Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: June 10, 2022

CLAIM NO. 202078494

MARION ESTERS PETITIONER

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

TRANSIT AUTHORITY OF CENTRAL KENTUCKY and
HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

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

MILLER, Member. Marion Esters ("Esters") appeals from the July 19, 2021 Opinion and Order of Hon. Jonathan R. Weatherby, Administrative Law Judge ("ALJ"). The ALJ awarded temporary total disability benefits from June 15, 2020 to November 12, 2020, as well as medical benefits through November 12, 2020. The ALJ determined the work injury caused a temporary aggravation to the left hand

which returned to baseline. A petition for reconsideration was not filed. For the reasons set forth below, we affirm.

BACKGROUND

Esters suffered a work injury on June 15, 2020 when he was involved in a motor vehicle accident ("MVA") while driving for Transit Authority of Central Kentucky ("TACK"). His job involved transporting passengers to medical or other appointments. The vehicle he was driving was struck from the rear by another vehicle. The impact pushed his vehicle across the median, causing it to strike another vehicle. Esters sustained an injury to his left hand and other body parts. No surgeries were required.

Esters testified at his deposition and at the final hearing. Esters was born on November 8, 1958. He attended school until tenth grade at Hart County High School and never obtained a GED. He is right-handed. His prior work experience was mainly operating a forklift in warehouses, including tobacco and delivery driving.

Esters began driving for TACK in June 2019. On June 15, 2020, he was driving a woman to Louisville, heading North on I-65 near Bullitt County. There was a wreck and while he was passing by, he was rear-ended and went across the median and his vehicle was struck by another car. His injuries included a knot on the back of his head, a knot and scrape on his right shin, and a knot on his left hand. EMS transported him to Hardin Memorial Hospital. Esters was released in three or four hours with his hand wrapped in a cast.

Prior to the MVA, Esters had been diagnosed with muscular dystrophy and received Social Security disability benefits. Esters had been previously diagnosed with osteoarthritis in his thumb. He re-applied for Social Security disability benefits after the June 15, 2020 work incident. Esters testified he was planning to retire in November 2020 when he turned 62. He is receiving early Social Security benefits. Esters testified he does not have the strength in the left hand he had before the injury. He did not think he could perform his job because, at times, it requires escorting people in wheelchairs, and he does not have the strength to help them in and out of the van. Esters testified he has not seen a doctor for treatment for the left-hand injury since November 12, 2020.

Medical records from Baptist Health Hardin Memorial Hospital from June 15, 2020 documented the MVA and Ester's primary complaint of left-hand pain. X-rays revealed no acute fracture or dislocation. The records also noted a right leg abrasion.

Two weeks later, Esters saw Dr. Jeffrey Been of Baptist Health Orthopedics. Dr. Been documented details regarding the MVA and Ester's major complaint of left-hand pain. He diagnosed left hand arthralgia, left hand swelling and contusion. On July 20, 2020, Esters had a follow-up with Dr. Been. At this time, Dr. Been noted less swelling and tenderness over pre-existing carpometacarpal ("CMC") joint arthritis. He ordered continued occupational therapy with the same diagnosis. There were no changes at Esters' August 10, 2020 visit. In total, Esters attended 16 occupational therapy visits. In October 2020, Dr. Been referred Esters to

Dr. Keith Morrison for left hand crush injury/complex regional pain syndrome of the left hand.

Dr. Joseph Oropilla of Baptist Health Hardin Neurology evaluated Esters on November 9, 2020. He performed a nerve conduction study and diagnosed moderate bilateral carpal tunnel syndrome.

Esters was referred to Dr. Keith Morrison, who examined him on November 12, 2020 for a left-hand injury sustained in a MVA on June 15, 2020. Dr. Morrison reviewed X-rays and performed diagnostic tests. Dr. Morrison diagnosed left hand numbness and tingling and left thumb CMC arthritis. No swelling was observed, but there was some thumb weakness with no significant atrophy. Dr. Morrison did not recommend any restrictions for Esters and opined he could return to work. He did not believe Mr. Esters had complex regional pain syndrome as he did not have much pain that day and did not have a lot of temperature changes or swelling.

TACK filed a January 26, 2021 report from Dr. Thomas Loeb, who performed an examination at its request. Dr. Loeb found the MVA caused a contusion to the left hand aggravating his underlying CMC arthritis at the base of the left thumb, but on a transient basis only. He noted the electrically diagnosed bilateral carpal tunnel syndrome but did not believe the MVA caused or aggravated that condition. He found Esters at maximum medical improvement ("MMI") within three to four months of the injury date. Dr. Loeb assessed a 0% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides") and agreed with Dr.

Morrison that no permanent physical restrictions resulted from the MVA. Dr. Loeb found absolutely no evidence, either subjectively or objectively, of complex regional pain syndrome.

Dr. Merrick Wetzler reviewed voluminous records at the request of Esters' counsel. The chief complaint was left hand pain, mostly over the thumb with left thenar atrophy. Dr. Wetzler opined the MVA caused permanent injuries to the left hand and diagnosed Esters with complex regional pain syndrome. He assessed a 12% impairment rating in accordance with the AMA Guides, although he did not state that Esters was at MMI. As of May 18, 2021, the date of the report, he found Esters unable to work.

On appeal, Esters argues he is entitled to receive a permanent partial disability ("PPD") award and additional medical benefits. He also argues the ALJ should have engaged in the appropriate analysis and awarded benefits based on the two or three-multiplier pursuant to KRS 342.730(1)(c) as set forth in Fawbush v. Gwinn, 201 S.W.3d 5 (Ky. 2003).

ANALYSIS

In his brief to the Board, Esters reargues the merits of his claim. Therefore, we must initially refer to KRS 342.285, which states:

> The board shall not substitute its judgment for that of the administrative law judge as to the weight of the evidence on questions of fact, its review being limited to determining whether or not:
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> (d) The order, decision, or award is clearly erroneous on the basis of the reliable, probative, and material evidence contained in the whole record; or

> (e) The order, decision, or award is arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

We note that a petition for reconsideration was not filed. Patent errors in an ALJ opinion and award are unpreserved for appeal if not asserted in a petition for reconsideration. Eaton Axle Corp. v. Nally, 688 S.W.2d 334 (Ky. 1985). Thus, to preserve a question of fact for appellate review, the aggrieved party must file a petition for reconsideration identifying the factual error. Halls Hardwood Floor Co. v. Stapleton, 16 S.W.3d 327 (Ky. App. 2000).

As the claimant in a workers' compensation proceeding, Esters 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 Esters was unsuccessful in his 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); Kroger v. Ligon, 338 S.W. 3d 269, 273 (Ky. 2011). 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).

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). In that regard, an ALJ is vested with broad authority to decide questions involving causation. Dravo Lime Co. v. Eakins, 156 S.W.3d 283 (Ky. 2003). Although a party may note evidence that would have supported a different outcome than that reached by an ALJ, such proof 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 Board, as an appellate tribunal, may not usurp the ALJ's role as factfinder by superimposing its own appraisals as to weight and credibility or by noting other conclusions or reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

The ALJ chose to rely on the opinions of Drs. Loeb and Morrison instead of Dr. Wetzler. Substantial evidence supports the ALJ's determination Esters suffered a temporary injury and the award of benefits. The ALJ specifically relied on Dr. Loeb's opinion in making this determination. Dr. Loeb reviewed the available medical records and performed an examination. He also tested grip strength with a dynamometer which showed no weakness of grip. Esters complained of a stabbing pain in the left hand which, at its worst, he rated a five out of ten on the pain scale. The ongoing diagnosis for the left hand was electrically diagnosed

bilateral carpal tunnel syndrome and longstanding pre-existing CMC arthritis at the base of the left thumb. Dr. Loeb thought Esters sustained a contusion to the left hand, mostly affecting his underlying CMC arthritis. He did not believe there is any evidence of complex regional pain syndrome. Any other body complaints from the MVA had resolved except for the complaints to the left hand. Dr. Loeb opined the contusion to the left thumb aggravated his underlying CMC arthritis transiently, and there was no aggravation or causation to Esters' idiopathic bilateral carpal tunnel syndrome. He found Esters reached MMI within three or four months of the accident, assessed a 0% impairment rating, and agreed with Dr. Morrison that no permanent physical restrictions were necessary because of the accident.

Dr. Morrison examined Esters, reviewed X-rays, and noted no significant swelling and full flexion-extension to the thumb and fingers of the left hand. Dr. Morrison released Esters to full-duty work.

Dr. Wetzler conducted a full records review and noted the complaints of left-hand pain, mostly over the thumb with associated left thenar atrophy. Dr. Wetzler assigned a 12% impairment rating pursuant to the AMA Guides noting loss of grip strength but not citing a specific table or page. He further believed Estes could not return to his pre-injury work and would need medical treatment of his pain. He did not assign an MMI date.

Where the medical evidence is conflicting, the sole authority to determine which witness to believe resides with the ALJ. Staples, Inc. v. Konvelski, 56 S.W.3d 412 (Ky. 2001); Pruitt v. Bugg Brothers, 547 S.W.2d 123 (Ky. 1977). Drs. Loeb and Morrisons' opinions constitute substantial evidence. The ALJ was

entitled to rely on their opinions over other conflicting medical opinions. The evidence does not compel a different result.

Esters furthers argues a Fawbush analysis is mandated. Such analysis is mandated when two prongs of KRS 342.730(1)(c) are applicable to the claim.

KRS 342.730(1)(c) states:

> 1. If, due to an injury, an employee does not retain the physical capacity to return to the type of work that the employee performed at the time of injury, the benefit for permanent partial disability shall be multiplied by three (3) times the amount otherwise determined under paragraph (b) of this subsection, but this provision shall not be construed so as to extend the duration of payments; or
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> 2. If an employee returns to work at a weekly wage equal to or greater than the average weekly wage at the time of injury, the weekly benefit for permanent partial disability shall be determined under paragraph (b) of this subsection for each week during which that employment is sustained. During any period of cessation of that employment, temporary or permanent, for any reason, with or without cause, payment of weekly benefits for permanent partial disability during the period of cessation shall be two (2) times the amount otherwise payable under paragraph (b) of this subsection. This provision shall not be construed as to extend the duration of payments.

The two-multiplier contained in KRS 342.730(1)(c)2 requires a return to work at a weekly wage equal to or greater than the average weekly wage at the time of injury. Here, there is no proof in the record that Esters returned to work earning equal or greater wages. *See* Bryant v. Jessamine Car Care, No. 2018-SC-000265-WC, 2019 WL 1173003 (Ky. Feb. 14, 2019) ("The Fawbush analysis only comes to fruition if the claimant, *has*, in fact, returned to employment").

The three-multiplier requires a finding that an employee does not retain the physical capacity to return to the type of work they performed at the time of the work injury. In this claim, the ALJ found Esters could return to the job where he was injured. For a Fawbush analysis to be necessary, the employee must be unable to return to the same type of employment as when injured, *and* second, the employee must have returned to work making equal or greater wages followed by a period of less wages.

Whether to award permanent benefits and the three-multiplier of KRS 342.730(1)(c)(1) is a question of fact for the ALJ to determine. Esters was released to return to work by Dr. Morrison with no restrictions. Dr. Loeb agreed with that opinion. Esters produced evidence from Dr. Wetzler with a contrary opinion. This is a claim with conflicting medical opinions. It is for the ALJ to determine upon which medical opinion he will base his decision. Mullins v. Mike Catron Construction/Catron Interior Systems, Inc., 237 S.W.3d 561 (Ky. App. 2007). Certainly, the evidence does not compel a contrary result. Because the ALJ found Esters could return to work unrestricted and there was no proof that Esters ever returned to work making equal or greater wages, a Fawbush analysis is not applicable.

Finally, Esters argues he is entitled to future medical benefits. The law is well settled that if an injured worker is found to suffer a permanent disability, he or she is statutorily entitled to future medical treatment pursuant to KRS 342.020; Max & Erma's v. Lane, 290 S.W.3d 695 (Ky. App. 2009). However, if the ALJ finds no permanent impairment and, like this case, a temporary exacerbation of a pre-existing

condition and no future treatments would be necessary, then an award of medical benefits is permissive, not automatic. Mullins, supra.

The ALJ relied on the opinions of Dr. Loeb and Dr. Morrison in reaching his conclusion that Esters suffered a temporary aggravation to his left thumb, but no permanent impairment from the work accident. Dr. Loeb further opined any future medical treatment regarding the carpal tunnel syndrome would be unrelated to the work accident. These findings were not challenged by a petition for reconsideration and are supported by substantial evidence.

Accordingly, the July 19, 2021 Opinion and Award of Hon. Jonathan Weatherby is **AFFIRMED**.

ALL CONCUR.

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