

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: July 17, 2020

CLAIM NO. 201774742

LYON COMPANY

PETITIONER

VS.

APPEAL FROM HON. GREG HARVEY,
ADMINISTRATIVE LAW JUDGE

MICHAEL FORD AND
HON. W GREG HARVEY,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION AFFIRMING

* * * * *

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

BORDERS, Member. Lyon Company (“Lyon”) appeals from the Interlocutory Opinion, Award, and Order; the April 6, 2020 Opinion, Order, and Award; and the Order on Reconsideration dated April 22, 2020, rendered by Hon. W. Greg Harvey, Administrative Law Judge (“ALJ”). The ALJ determined Michael Ford (“Ford”) sustained a work-related injury to his left knee on July 7, 2017.

In the Interlocutory Opinion, the ALJ determined Ford suffered a left knee injury, as defined by the Act, which aroused pre-existing dormant non-disabling conditions into disabling reality, necessitating a total replacement of the left knee. The ALJ placed the case in abeyance, ordered Lyon to pay for the surgery, and awarded temporary total disability (“TTD”) benefits until Ford achieved maximum medical improvement (“MMI”).

In the Opinion, Order, and Award of April 20, 2020, the ALJ determined Ford was entitled to permanent partial disability (“PPD”) benefits based on the 15% impairment rating assessed by Dr. Stacie Grossfeld. The ALJ further determined the 15% impairment rating solely resulted from the work injury, with no appointment to pre-existing active condition as requested by Lyon. Both parties submitted Petitions for Reconsideration. Ford sought to correct a typographical error, which was corrected by Order of April 17, 2020. Lyon argued in its petition that the ALJ erred by failing to find Ford had a 10% pre-existing impairment rating to his left knee due to the presence of advanced osteoarthritis as opined by Drs. Grossfeld and Frank Bonnarens. The petition was overruled by the ALJ. This appeal followed. For reasons to be set forth herein, we affirm.

Ford testified by deposition on two occasions and at the final hearings. In the first deposition and hearing, he testified he is high school graduate with an HVAC certification, and he has work experience in factories and construction. Ford began working at Lyon in 2009 as a sheet metal worker installing duct work. The job required him to work overhead, climb ladders, and use lifts. Ford had a right knee replacement in 2014 and returned to work for Lyon as a sheet metal worker without

work restrictions, although he continued to complain of some minor symptoms. He denied having any diagnostic studies or medical treatment performed on his left knee prior to his accident at Lyon. On July 7, 2017, Ford was on a ladder installing ductwork for Lyon. While coming down the ladder, he twisted his left knee. He felt a pop and the sudden onset of pain. Ford reported the incident and underwent medical treatment. At the time of the first deposition and hearing, Lyon was awaiting a decision to see who was to pay for the proposed left knee replacement surgery recommended by Dr. Robert Riley.

In the Opinion, Order and Award of Interlocutory relief, the ALJ considered evidence from Dr. Riley, Dr. Bonnarens, and Ford.

Ford relied on the testimony of Dr. Riley, who initially saw Ford on July 13, 2017 and received a history of him injuring his left knee while working on a ladder. He was ambulating with a walker. X-rays revealed tricompartmental osteoarthritis with osteophytes of the superior tibia and lateral distal femur. The patellofemoral joint space was decreased. Dr. Riley performed a steroid injection and an MRI was ordered. Ford returned on July 18, 2017 and was still having difficulty ambulating and with pain. Dr. Riley reviewed the MRI, which indicated interstitial degeneration anterior meniscal root para meniscal cyst. Dr. Riley diagnosed osteoarthritis in the lateral femoral compartment with a complex radial tear of the posterior horn of the medial meniscus, and osteoarthritis. Dr. Riley opined Ford needed a total knee replacement and that the need was caused by the work incident, which he felt exacerbated the underlying left knee conditions.

Lyon relied on testimony from Dr. Bonnarens. In his letter dated December 4, 2017, Dr. Bonnarens stated, in part “there is no mention of the left knee in any of the notes that Dr. Olsen has generated, and as a result, it is difficult to make an absolute determination regarding preexisting conditions in regard to the left knee.” However, Dr. Bonnarens went on to determine that since the arthritic changes seen in the left knee were the same as seen in the right knee, they must therefore have been pre-existing and active prior to the July 7, 2017 work incident. Therefore, he opined the left knee condition and the need for replacement surgery were not work-related.

Dr. Bonnarens was deposed, and opined Ford’s left knee condition was pre-existing active, and the work-related twisting incident was not sufficient in force to cause the current condition and the need for replacement surgery.

In the Opinion, Order, and Award of Interlocutory relief, the ALJ ruled as follows, *verbatim*:

Ford argues he sustained an injury to the left knee on July 7, 2017 and that, as a result, Dr. Riley has opined he needs a total left knee arthroplasty. Both Dr. Riley and Dr. Bonnarens agree Ford needs the left knee replacement but their opinion on whether that surgery was caused by the July 7, 2017 work incident differs. Both physicians also agree Ford had osteoarthritis in the left knee prior to the work incident. Dr. Riley has opined the July 7, 2017 incident exacerbated the pre-existing arthritis and that simply scoping the knee will not alleviate the symptoms. He was very quick to point out that if pain was present in the left knee in advance of the injury date then his opinion would be that there was not an exacerbation.

Dr. Bonnarens acknowledged the injury and opined it should have been a temporary one lasting three to four weeks. He went on to describe why he felt the meniscus

tear present on the MRI was not acute but degenerative in nature; that the total knee replacement was to treat Ford's longstanding osteoarthritis; that there was no permanent injury to the knee from the July 7, 2017 incident and that the arthritis in the knee was active prior to the incident as evidenced by the joint space narrowing, degenerative changes in the meniscus and bony remodeling.

One cannot ignore the fact that Ford had his right knee replaced in 2014 due to osteoarthritis. Similarly, one cannot ignore Ford's testimony. He was working full duty without restrictions at the time of the 2017 incident. Immediately prior he had climbed a ladder into the ceiling where he was working. Although there is supposition that he complained of left knee pain to Dr. Hume in 2016 based on a complaint of bilateral hip and lower extremity pain, Ford denies any such pain in the left knee or treatment for it prior to the 2017 incident. In describing the incident itself, he is specific as to the date and time and task he was performing when it occurred. Despite Dr. Bonnarens opinion that that pivoting to the left would not have caused injury, Ford vividly describes the onset of pain in the left knee and even said he almost urinated on himself when it happened because of the pain. Also contrary to Dr. Bonnarens' expectation of a three to four week temporary injury, Ford underwent steroid injections and conservative treatment all the way through December 2017 without longstanding relief. He continues to have difficulty weight bearing on the left knee.

This is a Plaintiff who, after having his right knee replaced in 2014, returned to work six weeks after the surgery full duty. He is motivated and has testified he wishes to have the left knee treated so that he might make a return to gainful employment. The ALJ, consistent with Dr. Riley and Dr. Bonnarens recognizes Ford had pre-existing osteoarthritis in the left knee. Unfortunately for both parties, the incident on July 7, 2017 did cause an injury to the knee that, contrary to Dr. Bonnarens' expectations, has not resolved a month or now even eighteen months later. Although the ALJ understands the Defendant's contention that Ford had osteoarthritis in the knee prior to the incident, that fact does not relieve it of liability for the effects of the

incident if it is proven that the incident has hastened the need for the left knee replacement by exacerbating the underlying condition.

The undersigned finds Ford to be credible when he says he did not have left knee complaints or treatment prior to the 2017 work incident. There is no evidence introduced to rebut that except Dr. Hume's note that references bilateral hip and lower extremity pain. The ALJ does not find that somewhat amorphous and general note to dispel with Ford's credible testimony. The fact that Ford may have had to have the left knee replaced at some point in the future is not the question. The question is whether or not the July 7, 2017 incident caused an injury and whether or not the proposed treatment is intended for the cure and relief of that injury, is medically reasonable and necessary and hastened the need. *See* Bright v. American Greetings Corp., 62 S.W.3d 381 (Ky. 2001); Derr Construction Co. v. Bennett, 873 S.W.2d 824 (Ky. 1994); *see also* Addington Resources, Inc. v. Perkins, 947 S.W.2d 421 (Ky. App. 1977).

Here, the burden of persuasion is on Ford with regard to the elements of her cause of action. The undersigned finds he has satisfied both his burden of proof and his burden of persuasion. The ALJ acknowledges Dr. Bonnarens has offered logical and sound opinion evidence to the contrary. However, the ALJ is persuaded by Ford's testimony regarding the asymptomatic nature of his left knee prior to the incident, his detailed description of the injury and testimony that he has continuing complaints. That testimony is consistent with Dr. Riley's opinion and, for that reason, in this instance Dr. Riley is the most persuasive.

Defendant argues Ford's condition was preexisting and active. For the reasons set forth above, and in reliance on Ford's testimony and the opinion of Dr. Riley, the ALJ rejects that argument as it pertains to the compensability and need for the left knee replacement. The Defendant may later argue that some portion of the left knee condition was impairment ratable prior to the July 7, 2017 and the ALJ will not foreclose that argument at a later date. However, the undersigned

finds the work incident exacerbated Ford's dormant osteoarthritis and has caused the need for the proposed left knee replacement surgery.

Thereafter, the parties litigated this case to a conclusion. The ALJ held a second hearing and considered additional evidence from Ford, Dr. Jules Barefoot, Dr. Grossfeld, and additional medical evidence from Dr. Riley.

Following the interlocutory opinion, Ford testified once again by deposition and at the second final hearing. Ford testified he continued to experience a dull ache in the left leg. He has been released to return to work by Dr. Riley but continues to have some numbness and popping in the leg. Ford has not returned to work and does not feel capable of doing so. He is able to stand and walk, but then must elevate his leg for relief. He has continued swelling and cannot bend or squat. He spends eight hours a day in a chair elevating his leg. He has difficulties in performing activities of daily living.

Ford filed additional medical records from Dr. Riley detailing Ford's April 2, 2019 total left knee arthroplasty. The records indicate Ford's post-operative recovery, and that by June 24, 2019, he was doing well enough to be released to work with half-standing, half-seated restrictions. On August 7, 2019, Ford advised that he had continued discomfort with prolonged standing. He did not feel capable of returning to work. Ford was last seen on September 20, 2019 and despite his belief that he was incapable of working, he was released to return to work without restrictions.

Dr. Grossfeld evaluated Ford at Lyon's request on December 9, 2019. She received a history of Ford's July 7, 2017 work-related incident and the medical

treatment received as a result. Dr. Grossfeld reviewed all medical records and diagnostic studies performed to date and performed a physical examination. She opined Ford suffered a left knee strain as a result of the work incident and had a successful left knee replacement. Dr. Grossfeld opined the meniscal pathology and osteoarthritic conditions were pre-existing, active, and secondary to Ford's morbid obesity. Dr. Grossfeld opined the need for the left knee replacement surgery was not as a result of the work incident but was necessitated by his pre-existing conditions.

Lyon submitted a supplemental report from Dr. Grossfeld. Dr. Grossfeld opined that regardless of causation, Ford has a 15% impairment for his left knee condition, of which she further opined that 10% of the 15% is due to prior active conditions.

Dr. Barefoot evaluated Ford on October 19, 2019. He received a history of the July 7, 2017 work incident; the medical treatment received as a result, including the surgery notes; reviewed all medical records and diagnostic studies performed to date, and performed a physical examination. Dr. Barefoot noted the prior non-work-related right knee replacement. Dr. Barefoot a work-related left knee injury arousing pre-existing osteoarthritis present in his left knee, prior to the work incident, that was asymptomatic, dormant, non-disabling, and non-impairment ratable prior to the work incident. Dr. Barefoot assessed a 20% impairment rating for the left knee condition and opined Ford does not have the physical capacity to return to work for Lyon. In the Opinion, Award, and Order, the ALJ found as follows, *verbatim*:

The Defendant argues the ALJ should revisit the issue of causation. It argues that Dr. Grossfeld's opinion is that

Ford's total knee replacement was due to an idiopathic condition and that the ALJ should reconsider the prior finding. It also cites Dr. Bonnarens' testimony that Ford is morbidly obese and has osteoarthritis in the left knee that was gradual over time. Based on the combination of Dr. Bonnarens and Dr. Grossfeld, the Defendant contends Ford suffered only a strain on July 7, 2017 and that there was no trauma that caused or accelerated the osteoarthritis in Ford's left knee.

The Interlocutory finding considered Dr. Bonnarens' opinion regarding the work incident. That opinion notes that Ford was working full duty prior to the 2017 work incident and that on the date in question he experienced the onset of severe left knee pain. The undersigned found Ford suffered an injury to the left knee and that the incident in question hastened the need for the left knee replacement. Dr. Grossfeld shares the opinion of Dr. Bonnarens. By offering additional evidence of the same character, however, does not compel the ALJ to reconsider the initial finding of causation and work-relatedness of the left knee injury and replacement. Again, the ALJ recognizes the presence of osteoarthritis in the left knee prior to the accident. However, the incident in question was found to have exacerbated that otherwise dormant condition such that it came into a disabling reality. The ALJ declines to change the decision that Ford's left knee condition is the result of a work-related injury.

B. Extent and Duration/Permanent Total Disability/Benefits per KRS 342.730/Pre-existing active impairment/Conformity with the AMA Guides

Ford claims he is permanently and totally disabled as a result of his left knee injury and replacement. The Defendant submits Ford has had a good result following the replacement and that he had an active pre-injury impairment to the left knee of 10%. It asserts only 5% of the left knee impairment is compensable and that Ford's award should be limited to permanent partial disability benefits based on 5% and no multipliers given Dr. Riley's release to return to work without restrictions.

A review of Dr. Riley's post-surgical treatment indicates he believed Ford had a good result from the knee

replacement with strength, no swelling or atrophy. He released Ford to return to work with half sitting and half standing work. By September 20, 2019 he released Ford to return to work at full duty.

Dr. Grossfeld shared that opinion and characterized Ford's left knee replacement as a good result. Similarly, Dr. Barefoot's report noted no muscle atrophy or significant swelling. Lyon Company argues that Table 17-31 entitled Arthritis Impairments Based on Roentgenographically Determined Cartilage Intervals dictates a finding that Ford had ratable impairment in advance of the injury in the form of reduced cartilage in the knee.

Dr. Grossfeld opined that the knee replacement carries a 15% whole person impairment rating that, in this case because of Table 17-31, should result in a carve-out of 10% impairment as pre-existing.

Plaintiff argues Dr. Grossfeld failed to adhere to the Guides as she did not perform the point system testing (or at least set it forth in her report) that is required by Table 1735 to rate impairment following a total knee replacement.

Lyon filed a Petition for Reconsideration arguing the ALJ erred in finding no pre-existing impairment. Lyon argues Ford's left knee condition was impairment ratable immediately prior to the work incident as evidenced by the opinions of Dr. Bonnarens and Dr. Grossfeld, who attributed 10% of the 15% impairment assessed to the pre-existing condition. Lyon reiterated its argument that only 5% impairment resulted from the work incident. In an Order dated April 22, 2020, the ALJ overruled the petition as a re-argument of the cases merits. This appeal followed.

As the claimant in a workers' compensation proceeding, Ford had the burden of proving each of the essential elements of his claim. Snawder v. Stice, 576

S.W.2d 276 (Ky. App. 1979). Because Ford was successful in his burden, 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). 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).

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 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 require reversal on appeal. Id. In order to reverse the decision of the ALJ, it must be shown there was no substantial evidence of probative value to support his decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

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*. As long as the ALJ's ruling regarding an issue is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, *supra*.

On appeal, Lyon argues the ALJ erred by failing to apportion Ford's permanent impairment to his pre-existing condition. It argues the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"), chapter 17, and KRS, chapter 342, compel a finding that 10% of the 15% impairment rating assessed should be apportioned to Ford's pre-existing, unrelated advanced osteoarthritis. It further argues Table 17-31 of the AMA Guides compels finding of the existence of this impairment, regardless of whether the Ford had subjective complaints of pain. Lyon posits it should only be responsible for the 5% increase in impairment and nothing more. Ford argues the ALJ correctly decided the case as Lyon failed to prove the existence of a pre-existing condition that was both impairment ratable pursuant to the AMA Guides and symptomatic immediately prior to the work injury. Finley v. DBM Technologies, 217 S.W.3d 265 (Ky. App. 2007).

The ALJ was confronted with conflicting evidence regarding the issues of extent and duration of disability and pre-existing impairment/disability. Dr. Barefoot opined Ford did not suffer from a preexisting impairment/disability; his condition was dormant, non-disabling, and aroused into disabling reality by the work

incident, necessitating the need for surgery and the resultant impairment. Dr. Bonnarens and Dr. Grossfeld opined Ford retains a 15% impairment rating but apportioned 10% of the same to pre-existing active osteoarthritis. Both likewise opined the surgery was necessitated by the preexisting condition and is not attributable to the work incident. The ALJ found the opinions of Dr. Barefoot the most persuasive.

In addition, there is simply no proof in the record to satisfy the second prong of the two part test set forth in Finley v. DBM Technologies, supra. In Finley, the Court was clear that for an employer to successfully meet their burden of proving the existence of a preexisting condition, the employer must prove that the underlying pre-existing condition was both symptomatic and impairment ratable immediately prior to the work injury.

In this case, the ALJ properly exercised his discretion in picking and choosing from the evidence in determining Ford suffered a 15% impairment rating resulting from the work incident. Magic Coal v. Fox, supra; Whitaker v. Rowland, supra. In addition, the ALJ properly found there was no evidence in the record indicating the left knee condition was symptomatic immediately prior to the work incident. Therefore, Lyon did not meet its burden of proving the existence of a pre-existing active condition. We find no error in this determination.

Accordingly, the Opinion, Award, and Order of April 6, 2020 and the Order dated April 22, 2020 issued by the Hon. W. Greg Harvey, Administrative Law Judge, are **AFFIRMED**.

ALL CONCUR.

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