

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: May 27, 2022

CLAIM NO. 202100620

JONATHAN SIZEMORE

PETITIONER

VS. **APPEAL FROM HON. JOHN H. MCCRACKEN,
ADMINISTRATIVE LAW JUDGE**

KENTUCKY STATE POLICE and
HON. JOHN H. MCCRACKEN,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
AFFIRMING**

* * * * *

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

ALVEY, Chairman. Jonathan Sizemore (“Sizemore”) appeals from the Opinion and Order rendered January 13, 2022 by Hon. John H. McCracken, Administrative Law Judge (“ALJ”). The ALJ dismissed Sizemore’s claims for injuries to the low back and left shoulder caused by cumulative trauma and his claim for a psychological injury with an alleged injury date of June 5, 2020, while working for

the Kentucky State Police (“KSP”). Sizemore also appeals from the February 10, 2022 Order denying his Petition for Reconsideration.

On appeal, Sizemore argues the ALJ erred in finding the statute of limitations had expired for his alleged 2015, 2016, and 2019 injuries to the left shoulder and back. He also argues the ALJ erred in finding Jennifer Hale, MA, (“Ms. Hale”) did not associate his post-traumatic stress disorder (“PTSD”) or alcohol abuse with any physical injury. We find the ALJ appropriately exercised his discretion. We also find his decision is supported by substantial evidence, and a contrary result is not compelled; therefore, we affirm.

Sizemore filed a Form 101 on April 24, 2021 alleging he sustained PTSD, a left shoulder injury, and a low back injury caused by cumulative trauma on June 5, 2020. The Form 101 was never amended to include any claim for acute or specific injuries, and he did not list a 2019 injury date. The Form 104 indicates Sizemore’s work experience includes employment as a state trooper, as a butcher in a grocery, as a security guard, and as a cashier.

Sizemore testified by deposition on July 19, 2021 and at the hearing held November 17, 2021. Sizemore was born on March 25, 1985, and he resides in Hazard, Ky. He is a high school graduate, and subsequently obtained an Associate of Arts degree.

Sizemore began working for the KSP in September 2007, and last worked there as a sergeant. Prior to his promotion to sergeant, Sizemore served on the Special Response Team (“SRT”) as a sniper, and he had a firearms instructor certification. He worked as a “road” trooper prior to working for the SRT.

Sizemore last worked with the KSP on June 5, 2020 when he was taken off work due to a hospitalization for depression and alcoholism. He was last employed there on October 31, 2020, and he has worked nowhere else since that date. He receives disability retirement benefits from the KSP.

During his employment with the KSP, Sizemore once received a knife wound for which he was checked for exposure to possible blood-borne pathogens. He did not file a claim for that incident. He later sprained his wrist (no designation for right or left), injured his left shoulder, injured his low back, and began seeing psychologists due to shootings he was involved with and other stressful situations he encountered while working with the SRT.

Sizemore injured his left shoulder in 2015 while lifting weights as part of a physical conditioning program for the KSP. He ultimately had surgery for the left shoulder injury. He was advised the condition is work-related when he first sought treatment. He testified the left shoulder was again painful after he fell down an embankment in 2019. He did not file a Form 101 for the 2015 shoulder injury.

Sizemore experienced low back pain in 2016 when he was removing something from a shelf, and he experienced a popping sensation, resulting in pain from his low back to his left foot. He treated with physical therapy, and he was seen by Dr. James Bean, a neurosurgeon. Dr. Bean advised him his low back condition was work-related. He continued experiencing low back pain and followed up with his family physician for that condition, and he didn't file a Form 101 for that injury. He testified he reinjured his low back in 2019 when he fell down an embankment while pursuing a suspect. He has had no physical therapy since 2016. He takes over-

the-counter Ibuprofen, and occasionally Flexeril for his low back. He has had no treatment referral for his low back since the 2019 incident. He attributes his ongoing low back pain to wearing body armor while employed with the KSP. He does stretching exercises each morning to loosen up.

Sizemore began treating for psychological problems in 2013 after a shoot-out in Shelbyville, Kentucky. He was not physically harmed in that incident. Since that event and due to other similar traumatic events, he has had panic attacks. Sizemore has been diagnosed with depression, PTSD, and alcoholism stemming from the mentally traumatic events and images he experienced while working with the KSP.

In support of the Form 101, Sizemore filed the report of Dr. William E. Kennedy, an orthopedic surgeon who evaluated him on February 2, 2021 at his attorney's request. Dr. Kennedy noted Sizemore served with the KSP for 14 years. Sizemore reported he experienced left shoulder and low back pain while wearing body armor. He also noted the 2015 left shoulder injury and surgery. Sizemore reported the left shoulder continued bothering him while he was exercising. Sizemore also reported he initially experienced low back pain, which satisfactorily improved in 2013. In late 2015 or early 2016, he developed low back pain with tingling and numbness into the left lower extremity while lifting heavy boxes at work. A March 2016 MRI revealed a large left paracentral disc herniation at L5 impinging on the L5-S1 nerve root. He returned to work from that condition in May 2016, and his low back pain continued to worsen until November 2020.

Dr. Kennedy diagnosed Sizemore with post-traumatic painful arthrosis of the left acromioclavicular joint treated by arthroscopic resection on September 22, 2015, in addition to a partial thickness tear of the subscapularis tendons of the right rotator cuff with debridement and compression. Dr. Kennedy found the conditions were attributable to cumulative trauma Sizemore experienced while working as a state trooper. Likewise, Dr. Kennedy found Sizemore's low back problem continued to aggravate and worsen due to his work with the KSP. He found Sizemore had reached maximum medical improvement ("MMI") by the time of the evaluation. Dr. Kennedy assessed a 17% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"). Of this rating, he attributed 12% to the lumbar condition and 6% attributable to the shoulder condition for a combined 17% impairment rating. He recommended restrictions of lifting no more than 20 pounds occasionally, nor more than 10 pounds frequently. He also advised Sizemore to avoid hammering or jerking with the left hand.

Sizemore also filed the February 25, 2021 Form 107-P report prepared by Ms. Hale, a licensed psychological associate. Ms. Hale noted Sizemore presented with a history of PTSD and severe alcohol abuse due to his service with the KSP. She noted he treated with several medications including Seroquel, Prozosim, and Lexapro. She diagnosed him with alcohol use disorder, severe, in early remission, and PTSD. She related those conditions to his work with the KSP. In a supplemental note dated August 31, 2021, Ms. Hale stated Sizemore has a 25%

psychiatric disability rating. She made no reference to the AMA Guides, or how she arrived at this rating.

Sizemore submitted more than 20 separate filings of records from the ARH-Hazard, consisting of several hundred pages relating to treatment he received from 2019 to 2021, primarily for PTSD and alcoholism. The August 7, 2019 discharge summary notes he was seen in the Emergency Room for alcohol abuse and depression. The record further establishes he was intoxicated at the time of the visit. Sizemore submitted multiple lab studies from 2019 to 2021. The November 24, 2019 Emergency Room record notes he was seen for complaints of right shoulder, neck, upper back, and low back pain and muscle spasm due to falling down an embankment while apprehending a suspect in the course of his work with the KSP. Sizemore reported no loss of consciousness. A CT-scan revealed no acute fracture or dislocation, however it showed early spondylosis.

The additional records reflect treatment from 2019 to 2021 for intoxication, acute respiratory failure due to intoxication, major depressive disorder, anxiety disorder, and PTSD. On November 5, 2020, Dr. Anthony Yonts at ARH-Hazard noted Sizemore reported drinking for 50 days in a row. On June 16, 2021, he was discharged from treatment, and the discharge summary reflects he was treated for acute suicidal ideation, major depression, alcohol dependence, and PTSD. He was treated again for those conditions on June 21, 2021.

Records from Stepworks Recovery Center dated November 24, 2020 to December 24, 2020 indicate Sizemore was treated for alcohol dependence, major depressive disorder, anxiety disorder, and PTSD.

Sizemore also filed records from the Lincoln Trail Behavioral Health System (“LTBHS”) for treatment from September 19, 2019 to September 26, 2019, and on May 28, 2020, June 3, 2020, and June 27, 2020. Dr. Wasim Sajid, M.D. with LTBHS noted Sizemore was no longer on the SRT team, was divorced, and had increased paranoia after his promotion to sergeant. He diagnosed Sizemore with alcohol dependence, continuous; major depressive disorder, recurrent, mild; and he required further evaluation for PTSD.

On May 28, 2020, Dr. David Shraberg noted Sizemore had just completed a five-day detox program at ARH-Hazard. On June 3, 2020, Dr. Shraberg noted Sizemore had no acute physical condition; however, he diagnosed chronic severe alcohol dependence with delirium tremens, respiratory distress associated with alcohol toxicity, elements of PTSD, and major depressive disorder with no suicidal ideation. Sizemore was again admitted for treatment at that facility on June 27, 2020, and he saw Dr. Cletus Carvalho.

Sizemore also filed records from the Mountain After Hours Clinic pertaining to seven office visits between February 8, 2019 and September 6, 2019. Those records consist of lab studies and records of treatment for hypogonadism, hyper estrogen, and insomnia. The September 25, 2021 record from that facility indicates Sizemore was seen by Donald McPherson, APRN, for treatment of low testosterone, PTSD, high estrogen, depression, anxiety, and insomnia.

Sizemore next submitted records from J.C. Family Healthcare/ Primary Care. The undated record from Jamie Combs, APRN, indicates Sizemore was seen for anxiety, depression, insomnia, and PTSD due to “exposure” to various

traumatic events during his employment with the KSP. Sizemore was seen at the clinic on November 9, 2020 after being hospitalized from November 2, 2020 to November 6, 2020. The November 10, 2020 note of Paula Runyon, APRN, indicates Sizemore treated for PTSD due to his work with the KSP.

Sizemore filed Dr. Bean's treatment records for three office visits between January 8, 2016 and May 18, 2016. On January 8, 2016, Dr. Bean noted the MRI showed a diffuse large paracentral disc herniation at L5, impinging on the left nerve root, and a protrusion at L4-L5. On April 15, 2016, Sizemore was symptomatic for his left herniated disc. On May 18, 2016, Dr. Bean noted Sizemore had developed left hip pain and had plantar weakness in the left foot. Sizemore was released to full duty with no impairment.

Sizemore filed the records of Drs. Juan Favetto and Ryan Donegan for treatment of his left shoulder from January 20, 2015 to October 2, 2015. He had left shoulder surgery on August 19, 2015.

Sizemore filed treatment records from PT Pros in Hazard for 24 visits between October 7, 2015 and July 27, 2016. He initially treated for the left shoulder through February 15, 2016. Thereafter, he treated with Megan Hicks, P.T., for his lumbar complaints. On July 27, 2016, he continued to complain of lumbar pain, and he advised he was taking Oxycodone and vitamins.

Sizemore also submitted treatment records from Primary Care Centers of Eastern Kentucky for 10 office visits between July 15, 2021 and September 23, 2021. During that period, he saw Deonna Campbell, APRN, Christie Herald, APRN, and Dr. Douglas Howard for treatment of alcohol abuse and opioid abuse.

Dr. Rick Lyon, an orthopedic surgeon, evaluated Sizemore on August 18, 2021 at the KSP's request. In his September 8, 2021 report, he noted Sizemore first complained of low back pain in February 2016 while lifting weights as part of a required physical fitness program for the KSP. He reported his back pain worsened after falling down an embankment at work in November 2019. He reported the pain began radiating into his left lower extremity. He also reported the 2015 shoulder injury that occurred while lifting weights at work.

Dr. Lyon diagnosed Sizemore as having low back pain with nonverifiable radicular complaints. He noted Sizemore had recovered from radiculopathy after conservative care. He also diagnosed Sizemore as status-post left shoulder arthroscopic decompression, subacromial decompression, and a Mumford procedure. He found Sizemore had long ago reached MMI from those conditions and returned to full duty work. He determined the left shoulder injury was not caused by cumulative trauma and warranted an 8% impairment rating based upon the AMA Guides. He also determined Sizemore's low back complaints were caused by the acute 2016 event, not due to cumulative trauma, and he assessed a 5% impairment rating, again based upon the AMA Guides. Dr. Lyon opined Sizemore has no evidence of a harmful change caused by cumulative trauma. He found Sizemore had long ago reached MMI and requires no restrictions. Dr. Lyon additionally stated Dr. Kennedy apparently misunderstood cumulative trauma.

Sizemore filed a supplemental report from Dr. Kennedy on September 29, 2021. Dr. Kennedy had reviewed Dr Lyon's report and agreed with the 8% impairment rating assessed for the left shoulder condition, which he believed was

caused by cumulative trauma, not an acute injury. He disagreed with the 5% impairment rating for the lumbar complaints, which he again opined was caused by cumulative trauma.

Dr. Tim Allen, a psychiatrist, evaluated Sizemore at the KSP's request on August 11, 2021. In his September 13, 2021 report, Dr. Allen noted Sizemore began working for the KSP in 2007 and served with the SRT for several years. He noted Sizemore began counseling with Dr. Charles Beibel, Ph.D., a psychologist with the KSP, after shooting two suspects in 2013. He also noted Sizemore experienced a panic attack while driving to a call in 2013. Sizemore left the SRT in 2016 or 2017, was promoted to sergeant, and transferred to the Hazard post. Sizemore reportedly began drinking in 2013. He listed Sizemore's medications. He found Sizemore reached MMI for his PTSD on May 1, 2021, six months after his retirement from the KSP. He additionally noted Sizemore's 10 in-patient hospital admissions for PTSD and alcoholism from 2019 to 2021. He diagnosed Sizemore with PTSD and alcohol use disorder. He determined the PTSD was caused by the multiple mentally traumatic events and shootings he was involved with while working for the KSP. Dr. Allen assessed a 10% impairment rating pursuant to the AMA Guides (2nd Ed.), of which he found half was due to PTSD and half due to alcoholism.

The KSP filed the March 7, 2016 MRI report from ARH-Harlan. That report noted Sizemore had diffuse lumbar disc disease along with a large left paracentral disc herniation impinging on the L5-S1 nerve root. That study also indicated a protrusion at the L4-L5 interspace.

The KSP also filed the September 19, 2019 record from Cheryl Jarzonkowski, ARNP, from LTBHS. Sizemore was diagnosed with alcohol dependence, uncomplicated, and depression. The record noted Sizemore developed alcohol abuse a couple of years prior, exacerbated by his divorce, and the deaths of two close friends.

A Benefit Review Conference was held on November 17, 2021. The issues preserved included whether Sizemore has the ability to return to his job with the KSP, work-relatedness/causation, notice, income benefits per KRS 342.730 (permanent), pre-existing impairment (exclusion), contested medical treatment, TTD, future medical benefits, injury as defined, and manifestation date of injury.

The ALJ dismissed Sizemore's claim in the Opinion and Order issued January 13, 2022. The ALJ acknowledged that in Haycraft v. Corhart Refractories, 544 S.W.2d 222 (Ky. 1976), the Kentucky Supreme Court determined an injury caused by cumulative trauma could be found by a showing that the nature and duration of the work aggravated a degenerative disc condition to the degree it became actively disabling sooner than it would have if the work had been less strenuous. The ALJ further acknowledged an injury caused by cumulative trauma is generally considered to have been caused by repetitive micro-trauma occurring over time. The ALJ determined Sizemore did not prove his low back or left shoulder conditions were caused by work-related cumulative trauma. He found those conditions were caused by acute incidents in 2015, 2016, and 2019. He determined the injuries stemming from 2015 and 2016 are time barred. He also noted Sizemore

did not allege an acute injury - or, in fact, any injury - in 2019, in the Form 101; therefore, that issue was not before him.

The ALJ also correctly noted a psychological or psychiatric condition may be found compensable if it stems from a traumatic physical injury, citing to Lexington-Fayette Urban County Government v. West, 52 S.W.3d 564 (Ky. 2001) and McGowan v. Matsushita Appliance Company, 95 S.W.3d 30 (Ky. 2003); KRS 342.0011(1). However, because he determined Sizemore did not sustain a compensable physical injury, he dismissed the psychological injury claim.

Sizemore filed a Petition for Reconsideration on January 13, 2022, arguing the ALJ erred by dismissing his claim for a psychological injury. He argued the claim was filed within two years of him falling over an embankment on November 24, 2019 as he was chasing a suspect. Therefore, the psychological claim was timely. The Petition for Reconsideration was denied in the Order issued February 10, 2022. The ALJ specifically found *verbatim* as follows:

Plaintiff filed a Petition for Reconsideration regarding the Opinion and Order filed January 13, 2022, dismissing his claims for cumulative trauma injuries and psychological injury. Plaintiff states that the language contained in the Opinion and Order that the specific injury events in 2015/2016 or 2019 could have supported a claim for psychiatric injury. However, no claim for a specific acute injury was filed, only claims for cumulative trauma. The ALJ dismissed the cumulative trauma claims. The ALJ noted in the Opinion and Order that Jennifer Hale, M.A. did not associated Sizemore's PTSD or alcohol abuse with any physical injury. The ALJ did not find any mention of the acute injury in 2019 either as a basis for his PTSD, or that he even mentioned it to her when providing her a history. Even if Sizemore had filed a claim for specific injury from the 2019 incident, Hale did not relate his PTSD to that event.

On appeal, Sizemore argues the ALJ erred in finding the statute of limitations had expired for his 2015, 2016, and 2019 left shoulder and low back injuries. He additionally argues the ALJ erred in finding Ms. Hale failed to associate his PTSD or alcohol abuse with any physical injury.

Sizemore, as the claimant in this workers' compensation proceeding, 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 before the ALJ, 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 that which 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).

In rendering a decision, the Kentucky's workers' compensation Act grants the ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. See KRS 342.275; KRS 342.285; AK Steel Corp. v. Adkins, 253 S.W.3d 59 (Ky. 2008). The 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. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15, 16 (Ky. 1977). Although a party may note evidence which would support an

outcome other than that reached by the ALJ, this is not adequate to support a reversal 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 weight and credibility or by noting reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479, 481 (Ky. 1999). In order to reverse the decision of the ALJ, 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).

After reviewing the evidence, we find the ALJ did not err in dismissing Sizemore's claim, and his decision is supported by the evidence. We first determine the ALJ did not err in finding Sizemore did not sustain injuries caused by cumulative or repetitive trauma. The testimony and medical evidence support the finding that Sizemore sustained acute injuries to the left shoulder in 2015 and the low back in 2016, but he did not timely file a claim for either injury. KRS 342.185(1) bars a claim for an acute injury if it is not filed within two years of the date of accident, or within two years after the last payment of temporary total disability benefits, whichever is later. Since Sizemore's claim was not timely filed for either of those incidents, and because the ALJ determined he did not have injuries caused by cumulative trauma, we affirm.

We find a claim could have been timely filed for the 2019 incident; however, Sizemore never amended the Form 101 to include an injury stemming from that event. Even if Sizemore had amended his claim, the evidence does not establish he sustained permanent injuries stemming from that incident. He sustained

the left shoulder injury in 2015, and subsequently underwent surgery for that condition. As Dr. Lyon noted, Sizemore long ago reached MMI for that injury. He also determined the left shoulder condition was not caused by cumulative trauma. Likewise, Dr. Lyon determined Sizemore's low back condition was caused by an acute work-related low back injury, not cumulative trauma. Again, he found Sizemore had long ago reached MMI for that injury. He additionally determined any impairment Sizemore has relates to the 2015 and 2016 injuries, not the 2019 event. He found Sizemore recovered from the 2019 incident with no radiculopathy. Even if Sizemore had amended his claim to include the 2019 incident, the ALJ was not compelled to determine he sustained a compensable injury due to that event. Sizemore returned to work and continued performing his duties as a sergeant for the KSP until he left work in June 2020 due to problems with alcoholism and PTSD.

Finally, we find the ALJ did not err in dismissing Sizemore's claims for a psychological injury. KRS 342.0011(1) defines injury as follows:

"Injury" means any work-related traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings. "Injury" does not include the effects of the natural aging process, and does not include any communicable disease unless the risk of contracting the disease is increased by the nature of the employment. "Injury" when used generally, unless the context indicates otherwise, shall include an occupational disease and damage to a prosthetic appliance, **but shall not include a psychological, psychiatric, or stress-related change in the human organism, unless it is a direct result of a physical injury;** (Emphasis added)

We acknowledge Sizemore may well have PTSD and alcoholism, as well as other mental conditions, due to the stress he endured while working with the KSP, and particularly in his job duties with the SRT. As noted by the ALJ, and further as reflected by the evidence, Sizemore began having psychological problems after two shooting incidents in 2013 while serving as a sniper on the SRT, and in various other events he experienced. The evidence likewise establishes he began drinking in 2013. However, while Sizemore clearly has psychological issues with PTSD and alcohol addiction, the evidence only supports a finding that those conditions were caused by emotional trauma associated with his work, and do not result from the physical trauma. There is no evidence supporting a connection between the psychological condition or treatment and a physical injury he may have sustained while working for the KSP.

We find the ALJ did not err in determining Ms. Hale did not link Sizemore's psychological problems to any physical injury. Although her report and supplemental note reference work-related trauma, a complete review of those documents only establishes she was indicating emotional trauma, not associated with any physical injury Sizemore may have sustained while working. We therefore determine the ALJ did not err in dismissing Sizemore's psychological claim because there is no evidence linking those conditions to any physical injury.

Accordingly, the January 13, 2022 Opinion and Order, and the February 10, 2022 Order denying Sizemore's Petition for Reconsideration rendered by Hon. John H. McCracken, Administrative Law Judge, are **AFFIRMED**.

ALL CONCUR.

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