

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: May 17, 2019

CLAIM NO. 201799736

VALIANT MANAGEMENT & HOLDINGS, LLC

PETITIONER

VS.

APPEAL FROM HON. JOHN H. McCracken,
ADMINISTRATIVE LAW JUDGE

ROBERT BROOKS and
HON. JOHN H. McCracken,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
VACATING AND REMANDING

* * * * *

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

ALVEY, Chairman. Valiant Management and Holdings, LLC (“Valiant”) appeals from the December 21, 2018 order on Petition for Reconsideration rendered by Hon. John H. McCracken, Administrative Law Judge (“ALJ”). In that order, the ALJ reversed his previous determinations contained in the Opinion, Award and Order rendered November 19, 2018. In his original decision, the ALJ dismissed Robert Brooks’ (“Brooks”) claim for temporary total disability (“TTD”) and permanent

partial disability (“PPD”) benefits. Brooks filed his claim on May 8, 2018, for injuries he allegedly sustained on December 27, 2016 while working for Valiant. The ALJ awarded only temporary medical benefits.

On appeal, Valiant argues the ALJ exceeded the authority granted to him pursuant to KRS 342.281 in completely re-deciding the merits of Brooks’ claim for bilateral shoulder injuries rather than merely correcting patent errors. We vacate the findings in the December 21, 2018 order on Petition for Reconsideration, and remand for entry of an order limited to reinstating the ALJ’s original decision and correcting only patent errors contained in the November 19, 2018 decision.

Brooks filed a Form 101 on May 8, 2018, alleging he injured his back, both shoulders, both wrists and left foot when his left foot/heel caught in a turnstile as he was leaving the parking lot at work. He stated this caused him to fall backward and strike his back.

Brooks testified by deposition on August 16, 2018, and at the hearing held September 24, 2018. Brooks was born on October 22, 1952, and is a resident of Louisville, Kentucky. He began working for Valiant in February 2014. He testified he sustained multiple injuries on December 27, 2016 when a turnstile struck him as he was going to his car. His left foot was caught, and he was struck in the back by the turnstile. He attempted to catch himself, but fell onto his knees. He sought medical treatment on the date of the accident, and returned to work the next day. He later missed a period of work due to his complaints.

Brooks testified he sustained injuries to his left foot, both shoulders, both wrists, and left knee. He also testified he experiences pain on top of his left

thigh, down his left calf, into the left foot. He also complains of pain in the middle of his low back into his right hip. He missed some time from work after the December 2016 accident, but eventually returned without restrictions. Brooks received TTD benefits while he was off work, and all medical bills incurred due to the accident have been paid. Brooks has not had any surgery since the December 2016 accident. Prior to the accident, he drove vehicles between KTP Ford and LAP Ford in Louisville. His current job is essentially the same as prior to the accident, consisting of moving vehicles. He testified he has some difficulty walking since the accident. He uses ice packs, walks in a swimming pool, and takes Ibuprofen. He also rides a bicycle daily. He is currently earning more than prior to the accident, having received a significant pay increase in 2017.

Brooks could not recall being involved in a motor vehicle accident in 2001, when he broadsided another vehicle and experienced neck pain into both shoulders, despite the notations in the records from Dr. Amin's Family Practice Associates. He also did not recall injuring his left shoulder while using a pry bar. Brooks likewise did not recall sustaining a work-related left arm injury in June 2003, or left shoulder injuries in 2007 and 2008. He subsequently testified he received Social Security disability benefits from 2003 to 2007 after undergoing right elbow surgery. He returned to work, and subsequently underwent two shoulder surgeries prior to the December 2016 accident. Brooks also testified he did not recall treating for low back pain from 2009 to 2016, even though this treatment is reflected in the medical records filed as evidence.

In support of his claim, Brooks filed Dr. Jules Barefoot's March 27, 2018 report. He noted Brooks had a history of diabetes and hypertension. He also noted Brooks underwent two rotator cuff repair surgeries in 2008 and a right elbow surgery fifteen or twenty years ago. Brooks advised he had driven cars from the Ford plant to a pick up point for over five years. He stated that on December 27, 2016, he was going through a turnstile when his foot caught on a metal bar causing him to trip and fall. At the time of the examination, Brooks complained of persistent bilateral shoulder pain and loss of mobility. He also complained of difficulty sleeping due to chronic pain. He also advised he had no residual problems with his left shoulder after the surgeries until he fell in December 2016.

Dr. Barefoot diagnosed Brooks with a left shoulder full thickness re-tear of the left shoulder tendon, right shoulder supraspinatus and infraspinatus tendon tears, lumbar degenerative disk disease with non-verifiable radicular complaints, and a history of previous left rotator cuff tears. He stated Brooks reached maximum medical improvement ("MMI") on January 4, 2018. Dr. Barefoot determined the December 27, 2016 incident caused a harmful change to the human organism, and he had no active impairment ratable conditions prior to the work accident. Dr. Barefoot assessed an 18% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"). Of this rating, he attributed 8% to the lumbar condition, 8% to the right shoulder, and 4% to the left shoulder. He also restricted Brooks from working above shoulder level, and indicated he is unable to squat, kneel, crouch, and bend, and he must be able to sit and rest intermittently. He

also stated it is unsafe for Brooks to climb ladders or scaffolding. He additionally stated Brooks might require right and left shoulder surgeries in the future. He released Brooks to return to work at his job with Valiant.

Brooks also filed records from the Louisville Orthopaedic Clinic for eighteen office visits between February 2, 2017 and January 4, 2018. Those records consist of treatment from Dr. Vena Vemuri, D.O., and Megan Courtney, PA-C, for complaints of low back pain; Catherine O. Bell, PA-C for complaints of left knee pain; Dr. John O. Lewis for complaints of left foot pain; and Dr. Scott Kuiper, and Melissa Parshall, PA-C, for bilateral shoulder pain. Also included in those records is the report from the September 6, 2017 left foot MRI noting Brooks had degenerative changes, arthrosis and mild bursitis of the left foot. June 9, 2017 x-rays revealed lumbar degenerative changes and stenosis. Dr. Kuiper noted Brooks had supraspinatus and infraspinatus tendon tears with joint arthritis. Dr. Vemuri diagnosed Brooks with lumbar stenosis, lumbar spondylosis with radiculopathy and chronic pain. Dr. Lewis treated Brooks with Meloxicam and a short boot for his left foot pain.

Brooks additionally filed records from U.S. Healthworks reflecting treatment from Dr. William B. King and Amy O'Connell, N.P. Brooks was seen on three occasions from December 27, 2016 through January 11, 2017. On each occasion, he was released to return to work without restrictions.

Valiant filed records from numerous physicians and treatment facilities. It filed the records of Kleinert and Kutz from July 25, 2001 through May 26, 2004 for treatment of Brooks' right hand and cubital tunnel syndrome. Those

records include the notation of right elbow surgery by Dr. Thomas Wolfe, consisting of a right cubital tunnel release.

Valiant next filed reports of various diagnostic studies. A July 2, 2001 cervical MRI revealed degenerative changes at C4-C7. A December 1, 2002 EMG showed right ulnar neuropathy. A June 4, 2003 x-ray showed a transitional vertebra at L5. An August 27, 2003 left shoulder arthrogram revealed a tear of the supraspinatus muscle. A May 21, 2004 EMG showed significant motor slowing of the right ulnar nerve. November 6, 2007 and September 11, 2008 MRIs showed left supraspinatus tendon and rotator cuff tears. January 5, 2013 cervical x-rays revealed osteophytes and degenerative changes at C4-C5, and C5-C6, as well as degenerative lumbar changes. September 9, 2014 x-rays revealed retrolisthesis at L3 or L4, along with degenerative changes at L3-S1, along with a possible transitional vertebra. A September 7, 2015 CT-scan of the abdomen/pelvis revealed degenerative changes from L2-L5, with Schmorl's nodes at L2-L3 and L4-L5, with posterior osteophytes at L4-L5.

Valiant filed a March 15, 2004 functional capacity evaluation report. The report indicates that Brooks complained of right grip strength decrease, and persistent shoulder pain. The report recommended restrictions of occasional lifting of fifteen to thirty-five pounds, and ten to twenty pounds frequently; sitting or standing up to six hours per day; only occasional ladder climbing; and to avoid continued exposure to cold, noise, or vibrations.

Valiant next filed treatment records from Louisville Orthopaedics reflecting left shoulder treatment from April 7, 2008 through October 9, 2008,

including the operative report of Dr. Kuiper, and treatment records from Melissa Taylor, PA-C. The records state Brooks reported left shoulder pain, looseness, catching, locking and weakness. Dr. Kuiper performed arthroscopic labral debridement, acromioplasty, and rotator cuff repair. Brooks underwent a second or revision surgery of the left shoulder on October 9, 2008.

Valiant filed treatment records for twenty-eight office visits at Dr. Amin's Family Practice Associates between March 7, 2001 and June 8, 2007. Those records document Brooks' treatment for neck pain, right shoulder pain, left shoulder pain, right forearm tingling and numbness, right hand numbness, depression, and chronic pain into both upper extremities.

Valiant next filed records from Jewish Hospital for five visits between August 22, 2001 and January 9, 2003. Those records include operative records for right carpal tunnel surgery in 2001, and right elbow surgery in 2003.

Dr. Ellen Ballard evaluated Brooks at Valiant's request on November 6, 2017. Dr. Ballard noted Brooks' previous right hand problems, and that he had eventually returned to work a few years prior to the work incident. Brooks reported he sustained multiple injuries after an incident at work when he was caught in a turnbuckle on December 27, 2016. Dr. Ballard noted Brooks had normal shoulder range of motion during his physical examination, despite complaints of pain.

Dr. Ballard stated the fall at work resulted in only a temporary exacerbation of Brooks' pre-existing active problems. She noted Brooks had previously injured his left shoulder requiring surgeries. She additionally noted Brooks stated he had never previously experienced neck pain prior to the December 27, 2016

fall. Brooks reported multiple complaints after the fall on December 27, 2016. She also noted his history of chronic back pain documented in the medical records. She also noted his complaints of right hand weakness following a motor vehicle accident, and that he had severe cubital tunnel complaints. She additionally noted his history of bilateral foot surgery, and a ring finger deformity. Dr. Ballard reviewed multiple medical records, reports from diagnostic studies, and reviewed some of the actual studies. Interestingly, she noted she reviewed the report of a right shoulder MRI taken at High Field & Open MRI on September 11, 2008, which revealed a complete tear of the right supraspinatus tendon and degenerative changes in the superior labrum. This finding is consistent with the February 21, 2017 MRI of the right shoulder taken at X-ray Associates of Louisville. On physical examination, Brooks reported no pain to palpation over his shoulders, cervical spine or lumbar spine. She noted he had normal shoulder motion with some reports of pain.

Dr. Ballard determined Brooks reached MMI in May 2017, and could return to work with no restrictions other than those he may still have from his previous left shoulder surgery. She stated he has no restrictions due to the work incident. She stated all of his current complaints were caused by his previous injuries. She additionally stated Brooks has no impairment rating attributable to his work injury. She stated any impairment he may have is due to his pre-existing active problems with his shoulders, right hand, left hand, feet, neck and back.

Dr. Ballard stated regarding whether Brooks has an impairment rating, “Based on the Fifth Edition of the AMA Guides, there is no evidence that he has an impairment based on his work injury. He has pre-existing problems with his

shoulders, right hand, left hand, feet, neck and back.” She additionally stated as follows:

He had pre-existing conditions involving his neck and back, which would have been 8% of the lumbar spine (DRE Category II, Table 15-3, page 384) and for the cervical spine (DRE Category II, Table 15-5, page 392). For his shoulders, he had a pre-existing problem, although that impairment cannot be calculated with the information provided. There is no evidence of any new impairment. The same answer applies to both shoulders. For his pre-existing, severe ulnar neuropathy of his left hand, he would have an impairment of 46% of the upper extremity for motor deficit (Table 16-15) multiplied by 0.5 from Table 16-11 for a 23% upper extremity impairment, which translates using Table 4-39 to a 14% whole person impairment.

Dr. Ballard attributed none of Brooks’ impairment to the December 27, 2016 incident. She also stated Brooks has the physical capacity to return to the work he performed at the time of the incident.

Valiant next filed the August 31, 2009 x-ray report from the University of Louisville Hospital. The x-ray report noted Brooks has degenerative changes in his lumbar and pelvic regions, with no acute fracture or dislocation. It additionally filed the August 31, 2009 note from Dr. Raymond Orthober who treated Brooks for a lumbar strain due to a motor vehicle accident. Dr. Orthober noted Brooks’ complaints of chronic low back pain. Valiant also filed the ambulance records from that date from Louisville EMS, also noting his complaints of chronic low back pain.

Valiant additionally filed records from Dr. Eugene Giles for treatment from February 12, 2010 through October 7, 2016. Dr. Giles initially treated Brooks for left hand pain. He subsequently treated Brooks for low back pain beginning on

June 11, 2012, and continued to treat him for those complaints through October 7, 2016. He also treated Brooks for neck pain.

Valiant next filed physical therapy records from the Louisville Orthopaedic Clinic for thirty-three visits from June 10, 2008 through December 9, 2008. Brooks was treated for left shoulder and neck soreness.

Valiant also filed the vocational report of Dr. Luca Conte dated September 6, 2018. Dr. Conte stated Brooks has no reduction in his overall occupational capacity due to the December 27, 2016 incident.

Valiant additionally filed the opinion rendered by Hon. Chris Davis, Administrative Law Judge, on October 21, 2008, dismissing Brooks' claim for a left shoulder injury. It also filed the March 6, 2009 decision from this Board affirming the dismissal.

A Benefit Review Conference ("BRC") was held on September 12, 2018. The issues preserved for decision included whether Brooks sustained a work-related injury, causation, permanent income benefits per KRS 342.730, average weekly wage, TTD benefits, current wages, ability to return to work, exclusion for pre-existing impairment, credit for TTD, unpaid or contested medical expenses, constitutionality of KRS 342.730(4), which law applies at the date of injury and medical causation. Subsequent to the BRC, the parties stipulated that Brooks' pre-injury average weekly wage was \$969.76, and his post-injury average weekly wage was equal to or greater than that earned at the time of the work incident.

The ALJ rendered an Opinion, Award and Order on November 19, 2018, dismissing Brooks' claims for TTD and PPD benefits. He stated, "A review of

the medical records from prior to December 27, 2016 reveals that Mr. Brooks statements to Dr. Barefoot regarding his prior physical condition and treatment, were largely not true. Mr. Brooks even denied having any treatment to his low back in his deposition and one time during the hearing.” The ALJ determined Brooks sustained a temporary injury to his feet, low back, both shoulders, bilateral wrists, elbow and neck from the December 27, 2016 fall. The ALJ determined, as stated by Dr. Ballard, Brooks sustained only temporary injuries which were merely exacerbations of pre-existing conditions. The ALJ also relied upon Dr. Ballard in determining Brooks reached MMI on May 31, 2017.

The ALJ also stated the following:

The medical records reveal extensive treatment, over many years, to Mr. Brooks’ neck, shoulders bilaterally, right elbow, feet and low back. The ALJ does not understand why Mr. Brooks failed to disclose his prior neck, low back and feet treatment to Dr. Barefoot. However, that failure, and his persistent denials of prior neck and low back treatment, seriously undermined his credibility in his claims.

The ALJ awarded as follows:

... such medical expenses including, but not limited to, provider’s fees, hospital treatment, surgical care, nursing, supplies, appliances, prescriptions and mileage reimbursements as may be reasonably required for the cure and relief from the effects of the work related temporary injuries to his neck, bilateral shoulders, bilateral wrists, low back, and bilateral feet from December 27, 2016 to May 31, 2017. Mr. Brooks’ claims for bilateral shoulder and low back surgeries are dismissed and not compensable. Defendant’s obligations shall be commensurate with the limits set by the Kentucky Medical Fee Schedule.

Brooks filed a petition for reconsideration noting a misstatement in the ALJ's recitation of Dr. Ballard's assessment of impairment for his shoulders. The ALJ had noted Dr. Ballard stated Brooks had a prior active 14% impairment for his shoulders; however, he asserted she actually stated he had pre-existing shoulder problems for which impairment could not be calculated based upon the information available. Brooks also requested multiple additional findings, including but not limited to: whether he had symptomatic shoulder complaints at the time of the accident; when he last sought shoulder treatment prior to the incident; and what evidence showed his shoulder conditions were active and symptomatic prior to the date of the incident.

The ALJ issued an order on December 21, 2018. He agreed that Dr. Ballard assessed a 14% impairment for the upper extremities, and not specifically the shoulders. The ALJ then stated, "The ALJ reverses his prior decision as relates to the right and left shoulder injuries. This does not affect the prior decision in relation to the claims of injury by Mr. Brooks for other body parts." The ALJ awarded TTD benefits from April 10, 2017 through August 8, 2017. He additionally awarded PPD benefits based upon a 12% impairment rating. Of this rating, the ALJ attributed 4% to the left shoulder, and 8% to the right shoulder, based upon the assessment of Dr. Barefoot. The ALJ had previously rejected Dr. Barefoot's opinions based upon the inaccurate history proved by Brooks in accordance with the holding in Cepero v. Fabricated Metals Corp., 132 S.W.3d 839 (Ky. 2004). Valiant was given credit for TTD payments made from April 10, 2017 through December 10, 2017. The ALJ additionally stated, "The ALJ applies KRS 342.730(4) as enacted in 2018. This does

not apply a tier down calculation for benefits.” The ALJ also stated this amendment of his decision pertains only to the shoulders, and the previous decision remains intact as to the other alleged injuries.

On appeal, Valiant argues the ALJ was without authority to reconsider his dispositive factual findings and reconsider the claim on the merits in the ruling on the petition for reconsideration. It argues the ALJ erred and abused his discretion in reconsidering the merits of Brooks’ claim on reconsideration. We initially note that KRS 342.281 states as follows:

Within fourteen (14) days from the date of the award, order, or decision any party may file a petition for reconsideration of the award, order, or decision of the administrative law judge. The petition for reconsideration shall clearly set out the errors relied upon with the reasons and argument for reconsideration of the pending award, order, or decision. All other parties shall have ten (10) days thereafter to file a response to the petition. **The administrative law judge shall be limited in the review to the correction of errors patently appearing upon the face of the award, order, or decision** and shall overrule the petition for reconsideration or make any correction within ten (10) days after submission. (Emphasis added).

The ALJ exceeded his authority by reconsidering the merits of the claim rather than merely correcting patent errors when he ruled on the petition for reconsideration. While it dealt with the change of factual findings made in an interlocutory decision when an ALJ issued a final decision on the merits, the holding in Bowerman v. Black Equipment Co., 297 S.W.3d 858 (Ky. App. 2009) has some bearing in this claim. We note that in Bowerman v. Black Equipment Company, 297 S.W.3d at 867, the Court determined an ALJ as fact-finder may reverse a

dispositive interlocutory factual finding on the merits in a subsequent final opinion, only by showing of new evidence, fraud or mistake. However, this does not permit an ALJ to completely revisit the merits of the claim.

As noted in Kentucky Wagon MFG. Co. et. al v. Esters, 221 Ky. 63, 297 S.W. 811 (Ky. App. 1927) (citing to Wagner Coal & Coke Co. v. Gray, 2018 Ky. 152, 270 S.W. 721 (Ky. App. 1925), “It is just as essential that there should be an end to litigation in cases arising under the Workmen’s Compensation Act as in other cases.” Citing to Kentucky Wagon MFG. Co. et. al v. Esters, the Court of Appeals in Bowerman v. Black Equipment Co., 297 S.W.3d at 871, additionally held as follows:

Parties have a reasonable expectation that dispositive questions of fact, once fairly litigated, fully argued, and properly adjudicated, may be considered finally resolved, and thereby provide a sure foundation for their further argument or action, regardless of whether the factfinder’s determination is rendered in an interlocutory order or final decision. Otherwise, the failure and effect of factual findings, including those rendered in interlocutory proceedings, is eviscerated.

We additionally note the holding in Beth-Elkhorn Corporation v. Nash, 470 S.W.2d 329 (Ky. 1971). In that case, the old Workers’ Compensation Board dismissed Nash’s claim for pulmonary occupational disease. Nash subsequently filed a petition for reconsideration. After reconsidering the entire case, including the merits, the Board withdrew its decision, and awarded permanent total disability benefits. Beth-Elkhorn Corporation argued the Board was limited to review the correction of errors patently appearing on the face of the decision pursuant to KRS 342.281. The Kentucky Court of Appeals held the limitation

provided in that statute clearly and positively expresses a legislative policy that, “the Board shall not have authority to reverse itself on the merits of the claim.” Id. at 330. The Court additionally stated, “We simply cannot sanction a clear violation of the statute which expressly limits the authority of the Board upon reconsideration. ... Like the parties, we are bound to accept the limitations placed upon the power of the Board by KRS 342.281. The award appealed from was unauthorized.” Id. at 330, 331.

Unlike the situation in Bullock v. Goodwill Coal Company, 214 S.W.3d 890 (Ky. 2007), there is no allegation that the ALJ did not initially consider medical evidence of record. Clearly, in the decision rendered November 19, 2018, the ALJ outlined Dr. Ballard’s report and findings. While he may have attributed a statement to her that was not completely correct, this does not warrant a complete reconsideration of the merits of the decision. A review of the entirety of Dr. Ballard’s report shows that the ALJ correctly considered her conclusions when rendering his decision. Therefore, we determine the ALJ’s reversal of his initial determination was unwarranted. As noted in Durham v. Copley, 818 S.W.2d 610 (Ky. 1991), an unauthorized second review of the merits of a claim is an egregious error which constitutes manifest injustice.

While in his original decision the ALJ may have misstated that Dr. Ballard attributed a 14% pre-existing active impairment to his shoulders, this does not change the fact that she attributed no shoulder impairment to the December 27, 2016 incident. A complete review of Dr. Ballard’s report demonstrates that she found Brooks sustained no impairment rating due to the December 27, 2016 fall. We

note the ALJ completely discounted Dr. Barefoot's findings in the Opinion, Award and Order because of the inaccurate history provided by Brooks in accordance with Cepero v. Fabricated Metals Corp., *supra*. The correction of the ALJ's determination regarding Dr. Ballard's statement does not permit the reassessment of the credibility of Dr. Barefoot's findings. This is especially true in light of the fact that the clear reading of Dr. Ballard's report is consistent with the findings by the ALJ in his original determination.

The function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings are so unreasonable 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 or by noting reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 79 (Ky. 1999). However, in this instance, the ALJ abused his discretion in reconsidering the merits of the claim on reconsideration. The ALJ may not reverse himself on findings of fact. While the scope of the ALJ's authority in ruling on a petition for reconsideration is not strictly limited to the correction of clerical errors, he does not have the authority to reverse himself on the merits of the claim. Garrett Mining Co. v. Nye, 122 S.W.3d 522 (Ky. 2003); Beth-Elkhorn Corp. v. Nash, *supra*.

Based upon the foregoing, we must vacate the ALJ's order on reconsideration issued December 21, 2018, and remand for reinstatement of the November 19, 2018 Opinion, Award and Order. The ALJ shall issue a ruling on

Brooks' Petition for Reconsideration in accordance with the authority outlined in KRS 342.281.

Accordingly, the Order on reconsideration issued by Hon. John H. McCracken, Administrative Law Judge, on December 21, 2018 is hereby **VACATED**. This claim is **REMANDED** for the ALJ to reinstate his November 19, 2018 Opinion, Award and Order, and issue a determination addressing Brooks' Petition for Reconsideration consistent with the directions set forth above.

ALL CONCUR.

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