Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: November 19, 2021

CLAIM NO. 201871512

ROBERT WILKINS PETITIONER

VS. **APPEAL FROM HON. CHRIS DAVIS, ADMINISTRATIVE LAW JUDGE**

KENTUCKY TRANSPORTATION CABINET
and HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

BEFORE: ALVEY, Chairman, STIVERS, Member, and VACANT.

STIVERS, Member. Robert Wilkins ("Wilkins") appeals from the June 12, 2021, Opinion and Order and the July 3, 2021, Opinion of Hon. Chris Davis, Administrative Law Judge ("ALJ"). The ALJ awarded Wilkins temporary total disability benefits and medical benefits for a temporary work-related low back condition. The ALJ dismissed Wilkins' claim for permanent income and medical benefits.

On appeal, Wilkins asserts the causation opinions of Drs. Thomas Gruber and Timothy Kriss do not amount to substantial evidence and should not have been relied upon by the ALJ.

BACKGROUND

The Form 101 alleges Wilkins, while employed as a mechanic with the Kentucky Transportation Cabinet ("KTC"), sustained work-related injuries on July 26, 2018, to his "low back area (inc. lumbar and lumbo-sacral) in the following manner: "Pulling on a PTO shaft trying to get it on a tractor."

Several of Dr. Gruber's medical records were filed in the record by KTC. Persuasive to the ALJ is Dr. Gruber's December 6, 2018, answers to a Questionnaire dated November 29, 2018. The November 29, 2018, Questionnaire poses the following questions:

> 1. Do you feel the work injury of 07/26/2018 was the proximate cause of Mr. Wilkins' current condition?
>
> 2. What is the diagnosis?
>
> 3. What pre-existing objectively determinable medical/ physical condition were present before July 26, 2018?
>
> 4. When do you anticipate employee to be released to full duty work with employer? See job description.
>
> 5. Please advise as to whether you feel this employee has reached maximum medical improvement. If he has not yet reached MMI, please provide a reasonable estimate as to when you feel he will do so.
>
> 6. If he has reached MMI, please advise as to any PPI rating you might impose, if any. Please indicate what percentage, if any, would be due to a pre-existing condition. Please indicate the page number and table of the *5th Edition, AMA Guides* that you utilized. Please provide the part of body and whole-body rating.

> 7. Please advise of what treatment, if any, will be in relation to injury and which is medically necessary for future.
>
> Dr. Gruber's December 6, 2018, answers are as follows:
>
> 1. I feel that the work-related injury of 07/26/2018 was an exacerbation of an existing known long-standing back injury.
>
> 2. Chronic low back pain
>
> 3. The patient has been cared for by my office and pain management for chronic back issues for several years, starting in 2012.
>
> 4. I see no objective reason why the patient could not return to work.
>
> 5. The patient has likely reached MMI
>
> 6. I would impose no PPI rating
>
> 7. The patient does not require any surgical intervention. His back pain is best managed medically.

KTC also filed Dr. Kriss' September 2, 2020, Independent Medical Examination ("IME") report. After performing a physical examination and a medical records review, Dr. Kriss provided the following diagnoses:

> Temporary lumbar strain
>
> Temporary exacerbation of pre-existing active chronic
>
> multifactorial low back pain:
>
> 1995 disc herniation
>
> Postsurgical scarring from 1995 surgery
>
> 2013 postsurgical scarring
>
> Degenerative disc disease
>
> Osteoarthritis

Spondylosis

Morbid obesity

Deconditioning

Genetics

I would not assign any permanent harmful change to the July 26, 2018 work incident.

I would not construe the July 26, 2018 work activity as a permanent aggravation of a pre-existing lumbar condition.

Regarding causation, Dr. Kriss opined as follows:

The simplest, most medically accurate, and most scientific means for determining causation in a situation when the patient clearly has the exact same symptoms before and after a specific traumatic event is to rigorously compare 'apples to apples' and 'oranges to oranges' before and after the event in question.

For Mr. Wilkins, while he certainly has subjective worsening of pain on July 26, 2018, there is no medically detectable objective permanent harmful change, permanent physical change, neurologic deficit, permanent structural change, or even 'new' symptom that can be attributed specifically to the July 26, 2018 work incident:

Symptom quality and character before and after July 26, 2018 are exactly the same

Symptom anatomic location before and after July 26, 2018 is exactly the same

Physical examination before and after July 26, 2018 is exactly the same

Neurological examination before and after July 26, 2018 is exactly the same

Lumbar range of motion before and after July 26, 2018 is exactly the same.

Amount of opioid narcotics required before and after July 26, 2018 is exactly the same.

Therefore I conclude that there is no permanent harmful change specifically caused or aggravated by work activity on July 26, 2018.

Mr. Wilkins does have subjective worsening on July 26, 2018, but this subjective worsening is in a patient who:

Has a pre-existing active history of severe anxiety, which by medical definition, is a form of symptom magnification

Has a pre-existing active history of severe depression, which very commonly causes symptom magnification, especially in chronic pain patients

Has completely normal vital signs (blood pressure 134/74, heart rate 70) in the ER on July 26, 2018, even though he simultaneously complains of '9/10' subjective pain. With the pain level rated just one notch below the highest possible pain a human can experience, imagine or fathom, the patient's vital signs should be 'through the roof' as part of the natural 'fight or flight' response to extreme pain (adrenaline, etc). So completely normal vitals juxtaposed with such extreme subjective pain ratings objectively confirms considerable symptom magnification.

Has retrospectively recounted subjective pain history markedly at odds with voluminous contemporaneously documented medical records.

Has retrospectively testified to a subjective pain history markedly at odds with voluminous contemporaneously documented medical records

So purely subjective worsening on July 26, 2018 and thereafter, in the context of no detectable, significant permanent harmful change as measured by every available protective medical modality, in a patient with documented considerable symptom magnification, pre-existing active anxiety, pre-existing active depression, and markedly inaccurate subjective retrospective history of chronic pain, does not merit permanent harmful change or permanent impairment.

> Instead, at worst, I construe the July 26, 2018 lifting/pulling incident a work to have been a temporary exacerbation of Mr. Wilkins' pre-existing active, chronic, medically recalcitrant, spontaneously progressive, spontaneously escalating chronic low back pain, chronic right leg pain, and chronic left leg pain, requiring so much treatment in the days, weeks, months and years immediately prior to July 26, 2018.

KTC also filed Dr. Thomas O'Brien's May 14, 2020, medical records review report. After reviewing voluminous medical records as outlined and summarized in the report, Dr. O'Brien opined, in relevant part, as follows:

> Mr. Wilkins did not sustain a traumatic aggravation, acceleration, or precipitation of his long-standing pre-existing degenerative lumbar condition as a result of the work activities of 7/26/18 in which he and his coworkers were putting the PTO shaft on a tractor. Mr. Wilkins' complaints of low back pain on 7/26/18 represent a manifestation of a long-standing, clearly documented pre-existing degenerative personal health condition and the expected progressive natural history of this preexisting personal health condition.

The following questions and answers are seen on the final pages of Dr. O'Brien's report:

> 1. Was the surgery performed on 1/11/19 per Dr. Virella for Procedures: 1. Full lumbar laminectomy and dissection of scar tissue L4. 2. Full lumbar laminectomy and dissection of scar tissue L5. 3. Full lumbar laminectomy and dissection of scar tissue S1. 4. Placement of interbody graft, L5-S1, 8 mm titanium coated PEEK graft, L5-S1 with distraction of interspace. 5. Autograft harvest. 6. Pedicle screw placement, L5-S1. 7. Posterolateral fusion, intertransverse L5-S1. 8. Intraoperative monitoring, SSEP, MEP, EMG. 9. Intraoperative fluoroscopy. 10. Needle localization of level. 11. Neurolysis, dissection of very thick scar L5-S1 medically necessary and indicated as it pertains to his 7/26/18 work injury?
>
> Response: No. The ill-advised surgical procedure was carried out by Dr. Virella on 01/11/2019 in the form of

> instrumented spinal fusion revision lumbar decompression is related to the progressive natural history of Mr. Wilkins' long-standing pre-existing degenerative back condition and past history of back surgery in 2013 resulting in post-lamincectomy syndrome.
>
> Mr. Wilkins did not sustain 'injury' in the course of his job duties on 7/26/18. Mr. Wilkins' complaints of back pain after 7/26/18 representing manifestation and expected progression of longstanding documented personal health condition attributed to his age and multilevel degenerative disc disease and past history of lumbar surgery with secondary significant scar tissue in the lower lumbar motion segments.
>
> 2. Please explain.
>
> Response: Please see impression section.
>
> 3. Recommendations, opinions, alternatives?
>
> Response: Please see impression section.

Wilkins testified by deposition on July 29, 2020, and at the April 14, 2021, hearing. Due to the narrow issue on appeal, regarding the validity of the medical testimony ultimately relied upon by the ALJ, Wilkins' testimony is not relevant and will not be discussed herein.

The March 23, 2021, Benefit Review Conference Order and Memorandum lists the following contested issues: "benefits per KRS 342.730; work-relatedness/causation; unpaid or contested medical expenses; injury as defined by the ACT; credit for salary continuation; exclusion for pre-existing disability/ impairment; and TTD." Under "Other" is the following: "surgery by Dr. Virella, temporary exacerbation v. permanent injury, correct use of the AMA Guides, multipliers."

The June 12, 2021, decision contains the following findings of fact and conclusions of law which are set forth *verbatim*:

…

I. Work-relatedness/causation, Injury as defined by the Act and temporary v. permanent injury

The evidence has been accurately and fully summarized above and a complete, second, recitation would not be helpful. That being said it is fair to say that the evidence that supports the work-relatedness of any permanent injury and the surgery by Dr. Virella includes Dr. Lyles, Dr. Strenge, Dr. Virella, Dr. Roberts and the testimony of the Plaintiff. The evidence that suggests no work-relatedness of the permanent injury consists of Dr. O'Brien, Dr. Kriss and Dr. Gruber.

It is fair to say that even the medical evidence most in the Plaintiff's favor, from Drs. Roberts, Virella and Strenge, agree that the Plaintiff definitely had a pre-existing component to his condition and only a portion of the causation is due to the work injury. The law states that were I to agree with these opinions then the surgery would be work-related.

While not intending to level any untoward sentiments I would be remiss if I did not address concerns with each of the doctors supporting the Plaintiff's claim. First, and clearly, while I have never met Dr. Virella, have never had him involved in a claim before and am unlikely to have him involved in another one it can reasonably be inferred that it would be awkward for him, at best, if he wholly rejected the Plaintiff's input that his condition was work-related. Second, Dr. Roberts, whom I do respect and whom I believe is highly skilled, is nonetheless the Plaintiff's retained expert who was retained at least in part to provide a, hopefully positive, causation opinion. Third, Dr. Lyles appears to be a general practitioner who examined the Plaintiff once, after the July 26, 2018 incident and who necessarily accepted the Plaintiff's subjective analysis. Fourth and lastly, there is Dr. Strenge. Dr. Strenge is a specialist and he has no known or even potential bias. Nevertheless, he too has only

examined the Plaintiff since July 26, 2018 and has no pre-July 26, 2018 experience with him to compare.

On the other hand, Dr. Gruber has treated and followed the Plaintiff for a good deal of time, several years in total. He is the only physician in the entire record who examined the Plaintiff both before and after July 26, 2018. He is a surgeon. He has no known or implied bias. I do not find his testimony and opinions cryptic; on the contrary, they are straightforward and not self-contradictory. He has clearly and unambiguously stated that the pre and post July 26, 2018 MRIs do not show any traumatic change. He did not refer the Plaintiff for a second opinion on causation but as to the need for surgery. He clearly states that the Plaintiff has had an on-going history of pain management for his low back extending back more than a decade.

Dr. Gruber is supported in his opinions by Drs. O'Brien and Kriss. I realize both of those physicians are also retained experts, retained in the hopes that they would give a negative causation opinion. Regardless I find their opinions more in keeping with the totality of the evidence, including the Plaintiff's medical history, which include three prior low back injuries and prior surgery.

In making this finding, though it will be of little comfort to the Plaintiff, I did struggle with the fact that our system and our society should favor and encourage people to return to work after the types of injuries and treatment the Plaintiff had before July 26, 2018. I am also struck by the fact that the Plaintiff seems, to me, to be an entirely honest, hardworking and likable person. Regardless, even if subjectively honest those traits cannot decide a complex causation issue in instances like his with extensive prior surgeries and claims.

In reliance on the above analysis and with specific reliance on Dr. Kriss, the Plaintiff sustained a temporary exacerbation of his lumbar condition which lasted from July 26, 2018 through November 26, 2018 but he has no permanent work-related injury or condition after November 26, 2018.

> **II. Unpaid or contested medical expenses including surgery by Dr. Anthony Virella**
>
> The Plaintiff is entitled to all medical benefits for the temporary work-related exacerbation of his lumbar spine condition from July 26, 2018 through November 26, 2018.
>
> The surgery by Dr. Virella, while undoubtedly reasonable and necessary, is not work-related and therefore not compensable.
>
> **III. Temporary total disability benefits and credit for salary continuation**
>
> The Plaintiff is entitled to TTD at a rate of $546.82 a week from July 27, 2018 through November 26, 2018. While this results in an overpayment, the benefits were voluntarily paid and no PPD is being awarded so there is no mechanism for recoupment. The Plaintiff, being subjectively honest, was honest at the time he sought the TTD.
>
> …

Wilkins filed a Petition for Reconsideration which was overruled by Order dated July 3, 2021.

On appeal, Wilkins maintains the opinions of Drs. Gruber and Kriss do not constitute substantial evidence. Wilkins complains Dr. Gruber only saw Wilkins one time after his 2018 injury and before writing his report, and Dr. Kriss allegedly "cherrypicked" the medical records in order to emphasize a pre-existing condition. We affirm.

ANALYSIS

When the party with the burden of proof is unsuccessful, the sole issue on appeal is whether the evidence compels a different conclusion. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). Since Wilkins was

unsuccessful before the ALJ concerning the issue of permanent impairment, the relevant inquiry is whether the evidence compels a different conclusion. 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). In other words, an unsuccessful claimant on appeal must prove that the ALJ's findings are unreasonable and, thus, clearly erroneous, in light of the evidence in the record. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986). For an unsuccessful claimant, this is a great hurdle to overcome. In Special Fund v. Francis, supra, the Kentucky Supreme Court stated as follows regarding this standard of proof:

> If the fact-finder finds against the person with the burden of proof, his burden on appeal is infinitely greater. It is of no avail in such a case to show that there was some evidence of substance which would have justified a finding in his favor. He must show that the evidence was such that the finding against him was unreasonable because the finding cannot be labeled "clearly erroneous" if it reasonably could have been made. Thus, we have simply defined the term "clearly erroneous" in cases where the finding is against the person with the burden of proof. We hold that a finding which can reasonably be made is, perforce, not clearly erroneous. A finding which is unreasonable under the evidence presented is "clearly erroneous" and, perforce, would "compel" a different finding.

Id. at 643.

As an initial matter, we note that Wilkins is not contesting the ALJ's reliance upon the opinions of Drs. Gruber and Kriss based upon Cepero v. Fabricated Metals Corp., 132 S.W.3d 839 (Ky. 2004). Wilkins' objections to the ALJ's reliance upon Dr. Gruber's opinions relate exclusively to the number of

appointments he had with Dr. Gruber following the alleged work-related injury. His objections regarding the acceptance of Dr. Kriss' opinions relate to his alleged emphasis of Wilkins' pre-existing problems in the medical records he reviewed. However, Wilkins' specific objections regarding Drs. Gruber and Kriss relate *entirely* to the weight the ALJ chooses to afford their opinions and not the admissibility of those opinions. The ALJ, *as is his prerogative*, relied upon Drs. Gruber and Kriss in dismissing Wilkins' claim for permanent income benefits. Dr. Gruber, as noted by the ALJ in the June 12, 2021, Opinion and Order, "has treated and followed [Wilkins] for a good deal of time, several years in total." Dr. Gruber is a surgeon and the ALJ determined that he has "no known or implied bias." Further, as also noted by the ALJ, Dr. Gruber's opinions are buttressed by those of Drs. O'Brien and Kriss.

Concerning Wilkins' complaint relative to the reliance upon Dr. Kriss' opinions, this Board sees no attempt in his September 2, 2020, IME to highlight pre-existing conditions in an aberrant manner as suggested by Wilkins. That said, assuming, *arguendo*, Dr. Kriss did engage in the "cherrypicking" about which Wilkins complains, the ALJ is still vested with the discretion to rely upon Dr. Kriss' opinions. 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 supporting a different outcome than reached by an ALJ, this is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). Any bias evident in Dr. Kriss' IME report goes, once again, to the weight the ALJ chooses to afford his opinions.

We acknowledge there are physicians in the record offering opinions which differ from those of Drs. Gruber and Kriss. However, when "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 ALJ, as is within his discretion, relied upon the opinions of Drs. Gruber and Kriss, and this Board does not have the discretion to disturb this discretion. When reviewing a decision on appeal, the function of the Board is limited to a determination of whether the findings made 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). 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 to be afforded the physician's opinions 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 opinions of Drs. Gruber and Kriss constitute substantial evidence; consequently, the evidence does not compel a different result.

Accordingly, the June 12, 2021, Opinion and Order and the July 3, 2021, Opinion are **AFFIRMED**.

ALVEY, CHAIRMAN, CONCURS.

DISTRIBUTION:

COUNSEL FOR PETITIONER:

HON CRAIG HOUSMAN **LMS**
P O BOX 1196
PADUCAH KY 42002

COUNSEL FOR RESPONDENT:

HON STANLEY S DAWSON **LMS**
1315 HERR LANE STE 210
LOUISVILLE KY 40222

COUNSEL FOR RESPONDENT:

OFFICE OF GENERAL COUNSEL **USPS**
DEPARTMENT OF TRANSPORTATION
200 MERO ST 6TH FLOOR
FRANKFORT KY 40622

RESPONDENT:

DR ANTHONY VIRELLA **USPS**
P O BOX 6788
WEST LAKE VILLAGE CA 91359

ADMINISTRATIVE LAW JUDGE:

HON CHRIS DAVIS **LMS**
MAYO-UNDERWOOD BUILDING
500 MERO ST 3RD FLOOR
FRANKFORT KY 40601