

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: January 4, 2019

CLAIM NO. 201683866

WILLIAM WATTERS

PETITIONER

VS.

APPEAL FROM HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE

EXCEL, INC./DHL EXPRESS, INC.;
DR. NARENDRA NATHOO; and
HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

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

ALVEY, Chairman. William Watters (“Watters”) appeals from the Opinion and Order rendered August 20, 2018, by Hon. Grant S. Roark, Administrative Law Judge (“ALJ”) finding he failed to prove he sustained new, permanent neck or left shoulder injuries due to the May 17, 2016 work injury. The ALJ found Watters sustained only temporary injuries to his left shoulder and neck, and awarded

temporary medical benefits through November 20, 2017. Watters also appeals from the September 10, 2017 order on petition for reconsideration awarding only medical benefits for a work-related cervical disc extrusion.

On appeal, Watters argues the evidence compels a finding of a work-related, permanent injury to his neck, entitling him to permanent income benefits. Watters asserts Dr. Stacie Grossfeld's opinion regarding his cervical condition is erroneous since there is no evidence supporting the conclusion the condition was active prior to the work injury. Watters also argues the ALJ erred in not awarding medical benefits for his cervical degenerative changes. Because the ALJ's determination is supported by substantial evidence, and a contrary result is not compelled, we affirm.

Watters filed a Form 101 on December 20, 2016, alleging injuries to multiple body parts when he fell over a piece of pipe while exiting the forklift he was operating on May 17, 2016. Watters worked for Excel, Inc. ("Excel") as a forklift operator at the time of the work accident. At the hearing, Watters clarified that he was claiming injuries only to his neck and left shoulder due to the May 17, 2016 work injury. Therefore, we will summarize the evidence only related to those conditions. Excel subsequently filed a medical dispute challenging the reasonableness, necessity, and work-relatedness of the proposed five-level cervical fusion by Dr. Narendra Nathoo. Dr. David Trotter performed a utilization review on September 28, 2016, and opined the proposed cervical procedure is not medically necessary.

Watters testified by deposition on January 24, 2017, and at his hearing held June 19, 2018. Watters was born in 1955 and resides in Bowling Green, Kentucky. Watters worked as a forklift operator for Excel loading raw materials into trucks to be shipped to a processing plant. Watters testified that on May 17, 2016, he had loaded a truck with the forklift and backed out. As he exited the forklift, he stepped onto steel nipples welded to the ground, and twisted his right ankle and knee causing him to fall onto his left shoulder, neck and head. Watters was transported to the emergency room by ambulance. He then treated with his primary care physician, Dr. Sam Kesri, who referred him to Dr. William Schwank for his cervical problems. Dr. Nathoo took over his care when Dr. Schwank retired. Watters treated with Dr. Peter Buecker for his left shoulder and with a pain management physician, Dr. Ramarao Pasupuleti. Conservative treatment, including medication, physical therapy, and injections have helped his cervical condition. At the time of the accident, Dr. Kesri prescribed Watters medication to treat diabetes, cholesterol and high blood pressure. Watters is not currently treating with any physician for his work injuries, but continues to see Dr. Kesri for his unrelated health conditions. At the hearing, Watters testified he has not taken any prescription pain medication for his left shoulder or neck for over a year.

Watters testified Dr. Nathoo recommended a five-level fusion surgery. Watters is reluctant to undergo surgery, but he believes it is the only remaining treatment option for his cervical condition. Watters does not believe he can physically return to his forklift operator job with Excel. Watters has not worked anywhere since the May 17, 2016 work injury.

Watters testified about his pre-existing conditions and treatment prior to the May 17, 2016 work accident. Watters testified Dr. Schwank performed a two-level cervical fusion at C5-6 and C6-7 in 2008. Following a period of post-operative recovery, Watters was released without permanent restrictions and returned to his normal job. Subsequently, Watters only sought medical attention to ensure the cervical hardware was unaffected after he had fallen. Otherwise, Watters received no other treatment regarding his prior fusion. Watters also underwent left rotator cuff repair by Dr. Mark Buchanan in August 2014, and he was subsequently released without restriction in December 2014. Watters also testified he has arthritis in both hips and right knee, and had an epidural injection into his back. Watters testified that in the three years prior to the work injury, he was under no restrictions for his neck or left shoulder.

Excel filed the medical records from Western Orthopaedic Associates indicating Watters treated with Dr. Lynn Olson and Dr. Schwank prior to the work injury. On September 12, 2003, Watters reported pain in his neck, across his shoulders, and into his arms for approximately one year with no history of injury or trauma. X-rays demonstrated a moderate decrease in the C5-6 space with anterior and posterior spurring. Dr. Olson did not recommend any treatment other than noting Watters is not interested in steroids and surgery. Watters returned to Dr. Olson on December 29, 2004 complaining of left shoulder pain with tingling in the left hand for approximately one year with no history of injury or trauma. X-rays showed a moderate decrease in the C5-6 and C6-7 disc space, and spurring at both levels. X-rays of the left shoulder demonstrated spurring of the glenoid and

narrowing of the AC joint for which Dr. Olson administered an injection. Watters sought treatment with Dr. Olson on June 18, 2007, complaining of popping and grinding in his neck after he fell at home on May 30, 2007. Dr. Olson noted x-rays demonstrated a moderate decrease in the C5-6 and C6-7 disc spaces with mild anterior spurring. Dr. Olson recommended stretching and traction. Watters returned on March 9, 2011 with low back, and bilateral hip and leg complaints. Dr. Schwank noted he had performed an anterior cervical discectomy “in the past,” although the medical records from this prior fusion were not filed into evidence. A lumbar MRI was obtained and Watters returned on March 16, 2011 to discuss possible treatment options for his low back. Watters complained of right knee pain and swelling in March 2011, and low back pain radiating into the hips and legs in September 2015.

Following the work injury, Watters initially treated with Dr. Kesri on May 24, 2016. He noted the fall and diagnosed cervical, right ankle, left shoulder and right knee sprains. He prescribed medication, ordered physical therapy and restricted Watters from work. Watters regularly treated with Dr. Kesri in 2016 and 2017, who additionally referred him to Drs. Schwank, Buecker and Pasupuleti. His most recent diagnoses included cervical radiculopathy, left shoulder sprain, and frozen shoulder.

Watters began treating with Dr. Schwank on June 13, 2016, for his cervical complaints. Dr. Schwank noted Watters complained of neck pain radiating into his left shoulder, arm and hand with associated numbness and tingling in the left hand, following the May 17, 2016 work injury. Dr. Schwank noted he had

previously performed a 2008 cervical fusion which appeared unaffected by the May 17, 2016 fall. He ordered an MRI, which was performed on July 1, 2016. Dr. Schwank noted the cervical MRI demonstrated C3-4 right central disc extrusion indenting the ventral cervical cord and stenosis; C4-5 right central disc protrusion and stenosis; C5-6 post-surgical changes and mild stenosis; C6-7 post-surgical changes and stenosis; C2-3 grade 1 anterolisthesis C2 on C3 and stenosis; myelomalacia at C5-6; and loss of the cervical lordosis. A cervical x-ray demonstrated pseudoarthrosis at C5-6 and evidence of muscle spasms. Dr. Schwank diagnosed C6 radiculopathy on the right and pseudoarthrosis at C5-6, and ordered electrodiagnostic studies. The July 22, 2016 EMG/NCV report noted findings consistent with severe, chronic right median nerve entrapment at the right. It found no evidence of cervical radiculopathy, brachial plexopathy, ulnar/radial nerve entrapment, myopathic process, or peripheral polyneuropathy.

Dr. Nathoo took over Watters' care when Dr. Schwank retired in August 2016. Dr. Nathoo noted the 2008 fusion and May 17, 2016 fall at work. He initially diagnosed rotator cuff insufficiency of the left shoulder and cervical neck pain with evidence of disc disease. A cervical x-ray performed September 15, 2016 was negative. On September 21, 2016, Dr. Nathoo diagnosed cervical neck pain with evidence of disc disease and cervical instability. Dr. Nathoo recommended surgery consisting of "acromegaly posterior approach with C2 pars screws, + C3-C6 lateral mass screw insertion fusion with no decompressive cervical laminectomy." The surgery was denied and not performed. On July 13, 2017, Dr. Nathoo noted Watters' neck condition had not improved with conservative treatment. He

diagnosed cervical pain and spinal instability, and opined Watters still requires surgery.

Watters also treated with Dr. Pasupuleti on January 25, 2017. He diagnosed multilevel cervical degenerative disc disease; multilevel cervical spinal and foraminal stenosis; post laminectomy syndrome cervical post cervical fusion C5-7; left-sided cervical radiculopathy; and secondary muscle pain and spasm. He recommended trigger point injections, physical therapy and continued care with Dr. Nathoo. He also continued Watters' prescriptions of Oxycodone, Gabapentin, and Zanaflex.

Watters began treating with Dr. Buecker for his left shoulder condition in April 2017. He consistently diagnosed left glenohumeral arthritis, and ordered injections and physical therapy. Dr. Buecker found Watters reached maximum medical improvement ("MMI") on November 21, 2017, and assigned permanent restrictions.

Dr. Nathoo issued a medical report on November 20, 2017. He diagnosed adjacent segment cervical disc disease with instability. Dr. Nathoo wrote "yes" when asked if the diagnoses are causally related to the work injury and whether Watters had reached MMI. Dr. Nathoo assessed a 12% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"). Dr. Nathoo was unable to predict the impairment rating in the event Watters underwent the recommended cervical five-level fusion. Dr. Nathoo assigned permanent restrictions, and opined Watters is not

physically capable of returning to his pre-injury job. He recommended further medical treatment to include “surgery, pain clinic, ect.”

Dr. Buecker issued a report on December 29, 2017. He diagnosed left shoulder glenohumeral arthritis, decreased range of motion, and pain. Dr. Buecker noted Watters had pre-existing underlying arthritis and a prior rotator cuff surgery. However, “the pain he has now is causally related to acute exacerbation of an underlying otherwise quiescent condition related to a work injury sustained in May 2016 . . . ” Dr. Buecker assessed an 8% impairment rating for the left shoulder using the AMA Guides. Dr. Buecker was unable to apportion the impairment rating to reflect his underlying arthritis and work injury. However, since Watters was having minimal symptoms, if any, prior to the work injury, Dr. Buecker opined the majority of his current left shoulders symptoms are work-related. Dr. Buecker assigned restrictions and opined Watters is not capable of returning to his prior job.

Excel filed Dr. Grossfeld’s October 28, 2016 and October 9, 2017 reports. In the first report, Dr. Grossfeld diagnosed pre-existing, active degenerative joint disease of the right knee, and noted he had a prior rotator cuff repair predating the work injury. She opined Watters sustained a work-related right knee contusion, a right ankle sprain, and a contusion of the left shoulder. Based on the cervical MRI, Dr. Grossfeld noted Watters also sustained a right central disc extrusion indenting the ventral cervical cord with moderate central stenosis. Dr. Grossfeld recommended no additional treatment for the right ankle, knee and left shoulder. Regarding Watters cervical conditions, Dr. Grossfeld recommended undergoing a course of conservative treatment, including epidural injections, physical therapy and

prescription anti-inflammatory medication. Dr. Grossfeld opined cervical surgery for the work-related disc extrusion with no sensory/motor findings and normal EMG is not necessary. Dr. Grossfeld opined the recommended five-level fusion is related to Watters' pre-existing active cervical spine disease and pseudoarthrosis, and unrelated to his work injury. Dr. Grossfeld assessed a 25% impairment rating, but opined Watters had not attained MMI.

In the second report, Dr. Grossfeld noted the May 17, 2016 injury and summarized the medical records pre-dating and subsequent to the work injury. Dr. Grossfeld diagnosed pre-existing, active: 1) degenerative joint disease of the right knee, cervical spine, and bilateral hips; 2) prior rotator cuff repair; and 3) advanced glenohumeral joint arthritis, left shoulder. Dr. Grossfeld diagnosed work-related right ankle sprain, right knee and left shoulder contusion, and right disc extrusion of his cervical spine indenting the ventral cervical cord with moderate central stenosis with no sensory-motor limitations. Dr. Grossfeld opined Watters' conservative treatment for his work-related injuries is reasonable and complete. He requires no further medical treatment. Dr. Grossfeld opined Watters attained MMI on July 13, 2017.

Dr. Grossfeld opined the spinal surgery requested by Dr. Nathoo is related to his pre-existing active cervical degenerative joint disease. She noted the disc extrusion is not present on EMG/NCV findings or physical examination. She also noted the disc extrusion is to the right side while Watters' symptoms are primarily to the left side, evidencing the fact that the disc extrusion is not causing his current symptoms. Dr. Grossfeld similarly opined Watters' left shoulder condition is

not due to his work injury, but is the result of pre-existing active advanced osteoarthritis.

Dr. Grossfeld assessed a 25% impairment rating for the cervical spine and 8% for the left shoulder pursuant to the AMA Guides, attributing the entirety of each rating to his pre-existing active condition. Dr. Grossfeld clarified the 2008 cervical fusion warranted a 25% impairment rating, and that Watters' cervical impairment did not increase and remains at 25% subsequent to the work injury. Dr. Grossfeld noted Watters may need the cervical surgery regarding his degenerative joint disease, and would not be work-related. Likewise, Dr. Grossfeld opined the proposed five level fusion is related to the cervical degenerative joint disease, and is not work-related. Dr. Grossfeld assigned non-work-related restrictions.

A benefit review conference was held June 19, 2018. The parties stipulated Excel voluntarily paid temporary total disability ("TTD") benefits from May 25, 2016 through March 22, 2018 in the amount of \$50,524.00, and medical expenses in the amount of \$28,819.00. The parties identified 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 overpayment of TTD or unemployment, exclusion for pre-existing, active disability/impairment, TTD vocational rehabilitation, medical dispute, and whether Watters retains the physical capacity to return to his pre-injury job.

The ALJ first addressed causation/work-relatedness/injury, and determined Watters failed to prove he suffered any new, permanent neck or left shoulder injuries. Regarding Watters' cervical condition the ALJ stated as follows:

In reaching this conclusion, there is no question plaintiff fell at work on May 17, 2016, a point which even the defendant employer does not deny. Instead, the issue is really whether plaintiff suffered any new, permanent injuries to his neck or left shoulder. In considering this question, the ALJ finds Dr. Grossfeld's opinions most persuasive in this instance. She went through plaintiff's prior treatment records, and detailed his history of cervical and lumbar symptoms due to degenerative changes throughout the spine and noted the cervical fusion performed in 2008 for this condition. She further pointed out that plaintiff's current diagnostic studies and clinical examination findings do not reveal any new, acute injury as a result of the May 17, 2016 incident, other than a possible disc extrusion on the opposite side of plaintiff's symptoms and unrelated to his current complaints. The ALJ acknowledges plaintiff's treating physician, Dr. Nathoo, concluded plaintiff's current condition, for which he wants to perform a five level cervical fusion, is work-related. However, Dr. Nathoo also recognized plaintiff had pre-existing cervical degenerative changes for which he had undergone surgery in 2008, but he opined this condition was dormant and asymptomatic until aroused into disabling reality by the May 17, 2016 work injury. Thus, even Dr. Nathoo did not point out any new, subjective changes in plaintiff's cervical spine; rather, he indicated the "change" caused by the work injury was that plaintiff's pre-existing cervical degenerative changes were made symptomatic by the subject work injury.

Certainly, a pre-existing, dormant degenerative condition can be aroused into disabling reality by a work injury sufficient to render it compensable as a new, permanent injury. However, in this instance, the ALJ is more persuaded by Dr. Grossfeld's review of the records that plaintiff's cervical degenerative condition was not wholly dormant prior to May 17, 2016. This conclusion is further supported by Dr. Nathoo's diagnosis of adjacent level disc disease, indicating plaintiff's current problems are due to the effects on cervical discs adjacent to those affected and fused in 2008. This diagnosis supports Dr. Grossfeld's conclusion and a finding that plaintiff's current complaints are not due to any permanent injury from May 17, 2016 but, instead, due to pre-existing degenerative changes including those

caused by the effects of the 2008 cervical fusion surgery. For these reasons, the ALJ relies on Dr. Grossfeld to conclude that plaintiff did not suffer any new, permanent injury to his cervical spine and, instead, suffered only a temporary exacerbation of his previous condition. As such, plaintiff is not entitled to an award of permanent benefits.

The ALJ also relied upon Dr. Grossfeld's opinion in concluding Watters failed to prove he suffered a new, permanent injury to his left shoulder. The ALJ determined Watters only suffered a temporary left shoulder contusion and strain, and did not suffer any permanent injury. The ALJ then awarded medical expenses for the temporary left shoulder and cervical injuries up through November 20, 2017, the date Dr. Nathoo found Watters attained MMI.

Both parties filed petitions for reconsideration. Excel requested a specific finding that the proposed five-level cervical fusion is not compensable. Watters filed a petition asserting the ALJ improperly summarized Dr. Grossfeld's opinion. Watters pointed out Dr. Grossfeld in fact found he sustained an acute work injury in the form of the right disc extrusion of the cervical spine due to the May 17, 2016 fall. Watters also argued the evidence compels a finding any pre-existing condition of the neck and left shoulder were asymptomatic in the years leading up to the work injury and that Excel failed to prove a pre-existing, active condition pursuant to Finley v. DBM Technologies, 217 S.W.3d 261 (Ky. App. 2007). Watters requested the ALJ to reconsider the dismissal of his claim based upon the un rebutted evidence demonstrating he sustained a compensable work injury.

In the Order on petition for reconsideration, the ALJ provided the following additional findings and analysis:

With respect to the plaintiff's petition, the ALJ is persuaded it was air[sic] to conclude plaintiff did not suffer any new injury due to the May, 2016 work incident beyond his pre-existing cervical problems from a 2008 cervical fusion surgery. Indeed, Dr. Grossfeld explained the new finding of a disc extrusion did not cause any sensory or motor loss, did not show up on the EMG and was on the opposite side of plaintiff's symptoms. She therefore concluded this injury did not cause any impairment or any need for any treatment. For these reasons, the ALJ agrees it was air[sic] to conclude plaintiff suffered no new, permanent injury, but that the injury plaintiff suffered was a cervical disc extrusion which did not cause any impairment and requires no treatment at this time and is not relevant to the five level fusion proposed by Dr. Nathoo. Because it is a permanent injury, plaintiff will be entitled to any future medical treatment which may be reasonable or necessary for it in the future, but the treatment currently in dispute is not related to that cervical disc extrusion. As such, the plaintiff's petition for reconsideration is sustained only to the extent that it is determined plaintiff did suffer a new, permanent injury in the form of the cervical disc extrusion noted by Dr. Grossfeld.

The plaintiff's petition for reconsideration with respect to any award of benefits is overruled because Dr. Grossfeld specifically concluded any impairment or need for any additional treatment was due to plaintiff's pre-existing, active cervical degenerative joint disease rather than the effects of any May, 2016 work injury. In this respect, plaintiff's reliance upon *Finley v. DBM Technologies*, 217 S.W.3d 261 (Ky. App. 1984) is misplaced as that case dealt with what must be present in order to carve out some portion of an award based on pre-existing, active impairment. The finding at issue here is one of causation. Based on Dr. Grossfeld's opinions, it was/is determined that plaintiff's only work-related, permanent injury, the cervical disc extrusion, has not caused any permanent impairment. Plaintiff's petition for reconsideration on this point is therefore overruled.

With respect to the defendant's petition for reconsideration, the ALJ specifically finds that Dr. Nathoo's proposed five level cervical fusion is not

compensable as it is not work-related. Again, Dr. Grossfeld pointed out that the proposed surgery would be causally related to plaintiff's pre-existing, active cervical degenerative joint disease. This is consistent with Dr. Nathoo's own diagnosis of adjacent disc syndrome, indicating plaintiff's symptoms and need for surgery are causally related to the effects of plaintiff's 2008 cervical fusion surgery. For these reasons the defendant employer's petition for reconsideration is sustained and the proposed five level fusion surgery is found not compensable. In all other respects, the August 20, 2018 Opinion & Order remains unchanged.

On appeal, Watters argues the evidence compels a finding of work-related, permanent injury to his neck, rather than a temporary exacerbation of his pre-existing condition, entitling him to permanent income benefits. In his brief to the Board, Watters only addresses the ALJ's findings regarding his neck. Watters asserts Dr. Grossfeld's opinion that his pre-existing cervical condition was active at the time of the work injury is not supported by the evidence, noting he did not receive any treatment for his cervical conditions in the eight years preceding May 17, 2016.

Watters notes the Court in Finley v. DBM Technologies, *supra*, held that in order to be characterized as active, an underlying pre-existing condition must be symptomatic and impairment ratable pursuant to the AMA Guides immediately prior to the work injury. The burden of proving the existence of a pre-existing condition fall upon the Employer.

Watters argues the evidence establishes he sustained an injury under the Act, and is entitled to permanent income benefits and medical expenses for his degenerative changes. Watters asserts the evidence is not consistent with a resolved cervical exacerbation and directs our attention to Dr. Nathoo's opinion that his

dormant cervical degenerative condition was brought into disabling reality by the work injury warranting a 12% impairment rating. Watters again emphasizes the lack of restrictions and medical care in the period after he recovered from his 2008 fusion surgery. Watters similarly argues the ALJ erred by not awarding future medical expenses, including the proposed five-level fusion, for his cervical degenerative condition, and again argues it was an error to rely upon Dr. Grossfeld's opinion.

Watters asserts that even a contusion meets the definition of an injury under the Act, and "[a]s such, the ALJ was compelled to award future medical benefits." Watters asserts "At the very least, Watters is entitled to an award of medical benefits . . . for his cervical degenerative changes."

As the claimant in a workers' compensation proceeding, Watters 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). Since he was unsuccessful in proving entitlement to permanent income and medical benefits, 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).

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). An ALJ is vested with broad authority to decide questions involving causation. Dravo Lime Co. v. Eakins, 156 S.W.3d 283 (Ky. 2003). 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).

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. Whittaker v. Rowland, 998 S.W.2d 479, 481 (Ky. 1999). As 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).

We note Watters only challenges the ALJ's finding regarding his cervical condition. In the opinion, the ALJ found Watters did not suffer any new, permanent injury to his cervical spine and, instead, suffered only a temporary exacerbation of his previous degenerative condition. The ALJ relied primarily on Dr. Grossfeld's opinion, as well as Dr. Nathoo's diagnosis of adjacent level disc disease, and awarded temporary medical expenses through November 20, 2017. However, in the Order on petition for reconsideration, the ALJ found he erred in determining Watters did not suffer any new injury due to the May 2016 work

incident beyond his pre-existing cervical problems from a 2008 cervical fusion surgery. Relying upon Dr. Grossfeld's opinion, the ALJ determined Watters sustained "a cervical disc extrusion which did not cause any impairment and requires no treatment at this time and is not relevant to the five level fusion proposed by Dr. Nathoo." Accordingly, the ALJ found Watters entitled to future medical treatment, which may be reasonable or necessary for the disc extrusion in the future. The ALJ again emphasized the treatment in the dispute is not related to the work-related cervical disc extrusion, and specifically found the proposed five-level fusion not compensable.

We find Dr. Grossfeld's opinions constitute substantial evidence supporting the ALJ's determination regarding the cervical condition and no contrary result is compelled. In her October 9, 2017 report, Dr. Grossfeld provided an extensive summary of the medical records both pre-dating and subsequent to the work injury, including diagnostic imaging and an EMG, and performed a physical examination. Her diagnoses included non-work-related pre-existing, active cervical degenerative joint disease, as well as right disc extrusion indenting the ventral cervical cord with no sensory-motor limitation due to the May 17, 2016 work injury. In addressing treatment, Dr. Grossfeld found the recommended spinal surgery related to the pre-existing active cervical degenerative disease. She also found the work-related disc extrusion was not causing Watters' current symptoms since it is not present on the EMG/NCV findings or physical examination, and since it is located on the right side rather than Watters' symptomatic left side. Dr. Grossfeld assessed a

25% impairment rating for Watters' cervical condition after the 2008 fusion surgery, and stated his current impairment remains the same despite the disc extrusion.

The ALJ, in his Order on petition for reconsideration, found Watters sustained a cervical disc extrusion, which did not cause any impairment and requires no treatment at this time based upon Dr. Grossfeld's opinion. The ALJ specifically rejected Dr. Nathoo's opinion that the work injury aroused Watters' pre-existing dormant cervical disease into disabling reality. The ALJ acted within his discretion in finding Dr. Grossfeld's opinion more persuasive than Dr. Nathoo's opinion. Watters' arguments against Dr. Grossfeld's opinion go to the weight of the evidence and do not constitute an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., *supra*.

We disagree with Watters that the principles set forth in the holding in Finley v. DBM Technologies, *supra*, are applicable to this case. However, we note that since the rendition of Robertson v. United Parcel Service, 64 S.W.3d 284 (Ky. 2001), this Board has consistently held it is possible for an injured worker to establish a temporary injury for which temporary benefits may be paid, but fail to prove a permanent harmful change to the human organism for which permanent benefits are payable. In Robertson, the ALJ determined the claimant failed to prove more than a temporary exacerbation and sustained no permanent disability because of his injury. Therefore, the ALJ found the worker was entitled to only medical expenses the employer had paid for the treatment of the temporary flare-up of symptoms. The Kentucky Supreme Court noted the ALJ concluded Robertson suffered a work-

related injury, but its effect was only transient and resulted in no permanent disability or change in the claimant's pre-existing spondylolisthesis. The Court stated:

Thus, the claimant was not entitled to income benefits for permanent partial disability or entitled to future medical expenses, but he was entitled to be compensated for the medical expenses that were incurred in treating the temporary flare-up of symptoms that resulted from the incident. Id. at 286.

We also note the holding in FEI Installation, Inc. v. Williams, 214 S.W.3d 313 (Ky. 2007). In that case, the Kentucky Supreme Court instructed KRS 342.020(1) does not require proof of an impairment rating to obtain future medical benefits, and the absence of a functional impairment rating does not necessarily preclude such an award. Therefore, the absence of an impairment rating does not preclude the ALJ from awarding future medical benefits. In this instance, the ALJ found Watters entitled to future medical benefits for the cervical disc extrusion even though the injury did not warrant a permanent impairment in accordance the Robertson v. United Parcel Service, supra, and FEI Installation, Inc. v. Williams, supra. Therefore, because Dr. Grossfeld's opinions constitute substantial evidence and no contrary result is compelled, and because the ALJ awarded temporary benefits in accordance with the law, we affirm.

Accordingly, the August 20, 2018 Opinion and Order, and the September 10, 2017 Order on petition for reconsideration rendered by Hon. Grant S. Roark, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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