

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: January 3, 2020

CLAIM NO. 201900012 & 201764873

TRACY EALY

PETITIONER

VS. APPEAL FROM HON. STEPHANIE L. KINNEY,
ADMINISTRATIVE LAW JUDGE

LONE MOUNTAIN PROCESSING/ARCH COAL
and HON. STEPHANIE L. KINNEY,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING AND REMANDING

* * * * *

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

STIVERS, Member. Tracy Ealy (“Ealy”) seeks review of the July 11, 2019, Opinion, Award, and Order of Hon. Stephanie L. Kinney, Administrative Law Judge (“ALJ”) awarding temporary total disability benefits, permanent partial disability benefits, and medical benefits for a work-related left knee injury sustained while in the employ of Lone Mountain Processing/Arch Coal (“Lone Mountain”). The ALJ found Ealy did not sustain a work-related low back injury and occupational hearing loss as a result of

his employment with Lone Mountain. Ealy also appeals from the August 1, 2019, Order sustaining his petition for reconsideration to the extent that additional findings of fact were provided in support of the finding he did not sustain a low back injury.

On appeal, Ealy asserts the ALJ's dismissal of his low back injury is not supported by substantial evidence. Because the appeal does not relate to the ALJ's determinations concerning the left knee work injury and the dismissal of Ealy's hearing loss claim, we will not discuss the lay and medical evidence relating to those claims.

BACKGROUND

The Form 101 alleges that on July 27, 2017, Ealy was "walking around a piece of equipment when the ground he was on gave way causing him to twist his left knee and injure his lower back." Ealy attached the June 25, 2018, report of Dr. David Muffly. Dr. Muffly concluded Ealy sustained work-related lumbar and left knee injuries. Pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment, he assessed a 3% impairment rating for the knee injury and an 8% impairment rating for lumbar spine injury. During the proceedings, Ealy also submitted the medical records of Dr. Ronald Dubin who treated his low back condition.

Both parties introduced the records of Dr. Timothy Jenkins who diagnosed a tear of the medial meniscus of the left knee, performed surgery on the left knee, and treated Ealy's lumbar spine.

In addition to portions of Dr. Jenkins' records, Lone Mountain introduced the March 6, 2019, independent medical evaluation report of Dr. Daniel Primm.

The Benefit Review Conference (“BRC”) Order & Memorandum of May 8, 2019, reflects the parties stipulated Ealy sustained a July 27, 2017, work-related left knee injury. However, Lone Mountain disputed Ealy sustained a low back injury. The contested issues were injury defined by the Act, causation/work-relatedness of alleged low back injury and occupational hearing loss, permanent income benefits per KRS 342.730, ability to return to pre-injury work, and unpaid or contested medical expenses.

Ealy testified at a March 13, 2019, deposition and the May 23, 2019, hearing. During his deposition, Ealy testified he has only worked in coal mines and last worked underground on the date of the injury. After the injury, he continued to work for Lone Mountain at a desk in the office. He denied experiencing prior injuries while at Lone Mountain. He provided the following account of the work incident resulting in the knee and alleged back injuries:

A: ... I went to get my dust – It’s a super sack. I had it hanging from the top. What I mean from that is it was a ton sack of dust. I pulled up in under it. I get out of my low track. I started to walk around it. There’s gob right there off the corners.

Q: The gob is what?

A: Coal, where they cut it out. I just stepped up on it, you know. It was hard. As soon as I stepped across it, my foot went through it. When my foot went through it, there I went.

Q: Which foot?

A: My left.

Q: And your left foot, did it – kind of like a quicksand type of thing?

A: Like I stepped in a big pothole.

Q: But it wouldn't ooze out?

A: No, ma'am. It had a bad pop and a jolt.

Q: What was a bad pop?

A: It felt like it come from my knee, the pop. The reason I heard it so good is where the earplugs, you know – You can smack yourself or something another and you would hear a lot better. The pop and jolt went up my back. I kind of almost went down. I didn't hit the ground because I caught myself when I was walking around the duster because I had to walk around the front and cut it where it could fall in.

He immediately experienced “extremely bad” knee pain. At the time of the incident, Ealy was working alone. He continued to work, hoping the pain would subside. Later in his shift, he reported the injury, and someone was sent to bring him out of the mine. Once outside the mine, Ealy completed an accident form and drove to the Harlan Appalachian Regional Hospital (“Harlan ARH”) emergency room where x-rays were taken of his left knee. At the hospital, Ealy reported his only problem was with the left knee.

The following Monday, Ealy met with the “comp lady.” He was referred to Dr. Jenkins, an orthopedic surgeon, at Watauga Orthopedics in Johnson City, Tennessee. Ealy was removed from underground work and placed “sitting at work, going to physical therapy.” During this time, he answered the phone and was paid his regular hourly rate based on an 8-hour workday. He did not work Saturdays. On September 13, 2017, the employees were advised Lone Mountain had been sold, and the new owner told Ealy to “sign up on comp” because he had nothing for him. On September 26, 2017, Dr. Jenkins performed surgery on his left knee.

Ealy insisted he told the “comp lady” and Dr. Jenkins that he had injured his back on July 27, 2017. He acknowledged he did not report back problems at the hospital emergency room. However, between the injury date and the surgery Ealy was treated for back problems. Although he was unable to remember when he reported back problems to Dr. Jenkins, he recalled informing Dr. Jenkins of his back problems after the physical therapist recommended doing so. When he last saw Dr. Jenkins on April 2, 2018, he was released to full duty.

Ealy subsequently went to Dr. Dubin, because he was having severe back pain and the workers’ compensation carrier had denied liability for an MRI. Dr. Dubin sent him to Somerset for an MRI on his back and placed him in a back brace. Ealy estimated he saw Dr. Dubin two or three times and may have seen his nurse practitioner on one occasion.

Ealy’s current treating physician in Harlan prescribes medications for his knee and back pain. His physician wanted to refer Ealy to Dr. Bean who ultimately declined seeing him because workers’ compensation was involved.¹ Ealy currently experiences back pain in the “lower part of [his] back across [his] hips.”

At the hearing, Ealy reiterated much of his deposition testimony. He acknowledged the only treatment he received at the Harlan ARH emergency room was an x-ray of his left knee. He testified the carrier approved physical therapy for his back. Ealy is unable to bend over and twist due to his back problems. He denied undergoing treatment of his back prior to July 27, 2017. An Employee Information Form Ealy completed for Dr. Jenkins was introduced as Exhibit 1. The form reflects,

¹ Ealy did not provide Dr. Bean’s first name.

in relevant part, Ealy's description of how the injury occurred: "walking around a piece of equipment as I stepped around the corner my left foot went down and my knee popped and a jolt went all the way up me." Under body part(s) injured, Ealy wrote "knee?" Also introduced at the hearing, as Exhibit 2 is a letter to Ealy from Patty Austin, Claims Adjuster, from Underwriters Safety & Claims along with a two-page form completed by Dr. Jenkins with the heading Tennessee Department of Labor and Workforce Development. In the two-page form, Dr. Jenkins assessed a 1% impairment rating to the body as a whole for the injury to the left knee and provided a diagnosis of "tear of medial meniscus of knee – left" and returned Ealy to work with no restrictions as he had reached maximum medical improvement.

Ealy introduced as Exhibit 3 Dr. Jenkins' September 19, 2017, report which reflects Ealy reported he twisted and injured his lumbar spine at the time of the original accident. Since that time, he had suffered lumbar stiffness and muscle spasm with some upper buttock pain. Dr. Jenkins noted the physical therapy reports reveal Ealy's condition had improved some and may improve with further lumbar conditioning. Dr. Jenkins's assessment was tear of the medial meniscus of the knee, low back pain, and lumbar sprain.

In the July 11, 2019, decision, the ALJ provided the following findings of fact and conclusions of law in determining Ealy did not sustain a work-related low back injury:

1. Injury as defined by the Act, causation/work-relatedness of alleged low back injury and occupational hearing loss

Plaintiff alleged a permanent injury to his left knee as a result of a work accident on July 27, 2017. This

portion of Plaintiff's claim was accepted. Plaintiff also alleged he injured his low back as a result of the July 27, 2017 work accident. Defendant asserts Plaintiff did not sustain an injury to his low back, relying on Dr. Primm's opinions. Lastly, Plaintiff alleges he sustained occupational hearing loss as a result of his employment with Defendant. After reviewing the evidence, this ALJ finds Plaintiff did not sustain a low back injury on July 27, 2017. In making this finding, the ALJ relies on Dr. Primm's opinions. Additionally, this ALJ finds Plaintiff's hearing loss is not a result of his occupation with Defendant. In making this finding, the ALJ relies on Dr. Brose's opinions.

This ALJ carefully considered Dr. Muffly's causation opinion regarding Plaintiff's alleged low back injury. Dr. Muffly opined Plaintiff sustained an arousal of degenerative changes caused by the work accident. An arousal of a previously dormant condition is compensable and is not to be considered "natural aging" to be excluded from compensability. McNutt Construction/First General Services v. Scott, 40 S.W.3d 854 (Ky. 2001). Thus, the initial query this ALJ must resolve is whether the July 27, 2017 work accident caused an aggravation. After reviewing Plaintiff's treatment notes, this ALJ concludes Plaintiff's low back symptoms were not aggravated by the work accident.

The work accident occurred on July 27, 2017. Almost immediately thereafter, Plaintiff presented to the emergency room for treatment and did not report low back symptoms. Plaintiff's failure to report low back symptoms while seeking treatment at the emergency room is not indicative of an arousal caused by the work accident. Furthermore, Dr. Dubin's treatment notes indicate Plaintiff's low back symptoms occurred "since 01-2-2018." Based upon Dr. Dubin's treatment notes, Plaintiff's low back symptoms developed over five months after the work accident. This ALJ is not convinced the work accident caused an aggravation of Plaintiff's low back symptoms because Plaintiff's low back symptoms did not arise until several months after the work accident. As such, this ALJ finds Plaintiff failed to meet his burden of proving the work accident caused an arousal of low back symptoms. In making this finding, the ALJ relies on Dr. Primm's opinions.

...

Significantly, the ALJ did not dismiss Ealy's low back and hearing loss claims in the award.

In response to the ALJ's decision, Ealy filed a petition for reconsideration requesting additional findings of fact and that the ALJ reconsider her decision. Ealy asserted the ALJ's conclusion that there was a lack of low back symptoms developing over five months following the July 27, 2017, work incident was a misinterpretation of the medical evidence. Ealy cited to Dr. Jenkins' September 18, 2017, treatment note introduced at the hearing. Ealy also took issue with the ALJ's finding that Dr. Dubin's records indicate his symptoms began on January 2, 2018, as Dr. Dubin's history notes he was seeing Ealy as a result of a low back injury which occurred on July 27, 2017, while he was working for Arch Coal.

Ealy contended the ALJ had misinterpreted the medical evidence which led her to believe the symptoms in the low back did not arise for several months following the July 27, 2017, event. Ealy requested the ALJ enter additional finding of fact regarding the onset of his lumbar spine symptoms and provide a new determination as to causation of the lumbar spine condition including an analysis based on a proper understanding of the medical events.

The ALJ's August 1, 2019, Order reads as follows:

This matter comes before this Administrative Law Judge ("ALJ") upon Plaintiff's petition for reconsideration. Plaintiff requests additional findings of fact sufficient to reveal the basis of the ALJ's decision. Plaintiff asserts this ALJ misinterpreted the evidence in terms of when Plaintiff sought treatment for low back symptoms. Plaintiff asserts he sought treatment on September 18, 2017 with Dr. Jenkins. Plaintiff argues he sought

treatment for low back symptoms two months following the work injury, and this supports a causation opinion in his favor.

Plaintiff alleged an injury to his low back and left knee on July 27, 2017 as the result of an acute work accident. On June 25, 2018, Dr. Muffly examined Plaintiff. Dr. Muffly reviewed Dr. Jenkins' treatment notes, which noted a lumbar injury. Apparently, the lumbar injury was noted in a September 18, 2017 treatment note. On March 6, 2019, Dr. Primm examined Plaintiff and noted Plaintiff treated with Dr. Dubin for low back symptoms. Dr. Dubin recommended a lumbar MRI that was performed on January 18, 2018. Dr. Primm noted Plaintiff underwent a partial meniscectomy on September 26, 2017 and had low back pain "at that time."

At the final hearing, a portion of Dr. Jenkins' treatment notes were submitted. On September 18, 2017, Dr. Jenkins noted Plaintiff reported he injured his low back as a result of the original accident. Dr. Jenkins diagnosed low back pain and recommended physical therapy.

The relevant query is whether Plaintiff's acute work accident on July 27, 2017 injured Plaintiff's back or aggravated Plaintiff's lumbar degenerative changes. This ALJ reviewed the records once again, and remains unconvinced that Plaintiff's work accident aggravated his lumbar degenerative changes. This ALJ reviewed Dr. Jenkins' treatment notes, as referenced above. This ALJ remains skeptical that the work accident aggravated Plaintiff's lumbar degenerative conditions. Plaintiff went to the emergency room on the day of the work accident and did not report any lumbar symptoms. Thus, immediately after the work accident, Plaintiff did not experience lumbar symptoms. Furthermore, based upon Dr. Jenkins' treatment notes Plaintiff did not report low back symptoms until approximately two months after the work accident. Thus, based upon the treatment notes and a delayed period of lumbar treatment following the work accident, this ALJ finds Plaintiff did not sustain a lumbar injury on July 27, 2017. In making this finding, the ALJ relies on Dr. Primm.

After reviewing this matter, and the ALJ being in all ways sufficiently advised, it is hereby ordered as follows:

1. Plaintiff's petition for reconsideration is sustained.
2. Additional findings are provided above.

On appeal, Ealy argues the ALJ's reliance upon the opinions of Dr. Primm is misplaced, as those opinions are completely contrary to the medical records. Ealy contends the ALJ misread the timeline of his lower back treatment resulting in her incorrectly concluding his lower back complaints did not arise until months after the accident. Ealy further asserts the ALJ ignored the fact that Lone Mountain accepted the low back injury as compensable and paid medical benefits for that injury including authorizing physical therapy based on Dr. Jenkins' recommendation. Ealy concedes the ALJ correctly noted he did not mention lower back pain when he visited the emergency room at Harlan ARH on the night of the injury. However, he points out he was not able to advise a physician for over a month he had also experienced a lumbar spine injury on that date.

Ealy maintains the ALJ's reliance upon Dr. Primm ignores the fact that an MRI revealed a moderate-sized broad-based disc herniation at L1-2 and smaller protrusions at L2-3 and L3-4. Ealy posits the ALJ's reliance upon Dr. Primm is "tainted" by her misinterpretation of the medical evidence as to when his lower back symptoms arose.

Ealy further argues that, in her order on reconsideration, the ALJ merely corrected the timeline to suit her prior conclusion which was based on an erroneous reading of the medical records. Thus, Ealy argues the order on reconsideration flies in the face of Dr. Muffly's opinions and the medical records of Drs. Jenkins and Dubin. Ealy requests the Board to closely examine the medical

evidence and reverse the ALJ's finding he did not sustain a work-related lower back injury.

ANALYSIS

As the claimant in a workers' compensation proceeding, Ealy had the burden of proving each of the essential elements of his claim concerning his alleged lower back injury. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Ealy 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).

As noted by the ALJ, the Employee Information Form, Exhibit 1 to Ealy's hearing testimony, reflects when Ealy was first seen by Dr. Jenkins, he did not describe a low back injury occurring on July 27, 2017. Rather, the only injury he described was to his left knee. Consistent with the information contained in the Employee Information Form is Ealy's deposition and hearing testimony indicating he reported to personnel at the emergency room at Harlan ARH a left knee injury resulting in the hospital performing only x-rays of the left knee. Contrary to Ealy's assertion, the records concerning Dr. Dubin's initial treatment on January 2, 2018, also supports the ALJ's conclusion he did not sustain a lower back injury on July 27, 2017. Under the "History of Present Illness Low Back Pain New," Dr. Dubin wrote: "The pain began with no specific trigger. The symptoms are moderate in nature. Location of the pain is the lumbar. The symptoms began 4 months. Frequency of pain is constant with intermittent worsening." However, we note Dr. Dubin also wrote: "The patient is a 41-year-old white male who is seen for low back injury which occurred on July 27, 2017." Dr. Dubin noted Ealy had twisted his left knee as well as

injuring his lumbar spine. Dr. Dubin noted it was his understanding Ealy's back is not being handled as a work-related injury and was being billed under his private insurance. Dr. Dubin described the pain in Ealy's lower back.

As previously noted, the ALJ enjoys the discretion to accept portions of Dr. Dubin's medical report while rejecting other portions. A portion of Dr. Dubin's record firmly supports a finding that Ealy did not sustain a low back work injury on July 27, 2017.

Dr. Primm's opinions support the finding Ealy did not sustain a work-related low back injury. As a result of the history he received, a medical records review, and an examination, Dr. Primm provided the following impression:

1) Work-related injury to the left knee on 7/27/17 resulting in medial meniscal tear; 2) status post partial medial meniscectomy with good clinical result based on objective findings; 3) chronic preexisting degenerative disk disease and degenerative arthritis, lumbar spine, secondary to chronic morbid obesity; 4) no evidence to suggest lumbar radiculopathy.

Dr. Primm opined as follows:

Overall, Mr. Ealy, I think has done well following his left-knee arthroscopy. I would not attribute his back pain symptoms to his work-related injury, since he told me he did not injure his back at the time of the twisting injury to his knee, but rather his lumbar symptoms began about a month after that injury. In my opinion, based on medical probability, his lumbar symptoms are a direct result of his chronic preexisting degenerative changes and his morbid obesity.

Contrary to Ealy's assertions, the report of Dr. Primm, the Employee Information Form (Exhibit 1 to Ealy's hearing testimony), and Ealy's testimony constitute substantial evidence upon which the ALJ was free to rely in reaching a decision on the merits concerning the alleged low back injury. Kentucky Utilities Co.

v. Hammons, 145 S.W.2d 67, 71 (Ky. App. 1940) (citing American Rolling Mill Co. v. Pack et al., 128 S.W. 2d 187, 190 (Ky. App. 1939)).

Ealy testified that, on the night of the injury, he only reported a knee injury and not a low back injury when he went to the Harlan ARH emergency room. The Employee Information Form establishes Ealy did not initially report a July 27, 2017, low back injury but only a left knee injury to Dr. Jenkins. Although he may have later reported a low back injury, the ALJ was free to reject that fact and instead rely upon Ealy's testimony, the Employee Information Form, and the opinions of Dr. Primm expressed in his March 6, 2019, report in finding Ealy did not sustain a low back work injury.

Similarly, we find no merit in Ealy's assertion Lone Mountain accepted the low back injury as compensable by paying medical expenses for treatment of the low back. The fact Lone Mountain may have paid certain medical expenses does not constitute an acceptance of the low back injury as compensable. As reflected in the BRC Order and throughout the proceedings, Lone Mountain consistently disputed Ealy's assertion he sustained a low back injury on July 27, 2017. The ALJ's decision reflects the parties understood Lone Mountain contested the existence of a low back injury resulting from the July 27, 2017, accident. Significantly, in the petition for reconsideration, Ealy did not assert Lone Mountain had accepted the low back injury as compensable and request the ALJ to revise her decision to reflect that fact.

While Ealy is correct in stating the contrary opinions of Drs. Muffly, Dubin, and Jenkins could have been relied on by the ALJ to support a different outcome in his favor, in light of the remaining record, the views articulated by those

physicians represent nothing more than conflicting evidence compelling no particular result. Copar, Inc. v. Rogers, 127 S.W. 3d 554 (Ky. 2003). As previously stated, where the evidence with regard to an issue preserved for determination is conflicting, the ALJ, as fact-finder, is vested with the discretion to pick and choose whom and what to believe. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). Consequently, we find no error in the ALJ's reliance upon Ealy's testimony, the Employee Information Form, and the opinions of Dr. Primm in determining Ealy did not sustain a low back work injury.

Because the outcome selected by the ALJ is supported by the record, we are without authority to disturb her decision on appeal. Special Fund v. Francis, *supra*. Moreover, even if the ALJ may have misread a portion of the reports, we believe the ALJ corrected any misunderstanding she may have had of the medical evidence in her August 1, 2019, Order.

Accordingly, the July 11, 2019, Opinion, Award, and Order and the August 1, 2019, Order ruling on the petition for reconsideration are **AFFIRMED**. However, in light of the fact the ALJ failed to dismiss Ealy's claims for work-related hearing loss and a low back injury, we **REMAND** to the ALJ for entry of an amended opinion, award, and order directing that his claims for work-related hearing loss and a low back injury are dismissed.

ALL CONCUR.

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