

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: May 20, 2022

CLAIM NO. 202091420

JAMES BROWN

PETITIONER

VS.           **APPEAL FROM HON. JONATHAN R. WEATHERBY,  
ADMINISTRATIVE LAW JUDGE**

LOGAN ALUMINUM and  
HON. JONATHAN R. WEATHERBY,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION  
AFFIRMING**

\* \* \* \* \*

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

**MILLER, Member.** James Brown (“Brown”) seeks review of the October 24, 2021 Opinion, Award, and Order and the November 18, 2021 Order on Petition for Reconsideration and Amended Opinion, rendered by Hon. Jonathan R. Weatherby, Administrative Law Judge (“ALJ”). The ALJ found Brown sustained a work injury, resulting in an 8% impairment rating to the lumbar spine pursuant to the 5<sup>th</sup> Edition

of the American Medical Association, Guides to the Evaluation of Permanent Impairment (“AMA Guides”) and he retained the physical capacity to return to the same type of work. The ALJ determined Brown suffered a lumbar strain and awarded medical benefits for that condition. Further, the ALJ found Brown’s proposed lumbar fusion surgery was not reasonable and necessary for the cure and relief of his condition and the surgery is unrelated to the work injury. Brown filed a Petition for Reconsideration, alleging the ALJ failed to analyze whether the work injury aroused a prior, dormant condition and failed to make sufficient factual findings. The ALJ issued an Amended Opinion on November 18, 2021, finding Brown had a pre-existing dormant condition but found the proposed fusion surgery was not causally work-related, reasonable or necessary, and thus, not compensable.

On appeal, Brown argues, while the ALJ found he had a prior dormant condition, he failed to analyze whether it was aroused into a disabling reality by the work injury. Brown also argues the ALJ did not make sufficient factual findings regarding the conflicting medical evidence. For the reasons set forth below, we affirm.

### **BACKGROUND**

Brown is 60 years old and has worked for Logan Aluminum (“Logan”) since 2008. He worked as an operator tech running a machine that slices coils of aluminum. On February 27, 2020, his foot got caught on a piece of angle iron that was welded to the floor. He then slipped in oil and landed on his right hip, shoulder, and knee on a steel floor. Brown felt pain in his lower back, knee, hip, and

shoulder and saw Logan's nurse the same day, who treated his condition with ice packs, aspirin, and Tylenol.

Since the injury, Brown has experienced bilateral foot pain and numbness, greater in the right foot. He has attended physical therapy and has received an epidural injection but has not seen improvement with his lower back or the foot pain and numbness. After his injury, he attempted to return to work but stated he could not stand on the concrete for very long. Brown still works at Logan, but he now works from home performing data entry. He testified he does not believe he can return to his pre-injury work.

Brown also testified regarding two prior back surgeries. He stated he had back surgery in the 1990s for pain in his back and down the right leg. After the two surgeries, his symptoms resolved, and he returned to work without restriction. Brown also testified he went to Owensboro Medical Group due to a low back strain in 2018. He stated he returned to work, his symptoms resolved, and he had no other issues.

On March 27, 2020, a few weeks after the fall at work, Brown saw Dr. Steve Salyers, who diagnosed a lumbar strain, lumbar degenerative disc disease, and acute right shoulder pain. Dr. Salyers noted the shoulder injury appeared to be resolving and recommended physical therapy and activity restrictions. On July 30, 2020, Dr. Salyers showed concern that Brown may develop a frozen shoulder and he recommended light duty restrictions. On October 1, 2020, Dr. Salyers released Brown from restrictions regarding his shoulder and assessed a 0% whole person impairment rating pursuant to the AMA Guides. Dr. Salyers noted his assessment

offered no commentary regarding Brown's back condition or "his suitability to perform his job secondary to his back issues." The decision regarding the shoulder injury has not been appealed.

Dr. Salyers referred Brown to Dr. Brett Babat. Dr. Babat initially diagnosed Brown with low back pain, post-laminectomy syndrome, and other spondylosis with radiculopathy of the lumbar region. Dr. Babat prescribed a back brace and physical therapy and ordered an MRI. After reviewing the MRI, Dr. Babat diagnosed Brown with spinal stenosis of the lumbar region with neurogenic claudication, post-laminectomy syndrome, lumbar disc degeneration, and spondylosis with radiculopathy of the lumbar region. Dr. Babat took note of Brown's two prior back surgeries in 1991, but acknowledged his symptoms resolved and he returned to work within six months. Dr. Babat ultimately recommended a decompression and fusion surgery at L5-S1.

Logan submitted medical evidence from Dr. Tarek Elalayli. On September 3, 2020, Brown presented for an independent medical examination with Dr. Elalayli. He diagnosed a lumbar sprain with a history of lumbar discectomy, lumbar degenerative disc disease, and retrolisthesis of the vertebrae. He found the L5-S1 condition was entirely degenerative and did not correlate with the primary complaint of bilateral foot numbness. He found symptoms more consistent with peripheral neuropathy, which would not be consistent with the injury that occurred at work. Dr. Elalayli opined the degeneration was caused by age and not due to an acute injury. Finally, he opined a lumbar sprain was the only work-related injury and any surgery would be to address a pre-existing, post-operative degenerative

problem in the low back that may have been aggravated by the work injury. He recommended an epidural steroid injection on the right at L5-S1.

Dr. Elalayli also recommended electromyography (“EMG”) testing to determine whether radiculopathy was present. After reviewing EMG testing performed by Dr. James Anderson, Dr. Elalayli opined there is no evidence of active lumbosacral radiculopathy. He noted the EMG showed a potential issue with the saphenous nerve, which is not work-related. Dr. Elalayli opined a lumbar fusion surgery is not necessary and would likely not relieve Brown’s symptoms. On November 3, 2020, Dr. Elalayli placed Brown at maximum medical improvement (“MMI”) and assessed a 5% whole person impairment rating based on DRE Category II pursuant to the AMA Guides.

Brown filed a report from Dr. Jules Barefoot who examined Brown on June 8, 2021. Dr. Barefoot noted Brown’s May 5, 2020 MRI revealed broad-based disc bulges at L3-L4, L4-L5, and L5-S1, as well as evidence of a right L5 radiculopathy secondary to Brown’s fall at work. Dr. Barefoot considered Brown’s medical history of prior surgeries and found the February 27, 2020 workplace injury activated Brown’s condition into a symptomatic, disabling reality. Due to the evidence of radiculopathy, failed conservative treatments, and Brown’s continuing symptoms, Dr. Barefoot found the fusion surgery was reasonable and necessary. He stated Brown was at MMI if no further definitive treatment was available and assessed a 30% whole person impairment rating based on the Range of Motion method in the AMA Guides. He subtracted 10% for the prior two lumbar surgeries and arrived at a net 20% whole person impairment rating.

After reviewing further medical records, including Dr. Barefoot's report, Dr. Elalayli submitted an addendum to his report. He disagreed with Dr. Barefoot's radiculopathy diagnosis, stating the EMG did not show evidence of radiculopathy and that, as an emergency medicine physician, Dr. Barefoot was not qualified to provide an opinion regarding the spinal surgery. Dr. Elalayli noted the small likelihood that a fusion would produce a good outcome and stated it was unlikely to resolve Brown's primary complaint of foot numbness. He opined the degeneration at L5-S1 is pre-existing, and degeneration at other levels is age-related. He concluded Brown suffered a sprain type injury at work and "perhaps aggravated some pre-existing degenerative disease." Dr. Elalayli stated an 8% impairment rating would be reasonable due to Brown's ongoing complaints of pain.

The ALJ held a formal hearing on September 7, 2021 and rendered an Opinion and Order on October 24, 2021. The ALJ found a 0% impairment rating for Brown's shoulder but found he sustained an 8% whole person impairment rating to the lumbar spine due to the work injury. The ALJ also found Brown retained the physical capacity to return to the same type of work and that the "proposed fusion surgery would be related to pre-existing post-laminectomy syndrome and that said fusion would not be reasonable and necessary for the cure and relief of the exacerbation of the Plaintiff's prior back issues." Accordingly, the ALJ awarded permanent partial disability ("PPD") benefits and reasonable and necessary medical expenses for the lumbar sprain but found the fusion surgery non-compensable.

Brown filed a Petition for Reconsideration, arguing the ALJ failed to analyze whether the work injury aroused a prior, dormant condition and failed to

make sufficient factual findings. Pursuant to Brown's request for additional findings, the ALJ issued an Amended Opinion and Order on November 18, 2021. The ALJ added the following language to his original Opinion:

4. For purposes of determining the extent of employer's liability for workers' compensation benefits for the work-related arousal of a pre-existing condition, to be characterized as active, an underlying pre-existing condition must be symptomatic and impairment ratable pursuant to the American Medical Association (AMA) Guidelines immediately prior to the occurrence of the work-related injury. Finley v. DBM Technologies, 217 S.W.3d 261 (Ky.App.2007)

...

7. The Court of Appeals in Finley, articulated that a pre-existing condition that is both asymptomatic and produces no impairment prior to the work-related injury constitutes a pre-existing dormant condition. Finley v. DBM Technologies, 217 S.W.3d 261 (Ky. App. 2007).

8. Dr. Elalayi noted that the Plaintiff had pre-existing degenerative changes but that he reported having no symptoms prior to the work injury. Dr. Elalayi therefore has convinced the ALJ that the Plaintiff's prior low back injury was dormant and that the work-related injury suffered by the Plaintiff on February 27, 2020, was a lumbar sprain.

Brown now appeals from the ALJ's October 24, 2021 Opinion and Order and the November 18, 2021 Order on Petition for Reconsideration. He argues the ALJ erred in relying on Finley v. DBM Technologies, 217 S.W.3d 261 (Ky. App. 2007) and failed to analyze whether the pre-existing dormant condition was aroused into a disabling reality by the work injury, citing to McNutt Construction First General Services v. Scott, 40 S.W.3d 854 (Ky. 2001). Brown also argues the ALJ did not make sufficient factual findings regarding the conflicting medical evidence.

## ANALYSIS

First, Brown argues the ALJ failed to analyze whether Brown's dormant condition was aroused into a disabling reality and whether such arousal was temporary or permanent. Brown asserts the standards in McNutt should be utilized as opposed to the standards in Finley.

The initial issue is what constitutes a dormant condition and, further, what that characterization mandates in terms of benefits. McNutt, supra, is not applicable, as that case relates to whether apportionment of disability is mandated when an injured worker injures part of his body where he has degenerative conditions caused by the natural aging process. In McNutt, there had been no treatment to the lumbar area pre-injury. After the work injury, McNutt had two surgeries. Id. at 856. The treating surgeon's opinion utilized by the ALJ attributed the entire impairment to the work injury. Id. at 858. The Court concluded that the arousal of a prior dormant condition caused by a work injury was compensable. Id. at 859. The effects of the natural aging process are not an injury, but a work-related trauma that is the proximate cause in producing a harmful change in the human organism does constitute a compensable injury. Id.

Finley elaborated on what constitutes a dormant condition, whether a work injury aroused the condition in either a temporary or permanent fashion, and whether the condition was impairment ratable pre-injury. It is well established that the work-related arousal of a pre-existing dormant condition into a disabling reality is compensable. Finley v. DBM Technologies, supra at 265 (citing McNutt, supra). A

pre-existing condition may be either temporarily or permanently aroused. Finley, supra. The Court of Appeals stated:

In its opinion, the Board correctly and succinctly set forth the law upon compensability of a pre-existing dormant condition:

What then is necessary to sustain a determination that a pre-existing condition is dormant or active, or that the arousal of an underlying pre-existing disease or condition is temporary or permanent? To be characterized as active, an underlying pre-existing condition must be symptomatic and impairment ratable pursuant to the AMA Guidelines immediately prior to the occurrence of the work-related injury. Moreover, the burden of proving the existence of a pre-existing condition falls upon the employer. Wolf Creek Collieries v. Crum, 673 S.W. 2d 735, 736 (Ky. App. 1984).

Alternatively, where the underlying pre-existing disease or condition is shown to have been asymptomatic immediately prior to the work-related traumatic event **and** all of the employee's permanent impairment is medically determined to have arisen after that event—due either to the effects of the trauma directly or secondary to medical treatment necessary to address previously nonexistent symptoms attributable to an underlying condition exacerbated by the event—then as a matter of law the underlying condition must be viewed as previously dormant and aroused into disabling reality by the injury. Under such circumstances, the injured employee must be compensated not just for the immediate physical trauma, but also for all proximate chronic effects corresponding to any contributing pre-existing condition, including any previously dormant problem strictly attributable solely to congenital or natural aging processes, as it relates to the whole of her functional impairment and subsequent disability rating, including medical care that is reasonable and necessary pursuant to KRS 342.020.

Id. at 265.

Like the facts in McNutt, the pre-existing condition in Finley was never treated or ratable. This is not the factual scenario in the present case, as Brown had undergone two lumbar discectomies prior to the work injury; thus, those surgeries are clearly ratable under the AMA Guides.

Brown had two prior back surgeries at L5-S1, performed many years ago, at the same body region as his work injury. Hence, while the symptoms were found to be dormant, this determination can only apply to the functional abilities, as clearly, the condition resulting from two lumbar surgeries must be issued an AMA impairment rating. The point here is, **if** the ALJ found that the work injury aroused a pre-existing condition into disabling reality, some carve-out would be required from the AMA impairment assessment. ViWin Tech Windows & Doors, Inc. v. Ivey, 621 S.W.3d 153 (Ky. 2021).

The ALJ did not specifically state that the work injury either did or did not arouse a pre-existing dormant condition into disabling reality. Further, the ALJ did not specifically state whether the work injury was a temporary condition or was permanent. However, the ALJ relied on Dr. Elalayli who definitively stated the only diagnosis related to the February 27, 2020 work injury was a lumbar sprain. Dr. Elalayli initially placed Brown at MMI on October 1, 2020 and assessed a 5% impairment rating, but he suggested an EMG to firmly establish causation of the symptoms. On November 3, 2020, he reviewed the EMG and maintained the patient's symptoms of bilateral foot pain were unrelated to his back and a fusion at L5-S1 would likely not help his symptoms. He stated an epidural steroid injection may be reasonable, but otherwise opined Brown had reached MMI. On July 20,

2021, Dr. Elalayli opined the patient did not suffer anatomic change or disc herniation related to this work injury and continued his diagnosis of a sprain type injury. He stated: “I believe the patient suffered a sprain type injury and perhaps aggravated some pre-existing degenerative disease.” Dr. Elalayli maintained the likelihood of a good outcome following a fusion was small as the primary complaint was bilateral foot numbness, not radiculopathy. He assessed a DRE Category II rating of 8% per the AMA Guides for the sprain type injury.

As the claimant in a workers’ compensation proceeding, Brown 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 he was unsuccessful, Brown must demonstrate the evidence compels a different result. For evidence to be compelling, it must be so overwhelming that no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985).

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 adversary 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). Further, as stated in Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986):

If the fact finder finds against the person with the burden of proof, his burden on appeal is infinitely greater. It is of no avail in such a case to show that there was some evidence of substance which would have justified a finding in his favor. He must show that the evidence was such that the finding against him was unreasonable because the finding cannot be labeled “clearly erroneous” if it reasonably could have been made.

The function of the Board in reviewing an ALJ’s decision 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 the weight and credibility to be afforded the evidence or by noting reasonable inferences which otherwise could have been drawn from the record. Whitaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

Here, there are differing medical opinions as to the cause of Brown’s symptoms and whether a lumbar fusion is warranted to treat the work injury. There were fundamental issues of work-relatedness for the fusion and whether it was a reasonable and necessary procedure.

When the question of causation involves a medical relationship not apparent to a layperson, the issue is properly within the province of medical experts. Mengel v. Hawaiian-Tropic Northwest and Central Distributors, Inc., 618 S.W.2d

184, 186-187 (Ky. App. 1981). Medical causation must be proven by medical opinion within “reasonable medical probability.” Lexington Cartage Company v. Williams, 407 S.W.2d 395 (Ky. 1966). The mere possibility of work-related causation is insufficient. Pierce v. Kentucky Galvanizing Co., Inc., 606 S.W.2d 165 (Ky. App. 1980). While objective medical evidence must support a diagnosis of a harmful change, it is not necessary to prove causation of an injury through objective medical findings. Staples, Inc. v. Konvelski, 56 S.W.3d 412 (Ky. 2001).

Further, the proper interpretation of the AMA Guides is a medical question solely within the province of the medical experts. Kentucky River Enterprises, Inc. v. Elkins, 107 S.W.3d 206 (Ky. 2003) to treat claimant’s symptoms. The ALJ is entitled to pick and choose among conflicting medical opinions. Pruitt v. Bugg Brothers, 547 S.W.2d 123 (Ky. 1977).

The ALJ found the work injury was a lumbar sprain and by accepting the 8% AMA impairment rating from Dr. Elalayli, he implicitly rejected Brown’s contention that the work injury aroused his pre-existing condition. While specific language concerning the arousal or lack thereof by the work injury of a non-symptomatic condition would have been preferred, it is clear the ALJ found the work injury solely to be a lumbar strain. The AMA rating and PPD benefits awarded are consistent with that finding.

Brown also contends the ALJ failed to make sufficient factual findings regarding the conflicting medical evidence. He specifically argues the ALJ did not

accurately summarize the conflicting evidence, failed to consider the opinions of Drs. Barefoot and Babat, and misconstrued Dr. Babat's diagnosis.

In his findings, the ALJ discussed the medical opinions of Dr. Elalayli, Dr. Barefoot, Dr. Babat, and Dr. Salyers. In determining whether Brown is entitled to PPD benefits, the ALJ supported his award by comparing the findings of Dr. Elalayli and Dr. Barefoot. The ALJ ultimately found Dr. Elalayli's report to be credible and convincing. He noted that Dr. Elalayli believed Dr. Barefoot's opinion was inconsistent with objective medical findings and that Dr. Barefoot did not appear to be aware of the extent of Brown's lower back issues. The ALJ also stated he found Dr. Elalayli's opinion persuasive and convincing regarding whether the proposed fusion surgery was a reasonable and necessary medical expense. The ALJ supported his finding with evidence from Dr. Elalayli's report that the surgery would be related to pre-existing post-laminectomy syndrome and that it was not reasonable or necessary for the cure or relief of the work injury and Brown's symptoms.

The ALJ found the February 27, 2020 work injury is a lumbar sprain. This injury could have produced a temporary flare up or aggravation of Brown's underlying condition for which he had two prior back surgeries or a permanent change to his underlying condition. The ALJ found the lumbar sprain is permanent, as he awarded an 8% whole person impairment rating pursuant to the AMA Guides. Medical benefits flow from that award, but not all medical benefits. The claimant still has the initial burden to prove the proposed treatment is both reasonable and necessary and further related to the work injury.

The ALJ found the bilateral foot numbness was caused by a peripheral neuropathy unrelated to the lumbar condition. In finding as much, he relied on Dr. Elalayli's opinion that the surgery was not reasonable, and the MRI and EMG findings did not correlate with Brown's symptoms. Accordingly, the ALJ found the proposed fusion non-compensable. The opinions contained in Dr. Elalayli's reports constitute substantial evidence.

The contrary opinions pertaining to causation expressed by Dr. Barefoot and Dr. Babat are nothing more than conflicting evidence compelling no particular result. Where medical evidence is conflicting concerning causation, the question of which evidence to believe and what inferences are to be drawn from it is the exclusive province of the ALJ. Brown-Foremen Corp. v. Upchurch, 127 S.W.3d 615, 621 (Ky. 2004). While the opinions of Drs. Babat and Barefoot may have led to a different finding, that is not for this Board to conclude.

It is recognized that the ALJ must provide a sufficient basis to support his or her determination. Cornett v. Corbin Materials, Inc., 807 S.W.2d 56 (Ky. 1991). Parties are entitled to findings sufficient to inform them of the basis for the ALJ's decision to allow for meaningful review. Kentland Elkhorn Coal Corp. v. Yates, 743 S.W.2d 47 (Ky. App. 1988); Shields v. Pittsburgh and Midway Coal Mining, Co., 634 S.W.2d 440 (Ky. 1982).

In the present case, the ALJ informed the parties of his reasoning and the medical evidence he relied upon in rendering his decision. The ALJ determined the fusion surgery would not be necessitated by the work injury, but further it would not be a reasonable or necessary procedure to treat Brown's symptoms. These are

findings of fact which this Board cannot superimpose 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. Miller v. Go Hire Emp. Dev., Inc., 473 S.W.3d 621, 629 (Ky. App. 2015). When the medical evidence is conflicting, the question of which evidence to believe is the exclusive province of the ALJ. Square D Co. v. Tipton, 862 S.W.2d 308, 309 (Ky. 1993).

Lastly, Brown contends the ALJ mischaracterized Dr. Babat's opinion. Dr. Babat's office records consisted of three visits. His initial assessment from March 27, 2020 included a diagnosis of post-laminectomy syndrome, which the ALJ noted in his findings, and the next two visits with the nurse practitioner discussed the back pain and bilateral foot numbness. Dr. Babat's opinion regarding causation, however, is not clear, and the ALJ firmly relied on Dr. Elalayli's opinion that Brown's symptoms were not caused by the work injury.

In sum, there is substantial evidence of record to support the ALJ's decision that the work injury resulted in a lumbar sprain, for which PPD benefits were awarded, including future medical benefits, but that a proposed fusion surgery is not causally related to the work injury or reasonable and necessary treatment for Brown's symptoms.

### **CONCLUSION**

Accordingly, the October 24, 2021 Opinion and Order and the November 18, 2021 Order on Petition for Reconsideration rendered by Hon. Jonathan R. Weatherby, are **AFFIRMED**.

ALL CONCUR.

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