

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



DIVISION ONE
FILED: 12/27/2012
RUTH A. WILLINGHAM,
CLERK
BY: mjt

JAMES M. REED,) No. 1 CA-IC 12-0017
)
Petitioner,) DEPARTMENT C
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
THE INDUSTRIAL COMMISSION OF) Rule 28, Arizona Rules of
ARIZONA,) Civil Appellate Procedure)
)
Respondent,)
)
LARRY MILLER DODGE,)
)
Respondent Employer,)
)
PINNACLE RISK MGMT,)
)
Respondent Carrier.)
_____)

Special Action - Industrial Commission

ICA Claim No. 20091-680089

Carrier Claim No. WCAWC2009564653

Administrative Law Judge James B. Long

AWARD AFFIRMED

James M. Reed *in propria persona*
Petitioner Employee

Tolleson

Andrew F. Wade, Chief Counsel,
The Industrial Commission of Arizona
Attorney for Respondent

Phoenix

S W A N N, Judge

¶1 This is a special action review of an Industrial Commission of Arizona decision and award denying petitioner James Reed's request to reopen his claim for benefits for his physical condition.¹ Reed contends that the decision was not supported by sufficient evidence. We conclude that it was, and therefore affirm.

FACTS AND PROCEDURAL HISTORY

¶2 In June 2009, Reed suffered an industrial injury when he fell down a flight of stairs. He filed a workers' compensation claim, and his claim was accepted for benefits. In September 2010, the Administrative Law Judge ("ALJ") entered a decision and award concluding that Reed continued to require treatment for his psychological condition, but, as of November 6, 2009, his physical condition was stationary and without permanent physical impairment caused by the industrial accident. Accordingly, the ALJ awarded continuing benefits for Reed's psychological condition but terminated benefits for his physical condition. On January 31, 2011, Reed filed a petition

¹ Reed does not challenge the portion of the decision terminating benefits for his psychological condition.

to reopen his claim for benefits for his physical condition. In March 2011, the respondent carrier denied the petition to reopen, and terminated benefits for psychological care.

¶3 Reed protested the carrier's notices, and the matter proceeded to a consolidated hearing at which the following evidence was presented. In October 2009, neuropsychologist Dr. Lauren Dawson, Ph.D., evaluated and diagnosed Reed with a somatoform disorder because he was "claiming physical symptoms when there is no underlying medical cause for those symptoms." At that time, Dr. Dawson concluded that the disorder was caused by a temporary exacerbation of Reed's preexisting anxiety, and she therefore recommended that he receive six to eight weeks of psychotherapy from clinical psychologist Dr. Jay Summers, Ph.D. Dr. Summers began treating Reed in January 2010, and continued to treat him as of the time of the consolidated hearing. At the hearing, Dr. Summers testified that he believed Reed required further treatment for depression, but Dr. Summers refused to give an opinion regarding whether the industrial accident was a substantial contributing cause of Reed's psychological condition. Dr. Dawson, however, opined that based on her review of Dr. Summers' reports and her own reevaluation of Reed in February and March 2011, Reed did not require further psychotherapy for reasons related to the industrial accident.

Dr. Dawson testified that she believed Reed's condition had become stationary with no permanent psychological impairment from the accident.

¶4 With respect to Reed's physical condition, neurologist Dr. Daniel Torzala, M.D., opined that comparison of a September 2009 MRI image with an April 2010 MRI image showed worsening cervical disc herniation. Because of the herniation, Dr. Torzala referred Reed to neurological surgeon Dr. Daniel Lieberman, M.D., for a second opinion. Dr. Lieberman examined Reed in July 2010, found no evidence of radiculopathy, and referred him to physiatrist Dr. Dina Zaza, M.D. Dr. Zaza provided Reed with physical therapy, but when Dr. Lieberman examined Reed again in January 2011, he did not see the progress that would be expected in a person with a musculoskeletal injury. Dr. Lieberman opined that Reed had an underlying degenerative disc condition that was aggravated by the industrial accident, but also acknowledged that he had not reviewed any of Reed's records predating November 2009.

¶5 Neurologist Dr. John Powers, M.D., by contrast, had examined Reed before November 2009 and at that time had concluded that the industrial accident had caused soft-tissue injuries from which Reed had recovered, such that his condition was stationary with no permanent physical impairment.

Dr. Powers reexamined Reed in June 2011 and, based on that examination and his review of the interval-care reports by Drs. Torzala, Lieberman, and Zaza, opined that there was no evidence of a new, additional, or previously undisclosed condition attributable to the industrial accident. Dr. Powers testified that his review included the April 2010 MRI image, and that he believed the degeneration shown therein was age-related.

¶6 After considering the evidence, the ALJ entered a decision and award concluding that Reed had not shown that his claim should be reopened with respect to his physical condition. The ALJ explained that he resolved the conflict between the opinions of Drs. Lieberman and Powers by accepting Dr. Powers' opinion "as being more probably well-founded and correct."

¶7 Reed requested review of the decision and award, and the ALJ affirmed upon review. Reed then brought this special action.

JURISDICTION AND STANDARD OF REVIEW

¶8 We have jurisdiction pursuant to A.R.S. §§ 12-120.21 and 23-951(A), and Ariz. R.P. Spec. Act. 10. We defer to the ALJ's factual findings but review questions of law de novo. *Young v. Indus. Comm'n*, 204 Ariz. 267, 270, ¶ 14, 63 P.3d 298, 301 (App. 2003). We consider the evidence in the light most

favorable to upholding the ALJ's decision. *Lovich v. Indus. Comm'n*, 202 Ariz. 102, 105, ¶ 16, 41 P.3d 640, 643 (App. 2002).

DISCUSSION

I. DENIAL OF PETITION TO REOPEN REGARDING PHYSICAL CONDITION

¶19 A.R.S. § 23-1061(H) provides that a claimant may reopen his workers' compensation claim "to secure an increase or rearrangement of compensation or additional benefits . . . upon the basis of a new, additional or previously undiscovered temporary or permanent condition" In cases involving a first petition to reopen, the relevant comparison points for showing a changed condition are the dates of the claim's closure and the petition's filing. *Cornelson v. Indus. Comm'n*, 199 Ariz. 269, 271, ¶ 14, 17 P.3d 114, 116 (App. 2001). The claimant must show, by a preponderance of the evidence, both (1) the existence of a new, additional or previously undiscovered condition, and (2) a causal relationship between that condition and the prior industrial injury. *Sneed v. Indus. Comm'n*, 124 Ariz. 357, 359, 604 P.2d 621, 623 (1979). When the causal relationship between the changed condition and the industrial injury is not apparent to a lay person, that showing must be established by expert medical testimony. *Stainless Specialty Mfg. v. Indus. Comm'n*, 144 Ariz. 12, 19, 695 P.2d 261, 268 (1985).

¶10 Here, Drs. Lieberman and Powers offered conflicting medical opinions regarding whether Reed's intervertebral degeneration was causally related to the industrial injury. Reed contends that Dr. Powers' opinion should not have been considered. Specifically, Reed contends that Dr. Powers could not have reviewed the April 2010 MRI image because Reed did not authorize Dr. Powers to receive a copy of the image, and contends that Dr. Powers therefore testified untruthfully when he stated that he had received the image on a disk and viewed it. Reed is correct that a medical opinion premised on an inaccurate or incomplete factual background may not constitute substantial evidence. *Royal Globe Ins. Co. v. Indus. Comm'n*, 20 Ariz. App. 432, 434, 513 P.2d 970, 972 (1973); *Desert Insulations, Inc. v. Indus. Comm'n*, 134 Ariz. 148, 151, 654 P.2d 296, 299 (App. 1982). But on this record, the ALJ reasonably concluded that the factual background for Dr. Powers' opinion was accurate and complete.

¶11 In support of his argument, Reed identifies a facsimile transmittal sheet -- which he provided to the ALJ at or before the hearing -- sent to him by the imaging provider. The narrative typed on the sheet states that Reed was the only person who requested the image from the provider. But Reed testified that after the provider gave him the disk containing

the image, he passed it on to Dr. Torzala -- and no evidence was presented regarding what Dr. Torzala did with it. On this record, it was not unreasonable for the ALJ to accept Dr. Powers' testimony that he had received a disk containing the image and (as he also noted in his written report) reviewed the image. Though the ALJ could also have reached a different conclusion, such credibility determinations are for the ALJ and fall outside the scope of our review. *Royal Globe*, 20 Ariz. App. at 434, 513 P.2d at 972.

¶12 Dr. Powers' opinion constituted substantial evidence that provided sufficient support for the ALJ's findings and conclusions. The conflict between Dr. Powers' opinion and Dr. Lieberman's opinion was for the ALJ to resolve. *Stainless Specialty*, 144 Ariz. at 19, 695 P.2d at 268. We do not reweigh the evidence. *Perry v. Indus. Comm'n*, 112 Ariz. 397, 398-99, 542 P.2d 1096, 1097-98 (1975). The ALJ did not err by denying Reed's petition to reopen.

II. TERMINATION OF BENEFITS FOR PSYCHOLOGICAL CONDITION

¶13 Reed does not challenge the termination of benefits for his psychological condition. We therefore need not consider that issue. See *Polanco v. Indus. Comm'n*, 214 Ariz. 489, 492 n.2, ¶ 6, 154 P.3d 391, 394 n.2 (App. 2007). We note, however, that the only relevant medical opinion offered on the issue was

Dr. Dawson's, and her opinion supported the ALJ's findings and conclusions.

CONCLUSION

¶14 Sufficient evidence supported the ALJ's decision and award. We therefore affirm.

/s/

PETER B. SWANN, Judge

CONCURRING:

/s/

PHILIP HALL, Presiding Judge

/s/

SAMUEL A. THUMMA, Judge