

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: February 18, 2022

CLAIM NO. 201695061

NICHOLAS BASS

PETITIONER

VS. **APPEAL FROM HON. MONICA RICE-SMITH,
ADMINISTRATIVE LAW JUDGE**

ZENITH LOGISTICS
and HON. MONICA RICE-SMITH,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
AFFIRMING**

* * * * *

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

STIVERS, Member. Nicholas Bass (“Bass”), *pro se*, seeks review of the July 2, 2021, Opinion, Award, and Order of Hon. Monica Rice-Smith, Administrative Law Judge (“ALJ”). Upon reopening, the ALJ found a worsening of impairment and awarded increased permanent partial disability (“PPD”) benefits from the date Bass filed his Motion to Reopen extending through the remainder of the 425-week award of PPD

benefits.¹ Bass also appeals from the October 6, 2021, Order overruling his Petition for Reconsideration.

On appeal, Bass argues the ALJ erroneously relied upon Dr. Thomas Loeb's assessment of Bass' current impairment rating. He argues the ALJ should have relied upon the impairment rating of Dr. Michael Casnellie since he utilized the more appropriate method in the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides") in his assessment of Bass' impairment rating. Bass also takes issue with the ALJ's failure to award temporary total disability ("TTD") benefits.

BACKGROUND

The parties have engaged in continuous litigation spanning more than five years. Bass filed separate claims for a September 4, 2015, neck injury due to cumulative trauma (Claim No. 2017-00136), and a January 6, 2016, lumbar injury (Claim No. 2016-95061). By Order dated March 3, 2017, the claims were consolidated.

In a December 27, 2017, Opinion, Order, and Award, Hon. Grant S. Roark, Administrative Law Judge ("ALJ Roark") found Bass failed to prove he sustained a work-related cervical injury but did not order Claim No. 2017-00136 dismissed. However, ALJ Roark found Bass sustained a compensable lumbar injury resulting in a 13% impairment rating. ALJ Roark determined the three-multiplier set forth in KRS 342.730(1)(c)1 was applicable and enhanced Bass' PPD benefits. ALJ

¹ Because Bass' copy of the July 2, 2021, decision was sent to the wrong address, by Order dated September 8, 2021, the ALJ reissued the decision as of the date of the Order.

Roark denied Bass' Petition for Reconsideration. Bass appealed to this Board regarding the ALJ's finding he did not sustain a work-related cervical injury. In our June 8, 2018, Opinion, we affirmed ALJ Roark's determination. Three days after we entered our decision, on June 11, 2018, Zenith Logistics ("Zenith") filed a Form 112 Notice of Medical Fee Contest and Motion to Add Additional Party contesting the lumbar surgery recommended by Dr. Casnellie.² Thereafter, Bass appealed this Board's decision to the Kentucky Court of Appeals. In a decision rendered March 1, 2019, the Court of Appeals affirmed the decisions of ALJ Roark and this Board. The claim was subsequently reassigned to Hon. Brent E. Dye, Administrative Law Judge ("ALJ Dye").

On August 29, 2019, ALJ Dye entered an Order dismissing Claim No. 2017-00136 and deconsolidating it from Claim No. 2016-95061 in which ALJ Roark had entered an award for a lumbar spine injury. On that same date, ALJ Dye granted Zenith's Motion to Reopen to assert a Medical Fee Dispute and its Motion to Add Dr. Casnellie as a party. ALJ Dye set the matter for a telephonic conference.

Thereafter, the parties introduced medical proof. A formal hearing was conducted on January 31, 2020, at which Bass testified. In a February 26, 2020, Opinion, Award, and Order, ALJ Dye found the proposed surgery consisting of a left L2-S1 decompression and fusion open posterior procedure performed by Dr. Casnellie on August 7, 2018, to be work-related and compensable. ALJ Dye ordered Zenith to pay for the surgery.

² Zenith sought to join Dr. Casnellie as a party.

Bass filed a Petition for Reconsideration which ALJ Dye overruled noting it was not timely filed. On April 21, 2020, Bass filed a Motion to Appeal to the Workers' Compensation Board. On May 12, 2020, Hon Christopher Evensen ("Evensen") filed his Notice of Representation as Bass' attorney. On May 18, 2020, Bass filed a Motion to Reopen for Increased Impairment/Occupational Disability.

On May 20, 2020, Evensen filed a Motion to Withdraw as counsel for Bass. On May 21, 2020, Zenith filed a Motion to Dismiss the appeal. It observed ALJ Dye found Bass had not timely filed his Petition for Reconsideration; therefore, since the Notice of Appeal had not been filed within thirty days from ALJ Dye's decision resolving the medical fee dispute, the appeal was not timely. In an Order dated June 24, 2020, the Board sustained Evensen's Motion to Withdraw as counsel for Bass. Further, the Board noted that after reviewing the record it appeared the Petition for Reconsideration submitted to ALJ Dye was not timely filed. The Board ordered Zenith's Motion to Dismiss passed for fifteen days and granted Bass fifteen days from the date of the Order to show cause why the appeal should not be dismissed as untimely.

On July 22, 2020, the Board entered an Opinion and Order Dismissing the appeal after finding Bass had not timely appealed from ALJ Dye's February 26, 2020, Opinion, Award, and Order.

By Order dated September 2, 2020, Hon. Douglas W. Gott, Chief Administrative Law ("CALJ"), found Bass had made the required *prima facie* showing for reopening and sustained Bass' previously filed Motion to Reopen for Increased Impairment/Occupational Disability. The CALJ stated the claim would

be assigned to an ALJ for further adjudication. Thereafter, the claim was assigned to the ALJ.

Bass relied upon the records and report of Dr. Casnellie, and Zenith relied upon the opinions of Dr. Loeb set forth in his November 3, 2020, report.

Bass testified at the May 5, 2021, hearing that he was undergoing pain management. He described that treatment as follows:

Q: Okay. And what kind of treatment are they giving you?

A: Just maybe medication. I just assume I always have an appointment after three months for him to check how I'm progressing with the injury. So I go there every three months, and he prescribed my medication every month.

Bass undergoes pain management treatment every two or three months. He last worked on September 31, 2016, working approximately six hours that day. Because he developed pain on that date, he was sent home before his workday ended.

Since the August 7, 2018, surgery, Bass is able to walk long distances which he was unable to do prior to the surgery. Bass described his current limitations:

Q: Okay. What types of things were you limited to, then, after the surgery?

A: After the surgery, when I put on my pants, I can't stand without holding onto something, and it's difficult. I cannot bend. If, like, after the surgery, if I stand at the kitchen sink to wash dishes, after that, I can feel that, you know – I can feel that it's, like, kind of stiffness in my back.

...

A: ... But after the surgery, I've done good. Yeah, I've done good. After the surgery, I was able [sic] walk proper.

...

A: But it's like – yeah. I'm still also limited on how long I can sit, you know. If when I drive a long time, you know, I will feel it. And I have to take medicine, which I don't even want to take medicine. The Lord knows that, but there are circumstances that, you know –

Bass takes one Gabapentin, two Oxycodone, and three muscle relaxers daily. He has no restrictions on his driver's license.

In finding Bass retains an 18% impairment rating pursuant to the AMA Guides, the ALJ provided the following findings of fact and conclusions of law:

2. Worsening of impairment/disability

Bass has sustained a worsening of his impairment. It is undisputed that Bass has sustained a worsening of his impairment since his opinion and award of December 27, 2017. Dr. Loeb and Dr. Casnellie both assessed increased impairment ratings following the August 7, 2018 work-related surgery.

3. Benefits pursuant to KRS 342.730

The ALJ finds Bass now has an 18% impairment rating. Although Dr. Casnellie explained his reasoning for use of the DRE method of assessing impairment, the ALJ finds Dr. Loeb's use of the Range of Motion method most appropriate under the AMA Guides.

Under 15.2 Determining the Appropriate Method for Assessment, the Guides provide several situations in which the Range of Motion method is appropriate. The Guides specifically state Range of Motion should be used where there is alteration of motion segment integrity (e.g., fusions) at multiple levels in the same spinal region, unless there is involvement of the corticospinal tract. That is Bass' very situation. He had

fusion surgery at multiple levels in his lumbar spine and there is no involvement of the corticospinal tract. Dr. Loeb assessed an 18% impairment based on the Range of Motion method.

The ALJ finds Bass failed to satisfy his burden of proving he is totally disabled. ALJ Roark previously found Bass entitled to the three multiplier, as he was unable to return to the work performed at the time of injury. Although on reopening, the doctors agree Bass has an increase in impairment, neither opined he is disabled from all work or imposed restrictions that would prevent him from performing all employment.

Dr. Loeb and Dr. Casnellie assessed very similar restrictions. Dr. Loeb advised Bass should avoid repetitive bending, stooping, excessive stair climbing, running, jumping, or lifting greater than 20-25 pounds. Dr. Casnellie recommended he avoid repetitive bending, lifting, and twisting. None of these restrictions prevents Bass from engaging in all work activities.

Bass is only 45 years old with two years of education beyond high school. Based on his testimony at the final hearing, he appears to have no learning or developmental disabilities. He has minimal restrictions assessed by Dr. Loeb and Dr. Casnellie. Although Bass remains entitled to the three multiplier, the evidence does not establish he is unable to find and maintain some type of work in a competitive employment market.

The ALJ declined to award TTD benefits reasoning as follows:

Similarly, Bass did not file his motion to reopen until after the period of TTD expired. Bass underwent surgery on August 7, 2018. Dr. Casnellie placed him at MMI at the latest April 6, 2020, when he assigned permanent impairment. Dr. Loeb assessed MMI as of August 2019. Any request for TTD could not extend beyond the latest MMI date of April 6, 2020. Bass did not file his motion to reopen until May 18, 2020, after the period of TTD expired.

Bass filed a Petition for Reconsideration. Concluding Bass' Petition for Reconsideration was merely a re-argument of the facts and a request to re-weigh the

evidence, by Order dated October 6, 2021, the ALJ overruled the Petition for Reconsideration. The ALJ again explained she found Dr. Loeb's opinion regarding Bass' impairment rating most appropriate based on the AMA Guides.

Asserting the ALJ committed an error in assessing the evidence and determining the applicable impairment rating on appeal, Bass argues as follows:

The Hon. ALJ committed an error in her assessment of the evidence presented in relation to the injury in question and ultimately the impairment rating given and the methodology used. In overruling my petition for reconsideration, the ALJ argued that she reserves the right to what evidence to believe or disbelieve. This is a fact that is not up for debate. My argument is that the reason put forth by the ALJ for believing the opinion of Dr. Loeb is not based on facts, as far as the injury in question is concern [sic]. The ALJ argued, 'The Guides specifically state Range of Motion should be used where there is alteration of motion segment integrity (e.g. fusions) at multiple levels **in the same spinal region**, unless there is involvement of the corticospinal tract.' The ALJ's argument that the multilevel fusion involved the same spinal region (lumbar region) is not factual. The surgery performed by Dr. Casenellie [sic] involved the **lumbar and sacral** region. The procedure was **L2-S1 MAST-TLIF**. This is the undisputable fact that the Honorable ALJ did not responded [sic] to. Again, the point is not whether she has the right to choose what opinion to believe, but rather that there is a misrepresentation of the facts of the evidence that informed her choice. In overruling my petition for reconsideration, the honorable ALJ failed to respond to this argument, instead generalized that I was merely rearguing the evidence. This is obviously not the case.

According to the AMA guides, the evaluation of permanent impairment fifth edition, page 379 under section 15.2, the **DRE Method is the principal methodology to use to evaluate an individual who has had a distinct injury**. Further, if the impairment can be **well characterized** by the DRE method, the evaluator should use the DRE method.' [sic] There is no doubt that a four multilevel spinal fusion that involves two

regions of the spine (namely the lumbar and sacral region) can be well characterized by the DRE method. The ALJ clearly pointed that the Range of motion method should be used where multiple levels of the **‘same spinal region’** are involved. The ALJ failed to acknowledge that the injury in question affected two regions of the spine, namely the lumbar and sacral region. Clearly, acknowledging this fact about the injury will disqualify the use of the Range of Motion method. (emphasis not ours).

Bass also contends the ALJ erred in not awarding TTD benefits. He notes his Motion to Reopen met the four-year time limit set forth in KRS 342.125(4). He asserts justice will not be served if he is denied TTD benefits based on procedural rules. We affirm.

ANALYSIS

As the claimant in a workers’ compensation proceeding, Bass had the burden of proving he currently has a 23% impairment rating and is entitled to TTD benefits. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Bass was unsuccessful in that 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). 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).

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 discretion to determine 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). 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). 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 that otherwise could have been drawn from the record. Whittaker v. Rowland, 998 S.W.2d 479, 481 (Ky. 1999). So long as the ALJ's ruling with regard to an issue is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

In his February 25, 2021, note, Dr. Casnellie provided the following explanation for his use of the DRE method set forth in the AMA Guides, and why he believed Dr. Loeb's impairment rating is incorrect.

He may continue with activity as tolerated. Again, I previously advised him to try to avoid repetitive bending, lifting, twisting.

Primary purpose of today's visit is really addressing the IME of Thomas Loeb. First, I would state that he did feel that his work situation aggravated his preexisting condition into a disabling reality so he does agree that

his symptomatic condition was caused by work. He had also advised at [sic] weaning off of oral opioids. While again I think that that is desired if possible which is also what he said, but he is also taking a relatively small and reasonable dose, particularly if it allows him to function better. From a risk-benefit standpoint, again taking two oral opioids per day on average would seem to be reasonable. As far as his impairment rating, he did use the range of motion method since this is a multilevel issue; however, looking at AMA guides, the evaluation of permanent impairment Fifth Edition, page 379 under section 15.2 it does state that the DRE method is the principal methodology to use to evaluate an individual who has had a distinct injury. Further, if the impairment can be well characterized by the DRE method, the evaluator should use the DRE method. That is the principal reason for my choosing of the DRE method as it is well characterized. I would continue to give based off of table 15-3 DRE lumbar category IV with 23% impairment of the whole person. DRE lumbar category IV is used once a person has a fusion. The lower end of that range is 20%. Dr. Loeb gave him 18% because he used the range of motion method, and due to the multilevel nature of his condition, for the sake of argument if Mr. Bass only had a one level fusion he would agree that he should be placed in the DRE lumbar category IV with 20-23% impairment so he has assigned an impairment level lower than a one level fusion to Mr. Bass who has had a four level fusion. Clearly that defies logic. Again, I would use the higher end of the spectrum because of the multilevel nature of his condition, and the fact that he is not able to return to his pre-work injury level of activity.

Dr. Loeb's November 3, 2020, report reflects he reviewed various medical records and conducted a physical examination. The results of his physical examination are as follows:

There is some mild tenderness to palpitation over the lower lumbar spine mostly to the left side without spasm or guarding of the paralumbar musculature. Range of motion using a dual inclinometer reveals forward flexion is 70 degrees with 50 degrees sacral, extension at 20 degrees, and side-to-side bending left and right 25

degrees each. Heel-toe gait is entirely normal bilaterally and regular gait pattern is normal. Deep tendon reflexes reveal trace knee jerk and ankle jerk bilaterally even with reinforcement. Straight leg raising is negative bilaterally at 80 degrees both sitting and supine. He has tight hamstrings at this level, but straight leg raising does not reproduce low back or radicular symptoms. Long-tract signs are negative with normal Babinski and no evidence of clonus bilaterally. Skin, temperature, tone, and pulses are normal on both lower extremities. Sciatic stretch, popliteal compression and figure-4 tests were normal bilaterally. He has a normal neurologic exam in both lower extremities. Hip exam reveals full, painless range of motion in both hips.

Dr. Loeb believed the work injury was due to repetitive heavy lifting over an extended period of time. He diagnosed multilevel degenerative disc disease of the lumbar spine with acute herniated disc at L2-L3 originally. He believed the alleged work injury was a contributing factor to the L2-L3 herniated disc. There also may have been a transient aggravation of the other levels of the lumbar spine. Dr. Loeb noted Bass was already suffering from degenerative disc disease and posterior column arthritic changes. He concluded the pre-existing degenerative disc disease was present and aggravated into disabling reality by the work situation. Bass should avoid repetitive bending, stooping, or lifting greater than 20 to 25 pounds on a day-to-day basis as well as excessive stair climbing and running or jumping activities. Dr. Loeb found Bass attained maximum medical improvement (“MMI”) in approximately August 2019. Dr. Loeb set forth the following explanation for the 18% impairment rating assessed pursuant to the AMA Guides utilizing the range of motion method:

Because of his multilevel pathology and surgical procedures, he falls under the range of motion method. On this basis refer to page 404, Table 15-7. He will fall

under II 'intervertebral disc or other soft lesion category.' F, 'with multiple levels with or without operations and with or without residual signs or symptoms.' Also G, 'with multiple operations with or without residual signs or symptoms.' For the lumbar spine, this is a baseline of 10% to the whole person with four levels involved, this would be 14% to the whole person and after the second operation 2% more percent was added for a total of 16% to the whole person. Then turn to tables 15-8 and 15-9. His major findings by goniometer x 2 on this date of exam revealed that he has a normal range of motion of the lumbar spine in flexion and side-to-side bending. Except for extension of 20 degrees which would add 2% impairment to the whole person for total of 18% to the whole person. All other motion parameters for the lumbar spine was in normal limits.

The opinions of Dr. Loeb set forth above constitute substantial evidence sufficient in our opinion to support the ALJ's finding regarding Bass' current impairment rating. The opinion of Dr. Casnellie represents nothing more than conflicting evidence compelling no particular result. Copar, Inc. v. Rogers, 127 S.W.3d 554 (Ky. 2003). Only the ALJ may determine the applicable impairment rating.

We find no merit in Bass' assertion the ALJ erred in relying upon Dr. Loeb's impairment rating. Within his report, Dr. Loeb explained the methodology he utilized citing to Page 404, Table 15.7 of the AMA Guides in assessing the impairment rating. He also relied upon Tables 15.8 and 15.9 of the AMA Guides.

In Kentucky River Enterprises, Inc. v. Elkins, 107 S.W.3d 206 (Ky. 2003), the Kentucky Supreme Court instructed that the proper interpretation of the AMA Guides is a medical question solely within the province of the medical experts. Consequently, while an ALJ may elect to consult the AMA Guides in assessing the

weight and credibility to be accorded an expert's impairment assessment, as the trier of fact the ALJ is never required to do so. This Board has repeatedly held that the ALJ, as fact-finder, has the authority to pick and choose whom and what to believe from among the medical testimony in the record. The AMA Guides denote that its purpose is to provide objective standards for the "estimating" of permanent impairment ratings by physicians. Because Dr. Loeb is a licensed medical doctor, the ALJ could appropriately assume his expertise in utilizing the AMA Guides was comparable or superior to any other expert medical witnesses of record. The ALJ is not required to look behind an impairment rating and meticulously sift through the AMA Guides to determine whether an impairment assessment harmonizes with that treatise's underlying criteria. Except under compelling circumstances, where it is obvious even to a lay person that a gross misapplication of the AMA Guides has occurred, the issue of which physician's impairment rating is most credible may only be resolved by the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985).

As fact-finder, the ALJ is vested with the authority to weigh the medical evidence, and if "the physicians in a case genuinely express medically sound, but differing, opinions as to the severity of a claimant's injury, the ALJ has the discretion to choose which physician's opinion to believe." Jones v. Brasch-Barry General Contractors, 189 S.W.3d 149, 153 (Ky. App. 2006).

The opinions expressed by Dr. Loeb as summarized herein constitute substantial evidence supporting the ALJ's determination Bass currently retains an 18% impairment rating. That being the case, a contrary result is not compelled. Since

the ALJ has the sole authority to pick and choose the physician upon whom he relied, he was free to rely upon Dr. Loeb's opinions as more credible and this Board is not authorized to disturb the ALJ's choice on appeal. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

With respect to Bass' argument that he is entitled to TTD benefits, the ALJ correctly noted he filed his Motion to Reopen on May 8, 2020, which was after Dr. Loeb determined he had reached MMI. The ALJ noted both Drs. Casnellie and Loeb assessed MMI prior to the date Bass filed his Motion to Reopen. Thus, pursuant to Bartee v. University Medical Center, 244 S.W.3d 91 (Ky. 2008), Bass was not entitled to TTD benefits. In Bartee, the Supreme Court noted KRS 342.125(3) and (8) permit a worker to seek TTD benefits at any time within the period of the award. The Supreme Court observed that the longstanding decisions establish any changes in the amount of benefits due to a post-award change of disability must be prospective and places an unambiguous limit on an ALJ's authority to change the amount of compensation. "Any change in the amount of compensation shall be ordered only from the date of filing the motion to reopen." Id. at 94.

KRS 342.0011(11) defines temporary total disability benefits as follows:

Temporary total disability" means the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement that would permit a return to employment.

Thus, Bass would only be entitled to TTD benefits during the period when he had not reached MMI from the injury and had not reached a level of improvement that would prevent a return to employment. Since the medical evidence unanimously establishes Bass had already reached MMI before he filed his Motion to Reopen on May 18, 2020, by law the ALJ was precluded from awarding TTD benefits.

Accordingly, on all issues raised on appeal, the Opinion, Award, and Order reissued on September 8, 2021, and the October 6, 2021, Order overruling Bass' Petition for Reconsideration are **AFFIRMED**.

ALL CONCUR.

DISTRIBUTION:

PETITIONER/PRO SE:

NICHOLAS BASS
3514 RAMONA AVE
LOUISVILLE KY 40220

USPS

COUNSEL FOR RESPONDENT:

HON LEE JONES
P O BOX 1167
PIKEVILLE KY 41502

LMS

RESPONDENT:

DR MICHAEL CASNELLIE
9300 STONESTREET RD STE 2
LOUISVILLE KY 40272

USPS

ADMINISTRATIVE LAW JUDGE:

HON MONICA RICE-SMITH
MAYO-UNDERWOOD BUILDING
500 MERO ST 3RD FLOOR
FRANKFORT KY 40601

LMS