Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: March 25, 2022

CLAIM NO. 202095996

CLARIANT CORPORATION PETITIONER

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

BRADLEY EVERETT and
HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

ALVEY, Chairman. Clariant Corporation ("Clariant") appeals from the October 25, 2021 Opinion, Order, and Award rendered by Hon. Grant S. Roark, Administrative Law Judge ("ALJ"). The ALJ awarded Bradley Everett ("Everett") temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits enhanced by the multipliers contained in KRS 342.730(1)(c)1, and medical

benefits for a work-related left leg injury. Clariant also appeals from the November 23, 2021 Order denying its Petition for Reconsideration.

Clariant argues the ALJ erred in applying the three-multiplier contained in KRS 342.730(1)(c)1 to the award of PPD benefits. It argues the ALJ improperly picked and chose from the evidence to "support his narrative". It argues the finding Everett cannot perform his prior job duties "is simply not consistent with the factual and medical history of the claim." We find the ALJ properly exercised his discretion, and his decision is supported by substantial evidence. Therefore, we affirm.

Everett filed a Form 101 on February 25, 2021, alleging he sustained left lower extremity injuries when he caught his foot on a doorframe while working for Clariant on January 26, 2020. Everett worked for Clariant from 1986 until he was terminated in September 2020.

Everett testified by deposition on April 22, 2021, and at the hearing held August 24, 2021. Everett was born on March 18, 1964, and he resides in Louisville, Kentucky. Everett is a high school graduate, and has several college course hours, but he did not complete a degree program. He has no specialized vocational training. In addition to working for Clariant, Everett previously worked as an assistant manager for a furniture rental company. He also worked briefly for a roofing company, and at a "dude" ranch prior to working for Clariant. Before his work injury, Everett also operated a lawn service company, but he has been unable to do that since the accident.

Everett initially worked as a laborer for Clariant, or its predecessor. He later became a shift leader, supervising eight to twelve employees. He stated the job involved significant walking, up to 50% of the time, spot checking, and supervising employees on multiple floors, which required climbing stairs.

On January 26, 2020, Everett was exiting the warehouse to go to another building. The toe of his boot caught in the door threshold. His leg twisted and broke in two places. He did not fall because he grabbed the doorframe, and he was able to sit down. He used his radio to call maintenance for assistance. He was taken to Norton Audubon Hospital, and he underwent surgery on January 27, 2020.

When he returned to work on April 12, 2020, he was given a golf cart to make his rounds. He also testified co-workers assisted with the performance of his job duties. He had restrictions on standing and walking. He also had to frequently elevate his leg. He testified he experienced swelling in his leg. He also testified that despite returning to the same pay rate, he had difficulty performing his job duties due to his physical limitations. He currently has leg numbness and continued leg pain. After Clariant terminated him in September 2021 over a union dispute, Everett worked as a night manager for a cleaning service, which included scheduling, spot checking, and primarily using the telephone. He currently drives residents of an assisted living facility to physician appointments, hair appointments, and to the grocery. He works approximately thirty-seven hours per week, and he earns $12.75 per hour. He testified he would be unable to perform his previous work for Clariant without significant accommodations. He also testified he has difficulty performing many of the activities he enjoyed prior to the injury date.

Everett supported his claim with the January 26, 2020 treatment records from Norton Audubon Hospital. He was initially treated by Dr. Stephanie Krema. X-rays revealed he sustained a comminuted mildly displaced fracture of the proximal fibular shaft, and a spiral type distal tibial fracture. Dr. Krema diagnosed closed fractures of the left tibia and fibula.

Dr. James Farrage evaluated Everett on April 21, 2021. He noted the history of Everett tripping over the threshold of a doorway at work. Everett reported experiencing a bony snap without bone exposure. He additionally noted Everett's continued complaints of left lower extremity and ankle pain, as well as swelling after extended periods of standing and walking. He noted Everett does not use an assistive device to walk, but he has difficulty with navigating stairs, uneven terrain, kneeling, and squatting. Dr. Farrage diagnosed Everett as status-post intra medullary nailing of the left tibial fibula fracture, with continued problems with post-traumatic ankle arthritis, restricted range of motion, decreased endurance, edema, residual gait abnormality, and impaired capacity. He recommended Everett avoid lifting or carrying more than thirty pounds occasionally or fifteen pounds frequently. He stated Everett could push or pull up to fifty pounds occasionally. He also stated Everett could stand or walk up to two hours at a time with frequent position changes, and he can occasionally climb stairs. Dr. Farrage recommended Everett avoid climbing ladders or working from unprotected heights. He stated Everett retains the physical capacity to perform his previous job. Dr. Farrage assessed a 4% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides").

Dr. Stacie Grossfeld evaluated Everett at Clariant's request on April 14, 2021. She noted the history of the January 26, 2020 work accident. Dr. Grossfeld noted Everett has limited left ankle range of motion due to gastoic soleus atrophy of the left lower extremity. She stated he reached maximum medical improvement ("MMI") by July 21, 2020. Dr. Grossfeld assessed a 6% impairment rating pursuant to the AMA Guides. She assessed no restrictions and found no need for any additional treatment.

Clariant also filed a questionnaire completed by Dr. Carl Kure, Everett's treating surgeon, on February 2, 2021. Dr. Kure stated Everett had reached MMI. He found Everett has no significant impairment and needs no restrictions.

A Benefit Review Conference was held on July 14, 2021. The issues preserved for determination included benefits per KRS 342.730, and whether Everett retains the capacity to return to his previous work.

In the Opinion, Order, and Award issued October 25, 2021, the ALJ noted the fact Everett sustained a work-related left lower extremity injury on January 26, 2020 is undisputed. The ALJ determined Everett returned to work at the same average weekly wage until he was terminated on September 15, 2020. The ALJ next determined the 6% impairment rating assessed by Dr. Grossfeld is the most appropriate. He explained his basis for making this determination. The ALJ also determined that based upon Everett's testimony and the restrictions imposed by Dr. Farrage, he does not have the ability to return to his pre-injury work. He specifically noted Everett returned to his position from April 2020 until he was terminated in September 2020, although he did so based upon assistance from his co-workers and

accommodations from Clariant. Based upon the holding in Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003), he noted the two-multiplier contained in KRS 342.730(1)(c)2 is also applicable because Everett returned to the same rate of pay. Based upon the holding in Adams v. NHC Healthcare, 199 S.W.3d 163 (Ky. 2006), the ALJ found the application of the three-multiplier more appropriate.

Both Everett and Clariant filed Petitions for Reconsideration. Everett argued numerical paragraph 2 on page 8 of the ALJ's decision contained a typographical error. The ALJ corrected this mistake in an Order issued on November 16, 2021. Clariant argued the ALJ erred in applying the three-multiplier contained in KRS 342.730(1)(c)1. It also argued the ALJ erred in finding the two-multiplier contained in KRS 342.730(1)(c)2 applicable because Everett did not in fact return to earning the same or higher pay rate. The ALJ granted, in part, Clariant's Petition for Reconsideration, and found the two-multiplier is not applicable since Everett did not return to earning the same or higher pay rate. He denied the challenge to the application of the three-multiplier, and he provided his explanation for doing so. He noted that although Dr. Farrage indicated Everett could return to his pre-injury job, restrictions were placed upon his activities. Those restrictions, coupled with Everett's testimony regarding his physical limitations, preclude his ability to return to his pre-injury work.

We initially note that as fact-finder, the ALJ has the sole authority to determine the weight, credibility, and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the sole authority to judge all reasonable inferences to be drawn from the evidence. Miller v. East

Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). The ALJ may 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. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000); Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). Mere evidence contrary to the ALJ's decision is inadequate to require reversal on appeal. Id. In order to reverse the decision of the ALJ, it must be shown there was no substantial evidence of probative value to support his decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to the weight and credibility to be afforded the evidence or by noting reasonable inferences that otherwise could have been drawn from the record. Whittaker v. Rowland, supra.

In reaching a determination, the ALJ must also provide findings sufficient to inform the parties of the basis for his decision to allow for meaningful review. 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 relied upon the impairment rating assessed by Dr. Grossfeld, who he determined more appropriately calculated the impairment rating based upon Everett's condition. This finding was not challenged by Clariant; therefore, the only issue on appeal is whether the ALJ performed the appropriate analysis in applying

the three-multiplier contained in KRS 342.730(1)(c)1. The ALJ determined the application of the three-multiplier was appropriate based upon Everett's testimony regarding his ongoing left lower extremity difficulty, and his assertion he was only able to perform his job with assistance from co-workers and accommodations from Clariant. The ALJ also found significant the limitations recommended by Dr. Farrage.

Clariant argues the ALJ inappropriately picked and chose from the evidence, but that is precisely what he is empowered to do. As explained by the Court of Appeals in affirming our February 9, 2018 decision, the case of Copar, Inc. v. Rogers, 127 S.W.3d 554, 561 (Ky. 2003) is dispositive of this issue. There, the Supreme Court stated:

> We note, however, that an ALJ may pick and choose among conflicting medical opinions and has the sole authority to determine whom to believe. *Pruitt v. Bugg Brothers,* Ky., 547 S.W.2d 123 (1977). Thus, the ALJ was free to rely upon Dr. Gleis in order to conclude that the claimant reached MMI before November, 2000, but to rely on Dr. Taylor with respect to the cause and extent of her impairment. Likewise, the ALJ was free to rely upon Dr. Taylor with respect to causation but Dr. Gleis with respect to the extent of permanent impairment at MMI. In either event, there was sufficient evidence in the record to support a finding of total disability.

Thus, we find no error in the ALJ's reliance upon the impairment rating Dr. Grossfeld assessed, and Dr. Farrage's restrictions, coupled with Everett's testimony regarding his limitations.

KRS 342.730(1)(c)1 states, in relevant part, as follows:

> If, due to an injury, an employee does not retain the physical capacity to return to the type of work that the

> employee performed at the time of injury, the benefit for permanent partial disability shall be multiplied by three (3) times the amount otherwise determined under paragraph (b) of this subsection.

The ALJ determined, based upon the restrictions recommended by Dr. Farrage, Everette's own testimony, and the fact that he never returned to his job at Clariant without assistance or job accommodations, in addition to his ongoing symptoms, the three-multiplier contained in KRS 342.730 (1)(c)1 is applicable. The ALJ adequately explained the basis for his decision, and we find he did not err as a matter of law.

Accordingly, the October 25, 2021 Opinion, Order, and Award, and the November 23, 2021 Order on Petition for Reconsideration rendered by Hon. Grant S. Roark, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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