

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: March 27, 2020

CLAIM NO. 201997791

JOE BART WATTS

PETITIONER

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

JAB CONTRACTING, LLC  
and HON. MONICA RICE-SMITH,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION  
AFFIRMING**

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

**STIVERS, Member.** Joe Bart Watts (“Watts”) seeks review of the November 25, 2019, Opinion, Award, and Order of Hon. Monica Rice-Smith, Administrative Law Judge (“ALJ”) finding he sustained a January 9, 2019, work-related low back injury while in the employ of JAB Contracting, LLC (“JAB”). The ALJ awarded permanent partial disability (“PPD”) benefits enhanced by the three multiplier contained in KRS 342.730(1)(c)1 and medical benefits for the back injury. However, the ALJ dismissed

Watts' claim for a right hernia injury alleged to have occurred during the same incident. Watts also appeals from the December 28, 2019, Order overruling his petition for reconsideration.

On appeal, Watts asserts the ALJ erred in finding his hernia did not result from the subject work injury. He also contends the ALJ erred in not finding him totally occupationally disabled.

### **BACKGROUND**

Watts' Form 101 alleges he sustained an injury while in the employ of JAB while "moving a piece of belt structure." Watts alleged he injured his back and sustained a hernia.

The parties introduced Watts' medical records concerning his treatment before and after the January 9, 2019, work injury. JAB introduced the utilization review report of Dr. Michael Chunn, Dr. David Jenkinson's independent medical evaluation ("IME") report and addendum report, and Dr. Russell Travis' medical records review report. Watts introduced Dr. David Muffly's IME report.

Watts testified at an April 24, 2019, deposition and the September 24, 2019, hearing. Watts is a high school graduate and possesses no special certification other than as an underground miner. Watts worked for JAB from 1997 through the date of injury. He has not worked since the injury. During his employment with JAB, he worked as a belt man, with an average work week of 70 to 80 hours. He denied experiencing any prior injuries. During his deposition, Watts described the January 9, 2019, event as follows:

Q: You had serviced the head drive?

A: Right. Well, then I cleaned it up. I shoveled on the belt and then I come back to clean it up. That's pretty much when the mine foreman come and got me.

Q: Who is the mine foreman?

A: David Rife, R-i-f-e.

Q: What did he come and get you for?

A: To get a piece of structure to throw to him on the other side of the belt.

Q: Okay.

A: When I went to pick up the belt structure, it was stuck in real sticky mud, muck, so I tried to pry it out. When I pried it out, I felt something burning in the front from my lower ab. Well, I still went on and then I picked it up and probably carried it about ten or fifteen foot and then I went to throw it on the other side of the belt. He was probably about where that guy is.

Q: You're saying the Court Reporter, about five or six feet away?

A: Yeah, I tried to do that. When I done that, I felt a pain like a stabbing, somebody stabbing me in the back with a knife, and it went from my back down to the right side of my leg.

Q: So he didn't help you lift the structure?

A: No, sir. I lifted it by myself.

Q: So he was on the other side of the belt?

A: Right.

Q: So you were going to throw this piece of belt structure over to him?

A: Yeah.

Q: So did you actually throw it over to him or did you stop on this side?

A: I ended up, when I couldn't do it, I tried to push it up under it instead of throwing it. I first started to throw it, but I tried to, you know, go under instead of over top of it.

Q: What happened next?

A: That's when my back hurt and down the right side of my leg and I stopped. I went down. I couldn't do nothing else.

Q: So it didn't happen when you were trying to throw it? It happened when you were trying to push it under?

A: No. I didn't throw it on top. I threw it across under the bottom.

Q: So there was just one throwing movement? That was to throw it under?

A: Uh-huh.

Watts immediately told his foreman he was hurt. He spent the remainder of his shift, approximately four or five hours, laying against a rib in the underground mine. At the end of the shift, he rode the mantrip outside the mine where he again told his foreman he was hurt. He received no instructions from his foreman as to what he should do. Watts went home that evening and the next day went to the emergency room at Whitesburg Appalachian Regional Hospital ("Whitesburg ARH"). Watts also called his superintendent, Brook Loving, and informed him he had been injured the day before, was going to the doctor, and would not be at work. Emergency room personnel at Whitesburg ARH provided him an off-work slip. Dr. Dustin Campbell later performed hernia repair surgery.<sup>1</sup>

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<sup>1</sup> The medical records of Whitesburg ARH reveal that, on February 18, 2019, Dr. Campbell performed an open right inguinal hernia repair with mesh and removed an 11 x 6 centimeter lipoma. The post-operative diagnosis was "indirect and direct right inguinal hernia with cord lipoma."

Watts testified that prior to his surgery, his family physician Dr. Shannon Rutherford, had prescribed medication for the hernia. In March 2019, Watts saw Dr. Phillip Tibbs for his back symptoms. Dr. Tibbs referred him to Kentucky Pain Management in Hazard. At the time of his deposition, Watts was undergoing physical therapy twice a week. Watts experienced pain from the middle of his back down his right leg. Prior to the injury, Watts had experienced pulled muscles in the upper back but not in the lower back.

Watts testified he had a knot in the area of the hernia prior to the injury but insisted it was not painful. He had seen Dr. Rutherford approximately one week before the injury for this problem. Watts believed the bulging had been there for probably a year. Except for seeing Dr. Rutherford approximately one week before the injury, he had not been previously treated for this bulge, as it had not been painful prior to the injury. Watts testified he felt a tear in the area of the hernia during the January 9, 2019, incident. He denied experiencing any prior back problems.

At the hearing, Watts reiterated much of his deposition testimony. He testified his job regularly required him to lift between 100 and 200 pounds. Watts acknowledged having previous back problems which he characterized as muscle pulls and strains. However, he never missed work as a result of these problems. He again emphasized that although he had a previous bulge in the location of the hernia, it was not painful. Watts only noticed the condition in the last couple of months. His groin area only became painful after the January 9, 2019, event.

Watts testified he also injured his back on January 9, 2019, and he has not been released to return to work since the injury. Watts had been walking with the

aid of a cane for approximately four or five months. Personnel at Mountain Comprehensive Health Corporation (“MCHC”) had prescribed the cane for him. Watts testified he has significant daily back pain and pain at the hernia site. Watts denied experiencing chronic back pain prior to the injury. However, he previously experienced back problems in 2017 and 2018 for which Hydrocodone was prescribed.

In the November 25, 2019, decision, the ALJ concluded Watts met his burden of establishing a January 9, 2019, permanent low back injury. She noted both Drs. Muffly and Travis agreed Watts sustained an exacerbation of a pre-existing low back condition on January 9, 2019. The ALJ accepted Dr. Muffly’s assessment of an 8% total lumbar impairment rating but accepted Dr. Travis’ opinion a 5% impairment rating is attributable to a condition “which was active, present, and symptomatic” on the date of the injury. Consequently, the ALJ found Watts has a 3% impairment rating as a result of the January 9, 2019, lumbar spine injury. In finding Watts’ hernia is not work-related, the ALJ provided the following findings of fact and conclusions of law:

With regard to the right inguinal hernia, the medical records document diagnosis prior to January 9, 2019. On January 3, 2019, Watts presented to Dr. Rutherford at MCHC for chronic conditions. Dr. Rutherford noted Watts had issues with a questionable hernia on the right side with pain and bulging. Dr. Rutherford assessed recurrent unilateral inguinal hernia with obstruction. She noted Watts had a 2-week history of the hernia, which was bulging. She made a referral to Diagnostic Radiology at Harlan ARH for evaluation and treatment.

Although Watt’s [sic] testified the hernia was not bothering him prior to January 9, 2019, his testimony is inconsistent with his medical treatment records. The January 3, 2019 MCHC treatment note indicates diagnosis of a unilateral inguinal hernia with obstruction. In direct conflict with Watt’s [sic] testimony, the note also

indicates pain and bulging associated with the hernia. Dr. Muffly's opinion regarding causation of the hernia is less than credible since it relies on the [sic] Watt's [sic] conflicted testimony.

Based on the foregoing, the ALJ finds Watts sustained a permanent work-related injury to his low back on January 9, 2019, but no hernia related to that injury date.

Concerning Watts' occupational disability, the ALJ provided the following:

The ALJ finds Watts does not retain the capacity to return to his work as a belt man. Dr. Muffly opined Watts could not return to the work he was performing at the time of injury. He restricted Watts to lifting no more than 20 pounds. He also recommended Watts avoid bending and stooping. The ALJ is not convinced Watts is very disabled. Dr. Muffly's restrictions do not preclude all work. Watts is 51 years old with a high school education. During his testimony, there was no indication Watts has any limitations in intellectual ability or thought processes.

Watts filed a petition for reconsideration asserting the ALJ's decision did not reference additional issues and Dr. Campbell's off-work slips provided at the hearing. Watts took issue with the finding of the impairment rating attributable to his low back injury as well as the finding the hernia is not work-related. He urged the ALJ to reconsider her decision and find the hernia and resulting surgery were necessitated by the injury and award medical benefits and TTD benefits based on Dr. Campbell's treatment of the hernia. Watts also requested the ALJ reconsider her decision regarding the back injury asserting that even though she found he only had a work-related 3% impairment rating, the injury had left him totally occupationally disabled. Watts argued he worked full-time prior to the injury but after the injury had not been able to return to work. Thus, he is totally occupationally disabled. Significantly, Watts

did not request additional findings regarding the issues raised in the petition for reconsideration nor did he contend the ALJ's finding the hernia is not work-related is unsupported by substantial evidence. Watts also did not assert the ALJ's analysis regarding his occupational disability was deficient as a matter of law. The ALJ overruled the petition for reconsideration finding it to be a re-argument of the facts and a request for her to reweigh the evidence.

On appeal, Watts relies heavily upon the fact he did not miss any work for back or hernia problems prior to his injury. Watts cites to Dr. Muffly's opinion he experienced an acute exacerbation of chronic low back pain and a hernia due to the January 9, 2019, event. He notes Dr. Muffly imposed permanent restrictions of lifting no more than 20 pounds and avoiding bending and stooping. As a result, Dr. Muffly believed Watts was unable to return to his previous occupation. Watts also contends his treatment and surgical records reveal a tumor was removed during the hernia repair which was the source of his complaints prior to the injury. Notably, Watts does not cite to any medical proof supporting this conclusion. In his view, the ALJ resolved his hernia claim based on a complete misunderstanding of the facts. He asserts the ALJ should have awarded income benefits including TTD benefits for the work-related hernia.

Finally, Watts contends the ALJ erroneously found he is not totally occupationally disabled. In support of this proposition, Watts cites to his testimony and Dr. Muffly's report. Watts contends Dr. Muffly's report demonstrates he is totally occupationally disabled. Watts emphasizes he worked in the underground mines for twenty-one years without missing work until he was injured on January 9, 2019.

Consequently, Watts argues the injury caused him to be unable to return to his underground mining job or any job.

### **ANALYSIS**

Watts' first argument the ALJ erred in dismissing his claim for a work-related hernia is a re-argument of the same evidence presented to the ALJ. Watts impermissibly requests this Board to engage in fact-finding and substitute its judgment as to the weight and credibility of the evidence. That is not the Board's function. *See* KRS 342.285(2); Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). Moreover, we note Watts does not contend substantial evidence does not support the ALJ's finding he did not sustain a work-related hernia.

As the claimant in a workers' compensation proceeding, Watts had the burden of proving each of the essential elements of his work-related hernia claim. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Watts 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).

The medical evidence abundantly supports the ALJ's dismissal of Watts' claim for a work-related hernia. As noted by the ALJ, the January 3, 2019, MCHS treatment note under the heading History of Present Illness reflects: "pt presents for medication refills, pt with issues with questionable hernia on right side, pt with pain and is bulging." Recurrent unilateral inguinal hernia with obstruction and without gangrene was listed as one of Watts' conditions. The report also contains the following assessment: "Recurrent unilateral inguinal hernia with obstruction and without gangrene. Pt with 2 week hx of, is bulging today, will do stat US of. Referrals:

Diagnostic Radiology, Harlan ARH. Evaluate and treat.” This pre-injury note firmly demonstrates Watts suffered from a hernia at least six days before the January 9, 2019, work injury. The ALJ concluded Watts’ testimony regarding his medical history is directly contradicted by the January 3, 2019, MCHC treatment note. The ALJ disregarded Dr. Muffly’s opinion regarding the etiology of Watts’ hernia because he relied upon Watts’ conflicting testimony. We note that of the records Dr. Muffly listed he reviewed, the January 3, 2019, treatment note of MCHC was not one of them. Thus, this key piece of medical information was not provided to Dr. Muffly prior to the formulation of his opinion the hernia is related to the January 9, 2019, event. Consequently, the ALJ, within her discretion, chose not to rely upon Dr. Muffly’s opinion regarding the cause of the hernia.

Moreover, the February 14, 2019, UR report of Dr. Chunn amply supports the ALJ’s finding that Watts’ hernia is not work-related. In his report, Dr. Chunn noted the right inguinal hernia was diagnosed over one week prior to the January 9, 2019, event. He concluded the right inguinal hernia “is not related to his lifting incident or in regard to the workplace incident.” Therefore, he opined Watts’ complaints of right groin pain and the right inguinal hernia are not causally related to the work incident.

Similarly, in his initial report of August 13, 2019, Dr. Jenkinson noted Watts presented to his primary care physician with complaints of a right inguinal hernia on January 3, 2019. He noted Watts provided a history of a bulge in his groin for two weeks and had been scheduled for an ultrasound prior to the alleged work injury. Dr. Jenkinson noted Watts underwent right inguinal hernia repair and

appeared to have recovered satisfactorily. Although Watts also had a left inguinal hernia, he has not alleged that it occurred on January 9, 2019. Since Watts' right inguinal hernia symptoms were present prior to the injury, Dr. Jenkinson opined there is no objective evidence demonstrating "Watts had any significant change in the status of his right inguinal hernia" as a result of the alleged January 9, 2019, incident. He opined the right inguinal hernia is not causally related to the January 9, 2019, injury. Similarly, Dr. Jenkinson opined Watts had "0% impairment of function relative to the right inguinal hernia." He also believed Watts had no restrictions due to this hernia.

In Dr. Travis' August 10, 2019, records review report he notes that on January 3, 2019, Dr. Rutherford with MCHC had recorded a history of "'hernia on right the right side with pain and bulging.'" Thus, by the date of injury, Watts already had a diagnosis of right inguinal hernia with pain and bulging. Dr. Travis concluded the hernia is not related to the January 9, 2019, injury as it was clearly diagnosed and symptomatic before the January 9, 2019, injury.

Since the ALJ's determination that Watts' hernia is not work-related is supported by substantial evidence and a contrary result is not compelled, this Board has no authority to disturb that determination. Consequently, the ALJ's dismissal of Watts' claim for a work-related hernia must be affirmed.

Similarly, we find no merit in Watts' second argument the ALJ erred in finding him partially disabled. As an initial matter we note Watts did not request additional findings of fact or a more explicit ruling concerning this issue in his petition for reconsideration as required by KRS 342.281 and KRS 342.285. Although the ALJ's analysis regarding his occupational capacity did not specifically address whether

Watts' is totally occupationally disabled, the ALJ concluded based on Dr. Muffly's restrictions he was not precluded from performing all work. The ALJ noted Watts was 51 years old, had a high school education, and his testimony did not demonstrate he possessed "limitations in intellectual inability or thought processes." Watts did not challenge this finding by requesting additional findings or requesting the ALJ to engage in further analysis as required by the applicable case law. *See McNutt Construction/First General Services v. Scott*, 40 S.W.3d 854 (Ky. 2001) and *City of Ashland v. Stumbo*, 461 S.W.3d 392 (Ky. 2015). As such, the issue of the ALJ's analysis regarding the extent of Watts' occupational disability is not properly preserved for review by this Board. That being the case, our task is to determine whether the evidence supports the ALJ's finding Watts is permanently partially disabled.

We turn first to Dr. Muffly's report in which he concluded Watts' restrictions were not to lift more than 20 pounds and to avoid bending and stooping. Dr. Muffly concluded Watts could not return to his previous occupation. He did not express the opinion Watts was incapable of performing all physical tasks or jobs. Significantly, the ALJ relied upon Dr. Muffly's restrictions in determining the three multiplier was applicable. She also concluded Dr. Muffly's restrictions did not preclude Watts from performing all types of work. Based on Dr. Muffly's report, we believe the ALJ could reasonably infer Dr. Muffly did not believe Watts was totally occupationally disabled. Moreover, Dr. Jenkinson concluded Watts was capable of returning to work at his former occupation or any comparable employment without restrictions. Dr. Jenkinson's opinion supports the ALJ's finding Watts is not totally disabled.

Dr. Travis had a somewhat different opinion than Dr. Jenkinson. He concluded Watts sustained a work injury on January 9, 2019. Based on his review of the January 11, 2019, CT of the lumbar spine, the January 21, 2019, MRI of the lumbar MRI, and other medical records, Dr. Travis concluded Watts suffered an injury on January 9, 2019. However, he also believed Watts had an active pre-existing condition meriting a 5% impairment rating. Dr. Travis opined Watts exacerbated a pre-existing problem with an “increase in low back pain and ‘sciatica, unspecified side.’” Dr. Travis believed Watts retained the functional capacity to return to his past work as a coal miner for JAB or similar employment. However, he provided the following caveat:

Yes. Mr. Watts had successful repair of his right inguinal hernia. He has low back pain with which he was working since at least 9/25/2015 full-time, although I would be concerned taking hydrocodone three times a day and working in an underground mine as well as methocarbamol. Also, his other medications such as Xanax 1 mg two times every evening, in combination of opioids and benzodiazepines of which Mr. Watts has been on since at least 9/25/2015, is not a good combination and I would be concerned about Mr. Watts’ functional capacity to return to his past work for JAB Contracting or similar employment, not because of the 1/9/2019 injury but simply because of his preexisting history of taking opioids and benzodiazepines as well as Flexeril and methocarbamol and working in the environment in which he works.

The opinions expressed by Drs. Jenkinson, Travis, and Muffly, standing alone or in concert, constitute substantial evidence supporting the ALJ’s determination that Watts suffered a permanent partial disability resulting from the January 9, 2019, work injury and is not totally occupationally disabled. That being the case, this Board is without authority to disturb the ALJ’s decision.

Accordingly, the November 25, 2019, Opinion, Award, and Order and the December 28, 2019, Order overruling Watts' petition for reconsideration are **AFFIRMED.**

ALL CONCUR.

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