

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: November 2, 2018

CLAIM NOS. 201798576, 201701494 & 201700963

DOUG BURKHART

PETITIONER

VS.

APPEAL FROM HON. JOHN H. McCracken,
ADMINISTRATIVE LAW JUDGE

NALLY & HAMILTON ENTERPRISES, INC.
And HON. JOHN H. McCracken,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

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

RECHTER, Member. Doug Burkhart appeals from the April 26, 2018 Opinion, Award and Order and the June 11, 2018 Order on Reconsideration rendered by Hon. John H. McCracken, Administrative Law Judge ("ALJ"). The ALJ determined Burkhart suffered work-related hearing loss, low back and right shoulder injuries. The ALJ dismissed Burkhart's claim for a psychological injury. On appeal, Burkhart

argues the evidence establishes a work-related psychological injury, and that he is entitled to permanent total disability benefits. For the reasons set forth herein, we affirm.

Burkhart worked for Nally & Hamilton Enterprises, Inc. as a coal miner. He holds a foreman certification and worked both underground and on the surface of the coal mine. On May 17, 2016, Burkhart slipped while prying a pipe. He fell and landed on his right shoulder. A second work injury occurred on January 10, 2017, when he was preparing coal for a portable crusher. He lifted a rock and felt his back “pop”. He experienced immediate pain and was unable to stand straight or walk.

The medical evidence in this claim consists of independent medical examination (“IME”) reports. Dr. Ronald Dubin examined Burkhart on March 28, 2017 and April 27, 2017. Burkhart reported low back pain, which Dr. Dubin diagnosed as moderate lumbar pain. He reviewed prior MRI scans, CT scans and medical history. He placed Burkhart at maximum medical improvement for his low back condition on March 28, 2017 and assigned a 5% whole person impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition (“AMA Guides”). Dr. Dubin opined Burkhart is not able to return to work as a coal miner.

Dr. David Jenkinson examined Burkhart on August 28, 2017. Dr. Jenkinson recorded Burkhart’s complaints of constant low back pain which radiates into his hips and legs. He also reported limited range of motion and pain in his right shoulder. After a physical examination and records review, Dr. Jenkinson found no

specific abnormality to support any structural injury in the right shoulder or low back. Instead, he suspected a sprain or strain injury to the low back and a right shoulder contusion, both of which had resolved. He found no basis upon which to assign a permanent impairment rating, and challenged Dr. Dubin's rating as based solely on subjective complaints of pain. He opined Burkhart could return to his employment as a coal miner. Later, Dr. Jenkinson was provided a July 25, 2017 MRI of the low back. He interpreted the MRI to indicate age-appropriate degenerative changes. He again opined the January 10, 2017 work accident caused only a temporary sprain or strain.

Dr. David Muffly examined Burkhart on October 4, 2017. Burkhart reported his low back and right shoulder injuries, and denied any prior problems. Dr. Muffly diagnosed lumbar disc protrusions at L4-5 and L5-S1, and a partial right rotator cuff tear. He concluded both injuries are work-related. He assessed a 7% whole person impairment for the lumbar injury, and a 3% impairment for the right shoulder injury. Dr. Muffly placed Burkhart at maximum medical improvement on October 4, 2017 and opined he does not retain the physical capacity to return to his prior employment.

Dr. Daniel Primm conducted an IME on November 17, 2017. Dr. Primm conducted a physical exam and medical records review. He diagnosed a lumbar strain and mild right shoulder tendinosis with impingement syndrome. He found no permanent impairment to the lumbar spine, but assigned a 1% whole person impairment rating for the right shoulder condition pursuant to the AMA Guides. He further opined Burkhart could return to his pre-injury employment.

Dr. Stephen Lamb conducted an independent psychological evaluation on September 6, 2017. Burkhart reported feelings of irritability, racing thoughts, excessive worry and panic attacks since the work injuries. These feelings impacted his ability to sleep and function in groups of people. Burkhart also reported feelings of worthlessness over the fact he is physically unable to work, and therefore cannot provide for his family. Dr. Lamb diagnosed adjustment disorder with mixed emotional features. He assigned a 26% whole person impairment using the American Medical Association Guides to the Evaluation of Permanent Impairment, 4th Edition.

Dr. David Shraberg conducted an independent psychological evaluation on January 15, 2018. Burkhart again reported racing thoughts, anxiety, and excessive worry. Upon evaluation, Dr. Shraberg found Burkhart to be highly irritable and defensive, though his thought process was lucid and unimpeded, with normal memory and comprehension. Dr. Shraberg concluded Burkhart was essentially “disabling himself” by exaggerating the impact of his injuries. He described Burkhart’s claims of catastrophic and global inability to perform any task inconsistent with the physicians’ assessment of his physical condition. In essence, Burkhart had adopted an unrealistic assessment of his symptoms and impairment. Dr. Shraberg diagnosed a temporary adjustment disorder that requires no psychiatric treatment and does not preclude Burkhart from returning to work. He assigned no permanent impairment rating.

Additional proof was submitted concerning Burkhart’s claim for hearing loss. That portion of the ALJ’s award has not been specifically appealed and

therefore a detailed recitation of the proof is unnecessary. The university evaluator, Brittany Brose, concluded Burkhart suffers work-related hearing loss resulting in a 6% whole person impairment. Burkhart was examined by Dr. Samir Guindi, who assigned a 3% whole person impairment for work-related hearing loss. Dr. Kara Kratzer also evaluated Burkhart, and found evidence of work-related hearing loss. She assigned a 4% whole person impairment rating for the condition.

The ALJ first considered Burkhart's claim for work-related hearing loss, and found no proof to rebut the report of the university evaluator. He concluded Burkhart suffers work-related hearing loss which does not reach the 8% threshold set forth in KRS 342.7505. The ALJ awarded medical benefits for this condition.

The ALJ next determined Burkhart suffered a work-related right shoulder injury as a result of the May 17, 2016 incident. He noted several concerns with Burkhart's claim of a right shoulder injury, including the fact Burkhart received no treatment until a year after the alleged incident and also Dr. Jenkinson's belief he exaggerated his right shoulder complaints. Nonetheless, the ALJ concluded an injury had occurred and relied upon Dr. Primm's report to assign a 1% impairment rating for the right shoulder condition.

Turning to the low back injury, the ALJ again noted Dr. Jenkinson's concern about symptom magnification. However, he found Burkhart's report of a work accident credible. The ALJ relied upon Dr. Muffly to conclude a work-related low back injury had occurred, and relied upon Dr. Dubin's assigned impairment rating of 5%.

The ALJ dismissed Burkhart's claim of a psychological injury. In thoroughly weighing the opinions of Drs. Lamb and Shraberg, the ALJ was persuaded by the evidence of symptom magnification which Dr. Shraberg noted. Dr. Shraberg concluded Burkhart has convinced himself his physical conditions are worse than they are, a conclusion supported by the fact no physician has recommended any further treatment for either the low back or right shoulder. The ALJ was also persuaded by Dr. Shraberg's critique of Dr. Lamb's assessment.

Finally, the ALJ addressed the extent of Burkhart's disability, noting the analysis required by Ira A. Watson Dep't Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000) to determine whether a claimant is permanently totally disabled. He noted Burkhart's age of fifty-four, and his limited education and work history. He weighed these factors against the fact Drs. Jenkinson and Primm found no significant structural abnormalities as a result of the work incidents, and assigned no restrictions. Both physicians opined Burkhart could return to his usual employment, which the ALJ found persuasive. He concluded Burkhart is not permanently totally disabled.

Burkhart filed a petition for reconsideration, making the same arguments now raised on appeal. The ALJ denied the petition. On appeal, Burkhart argues the ALJ erred in relying upon Drs. Shraberg, Jenkinson and Primm. He claims the opinions of Drs. Dubin, Muffly and Lamb more accurately reflect his condition and establish he suffered severely debilitating work injuries that render him permanently totally disabled.

As the claimant in a workers' compensation proceeding, Burkhart bore the burden of proving each of the essential elements of his cause of action. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because he was unsuccessful in establishing a psychological injury and permanent total disability, 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). The function of the Board in reviewing the ALJ's decision is limited to a determination of whether the findings made by the ALJ 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).

As the 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 discretion to determine 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).

In arguing the ALJ erred in dismissing his claim of a psychological injury and rejecting his claim for permanent total disability benefits, Burkhart

essentially asks this Board to reweigh the proof. He points to evidence which tends to undermine the conclusions of Drs. Shraberg, Jenkinson and Primm. Despite the right shoulder injury, Burkhart continued to work and did not seek medical attention, reflecting his determination to work rather than the insignificance of the injury. Similarly, Burkhart argues, his failure to specifically report his right shoulder condition to Dr. Jenkinson reflects a lack of understanding of the IME process. With respect to the psychological injury, Burkhart argues his testimony comports with Dr. Lamb's conclusions, and undermines the credibility of Dr. Shraberg's opinion. Though Dr. Shraberg characterizes him as bitter with an exaggerated, resentful view of his physical condition, Burkhart argues these exact symptoms actually reflect the opinions of a depressed man robbed of his ability to labor.

Burkhart has emphasized proof which could establish he suffered a work-related psychological injury and is permanently totally disabled. However, substantial evidence also exists to support the conclusion he is partially disabled. Specifically, the opinions of Drs. Shraberg, Primm and Jenkinson constitute the requisite substantial evidence upon which the ALJ may base his ultimate conclusions. Though Burkhart has offered alternate interpretations of the proof which would tend to support his claim, these arguments go to the weight of the evidence. He has identified no deficiency in the reports of Drs. Shraberg, Primm or Jenkinson, which would render these opinions unreliable or insufficient.

The ALJ thoroughly and comprehensively reviewed the evidence. He cited and applied the proper legal standards to evaluate whether Burkhart is permanently totally disabled. He articulated the reasons he was more persuaded by

the opinions of Drs. Jenkinson, Primm and Shraberg. Accordingly, it is not the province of this Board to reweigh the proof and reach an alternate result.

Accordingly, the April 26, 2018 Opinion, Award and Order and the June 11, 2018 Order on Reconsideration rendered by Hon. John H. McCracken, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

DISTRIBUTION:

COUNSEL FOR PETITIONER: **LMS**

HON. RONALD C. COX
207 EAST CENTRAL STREET
HARLAN, KY 40831

COUNSEL FOR RESPONDENT: **LMS**

HON. W. BARRY LEWIS
PO BOX 800
HAZARD, KY 41702

ADMINISTRATIVE LAW JUDGE: **LMS**

HON. JOHN H. McCracken
ADMINISTRATIVE LAW JUDGE
PREVENTION PARK
657 CHAMBERLIN AVENUE
FRANKFORT, KY 40601