

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: February 21, 2020

CLAIM NO. 201801721

JAMES HALL

PETITIONER

VS. **APPEAL FROM HON. MONICA RICE-SMITH,
ADMINISTRATIVE LAW JUDGE**

LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT
and HON. MONICA RICE-SMITH,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
AFFIRMING**

* * * * *

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

STIVERS, Member. James Hall (“Hall”) appeals from the September 16, 2019, Opinion and Order and the October 23, 2019, Order rendered by Hon. Monica Rice-Smith, Administrative Law Judge (“ALJ”). The ALJ concluded Hall failed to satisfy his burden of proving his low back pain and radiculopathy relate to an alleged September 28, 2018, work injury. On appeal, Hall argues the ALJ erred in failing to

find a work-related injury. Hall also takes issue with her findings regarding notice. Because the evidence does not compel a finding in Hall's favor, we affirm.

BACKGROUND

Hall filed his claim on December 11, 2018, alleging a low back injury when he slipped and fell on September 24, 2018, while in the employ of Lexington-Fayette Urban County Government ("LFUCG").

Hall testified by deposition on March 11, 2019, and June 14, 2019. Hall worked as a detective for LFUCG for approximately eight years. Hall testified he was doing in-service training on September 24, 2018, when he slipped and fell, landing on his holster located on his side. Several officers witnessed his fall. He immediately experienced pain in his low back and hip that later became more severe and started moving down his right leg. When he got home, he took Aleve which helped. He returned to work the next day. Within four or five days, his pain rapidly increased. He informed Sgt. Kevin Goldie and asked if he could hold off on preparing a report until he could determine whether the pain would subside.

Hall continued taking Aleve for a few weeks until he started having more pain down the back of his right leg. His foot began falling asleep. Hall saw Dr. Harry Lockstadt who administered two epidural shots, took x-rays, and obtained an MRI. Hall believed his private insurance paid for his initial care with Dr. Lockstadt. Hall did not complete a SP-302 injury form until December 2018, after Dr. Lockstadt discussed surgery. Hall testified he has been on modified duty since the fall. His job now is mostly deskwork. He has applied for disability retirement. Hall testified if he filed a SP-302 and a doctor assigned restrictions, he would lose his car and radio and

be assigned to desk duty. He did not initially complete an SP-302 because he wanted to avoid that.

Dr. Lockstadt previously treated Hall on June 19, 2008, June 29, 2009, and July 9, 2009, for low back pain. Hall's symptoms were primarily on the right. However, on June 19, 2008, Dr. Lockstadt noted Hall reported, "sometimes when he sits, he gets an extreme dull ache in the right femur and other times it is in the left." Dr. Lockstadt noted a dramatic improvement in back pain on July 9, 2009. Hall no longer had radiculopathy. X-rays showed a minor loss of disc space at L5-S1 with minor retrolisthesis.

Dr. Lockstadt treated Hall for back pain on referral from Hall's primary care physician beginning on October 9, 2018. Dr. Lockstadt noted Hall is "complaining that for about the last years [sic] had increasing pain and discomfort to his lower back right hip and leg." Dr. Lockstadt noted Hall had similar symptoms nine or ten years ago, that improved with conservative care. Dr. Lockstadt further noted, "Patient over the past years [sic] been taking his anti-inflammatories." Dr. Lockstadt's November 1, 2018, and November 28, 2018, notes do not refer to a work injury or traumatic event. Dr. Lockstadt diagnosed a disc herniation at L5-S1. On May 23, 2019, Dr. Lockstadt again noted a history of prior injuries in 2008 and 2009 with back and left lower extremity complaints, following which Hall was released for full duty. Hall then sustained a back injury in September 2018 with low back and right lower extremity complaints. Dr. Lockstadt placed Hall's condition within DRE category III and assessed a 10 to 13% impairment rating pursuant to the 5th Edition of the American

Medical Association, Guides to the Evaluation of Permanent Impairment (“AMA Guides”).

Dr. Frank Burke performed an independent medical evaluation (“IME”) on March 18, 2019. Dr. Burke diagnosed an episode of acute low back pain with development of a right S1 radiculopathy as a result of the work-related injury. Dr. Burke assigned an 8% impairment pursuant to the AMA Guides and noted Hall was asymptomatic and not impairment ratable prior to the injury.

Dr. James Owen performed an IME on January 25, 2019. Dr. Owen diagnosed right S1 radiculopathy in need of surgical intervention. Dr. Owen felt the work injury caused Hall’s impairment. He noted Hall gave a history of working in an effective manner from 2009 to 2018. Therefore, Dr. Owen felt the pre-existing condition was dormant and non-disabling. Dr. Owen assigned an 11% impairment rating finding Hall’s condition fell within DRE category III of the AMA Guides. He noted Hall would be in DRE category IV with a higher impairment rating if he has fusion surgery. Hall did not have an active impairment prior to this injury.

Dr. Timothy Kriss performed an IME on March 20, 2019. Hall reported he did not say anything to his employer for almost three months because he was waiting to see if his pain would go away. Dr. Kriss diagnosed a right L5-S1 disc herniation causing right S1 nerve root compression and right S1 lumbar radiculopathy. Dr. Kriss noted Hall “has a fairly impressive history of recurring back problems prior to September 28, 2018, *even a history of right S1 radiculopathy*, although the distant, multiple lumbar spine injuries all recovered fairly nicely.” Although Hall reported no symptoms or treatment for his back for years prior to the alleged 2018 work injury, Dr.

Kriss noted Dr. Lockstadt's October 9, 2018, record contained a history of steadily progressive back and leg pain "for about the last years" that required treatment "over the past years with anti-inflammatories." Dr. Kriss stated atraumatic degenerative aging processes are responsible for the vast majority of disc herniations and chronic back pain. Dr. Kriss stated a patient with a spontaneous, gradual, naturally occurring, degenerative osteoarthritic/spondylitic/degenerative disc commonly retrospectively searches for and blames identifiable trauma for the condition. Dr. Kriss stated he was "fairly certain" that is what occurred with Hall. Dr. Kriss noted Hall "flip-flops" completely from pre-existing active chronic back problems in October 2018 to a work injury "several years" prior to December 2018, before ultimately changing to a third account attributing all ongoing back and leg pain to a discrete training injury on September 28, 2018. Dr. Kriss discussed at great length how the actions taken by Hall and his initial history provided to Dr. Lockstadt are inconsistent with a traumatic injury to the spine occurring in September 2018. Dr. Kriss felt Hall's current L5-S1 disc herniation, right S1 radiculopathy, low back pain, leg pain, and need for surgery are consequences of pre-existing active degenerative disc disease, not the September 28, 2018, slip and fall. He concluded Hall did not suffer permanent injury or permanent harmful change on September 28, 2018. Dr. Kriss opined Hall's condition fell within DRE Category III and assigned a 10 to 13% impairment rating pursuant to the AMA Guides. Hall has a 5% impairment rating for prior back issues in 2009 based upon a documented, correlating lumbar radiculopathy that subsequently improved/resolved with conservative treatment.

In a June 26, 2019, supplemental report, Dr. Kriss indicated he personally reviewed the June 13, 2008, lumbar MRI which revealed mild to moderate bilateral recess stenosis and severe bilateral symmetric foraminal stenosis with a broad paramedian and foraminal disc herniation on the left with complete obliteration of the left L5-S1 lateral recess. Dr. Kriss stated the changes on the November 14, 2018, lumbar MRI are “exceedingly chronic” and none are acute or traumatic. Dr. Kriss stated, “the changes seen in the 2018 MRI stem directly from progression of the degeneration that began ten years prior to the alleged work injury and continuation of these chronic changes at the key L5/S1 level is not surprising, and indeed fully expected.” Dr. Kriss stated the right S1 nerve root compression at L5-S1 in November 2018 is from chronic degenerative change, severe facet hypertrophy, severe ligamentum flavum hypertrophy, and chronic disc bulge.

Dr. Daniel Primm performed an IME on May 15, 2019. Dr. Primm diagnosed an acute lumbar strain superimposed on chronic degenerative disc disease of the lumbar spine. Dr. Primm concluded Hall’s lumbar condition was encompassed within DRE category III and assigned a 10% impairment rating, apportioning 75% to pre-existing active L5-S1 degenerative disc disease and 25% to the most recent work-related injury in September 2018, as a result of further aggravation or arousal of the chronic changes and symptomatology. Dr. Primm felt a lumbar discectomy would be reasonable. However, a lumbar fusion would not be indicated because Hall has no signs of significant instability at the L5-S1 level.

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

Hall failed to satisfy his burden of proving his lumbar spine condition and recommended surgery are

related to any work incident on or around September 28, 2018. The medical evidence establishes Hall had three prior back injuries and history of degenerative disc disease before September 2018. Further, Hall's initial complaints to Dr. Lockstadt, his failure to report a work incident, and Dr. Lockstadt's diagnostic test results are consistent with degenerative conditions not an acute injury. In light of the total evidence, the ALJ finds Dr. Kriss's opinion most credible.

Hall sustained low back injuries in 2002, 2008, and 2009. During his treatment for these injuries, he was diagnosed with disc degeneration at L5/S1 and left radiculopathy. He received conservative treatment, which included physical therapy to teach him exercises to help relieve his symptoms. Although after each injury, he did return to full duty work, the recent MRI and x-rays as noted by Dr. Lockstadt reveal advanced disc degeneration and degenerative disc herniation to the right at L5/S1.

Hall did not initially report any work injury on September 28, 2018 to his employer or Dr. Lockstadt. Despite having had three prior work injuries for which he reported and received medical benefits, Hall did not immediately complete any accident forms after the alleged September 28, 2018 injury. He testified he wanted to wait and see if the pain would subside; however, he did not even complete any accident forms when he began seeking medical treatment. On October 9, 2018, Hall presented to Dr. Lockstadt for treatment of his low back pain. Hall gave no history of any work injury in September 2018. Instead, he reported having increasing pain and discomfort in his low back, right hip and leg in the last years. He indicated over the past years having taken anti-inflammatories and maintained an exercise program for his low back. He treated with Dr. Lockstadt several more times and received epidural injections without reporting any work related injury. On November 28, 2018, Dr. Lockstadt recommended and scheduled surgery and still Hall mentions no work event or injury in September 2018. On December 4, 2018, Hall contacted his Sargent [sic] and completed an SP302 work accident report. It was not until December 6, 2018 that Hall told Dr. Lockstadt that he believes his back condition is work related with an injury several years ago. At that time, Hall

advised he wanted the surgery put through workers' compensation.

Although Hall contends he reported a work injury to April Gibbons at Bluegrass Orthopedic when he scheduled his original appointment, his testimony about Ms. Gibbon's involvement is confusing. At his June deposition, when asked about who he contacted at Bluegrass Orthopedics, Hall testified he contacted April Gibbons, who he testified is "basically the workers' comp liaison between us and Bluegrass." However, previously at his March deposition, Hall testified he casually ran in to [sic] Ms. Gibbons, who works for Bluegrass Orthopedic. He testified Ms. Gibbons came to pick up her son, who was working for him. While she was there, he told her what happened, and she set him up to come in and get the epidural shots. He testified he knew her and that she worked at Bluegrass. This initial testimony does not indicate Ms. Gibbon's has any connection to workers' compensation or Hall initiated any contact with Bluegrass Orthopedics directly to set his appointment as was implied by his testimony in June.

Further, Dr. Lockstadt's treatment records document degenerative conditions, with no mention of any acute injury. Hall reported complaints consistent with a degenerative condition. Hall reported increasing pain over the years. Dr. Lockstadt notes the x-rays reveal advanced disc degeneration at L5/S1 and lesser at L4/5. He diagnosed symptomatic lumbar disc degeneration at L4/5 and L5/S1 with right L5 and S1 radicular symptoms. On November 28, 2018, he notes the MRI reveals advanced disc degeneration L5/S1 with disc herniation stenosis to the right at L5/S1. He diagnoses [sic] a degenerative disc herniation at L5/S1 causing right leg pain and numbness.

In light of the foregoing, the ALJ finds the opinion of Dr. Kriss most persuasive. After examining Hall, reviewing all the treatment records, and reviewing and comparing the 2008 and 2018 MRIs, Dr. Kriss opines there is no evidence that Hall's back and leg pain emanated from any work activity on September 28, 2018. He explains Hall's low back condition is a naturally progressive condition and atraumatic consequence of the degenerative processes of aging. Dr. Kriss explains Hall's

chronic degenerative processes have progresses [sic] in the 10 years between 2008 and 2018. He advises Hall's current S1 nerve root compression is due to chronic degenerative changes including chronic bone spur formation, chronic spondylosis, and chronic degenerative disc disease. Dr. Kriss explains the 2018 MRI confirms the expected completely natural age related progression of the degenerative processes. The structural changes on the 2018 MRI are all exceedingly chronic, degenerative and naturally occurring. He opines there is nothing to suggest the changes are acute or traumatic. Dr. Primm and Dr. O'Brien agree that Hall's low back pain and radicular symptoms are due to chronic preexisting progressive conditions rather than any acute injuries sustained on September 28, 2018.

Based on the foregoing, the ALJ finds Hall failed to satisfy his burden of proving his low back pain and radiculopathy is related to any work injury on September 28, 2018.

Hall filed a petition for reconsideration arguing the ALJ erred in determining he sustained a degenerative/repetitive injury. Hall contended there was no evidence of an active issue or cumulative trauma. Hall also argued the ALJ erred in her findings regarding notice. Hall noted he had informed Sgt. Goldie on the date of injury but asked him to withhold the written report until it could be determined if the pain would subside. Hall characterized his situation as simply a traumatic injury to a different part of his anatomy.

The ALJ overruled the petition for reconsideration, stating Hall was re-arguing the facts and requesting her to re-weigh the evidence. The ALJ stated she found Dr. Kriss's opinion most persuasive based on the totality of the evidence, and had previously explained her reasons for the reliance upon his opinions in the decision.

On appeal, Hall argues the ALJ erred in failing to find a September 2018 injury. He contends the ALJ found a degenerative repetitive injury, despite evidence

of a traumatic incident. Hall argues the ALJ erroneously found notice was not given in a timely manner. Hall states his verbal notice at the time of the incident and completion of a form SP-302 when he was aware he had sustained a serious injury constitute sufficient notice. Hall notes a claimant is not required to self-diagnose his condition. Hall argues that, following the L5-S1 injury with left sided symptoms, he performed his work from 2009 to 2018 and his herniation/radiculopathy at L5-S1 is now on the right side. Therefore, he must have sustained a new injury caused by the traumatic event in September 2018. Hall contends the evidence is insufficient to support a finding of a pre-existing active impairment.

ANALYSIS

As the claimant in a workers' compensation proceeding, Hall 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).

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 supporting a different outcome than reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). Rather, it must be shown there was no evidence of substantial probative value to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The evidence does not compel a finding that Hall sustained an injury in September 2018. As noted by Dr. Kriss who compared MRIs taken prior to the alleged injury and in 2018, Hall had degenerative changes present bilaterally in 2008-2009. Hall had mild to moderate bilateral recess stenosis and severe bilateral symmetric foraminal stenosis with a broad paramedian and foraminal disc herniation in 2008. On June 19, 2008, Dr. Lockstadt noted Hall reported he sometimes gets an extreme dull ache in his right femur when he sits. After reviewing Dr. Lockstadt's records, Dr. Kriss concluded Hall had a prior history of right S1 radiculopathy.

Much of Hall's argument is predicated on his belief that the presence of symptoms on the right as opposed to the left at the time of the prior incidents is conclusive on the question of whether he has a new injury. However, the mere fact that there are complaints related to a different side is not sufficient to establish a new injury. Causation is a factual issue to be determined within the sound discretion of the ALJ as fact-finder. Union Underwear Co. v. Scarce, 896 S.W.2d 7 (Ky. 1995). When the question of causation involves a medical relationship not apparent to a layperson, the issue is properly within the province of medical experts and an ALJ is not justified

in disregarding the medical evidence. 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).

Since the question of whether Hall sustained a new injury at L5-S1 is not readily apparent to a layperson, the presence of an injury must be established by medical evidence. Here, conflicting medical opinions were presented on whether there was a new injury. Certainly, Dr. Lockstadt expressed the opinion that the herniation and symptoms on the right were indicative of a new injury. However, Dr. Kriss explained in great detail why he concluded the herniation and symptoms on the right in 2018 were not the result of any incident at work in 2018. Dr. Kriss believed Hall’s failure to report a work-related injury or trauma to Dr. Lockstadt until it became apparent surgery was required was inconsistent with a traumatic injury in 2018. Dr. Kriss noted the changes seen in the 2018 MRI were longstanding chronic degenerative changes and there was no sign of any acute injury. Additionally, Hall admitted the initial treatment expenses for Dr. Lockstadt were submitted to his private insurance, despite his familiarity with workers’ compensation injuries and LFUCG’s procedures regarding reporting a work injury. The ALJ was free to rely on the opinion of Dr. Kriss in determining Hall failed in his burden of proving a work-related injury on September 24, 2018. The ALJ has discretion to determine which medical opinion was most

persuasive. When evidence is conflicting, it cannot be said the proof compels a particular conclusion.

Contrary to Hall's assertion, the ALJ did not make a finding of a repetitive injury. It is clear the ALJ, in adopting the opinion of Dr. Kriss, concluded Hall's present condition is due to the natural progression of the degenerative condition in Hall's spine. Dr. Kriss indicated Hall has chronic degenerative changes unrelated to the alleged injury. He stated the changes responsible for the radiculopathy do not relate to acute trauma.

Finally, we note the ALJ did not dismiss the claim for failure to give notice. Rather, she discussed notice in the context of whether Hall's account was credible. The entirety of the ALJ's findings reflect she was referring to Hall's failure to comply with LFUCG's policy regarding completion of the Form SP-302 as being inconsistent with the occurrence of a traumatic injury to the lumbar spine in the September 2018 incident. Hall was well aware of department policies and had complied with them by completing the necessary paperwork for three previous injuries.

While Hall has identified evidence supporting a different conclusion, there is substantial evidence supporting the ALJ's ultimate determination. As such, the ALJ acted within her 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 September 16, 2019, Opinion and Order and the October 23, 2019, Order rendered by Hon. Monica Rice-Smith, Administrative Law Judge, are hereby **AFFIRMED**.

ALVEY, CHAIRMAN, CONCURS.

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