

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: December 3, 2021

CLAIM NO. 202080250

JOSE ORTIZ-LEIVA

PETITIONER

VS.

APPEAL FROM HON. CHRIS DAVIS,  
ADMINISTRATIVE LAW JUDGE

BLITZ BUILDERS, INC.  
and HON. CHRIS DAVIS,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION  
AFFIRMING

\* \* \* \* \*

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

**STIVERS, Member.** Jose Ortiz-Leiva (“Ortiz-Leiva”) appeals from the August 7, 2021, Opinion, Award, and Order and the August 30, 2021, Order on Petition for Reconsideration of Hon. Chris Davis, Administrative Law Judge (“ALJ”). The ALJ awarded Ortiz-Leiva permanent partial disability benefits, temporary total disability, and medical benefits for a work-related left elbow injury.

On appeal, Ortiz-Leiva asserts the ALJ committed reversible error by relying upon the 1% impairment rating assessed by Dr. Michael Moskal.

### **BACKGROUND**

The Form 101 asserts that Ortiz-Leiva sustained work-related injuries to his left hand, elbow, and arm after falling off a ladder on June 3, 2020, while in the employ of Blitz Builders, Inc. (“Blitz Builders”).

Ortiz-Leiva testified by deposition on October 15, 2020, and at the June 16, 2021, hearing. His testimony is not relevant to the issue on appeal.

Blitz Builders filed Dr. Moskal’s December 3, 2020, Independent Medical Evaluation (“IME”) report generated after a physical examination and a medical records review. In his medical records review, Dr. Moskal noted that on June 3, 2020, Ortiz-Leiva was diagnosed with a “dislocated left elbow demonstrated with anatomical alignment.” The following questions and answers are set forth on the first page of his report:

1. What is your current diagnosis of the patient? No answer.
2. Do you believe the June 3, 2020 work incident resulted in harmful change to the human organism as evidenced by objective medical findings with regard to the patient?
  - a. Left elbow: Yes.
  - b. Left arm: No.
  - c. Any other body region: No.
3. When do you believe the patient reached maximum medical improvement following June 3, 2020 work incident?

Date: November 17, 2020

4. What degree of functional impairment (if any) would you assess of the patient? Fifth Edition.

a. Using the Fifth Edition Chapter 16, impairment is 0%.

b. Using Fifth Edition, Mr. Leiva's report of pain after prior elbow dislocation, physical examination and Chapter 18, a 1% whole person impairment is assigned.

5. What permanent restrictions (if any) would you assess of the patient's work activities?

a. None.

6. Do you feel the patient retains the physical capacity to return to work at his regular job as a construction worker for Blitz Builders, Incorporated?

a. Yes.

7. What type of future conservative medical treatment (if any) would be reasonable and productive in this particular patient's case?

a. None.

8. What type of future surgical medical treatment (if any) would be reasonable and productive in this particular patient's case?

a. None.

9. Have all of your answers and opinions been based within a reasonable degree of medical probability?

a. Yes.

Ortiz-Leiva filed Dr. Jules Barefoot's December 16, 2020, IME report.

After performing a physical examination and a medical records review, Dr. Barefoot provided the following diagnoses:

1. History of a workplace fall June 3, 2020 with a left posterior elbow dislocation, reduced on that same date.

2. Ongoing loss of motion in the left elbow with diminished grip strength in the left hand.

3. Apparent heterotopic ossification of the left elbow.

Dr. Barefoot commenced with the following discussion:

Using the American Medical Association Guides to Evaluation of Permanent Impairment, Fifth Edition, I would rate Jose Leiva's impairment as follows:

From page #472 of the guides, figure 16-34, flexion of 130 degrees equals a 1% impairment and extension of 20 degrees equals a 2% impairment.

From page #474, figure 16-37, supination of 65 degrees equals a 1% impairment and pronation of 75 degrees equals a 1% impairment.

Adding the above impairment totals a 5% impairment.

Referring to page #509, table 16-34, he was noted to have a 31 - 60% strength loss index, which equals a 20% upper extremity impairment.

Referring to page #604 of the Guides, Combined Values Chart, combining a 20% impairment with a 5% impairment equals a 23% upper extremity impairment.

From page #439, table 16-3, a 24% upper extremity impairment equals a 14% whole-person impairment.

Therefore, I would rate Jose's whole-person impairment at 14%.

I would apportion 100% of this 14% impairment to that fall that occurred on June 3, 2020.

He has no active, symptomatic impairment ratable conditions present in his left upper extremity prior to that date.

Unfortunately, he does continue to be symptomatic with loss of motion in his left elbow as well as loss of grip strength in his left hand.

I would recommend referral for Nerve Conduction Studies/EMG of the left upper extremity.

Following this he should have an MRI done of his left elbow.

Following these two diagnostic studies, followup with orthopedics would be recommended.

He would have marked difficulty using his left arm for repetitive pushing and pulling.

He would have difficulty using his left arm for repetitive flexion, extension, supination and pronation activities.

It would not be safe for him to work on ladders, scaffolding or at heights unprotected.

He would have difficulty with lifting, grabbing and carrying with his left hand/arm.

It is doubtful, given his current condition, he would be able to return to the building construction trades.

He would have difficulty operating handheld equipment.

The January 13, 2021, Benefit Review Conference Order and Memorandum (“BRC Order”) lists the following contested issues: “benefits per KRS 342.730; average weekly wage; unpaid or contested medical expenses; credit for unemployment, wage continuation, short and long term disability; and TTD.”

In the August 7, 2021, decision, the ALJ furnished the following findings of fact and conclusions of law:

#### **IV. Benefits per KRS 342.730**

Two doctors, Drs. Moskal and Barefoot, have assigned impairment ratings. Dr. Barefoot has assigned a 14% for heterotopic ossification, something not mentioned in Dr. Duffee’s records. In fact, it seems, from the records of Dr. Duffee, the treating physician, that the Plaintiff has had an excellent result. Dr. Duffee states that there are no restrictions and no need for any further medical treatment, at this time. While I cannot not award medical benefits, those opinions taken as a

whole prove that the condition is not as severe as Dr. Barefoot states.

The opinion of Dr. Moskal is more in keeping with the totality of the evidence, including the Plaintiff's excellent result, the lack of restrictions assigned by Dr. Duffee and my own opinion. In reliance on Dr. Moskal the Plaintiff has a 1% impairment rating.

Also in reliance on Dr. Moskal and Dr. Duffee the Plaintiff has no permanent restrictions. Without any limitations, he can return to the type of work done on the date of injury. He never returned to work at equal or greater wages. Therefore, he is not entitled to any multipliers.

On August 23, 2021, Ortiz-Leiva filed a Petition for Reconsideration asserting the same argument he now makes on appeal.

The August 30, 2021, Order overruling Ortiz-Leiva's Petition for Reconsideration sets forth the following findings:

This matter comes before the undersigned on the Plaintiff's Petition for Consideration, the Defendant's Response thereto and the Plaintiff's Motion to Re-Issue the Opinion. The Petition and the Motion are both OVERRULED. The date an Opinion is filed is controlled by 803 KAR 25:010, Section 3(2). Regardless, as the Defendant points out I am neither obligated nor qualified to independently evaluate the medical soundness of the opinions of Dr. Moskal. Dr. Moskal's own assertion that his opinions are valid is sufficient basis for me to rely on him. The opinions of Dr. Moskal more closely align with the treating medical records. It is Dr. Barefoot who is the outlier.

Ortiz-Leiva argues the ALJ erred by adopting Dr. Moskal's 1% impairment rating instead of Dr. Barefoot's 14% impairment rating, since Dr. Barefoot's impairment rating is based upon range of motion measurements and his report references the exact charts upon which he relied. We affirm.

## ANALYSIS

When the party with the burden of proof is unsuccessful, the sole issue on appeal is whether the evidence compels a different conclusion. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). Since Ortiz-Leiva was unsuccessful before the ALJ because he relied upon Dr. Moskal's opinion that Ortiz-Leiva retains a 1% impairment rating due to the work injury, the sole issue in this appeal is whether the evidence compels a different conclusion. Wolf Creek Collieries v. Crum, *supra*.

The claimant bears the burden of proof and risk of persuasion before the board. If he succeeds in his burden and an adverse party appeals to the circuit court, the question before the court is whether the decision of the board is supported by substantial evidence. On the other hand, if the claimant is unsuccessful before the board, and he himself appeals to the circuit court, the question before the court is whether the evidence was so overwhelming, upon consideration of the entire record, as to have compelled a finding in his favor.

Id.

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). In other words, an unsuccessful claimant on appeal must prove that the ALJ's findings are unreasonable and, thus, clearly erroneous, in light of the evidence in the record. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986). For an unsuccessful claimant, this is a great hurdle to overcome. In Special Fund v. Francis, *supra*, the Supreme Court said:

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. Thus, we have simply defined the term “clearly erroneous” in cases where the finding is against the person with the burden of proof. We hold that a finding which can reasonably be made is, perforce, not clearly erroneous. A finding which is unreasonable under the evidence presented is “clearly erroneous” and, perforce, would “compel” a different finding.

Id. at 643.

The ALJ has the sole authority to judge 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); Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). Mere evidence contrary to the ALJ’s decision is inadequate to merit reversal on appeal. Id. In order to reverse the decision of the ALJ, there must also be a showing substantial evidence of probative value does not support his decision. Special Fund v. Francis, supra. Moreover, the ALJ is vested with the authority to weigh the medical evidence, and if “the physicians in a case genuinely express medically sound, but differing, opinions as to the severity of a claimant's injury, the ALJ has the discretion to choose which physician's opinion to believe.” Jones v. Brasch-Barry General Contractors, 189 S.W.3d 149, 153 (Ky. App. 2006). Consequently, the Board may not second-guess



the ALJ and the reasons he relied upon the opinions of one physician while rejecting the opinions of another. This discretion belongs exclusively to the ALJ.

The reasons asserted by Ortiz-Leiva in his brief as to why the ALJ erred in relying upon Dr. Moskal relate to the weight the ALJ ultimately chooses to give to his opinions and not their admissibility. Despite Ortiz-Leiva's assertions to the contrary, the fact Dr Moskal did not provide the calculations supporting his impairment rating or reference specific Tables in the 5<sup>th</sup> Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides") do not render his opinions inadmissible nor cause the ALJ's reliance upon those opinions to comprise reversible error. We point out Dr. Moskal's December 3, 2020, report contains a reference to the Chapter in the AMA Guides upon which he relied. While a reference to the specific charts upon which a physician relied may be preferable, it is not required. Dr. Moskal also detailed over the course of five pages the results of his extensive physical examination of Ortiz-Leiva. Importantly, Ortiz-Leiva did not file an objection to Dr. Moskal's report or a Motion to Strike during the pendency of the litigation. Further, his objection to Dr. Moskal's report was not listed as a contested issue in the BRC Order.

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). 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. Whittaker v. Rowland, supra. In other words, as 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, supra.

The ALJ's reliance upon Dr. Moskal's opinions and impairment rating instead of Dr. Barefoot's opinions and impairment rating falls within the discretion afforded to him under applicable statutory and case law. Since Dr. Moskal's opinions and impairment rating constitute substantial evidence, the ALJ's decision may not be disturbed on appeal.

Accordingly, the August 7, 2021, Opinion, Award, and Order and the August 30, 2021, Order on Petition for Reconsideration are hereby **AFFIRMED**.

ALVEY, CHAIRMAN, CONCURS.

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