

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: June 14, 2019

CLAIM NO. 201673243

CHARLES DEWEESE CONSTRUCTION

PETITIONER

VS.

APPEAL FROM HON. JEFF V. LAYSON,
ADMINISTRATIVE LAW JUDGE

CHRISTOPHER BRASWELL and
HON. JEFF V. LAYSON,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

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

ALVEY, Chairman. Charles Deweese Construction (“Deweese”) appeals from the Opinion, Award and Order rendered January 28, 2019 by Hon. Jeff V. Layson, Administrative Law Judge (“ALJ”), awarding temporary total disability (“TTD”) benefits, permanent partial disability (“PPD”) benefits, and medical benefits to Christopher Braswell (“Braswell”). The ALJ determined Braswell sustained a work-related low back injury in 2016 as he was exiting the bed of a dump truck he had just

cleaned to begin his workday. Deweese also appeals from the February 28, 2019 order denying its petition for reconsideration.

On appeal, Deweese argues the ALJ improperly discounted and ignored inconsistent post-injury medical records. Deweese also argues the ALJ improperly relied upon Dr. Margaret MacGregor's deficient report, which cannot constitute substantial evidence. Finally, Deweese argues the ALJ improperly discounted and ignored Dr. Stephens' medical opinion without consideration or analysis. Because the ALJ performed the appropriate analysis (which he adequately explained), and his determination is supported by substantial evidence, we affirm.

Braswell filed a Form 101 on August 1, 2017 alleging he injured his low back on June 28, 2016 when he twisted it while working for Deweese in Franklin, Kentucky. In the Form 104, Braswell noted his work experience includes driving dump trucks as well as other types of trucks, team leader of a mine crew, pipeline construction worker, blaster, and operating a home remodeling company.

Braswell testified by deposition on June 20, 2018, and at the hearing held November 29, 2018. Braswell is a resident of Hartsville, Tennessee. He was born on October 16, 1981. He completed the eleventh grade, and later obtained a GED. He has no specialized vocational training. In addition to driving a dump truck (which involved hauling dirt, rock and asphalt), Braswell has operated end loaders, and has worked as a semi-truck driver.

As a dump truck driver, Braswell was required to keep the bed clean due to hauling asphalt. This required him to climb into the bed by using a ladder. On June 28, 2016, Braswell climbed into the truck bed to clean it. When he

attempted to exit, he swung his leg over to reach the ladder, and experienced immediate low back pain at the belt level on the right side. He later developed pain in the left lower back which radiated into his left leg. He did not immediately call his supervisor to report the injury because he believed the pain would resolve; however, he did advise co-workers of his problems. He finished his shift, and continued to work for the next few days despite increased pain. On July 1, 2016, he went to a chiropractor for an adjustment, which he believed would relieve his pain. When it did not, he went to the emergency room where he was given an injection and medication. When his symptoms did not resolve, he reported the work incident to his supervisor on July 5, 2016, the day he returned from the holiday.

Braswell worked part of a shift on July 5, 2016, and has been unable to return to Dewese. His only work since that time is mowing and some yard work. He testified he is unable to return to construction work, and does not believe he can return to the type of work performed for Dewese on the date of the accident. Braswell testified he had no back problems prior to June 28, 2016, which prevented him from working. Since the accident, Braswell has had difficulty with deer hunting, housework, and performing yard work.

Braswell filed multiple medical records and reports in support of his claim. He filed records from Integrity Pain Consultants in Hartsville, Tennessee for six treatment dates between May 17, 2017 and September 7, 2017. Braswell was treated for chronic low back pain, which although constant, varied in intensity. He was diagnosed with spondylosis, radiculopathy, and low back pain for which he had received long-term treatment with opiate analgesics. Braswell received epidural

steroid injections on both the right and left. He had some pain reduction on the right, but none on the left.

Braswell also filed records from Neurology Clinic & Associates, of Lebanon, Tennessee, where he saw Dr. Deka A. Efobi. Dr. Efobi treated Braswell on four occasions between March 20, 2013 and September 19, 2017. He diagnosed Braswell with left lumbago with sciatica, monoplegia in the left lower extremity, abnormality of gait/mobility, low back pain, skin paresthesia and left foot drop. He noted injections and a dose pack had provided no pain relief.

Braswell began treating with Dr. MacGregor on July 17, 2017. He filed records from ten visits between July 17, 2017 and March 21, 2018. On September 28, 2017, Dr. MacGregor performed a laminectomy at L5-S1 for a lumbar disc herniation and bilateral L5-S1 radiculopathy. On March 21, 2018, she diagnosed Braswell with chronic lumbar radiculopathy, lumbosacral radiculopathy, chronic narcotics use, and left piriformis syndrome. She determined Braswell had reached maximum medical improvement (“MMI”) as of that date. In her report dated June 18, 2018, Dr. MacGregor stated Braswell’s low back and lower extremity pain was caused by the June 28, 2016 twisting incident when he was exiting a dump truck. She stated Braswell exhibited no signs of symptom magnification or malingering during treatment. She assessed a 13% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment (“AMA Guides”), based upon DRE Category III. Dr. MacGregor attributed all of the treatment rendered to the work injury.

Braswell next submitted records from the Macon County Hospital for treatment received on September 19, 2016, and October 4, 2016. He saw Dr. Steven Graham, a neurologist. Dr. Graham diagnosed Braswell with persistent musculoskeletal, left lower back pain, and ordered physical therapy. He stated he found, “no specific neurological exam deficits were present, and MRI scan of the lumbar spine was normal.” Dr. Graham noted Braswell reported he injured his back in June 2018 as he was climbing off a large dump truck.

Braswell also submitted the records from the Westmoreland Family Medical Clinic for four office visits between July 7, 2016 and April 25, 2017. Braswell was treated by Dr. Tony Freeman, and Nicki Perkins, APRN. He reported he sustained a low back injury on June 28, 2016 when he twisted as he was getting out of a truck.

Braswell next filed radiographic reports from the Summit Medical Center dated September 26, 2017. Those studies merely confirm the location for the surgery.

Braswell filed records from New Life Physical Therapy where he received therapy on twenty-two occasions between July 25, 2017 and February 12, 2018.

Dr. Anthony McEldowney evaluated Braswell on July 16, 2018. He noted the history of Braswell’s injury of climbing down from a truck bed. Dr. McEldowney diagnosed Braswell with a lumbar disk herniation, bilateral L5-S1 radiculopathy, clinical left sacroiliac joint sprain/instability, and clinical chronic pain syndrome. He attributed the diagnoses to Braswell’s work injury. He determined

Braswell had reached MMI by February 12, 2018. He assessed an 11% impairment rating pursuant to the AMA Guides. Dr. McEldowney determined Braswell does not retain the capacity to return to the type of work performed on the date of the injury. He stated Braswell can lift up to twelve pounds, and can push/pull up to thirty pounds.

Braswell also filed records of eleven visits between November 9, 2017 and June 28, 2018 with Integrity Pain Consultants, where he saw Dr. Kenneth Homolya and Angela Kitchen, APRN for low back and left leg pain.

Deweese filed the April 3, 2018 report of Dr. Thomas O'Brien, who examined Braswell at its request. Dr. O'Brien stated Braswell's low back pain started on June 28, 2016 when he was using a pump sprayer to clean out the bed of a dump truck. He noted the initial complaints were in the low back and right leg, but later shifted to the left leg. He additionally noted the September 2017 decompressive discectomy and laminectomy. He noted Braswell reported initial pain relief after the surgery, which later returned. At the time of the evaluation, Braswell reported low back and left buttock pain.

Dr. O'Brien diagnosed chronic low back pain secondary to multilevel mild degenerative disc disease. He stated Braswell did not sustain a work-related injury on June 28, 2016. He stated the symptoms are a manifestation of chronic progressive multilevel degenerative disc disease. He stated the June 28, 2016 work activities did not cause either a temporary or permanent aggravation, acceleration or precipitation of the pre-existing degenerative disorder. He stated there are multiple inconsistencies in Braswell's records. He also stated Braswell reached MMI from the

surgery on December 26, 2017. He stated Braswell had a 5% impairment prior to June 28, 2016 due to the degenerative condition. He stated Braswell had no disc herniation and his complaints are due to non-work factors.

On August 20, 2018, Dr. O'Brien noted he had reviewed additional records, but that his opinions had not changed from his previous report. He stated Braswell had a 10% impairment rating due to the surgical procedure, which was unnecessary. He reiterated Braswell exhibited many inconsistencies, and did not sustain a work-related injury.

Deweese filed the August 27, 2018 functional capacity report from Results Physiotherapy prepared by Rachel Forrester, P.T. She noted Braswell exhibited poor consistency during the evaluation, and he self-limited his capabilities.

Dr. Stephens performed a records review and issued a report on October 11, 2018 at Deweese's request. Based upon his review, he determined Braswell did not sustain a work injury. He stated the surgery performed by Dr. MacGregor was not supported by the MRI findings. He stated the fact that surgery had been performed would qualify Braswell for a 10-13% impairment rating pursuant to the AMA Guides, DRE III, but again, this was not caused by a work injury. He stated Braswell had reached MMI in March 2018.

A Benefit Review Conference ("BRC") was held on November 29, 2018. The BRC memorandum reflects that the contested issues included work-relatedness/causation, notice, benefits per KRS 342.730, "injury" as defined by the "Act", TTD, pre-existing active, medical benefits, work-relatedness causation and

reasonableness and necessity of surgery, appropriate use of AMA Guides, and appropriate interest on past due benefits.

In the Opinion, Award and Order rendered January 28, 2019, the ALJ stated Dr. O'Brien's opinions regarding causation lacked credibility, and he explained the basis for this determination. For the same reasons, he discounted Dr. Stephens' opinions contained in the records review report. The ALJ chose to rely upon Dr. MacGregor's opinions in finding Braswell sustained a work-related low back injury on June 28, 2016. He additionally determined there is no evidence of record supporting Dewese's argument that Braswell suffered from a pre-existing active impairment. The ALJ determined Braswell provided due and timely notice. He noted Dewese reportedly advised co-workers at the time of the incident, continued to work, and believed the condition would resolve. He also noted Braswell reported the injury to the safety director on July 5, 2016, only a week after the incident.

The ALJ also determined the medical evidence established Braswell qualifies for an impairment rating in DRE Category III pursuant to the AMA Guides, which falls within 10-13%. This is established by the opinions of Drs. MacGregor, McEldowney and Stephens. The ALJ relied upon the 13% impairment rating assessed by Dr. MacGregor in awarding PPD benefits, and clearly provided his reasons for doing so. The ALJ also determined Braswell does not have the physical capacity to return to his pre-injury job as a dump truck driver, and enhanced the PPD benefit award by the three multiplier contained in KRS 342.730(1)(c)1. The ALJ found Braswell reached MMI by March 21, 2018, and awarded TTD benefits

from July 2, 2016 through March 21, 2018, medical benefits, and 12% interest on past due and owing benefits through June 28, 2017, and 6% thereafter.

Deweese filed a petition for reconsideration arguing the ALJ improperly reviewed the medical evidence, and ignored contradictory records. It argued Braswell failed to advise the chiropractor, where he initially sought treatment, that his condition was work-related. It requested additional findings of fact regarding the determination the injury was work-related. It also argued Dr. MacGregor's opinions do not constitute substantial evidence. Deweese additionally requested additional findings regarding why the ALJ relied upon Dr. MacGregor's opinions. Deweese also argued the ALJ improperly discounted Dr. Stephens' report without proper consideration.

The ALJ denied the petition by order entered February 28, 2109. The ALJ specifically stated as follows:

After reviewing the Petition and the original Opinion, Award and Order, the Administrative law Judge concludes that the assertions made in the Petition are a re-argument of the merits of this claim, which were adequately addressed in the Opinion. Therefore, it is ordered that the Defendant/Employer's Petition for Reconsideration is overruled.

On appeal, Deweese essentially argues the ALJ improperly evaluated the evidence, and his determinations are not supported by substantial evidence. As the claimant in a workers' compensation proceeding, Braswell had the burden of proving each of the essential elements of his claim. *See* KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since he was successful in his burden, the question on appeal is whether substantial evidence of record supports the ALJ's

decision. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). “Substantial evidence” is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971).

In rendering a decision, 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). An ALJ is vested with broad authority in determining causation. Dravo Lime Co. v. Eakins, 156 S.W.3d 283 (Ky. 2003). Although a party may note evidence supporting a different outcome than reached by an ALJ, this 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 that 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).

An ALJ's discretion is not unlimited. In reaching a determination, the ALJ must provide findings sufficient to inform the parties of the basis for the decision to allow for meaningful review, and as noted above the determination must be based upon substantial evidence. Kentland Elkhorn Coal Corp. v. Yates, 743 S.W.2d 47 (Ky. App. 1988); Shields v. Pittsburgh and Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982); Big Sandy Community Action Program v. Chafins, 502 S.W.2d 526 (Ky. 1973).

The ALJ determined Braswell sustained a work-related injury for which he awarded income and medical benefits. This determination is supported by Dr. MacGregor's opinions. Dr. O'Brien determined Braswell did not sustain a work injury. Likewise, Dr. Stephens determined Braswell did not sustain a work-injury, but found he qualified for an impairment rating pursuant to DRE III of the AMA Guides due to the surgery. Dr. MacGregor's opinion constitutes substantial evidence supporting the ALJ's determination. The opinions of Dr. Stephens and Dr. O'Brien provide a contrary viewpoint upon which the ALJ was not compelled to rely. Because the ALJ's determination is supported by substantial evidence, which he adequately outlined, and explained the basis for his reliance, his determination will not be disturbed.

Accordingly, the January 28, 2019 Opinion, Award, and Order, and the February 28, 2019 Order on petition for reconsideration rendered by Hon. Jeff V. Layson, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

DISTRIBUTION:

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