

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: January 26, 2018

CLAIM NO. 201700027

GAMALIEL PENN

PETITIONER

VS.

APPEAL FROM HON. JONATHAN WEATHERBY,  
ADMINISTRATIVE LAW JUDGE

UNITED PARCEL SERVICE  
and HON. JONATHAN WEATHERBY,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION  
AFFIRMING

\* \* \* \* \*

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

**STIVERS, Member.** Gamaliel Penn ("Penn") seeks review of the July 24, 2017, Opinion and Order of Hon. Jonathan Weatherby, Administrative Law Judge ("ALJ) finding Penn did not sustain a work-related injury on March 22, 2016, while in the employ of United Parcel Service ("UPS) and dismissing his claim for income and medical benefits. Penn

also appeals from the September 20, 2017, Order denying his petition for reconsideration.

On appeal, Penn contends the ALJ committed reversible error in dismissing his claim since the evidence compels a finding he met his burden of proving a work-related injury.

Penn's Form 101 alleges that on March 22, 2016, he sustained cumulative trauma injuries to his neck, left arm, and shoulder as a result of "bumpy rides in truck."

Penn testified at a March 16, 2017, deposition and at the May 25, 2017, hearing. At the time of his alleged injury, Penn was driving a truck for UPS and returning from Chicago to Louisville when he began to experience pain in the center and left side of his chest. He also experienced numbness and tingling. As a result, he believed he was having a heart attack. Penn called UPS dispatch and informed the dispatcher he had a lot of chest pain on the left side. The dispatcher directed him to go to the emergency room immediately. Penn did not go immediately to the emergency room. Instead, he drove his truck to Louisville and went to the emergency room at Jewish Hospital Medical Center East ("Jewish Hospital") where he was treated for heart attack symptoms. Penn testified he was informed by personnel at Jewish Hospital

that he did not experience a heart attack and was provided acid reflux medication.

Upon being advised he did not have heart problems, Penn concluded his truck driving activity caused problems in his neck, left shoulder, and arm. He testified that when he constantly hits bumps, he experiences tightness in the neck and numbness in the left shoulder and arm. Penn explained that the truck he was driving on the day of the alleged injury was a "spring ride" truck which does not provide much shock absorption when hitting bumps. Since then, UPS has provided him with an "air ride" truck. After being treated at Jewish Hospital, Penn went to his family physician, Dr. Nison Abayev, with Pleasure Ridge Primary Care. He was then referred to Dr. John Mahan. After treating him briefly, Dr. Mahan referred Penn to Dr. Dean Collis for pain management. While under the care of Dr. Collis, Penn received two epidural steroid injections. Penn testified he takes over-the-counter Ibuprofen for pain in his neck and left shoulder region. Penn testified he missed approximately fifteen to twenty days of work due to the injury. Although in some discomfort, he continues to perform the job he was performing at the time of the alleged injury as a full-time feeder driver. His pain extends from his neck into his shoulder and the back of his

left arm. Since he now has an air ride truck his symptoms are much better. Penn testified no doctor has imposed work restrictions.

The records of Drs. Abayev and Mahan were introduced by the parties. Penn relied upon the Independent Medical Examination ("IME") report of Dr. Warren Bilkey who assessed an 8% impairment rating after concluding that pursuant to the 5<sup>th</sup> Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"), Penn fell within Cervical DRE Category II. UPS relied upon the April 13, 2017, IME report of Dr. Ellen Ballard who concluded Penn did not sustain a work injury and did not have an impairment rating based on the AMA Guides.

In the July 24, 2017, decision, after summarizing the evidence, the ALJ entered the following findings of fact and conclusions of law:

9. The ALJ is most persuaded by the medical opinion of Dr. Ballard expressed herein as it is based upon the objective medical evidence available rather than the subjective complaints of the Plaintiff.

10. Dr. Ballard diagnosed a history left sided chest and arm pain and mild degenerative disc disease. She found that the Plaintiff could have had indigestion or Prinzmetal's angina but found no evidence of a specific injury

to the cervical spine. Dr. Ballard credibly concluded that the Plaintiff did not sustain a harmful change to the human organism on March 22, 2016. This opinion has convinced the ALJ.

11. Dr. Ballard also credibly found that no further treatment was needed and that the Plaintiff's symptoms are not causally work-related because there was no triggering event. The Opinion of Dr. Ballard has convinced the ALJ and the ALJ finds based thereupon that Plaintiff did not sustain a harmful change to the human organism.

Penn filed a petition for reconsideration asserting the same arguments he makes on appeal which the ALJ denied in an order dated September 20, 2017. Penn did not question the sufficiency of the ALJ's findings.

Penn argues the ALJ erroneously relied upon the medical opinions of Dr. Ballard, as her opinions are contrary to the overwhelming weight of the lay and medical evidence. Penn insists the evidence indicates his strenuous job activities and prolonged exposure to "driving turbulent spring ride trucks" is directly responsible for his debilitating symptoms which developed on March 22, 2016. Penn contends that without question his driving activities have taken a toll on his neck resulting in his physical limitations. Penn asserts he has never experienced any symptoms or injuries in the neck region prior to the date of the alleged injury. Penn posits there

can be no other possible contributing factors to the arousal of his symptoms into disabling reality. Penn asserts Dr. Ballard's analysis and opinions ignore and fail to address the unanimity of the medical opinions that he has a cervical condition with radiculopathy. Penn cites to the results of the MRI revealing three bulging discs. Penn notes Dr. Mahan diagnosed cervical radiculopathy with the presence of a cervical herniation prior to referring him to pain management. Penn contends Dr. Ballard is the only physician to omit any reference to the presence of Penn's cervical strain with radiculopathy and her report is replete with inconsistencies. Penn seeks reversal and remand for the appropriate findings and award. Finding no error, we affirm.

On review, we find Penn's appeal to be nothing more than a re-argument of the evidence before the ALJ. Penn impermissibly requests this Board to engage in fact-finding and substitute its judgment as to the weight and credibility of the evidence for that of the ALJ. That is not the Board's function. See KRS 342.285(2); Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985).

As the claimant in a workers' compensation proceeding, Penn had 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). Since Penn 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). 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 that they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

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 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). 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). 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, 998 S.W.2d 479, 481 (Ky. 1999). So long as the ALJ's ruling with regard to an issue is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

In her April 13, 2017, IME report, Dr. Ballard set forth the background information she received, provided the history of present illness, and listed the records she reviewed. Those records included the records she received from Dr. Abayev at Pleasure Ridge Primary Care, the IME report of Dr. Bilkey, and the records of Jewish Hospital generated before and after Penn's alleged injury. We specifically note that Dr. Ballard had the results of all tests Jewish Hospital performed and the records generated on the date Penn was seen on March 22, 2016, the date of



the alleged injury, and the tests performed thereafter. Dr. Ballard also reviewed the report concerning the MRI of the cervical spine conducted on April 19, 2016. Dr. Ballard also performed a physical examination. Based on all of the information and her examination, Dr. Ballard provided the following diagnoses:

1. History of episode of left-sided chest pain and arm pain.
2. Mild degenerative disc disease.

Dr. Ballard's diagnosis was "an episode of chest and arm, pain which, in [her] opinion, has not actually been clearly defined as to cause." With respect to the proximate cause of the condition diagnosed, Dr. Ballard stated Penn may have had either indigestion or Prinzmetal's angina. However, there was no evidence that this was specific to Penn's cervical spine. Dr. Ballard did not believe Penn sustained a harmful change to the human organism on March 22, 2016, as evidenced by objective medical findings. Further, Dr. Ballard opined Penn did not sustain a cumulative trauma to his neck, left arm, and shoulder which became occupationally disabling from driving a truck at UPS, as there was no evidence to support such occurred due to driving a truck. She concluded Penn had reached maximum medical improvement and assessed a 0%

impairment rating pursuant to the AMA Guides for the alleged work injury. However, Dr. Ballard noted Penn had a previous history of trigeminal neuralgia and may have a 2% or 3% impairment rating for pain for this condition. Dr. Ballard concluded this condition pre-existed the March 22, 2016, event, and had been active sometime before then. Dr. Ballard disagreed with Dr. Bilkey's diagnosis as Penn had no evidence of any findings which she would relate to disc disease. Further, she did not believe that any problems Penn experienced were related to his job. Dr. Ballard also disagreed with the impairment rating assessed by Dr. Bilkey as she saw no evidence Penn sustained an injury. She did not believe Penn's condition required further treatment.

Contrary to Penn's assertions, the findings and opinions of Dr. Ballard set forth in her April 13, 2017, IME report constitute substantial evidence upon which the ALJ was free to rely in reaching a decision on the merits. Kentucky Utilities Co. v. Hammons, 145 S.W.2d 67, 71 (Ky. App. 1940) (citing American Rolling Mill Co. v. Pack et al., 128 S.W.2d 187, 190 (Ky. App. 1939)). Dr. Ballard's opinions are unequivocal and supported by her citation a number of medical records she reviewed, many of which were generated after the alleged March 22, 2016, work injury.

We take issue with Penn's assertion that the medical records, aside from those of Dr. Ballard, overwhelmingly support a finding he sustained a work-related injury. We specifically note that in Dr. Mahan's May 13, 2016, report, he noted Penn's primary complaint was neck and left arm pain. Dr. Mahan noted there was no known cause of the neck pain. He also noted Penn's work as a truck driver aggravated his pain. In a subsequent report dated September 19, 2016, Dr. Mahan noted Penn's chief complaint was neck pain with no known cause.<sup>1</sup> Dr. Mahan indicated therapy did not help. Significantly, the September 19, 2016, record did not contain a notation, as did the May 13, 2016, note, that Penn's work as a truck driver aggravated his pain. Thus, aside from Dr. Ballard's report, the medical records do not overwhelmingly support the conclusion Penn sustained a work-related injury. Dr. Mahan's records contain no reference to a work-related event being the proximate cause of Penn's problems.

While Penn is correct the contrary opinions espoused by Drs. Bilkey and Abayev could have been relied upon by the ALJ to support a different outcome in his favor, in light of the remaining record, the views

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<sup>1</sup> Those records were introduced as an exhibit at the May 25, 2017, hearing.

articulated by those physicians represent nothing more than conflicting evidence compelling no particular result. Copar, Inc. v. Rogers, 127 S.W.3d 554 (Ky. 2003). Consequently, we find no error in the ALJ's reliance upon the opinions of Dr. Ballard. Because the outcome selected by the ALJ is supported by substantial evidence, and the record does not compel a contrary result, we are without authority to disturb the ALJ's decision on appeal. Special Fund v. Francis, *supra*.

Accordingly, the July 24, 2017, Opinion and Order and the September 20, 2017, Order denying the petition for reconsideration are **AFFIRMED**.

ALL CONCUR.

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