

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: January 22, 2020

CLAIM NO. 201565728

FLOYD COUNTY BOARD OF EDUCATION

PETITIONER

VS. **APPEAL FROM HON. JANE RICE WILLIAMS,
ADMINISTRATIVE LAW JUDGE**

JAMES SLONE
and HON. JANE RICE WILLIAMS,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
AFFIRMING**

* * * * *

BEFORE: ALVEY, Chairman, STIVERS and RECHTER¹, Members.

STIVERS, Member. Floyd County Board of Education (“Floyd County”) seeks review of the August 9, 2019, Opinion, Award, and Order on Remand of Hon. Jane Rice Williams, Administrative Law Judge (“ALJ”). The ALJ found James Slone

¹ Although Board Member Rechter’s term expired on January 4, 2020, she is permitted to serve until January 22, 2020, pursuant to KRS 342.213(7)(b), and participated in the above decision.

(“Slone”) attained maximum medical improvement (“MMI”) on April 5, 2016, rather than June 27, 2016. The ALJ then determined Slone sustained a September 29, 2015, work-related low back injury resulting in an 11% impairment rating based upon the opinions of Dr. James C. Owen, and that Slone is totally occupationally disabled.

Floyd County also appeals from the September 3, 2019, Order sustaining its petition for reconsideration to the extent the ALJ deleted an incorrect reference to right knee replacement surgery but overruling the remainder of the petition for reconsideration.

On appeal, Floyd County challenges the ALJ’s decision on three grounds. First, it argues the ALJ’s decision that Slone sustained an injury as defined by the Act is not supported by substantial evidence and is not in accordance with the law. Next, it argues the ALJ “impermissibly rehabilitated Dr. Owen’s impairment assessment and Dr. Owens’ opinion cannot constitute substantial evidence.” Finally, Floyd County argues the award of permanent totally disability (“PTD”) benefits should be vacated as Dr. Owen’s impairment rating is not in conformity with the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment (“AMA Guides”). Thus, there is no impairment rating in compliance with the AMA Guides to support a finding of permanent total disability. Alternatively, Floyd County asserts the ALJ “did not sufficiently address the elements of entitlement to PTD benefits and instead only provided cursory statements.”

BACKGROUND

Slone’s Form 101 alleged a September 29, 2015, back injury occurring when he was lifting a cheerleading mat at work on September 29, 2015. Slone had

completed the 11th grade and attained a GED. He had no specialized training and worked approximately twenty-nine years for Floyd County.

Slone relied upon the Form 107 completed by Dr. Owen dated July 8, 2016, generated as a result of a June 27, 2016, examination. Dr. Owen also testified by deposition. Floyd County introduced multiple reports from Drs. Henry Tutt and David Jenkinson and also deposed both doctors. The medical records of Dr. Phillip Tibbs with the University of Kentucky Medical Center were introduced relating to his treatment of Slone prior to and after the September 29, 2015, work injury. The records of Dr. Bill Webb were also introduced relating to his treatment of Slone prior to the injury.

In a September 14, 2017, Opinion, Award, and Order, relying upon the opinions of Dr. Owen, the ALJ found Slone sustained a work-related injury, attained MMI on June 27, 2016, and retained an 11% impairment rating as a result of the work injury. The ALJ found Slone was totally occupationally disabled. After its petition for reconsideration was overruled, Floyd County appealed to this Board. We described the arguments raised on appeal in our previous February 9, 2018, decision as follows:

On appeal, Floyd County challenges the ALJ's decision on three grounds. First, Floyd County argues the ALJ's determination Slone sustained a compensable work-related injury on September 29, 2015, is not supported by substantial evidence. Next, Floyd County asserts the ALJ's determination regarding maximum medical improvement ("MMI"), the award of TTD benefits, the credit for TTD benefits, the injury generated an 11% permanent impairment rating, and that Slone is permanently totally disabled is not support supported by the evidence. Specifically, Floyd County asserts that Dr. James Owen's impairment rating, upon which the ALJ relied, is not in compliance with the 5th Edition of the American Medical Association, Guides to the Evaluation

of Permanent Impairment (“AMA Guides”). Thus, it is not in accordance with the law and could not be relied upon by the ALJ. Finally, Floyd County argues the ALJ either misunderstood, or failed to sufficiently summarize and weigh the evidence. The main thrust of Floyd County’s [sic] argument is that the impairment rating assessed by Dr. Owen, by his own admission, was not in accordance with the AMA Guides, and therefore cannot support the ALJ’s determination the work injury generated an 11% impairment rating and an award of TTD benefits and PTD benefits.

In our February 2018, decision, we affirmed in part, vacated in part, and remanded. In rejecting Floyd County’s first argument that the ALJ’s finding Slone sustained an injury as defined by the Act was not supported by substantial evidence, we held:

We find no merit in Floyd County’s first argument the ALJ’s finding Slone sustained an injury as defined by the Act is not supported by substantial evidence. Slone’s testimony, if believed, established he sustained a significant injury. In addition, the opinions of Dr. Owen expressed in his Form 107-I indicating Slone’s symptoms were caused by the work injury constitute substantial evidence supporting the ALJ’s finding Slone sustained a work-related injury. Significantly, both Drs. Jenkinson and Tutt concluded Slone sustained a work-related injury, albeit temporary. In his April 5, 2016, report, Dr. Jenkinson stated there was no objective findings to support a specific diagnosis; however, it appeared Slone had a sprain/strain of the lower back. As a result, he opined Slone had reached MMI from the lower back sprain/strain at the time he examined him. Dr. Tutt expressed a similar opinion stating there was no evidence that Slone sustained an injury beyond that of a transient myofascial injury relative to the work event from which he had long ago reached MMI and an endpoint to treatment. Within her discretion, the ALJ relied upon Slone’s testimony and the opinions of Dr. Owen in concluding Slone sustained a work-related injury. The ALJ’s findings are sufficient to support her decision as to causation.

Within this argument, Floyd County also asserts the ALJ should not have relied upon Dr. Owen because his opinions were based on Slone's subjective complaints. It further argues the ALJ should have provided an explanation and the rationale for her finding Dr. Owen's testimony is more persuasive. The ALJ was not required to go to that length. In addition, the ALJ was certainly not required to summarize the entirety of medical opinions and medical records submitted in the claim.

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 in accordance with the law, and 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 is not required to set out the minute details of her reasoning in reaching her conclusion. Big Sandy Community Action Program v. Chafins, *supra*; Shields v. Pittsburgh and Midway Coal Mining Co., *supra*. The only requirement is the decision must adequately set forth the basic facts upon which the ultimate conclusion was drawn so the parties are reasonably apprised of the basis of the decision. Big Sandy Community Action Program v. Chafins, *supra*. The ALJ's decision adequately set forth the basic facts, including the lay and medical evidence, upon which she relied in finding Slone sustained a work-related injury; thus, the ALJ's decision finding Slone sustained a work-related injury will not be disturbed.

However, we agreed with Floyd County that the ALJ erroneously relied upon Dr. Owen's opinion in finding Slone attained MMI on June 27, 2016, and his assessment of an impairment rating. We explained:

KRS 342.0011 (35), (36) & (37) state as follows:

(35) "Permanent impairment rating" means percentage of whole body impairment caused by the injury or occupational disease as determined by the

"Guides to the Evaluation of Permanent Impairment";

(36) "Permanent disability rating" means the permanent impairment rating selected by an administrative law judge times the factor set forth in the table that appears at KRS 342.730(1)(b); and

(37) "Guides to the Evaluation of Permanent Impairment" means, except as provided in KRS 342.262:

(a) The fifth edition published by the American Medical Association; and

(b) For psychological impairments, Chapter 12 of the second edition published by the American Medical Association.

MMI and the proper methods for assessment of impairment are set forth in the AMA Guides, Chapter 1, *Philosophy, Purpose and Appropriate Use of the Guides*, 1.2(a), p. 2, states as follows:

An impairment is considered permanent when it has reached maximal medical improvement (MMI), meaning it is well stabilized and unlikely to change substantially in the next year with or without residual treatment.

Section 2.4 of Chapter 2 of the AMA Guides directs as follows:

2.4 When Are Impairment Ratings Performed?

An impairment should not be considered permanent until the clinical findings indicate that the medical condition is static and well stabilized, often termed the date of **maximal medical improvement (MMI)**.

It is understood that an individual's condition is dynamic. Maximal medical

improvement refers to a date from which further recovery or deterioration is not anticipated, although over time there may be some expected change. Once an impairment has reached MMI, a permanent impairment rating may be performed. The *Guides* attempts to take into account all relevant considerations in rating the severity and extent of permanent impairment and its effect on the individual's activities of daily living.[footnote omitted]

The AMA Guides in Chapter 15, which deals with spinal impairment, Introduction, p. 374, states as follows:

As stated in this edition, an individual with a spinal condition is rated only when the condition is stabilized (unlikely to change within the next year regardless of treatment), ie, when MMI has been reached (Chapter 1 and Glossary). *The individual is evaluated based on medical findings that are present when MMI has been reached.* (Emphasis added).

In the Glossary of the AMA Guides, p. 601, MMI is defined as follows:

Maximal Medical Improvement. A condition or state that is well stabilized and unlikely to change substantially in the next year, with or without medical treatment. Over time, there may be some change; however, further recovery or deterioration is not anticipated.

Our courts have consistently stated the proper method for impeaching a physician's methodology pursuant to the AMA Guides is through cross-examination of that physician or the opinion of another medical expert. Jones v. Brasch-Berry General Contractors, 189 S.W.3d 149 (Ky. App. 2006). In this instance, Floyd County did both.

In Jones v. Brasch-Berry General Contractors, supra, the Kentucky Court of Appeals held as follows:

A claimant found to have a compensable, permanent partial disability receives workers' compensation benefits based on the percentage of the employee's disability assessed by the ALJ in accordance with the AMA Guides. Thus, the AMA Guides are an indispensable tool utilized by an ALJ to determine the nature and severity of any claimant's injuries. In the case at hand, two physicians found that Jones suffers from a "Category III" impairment under the AMA Guides; and only Dr. Reasor found that Jones suffered from a "Category IV" impairment. Thus, the ALJ's decision to find Jones twenty-six percent disabled rests solely upon Dr. Reasor's opinion.

As noted by the Board, Dr. Reasor's impairment rating "is a reflection of a personal [sic] desired outcome for the numerical percentage rather than an expert medical application of the definitions reflected within the categories of impairment [found in the AMA Guides]." This inescapable conclusion is borne out by the fact that Dr. Reasor testified repeatedly in his deposition that Jones's impairment properly fell within the "strict definition" of Category III of the AMA Guides, not Category IV. We will not belabor this opinion by reprinting the lengthy excerpt of Dr. Reasor's opinion on this topic, especially in light of the fact that the Board has already done so on pages 5-12 of its opinion. Category III calls for an impairment range of ten to sixteen percent. Accordingly, Dr. Reasor's assignment of a twenty-six percent impairment rating for Jones was not in accordance with the strictures of the AMA Guides.

We agree with Jones that the AMA Guides do not abrogate a physician's right to assess independently an individual's impairment rating. We also agree that if the physicians in a case genuinely express medically sound, but differing, opinions as to the

severity of a claimant's injury, the ALJ has the discretion to choose which physician's opinion to believe. But an ALJ cannot choose to give credence to an opinion of a physician assigning an impairment rating that is not based upon the AMA Guides. In other words, a physician's latitude in the field of workers' compensation litigation extends only to the assessment of a disability rating percentage within that called for under the appropriate section of the AMA Guides. The fact-finder may not give credence to an impairment rating double that called for in the AMA Guides based upon the physician's disagreement with the disability percentages called for in the AMA Guides, which is precisely what Dr. Reasor did in the case at hand.

Under our law, the AMA Guides are an integral tool for assessing a claimant's disability rating and monetary award. So to be useful for the fact-finder, a physician's opinion must be grounded in the AMA Guides, meaning that a physician's personal antagonism toward the AMA Guides, such as that demonstrated by Dr. Reasor in this case, is legally irrelevant. And any assessment that disregards the express terms of the AMA Guides cannot constitute substantial evidence to support an award of workers' compensation benefits.

Therefore, Dr. Reasor's opinion that Jones is twenty-six percent disabled is not competent, substantial evidence because such a finding is greatly in excess of the express terms of the AMA Guides for the Category III injury Dr. Reasor found Jones to have. Since the Board found that the ALJ's decision was not supported by substantial evidence, it neither "overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice. (Footnotes omitted).

Dr. Owen's report and his deposition testimony establish Slone had not attained MMI at the time of Dr. Owen's examination on June 27, 2016, and he erred in assessing an impairment rating then as it was not in accordance with the AMA Guides. Dr. Owen admitted as much in his deposition. Thus, the ALJ could not rely upon the impairment rating assessed by Dr. Owen based on a finding MMI was attained on June 27, 2016. Although the ALJ believed Dr. Owen's assessment was in accordance with the AMA Guides, his testimony establishes the contrary as Slone had not, according to Dr. Owen, attained MMI at the time the impairment rating was assessed. Any ambiguity created by Dr. Owen's June 27, 2016, report as to whether Slone had attained MMI at the time he assessed an impairment rating was clarified during his deposition when he unequivocally testified Slone had not reached MMI; thus, the 11% impairment rating was not in accordance with the AMA Guides. Therefore, the impairment rating assessed by Dr. Owen does not currently comprise substantial evidence supporting the ALJ's finding Slone sustained a permanent injury generating an 11% impairment rating as a result of the September 29, 2015, event. Further, the ALJ's determination Slone attained MMI on June 27, 2016, when Dr. Owen examined Slone cannot stand scrutiny as that finding is not supported by substantial evidence. That being the case, the award of PTD benefits, at this time, is not supported by Dr. Owen's impairment rating. Consequently, the ALJ's finding Slone attained MMI on the date Dr. Owen examined him, Slone has an 11% impairment rating, and the award of TTD benefits and PTD benefits must be vacated and the claim remanded for additional findings.

However, we refused to reverse the decision Slone had an 11% impairment rating and remand the claim with directions to find Slone did not have an impairment rating. Our reasoning was as follows:

That all said, although Dr. Owen's impairment rating is the only impairment rating in the record, we decline to reverse the ALJ's decision and direct that on remand the ALJ is limited to finding Slone sustained a temporary injury and may be entitled to a period of TTD benefits and medical benefits.

This Board is cognizant of the fact that Dr. Owen's impairment rating is the only impairment rating in the record. However, the fact Dr. Owen opined Slone was not at MMI on June 27, 2016, is not fatal to Slone's claim for PPD benefits or PTD benefits. As this Board has held many times, the ALJ may accept Dr. Owen's impairment rating if, based upon other medical testimony in the record, she determines Slone attained MMI prior to the date Dr. Owen examined Slone on June 27, 2016. This is significant because in Dr. Jenkinson's initial report dated April 5, 2016, he opined Slone "has already reached maximum medical improvement as of the date of this evaluation 4/5/16." Thus, on remand, if the ALJ determines Slone attained MMI on the date he was seen by Dr. Jenkinson, the impairment rating assessed by Dr. Owen is in accordance with the AMA Guides, as it would have been assessed after Slone attained MMI. [footnote omitted]

As there is evidence in the record which could rehabilitate the impairment rating assessed by Dr. Owen, we may not reverse the award of the ALJ and remand for a limited award, if appropriate, of TTD benefits and medical benefits. Rather, the award of all income benefits and the finding regarding the date of MMI must be vacated and the claim remanded for a finding of the date of MMI, as the ALJ is precluded from finding Slone attained MMI on the date he was seen by Dr. Owen. If the ALJ chooses to rely upon the opinion of Dr. Jenkinson as the date MMI was attained, the impairment rating assessed by Dr. Owen is in accordance with the AMA Guides and may be relied upon. Stated another way, the reliance upon Dr. Jenkinson's opinion as to MMI rehabilitates the impairment rating of Dr. Owen. If the ALJ accepts Dr. Jenkinson's assessment of MMI and Dr. Owen's impairment rating, she must again determine the extent of Slone's occupational disability and entitlement to income benefits. The ALJ must also determine the credit to which Floyd County is entitled for TTD benefits already paid. If the ALJ chooses not to rely upon the opinion of Dr. Jenkinson as to MMI, she cannot rely upon the impairment rating assessed by Dr. Owen, as there is no evidence in the record establishing Slone attained MMI prior to the date he was seen by Dr. Owen and was assessed an 11% impairment rating. We express no opinion as to the outcome.

Since there is no dispute Slone sustained at least a temporary injury on September 29, 2015, should the ALJ not rely on Dr. Jenkinson's assessment of MMI and Dr. Owen's impairment rating, she must determine whether an award of TTD benefits and medical benefits is appropriate. Concerning an award of medical benefits, since rendition of Robertson v. United Parcel Service, 64 S.W.3d 284 (Ky. 2001), this Board has consistently held it is possible for an injured worker to establish a temporary injury for which temporary benefits may be paid, but fail to prove a permanent harmful change to the human organism for which permanent benefits are payable. In Robertson, the ALJ determined the claimant failed to prove more than a temporary exacerbation and sustained no permanent disability because of his injury. Therefore, the ALJ found the worker was entitled to only medical expenses the employer had paid for the treatment of the temporary flare-up of symptoms. The Kentucky Supreme Court noted the ALJ concluded Robertson suffered a work-related injury, but its effect was only transient and resulted in no permanent disability or change in the claimant's pre-existing spondylolisthesis. The Court stated:

Thus, the claimant was not entitled to income benefits for permanent partial disability or entitled to future medical expenses, but he was entitled to be compensated for the medical expenses that were incurred in treating the temporary flare-up of symptoms that resulted from the incident. Id. at 286.

In FEI Installation, Inc. v. Williams, 214 S.W.3d 313 (Ky. 2007), the Kentucky Supreme Court instructed KRS 342.020(1) does not require proof of an impairment rating to obtain future medical benefits, and the absence of a functional impairment rating does not necessarily preclude such an award.

Floyd County's final argument on appeal is rendered moot in light of our findings herein.

Those portions of the ALJ's September 14, 2017, decision and the October 3, 2017, Order ruling on the petition for reconsideration finding Slone

sustained a work-related injury were affirmed. Those portions of the ALJ's September 14, 2017, decision and the October 3, 2017, Order ruling on the petition for reconsideration finding the work injury resulted in an 11% impairment rating, Slone attained MMI on June 27, 2016, was permanently totally disabled, and the award of temporary total disability ("TTD") benefits and PTD benefits were vacated. The claim was remanded to the ALJ for entry of an amended decision in accordance with our opinion.

Floyd County appealed to the Kentucky Court of Appeals. The Court of Appeals affirmed this Board on all grounds raised by Floyd County. In Floyd County Board of Education v. Slone, 2018-CA-000385-WC, rendered May 24, 2019, Designated Not To Be Published, the Court of Appeals held as follows:

Despite Floyd County's contention, the ALJ's finding that Slone sustained a compensable injury under the Workers' Compensation Act did not rely on a diagnosis based solely on Slone's subjective complaints. Rather, Dr. Owen's diagnosis was the result of findings from his physical evaluation of Slone and his review of Slone's prior medical history. Although there was evidence supporting a different finding, that is not a basis for reversing the Board. Accordingly, the ALJ's finding that Slone experienced an injury under the Workers' Compensation Act was supported by substantial evidence and must be affirmed.

Floyd County also appeals the Board's holding that Dr. Owen's permanent impairment rating can be rehabilitated on remand. It argues that a factual finding cannot be considered reasonable under the evidence if an ALJ is "given unfettered discretion to concoct an award by essentially combining opposite, competing opinion." We believe *Copar, Inc. v. Rogers*, 127 S.W.3d 554 (Ky. 2003), is dispositive to this argument. In that case, one physician assigned a claimant a 15% permanent impairment rating, which he attributed to the claimant's workplace injury. *Id.* at 557. However, he testified the claimant had not

reached MMI. *Id.* A second physician assigned a 5% impairment rating, which he attributed to an incident that occurred before the workplace injury. *Id.* Nonetheless, the second physician opined the claimant had reached MMI. *Id.* The ALJ subsequently found the claimant totally disabled and awarded PTD benefits. *Id.* at 558. On appeal, the employer contended that the first physician's impairment rating was invalid because it was assigned before he thought the claimant reached MMI. *Id.* at 561. The Kentucky Supreme Court rejected this argument, holding that substantial evidence supported the ALJ's award:

We note ... 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.

Id. The Board's opinion regarding the potential rehabilitation of Dr. Owen's impairment rating is consistent with the Kentucky Supreme Court's opinion in *Copar, Inc.* Moreover, the ALJ has yet to make any findings on remand, let alone one we could deem so unreasonable that it must be viewed as erroneous as a matter of law. Accordingly, there is no basis to reverse the Board's instructions on remand.

Slip Op. at 3-4.

In her August 9, 2019, decision, relying upon Dr. Jenkinson's opinion, the ALJ concluded MMI was attained on April 5, 2016. Relying upon the opinions of

Dr. Owen set forth in his Form 107, the ALJ again concluded Slone sustained a work-related injury meriting an 11% impairment rating. The ALJ found as follows:

Plaintiff also testified sincerely about his prior pain as best he could and was found believable. He appeared as making every effort to be as truthful as possible. This coincides with Dr. Owen's opinion that 2% of the 13% whole person impairment was preexisting, active at the time of the injury. Based on this opinion, Slone's whole person impairment is found to be 11%. Regarding MMI, Dr. Jenkinson saw Plaintiff on April 5, 2016 and found he had reached MMI. This is persuasive as there is no compelling evidence of a change in Plaintiff's condition after that date.

In determining Slone was totally occupationally disabled, the ALJ provided the following findings of facts and conclusions of law:²

The determination of a total disability award remains within the broad authority of the ALJ. *Ira A. Watson Department Store v. Hamilton*, 34 S.W.3d 48 (Ky. 2000). To determine the likelihood that a worker can resume some type of work under normal employment conditions, the ALJ should consider the worker's age, education level, vocational skills, medical restrictions, emotional state and how those factors interact. *Id.* "A worker's testimony is competent evidence of his physical condition and of his ability to perform various activities both before and after being injured." *Id.* at 52 (citing *Hush v. Abrams*, 584 S.W.2d 48 (Ky. 1979)).

Slone has met his burden of proving he is totally disabled as a result of the work injury. In so finding, the ALJ relies on Slone's testimony and on the impairment rating and restrictions as provided by Dr. Owen. The evidence is persuasive that Slone is not able to continue working.

i. Age

Slone is sixty-two years old. While this is not quite retirement age, the harsh reality is that workers fifty and over face added challenges when trying to find new

² The findings of fact and conclusions of law are a reiteration of the ALJ's previous findings and conclusions contained in the September 14, 2017, Opinion and Award.

employment. On the balance, the age factor weighs in favor of total disability.

ii. Education and Vocational Skills

Slone received a GED. He has experience in a limited number of jobs and does possess transferable skills in that his maintenance job for nearly 30 years allowed him to learn skills in many different areas including plumbing, roofing and general handy man skills. The problem is Slone's skill and training do not extend beyond heavy labor type job. On the balance, this factor weighs in favor of disability as Slone has limited significant work force skills.

iii. Restrictions

Slone's restrictions are significant, He is not to lift over 10 pounds with limited stooping, squatting and crawling. He testified to the high physical demands of the job he has held for the last 30 years. Even as a truck driver, he would have to sit for longer periods than he can tolerate. Slone's restrictions would prohibit him from returning not only to his job as a maintenance man, but to any of the jobs he has worked in the past. This factor weighs heavily in favor of disability.

iv. Emotional state

The evidence is convincing that Slone loved working and would much prefer to work. He suffers anxiety from his inability to be active and continue his job. Still, the emotion factor does not weigh heavily. Should all the other elements fall in place, the emotional aspect would probably not be disabling. Proof is limited on this issue.

The ALJ awarded TTD benefits from September 29, 2015, through April 5, 2016, and PTD benefits from September 29, 2015, "suspended during any period of TTD benefits, and continuing thereafter for so long as [Slone] is so disabled."

Floyd County filed a twelve-page petition for reconsideration asserting there were numerous patent errors within the ALJ's findings of fact and conclusions of law. As previously noted, the ALJ sustained the petition for reconsideration to the

extent that she corrected a typographical error and overruled the remainder of the petition for reconsideration as a re-argument of the merits.

On appeal, Floyd County again contends Dr. Owen's opinions do not constitute substantial evidence supporting the ALJ's finding of a work injury. It argues the ALJ provided no rationale for her rejection of the opinions of Drs. Tutt and Jenkinson. Floyd County next argues the ALJ's reliance upon Dr. Jenkinson's assessment that Slone attained MMI cannot serve to rehabilitate the impairment rating assessed by Dr. Owen, because he unequivocally admitted his impairment rating was not in accordance with the AMA Guides. Significantly, on page 13 of its brief, Floyd County admits the ALJ's reliance upon Dr. Jenkinson's assessment of the MMI date was appropriate. Floyd County again cites to the testimony of Drs. Tutt and Jenkinson who challenged Dr. Owen's impairment rating. Floyd County argues Dr. Owen's impairment cannot constitute substantial evidence as he disregarded the express terms of the AMA Guides. Floyd County further contends Dr. Owen erroneously found Slone suffered L5-S1 radiculopathy since all other doctors made no such finding. It notes Drs. Tutt and Jenkinson completely disagreed with Dr. Owen's assessment of Slone's condition, as both doctors concluded there is no evidence Slone sustained an injury as defined by the Act.

Floyd County observes Drs. Tutt and Jenkinson reviewed pre-injury and post-injury medical records while Dr. Owen only reviewed a prior lumbar MRI report and post-injury medical records. It also observes Drs. Tutt and Jenkinson actually reviewed the MRI and Dr. Owen did not. Instead, Dr. Owen relied upon the radiologist's interpretation. Thus, Dr. Owen's impairment cannot stand scrutiny.

In a related argument, Floyd County argues the award of PTD benefits must be vacated, because Dr. Owen admitted his impairment rating was not in compliance with the AMA Guides. Thus, since the record does not contain an impairment rating consistent with the AMA Guides, by statute an award of PTD benefits is precluded. Floyd County's alternative argument consists of the following: "Alternatively, Hon. ALJ Rice Williams did not sufficiently address the elements of entitlement to PTD benefits and instead only provided cursory statements. Therefore, the award of PTD should be vacated."

ANALYSIS

Since we resolved Floyd County's first argument in our February 9, 2018, decision, we affirm on this issue. Our February 9, 2018, decision concluded Slone's testimony and Dr. Owen's opinions expressed in his Form 107 constituted substantial evidence supporting the ALJ's finding Slone sustained a work-related injury. Floyd County appealed to the Court of Appeals and the Court of Appeals affirmed our decision. Floyd County did not seek review by the Kentucky Supreme Court; thus, our determination as affirmed by the Court of Appeals is the law of the case and *res judicata* as to whether Slone sustained a September 29, 2015, work injury. The following from the Supreme Court in McGuire v. Coal Ventures Holding Company, Inc., 2009-SC-000114-WC, rendered October 29, 2009, Designated Not To Be Published, is dispositive:

The doctrines of *res judicata* and the law of the case relate to the preclusive effect of previous judicial decisions. *Res judicata*, a Latin term meaning "a matter adjudged," stands for the principle that a final judgment on the merits is conclusive of causes of action (claim preclusion) and facts or issues (issue preclusion/collateral estoppel)

thereby litigated as to the parties and their privies. [footnote omitted] The law of the case doctrine concerns the preclusive effect of judicial determinations in the course of a single litigation before a final judgment. [footnote omitted] As applied to workers' compensation cases, a final decision of law by an appellate court [footnote omitted] or the Board [footnote omitted] establishes the law of the case and must be followed in all later proceedings in the same case.

Slip Op. at 3.

Once the ALJ's determination Slone sustained a work-related injury was affirmed by this Board and the Court of Appeals, that determination became the law of the case by which the parties are bound. The doctrine of *res judicata* bars the re-litigation of a cause of action previously adjudicated between the same parties. Parson v. Union Underwear Company, 758 S.W.2d 43 (Ky. App. 1988); Beale v. Faultless Hardware, 837 S.W.2d 893 (Ky. 1992). A final judgment, identity of subject matter, and mutuality of parties is required. BTC Leasing Inc. v. Martin, 685 S.W.2d 191 (Ky. App. 1984). "The doctrine of *res judicata* applies to the rulings of a Workmen's Compensation Board the same as it does to the decisions of a court." Hysteam Coal Corp. v. Ingram, 141 S.W.2d 570, 572 (Ky. App. 1940).

The question of causation does not evolve over time. Kentucky courts have applied the principle of *res judicata* to subsequent attempts to re-litigate causation. "[O]nce an ALJ-adjudicated award and order becomes final, the ALJ's determinations with respect to e.g., causation, notice apportionment, etc. cannot be readdressed under KRS 342.125" due to the principle of *res judicata*. Garrett Mining Co. v. Nye, 122 S.W.3d 513 (Ky. 2003). Once an ALJ determines that work-related causation has not been established, subsequent tribunals are bound by this determination. Godbey v.

University Hospital of Albert B. Chandler Medical Center, Inc., 975 S.W.2d 104 (Ky. App. 1998) (applying *res judicata* effect to finding claimant failed to establish work-relatedness in subsequent civil action). As the law of the case and *res judicata* bar re-litigation of this issue, Floyd County's first argument has no merit.

We also find no merit in Floyd County's second argument asserting the ALJ impermissibly rehabilitated Dr. Owen's impairment assessment. We also specifically addressed this contention in our February 9, 2018, decision. Although we held Dr. Owen's impairment rating could not be relied upon at that time, we declined to reverse the ALJ's decision and direct the ALJ was limited to finding Slone sustained a temporary injury potentially entitling him to a period of TTD benefits and medical benefits. In accordance with the law, we instructed if the ALJ, upon remand, relied upon the date of Dr. Jenkinson's assessment of MMI, April 5, 2016, then the 11% impairment rating of Dr. Owen could be accepted by the ALJ since his impairment rating would then be in accordance with the AMA Guides. We held the ALJ was permitted to accept Dr. Jenkinson's assessment of MMI while simultaneously accepting Dr. Owen's opinion that Slone had an 11% impairment rating due to his September 29, 2015, work injury. As a result, we vacated the ALJ's finding Slone had an impairment rating, the award of TTD and PPD benefits, and remanded for additional findings. On remand, the ALJ, within the parameters of our decision, accepted Dr. Jenkinson's date of MMI, April 5, 2016, but accepted Dr. Owen's opinion that Slone had an 11% impairment rating as a result of the work injury. Those findings were within the discretion of the ALJ and did not violate our holding. 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.

The Court of Appeals upheld our decision regarding the potential rehabilitation of Dr. Owen's impairment rating since it was in concert with Copar, Inc., *supra*. Consequently, we find no merit in Floyd County's second argument.

In a sub-argument, Floyd County asserts that because Dr. Owen did not review Slone's pre-injury medical records, diagnosed radiculopathy when no other doctor provided such a diagnosis, and did not review the lumbar MRI films, rejection of his opinions as not comprising substantial evidence is mandated. We disagree.

Dr. Owen's opinions expressed in his Form 107 and his deposition testimony qualify as substantial evidence sufficiently supporting the ALJ's conclusion that Slone sustained a work-related injury. The fact that Dr. Owen diagnosed radiculopathy when no other doctor did, did not review Slone's pre-injury medical records, and did not review the MRI study in formulating the opinions contained in his report does not render his opinion less than substantial. Rather, those factors merely affect the weight to be assigned Dr. Owen's opinions, a question solely to be

decided by the ALJ in her role as fact-finder. Luttrell v. Cardinal Aluminum Co., 909 S.W.2d 334 (Ky. App. 1995).

In summary, Floyd County repeatedly argues Dr. Owen's deposition testimony indicating his impairment rating was not in accordance with the AMA Guides prohibited the ALJ from relying on his impairment rating on remand. However, Dr. Owen's deposition testimony indicating his impairment rating is not in accordance with the AMA Guides is based solely upon the fact that he assessed an impairment rating even though he concluded Slone had not attained MMI. However, on remand, the ALJ's acceptance of Dr. Jenkinson's April 5, 2016, date of MMI rehabilitated Dr. Owen's 11% impairment rating assessed over two months later on June 27, 2016. The acceptance of Dr. Jenkinson's date of MMI and Dr. Owen's impairment rating was within the ALJ's discretion as outlined in our February 9, 2018, decision. There can be no question about that since the Court of Appeals specifically held our analysis regarding the rehabilitation of Dr. Owen's impairment rating was in accordance with the law enumerated in Copar, Inc. The ALJ's determination Slone sustained an 11% impairment rating shall be affirmed.

Similarly, we find no merit in Floyd County's third argument asserting since Dr. Owen admitted his impairment rating is not in compliance with the AMA Guides, his opinion cannot constitute substantial evidence supporting the ALJ's finding Slone has a permanent impairment rating pursuant to the AMA Guides and is totally disabled. Since we have affirmed the ALJ's finding Slone has an 11% impairment rating as a result of the September 29, 2015, work injury, her finding of

permanent total disability is in accordance with KRS 342.0011(11)(c). Therefore, the ALJ was permitted to determine Slone is permanently totally disabled.

Finally, Floyd County's one-sentence alternative argument asserting the ALJ did not specifically address the elements of Slone's entitlement to PTD benefits has no merit, as the ALJ conducted an itemized analysis of the elements she was required to consider in determining Slone was permanently disabled. Consequently, her determination Slone is permanently disabled will remain unaltered.

Accordingly, the August 9, 2019, Opinion, Award, and Order on Remand and the September 3, 2019, Order ruling on the petition for reconsideration are **AFFIRMED**.

ALL CONCUR.

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