

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: October 4, 2019

CLAIM NOS. 201888686 & 201801473

LETCHER COUNTY FISCAL COURT

PETITIONER

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

EDDIE MEADE AND  
HON. JONATHAN WEATHERBY,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION  
AFFIRMING & REMANDING

\* \* \* \* \*

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

**RECHTER, Member.** Letcher County Fiscal Court (“Letcher County”) appeals from the April 24, 2019 Opinion and Award, and the May 29, 2019 Order on Reconsideration rendered by Hon. Jonathan Weatherby, Administrative Law Judge (“ALJ”). The ALJ determined Eddie Meade was permanently totally disabled as a result of two work-related accidents. On appeal, Letcher County argues the ALJ

erred in relying upon impairment ratings assessed by Dr. John Gilbert, and in failing to order a vocational rehabilitation evaluation. For the reasons set forth herein, we affirm and remand to the ALJ.

Meade worked in construction as a road foreman. This position required him to perform mechanic, carpentry, and plumbing work, drive trucks, and operate other machinery. His first injury occurred on May 19, 2017 when he was lifting a fuel tank with a co-worker. He experienced a hot, sharp pain in his low back. He missed a few days of work but eventually returned without restrictions. The second injury occurred on March 22, 2018 when he was rear-ended while driving a work truck. The accident caused pain in his back, neck and legs, with tremors in his arms and headaches. He was unable to return work after the truck accident.

On September 30, 2017, a few months after the lifting injury, Meade was seen at Pikeville Neurology Clinic for back pain. He was referred by his primary care physician, Dr. Van Breeding, to Dr. Sai Gutti. Dr. Gutti diagnosed lumbar disc herniation at L2-S1, predominantly on the left side. He interpreted a September 20, 2017 lumbar MRI as revealing herniation at all levels, but most severe at L4-5.

Following the truck accident, on March 23, 2018, Meade visited Dr. Breeding for neck and back pain. He also returned to Dr. Gutti on April 13, 2018 and reported neck and back pain. Dr. Gutti diagnosed post-traumatic headache and mild post-concussive syndrome, cervical pain, low back pain, and possible L5-S1 radiculopathy. A CT scan of the head dated April 5, 2018 revealed a retention cyst in the left maxillary sinus. An April 25, 2018 lumbar MRI revealed multilevel

lumbar disc herniation and an annular tear at L4-5 which was not present on the 2017 MRI. An April 25, 2018 cervical MRI revealed cervical discogenic disease including herniation at C3-4 and C5-6. A May 11, 2018 NCV/EMG study confirmed left C6 radiculopathy, and left S1 radiculopathy.

In the months following the truck accident, Meade's pain persisted. He was seen at UK Healthcare on September 28, 2018 for headaches. Dr. Nathan Abdelsayed diagnosed concussion and recommended speech and physical therapy. At an October 31, 2018 follow-up with Dr. Breeding, the neck and back pain had persisted. Dr. Breeding diagnosed cervical radiculopathy, cervical disc herniation, chronic low back pain, lumbar degenerative disc disease and radiculopathy. On November 20, 2018, Meade returned to Dr. Gutti, who diagnosed left C6 radiculopathy, cervical disc herniation at C3-4 and C5-6, and lumbar disc herniation at L2-3, L3-4, and S1.

Dr. Timothy Kriss conducted an independent medical evaluation ("IME") on September 19, 2018. Dr. Kriss diagnosed whiplash and low back pain due to the truck accident. He found no evidence of radiculopathy in the cervical or lumbar spine, though Meade reported radicular pain. He acknowledged the EMG findings pointed to S1 distribution, but emphasized Meade's pain pattern was at L5, which did not correlate to the diagnostic study. Dr. Kriss noted numerous signs of symptom magnification. He assigned a 5% impairment rating pursuant to the American Medical Association Guides to the Evaluation of Permanent Impairment, 5<sup>th</sup> Edition ("AMA Guides") for a musculoskeletal strain resulting from the 2017 lifting injury. He assigned a 5% impairment rating for injuries to the cervical spine

resulting from the 2018 truck accident. He opined Meade would benefit from medications to help with his chronic pain, and could return to his prior job duties.

Dr. James Owen conducted an IME on November 5, 2018. He diagnosed cervical and lumbar radiculopathy confirmed by EMG. He recommended a neurosurgery evaluation for neck and low back pain. Dr. Owen did not believe Meade could return to his pre-injury job, and assessed a 29% impairment rating pursuant to the AMA Guides. He apportioned 18% of this impairment rating for the neck injury, and 13% for the low back injury. Dr. Owen attributed the entirety of the impairment rating to Meade's two work accidents.

Dr. Gilbert conducted on IME on November 14, 2018. Dr. Gilbert diagnosed disc ruptures at C3-4, C5-6, L2-3, L3-4, L4-5, and L5-S1. He also diagnosed cervical and lumbar foraminal stenosis, nerve root dysfunction, pain, and radiculopathy. He assessed a 33% impairment rating pursuant to the AMA Guides, which he attributed entirely to Meade's work accidents. Dr. Gilbert stated 13% of the impairment rating is attributable to the lumbar injury, 15% to the cervical spine injury, and 9% to gait and station. He concluded Meade lacks the physical capacity to return to his prior employment.

In a November 30, 2018 letter, Dr. Breeding noted he had been treating Meade for ten years. He opined the truck accident had exacerbated the pain caused by the prior lifting injury. He also noted Meade suffered depression since the two work injuries, which had left him unable to work. He concluded Meade is unable to return to his prior employment due to his physical condition.

The ALJ first addressed the 2017 injury, and noted Dr. Kriss was the only physician who assessed an impairment rating “specific” to this work incident. He adopted the 5% impairment rating Dr. Kriss assessed for the lumbar spine injury resulting from this work incident. Turning to the 2018 truck accident, the ALJ relied on the 33% impairment rating assessed by Dr. Gilbert.

In addressing the extent of Meade’s disability, the ALJ noted Dr. Breeding advised he could not perform his pre-injury job duties. The ALJ was particularly persuaded by this assessment as Dr. Breeding had treated Meade for ten years prior to the accident. The ALJ also noted both Dr. Gilbert and Dr. Owen concluded Meade could not return to his pre-injury work, despite his relatively young age of 47. Both of these physicians also imposed physical restrictions against bending, stooping, squatting and lifting more than ten pounds. Though Meade is a high school graduate with a foreman’s certificate, his work history includes only jobs as a manual laborer. Based on these circumstances, the ALJ concluded Meade is permanently totally disabled by the March 22, 2018 work injury.

Letcher County filed a petition for reconsideration. It argued the ALJ failed to address deficiencies contained in the reports of Drs. Gilbert, Owen and Breeding. Letcher County argued these deficiencies were explained at length by Dr. Kriss, whose opinion is most reliable because it incorporated diagnostic studies. Letcher County also requested a referral for a vocational rehabilitation evaluation. Though the ALJ amended the award to comport with a recent statutory amendment to KRS 342.730, the petition was otherwise denied. The ALJ noted the issue of

vocational rehabilitation was not preserved as a contested issue at the benefit review conference.

On appeal, Letcher County first argues the ALJ improperly relied upon the assessments of Drs. Gilbert, Owen and Breeding to conclude Meade is permanently totally disabled. Letcher County attacks Dr. Breeding's medical opinion because he is a family physician, and he reviewed no diagnostic studies or medical records prior to the 2018 truck accident. It points out his diagnosis of radiculopathy is based solely on Dr. Gutti's EMG study, and not on his own physical examination. Letcher County criticized Dr. Gilbert's medical opinion, claiming it is not based on diagnostic studies. Dr. Kriss emphasized that the lumbar and cervical MRI studies do not support Dr. Gilbert's diagnosis of disc ruptures. Further, according to Letcher County, Dr. Gilbert does not substantiate his impairment rating for gait and station with any studies. Letcher County argues the report of Dr. Kriss is the most credible evidence and the ALJ should have relied thereon.

As the claimant in a workers' compensation proceeding, Meade bore 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 successful, the question on appeal is whether substantial evidence supports the ALJ's decision. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Substantial evidence" is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971). In rendering a decision, KRS 342.285 grants an ALJ as

fact-finder the sole discretion to determine the quality, character, and substance of evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). An 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. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977); Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). Although a party may note evidence supporting a different outcome than reached by an ALJ, such is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). Rather, 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).

The function of the Board in reviewing an ALJ's decision is limited to determining whether the findings made 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 our own appraisals as to the weight and credibility of the proof, or by noting other conclusions that could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

The arguments raised by Letcher County concern the weight to be afforded the medical opinions of Drs. Gilbert, Owen and Breeding. Letcher County submitted Dr. Kriss' evaluation report, which identified and explained his disagreements with their diagnoses and impairment ratings. He highlighted the type

and quantity of examinations they relied upon, and contradicted the results of their physical examinations. However, Letcher County has failed to identify any deficiency which would render these medical opinions unreliable or otherwise not in conformity with the AMA Guides. Dr. Gilbert's medical opinion was based on his review of the medical records, imaging studies, and physical exam. That his medical conclusions differ from those of Dr. Kriss is not a basis for this Board to reverse an award. When the medical evidence is conflicting, the ALJ enjoys the discretion to determine upon which opinion to rely.

Further, the ALJ is entitled to lend credence to the opinion of Dr. Breeding, as Meade's long-term treating physician. Because Dr. Breeding did not assess an impairment rating, the ALJ did not rely upon his opinion to determine the extent of Meade's injury. But the ALJ is permitted to rely on Dr. Breeding's opinion as to Meade's ability to return to work. As pointed out by the ALJ, Dr. Breeding had treated Meade for ten years prior to the work accidents and was in a position to offer a credible opinion about his ability to labor.

Because the medical opinion of Dr. Gilbert constitutes substantial evidence upon which the ALJ could rely, we find no error. Dr. Gilbert's opinion was substantiated by those of Drs. Owen and Breeding. Additionally, the ALJ is entitled, in his discretion, to believe Meade's own testimony about his ability to labor. Letcher County has not identified any other deficiency in the ALJ's assessment of permanent total disability, other than his reliance on Drs. Gilbert, Owen and Breeding. Therefore, we affirm the determination Meade is permanently totally disabled.

Nonetheless, we believe a remand to the ALJ is necessary. In the event of a reopening in the future, and because this claim involves excess disability, it will be important that the award differentiates between Meade's two distinct work injuries. The first award should direct Letcher County to pay permanent partial disability ("PPD") benefits at the rate of \$20.27 commencing on May 19, 2017, for 425 weeks together with interest at the rate of 6% per annum on any due and unpaid installments of such compensation. Letcher County takes credit for any payments of such compensation previously paid.

The second award should direct that Meade recover from Letcher County permanent total disability ("PTD") benefits in the amount of \$623.84 beginning March 22, 2018, for so long as he is disabled, together with interest at the rate of 6% per annum on all due and unpaid installments of such compensation. Letcher County takes credit for those payments of compensation previously paid. Beginning March 22, 2018, and during the period the award of PPD benefits overlaps the award of PTD benefits, Letcher County shall receive a credit of \$20.27 per week for the remainder of the 425-week PPD award. Upon cessation of the PPD award, Letcher County shall pay the entire payment of \$623.84 per week. The duration of the PTD award shall be controlled by KRS 342.730(4). Under no circumstances shall Meade receive income benefits totaling more than \$623.84 per week. There should be no award of temporary total disability benefits for the second injury since the PTD benefits begin as of the date of the injury on March 22, 2018. The ALJ should also enter a separate award of medical benefits for each injury.

Next, Letcher County argues the ALJ erred in failing to order an evaluation for vocational rehabilitation. When a work injury prevents a claimant from returning to work for which he or she has previous training and experience, the claimant is entitled to vocational rehabilitation services. KRS 342.710. It is within the ALJ's discretion to refer the employee for a vocational rehabilitation evaluation to assess the claimant. Id. Once the evaluation report is received, it is again within the ALJ's discretion to order such recommended treatment be provided. Id. Contrary to Letcher County's assertion on appeal, the failure to order a vocational rehabilitation evaluation cannot constitute patent error, as the decision lies squarely within the ALJ's discretion.

Furthermore, as noted by the ALJ in his Order on Reconsideration, Letcher County did not raise the issue of vocational rehabilitation during the pendency of the litigation. It was not included as a contested issue at the benefit review conference. A petition for reconsideration is not the proper vehicle to request a vocational rehabilitation evaluation. Carnes v. Parton Bros. Contracting, Inc., 171 S.W.3d 60 (Ky. 2005). We find no abuse of discretion in the ALJ's refusal to order a vocational rehabilitation evaluation.

For the foregoing reasons, the April 24, 2019 Opinion and Award, and the May 29, 2019 Order on Reconsideration rendered by Hon. Jonathan Weatherby, Administrative Law Judge are hereby **AFFIRMED IN PART AND REMANDED** for entry of a revised award consistent with this opinion.

ALL CONCUR.

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