

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: January 17, 2020

CLAIM NO. 201357724

KENNETH WEDDINGTON

PETITIONER

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

MCCOY ELKHORN COAL/HEALTHSMART  
and HON. JOHN H. MCCRACKEN,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION  
AFFIRMING**

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BEFORE: ALVEY, Chairman, STIVERS and RECHTER<sup>1</sup>, Members.

**STIVERS, Member.** Kenneth Weddington (“Weddington”) appeals from the August 15, 2019, Opinion and Order and the September 16, 2019, Order on Petition for Reconsideration of Hon. John H. McCracken, Administrative Law Judge (“ALJ”). In

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<sup>1</sup> Although Board Member Rechter’s term expired on January 4, 2020, she is permitted to serve until January 22, 2020, pursuant to KRS 342.213(7)(b), and will participate in decisions rendered by this Board through that date.

the August 15, 2019, Opinion and Order, the ALJ denied Weddington's motion to reopen in which he alleged an increase in impairment and that he is now permanently and totally disabled due to an injury sustained while in the employ of McCoy Elkhorn Coal/Healthsmart ("McCoy Elkhorn").

On appeal, Weddington requests this Board to remand the claim to the ALJ in order to set forth additional findings addressing Dr. Chris Stephens' opinions regarding Weddington's impairment rating. Weddington's second argument is the ALJ failed to address Dr. Anbu Nadar's opinions regarding a 3% increase in his impairment rating which, as Weddington argues, was based upon diagnostic studies and not just his complaints of pain.

The Form 101 alleges Weddington sustained work-related injuries to his "lower back with radiation into the legs" on December 9, 2013, in the following manner: "The injury occurred when he was working with another employee and they were pulling a very heavy box through the mud and he developed severe pain in his back with radiation into the left leg."

In a July 27, 2015, Opinion, Award, and Order, Hon. Steven Bolton, ALJ ("ALJ Bolton") awarded temporary total disability benefits, permanent partial disability ("PPD") benefits, and medical benefits for a work-related low back injury. ALJ Bolton relied upon the opinions and impairment ratings assessed by Drs. Joseph Zerga and Nadar.<sup>2</sup> The ALJ also relied upon the opinions of Dr. Nadar in finding

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<sup>2</sup> The record reveals Dr. Zerga assessed a 7% whole person impairment rating pursuant to the 5<sup>TH</sup> Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"), DRE Category 2, Table 15-3. Dr. Nadar assessed a 10% whole person impairment rating pursuant to the AMA Guides, Table 15-3, with 3% of the impairment rating attributable to a pre-existing active lumbar condition.

Weddington does not retain the capacity to return to his pre-injury employment and in enhancing the award by the three multiplier.

On November 6, 2018, Weddington filed a Motion to Reopen alleging a change of disability based upon the opinions of Dr. Nadar. Attached to the motion is the April 5, 2018, Form 107-I report of Dr. Nadar. After performing a physical examination and a medical records review, Dr. Nadar diagnosed “[l]umbosacral strain, with radiculopathy, with disc herniation at L5-S1” and “chronic pain syndrome.” Regarding causation, Dr. Nadar opined “the work-related injury has caused permanent damage to soft tissues” and he assessed a 13% whole person impairment rating. There is nothing written in response to the inquiry regarding the date Weddington reached maximum medical improvement (“MMI”). Dr. Nadar opined Weddington no longer is able to return to gainful employment.

Also attached to the motion is a letter dated April 5, 2018, from Dr. Nadar to Weddington’s counsel reiterating much of what is contained in the Form 107-I report. However, in this letter Dr. Nadar specifically opined Weddington had achieved MMI. Dr. Nadar did not change the 13% impairment rating set forth in the Form 107-I or his opinion Weddington is totally disabled from gainful employment. He stated the additional 3% impairment rating is for “chronic pain.”

Lastly, attached to Weddington’s Motion to Reopen is a supplemental correspondence from Dr. Nadar dated October 4, 2018, which reads, in pertinent part, as follows:

I had the opportunity to review the recent records you provided namely the recent MRI of the lumbar spine done on June 21, 2018 which is reported to have central and right-side disc herniation at L5-S1with foraminal

encroachment and also, had nerve conduction studies done on May 9, 2018 which has been reported to have L5-S1 radiculopathy, and as of my last evaluation, the patient continued to have persistent back and leg pain.

This confirms his ongoing radicular symptoms namely his low back and leg pain with numbness involving the right leg and in my opinion, his symptoms have progressed over the years and he may be a candidate for surgical intervention if he has significant ongoing leg pain. Regarding impairment rating, using the 5<sup>th</sup> Edition of AMA Guidelines, Table 15-3, I would place him on Category 3 for maximum of thirteen percent (13%).

By order dated December 10, 2018, Hon. Douglas Gott, Chief Administrative Law Judge, sustained Weddington's Motion to Reopen.

McCoy Elkhorn filed in evidence the January 21, 2019, follow-up Independent Medical Examination report of Dr. Stephens. After performing a physical examination of Weddington and a medical records review, Dr. Stephens set forth the following discussion:

I have been asked by Mr. Allen to opine with regards to a worsening of his lumbar condition. It is Mr. Weddington's opinion that his symptoms are subjectively worse. I can find no objective basis for this contention however. He is in fact on a less potent medication regimen currently, as he was the last time I saw him. His opiate prescription has been reduced by 50%. This reduction could account for his subjective perception that is [sic] pain has worsened. Furthermore, Mr. Weddington has gained a significant amount of weight since I last saw him. He has gained 33 lb. This unquestionably reduces his mobility and increases the discomfort he would feel on a daily basis, irrespective of other mitigating factors in the case. Finally, the MRI scan performed in 2018 and compared directly with his previous scan in 2013, does not show any significant progression or worsening of the degenerative disc disease or lumbar spinal stenosis. Based upon this medical evidence, I can find no evidence of a worsening of his lumbar condition. He was awarded a 7% impairment rating in 2015. I do not believe that this rating

has increased or changed since that time. This rating was primarily based on the opinion of Dr. Zerga. It was Dr. Zerga's opinion that he did not have a preexisting active condition. I had previously opined that his impairment rating was 6%, with 5% of that due to a preexisting active condition. I believe the 7% rating that he was given is a fair rating, though I continue to believe he did have a preexisting active condition.

I do not believe there is medical necessity for any change in restrictions based on findings of his physical examination and current diagnostic studies. I believe that the restrictions that I gave him in September of 2014 are applicable today with regards to his lower back.

The only meaningful change that I can find in Mr. Weddington's case is in his cervical spine. In the past year, he has developed new onset neck and arm symptoms that are not related to his previous work injury. He has subclinical cervical myelopathy associated with this as well. Other than these new onset cervical symptoms I can find no overall change in Mr. Weddington's condition since I last evaluated him in September of 2014.

Weddington was deposed on February 21, 2019. He has not returned to work since his accident on December 9, 2013. He is currently taking Tramadol, Lyrica, Hydrocodone, and using Flexeril and Lidocaine patches, which are prescribed by Dr. Ronald Mann. Other than Dr. Mann, Weddington has not seen any other doctors. He further testified as follows:

Q: Okay. Does Dr. Mann send you to anybody else for any kind of specialist treatment of anything like that?

A: No.

Q: No. So just Dr. Mann. How often do you see him now?

A: Every month.

Q: One time a month. I guess, how long has that been going on?

A: Going on since 2013.

Q: Okay. It's not changed? It's not gotten further apart or closer together or anything like that?

A: No.

Q: Been pretty steady basically?

A: Yeah.

Weddington has not undergone surgery due to the work injury. Weddington was wearing a back brace at the time of his deposition that he also wore in 2015. The medications he was taking at the time of the deposition have not changed since 2015, with the exception of Dr. Mann increasing the dosage of Lyrica and Tramadol and lowering the dosage of Hydrocodone.

Weddington described his current back problems:

A: It's just staying numb, my legs are staying more numb.

Q: Okay. Both?

A: Yes. But mostly on my right. The right is hurting more than my left.

Q: Okay. So you say your legs stay numb?

A: Yeah.

Q: You said something, more numb? You can tell a difference? Is that what you're telling me?

A: Yeah, yeah.

Q: But you think the right is worse than the left?

A: Yes.

Q: Is that on pain or the numbness?

A: The numbness.

Q: Okay. How about your back itself, you know, there is your back area as opposed to your legs? What's going on with you there now?

A: It hurts all the time.

Q: Now, you've got that belt sort of around there where your – it looks like it's almost right on top where your pants belt is there?

A: Yeah.

Q: Is that where your pain is there?

A: Yes, yes.

Q: Like you know what I'm talking about? Our belts like we wear to keep our pants up, is that where the pain is?

A: Yes.

Q: And then from there, it goes down both legs?

A: Yes.

Q: Okay. Any other problems that you're having now as a result of this [sic] lifting this box back there for McCoy Elkhorn that's the basis of your case?

A: Any other problems?

Q: Other than the back and the legs that we've talked about here?

A: Yes. I'm having neck [sic].

Q: You've got neck pain?

A: Yes.

Q: When did it start?

A: A couple of months ago.

Q: Okay. So it just sort of came on here –

A: Yeah.

Q: - just pretty quickly then?

A: Yeah.

Q: Did something happen?

A: No.

Q: I mean, did you sleep funny on your pillow or something –

A: No.

Q: - or it just started happening?

A: It just started happening.

Q: Okay. So this is something that we're talking about is going on – because this accident was back in like 2013. So we're talking about six, seven years later, the first time now you're starting to have this neck pain?

A: Yes.

Q: Is it just in your neck or is it down the arms?

A: Down the arms.

Q: Both, one?

A: Yeah, both.

Q: Both arms. Okay. Have you told Mann about that?

A: Yes.

Weddington had an MRI of his neck, and Dr. Sujata Gutti, a neurologist, administered shots for his neck pain. Weddington also wears carpal tunnel braces on his wrists at night.

Weddington explained that his pain has increased since 2015:

Q: Okay. So since we had this case the first time, as of July 27, 2015, from then until now, how is your condition? Has it stayed much the same, gotten better, gotten worse or what?

A: It's gotten worse.

Q: Gotten worse. Well, tell me how it's gotten worse?

A: Just the pain and then the numbness in my right leg has got [sic] worse.

Q: You said the right is worse than the left?

A: Yes.

Q: Okay. So is it primarily then just the pain and the numbness is [sic] the things that's [sic] gotten worse –

A: Yes, yes. The pain.

Q: - since '15 till now?

A: Yes.

Weddington also testified at the June 25, 2019, hearing, and his testimony is mostly duplicative of his deposition testimony.

The April 10, 2019, Benefit Review Conference Order and Memorandum lists the following contested issues: “Work related injury/causation, permanent income benefits per KRS 342.730, exclusion for pre-existing impairment.” Under “other contested issues” is the following: “This is before the ALJ on a motion to re-open; Is there a worsening of condition, PTD, increase in impairment.”

In the August 15, 2019, Opinion and Order, the ALJ provided the following analysis:

The ALJ relies on the imaging studies from before and after the 2015 award, his medical treatment by Dr. Mann, Dr. Nadar, Dr. Stephens, the 2018 NCS/EMG study, and Mr. Weddington's testimony from the original claim and the re-opening, to find no change in disability as shown by objective medical evidence of a worsening of impairment due to a condition caused by the injury as required by KRS 342.125. Mr. Weddington's 2019 testimony as to his ability to hold a job is very similar from his testimony in the original claim. His complaints relating to his sleep habits, ability to work any job for eight hours a day, five days a week are extremely similar from both time periods. The ALJ did not see where Dr. Mann recommended surgery. Many of his office notes indicated that Weddington was doing well with his prescription regimen with no complications and that he appeared in no acute distress. This does not mean that Weddington did not have pain, but that his condition has waxed and waned for years.

Of significance is Dr. Nadar's explanation for the increase in impairment to 13%. In his April 5, 2018 report, Dr. Nadar states that Weddington continues to had [sic] a Lumbar DRE Category III 10% impairment, but due to Weddington's claims that his symptoms worsened over the years, he added 3% impairment due to pain. Dr. Nadar did not make a change of impairment due to a change in Weddington's low back structure that is measurable. However, Weddington's complaints of pain, while not exact, are similar to the pre-award symptoms. In some respects his pre-award symptoms are worse than his current symptoms. In the Opinion and Award of 2015, ALJ Bolton noted Weddington did not believe that he could pick up a gallon of milk.

The ALJ is not convinced by Dr. Nadar that Weddington has an additional 3% impairment pursuant to the Guides to the Evaluation of Permanent Impairment, Fifth Edition. The ALJ relies on Dr. Stephens to find that no increase in impairment has occurred since the date of the award by ALJ Bolton.

The ALJ relies on Dr. Stephens to find that Weddington's complaints of cervical pain are not work-related.

Weddington filed a petition for reconsideration asserting several errors. Weddington asserted the ALJ erred by relying upon Dr. Stephens in dismissing his Motion to Reopen when ALJ Bolton, in the original opinion and order, relied upon Dr. Zerga. Weddington also asserted Dr. Stephens, who assessed a 1% impairment rating at the time of the original opinion and order, now stated he can agree with the 7% impairment rating which constitutes a "6% change in what he said previously." Weddington also argues that the 3% increase in Dr. Nadar's impairment rating was based upon a review of diagnostic studies and not just an increase in Weddington's pain. By order dated September 16, 2019, the ALJ denied Weddington's petition.

Weddington's first argument is a request that this Board remand the claim to the ALJ with instructions to make specific findings regarding Dr. Stephens' statement that he could be in agreement with the 7% impairment rating the ALJ ultimately relied upon in the original claim. We affirm on this issue.

As an initial matter, the ALJ addressed this issue directly in the August 15, 2019, Opinion and Order, and interpreted the comment to mean Dr. Stephens believed the 7% impairment rating at the time of the original award was fair and not that Dr. Stephens was increasing his own impairment rating. Further bolstering this interpretation is the fact that Dr. Stephens explicitly stated he can find no evidence of a *worsening* of Weddington's lumbar condition and that he does not believe Weddington's impairment rating has "increased or changed" since 2015.

An ALJ has wide-ranging discretion in reaching his or her decision. Seventh Street Road Tobacco Warehouse v. Stillwell, 550 S.W.2d 469 (Ky. 1976); Colwell v. Dresser Instrument Div., 217 S.W.3d 213, 219 (Ky. 2006). 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 10 (Ky. 1979). 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, 998 S.W.2d 479 (Ky. 1999).

Further, authority generally establishes that, while an ALJ must effectively set forth adequate findings of fact from the evidence in order to apprise the parties of the basis for his decision, he is not required to recount the record with line-by-line specificity nor engage in a detailed explanation of the minutia of his reasoning in reaching a particular result. Shields v. Pittsburgh and Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982); Big Sandy Community Action Program v. Chaffins, 502 S.W.2d 526 (Ky. 1973).

The ALJ carefully considered the evidence in the record, including Dr. Stephens' original report and the January 21, 2019, report in this reopening, and provided findings in the August 15, 2019, Opinion and Order specifically addressing the statement by Dr. Stephens' with which Weddington now takes issue. To request

additional findings from the ALJ on this issue would be compelling the ALJ to perform tasks beyond what is required of him by the relevant law.

Assuming, *arguendo*, Weddington's assertion is correct and Dr. Stephens was stating that he is now increasing his original impairment rating to 7%, this does not constitute a worsening of impairment within the context of this reopening. ALJ Bolton, in the original opinion and order, relied upon the opinions and impairment ratings of Drs. Zerga and Nadar to conclude Weddington was entitled to an award of PPD benefits based upon a 7% whole person impairment rating. Thus, in order to prove a worsening of impairment in this reopening, the new impairment rating must exceed 7%, as the 7% impairment rating is *res judicata*. See LKLP CAC Inc. v. Fleming, 520 S.W.2d 382 (Ky. 2017). This fact essentially renders Weddington's first argument moot.

This Board will not be seen to second-guess the ALJ's interpretation of this specific statement by Dr. Stephens. Further, Dr. Stephens' opinions directly address the issue of whether Weddington's condition has worsened since the original award and constitute substantial evidence supporting the ALJ's conclusion Weddington's lumbar back condition has not worsened and his impairment rating has not increased since the original award. Consequently, on this issue, we must affirm.

Next, Weddington asserts the ALJ failed to address Dr. Nadar's opinions regarding a 3% increase in Weddington's impairment rating which, as Weddington argues, was based upon diagnostic studies and not just his complaints of pain. We affirm on this issue.

Dr. Nadar's original reports, both dated September 4, 2014, indicate he assessed a 10% whole person impairment rating with 3% apportioned to a pre-existing active lumbar condition. ALJ Bolton ultimately accepted Dr. Nadar's impairment rating and relied upon it in conjunction with Dr. Zerga's 7% impairment rating as the basis of his award of PPD benefits. ALJ Bolton's reliance upon Dr. Nadar's 10% whole person impairment rating, with 3% apportioned to a pre-existing active lumbar condition, is *res judicata*. Id.

In Dr. Nadar's reports, which were attached to Weddington's Motion to Reopen, he reiterated his original 10% impairment rating and, as clearly delineated in the April 5, 2018, letter, the extra 3% impairment rating is for "chronic pain."

In the August 15, 2019, Opinion and Order, the ALJ evidenced a thorough understanding of the medical testimony set forth by Dr. Nadar in both the original litigation and upon reopening, and as is within the discretion afforded to him under the law, decided to reject Dr. Nadar's opinions in this reopening. Once again, the ALJ must only set forth sufficient findings to inform the parties of the basis for his decision. *See Shields v. Pittsburgh and Midway Coal Mining Co.*, *supra*; *See also Big Sandy Community Action Program v. Chaffins*, *supra*. Here, the ALJ has done so. The ALJ, in his opinion and order, noted in detail Dr. Nadar's explanation for the increase in the impairment rating. As the ALJ stated, Dr. Nadar "added 3% impairment due to pain....Dr. Nadar did not make a change of impairment due to a change in Weddington's low back structure that is measurable." The ALJ's findings regarding Dr. Nadar's opinions on reopening are in harmony with this Board's own review of the medical evidence by Dr. Nadar. Therefore, we must affirm.

Accordingly, the August 15, 2019, Opinion and Order and the September 16, 2019, Order on Petition for Reconsideration are **AFFIRMED**.

ALL CONCUR.

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