

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: July 26, 2019

CLAIM NO. 201700245

JAMES DAVID ROBERTS

PETITIONER

VS.

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

REVELATION ENERGY,
And HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

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

RECHTER, Member. James David Roberts appeals from the January 28, 2019 Opinion and Order and the February 20, 2019 Order on Reconsideration rendered by Hon. Jonathan R. Weatherby, Administrative Law Judge ("ALJ"). The ALJ dismissed Roberts' claim for cumulative trauma injuries to his neck, low back, right wrist, right shoulder, eyes, bilateral hands, bilateral feet and bilateral knees. On

appeal, Roberts argues the ALJ failed to perform a proper analysis of the evidence. For the reasons set forth herein, we affirm.

Roberts has worked in coal mines since 1980. At Revelation Energy (“Revelation”), he worked as a belt foreman, out-by electrician, welder, repairman, and general manager. Roberts alleged he sustained cumulative trauma injuries to his shoulders from repeated pulling, tugging, and lifting. His cervical complaints resulted from running equipment, hitting bumps, hitting his head on canopies of equipment, and walking into roof bolts. He attributed his low back complaints to lifting, pulling, tugging, and working in awkward positions. His wrists and hands were affected by picking up heavy loads, including routine handling of 40-pound bags of rock dust. He attributed his knee pain to crawling. He believed his eyes were injured from UV flashes and heat associated with welding. The alleged injury date of May 12, 2016 is the day Roberts was laid off. He was called back to work but could not return because he was in the hospital due to blackout spells.

Dr. David Muffly performed an independent medical evaluation (“IME”) on December 8, 2016. Dr. Muffly reviewed medical records from Roberts’ primary care physician since 2012, as well as multiple diagnostic studies. These diagnostic studies included a 2011 MRI revealing a right rotator cuff tear, and 2014 cervical x-rays showing narrowing at C5-6 with loss of height at C6 and multiple osteophytes. Cervical spine x-rays on June 23, 2016 showed moderate disc space narrowing at C5-6 with spondylosis and mild to moderate disc space narrowing at C6-7 with spondylosis. Additional studies included cervical, thoracic, shoulder, elbow and lower extremity x-rays from 2016, an EMG/NCV study, and cervical and lumbar

MRIs, also from 2016. Dr. Muffly diagnosed left cervical radiculopathy related to cervical disc herniation, chronic neck pain, right cubital tunnel syndrome, low back pain with early degenerative disc disease, and right shoulder calcific tendonitis with normal exam. He assigned a 15% impairment rating for the cervical spine and 2% for right ulnar neuropathy (cubital tunnel syndrome) for a combined impairment rating of 17% pursuant to the American Medical Association Guides to the Evaluation of Permanent Impairment, 5th Edition (“AMA Guides”). Dr. Muffly concluded the impairment is the result of cumulative trauma caused by Roberts’ occupation, and no active impairment existed prior to the cumulative trauma injuries. Dr. Muffly assigned 0% ratings for the right shoulder and lumbar spine.

Dr. Ronald Burgess performed an IME on May 3, 2017 which focused primarily on Roberts’ upper extremities. Five months before Dr. Burgess’ examination, Roberts underwent right cubital tunnel release surgery. As such, Dr. Burgess diagnosed Roberts as status post right cubital tunnel release for cubital tunnel syndrome. He opined the cause of the compression was osteoarthritic changes with no evidence of any internal derangement of the right shoulder. Dr. Burgess found no symptoms of any significant nature in the carpal tunnel and Roberts’ current symptoms are non-ratable. He further opined Roberts has no permanent impairment for the right shoulder or bilateral wrists.

Dr. Phillip Corbett performed an IME on May 24, 2017 which included a medical records review and physical examination. Dr. Corbett noted full range of cervical motion, a normal neurologic clinical examination of the upper extremities, and radiographic evidence of degenerative disc disease at C4-5. Based on these

findings, Dr. Corbett concluded Roberts suffers from chronic degenerative disc disease at C5-6, the most common disc level for an individual of his age. Dr. Corbett found no evidence of cumulative trauma or that the conditions are work-related.

After Dr. Corbett conducted the IME, Dr. James Rice performed a cervical discectomy and fusion at C5-6 and C6-7 on June 15, 2017. Dr. Rice examined Roberts on August 9, 2017 and prepared a Form 107 medical report. He indicated Roberts' work is not the cause of his cervical pathology. Rather, he attributed Roberts' cervical condition to degenerative disc disease.

A March 1, 2018 MRI from Central Kentucky Radiology was introduced, that revealed a small left foraminal disc protrusion at L4-5 with mild left neural foraminal narrowing.

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

10. The ALJ finds that the overwhelming amount of objective medical evidence and medical opinions based thereupon indicate that the Plaintiff's current condition is degenerative in nature and not related to work.

11. The ALJ finds that Dr. Corbett convincingly diagnosed degenerative disc disease at C4-5 adding that X-rays were consistent with chronic degenerative disc disease focused on the most common disc level for someone his age at C5-6. Dr. Corbett found that there was no evidence that the Plaintiff's complaints were work-related and no evidence to support a cumulative trauma diagnosis to the cervical spine. Importantly, Dr. Corbett also stated that he could find no evidence that the Plaintiff's lumbar pain, knee pain, foot pain or ankle pain were causally work-related,

12. Likewise, treating surgeon Dr. Rice who performed surgery on the Plaintiff diagnosed cervical degenerative disc disease with stenosis and radiculopathy but did not believe that the work event caused the resulting impairment.

13. The ALJ further finds that the causation opinion provided by Dr. Muffly is lacking in that it appears to be primarily based upon the subjective complaints of the Plaintiff and as such is outweighed by the previously cited opinions that are based upon the objective medical evidence available.

14. A review of all of the evidence in this matter reveals the credibility of the opinions of Drs. Corbett and Rice in the eyes of the ALJ and thus supports the finding that the Plaintiff's impairment is degenerative in nature and is not causally work-related.

15. The ALJ also finds that the opinion of Dr. Burgess that the Plaintiff had no impairment to the right shoulder or bilateral wrists and that his right cubital tunnel release was not causally work-related was credible and convincing and again outweighed any evidence to the contrary filed herein. The ALJ finds that Dr. Burgess was thorough and that he demonstrated a detailed review and understanding of the Plaintiff's medical history.

16. The ALJ therefore finds based upon the foregoing, that the most credible evidence available indicates that the listed conditions at issue including the shoulders, cervical spine, lumbar spine, wrist, hands, foot and knees, are not causally work-related. The ALJ further finds that with respect to the alleged eye damage asserted by the Plaintiff that there is no evidence of record to support said claim and as such same is **DISMISSED**.

Roberts filed a petition for reconsideration raising the same arguments he makes on appeal. The ALJ denied Roberts' petition for reconsideration and provided the following discussion:

1. The ALJ reiterates the reliance upon the opinions of Drs. Corbett, Burgess, and Rice in this matter as well as the finding that these opinions outweighed that of Dr. Muffly which the ALJ finds is less credible by comparison.

2. The ALJ finds that the opinion issued by Dr. Muffly on the issue of work-relatedness and causation is

conclusory and lacks sufficient support from the objective medical evidence, the majority of which supports the conclusion that the Plaintiff's issues are degenerative in nature.

On appeal, Roberts argues the medical evidence compels a finding he suffered work-related cumulative trauma injuries. He further contends the ALJ did not properly consider Dr. Muffly's report in light of Gray v. Trimmer, 173 S.W.3d 236 (Ky. 2005). Roberts notes the ALJ found that Dr. Muffly relied on subjective complaints from Roberts rather than objective evidence. However, Roberts notes Dr. Muffly reviewed a significant number of diagnostic imaging tests.

As the claimant in a workers' compensation proceeding, Roberts 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). Because he 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). The function of the Board in reviewing the ALJ's decision is limited to a determination of whether the findings made by the ALJ are so unreasonable under the evidence they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

As 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).

We begin by noting the present case is easily distinguished from Gray v. Trimmer. In Gray, the claimant filed a Form 101 alleging bilateral arm injuries, and attached a medical report of Dr. Brooks stating her work caused an inflammatory process in her arms. The employer failed to file a timely Form 111 or appear at the benefit review conference ("BRC"). The day after the BRC, the employer filed a Form 111, but thereafter filed no evidence. Gray later filed the medical report of Dr. Owen, who diagnosed rheumatoid arthritis and assigned a 2% whole person

impairment rating based on pain. The ALJ noted the employer admitted Gray suffered a work-related injury through its failure to timely file a Form 111. However, the ALJ dismissed the claim, determining Gray had failed to establish “through objective medical findings” that she suffered a compensable injury.

The ALJ determined Dr. Owen’s report did not establish an injury through “objective medical findings” because his impairment rating was based solely on subjective complaints of pain. The Supreme Court agreed with this assessment of Dr. Owen’s report, but determined the ALJ failed to give proper effect to the untimely filing of the Form 111. By failing to deny the allegations of the claimant’s application, the employer admitted that she sustained repetitive motion injuries to both upper extremities, that the injuries caused an inflammatory process, and that they occurred within the course and scope of her employment. Therefore, Gray could not prove an injury through Dr. Owen’s impairment rating alone, as it was not based on objective medical findings. However, because her injury had been admitted through the employer’s failure to file a timely Form 111, she could establish the *extent* of her injury through the use of Dr. Owen’s impairment rating. The Supreme Court observed “[T]he ALJ could have determined from the evidence that the “injury” to which the employer admitted resulted in the impairment that Dr. Owen measured.” *Id.* at 243. The claim was remanded for the ALJ to consider the possibility Gray had established a permanent impairment.

Here, Revelation timely filed a Form 111 denying that the alleged injury arose out of and in the course of Roberts’ employment with Revelation. Further, the BRC Order noted the alleged May 12, 2016 injury is disputed and it

listed benefits per KRS 342.730, work-relatedness/causation, injury as defined by the Act, and exclusion for pre-existing disability/impairment as contested issues.

Moreover, Revelation submitted substantial evidence supporting its position that the alleged conditions are not causally related to Roberts' work. Dr. Corbett found only osteoarthritic changes in the cervical spine which he expressly found to be degenerative in nature and not work-related. Dr. Rice, the physician who performed Roberts's two-level cervical fusion surgery, also indicated the condition was not work related. Dr. Burgess stated Roberts has no permanent impairment for the right shoulder or bilateral wrists, and the cubital tunnel release is not related to his work.

While Dr. Muffly assigned a permanent impairment rating for the cervical condition, which he related to Roberts' employment, there were conflicting medical opinions regarding the cause of this condition. The ALJ considered the evidence, and found the medical opinions of Drs. Corbett, Rice and Burgess more persuasive than Dr. Muffly. An ALJ has broad authority to decide questions involving causation. Dravo Lime Co. v. Eakins, 156 S.W.3d 283 (Ky. 2003). The ALJ reached a conclusion supported by substantial evidence.

Roberts' arguments on appeal are essentially a request for this Board to re-weigh the evidence and direct a finding in his favor, which we are not permitted to do. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). While Roberts 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 January 28, 2019 Opinion and Order and the February 20, 2019 Order rendered by Hon. Jonathan R. Weatherby, Administrative Law Judge, are hereby **AFFIRMED**.

ALVEY, CHAIRMAN, CONCURS.

STIVERS, MEMBER, NOT SITTING.

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