Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: **April 26, 2019**

CLAIM NO. 201079408

ELLIS W. COLEMAN PETITIONER

VS.

APPEAL FROM HON. JOHN B. COLEMAN,
ADMINISTRATIVE LAW JUDGE

DEPARTMENT OF TRANSPORTATION
And HON. JOHN B. COLEMAN,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

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

RECHTER, Member. Ellis W. Coleman appeals from the November 26, 2018 Opinion and Order on Reopening and the December 27, 2018 Order rendered by Hon. John B. Coleman, Administrative Law Judge ("ALJ"). The ALJ dismissed

Coleman's motion to reopen. On appeal, Coleman challenges the ALJ's determination that his work-related condition has not worsened. We affirm.

In the original decision, Hon. Otto Daniel Wolff, IV, Administrative Law Judge, determined Coleman sustained a 16% impairment rating pursuant to the American Medical Association Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"), consisting of 9% for a physical injury and 8% for a psychological condition. Coleman filed a motion to reopen his claim on January 5, 2018, alleging a change in his disability and increase in impairment. The Kentucky Department of Transportation ("KDOT") filed a medical fee dispute on March 16, 2018 to contest a repeat lumbar MRI scan recommended by Dr. David Weber.

On July 30, 2010, while working as an equipment operator for KDOT, Coleman was struck by a 55-gallon barrel that rolled down an embankment. He sustained injuries to his low back and right leg. After the injury, Coleman attempted to return to work as a deputy sheriff from March 2016 through August 2016, which was less physically demanding than his position as an equipment operator. Nonetheless, Coleman stated he was unable to continue the job due to the prolonged sitting and standing, and the occasional necessity to physically restrain prisoners.

In the original proceeding, Dr. Anbu Nadar assessed an 11% impairment rating, consisting of 8% for the lumbar spine and 3% for chronic pain. Dr. Nadar opined 30% of Coleman's impairment was pre-existing and active, and he would have limitations in work activities requiring heavy lifting, frequent bending, prolonged sitting and standing, and climbing. He opined Coleman would be unable to return to his former employment.

Dr. Nadar reevaluated Coleman on December 6, 2016 and prepared his report on April 12, 2017. Coleman complained of persistent back and leg pain. Dr. Nadar diagnosed lumbosacral strain with radiculopathy, and degenerative disc disease with central protrusion at L4-5. Dr. Nadar noted an MRI suggested bulging discs at L4-5 and L5-S1. He indicated Coleman had a lumbosacral strain with radiculopathy and degenerative disc disease with central disc protrusion at the L4-5 level. Dr. Nadar concluded Coleman's symptoms have worsened, requiring visits to the emergency room as well as treatment with a chiropractor and pain management specialist. He opined Coleman would have limitations in work activities that require heavy lifting, bending, twisting, prolonged sitting, standing and walking. Dr. Nadar determined Coleman's lumbar impairment had increased by 2%, due to persistent radicular symptoms and numbness.

In the original proceeding, Dr. G. Christopher Stephens diagnosed chronic recurring back pain secondary to degenerative disc disease. Dr. Stephens concluded Coleman did not suffer any permanent impairment, nor would he require any permanent restrictions as a result of the July 30, 2010 work incident. Dr. Stephens also compared a 2002 MRI with the 2010 MRI, and concluded Coleman's condition was worse in 2002. Relying on the MRI reports, he concluded the 2010 incident produced only a temporary exacerbation of Coleman's chronic active back pain.

Dr. Stephens reevaluated Coleman on February 5, 2018. Coleman continued to suffer from chronic lower back and leg pain secondary to degenerative disc disease. He found no evidence Coleman's condition has worsened, based on his

pattern of treatment at the time of the previous examination compared to his most recent evaluation. Coleman's pattern of treatment was not consistent with a worsening of his condition, as he has a significant reduction in his daily dosage of Neurontin. Dr. Stephens noted Coleman is taking slightly more potent pain medication, but is taking it less frequently. There has been no worsening or diminished functional status, based upon examination. Relying on these circumstances, Dr. Stephens found no change in Coleman's impairment rating since the award.

Dr. David Muffly conducted an independent medical examination ("IME") on April 12, 2018. Dr. Muffly diagnosed chronic low back pain with radiculopathy and an L4-5 disc herniation. He opined the 2015 MRI revealed an objective worsening, noting an L4-5 disc herniation that was not present on the 2010 lumbar MRI. Dr. Muffly assessed a 16% whole person impairment under the AMA Guides, consisting of 13% for the lumbar spine and 3% for chronic pain. He characterized this as an increase in Coleman's impairment. Dr. Muffly recommended permanent restrictions of no bending or stooping, and no lifting greater than ten pounds. He recommended Coleman change positions every 30 minutes and must be able to lie down during an eight-hour day for pain relief. Dr. Muffly felt Coleman could not return to his previous occupation, and is totally disabled.

In March 21, 2018 and May 1, 2018 supplemental reports, Dr. Stephens indicated he had reviewed Dr. Muffly's report and an MRI scan from November 27, 2015, which demonstrated mild degenerative disc disease at L4-5 and L5-S1. There was mild annular bulging at both levels, but there was no herniated disc at either

level. Dr. Stephens noted Dr. Muffly had not actually reviewed the MRI. Dr. Stephens did not consider the changes seen on MRI to be advanced. He felt Coleman's reported symptoms were out of proportion to the objective findings. Dr. Stephens' review of the MRI reinforced his earlier opinions and he did not find any worsening of Coleman's condition. He concluded there is no subjective or objective evidence that Coleman's condition has worsened and there is no anatomic change based upon comparisons of the MRIs.

At a September 19, 2018 deposition, Dr. Stephens disagreed with the restrictions assessed by Dr. Muffly, noting those restrictions would be reserved for a patient who had a vertebral fracture or multilevel fusion with poor result. Dr. Stephens stated he understood Coleman attempted to work as a deputy sheriff for five to seven months in 2016. Based upon Coleman's objective findings, Dr. Stephens would have encouraged his return to work. Dr. Stephens stated the anatomic condition of Coleman's spine is better than that of the average 50-year-old male. He does not believe Coleman is totally disabled, and can return to some form of work on a full–time basis.

In a March 12, 2018 report, Dr. Daniel Wolens reviewed extensive medical records including a May 23, 2002 lumbar MRI that reported a disc herniation at L4-5 and a January 8, 2008 MRI that reported a disc protrusion at L4-5. Based on these reports, Dr. Wolens concluded the pathological processes long predated the 2010 injury. Further, the post-injury MRIs would not account for any pathology within the lower extremities. Because Coleman has sensory and motor polyneuropathy due to diabetes, Dr. Wolens questioned the validity of radicular

studies because they would be masked or confounded by the diabetic neuropathy. Dr. Wolens disagreed with Dr. Weber's report of worsening symptoms, noting Coleman's quality of pain remains unaltered and there continues to be no evidence of neuropathology.

Proof concerning Coleman's psychological condition was also considered on reopening. Dr. Eric Johnson evaluated Coleman during the original claim. Dr. Johnson diagnosed depressive disorder and pain disorder associated with psychological factors and medical conditions. He recommended Coleman continue counseling and psychiatric consultation as needed for titration or change of medication. Dr. Johnson did not feel Coleman had reached maximum medical improvement, but estimated he would have an 8% whole person psychiatric impairment under the AMA Guides.

Dr. Leigh Ann Ford, PHD, performed a psychiatric evaluation on March 27, 2018. Dr. Ford diagnosed unspecified depressive and anxiety disorders. She felt Coleman's symptoms of anxiety and depression are, in part, due to frustration associated with his inability to work and engage in other activities. She assessed a 3% whole person psychiatric impairment pursuant to the AMA Guides.

Dr. Timothy S. Allen performed a psychiatric evaluation on June 19, 2018. He agreed with Dr. Ford's assessment of a 3% impairment rating for the psychological condition but found two thirds of the rating to be non-work-related.

The ALJ's findings relevant to this appeal are as follows:

> From his meeting with the plaintiff at the formal hearing, the undersigned ALJ found the plaintiff to be sincere in his complaints of continuing lower back pain with radicular symptoms. However, it is incumbent upon the

ALJ to apply the legal standard of requiring a request for increased income benefits under KRS 342.125 proven by objective evidence. The plaintiff has difficulty showing an increased impairment rating, which could lead to entitlement to increased permanent partial disability benefits due to the fact Dr. Nadar, in his somewhat confusing report, indicated an increase of impairment due to low back symptoms of 2%. He did not point to any new objective findings. Dr. Muffly assessed a 16% impairment and pointed to the fact that a 2015 MRI of the lumbar spine had revealed an L4-5 disc herniation, which had not been revealed on the report from the lumbar spine in 2010 that had been interpreted as revealing mild degenerative disc disease at L4-5 and facet arthropathy at L4-5 and L5-S1. Dr. Muffly felt this was objective evidence of worsening of the plaintiff's impairment rating. However, the ALJ finds that Dr. Muffly's reliance on the simple comparison between the MRI reports of 2015 and 2010 to be less than persuasive. A review of Dr. Muffly's report describes the plaintiff's medical history from 2002 as, "He had prior treatment for low back pain from a 2002 work injury when working for Pike County Sheriff Department." Dr. Muffly's review of imaging studies includes MRI reports from 2010 and 2015 as well as a CT of the lumbar spine from 2018. Absent from the review is the MRI scans of 2002 or 2008. Obviously, Dr. Muffly was not fully aware of the extent of the plaintiff's 2002 work injury. This presents two problems, as the plaintiff's increase in impairment rating must be shown to be the result of the work injury. Additionally, under Osborne v. Pepsi-Cola, 816 S.W. 2d 643 (Ky. 1991), the ALJ may disregard the opinion of an expert witness who is shown to have a faulty medical history. Given the fact that the L4-5 herniated disc was shown to be present as the result of the 2002 injury instead of the 2010 injury, the ALJ does not find the report of Dr. Muffly to be persuasive.

An additional problem for the plaintiff in his claim for increased benefits is the mental health evidence presented. Both evaluating mental health experts opined the plaintiff's degree of impairment has dropped from 8%, as found in the prior decision, to 3% at the time of this reopening. This is a decrease of 5% in impairment, which is more than the 2% impairment rating increase described by Dr. Nadar in regards to the physical aspect

of the injury. The ALJ must be cognizant of the fact the opined 2% increase was not clearly borne out by objective medical evidence.

In regards to the plaintiff's claim for permanent total disability, the plaintiff is again faced with extreme difficulties proving by objective evidence that he has a change in occupational disability. The ALJ notes that the plaintiff was claiming permanent total disability at the time of the original proceedings. In fact, the plaintiff applied for and received Social Security disability benefits beginning in 2012. I am cognizant of the fact the plaintiff made an attempt to return to part-time light duty work on a trial basis in 2016, but note that does not help to show by objective evidence the plaintiff has had an increase in occupational disability, as he was already alleging permanent total disability and receiving benefits based upon the allegation. Further complicating the plaintiff's claim is the medical evidence from Dr. Allen who pointed to the plaintiff's non-work related physical problems, including ongoing complications from diabetes and heart disease, as the cause of the majority of the 3% psychological impairment.

After reviewing the entirety of the evidence in this claim, I am compelled to find the plaintiff has failed to show by objective evidence, a worsening of his impairment rating or impairment (disability) as the result of the effects of the work injury of July 10, 2010.

Additionally, the defendant filed a medical dispute regarding a request by Dr. Weber for an MRI of the lumbar spine due to the plaintiff's complaint of worsening lumbar pain. The utilization review physician, Dr. Daniel Wolens, opined that the request should be denied for two reasons. Dr. Wolens pointed to the fact the plaintiff had undergone a recent MRI of the lumbar spine, which failed to reveal any effects of injury-related pathology. He pointed to the fact that the disc herniation at L4-5 was present in 2002 and 2008, prior to the work injury. He noted there was no qualitative change since the prior MRI studies in order to justify a repeat MRI scan. He also opined that any neuropathic symptoms were most likely the result of sensorimotor diabetic polyneuropathy rather than the effects of the 2010 event. The requesting physician did not rebut this evidence from

> Dr. Wolens. Therefore, it is accepted and the ALJ finds the current request for a repeat MRI of the lumbar spine is not compensable under KRS 342.020.

Coleman filed a petition for reconsideration arguing the ALJ did not perform a proper analysis regarding whether there is a worsening of occupational disability. He also challenged the ALJ's reliance on Dr. Stephens' opinions. The ALJ denied the petition, noting a reopening under KRS 342.125 requires Coleman to show worsening of occupational disability as a result of the subject work injury. The statute requires the change of disability to be shown by objective medical evidence of worsening or improvement of impairment due to a condition caused by the injury since the date of the award or order. The ALJ again concluded Coleman failed to prove a worsening of impairment or disability caused by the work injury.

On appeal, Coleman argues there is insufficient evidence to support the ALJ's conclusion his condition has not worsened, emphasizing three points. First, Coleman argues the ALJ discounted or failed to consider properly the reports of Drs. Muffly and Nadar. He also challenges the reliability of Dr. Stephens' opinion. He points to Dr. Stephens' statement in the February 5, 2018 report indicating Coleman did not return to work after the prior examination, which is incorrect. Coleman also argues that Dr. Stephens was incorrect in stating that Dr. Muffly did not review the November 27, 2015 MRI. Finally, Coleman contends the ALJ improperly considered diagnostic studies from 2002 and 2008, which predate the work injury. According to Coleman, analysis should have been restricted to the 2010 MRI, which showed no herniation, and the 2015 diagnostic studies indicating a herniated disc.

The burden of proof in a motion to reopen based on a worsening of condition falls on the party seeking to increase the award. Griffith v. Blair, 430 S.W.2d 337 (Ky. 1968); Jude v. Cubbage, 251 S.W.2d 584 (Ky. 1952). Because Coleman was unsuccessful in that 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) *superseded by statute on other grounds as stated in* Haddock v. Hopkinsville Coating Corp., 62 S.W.3d 387 (Ky. 2001).

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 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 that would have supported a different outcome than that 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).

When reviewing a decision on appeal, the function of the Board 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).

We first address Coleman's objections to Dr. Stephens' report. Dr. Stephens stated that Dr. Muffly had not reviewed MRI studies which, contrary to Coleman's assertions, is technically accurate. Dr. Muffly noted "Report reviewed" rather than stating he reviewed the actual imaging. Dr. Stephens was aware that Dr. Muffly had reviewed the reports of the MRIs. However, Coleman is correct that Dr. Stephens inaccurately stated in the February 5, 2018 IME report that he had not returned to work following the prior examination. However, we note it is not clear that statement contained in the history section of the report is an account given by Coleman himself, or Dr. Stephens' understanding of the history. It is true that Coleman did not return to the work he performed at the time he was injured. Assuming *arguendo* that Dr. Stephens had an incorrect history at the time of the examination, this error was cured at the deposition. He testified he was aware of Coleman's return to work as a deputy for five to seven months in 2016. Importantly, Dr. Stephens did not alter his medical opinions in his deposition testimony. Any inconsistencies highlighted by Coleman go to the weight to be afforded Dr. Stephens'

opinion, not its admissibility or reliability. We conclude Dr. Stephens' opinions constitute substantial evidence upon which the ALJ could rely.

Pursuant to KRS 342.125(1)(d), in a motion to reopen alleging a worsening of disability, the worsening must be shown by "objective medical evidence of worsening . . . of impairment due to a condition caused by the injury since the date of the award or order." In Colwell v. Dresser Instrument Div., 217, 218 S.W.3d 213 (Ky. 2007), the Court noted KRS 342.125(1)(d) does not refer to the AMA Guides, permanent impairment rating or permanent disability rating. Therefore, a greater impairment rating is not the only objective medical evidence "by which the statute permits a worsening of impairment to be shown." Id. at 218. To show a worsening of impairment, a claimant must put forth objective medical evidence that demonstrates he or she has suffered "a greater loss, loss of use, or derangement of a body part, organ system, or organ function due to a condition caused by the injury." Id. The Court further stated, on reopening, an increased impairment rating is required when alleging an increase in permanent partial disability, but it is not a requirement when alleging permanent total disability. Id.

Here, the evidence does not compel a particular result. The impairment ratings assessed for the psychological condition on reopening were less than the rating determined in the original decision. Thus, the ALJ found there is a decrease in the impairment rating for the psychological condition from 8% at the time of the award to 3% on reopening. On reopening, though Dr. Stephens expressed some disagreement, he nonetheless accepted Coleman's impairment rating for the physical condition at the time of the award. Because Dr. Stephens expressly accepted the determinations

from the prior award as a starting point for his comparison, Coleman is incorrect that Dr. Stephen's opinion is unreliable in this regard.

Further, Dr. Stephens concluded there is no increase in Coleman's impairment rating since the original award. He found no subjective or objective evidence of worsening of Coleman's condition since the award. He noted there was no anatomic change in Coleman's condition. Dr. Stephens stated there was no need for greater restrictions than at the time of the award, and there has been no worsening or diminished functional status since his prior examination. Dr. Stephens concluded Coleman could return to some form of work on a full-time basis. Additionally, Dr. Wolens disagreed with Dr. Muffly's opinion that there is a worsening of condition. Dr. Wolens found no worsening of condition, noting the quality of pain remains unaltered and there continues to be no evidence of neuropathy related to the work injury. Clearly, the record contained conflicting medical opinions regarding any change in impairment or disability since the time of the original decision. Where medical evidence is conflicting, an ALJ is free to choose that which he finds most credible and assign evidentiary weight accordingly. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Because the record contains substantial evidence that there is no worsening of Coleman's condition since the time of the award, it cannot be said the evidence compels a finding of a change in his impairment or disability.

Finally, we find no error in the ALJ's consideration of the 2002 and 2008 MRIs. The ALJ considered those MRIs in the context of determining the weight to be accorded the opinions of the medical experts. The ALJ exercised his discretion to conclude Dr. Muffly's opinion was entitled to less weight because he did

not have a full understanding of the extent of Coleman's prior work injury in 2002.

While Coleman has identified evidence supporting a different conclusion, there was substantial evidence presented to the contrary. The ALJ acted within his discretion to determine which evidence to rely upon, and it cannot be said the ALJ's conclusions are so unreasonable as to compel a different result. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

Accordingly, the November 26, 2018 Opinion, Award and Order and the December 27, 2018 Order rendered by Hon. John B. Coleman, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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