

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: June 18, 2021

CLAIM NO. 201594425

KENNETH TURNER

PETITIONER

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

COMMONWEALTH OF KENTUCKY
DEPARTMENT OF CORRECTIONS, and
HON. JONATHAN R. WEATHERBY
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
AFFIRMING**

* * * * *

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

BORDERS, Member. Kenneth Turner (“Turner”) appeals from the January 26, 2021 Remand Opinion and Order and the February 17, 2021 Order on Petition for Reconsideration rendered by Hon. Jonathan R. Weatherby, Administrative Law Judge (“ALJ”), finding Turner sustained no permanent cervical spine injury as a

result of a work accident, and awarding a period of temporary total disability benefits and medical benefits. On appeal, Turner argues the ALJ failed to comply with the dictates of the Board and the Court of Appeals. Turner argues the ALJ is precluded from relying on the opinion of Dr. Thomas J. O'Brien. We find the ALJ's decision on remand for additional analysis is sufficient; therefore, we affirm.

The Board previously remanded this claim on three occasions to insure the ALJ accurately summarized and understood the evidence, and performed a sufficient analysis in light of Dr. O'Brien's inaccurate statement that Turner had no cervical complaints until two months after the alleged February 16, 2015 injury.

Turner's accident occurred on February 16, 2015, when he slipped and fell on ice. In his Form 101, he alleged injuries to his hips, ribs, right shoulder, and neck. Turner saw Holly McCormick, APRN ("Nurse McCormick"), of Trigg County Hospital Rehabilitation Department on February 23, 2015, with complaints of headaches, right shoulder pain, and right-sided chest pain. He reported the work accident to Nurse McCormick, who ordered X-rays and a CT scan. The X-rays revealed a shoulder abnormality of the clavicle and the AC joint, and broken ribs. Turner was referred to an orthopedic surgeon for his shoulder condition. When he returned to Nurse McCormick on March 4, 2015, Turner continued to complain of pain in his right shoulder and ribs. Neither record documents cervical complaints.

The record establishes Turner complained of right upper extremity radicular pain at physical therapy on March 24, 2015. Turner had a positive Spurling's test for cervical radiculitis, with limitation of cervical range of motion. At a March 31, 2015 visit, Turner continued to complain of neck pain with headaches,

and the office note indicates cervical pathology was suspected. Turner returned on April 13, 2015, and again had positive testing for right upper extremity radiculopathy. Turner reported the right upper extremity pain began a few days after the injury on February 16, 2015.

Turner returned to Nurse McCormick on April 6, 2015. The note for this visit is the first to document cervical complaints to Nurse McCormick. Turner reported having gradually worsening neck pain since the work incident.

Throughout the proceedings, the ALJ chose to rely on the opinion of Dr. O'Brien who diagnosed minor bruises/contusions to the shoulder, ribs, and hip as a result of the work incident. With regard to the neck condition, Dr. O'Brien emphasized Turner did not complain of neck pain until almost two months after the work accident. Dr. O'Brien summarized notes from Dr. Timothy Chang on March 13, 2015 and April 24, 2015 that did not include any mention of cervical complaints. Dr. O'Brien noted the first report of neck problems to Dr. Chang was on May 12, 2015. Dr. O'Brien noted Dr. Chang referred to "new symptoms" of pain in the elbow and ulnar nerve distribution, and neck pain. Dr. O'Brien opined, "The two month hiatus where there are no symptoms of neck pain or cervical radiculopathy effectively rules out a causal association with Turner's neck symptoms and the ultimate surgical procedure that was carried out by Dr. Gruber." Dr. O'Brien further noted the June 23, 2015 MRI scan of the cervical spine depicts longstanding mild degenerative disc changes with no acute objective findings that can be in any way associated with an acute injury resulting from the work incident. Based on these circumstances, Dr. O'Brien concluded that Turner had non-work-related, multi-level,

cervical degenerative disc disease, and the work injury of February 16, 2015 did not cause any temporary or permanent aggravation, acceleration or precipitation of the degenerative cervical condition beyond its expected natural progression. He assessed a 0% impairment rating for the neck and opined Turner could return to unrestricted work by May 12, 2015.

In the February 7, 2020 Opinion Vacating and Remanding, the Board directed the ALJ as follows:

We note the ALJ has had multiple opportunities to provide an accurate review of the evidence, but has failed to do so. In his latest decision, the ALJ only made a passing statement that the records from the Trigg County Hospital Rehabilitation Department are “illegible”, and did not reference the physical therapy records. We must therefore, again vacate the ALJ’s determinations, and remand for a complete review of the evidence, including the physical therapy records, and those from the Trigg County Hospital Rehabilitation Department. The ALJ must then discuss the impact of the information contained in those records upon Dr. O’Brien’s opinion. After reviewing the evidence and the impact, the ALJ may make any determination supported by the evidence. We do not direct any particular result; however, any decision must be based upon an accurate review of the evidence and its impact.

Turner appealed the Board’s decision. The Court of Appeals affirmed the Board in Turner v. Commonwealth of Kentucky Department of Corrections, 2020-CA- 0330-WC, rendered October 16, 2020, Designated Not To Be Published.

The Court of Appeals suggested that the ALJ:

- (1) provide a summary and analysis of the March and April records at issue highlighting any complaints or references to cervical/neck pain or treatment;
- (2) summarize and explain his understanding of Dr. O’Brien’s opinions regarding Turner’s neck injury and the rationale underpinning those opinions, if any;
- (3)

provide some explanation of whether Dr. O'Brien's failure to review the records at issue affected the ALJ's assessment of the credibility and reliability of Dr. O'Brien's report, and the explanation for such determination; and (4) in light of any such determination explain how the ALJ considered Dr. O'Brien's opinion in comparison to the other opinions of record.

Id. at 22.

On remand, the ALJ provided the following summary and findings:

This matter is before the ALJ upon Remand from the Workers Compensation Board with direction to provide additional findings in light of the Plaintiff's physical therapy records that indicate complaints of cervical pain that the Plaintiff related to the work injury as well as the suspicion referenced by Holly McCormick to suspected cervical pathology. The prior findings and evidence summaries, specifically including the references to the physical therapist's conclusions and APRN Holly McCormick's notes as listed in the Opinion, Award, and Order issued on July 23, 2018, are specifically incorporated herein by reference.

1. The Plaintiff in this matter alleged a work related injury occurring on February 16, 2015. He presented to Trigg County Hospital and the medical records reference shoulder impingement, cervical complaints and a positive Spurling's test.

2. The medical records of Holly McCormick, APRN indicate that the Plaintiff presented on February 23, 2015, a week after the fall at work, but did not complain of neck pain or issues. The Plaintiff was referred to physical therapy and began to complain about radicular pain in the right upper extremity on March 24, 2015, and again on March 31, 2015. On April 6, 2015, the Plaintiff reported having had some issues with neck pain since the work accident. His physical therapist believed that his shoulder pain could have been work-related and cervical pathology was suspected per the office note of the same date.

**FINDINGS OF FACT AND CONCLUSIONS OF
LAW**
**Work Relatedness and Causation of the Cervical
Spine Condition**

1. If the decision of the ALJ is supported by any substantial evidence of probative value, it may not be reversed on appeal. *Special Fund v. Francis*, Ky., 708 S.W.2d 641 (1986).

2. When conflicting evidence is presented, the ALJ may choose whom and what to believe. *Pruitt v. Bugg Brothers*, Ky., 547 S.W.2d 123 (1977).

3. 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 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 (Ky. 1979).

4. 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 not adequate to require reversal on appeal. *Id.*

5. The ALJ has repeatedly found that the opinion of Dr. O'Brien is the most persuasive and convincing in this matter. The ALJ acknowledges that the report of Dr. O'Brien includes a review of the records of Holly McCormick, APRN, but does not include a reference to the Plaintiff's cervical spine complaints or the much-discussed physical therapy records which include a reference to the Plaintiff's initial cervical spine complaints. While this omission is unexplained, the poor image quality of the documents cannot be overlooked.

6. The ALJ finds that these omissions by Dr. O'Brien do not diminish the substantial credibility of his

opinions regarding the Plaintiff's condition. The ALJ also notes that while Dr. O'Brien referenced a two-month delay in the reporting of symptoms by the Plaintiff, the records referenced herein clearly limit that delay to approximately five weeks. The ALJ also finds that this discrepancy has no effect on the credibility of the opinions offered by Dr. O'Brien.

7. In *Cepero v. Fabricated Metals, Corp.*, 132 S.W.3d 839, (Ky.2004), the Kentucky Supreme Court established the standard for circumstances wherein a medical opinion may be discounted due to being based upon an inaccurate medical history. The *Cepero* Court offered that the medical opinion "must be predicated upon such erroneous or deficient information that is completely unsupported by any other credible evidence can never, in our view, be reasonably probable." *Id* at 482.

8. The ALJ finds that the failure by Dr. O'Brien to acknowledge that the Plaintiff complained about work-related cervical symptoms a few weeks earlier than he previously believed, or that a nurse practitioner suspected cervical pathology, do not rise to the level articulated in *Cepero* that would constitute a medical history so inaccurate as to nullify his otherwise credible opinions.

9. The ALJ therefore finds that while Dr. O'Brien included a summary of the records of Holly McCormick but omitted any reference to cervical complaints or suspected cervical pathology resulting therefrom, his understanding of the Plaintiff's medical history is not so inaccurate that it serves to diminish his ultimate conclusions. The ALJ therefore finds that his opinions are credible and convincing.

10. The ALJ continues to find that the report of Dr. O'Brien in this matter is the most comprehensive, thorough, and persuasive and further finds that ample substantial evidence as referenced hereinbefore supports his conclusions.

11. Dr. O'Brien assessed a 0% impairment for the cervical spine and found that the Plaintiff reached maximum medical improvement and could return to

work unrestricted on May 12, 2015. The opinions of Dr. O'Brien have convinced the ALJ and the ALJ thus finds that the Plaintiff sustained only temporary injuries that resolved as of May 12, 2015.

Turner filed a Petition for Reconsideration asking for specific findings of fact as to whether Dr. O'Brien reviewed the physical therapy records and Nurse McCormick's April 6, 2015 office note, and was aware of the cervical complaints contained therein when he formed his opinion on causation and simply failed to write a summary of those documents. Turner also requested the ALJ to set forth whether Dr. O'Brien's reference to a two-month delay was essentially a typographical error and whether he actually understood that the first cervical complaint was made five weeks after the work injury. Finally, Turner asked the ALJ to find Dr. O'Brien's opinions are not credible, and to award benefits as previously requested.

The ALJ overruled Turner's Petition for Reconsideration as an impermissible re-argument of the merits of the claim.

On appeal, Turner argues the ALJ erred by failing to comply with the dictates of the Board and the Court of Appeals. Turner argues the ALJ did not provide a summary and analysis of the March and April 2015 records at issue highlighting any complaints and references to cervical/neck pain or treatment. Turner contends the ALJ's summary on remand remains insufficient, as the ALJ failed to discuss the limited range of motion and positive Spurling's test found in the physical therapy records from March 24, 2015 and April 13, 2015. Turner contends the ALJ did not adequately summarize and explain his understanding of Dr. O'Brien's opinions regarding the neck injury and the rationale underpinning those

opinions. Turner contends the ALJ's decision shows he did not review the evidence again, and he is confused about Dr. O'Brien's opinion regarding when the cervical pathology started. Finally, Turner notes the Court of Appeals directed the ALJ to explain how he considered Dr. O'Brien's opinion in comparison to the other opinions of record. Turner observes the ALJ made no reference on remand to the fact that six other medical experts indicated the cervical spine complaints were work-related.

Turner argues the ALJ is precluded from relying upon Dr. O'Brien's opinion. Turner cites the unpublished case of Packers Sanitation Services v. Cabrera, 2020-SC-0215-WC rendered March 25, 2021, arguing it does not apply the "substantially inaccurate" requirement. Thus, Turner contends he is only required to show the medical assessment is based on "inaccurate information" rather than a "substantially inaccurate or largely incomplete" history. Alternatively, Turner argues Dr. O'Brien's opinions are based upon a substantially inaccurate or incomplete history. Thus, Turner argues Dr. O'Brien's opinions do not constitute substantial evidence.

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

Since the first decision of the Board, we have noted Dr. O'Brien's opinion on causation was not based solely on a mistaken belief that Turner had no cervical complaints for two months following the injury. An ALJ is not required to disregard a medical opinion in light of inaccuracies if that opinion is supported by other substantial evidence. GSI Commerce v. Thompson, 409 S.W.3d 361, 364 (Ky. App. 2012). Dr. O'Brien also formed his opinion based upon MRI studies that he stated revealed longstanding mild degenerative disc changes with no acute objective findings that can be associated with an acute injury resulting from the work incident. Dr. O'Brien stated the work injury did not cause any temporary or permanent aggravation, acceleration or precipitation of the degenerative cervical condition above the natural progression of this condition. Turner initially voiced no complaints of neck or radicular pain to Nurse McCormick when she saw him one week following the accident. He first reported neck complaints to her on April 6, 2015, or seven weeks following the work incident. Turner voiced no complaint of neck problems to Dr. Chang until May 12, 2015, approximately three months following the incident and two months after beginning treatment with Dr. Chang.

We have repeatedly indicated we directed no particular finding regarding the weight to be given Dr. O'Brien's opinions. The Court of Appeals addressed the question of whether Dr. O'Brien's opinion could constitute substantial evidence stating, "Dr. O'Brien's opinion, although based in part on an incomplete review of all the medical records, is not so 'substantially inaccurate or largely

incomplete' that it could not be considered substantial evidence by the ALJ." Id at 21. Thus, the Court of Appeals concluded it could not disagree with the Board's decision refusing to direct the ALJ to reconsider the award without consideration of, or reliance on, Dr. O'Brien's opinion. The Court further noted the evaluation of the credibility and proper weight to be given to Dr. O'Brien's opinion falls on the ALJ.

The Board's function is to determine whether the ALJ's decision is based upon an accurate understanding of the facts and evidence. Here, the ALJ found Dr. O'Brien's failure to acknowledge Turner complained about work-related cervical symptoms a few weeks earlier than he previously believed, or that a nurse practitioner suspected cervical pathology did not rise to the level of inaccuracy articulated in Cepero constituting a medical history so inaccurate as to nullify Dr. O'Brien's otherwise credible opinions. Although Dr. O'Brien believed there was a two-month delay before Turner reported cervical complaints, there was a substantial delay of five weeks following the incident before cervical complaints were documented in the medical records. There was a two-month delay from the time Dr. Chang first treated Turner until Turner reported cervical complaints to him. There was also a delay in reporting cervical complaints to Nurse McCormick after she began treating Turner. Again, we note Dr. O'Brien also based his opinion on the type of changes reflected in the MRI. Based upon this evidence, the ALJ could reasonably conclude the difference between a five-week delay and an eight-week delay would not significantly alter Dr. O'Brien's causation opinion.

We acknowledge parties are entitled to findings sufficient to inform them of the basis for the ALJ's decision to allow for meaningful review. Kentland

Elkhorn Coal Corp. v. Yates, 743 S.W.2d 47 (Ky. App. 1988); Shields v. Pittsburgh and Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982). This Board is cognizant of the fact an ALJ is not required to engage in a detailed discussion of the facts or set forth the minute details of his reasoning in reaching a particular result. The only requirement is the decision must adequately set forth the basic facts upon which the ultimate conclusion was drawn so the parties are reasonably apprised of the basis of the decision. Big Sandy Community Action Program v. Chafins, 502 S.W.2d 526 (Ky. 1973); New Directions Housing Authority v. Walker, 149 S.W.3d 354 (Ky. 2004).

In this instance, we determine the ALJ sufficiently provided the basis for his decision, supported by the evidence, and a contrary result is not compelled. While Turner has identified evidence supporting a different conclusion, there was substantial evidence presented to the contrary. As such, 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 26, 2021 Remand Opinion and Order, and the February 17, 2021 Order on Petition for Reconsideration rendered by Hon. Jonathan R. Weatherby, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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