

Commonwealth of Kentucky
Court of Appeals

NO. 2016-CA-000086-WC

ROGER BRENT BOLING

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
CLAIM NO. WC-14-99215

OWENSBORO MUNICIPAL UTILITIES;
HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: ACREE, STUMBO AND TAYLOR, JUDGES.

STUMBO, JUDGE: Roger Brent Boling appeals from an Opinion of the Workers' Compensation Board affirming an Opinion and Award of Administrative Law Judge ("ALJ") Hon. Jonathan Weatherby. ALJ Weatherby denied Boling's Petition for Reconsideration upon determining that Boling sustained a temporary

exacerbation of a 2007 work injury rather than a new and distinct injury entitling Boling to permanent partial disability benefits. For the reasons stated below, we find no error and AFFIRM the Opinion of the Workers' Compensation Board.

Appellant Boling has been employed by the Owensboro Municipal Utilities ("OMU") since 1996. His job duties include repairing auxiliary equipment associated with a power generation unit. The record reveals that Boling's job duties are very physically demanding, and include the lifting of heavy objects as well and bending, twisting and squatting.

In 2007, Boling sustained a work-related low back injury when he was carrying a box of gear down a flight of stairs. As a result of the injury, Boling underwent surgery on his L4-L5 spine, and was released to return to work in 2008. Boling prosecuted a Workers' Compensation claim, which resulted in a settlement assessing a 13% impairment rating with benefits.

On December 26, 2013, Boling allegedly sustained a second low back injury while trying to position an actuator. At the time of the injury, he experienced pain in his back and right leg. The injury improved until April, 2014, when he was working for extended periods performing heavy lifting and bending. Boling would later testify that he started to notice increasing pain in his right buttocks and leg, with associated numbness of the right foot.

Boling sought medical attention from Dr. Gayle Rhodes, who referred him to Dr. Neil Troffkin who had treated Boling in 2007. Dr. Troffkin requested an MRI for Boling, which showed "triangular-shaped post-contrast enhancing

granulation tissue at right lateral recess of the L4-L5 causing moderate right lateral recessed stenosis. No recurrent or residual disc fragment is present.” Dr. Troffkin did not agree with the radiologist’s assessment, and concluded that a fragment of disc material under the L5 nerve root was responsible for Boling’s symptoms.

Dr. Troffkin performed surgery on Boling on July 16, 2014, to repair a herniated nucleus pulposus right L4-L5. Boling was returned to full duty work without restrictions on September 8, 2014.

Boling sought permanent occupational disability benefits as a result of the work-related injury occurring on December 26, 2013. A Benefits Review Conference and Formal Hearing were conducted in March, 2015, and the matter then proceeded before ALJ Weatherby. The contested issues were the entitlement to any benefits per Kentucky Revised Statute (KRS) 342.730, exclusion for pre-existing active disability or impairment, temporary total disability, and temporary exacerbation of a prior injury. Prior to submission of the matter to ALJ Weatherby, OMU filed a medical dispute and motion to reopen the 2007 claim. That dispute was withdrawn at the Benefits Review Conference.

On May 22, 2015, the ALJ rendered an Opinion and Award disposing of the claim. He determined in relevant part that all credible evidence supported the determination that Boling suffered a temporary exacerbation of his 2007 work injury. The ALJ noted that Dr. Loeb performed a physician review on April 17, 2014, to determine whether the current medical condition was causally related to the 2007 injury. Dr. Loeb answered that question in the affirmative. Additionally,

ALJ Weatherby found that Dr. Rhodes opined that the December 26, 2014 incident brought Boling's prior back condition into disabling reality, and that Dr. Troffkin opined that there was no increase in impairment as a result of the second injury.

ALJ Weatherby went on to find that Boling was entitled to temporary total disability benefits from July 16, 2014, through September 8, 2014, when Boling returned to unrestricted work. On July 9, 2015, ALJ Weatherby rendered an Order denying Boling's Motion for Reconsideration.

Boling appealed from those decisions to the Workers' Compensation Board. He argued that he sustained a distinct injury on December 26, 2013, and was entitled to a permanent impairment rating and award solely related to that injury. After considering the matter, the Board rendered an Opinion Affirming on December 18, 2015. The Board determined that the medical evidence was conflicting, with Dr. Loeb finding that Boling's current symptom were not caused by the 2013 event, whereas Dr. Troffkin concluding that the recurrence of Boling's symptoms in April, 2014, were attributable to the 2013 incident. The Board found that the ALJ properly exercised his discretion as fact-finder in concluding that Dr. Loeb's opinion was more persuasive. Ultimately, the Board found that because the record did not compel a finding that the April, 2014 symptoms and subsequent surgery were related to the December, 2013 incident, a permanent impairment rating arising from the 2013 incidence was not required. This appeal followed.

Boling now argues that the Board erred in sustaining the ALJ's Opinion and Award. Specifically, Boling contends that the evidence compels a

finding that an injury occurred on December 26, 2013, and that this injury warranted a permanent rather than temporary partial impairment rating. Boling directs our attention to the medical opinion of Dr. Troffkin, who believed that Boling's current physical condition arose from the 2013 event and was not related to the 2007 disc injury and surgery. Boling also notes that his 2007 injury and associated pain had resolved more than six years prior to the 2013 injury, during which time Boling performed extremely taxing physical work. According to Boling, these years of physically demanding work between 2007 and 2013 demonstrate that there was no underlying condition, and that the 2013 injury was unrelated to the 2007 injury. While acknowledging that the ALJ is vested with broad discretion in choosing what evidence to believe, Boling maintains that the evidence is sufficient to compel a finding of permanent partial disability stemming from the 2013 event. He seeks an Opinion and Order reversing the Board's Opinion and remanding the matter to the ALJ for entry of a permanent partial impairment rating and award of benefits.

Because Boling seeks to reverse the Board's Opinion, the burden of proof rests with him to prove that the evidence compels a ruling in his favor. *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735 (Ky. App. 1984). Boling's argument centers on the medical opinion of Dr. Troffkin, who found that the 2013 injury was not related to the 2007 injury and surgery. Dr. Troffkin's opinion may properly be characterized as compelling evidence in support Boling's claim that the 2007 and 2013 injuries are not related. Dr. Troffkin's opinion, however, was not the sole

medical evidence tendered to the ALJ and the Board. Rather, Dr. Thomas Loeb conducted a peer review on April 17, 2014, to address whether Boling's current diagnosis of low back strain, right sciatica and L4-L5 disc protrusion directly relate to the 2013 injury. As the Board properly found, Dr. Loeb reviewed the voluminous medical record and noted that Boling recovered spontaneously from the 2013 incident with conservative treatment and returned to full duty work on January 28, 2014, without any further findings of low back pain or any subjective complaints. Dr. Loeb did not believe that Boling had a new injury in 2013, that Boling experienced a recurrence of a longstanding medical condition, and that the recurrence of symptoms in April, 2014, was part of the natural occurrence of the degenerative condition at the L4-L5 disc space. The medical opinion of Dr. Rhodes was also introduced, who concluded that Boling's current symptomatology was a temporary exacerbation of the 2007 injury. The ALJ ultimately found the opinions of Drs. Loeb and Rhodes to be more persuasive, and accepted the opinion that no additional permanent rating was warranted.

In order to prevail on his appeal to the Board, Boling had the duty to demonstrate that the evidence compelled a different result than that reached by the ALJ. *Wolf Creek Collieries, supra*. Compelling evidence is defined as evidence so overwhelming that no reasonable person could reach the same result as the ALJ. *REO Mechanical v. Barnes*, 691 S.W.2d 224 (Ky. App. 1985). Dr. Loeb expressly found that the December, 2013 incident was only a temporary exacerbation that resolved in January, 2014. As noted by the Board, Boling's argument is predicated

on his belief that the recurrence of symptoms in April, 2014, must be attributed to the December, 2013 incident at work. The opinions of Drs. Loeb and Troffkin are at variance on this issue, with Dr. Loeb finding that Boling's 2014 symptoms being unrelated to the 2013 incident, and Dr. Troffkin reaching the opposite conclusion.

Ultimately, and as acknowledged by Boling, the ALJ has the sole authority to determine the weight, credibility, substance and inferences to be drawn from the evidence. *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418 (Ky. 1985). Where the evidence is conflicting, the ALJ may choose who and what to believe. *Pruitt v. Bugg Brothers*, 547 S.W.2d 123 (Ky. 1977). As applied herein, ALJ Weatherby was vested with the sole authority to judge the weight and credibility of the conflicting medical opinions. Because the evidence did not compel a different result than the one reached by the ALJ, *Wolf Creek Collieries, supra*, the Board properly sustained ALJ Weatherby's Opinion and Award. We find no error.

ALL CONCUR.

BRIEF FOR APPELLANT:

Scott M. Miller
Shepherdsville, Kentucky

BRIEF FOR APPELLEE
OWENSBORO MUNICIPAL
UTILITIES:

Sherri Brown-Keller
Lexington, Kentucky