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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001425-WC

AMAZON.COM

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-14-68458

SAMUEL D. WETHERBY;
HONORABLE STEPHANIE KINNEY,
ADMINISTRATIVE LAW JUDGE AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
REVERSING AND REMANDING

** ** * ** * ** *

BEFORE: ACREE, D. LAMBERT AND J. LAMBERT, JUDGES.

ACREE, JUDGE: At issue in this appeal is whether the Administrative Law Judge (ALJ) made sufficient findings to exclude a pre-existing condition in assessing Samuel Wetherby's impairment rating. The Workers' Compensation Board found the ALJ did not make sufficient findings. For the following reasons, we reverse

the Board's decision and remand for reinstatement of the ALJ's opinion, award, and order.

FACTUAL AND PROCEDURAL BACKGROUND

Samuel Wetherby sustained an injury on October 3, 2012, during the course of his employment with Amazon.com. Wetherby's Form 101 indicated that he injured his neck, right arm, and right hand while performing his duties operating a forklift for several hours and moving 50 to 75-pound boxes from a pallet lift table to a conveyor. Wetherby claimed his neck and arms were hurting throughout his shift, and when he was placing a box on the conveyor he felt a sharp electric shock run down his right arm from his neck. When the shocking sensation subsided, Wetherby experienced numbness in his right hand. He reported the injury to his area manager and was taken to the onsite medical facility.

Wetherby's October 3, 2012, work injury caused disc herniation at C7-8, necessitating a laminoforaminotomy at C7 through T1. Wetherby underwent the surgical procedure on June 9, 2014. He returned to work on September 10, 2014, performing the same job. However, he does not engage in as much lifting as before, and the forklift he now operates has power steering and power lifts. Wetherby still experiences numbness from the middle of his right forearm into his hand, which causes him frequently to drop things. He also experiences muscle spasms in his right arm.

Amazon agreed Wetherby's injury was compensable, but disputed the amount of compensation owed to him.

A Benefit Review Conference was conducted on May 10, 2016, at which time the parties entered into stipulations and identified remaining contested issues. Relevant to this appeal, one of the remaining contested issues was an exclusion for pre-existing disability or impairment. A final hearing was held on November 1, 2016.

The testimony established that Wetherby had sustained a cervical injury in 1980 requiring fusions in 1980 at C4-5 and fusions again in 1985 at C5-6 for presumptive left cervical radiculopathy. The symptoms Wetherby experienced in his 2012 injury were like those he endured in 1980. The second surgery was performed in 1985 due to ongoing pain in Wetherby's left shoulder following his first fusion procedure. The 1980 injury occurred at work, but he never filed a workers' compensation claim. Wetherby stated his employer paid for both his surgeries. He testified he has not experienced any problems in his left arm and neck following the 1985 surgery other than loss of muscle strength in his left shoulder and the occasional muscle spasm. He worked several jobs which required heavy lifting and loading since his 1985 surgery without issue. Wetherby further stated that there has been no change in his left shoulder since his October 3, 2012 injury.

Wetherby presented and relied upon the medical testimony of Dr. Frank Burke. Dr. Burke assessed a 17% impairment rating pursuant to the Diagnostic Related Estimate (DRE) method as set forth in the AMA Guides during Wetherby's March 25, 2015 independent medical evaluation (IME). Dr. Burke reevaluated Wetherby on June 13, 2016. At that IME, Dr. Burke assigned a 37% whole person impairment rating utilizing the range of motion (ROM) method as set forth in the Guides. Dr. Burke's assessment notes chronic myelopathy in the cervical spinal cord at C4-5 from his older injury as well as peripheral nerve root injury in his left shoulder as well as his right hand. Dr. Burke concluded that Wetherby had reached maximum medical improvement (MMI).

In his deposition, Dr. Burke stated he knew Wetherby had a prior injury, but believed it was not relevant to this case because he was asymptomatic prior to the 2012 injury, and the 1980 injury related to a different part of the cervical spine. Dr. Burke's rating did not make any provisions for Wetherby's 1980 injury. Dr. Burke testified that had Wetherby been evaluated in 1985, he would have been evaluated pursuant to the DRE model and placed in a Category IV, with a 25% impairment.

Amazon relied upon the report and deposition of Dr. G. Christopher Stephens as well as the report of Dr. Timothy Kriss.

Dr. Stephens performed a standard IME of Wetherby on July 11, 2013. According to his report, Dr. Stephens assessed Wetherby's impairment rating to be 28% pursuant to the DRE Cervical Category IV in the 5th edition of the AMA Guides. However, Dr. Stephens provided that had he assessed Wetherby *prior* to his October 2012 injury, he would have assigned a 25% impairment rating pursuant to the Guides utilizing the DRE method. He determined that Wetherby clearly had severe pre-existing disease in his cervical spine due to his previous fusion. Yet, Wetherby informed Dr. Stephens that he was completely asymptomatic prior to the subject injury. Dr. Stephens ultimately concluded that half of Wetherby's current symptoms and treatment were due to the October 2012 injury and half due to transitional level cervical spondylosis after the 1985 fusion. At the time of Dr. Stephens' evaluation, Wetherby had not undergone surgery. Dr. Stephens noted that if Wetherby elected to have surgery, he anticipated Wetherby would reach MMI four to six months after the operation; if he did not have surgery, Dr. Stephens considered Wetherby to be at MMI from the October 2012 injury.

Dr. Stephens was deposed on May 4, 2016. He opined that because Wetherby had surgery performed at additional cervical levels, he should now be evaluated using the Range of Motion (ROM) Model to obtain his impairment rating, with consideration given to his diagnostic-based rating as well as his pre-

existing impairment. Dr. Stephens testified that he did not know what Wetherby's current impairment rating was without reevaluating him because he had undergone surgery.

Dr. Kriss performed an IME on June 8, 2016. He reviewed Wetherby's medical records and reports. He also interviewed Wetherby. Dr. Kriss opined that Wetherby had "loads of degenerative change at every cervical spinal level[.]" In addition to the multilevel fusions from the 1980s, Dr. Kriss diagnosed "impressive degenerative changes of osteoarthritis, degenerative disc disease, spondylosis, and discontinuous ossification of the posterior longitudinal ligament, to varying but significant degrees at every cervical level from C2 down to T1." (R. 376).

Dr. Kriss explained his report that the ROM methodology was the appropriate method to be utilized to assess Wetherby's impairment rating because of Wetherby's history of multiple injuries and multiple surgeries at multiple vertebral levels of the cervical spinal region.

Dr. Kriss disagreed with Dr. Burke's testimony that there are multiple regions within the cervical spine. Dr. Kriss reported that there are only four regions of the spine (cervical, thoracic, lumbar, and sacral). Further, in assessing impairment, the AMA Guides provide tables and figures for each of the four areas of the spine, not "upper" and/or "lower" areas of each.

Applying the ROM methodology to Wetherby and his October 2012 injury, Dr. Kriss assessed a 31% whole person impairment. Dr. Kriss, however, utilized the DRE method to assess Wetherby's impairment after his second fusion surgery in 1985. Dr. Kriss agreed with Dr. Stephens' opinion that it was medically reasonable to increase the overall level of whole person cervical spinal impairment from 25% after the 1980 surgery to 28%, but still a DRE Category IV, after the 1985 surgery. Therefore, Dr. Kriss estimated that Wetherby's whole person cervical spinal impairment immediately prior to October 3, 2012 was 28%. Accordingly, Dr. Kriss assigned a 3% impairment attributable to Wetherby's October 3, 2012 injury.

Dr. Kriss further noted that Wetherby's whole person impairment would be less today if the previous injuries and surgeries from the 1980s were excluded. And lastly, Dr. Kriss stated that Wetherby's prior surgeries contribute to his current conditions and symptoms of intermittent neck pain and loss of cervical mobility.

With regard to Wetherby's permanent partial disability rating and pre-existing disability, the ALJ found:

The primary dispute in this claim is what permanent partial disability rating is appropriate. This claim is complicated by Plaintiff's prior cervical fusion surgeries and whether Plaintiff's permanent impairment rating should be calculated using the range of motion model versus the DRE method. This was a point of contention,

but all of the experts appear to now agree that the range of motion model is most appropriate because Plaintiff underwent surgery for the work injury at multiple levels. The ALJ must now determine Plaintiff's overall permanent impairment rating for his cervical spine. Dr. Burke has assessed a 37% permanent impairment rating using the range of motion model and Dr. Kriss has assessed 31% permanent impairment. After careful consideration, this ALJ finds Plaintiff retains a 31% permanent impairment rating, relying on Dr. Kriss. This ALJ notes Dr. Kriss is a neurosurgeon rather than an orthopedic surgeon, which places Dr. Kriss in an excellent position to assess permanent impairment in this complicated case. This ALJ also notes Dr. Owen^[1] released Plaintiff to return to work without any restrictions, which is another factor that favors Dr. Kriss' lower permanent impairment rating. Thus, this ALJ finds Plaintiff's overall impairment rating as a result of the October 3, 2012 work injury is 6%, relying on Drs. Kriss and Stephens.

The ALJ must now determine Plaintiff's permanent impairment rating for his cervical spine prior to the October 3, 2012 working injury. Dr. Stephens evaluated Plaintiff on July 11, 2013 and indicated Plaintiff's pre-existing cervical impairment rating was within the parameters of the Cervical DRE IV category. Dr. Stephens assessed a pre-existing cervical impairment rating of 25%. However, Dr. Kriss assessed a pre-existing cervical impairment rating using the highest range of the DRE IV Category, and assessed 28%. Following Plaintiff's cervical surgeries in 1980 and 1985, he returned to full duty work. At the time of the October 3, 2012 work injury, Plaintiff was not working under any permanent work restrictions. Thus, this ALJ finds Dr. Stephens' rating at the lower end of the DRE IV Category to be more appropriate. This ALJ finds

¹ Dr. Robert Owen performed Wetherby's posterior cervical laminoforaminotomy on June 9, 2014.

Plaintiff retained a 25% pre-existing cervical permanent impairment rating, relying on Dr. Stephens.

In Derr Construction^[2], the Kentucky Supreme Court explained:

KRS 342.120(4) [now KRS 342.120(6)] specifically exempts the employer from paying income benefits for prior, active disability or for disability resulting from the arousal of a previously dormant condition. However, KRS 342.020 contains no such exemption regarding medical benefits. Liability for medical expenses requires only that an injury was caused by work and that medical treatment was necessitated by the injury.

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). It is the Defendant’s burden to prove the existence of pre-existing, active disability. In order for a condition to be deemed pre-existing and active, it must be symptomatic, and impairment ratable immediately prior to the occurrence of the work event. Finley v. DBM Technologies, 217 S.W.3d 261 (Ky. [App.] 2007).

After a review of the evidence, this ALJ is not convinced Plaintiff’s October 3, 2012 work injury aroused his prior cervical condition at a different level in his spine into a symptomatic and disabling reality. Plaintiff underwent cervical fusions in 1980 and again in 1986 at C4 through C6. The ALJ is not convinced the October 3, 2012 work accident resulted in any trauma to those levels of Plaintiff’s spine which aroused a pre-existing dormant condition into a symptomatic disabling reality. The

² *Derr Const. Co. v. Bennett*, 873 S.W.2d 824, 827 (Ky. 1994).

October 3, 2012 [injury] caused a disc herniation at C7-8 which necessitated a laminoforaminotomy at C7-T1. Thus, the trauma associated with the October 3, 2012 work injury was to a different level of Plaintiff's cervical spine and did [not³] arouse a condition associated with the C4 through C6 level of Plaintiff's spine.

....

Plaintiff is awarded permanent partial disability benefits based on a 6% permanent impairment rating[.]

Following the ALJ's decision, Wetherby filed a petition for reconsideration requesting additional findings of fact as to whether he suffered from a prior, active condition, citing *Finley v. DBM Technologies*, 217 S.W.3d 261 (Ky. App. 2007). Wetherby asserted that the evidence established he was asymptomatic and had not received any medical treatment for cervical problems since 1985. Wetherby maintained that the ALJ must address the issue of a pre-existing, active condition.

The ALJ ruled:

Plaintiff has requested additional findings of fact concerning whether Plaintiff suffered for [sic] a pre-existing, active condition. Plaintiff has also requested an additional finding of whether (or not) the Defendant met its burden of proving a pre-existing, active condition.

This ALJ previously found Plaintiff retains a 31% whole person impairment rating for his cervical condition in

³ Wetherby asserted in his petition for reconsideration, and both parties ultimately agreed, that there was a typographical error in the ALJ's opinion, award, and order. The word "not" was inadvertently omitted. The ALJ corrected the error in the order issued upon reconsideration.

reliance on Dr. Kriss. This ALJ found Plaintiff retained a pre-existing 25% permanent impairment rating for his neck. The ALJ went on to determine Plaintiff's cervical impairment, as a result of the October 3, 2012 working injury was 6%.

Plaintiff's prior cervical fusions were at the C4 through C6 levels. The October 3, 2012 work injury caused a disc herniation at C7-8, which required foraminotomies at C7 through T1. In other words, the work accident resulted in trauma or an injury to an entirely different level of Plaintiff's cervical spine. Plaintiff has argued the October 3, 2012 work injury aggravated Plaintiff's preexisting cervical condition, but ultimately this ALJ was not convinced by that argument because the herniation associated with the October 3, 2012 work injury was as a different level. In other words, this ALJ was not convinced by the totality of the evidence that the October 3, 2012 work injury resulted in an arousal of Plaintiff's prior cervical condition at C4 through 6.

It is the Defendant's burden to prove a pre-existing, active condition, but the Plaintiff carries the burden of proving an aggravation. In this claim, the ALJ was not convinced there was an aggravation because the October 3, 2012 work injury was to an entirely different level of Plaintiff's cervical spine. Furthermore, the evidence indicates Plaintiff's prior cervical fusion at C4 through 6 is stable, which is not indicative of an arousal of Plaintiff's prior cervical condition at C4 through 6. This ALJ awarded permanent partial disability benefits based upon the October 3, 2012 injury to Plaintiff's cervical spine at the C7 through T1 levels.

Accordingly, Wetherby's petition relevant to the pre-existing active condition was denied; it was granted only to correct the typographical error. Wetherby appealed the issue to the Board.

On appeal, Wetherby argued that pursuant to *Finley v. DBM Technologies, supra*, the employer must establish the prior condition as both symptomatic and impairment-ratable prior to the work-related injury. Consequently, it was error for the ALJ to exclude a 25% impairment rating for a pre-existing condition from the award. Wetherby argued that the ALJ failed to make a finding which supported the exclusion for a pre-existing active, impairment. He further argued that because there was no evidence supporting a finding that his cervical condition was symptomatic prior to his most recent injury, the ALJ could not find that he had a pre-existing, active impairment. Therefore, the exclusion of 25% from his impairment rating was erroneous.

The Board agreed with Wetherby. As a result, the Board vacated the ALJ's impairment rating of 6% attributable to the October 3, 2012 injury and remanded the case for additional findings. Specifically, the Board instructed the ALJ to address whether *Finley v. DBM Technologies, supra*, is applicable. Amazon now appeals.

STANDARD OF REVIEW

Our review of an opinion of the Workers' Compensation Board is limited. We only reverse the Board's opinion when "the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice." *W. Baptist Hospital v. Kelly*,

827 S.W.2d 685, 687–88 (Ky. 1992). In reviewing the Board’s opinion, we look to the ALJ’s opinion. The ALJ’s findings of fact will not be disturbed if supported by substantial evidence. *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735 (Ky. App. 1984). And, the ALJ, as fact-finder, possesses the discretion to judge the credibility of testimony and weight of evidence. *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418 (Ky. 1985). Our review proceeds accordingly.

ANALYSIS

At issue is whether the ALJ made the necessary findings to exclude pre-existing, active disability from Wetherby’s overall impairment rating. Amazon maintains on appeal that the ALJ’s findings sufficiently addressed all contested issues, the decision comports with applicable law, and it was supported by substantial evidence. We agree.

Finley v. DBM Technologies explains that a pre-existing condition must be both symptomatic and impairment-ratable immediately before a work-related injury occurs in order to be viewed as being a pre-existing active condition that is not compensable in a claim for the injury. 217 S.W.3d 261, 265 (Ky. App. 2007). *Finley* applies when a pre-existing dormant condition is aroused into a disabling condition as a result of a work-related injury. *Id.*

The ALJ did not need to apply *Finley* in this case because the ALJ found the 1980 injury to be stable and that it had no disabling effect or connection

to the October 3, 2012 injury based upon the medical evidence presented. The findings recited above by the ALJ preclude the relevance of the application of *Finley*. The evidence of record established that Wetherby was asymptomatic prior to the October 2012 work-related injury, and the ALJ was not convinced, based upon the evidence, that the most recent injury aggravated or aroused a dormant condition into a disabling reality.

Additionally, the impairment rating was based upon the medical opinions of Dr. Stephens and Dr. Kriss, who each assigned a 25% and a 28% whole person impairment, respectively, to Wetherby subsequent to his 1985 surgery and prior to his October 2012 injury. The ALJ found their opinions to be the most accurate and credible. Excluding 25% from Wetherby's impairment rating for his 1980 injury in determining his impairment rating attributable to the October 3, 2012 work injury was supported by substantial, medical evidence. The ALJ has the discretion to choose which evidence he or she finds to be the most persuasive. *See Magic Coal Co. v. Fox*, 19 S.W.3d 88, 96 (Ky. 2000).

Accordingly, we find no error with the ALJ's non-application of *Finley* and resulting impairment determination.

For the above stated reasons, we conclude the Board erroneously vacated the ALJ's decision pertaining to Wetherby's impairment rating.

Therefore, we reverse and remand this matter to the Board for reinstatement of the ALJ's opinion, award and order.

LAMBERT, J., JUDGE, CONCURS.

LAMBERT, D., JUDGE, DISSENTS.

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