

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: October 28, 2022

CLAIM NO. 202059587

RONALD BRADY

PETITIONER

VS.

APPEAL FROM HON. JOHN B. COLEMAN,
ADMINISTRATIVE LAW JUDGE

TOYOTA MOTOR MANUFACTURING and
HON. JOHN B. COLEMAN,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

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

ALVEY, Chairman. Ronald Brady (“Brady”) appeals from the Opinion, Award, and Order rendered on July 7, 2022 by Hon. John B. Coleman, Administrative Law Judge (“ALJ”). The ALJ found Brady was entitled to only a brief period of temporary total disability (“TTD”) benefits and a temporary period of medical benefits for a low back injury he sustained while working for Toyota Motor Manufacturing (“Toyota”) on August 14, 2020. The ALJ additionally determined

Brady sustained a compensable cervical injury for which he awarded permanent partial disability (“PPD”) benefits and medical benefits pursuant to KRS 342.020(3).

No Petition for Reconsideration was filed. In the absence of a petition for reconsideration, on questions of fact, the Board is limited to a determination of whether substantial evidence in the record supports the ALJ’s conclusion. If a petition for reconsideration is not filed, inadequate, incomplete, or even inaccurate fact-finding on the part of an ALJ will not justify reversal or remand if substantial evidence supports the ALJ’s determination. Eaton Axle Corp. v. Nally, 688 S.W.2d 334 (Ky. 1985); Halls Hardwood Floor Co. v. Stapleton, 16 S.W.3d 327 (Ky. App. 2000).

On appeal, Brady argues the ALJ erred in overruling his Motion to Strike evidence filed outside of proof time. It also argues the ALJ’s decision is not supported by compelling evidence. We determine the ALJ properly exercised his discretion in allowing Toyota to file additional evidence. We likewise find his decision is supported by substantial evidence, and a contrary result is not compelled. Therefore, we affirm.

Brady, a resident of Georgetown, Kentucky, filed a Form 101 on December 15, 2021. He alleged he sustained a lumbar/sacral injury when he hit a bump while unloading a semi-trailer while using a forklift at Toyota on August 14, 2020. Brady’s previous employment history includes working as a team member at an automobile factory, as a mechanic for a trailer services company, as a driver for a baker, and as a cook at a fast-food restaurant. He worked for Toyota from March 1993 until September 2021. Although the Form 101 was never amended, Brady later

developed cervical pain in December 2020 that he also attributed to the work incident.

Brady testified by deposition on February 2, 2022 and at the Hearing held on May 20, 2022. Brady was born on April 14, 1966. He is a high school graduate with no specialized vocational training. He began working as a team member for Toyota on March 29, 1993. In August 2020, he worked in plastics transportation for approximately eight months earning \$29.60 per hour. That job involved operating forklifts and tuggers to supply the assembly lines. He spent approximately 90% of his time manually unloading supplies weighing 35-50 lbs.

On August 14, 2020, Brady was operating a forklift that had no suspension, and had solid tires. As he backed the forklift, he experienced a drop, or bump. He estimated the forklift dropped between one and six inches. He immediately experienced stabbing low back pain from the waist to the middle of the low back on both sides. He finished his shift. He later attempted to stand but it did not relieve his symptoms. He was off work for the next two days. When he returned to work, he reported the injury, and he was sent to IHS.¹ He noted he had experienced low back pain 12-14 years previously. He did not immediately have symptoms related to his neck.

IHS sent him to a specialist, Dr. Christian Ramsey, a neurosurgeon. Dr. Ramsey then referred Brady to Dr. Luis Vascello, a pain management physician. He underwent physical therapy at Toyota, and epidural steroid injections from Dr. Vascello. He was off work until the spring of 2021. He stopped receiving TTD

¹ Although it is not clearly indicated in the record, we believe IHS is Toyota's onsite medical department.

benefits in January 2021, then he began receiving short-term disability benefits. Likewise, the workers' compensation's insurer stopped paying his medical bills in January 2021, and subsequently they were processed through his health insurance. When he returned to work, he only continued for approximately a week and a half, purportedly due to his ongoing low back and neck pain. He last worked at Toyota in March 2021.

At his deposition, Brady testified he woke up with stabbing pain in his neck on December 23, 2020. At the hearing, he testified his neck pain developed while he was undergoing physical therapy. He went to the emergency room at the Georgetown Hospital. He was advised the neck pain was related to his low back condition. Dr. Ben Lyon, his family physician, gave him a pain injection. Physical therapy did not improve his condition. He last treated for his neck with Dr. Lyon in June 2021. He takes a muscle relaxer approximately three times per week for his neck. He also takes Ibuprofen.

Brady testified he continues to have back pain from the middle of his back to his waist with occasional right lower extremity numbness. He testified he has no symptoms in either arm. He testified he does not believe he can return to the job he was performing at the time of the accident due to his ongoing low back and neck pain.

Brady filed Dr. Anthony McEldowney's March 11, 2021 report in support of his claim. Dr. McEldowney evaluated Brady, at his attorney's request, on March 11, 2021. Brady reported he sustained cervical and lumbar injuries on August 14, 2020. Brady also reported he had neck and back pain radiating into both hips,

thighs, and his groin. He was off work until January 4, 2021. A return to work was unsuccessful. His low back pain continued to radiate into both hips with episodic groin pain after the attempted to return to work. Dr. McEldowney also noted Brady has diabetes mellitus. Dr. McEldowney reported x-rays, the December 23, 2020 CT-scan, and the August 27, 2020 MRI all indicate Brady has degenerative changes at L4-L5 and L5-S1 and C3-C4 and C5-C6.

Dr. McEldowney diagnosed Brady with a non-specific lumbar sprain/strain with an exacerbation of lumbar spondylosis and stenosis. He also diagnosed a cervical strain with the exacerbation of previously dormant and asymptomatic spondylosis and stenosis. He opined all of Brady's problems were caused by his work injury. He also found Brady had reached maximum medical improvement ("MMI"). He assessed a 6% impairment rating for Brady's cervical condition and a 5% impairment rating for the lumbar condition, all pursuant to the American Medical Association Guides to Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"). Dr. McEldowney also stated Brady has the physical capacity to return to the type of work he performed at the time of the injury.

Brady also filed the IHS records for 11 treatment dates between August 20, 2020 and April 13, 2021 detailing treatment for his low back and neck complaints. The first note indicates Brady saw Catherine Gulley, P.A., for complaints of low back pain radiating into the front of his thighs down to his knees stemming from the August 14, 2020 incident. She noted he had positive signs for possible nerve involvement. She also recommended treatment with heat, ice, and over-the-counter Ibuprofen. Brady was also referred for an MRI. Brady was

eventually referred to a neurosurgeon. The notes also reflect he underwent epidural steroid injections. The first documented note of neck pain was on January 4, 2021. That note reflects Brady could not return to work due to his neck problem. The February 19, 2021 note reflects there is “no definitive answer for the cause of his neck pain.” The March 10, 2021 note reflects Brady returned to regular duty work on March 8, 2021. The April 13, 2021 note reflects Brady’s symptoms worsened after returning to work and he was temporarily placed on restricted duty.

Brady also filed records from Georgetown Internal Medicine for treatment he received from December 28, 2020 to May 26, 2021. The December 28, 2020 note indicates Brady reported with both neck and low back pain. He reported the neck pain began the previous Wednesday when he awoke. Dr. Lyon saw him on February 15, 2021 for a follow-up regarding the complaints of neck pain. The May 26, 2021 note from Mandy R. Mynhier, P.A., states Dr. Lyon believes the neck condition was caused by physical therapy Brady had undertaken for his low back condition and hard work which exacerbated his cervical osteoarthritis.

Brady next filed the December 23, 2020 emergency room report from Georgetown Community Hospital. That report reflects Brady’s complaint of neck pain. He reported he woke up in the morning unable to move his neck. He also reported he shook uncontrollably if he stood for too long. A CT-scan reported multilevel degenerative changes with spondylosis.

Brady also filed the November 10, 2020 and June 30, 2021 records from Dr. Vascello, a pain management physician with the Baptist Health Medical Group in Lexington, Kentucky. On November 10, 2020, Dr. Vascello noted Brady

had a three-month history of complaints of non-radicular low back pain. He noted Brady's history of Type 2 diabetes, and that he had failed treatment with physical therapy and analgesics. He diagnosed Brady with degenerative lumbar or lumbosacral intervertebral disk, lumbar discogenic pain syndrome, lumbar stenosis with neurogenic claudication, spondylosis of the lumbar region without myelopathy or radiculopathy, and diabetes mellitus type 2. On June 30, 2021, he administered an epidural steroid injection at L4-L5.

Brady next filed records from Baptist Health Neurosurgery where he treated with Dr. Ramsey. In the September 21, 2020 record, Dr. Ramsey noted Brady sustained a work injury in August 2020. He also noted Brady had a previous history of low back pain, and he was treated with epidural steroid injections dating back to the 1990s. Dr. Ramsey specifically noted Brady had no upper extremity complaints. An MRI revealed degenerative changes at L5-S1 and L4-L5. He scheduled Brady to return in December for an evaluation regarding a release to return to work. On November 30, 2020, Dr. Ramsey diagnosed Brady with degenerative lumbar problems. He stated Brady could return to work with no lifting greater than 40 lbs. and no repetitive twisting or lifting. On April 1, 2021, Dr. Ramsey diagnosed Brady with lumbar stenosis, without neurogenic claudication, and lumbar discogenic pain syndrome. He noted Brady is intolerant to work, and the jarring from driving a forklift exacerbates his back symptoms. On June 4, 2021, Elizabeth Pinnix, PA-C, noted Brady's chronic complaints of neck and low back pain. She also noted work exacerbates his symptoms.

Dr. Henry Tutt, a neurosurgeon, evaluated Brady at Toyota's request on February 2, 2021. He noted Brady's initial complaints of low back pain, and his subsequent development of neck pain. He noted Brady had worked for Toyota for nearly 28 years. Brady reported his most recent job at Toyota consisted of operating tuggers and forklifts. Brady advised his low back pain began when he hit a bump while unloading a truck with a forklift. He completed his shift, and when he returned to Toyota two days later, he could barely get out of his truck due to low back pain. He treated at Toyota IHS, he was referred for treatment with a neurosurgeon, and an MRI was ordered. He noted Brady had previous episodes of low back pain in the past.

Dr. Tutt diagnosed Brady with a history of symptomatic lumbar degenerative disk and joint disease with intermittent flare-ups of back pain, and previous treatment with epidural steroid injections and facet blocks. He indicated Brady sustained a lumbar sprain/strain. He opined Brady experienced a transient myofascial injury which had resolved. He found the injury was an exacerbation of a longstanding previously active symptomatic osteoarthritic condition. He found Brady has no ongoing problems and he has reached MMI. He stated Brady can return to the job duties he was performing at the time of the injury. He also noted Brady spontaneously sustained a flare-up of similar osteoarthritic cervical symptoms on December 23, 2020, unrelated to the work-events, for which he has also reached MMI.

In a supplemental report dated April 29, 2022, Dr. Tutt noted he had reviewed Dr. McEldowney's report. He noted Brady reached MMI within six to

twelve weeks after August 14, 2020, and returned to his baseline with no impairment attributable to his work injury. He opined Brady had a 5% impairment rating pursuant to the AMA Guides due to his condition as it existed prior the August 14, 2020 injury, and he has no additional impairment. He again related the cervical condition is unrelated to the work injury. His review of Dr. McEldowney's report did not alter his previous opinions.

Toyota also filed records from Carla Kelly, ARNP, and Dr. Donald Douglas with Pain Management and Rehabilitation dated May 26, 2005 for treatment Brady received for low back pain. At that time, Brady was diagnosed with lumbar spondylosis with radicular symptoms radiating into the right buttock and thigh, along with degenerative disk disease with disk bulging and a central herniation at L4-L5 documented by MRI. He was also noted to have possible facet arthropathy, greater on the right. Injection therapy was recommended. He followed up with Dr. Sanaj Dubal, with the same group, on eight additional visits between June 16, 2005 and April 21, 2006. His treatment included epidural steroid injections, medication, lumbar facet blocks, and Lidoderm patches.

Toyota filed Dr. Vascello's May 4, 2021 office note. He saw Brady for complaints of chronic intractable low back pain, occasionally radiating to the hips. He recommended, "diagnostic and therapeutic bilateral L4-L5 transforaminal epidural steroid injections."

Toyota also filed IHS records for treatment Brady received on February 6, 2005 for mid to low back pain. Those records are generally illegible. On October 7, 2009, Brady treated for low back pain radiating to his left foot that

occurred as he turned to retrieve a part. A February 19, 2021 note reflects Brady was off work due to neck pain with no definitive cause.

Toyota filed Dr. Jeffrey Selby's September 7, 2005 office note. Brady complained of right-sided low back pain radiating into his right hip of gradual onset. Dr. Selby diagnosed Brady with muscular strains related to disk bulges.

Toyota also filed x-ray reports from April 12, 2005, September 7, 2005, and January 16, 2007, as well as the report from a December 10, 2009 MRI. Those records generally reported multilevel degenerative lumbar disk disease. The MRI noted a small central bulge and annular tear at L4-L5.

On April 11, 2022, Brady filed an objection to the untimely submission of the medical records and reports by Toyota. He argued Toyota's time to introduce evidence expired on March 16, 2022, and the claim should not be delayed by the filing of untimely evidence.

A telephonic Benefit Review Conference ("BRC") was held on April 13, 2022. The BRC Order and Memorandum reflects the issues preserved for determination included benefits per KRS 342.730 with multipliers, unpaid or contested medical expenses, TTD (rate and duration), work-relatedness and causation, injury as defined by the Act, credit for TTD and wages, temporary vs. permanent injury, proper use of the AMA Guides, and whether Brady retains the capacity to return to the type of work performed at the time of the injury. The BRC Order and Memorandum also reflects the ALJ overruled Brady's Motion to Strike, and he allowed Toyota to file Dr. Tutt's supplemental report.

A hearing was held on May 20, 2022. The Hearing Order does not reflect any additional argument or objection to the submission of additional evidence. Brady did not file any additional evidence after the date of the BRC, nor does the record reflect he made any attempt or request to do so.

The ALJ rendered his decision on July 7, 2022. He determined Brady only sustained a temporary lumbar injury on August 14, 2020. He cited to Brady's previous treatment records for the same or similar condition. He found Dr. Tutt's opinion regarding Brady's lumbar condition more credible on that issue than that expressed by Dr. McEldowney. Relying upon the holding in Robertson v. United Parcel Service, 64 S.W.3d 284 (Ky. 2001), the ALJ only awarded TTD benefits from November 2, 2020 to February 14, 2021, with six percent interest on any past due and owing income benefits and a temporary period of medical benefits for Brady's lumbar complaints for the same period.

The ALJ also determined Brady sustained a compensable cervical injury for which he awarded PPD benefits based upon the 6% impairment rating Dr. McEldowney assessed. He awarded medical benefits for that condition pursuant to KRS 342.020(3). The ALJ additionally performed an analysis in accordance with City of Ashland v. Stumbo, 461 S.W.3d 392 (Ky. 2015), and he determined Brady is not entitled to a permanent total disability award. Neither party filed a petition for reconsideration.

On appeal, Brady first argues the ALJ erred by overruling his Motion to Strike the evidence Toyota filed outside of proof time, citing to 803 KAR 25:010 §15. He argues as follows:

[L]itigants must be afforded procedural as well as substantive due process, citing to Kentucky Alcoholic Beverage Control Board v. Jacobs, 269 S.W.2d 189 (Ky. 1954). He noted the Court held the requirements of procedural due process include a hearing, the taking and weighing of evidence, findings of fact based upon consideration of the evidence, entry of an order supported by substantial evidence, and where the parties' constitutional rights are involved, judicial review of administrative action. *See also* Utility Regulatory Commission v. Kentucky Water Service Co., Inc., 642 S.W.2d 591 (Ky. 1982).

Brady argues the ALJ's allowance of Toyota to introduce evidence nearly a month after the expiration of its proof time deprived him of due process. We disagree. The ALJ entered his ruling on the Motion at the BRC. There is no evidence the claim was delayed, or that Brady sought the opportunity to file any additional evidence. It is well-settled that the ALJ has complete authority to control the taking of evidence before him. The ALJ possesses wide latitude in controlling the introduction of evidence and absent due process considerations, it is rare that the exercise of this discretion constitutes error. Searcy v. Three Point Coal Company, 134 S.W.3d 351 (Ky. App. 1939); *See also* Cornett v. Corbin Materials, Inc., 807 S.W.2d 56 (Ky. 1991); Kentucky National Park Commission, ex rel. Com. v. Russell, 301 Ky. 187, 191 S.W.2d 214 (Ky. 1945). We perceive no error, and find the ALJ acted well within his discretion in allowing the contested evidence into the record. There is no indication Brady was prejudiced by the ALJ permitting the submission of the evidence. Likewise, as noted above, Brady did not move to extend the time for introduction of additional evidence, nor did he attempt to file any additional evidence to rebut the medical proof Toyota submitted. Therefore, on this issue, we affirm.

Brady next argues the ALJ's decision regarding his lumbar claim is not based upon compelling evidence. However, compelling evidence is not the standard upon which the ALJ's decision must be reviewed. We note the ALJ's determination regarding Brady's cervical injury is not disputed on appeal and will not be addressed. As the claimant in a workers' compensation proceeding, Brady had the burden of proving each of the essential elements of his cause of action. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979).

As noted above, no petition for reconsideration was filed. Therefore, even if the fact-finding was deficient, that issue was not properly preserved. However, even assuming it was, since Brady was unsuccessful in proving whether he sustained a permanent lumbar injury, or whether he is permanently totally disabled, he must demonstrate the evidence compels a different result. For evidence to be compelling, it must be so overwhelming that no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985).

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). Similarly, the ALJ has the sole authority to judge the weight to be accorded the evidence and the inferences to be drawn therefrom. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Luttrell v. Cardinal Aluminum Co., 909 S.W.2d 334 (Ky. App. 1995). 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).

Although a party may note evidence supporting a different outcome than 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). Further, as stated in Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986):

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.

The function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings made 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). 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. Whitaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). 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*. (Emphasis added).

The ALJ was presented with conflicting medical opinions regarding the nature, cause, and extent of Brady's low back condition. When the question

involves a medical opinion not apparent to a layperson, it is properly within the province of medical experts. Mengel v. Hawaiian-Tropic Northwest and Central Distributors, Inc., 618 S.W.2d 184, 186-187 (Ky. App. 1981). Medical issues must be proven by medical opinion within “reasonable medical probability.” Lexington Cartage Company v. Williams, 407 S.W.2d 395 (Ky. 1966).

Substantial evidence supports the ALJ’s determination Brady’s low back injury was no more than a temporary exacerbation of his previous condition. The ALJ relied upon Dr. Tutt’s opinion that Brady’s lumbar condition returned to baseline after a brief flare up. While Dr. McEldowney expressed a contrary opinion, the ALJ chose to rely upon that expressed by Dr. Tutt, in conjunction with the treatment records, in determining Brady’s lumbar condition was only temporary. Dr. Tutt’s opinion, in addition to the medical records pertaining to Brady’s pre-injury condition, constitute substantial evidence upon which the ALJ could rely. Since a contrary result is not compelled, we affirm.

We find the ALJ acted within the scope of his authority. We additionally determine he was free to reach his determination based upon the evidence provided, and we perceive no error. Therefore, we affirm on all issues.

Accordingly, the Opinion, Award, and Order issued July 7, 2022 rendered by Hon. John B. Coleman, Administrative Law Judge, is hereby **AFFIRMED**.

ALL CONCUR.

DISTRIBUTION:

COUNSEL FOR PETITIONER:

LMS

HON KELLY SPENCER
2224 REGENCY ROAD
LEXINGTON, KY 40503

COUNSEL FOR RESPONDENT:

LMS

HON SARAH C ROGERS
1521 CAVALRY LANE, SUITE 103
FLORENCE, KY 41042

ADMINISTRATIVE LAW JUDGE:

LMS

HON JOHN B COLEMAN
MAYO-UNDERWOOD BLDG
500 MERO STREET, 3rd FLOOR
FRANKFORT, KY 40601