Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: June 10, 2022

CLAIM NO. 202100189

MELISSA BRADLEY PETITIONER

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

LAKE CUMBERLAND REGIONAL HOSPITAL and
HON. JOHN MCCRACKEN,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

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

MILLER, Member. Melissa Bradley ("Bradley") appeals from the November 23, 2021, Opinion, Award, and Order and the December 28, 2021, Order denying her Petition for Reconsideration rendered by Hon. John H. McCracken, Administrative Law Judge ("ALJ"). The ALJ found Bradley had a 9% whole person impairment ("WPI") rating and awarded permanent partial disability ("PPD") benefits enhanced

by the three-multiplier contained in KRS 342.730(1)(c)1. The ALJ declined to find Bradley permanently totally disabled.

On appeal, Bradley argues the ALJ erred in relying on ViWin Tech Windows and Doors v. Ivey, 621 S.W.3d 153 (Ky. 2021) and did not properly assess Dr. John Gilbert's medical opinion in his findings. Fundamentally, Bradley argues the ALJ utilized an incorrect impairment rating in issuing the award. For the reasons set forth below, we affirm.

BACKGROUND

Bradley worked at Lake Cumberland Regional Hospital ("Lake Cumberland") for 20 years. Bradley started as a lab technician and then began working as a registered nurse in the emergency room in 2003. Bradley was 45 years old at the time she suffered a work injury on January 13, 2020.

Prior to her 2020 work injury, Bradley had two previous back surgeries. In 2012, Dr. Magdy El-Kalliny performed an L5-S1 hemilaminectomy and discectomy. Bradley returned to her job as a nurse with no restrictions. In 2015, Dr. El-Kalliny performed a spinal fusion at L5-S1, and Bradley returned to work after six weeks without any restrictions. Both prior surgeries were due to work-related injuries. Bradley received temporary total disability benefits and medical benefits but did not file a claim for permanent benefits.

Bradley testified by deposition and at the final hearing. On January 13, 2020, she was assisting a 400-pound patient who had just been discharged from the hospital. She stated three other members of the nursing staff were assisting her. They took the patient to a vehicle in a wheelchair, but the patient stood up and then

collapsed and fell on top of Bradley. The patient's weight was bearing on Bradley, who landed in a crouched position with her legs underneath her.

Bradley immediately felt pain in her lower back that went down both legs. She testified the pain in her right leg went down to her knee, but the pain in her left leg went all the way down to her foot. After her injury, Bradley attended physical therapy and received epidural injections, but did not see improvement. In June 2020, Dr. Amr El-Naggar performed an L3-4 and L4-5 posterior lumbar interbody fusion. Prior to surgery, Bradley worked light duty for a short period of time but has not returned to work since March 2020. She was terminated from employment in August 2020 when her FMLA leave ran out.

After her spinal fusion surgery, Bradley had multiple falls, experienced numbness in her left leg, and had problems emptying her bladder. By September 2020, Bradley had shown significant improvement and was able to walk without an assisted device, but still experienced pain in both legs from her thighs to her knees. Bradley testified at the final hearing she continues to suffer falls on a regular basis when she experiences numbness in her legs. Bradley does not believe she can perform her job as an ER nurse as she cannot lift or assist patients in getting them in and out of a vehicle, in a wheelchair, or into a bed. Bradley testified she cannot sit or stand for more than an hour and is in pain most of the day.

On September 28, 2020, Dr. El-Naggar believed Bradley had reached maximum medical improvement ("MMI"). He issued permanent restrictions of no lifting over five pounds; no repetitive bending or twisting; and alternating sitting, standing, and walking every 30 minutes. Dr. El-Naggar assessed a 24% WPI rating

pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"). Dr. El-Naggar also opined Bradley was permanently and totally disabled.

Dr. John Gilbert evaluated Bradley at her request. He prepared a report, which included a review of her prior treatment. He diagnosed three different work injuries that resulted in three different surgeries. Using the AMA Guides, he assigned a 10% WPI rating for the first incident, a lumbar decompression without fusion, 20% for the L5-S1 decompression fusion surgery, and 23% to the January 13, 2020 work event and posterior L3, L4, L5 fusion decompression surgery. Dr. Gilbert used the combined value table contained in the AMA Guides and assessed a 44% WPI rating. He opined the work event as described to him caused the impairment.

Dr. John Vaughan evaluated Bradley at Lake Cumberland's request and submitted a report on May 19, 2021. He reviewed Bradley's prior medical records and conducted a physical examination. Dr. Vaughan diagnosed adjacent segment disease at L3-4 and L4-5 and status post L3-L4-L5-S1 fusion. He agreed with Dr. El-Naggar's September 28, 2020 MMI date but disagreed with his and Dr. Gilbert's impairment ratings. Dr. Vaughan believed Dr. El-Naggar and Dr. Gilbert had used the DRE method, but stated that the Range of Motion method was appropriate when there have been multiple injuries and multiple surgeries to the same spine region. Pursuant to the Range of Motion method contained in the AMA Guides, he assessed a 29% WPI rating with 20% assigned to Bradley's prior injuries. Accordingly, he assessed a 9% net impairment rating arising from the January 13, 2020 work injury.

Dr. Vaughan recommended restrictions of no lifting over 15 pounds, avoid bending and twisting at the waist, and alternating between standing and sitting as needed. He does not believe Bradley can return to her work as a nurse but opined she could perform sedentary or light duty jobs.

At Lake Cumberland's request, Dr. Ralph Crystal evaluated Bradley and prepared a vocational evaluation report. Dr. Crystal opined Bradley exhibited average intelligence and mental abilities and was literate for a range of jobs. He listed several types of jobs he believed Bradley could perform, including medical file reviewer, admissions and intake clerk, utilization review nurse, tele-health nurse, call center nurse, scheduler, and medical practice supervisor, along with a list of alternate clerical and service jobs. He opined Bradley could enter a wide range of jobs and was not disabled from employment.

Lake Cumberland also submitted a report from Dr. Christopher Bingham. Dr. Bingham reviewed Bradley's medical records but did not conduct a physical examination. Like Dr. Vaughan, he used the Range of Motion method to determine Bradley's impairment due to multilevel involvement. He stated her total impairment was between 24 and 28%. He apportioned 20% to her prior surgeries and opined her net impairment rating was between 4-8%. He also believed it was probable Bradley could return to sedentary or light duty work but stated a functional capacity evaluation may provide further clarity.

The ALJ conducted a formal Hearing on October 27, 2021 and rendered his Opinion, Award, and Order on November 23, 2021. Relying on medical evidence from Dr. Vaughan, the ALJ found Bradley sustained a 9%

impairment rating caused by the January 13, 2020 work injury, utilizing Dr. Vaughn's 29% range of motion impairment but subtracted 20% impairment for the pre-existing surgeries. The ALJ recognized there were no range of motion measurements for the prior two surgeries. He awarded PPD benefits using the three-multiplier and medical expenses but declined to find Bradley permanently and totally disabled.

Bradley filed a Petition for Reconsideration alleging patent error in the ALJ's findings regarding the appropriate impairment rating. She also argued the ALJ did not make sufficient findings as to why Dr. Gilbert's rating was not adopted. The ALJ denied Bradley's Petition for Reconsideration on December 28, 2021. This appeal follows.

On appeal, Bradley argues the ALJ erred in relying on ViWin Tech Windows and Doors v. Ivey, supra, and did not properly assess Dr. Gilbert's medical opinion in its findings.

ANALYSIS

As the claimant in this workers' compensation proceeding, Bradley had the burden of proving each of the essential elements of her cause of action. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since she was unsuccessful before the ALJ, 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). This is a high burden to overcome as it is not enough to show there

was evidence of substance which would have justified a finding in her favor. Special Fund v. Francis, 708 S.W. 2d 641 (Ky. 1986).

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 that 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, Kentucky's Workers' Compensation Act grants the ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. *See* KRS 342.275; KRS 342.285; AK Steel Corp. v. Adkins, 253 S.W.3d 59 (Ky. 2008). The 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. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15, 16 (Ky. 1977). Although a party may note evidence supporting an outcome other than that reached by the ALJ, this is not adequate to support a reversal on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact finder by superimposing its own appraisals as to weight and credibility or by noting reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479, 481 (Ky. 1999).

Bradley argues the ALJ erred in relying on ViWin Tech Windows and Doors v. Ivey, supra, in his Opinion, Award, and Order. In determining Bradley's impairment rating, the ALJ's findings are set forth *verbatim*:

> The ALJ does not believe that Dr. Gilbert and Dr. El-Naggar have properly used the AMA Guides in evaluating Bradley's impairment. They used the DRE method when the guides suggest using the range of motion method when multiple levels are involved. The ALJ relies on Dr. El-Naggar and Dr. Vaughan to find that Bradley had three surgeries from 2013 to 2020 that involved multiple vertebral levels. The ALJ relies on Dr. Vaughan to find that Bradley sustained a 29% impairment because of the January 13, 2020 work accident. However, calculating the prior impairment due to her 2013 and 2015 L5-S1 surgeries is different as there are no range of motion measurements from that period.
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> Viwin Tech Windows and Doors v. Mark E. Ivey, 621 S.W.3d 153 (Ky. 2021) is applicable in this claim. The ALJ believes the case at bar more closely resembles the Ivey, supra, case than it does Finley v. DBM Technologies, 217 S.W.3d 261 (Ky. App. 2007). Bradley had two prior surgeries at the L5-S1 level. The third surgery following her January 13, 2020 work injury was a fusion at L3-4, L4-5 and L5-S1.
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> Dr. Gilbert found 10% impairment for the 2013 surgery, 20% impairment for the 2015 surgery. Using the table at page 604 of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition translates this to a 28% impairment. If the ALJ uses Dr. Gilbert's impairment assessments, Bradley has a net impairment of 1%. Dr. El-Naggar did not provide impairment assessment for the first two surgeries. The ALJ does not believe that a 1% impairment adequately represents her net impairment caused by the January 13, 2020 work accident. The ALJ relies on Dr. Vaughan to find that her pre-existing impairment due to the 2013 and 2015 surgeries is 20% which yields a net 9% impairment because of the January 13, 2020 work accident.

KRS 342.730(1)(b) sets forth the formula for establishing the income benefit for permanent disability benefits. Within the formula, the legislature has provided multiplication by the permanent impairment rating caused by the injury or occupational disease as determined by the AMA Guides.

"Permanent impairment rating" is defined as percentage of whole-body impairment caused by the injury or occupational disease as determined by the Guides. KRS 342.0011(35). KRS 342.730(1) also states that impairment due to a nonwork-related disability may not be considered in determining PPD or permanent total disability benefits. It is well-established that the work-related arousal of a pre-existing dormant condition into disabling reality is compensable. McNutt Construction/First General Services v. Scott, 40 S.W.3d 854 (Ky. 2001).

In Finley v. DBM Technologies, 217 S.W.3d 261 (Ky. App. 2007), the claimant suffered from pre-existing congenital scoliosis. Before her work injury, Finley's congenital scoliosis was both asymptomatic and required no treatment. Finley, supra, at 263. It was undisputed that the work injury aroused the scoliosis into a disabling reality. Id. To remedy the work injury and the scoliosis, Finley underwent two surgical procedures. Id. The Court of Appeals held that, "[w]hen a pre-existing dormant condition is aroused into disabling reality by a work-related injury, any impairment or medical expense related solely to the pre-existing condition is compensable." Id. at 265. However, the pre-existing condition must be asymptomatic and produce no impairment prior to the work injury to be considered a "pre-existing dormant condition." Id. In both McNutt and Finley, the dormant underlying condition was neither disabling nor treated prior to the work injury.

In Wetherby v. Amazon.com, 580 S.W.3d 521 (Ky. 2019), the Kentucky Supreme Court discussed the impact of Finley when a claimant has had a prior surgery at the same spinal segment as the work injury, but not the exact spinal level. In that case, there were two prior surgeries to the cervical spine. The Court

acknowledged Wetherby's pre-injury condition was asymptomatic and found to be unrelated to the work injury, nevertheless it was proper to subtract prior impairment pursuant to the Guides. Id. at 529. Finley was not applicable, as the issue was not the arousal of a pre-existing dormant or active condition that was affected by the work injury.

Two years later in ViWin Tech, supra, the Court held the ALJ erred in applying Finley where the claimant had a prior surgery at the same spinal level as that caused by the work injury. The Court stated:

> The difference between this case and Finley is that Ms. Finley had a dormant, asymptomatic congenital condition. She had never been treated. On the other hand, Ivey had undergone two prior surgeries at the precise location, L4-5, that his workplace injury occurred. Although he was asymptomatic, under the AMA Guides, he had an impairment rating because of the prior surgeries. We find it completely illogical to conclude that a worker who has had two prior surgeries of the type Ivey had and who reinjures himself at the precise same location can be said not to have a pre-existing condition. Accordingly, the ALJ erred in concluding otherwise.

VinWin Tech, supra, at 158.

ViWin Tech involved prior surgeries to the exact lumbar disc level where the subsequent work injury occurred. The Court held, because the prior condition was impairment ratable, there must be a deduction of the prior impairment from the PPD impairment rating for the work injury. Id.

Because Bradley had two lumbar surgeries prior to the work injury, she had an impairment ratable condition. Thus, her case is factually analogous to

Wetherby and ViWin Tech, and the ALJ did not err in relying on Dr. Vaughan's net 9% WPI rating.

Bradley argues the present claim is distinguishable from ViWin Tech because her work injury occurred at a different segment of the spine, whereas the injury in ViWin Tech involved the same spinal level. The ViWin Tech Court, however, explicitly reiterated its approval of the ALJ's deduction in Wetherby for prior injury based on the AMA Guides, notwithstanding the ALJ's finding that a different part of the spine was injured. ViWin Tech, supra, at 158-159.

Like the medical experts relied upon in Wetherby and ViWin Tech, Dr. Vaughan utilized the Range of Motion method to determine Bradley's impairment rating. The AMA Guides state that the Range of Motion method should be utilized when "there is multilevel involvement in the same spinal region (e.g., fractures at multiple levels, disk herniations, or stenosis with radiculopathy at multiple levels or bilaterally)" or where "there is alteration of motion segment integrity (e.g., fusions) at multiple levels in the same spinal region." Guides at 380. Here, the 2015 fusion was at L5-S1, and the 2020 fusion was at the adjacent levels of L3-4 and L4-5. Dr. Vaughan noted severe disc degeneration at L3-4 and L4-5 above her prior fusion. Dr. El- Naggar also noted severe disc disease at the adjacent level to L5-S1. Because Bradley's impairment involved fusions at multiple levels, the ALJ did not err in accepting an impairment rating based on the Range of Motion method.

It is noted the ALJ stated the 2020 fusion encompassed L3-4, L4-5, and L5-S1. Regardless of whether this claim is viewed through the lens of ViWin Tech, the exact disc level involved, or through Wetherby, the same spinal segment,

the outcome is the same. The evidence relied upon certainly does not compel a contrary result.

The ALJ reasonably relied upon and adopted the findings of Dr. Vaughan, whose methodology and conclusions were grounded in the AMA Guides. Dr. Vaughan's use of the Range of Motion method for the work injury at issue and his use of the DRE method for Bradley's prior injuries to the L5-S1 level are grounded in Section 15.2 of the AMA Guides and his report explained his rationale for doing so. This constitutes substantial evidence. Further, "the proper interpretation of the Guides and the proper assessment of an impairment rating are medical questions." Plumley v. Kroger, Inc., 557 S.W.3d 905, 913 (Ky. 2018) (citing Kentucky River Enterprises, Inc. v. Elkins, 107 S.W.3d 206 (Ky. 2003)). This point is essential as the ALJ does not apply the Guides but rather chooses which medical opinion to believe. Pruitt v. Bugg Brothers, 547 S.W.2d 123 (Ky. 1977). Because the ALJ relied on a medical opinion grounded in the AMA Guides and did not err in relying on the deduction of Bradley's prior impairment based on the holdings in Wetherby and ViWin Tech, no reversible error occurred.

Bradley also argues the ALJ did not properly consider Dr. Gilbert's rating. The ALJ may pick and choose among conflicting medical opinions and has the sole authority to determine whom to believe. Pruitt, supra. It is also the ALJ's "sole authority [as the fact-finder] to judge the weight, credibility, substance, and inferences to be drawn from the evidence." AK Steel Corp. v. Adkins, supra, at 64.

The assignment of a permanent impairment rating is a question appropriately reserved to the medical experts, while the weight and credibility of

medical evidence is a question exclusively within the province of the fact-finder. George Humfleet Mobile Homes v. Christman, 125 S.W 3d 288, 294 (Ky. 2004).

In his findings, the ALJ discussed Dr. Gilbert's combined 44% WPI rating, as well as his rating for each of Bradley's surgeries, and acknowledged Dr. Gilbert's use of the DRE method. Bradley requests the ALJ simply use the 23% impairment rating assessed by Dr. Gilbert for the 2020 fusion surgery. The ALJ sufficiently explained why he was not adopting the ratings of Dr. El-Naggar or Dr. Gilbert:

> The ALJ does not believe that Dr. Gilbert and Dr. El-Naggar have properly used the AMA Guides in evaluating Bradley's impairment. They used the DRE method when the guides suggest using the range of motion method when multiple levels are involved. The ALJ relies on Dr. El-Naggar and Dr. Vaughan to find that Bradley had three surgeries from 2013 to 2020 that involved multiple vertebral levels.

The ALJ set forth sufficient findings apprising the parties and this Board of his rationale and the substantial evidence supportive of his ultimate conclusions. 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); Big Sandy Community Action Program v. Chaffins, 502 S.W.2d 526 (Ky. 1973). It was within the sole province of the ALJ to choose which medical opinion to believe as all opinions were grounded in the AMA Guides. Thus, the Board finds that the evidence does not compel a different result.

Accordingly, the November 23, 2021, Opinion, Award, and Order and the December 28, 2021, Order on Petition for Reconsideration rendered by Hon. John H. McCracken, Administrative Law Judge, are **AFFIRMED**.

ALL CONCUR.

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