prior to the injury, but stated an examination showed there was nothing wrong. Dobson was scheduled to be off work for two days and was released to work. Dobson acknowledged he had a back injury 15 years ago, but stated he fully recovered. Dobson denied any post-injury trauma to his knee, other than the evaluation conducted by Dr. Frank Bonnarens. Dobson testified Dr. Bonnarens was extremely aggressive in his examination, causing great pain. Dobson stated he nearly had to crawl from the office after the examination. Dobson has not returned to any work since the accident.

Dobson treated with Dr. George for his knee injury. On February 6, 2019, Dr. George noted Dobson initially "did great" following a medial meniscectomy. However, his symptoms returned and persisted. She noted he had

marked increase in symptoms "after what sounds like a McMurray test." A repeat MRI showed a recurrent medial meniscus tear and some progression of arthritis with a periarticular cyst seen in the medial femoral condyle related to the work injury. She performed a second knee surgery on May 10, 2019. In a June 18, 2019 report, she opined the second knee arthroscopy was related to Dobson's initial injury. She also addressed Dr. Bonnarens' opinion that a degenerative tear necessitated the second surgery rather than the effects of the work injury. Dr. George explained that during the surgery, she found Dobson had further meniscal tearing and less arthritis than was anticipated preoperatively. In an August 23, 2019 note, Dr. George again stated the May 10, 2019 surgery was related to his initial work injury.

In a November 1, 2019 letter, Dr. George stated she treated Dobson mostly for his knee, which was directly related to his work incident. She further stated, "It is my opinion based on his initial complaints of not only knee but also back and neck pain that all 3 are directly related to his fall." A January 15, 2020 letter stated Dobson underwent two knee arthroscopies and now has persistent knee pain and some degenerative changes. She noted he had some underlying changes at the time of his injury; however, he was asymptomatic. She opined his injury, meniscus tear, and subsequent surgery have propagated, causing his arthritis to worsen as a direct result of his work injury. On February 6, 2020, Dr. George placed Dobson at maximum medical improvement ("MMI") for the right knee. In a June 15, 2020 letter, Dr. George opined Dobson is unable to do his preinjury job requiring him to climb in and out of trucks.

On September 4, 2018, Dr. Joseph Werner saw Dobson on referral from Dr. George for complaints of neck pain. At that time, Dobson also voiced complaints of low back pain. Dr. Werner saw Dobson again on September 25, 2019 for continued low back and leg pain. In a November 1, 2019 letter, Dr. Werner stated he was treating Dobson for a work injury. He treated his back, and to a lesser extent his neck resulted from the work injury. He noted Dobson has L4-5 spondylolisthesis and some associated degenerative findings along with mild degenerative changes in the cervical spine, from which he never suffered major medical issues. Dr. Werner observed the L4-5 spondylolisthetic anatomic lesion was clearly pre-existing, yet the current severe symptoms were activated by the accident in question, and he remains under treatment for symptoms resulting from that accident.

Dr. Bonnarens performed evaluations on January 11, 2019 and October 25, 2019. In the initial examination, he noted full range of motion, along with crepitus, in both knees. Patellofemoral compression testing and quadriceps inhibition testing yielded positive findings in both knees. He diagnosed a degenerative tear of the meniscus that may have been exacerbated by the work accident, and placed Dobson at MMI as of January 11, 2019. Dr. Bonnarens explained Dobson has pre-existing and underlying arthritis of the right knee unrelated to the work injury. Regarding the diagnosis of a recurrent meniscus tear, Dr. Bonnarens concluded the work-related component of the right knee injury was corrected by the first surgery. Any progression of the underlying degenerative process, including a new meniscal tear, is unrelated to the work injury. Dr.

Bonnarens assigned a 2% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment, ("AMA Guides"). Dr. Bonnarens opined the arthritic changes are unrelated and pre-existing. He found no impairment is associated with the osteoarthritic changes. He felt Dobson does not require any further medical treatment for the cure and relief of the effects of the May 31, 2018 work injury.

Dr. James Farrage evaluated Dobson on February 20, 2020. Dr. Farrage diagnosed status post arthroscopic medial meniscectomy and arthroplasty, lumbar spondylolisthesis at L4-5 and cervical spondylolisthesis, related to the work injury. Dr. Farrage assigned restrictions of no lifting over 20 pounds occasionally or 10 pounds frequently, and no carrying over 20 pounds occasionally or 10 pounds frequently. He advised Dobson to avoid lifting ground to waist, ground to knee, ground to above shoulder, or waist to above the shoulder. He also advised Dobson to restrict bending, twisting, or walking to less than 1 hour, and he should only sit, stand, or push/pull 2-4 hours per day. Dr. Farrage also advised Dobson to never crawl or kneel, and he should only perform 4-8 hours a day of pinching/grasping or fine manipulations. Dr. Farrage stated Dobson has reached MMI for his knee condition. Dobson is not capable of returning to his previous work activities. Dr. Farrage assigned a 3% impairment rating for the knee injury pursuant to the AMA Guides. Dr. Farrage stated Dobson is not at MMI for the lumbar or cervical condition. None of the impairment is associated with any preexisting dormant condition. Dr. Farrage indicated Dobson is not capable of returning to his previous work activities.

Dr. Robert Sexton performed an evaluation on March 23, 2020. Dr. Sexton diagnosed multilevel mild spondylosis of the cervical spine, with no evidence of cervical discopathy, radiculopathy, myelopathy or neuropathy. He also diagnosed a 4mm spondylolisthesis at L4-5 with no nerve impingement, no discopathy, no lumbar radiculopathy, and no myelopathy or neuropathy. Dr. Sexton felt Dobson's symptoms do not correlate to his objective workup, which is suggestive of malingering. He stated there is no objective medical data documented to support Dobson acquired a cervical or lumbar injury due to the May 31, 2018 work event, or that Dobson requires additional medical or surgical treatment.

Dr. Peter Kirsch conducted physician reviews on September 24, 2018 and November 26, 2018. He concluded Dobson's complaints of neck and back pain are unrelated to the work accident of May 31, 2018. Dr. Kirsch noted the first mention of neck pain in the record was recorded by Dr. George on June 26, 2018, nearly two months after the accident. Back pain was not noted until September 4, 2018, more than three months after the accident. Based upon the delayed onset of symptoms, Dr. Kirsch concluded the complaints of neck and back pain are unrelated to the work accident. Dr. Kirsch opined the diagnosis of right knee osteoarthritis has no causal relationship with the work injury as there is no objective evidence of an acute alteration in the existing structural integrity of the right knee joint, and the arthritis is pre-existing and non-work-related.

The ALJ made the following Findings of Fact and Conclusions of Law relevant to this appeal, which are set forth, *verbatim*:

Causation/Work Relatedness

As this claim now stands, the compensability of plaintiff's right knee condition has already been established. However, the parties disagree as to whether plaintiff's alleged lower back condition is causally related to the effects of his May 31, 2018 injury. The defendant maintains plaintiff did not report any lower back symptoms until three months after the work injury and that his current lower back complaints are due to unrelated, age-appropriate degenerative conditions not caused or worsened by the work injury. In support of its position, it relies on its experts, Dr. Kirsch and Dr. Sexton, each of whom concluded plaintiff had no identifiable lumbar injury that could be related to the May 31, 2018 incident. For his part, plaintiff relies on the opinions of his treating physicians, Dr. George and her partner, Dr. Werner, who each concluded plaintiff's pre-existing lumbar degenerative changes were made symptomatic by the May 31, 2018 incident.

The burden of proof and risk of non-persuasion are on the claimant, relative to each and every essential element of his claim. *Burton v. Foster Wheeler Corp.*, Ky., 72 S.W.3d 925 (2002). With the December 12, 1996, amendments to the Act, these elements now include a "harmful change in the human organism evidenced by objective medical findings." KRS 342.0011(1). The term "objective medical findings" is defined in KRS 342.0011(33) as "information gained through direct observation and testing of the patient applying objective or standardized methods." The supreme court addressed the definition of "objective medical findings" in *Gibbs v. Premier Scale Co.*, Ky., 50 S.W.3d 754 (2001). The court held that a diagnosis of a harmful change based solely on complaints of symptoms was not sufficient to establish entitlement to benefits. KRS 342.0011(1) defines "injury" in relevant part as follows: (1) 'Injury' means any work-related traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings.

KRS 342.0011(33) defines "objective medical findings" accordingly: (33) 'Objective medical findings' means information gained through direct observation and testing of the patient applying objective or standardized methods.

In *Gibbs*, the Supreme Court of Kentucky first considered the definition of "objective medical findings" as required by KRS 342.0011(1) and defined in KRS 342.0011(33). The court, in *Gibbs*, explained:

KRS 342.0011(33) limits 'objective medical findings' to information gained by direct observation and testing applying objective or standardized methods. Thus, the plain language of KRS 342.0011(33) supports the view that a diagnosis is not an objective medical finding but rather that a diagnosis must be supported by objective medical findings in order to establish the presence of a compensable injury. The fact that a particular diagnosis is made in the standard manner will not render it an 'objective medical finding.' We recognize that a diagnosis of a harmful change which is based solely on complaints of symptoms may constitute a valid diagnosis for the purpose of medical treatment and that symptoms which are reported by a patient may be viewed by the medical profession as evidence of a harmful change. However, KRS 342.0011(1) and (33) clearly require more, and the courts are bound by those requirements even in instances where they exclude what might seem to some to be a class of worthy claims. A patient's complaints of symptoms clearly are not objective medical findings as the term is defined by KRS 342.0011(33). Therefore, we must conclude that a diagnosis based upon a worker's complaints of symptoms but not supported by objective medical findings is insufficient to prove an 'injury' for the purposes of Chapter 342.

Id. at 761-762. When the causal relationship between the trauma and the injury is not readily apparent to a layman, the question is one properly within the province of the medical experts. *Mengel v. Hawaiian-Tropic Northwest & Central Distributors, Inc.*, Ky. App., 618 S.W.2d 184 (1981); *Elizabethtown Sportswear v. Stice*, Ky. App., 720 S.W.2d 732 (1986). Authority clearly holds

the existence, cause and onset of medical impairment ratings under the AMA Guides are medical questions. *Kentucky River Enterprises, Inc. v. Elkins*, Ky., 107 S.W.3d 206 (2003). In order to rise to the level of substantial evidence, the opinion of a medical expert must be based upon reasonable medical probability or certainty. *Young v. Davidson*, Ky., 463 S.W.2d 924 (1971).

In considering the issue of causation in a case such as this, the Administrative Law Judge considers the opinions of the treating physician(s) especially carefully, as a treating physician is usually most familiar with the onset and etiology of their patient's complaints. In this case, both Dr. George and Dr. Werner concluded plaintiff's neck and back problems were causally related to the May 31, 2018 work injury. However, as the defendant points out, there is no record of any complaints of lower back pain until September 4, 2018, more than three months after the work injury. Prior to September 4, 2018, plaintiff was treated at Baptistworks at least six times and had seen Dr. George twice, and none of those records mention any complaints of lower back pain. In addition, plaintiff's physical therapy notes after the injury also make no mention of any lower back complaints. Given this quite significant lapse in time before the first documented complaints of lower back pain, Dr. Werner's, Dr. George's, and Dr. Farrage's naked conclusions as to causation are not especially persuasive. Neither treating physician explained how the work injury could have aroused pre-existing dormant degenerative lumbar changes and not be reported for over three months afterward. Similarly, Dr. Farrage explained how the mechanism of the work injury could have caused the lumbar complaints, but he also failed to explain why plaintiff reported no symptoms for over three months following the work injury.

Given these facts, the ALJ is simply not persuaded plaintiff has carried his burden of proving his lower back condition is work-related, as none of his experts provided any meaningful opinion on causation that links the mechanism of injury to the lower back complaints and explains the 3+ month delay in reporting symptoms. The ALJ is fully aware that plaintiff testified he tried to report his back problems when initially treated at Baptistworx but they would not listen to him. However,

> the ALJ finds it difficult to credit that plaintiff would have continually reported back pain and that such complaints would continue to be ignored and not documented. Moreover, his purported explanation does not touch upon why Dr. George's records do not document any complaints of lower back pain in his first two treatments with her. For these reasons, it is determined plaintiff has not carried his burden of proving work-related lower back condition, and that portion of his claim must be dismissed.
>
> Similarly, the ALJ finds no persuasive evidence to indicate plaintiff's vision floaters are causally related to his work injury and that portion of his claim is also dismissed."

Dobson appeals, arguing the ALJ committed reversible error by dismissing his claim for a lumbar injury.

As the claimant in a workers' compensation proceeding, Dobson had the burden of proving each of the essential elements of his claim. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because Dobson was not successful in his burden, the question on appeal is whether the evidence compels a different result. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Compelling evidence" is defined as evidence that is so overwhelming, no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985).

KRS 342.285 grants an ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). An ALJ may draw reasonable inferences from the evidence, reject any testimony, and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same

adversary party's total proof. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). Although a party may note evidence supporting a different outcome than reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). Rather, it must be shown there was no evidence of substantial probative value to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings made are so unreasonable under the evidence they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to weight and credibility or by noting other conclusions or reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

We note that neither party filed a Petition for Reconsideration. In the absence of a Petition for Reconsideration, on questions of fact, the Board is limited to a determination of whether substantial evidence in the record supports the ALJ's conclusion. Stated otherwise, where no Petition for Reconsideration was filed prior to the Board's review, inadequate, incomplete, or even inaccurate fact-finding on the part of an ALJ will not justify reversal or remand if there is substantial evidence in the record supporting the ALJ's ultimate conclusion. Eaton Axle Corp. v. Nally, 688 S.W.2d 334 (Ky. 1985); Halls Hardwood Floor Co. v. Stapleton, 16 S.W.3d 327 (Ky.

App. 2000). Thus, our sole task on appeal is to determine whether substantial evidence supports the ALJ's decision. We conclude it does.

The ALJ was confronted with conflicting medical evidence on the issue of whether Dobson suffered a lumbar injury as a result of the work incident of May 31, 2018. The ALJ specifically noted he did not find the evidence from Dr. Werner, Dr. George, and Dr. Farrage persuasive and deemed their opinions "naked conclusions" as none of the physicians explained how the mechanism of injury could have aroused pre-existing dormant conditions, not be reported to a medical provider for three months, and cause no symptoms for over three months after the work incident. In addition, the record contains substantial evidence in the form of the opinions of Drs. Sexton and Kirsch that Dobson did not suffer a lumbar spine injury as alleged.

We believe the ALJ properly exercised his discretion in determining Dobson did not meet his burden of proving his lumbar spine condition was caused by the work-related incident of May 31, 2018. The decision is supported by substantial evidence and a contrary result is not compelled.

Accordingly, the Opinion, Order, and Award rendered by Hon. Grant Roark, Administrative Law Judge on November 30, 2020 is **AFFIRMED**.

ALL CONCUR

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