RENDERED: APRIL 25, 2008; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001498-WC

ARNOLD BOWLING — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-01-83294

ELMO GREER & SONS, HON. DONNA H. TERRY, ADMINISTRATIVE LAW JUDGE, AND WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, NICKELL, AND TAYLOR, JUDGES.

NICKELL, JUDGE: Arnold Bowling ("Bowling") has petitioned for review of an opinion of the Workers' Compensation Board ("Board") entered July 6, 2007. That opinion affirmed an opinion and order of Administrative Law Judge Donna H. Terry ("ALJ") dated February 26, 2007, denying motions to reopen a non-surgery low back claim due to a worsened condition and to resolve a medical fee dispute. No petition for reconsideration of the ALJ's opinion and order was filed. We now affirm the Board's order.

For most of his adult life, Bowling worked as a heavy equipment operator. Born in 1951, he completed the eighth grade but testified his reading and writing skills are below the eighth grade level. On June 19, 2001, he suffered a work-related injury while operating a trackhoe for Elmo Greer & Sons ("Greer"). In 2003, Bowling and Greer reached a compromise settlement for $58,000.00.

In 2006, Bowling moved to reopen the claim alleging his health had deteriorated substantially, he was now totally and permanently disabled and thus unable to work, and his whole body impairment rating had increased from eight percent to twelve percent. He also alleged Greer had refused to pay for a new MRI of his lumbar spine as requested by an orthopedic surgeon in 2005. An order sustaining the motion to reopen the claim was entered in September 2006 and the case was assigned to the ALJ. After a hearing in January 2007, the ALJ issued an opinion and order dated February 23, 2007, from which we quote liberally:

> [Bowling] became employed by the defendant [Greer] as a heavy equipment operator in 1999. It is undisputed that he sustained a work-related injury on June 19, 2001 when the seat of a backhoe came off and he was thrown forward, injuring his low back. Following the work injury, [Bowling] sought medical treatment with Dr. Jose Echeverria, who had previously provided treatment to [Bowling] for lumbar degenerative disc disease, Parkinson's disease, COPD, and depression. Dr. Echeverria ordered physical therapy and medication as well as a referral to neurosurgeon Dr. James Bean [for] complaints following the work injury.
>
> Dr. Bean's treatment notes from the fall of 2001 indicate that maximum medical improvement was reached by October 29, 2001, that [Bowling] would not be released to return to work, and that continued treatment with analgesic medication would be required in the future. Dr. Bean assessed a 5% permanent impairment rating under the AMA Guidelines to the Evaluation of Permanent Impairment, at least 50% of which was pre-existing and recommended

restrictions against lifting more than 35 pounds with avoidance of repetitive bending, stooping, twisting, squatting, or crawling. According to Dr. Bean, the June 19, 2001 work injury caused pain of a subjective nature, but did not alter the objective medical findings regarding [Bowling's] low back condition.

[Bowling] entered into a settlement agreement with Greer's workers' compensation insurance carrier in an agreement approved by Administrative Law Judge Lloyd Edens on February 26, 2003. The agreement indicated that it represented a compromised settlement of a disputed claim arising from the June 19, 2001 low back strain and that [Bowling] was already receiving Social Security Disability benefits when the agreement was approved.

Orthopedic surgeon Dr. David Muffly performed an independent medical examination during the underlying claim on December 26, 2001 and recorded complaints of constant burning low back pain which radiated into [Bowling's] left foot and leg and which was worsened by walking, sitting, bending, or twisting. He reviewed a lumbar MRI which revealed degenerative disc disease at L4-5 and L5-S1, with a small central disc bulge and protrusion at L5-S1 with thecal sac indentation. Dr. Muffly assessed an 8% whole person impairment under Category DRE Lumbar II of the AMA Guides and recommended position changes every thirty to sixty minutes, sitting or standing [no] more than three hours in an eight hour day, performing only minimal bending and stooping, and refraining from lifting more than 25 pounds.

Dr. Muffly performed a second evaluation on July 13, 2006 and recorded complaints of constant low back (sic) with numbness into the left leg, along with a new complaint of burning and tingling in the right leg. [Bowling] told Dr. Muffly that his symptoms were increased by walking, standing, sitting, or riding in a car. Dr. Muffly compared x-ray films of the lumbar spine dated December 26, 2001 and December 20, 2005 and noted an increase in the size of the osteoarthritic spurs at L5 and more advanced degenerative disc disease at that level. He diagnosed lumbar radiculopathy and stated [Bowling's] low back condition was worse in comparison to the December 26, 2001 examination. Dr. Muffly assessed a 12% whole body impairment under DRE Lumbar Category III and recommended position

changes every fifteen to thirty minutes, no bending or stooping, and refraining from lifting more than 10 pounds.

Dr. Muffly subsequently issued a September 27, 2006 supplemental report stating his opinion that the June 19, 2001 injury is the cause of [Bowling's] current low back condition and that the deterioration in condition is a "direct result" of the low back injury. Without examining [Bowling] since July 13, 2006, he increased [Bowling's] impairment rating from 12% to 13%. Dr. Echeverria's treatment records between April 28, 2003 and September 7, 2006 were introduced herein. He continued to treat [Bowling] for COPD, Parkinson's disease, neck pain with a compression fracture at C-6, anxiety, and depression as well as low back pain and degenerative joint disease. [Bowling's] low back pain appeared to be controlled by medication until a regularly scheduled visit on March 21, 2005, when [Bowling's] complaints were recorded as "persistent severe back pain" and his Lortab dosage was increased. Subsequent quarterly appointments also revealed increased complaints of neck pain.

[Bowling] was subsequently referred by Dr. Echeverria to orthopedic surgeon Dr. Jean-Maurice Page for an evaluation at some point in 2006.

The only record from Dr. Page is a November 10, 2006 letter to [Bowling's] counsel indicating that [Bowling] had been evaluated and had neurologically symmetrical reflexes for L4 and S1 and complaints of numbness and tingling in his left lower extremity. Dr. Page recommended a new MRI to assess any progression of degenerative disc disease at L5-S1 since the 2001 MRI. Dr. Page also indicated that EMG/NCV studies might be required "in order to promote quality care and treatment options."

Dr. Page's request for pre-authorization for a lumbar MRI was submitted to utilization review, and the matter was assigned to orthopedic surgeon Dr. Ronald J. Fadel. Dr. Fadel indicated that he reviewed the medical file of [Bowling] on January 29, 2006 and could find no logical rationale for linking [Bowling's] current findings to the 2001 injury. He noted that "it is already known he has age appropriate discopathy" at several lumbar levels, that [Bowling] is not a surgical candidate, and that his current complaints do not substantially differ from his previous complaints. Since

[Bowling's] symptomatic treatment would remain essentially unchanged regardless of any imaging findings, Dr. Fadel concluded that a repeat MRI was not reasonable or necessary for treatment of the work injury.

Orthopedic surgeon Dr. John Vaughan performed an independent medical examination on September 27, 2006 and reviewed medical records. During the physical examination, Dr. Vaughan commented that the most striking finding was a constant "pill rolling" tremor of both hands at rest, a symptom consistent with his Parkinson's disease. Dr. Vaughan diagnosed low back pain due to lumbar spondylosis (combination of disc degeneration and arthritic changes) and assessed a 5% whole person impairment under DRE Lumbar Category II of the AMA Guides. According to Dr. Vaughan, the natural history of disc degeneration such as [Bowling] had in 2001 does not include progressive neurologic deficits, and his functional decline is more likely related to Parkinson's disease as opposed to progression of the 2001 injury. He did not believe that a lumbar MRI was indicated for the effects of the 2001 work injury and opined that both [Bowling's] impairment and restrictions arising from the 2001 injury remain the same as when assigned by Dr. Bean in the underlying claim.

[Bowling] testified that he has been treated by Dr. Echeverria since the mid 1990's and was questioned about statements in Dr. Echeverria's pre-settlement treatment notes indicating that [Bowling] was experiencing severe and constant low back pain at the time of the settlement. [Bowling] acknowledged that he has experienced low back pain prior to the settlement agreement but denied any problems with prolonged sitting or with right leg pain before February 26, 2003. He testified that he now has more severe pain and that he requires a higher dosage of Lortab than in 2003.

[Bowling] also acknowledged that he has not returned to work since 2001. He also admitted that he had applied for and had been granted Social Security Disability benefits even before the settlement agreement was approved on February 26, 2003.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Upon reopening, an injured employee must prove a change of disability as shown by objective medical evidence of worsening of impairment due to the work injury. KRS 342.125(1)(d). Reopening of necessity involves a comparison of an injured employee's condition and disability at the time of a decision or settlement agreement and upon reopening. *Hodges v. Sager Corp.,* 182 S.W.3d 497 (Ky. 2005).

In this case, [Bowling] testified he is unable to perform the type of work which he performed in the past, including the heavy equipment job which he performed for Greer. His brief also contends that his limited education would limit his opportunities for other types of employment. However, neither of these facts have changed since the February 26, 2003 settlement agreement, as [Bowling] was unable to perform any of his past relevant work in 2003 and had the same degree of education when he agreed to settle his claim. The record further establishes that [Bowling] did not return to work following the injury for Greer or any other employer, and that he had successfully applied for Social Security Disability benefits when he agreed to settle his claim.

[Bowling] testified that his complaints of pain have subjectively worsened and that he now has occasional pain in his right leg as well as his left leg. However, he admitted that he had complained of severe and constant pain in at least one leg since prior to the settlement agreement.

While Dr. Muffly did indicate a worsening of condition and some degree of increased impairment, the more convincing medical testimony, that of Dr. Vaughan, established that [Bowling's] 5% impairment rating remains unchanged from that assessed by Dr. Bean in 2001 and that [Bowling's] restrictions also remain essentially unchanged. Dr. Vaughan also indicated that [Bowling's] functional decline since 2001 is likely related to progression of his Parkinson's disease, causing constant tremors and slow movement, as opposed to any progression of the effects of the work injury. Based upon the opinion of Dr. Vaughan, the Administrative Law Judge finds that [Bowling] has not demonstrated a change of disability as shown by objective medical evidence of worsening of impairment arising from the work injury.

> Further, Dr. Page's explanation for the necessity of the MRI scan does not specifically link the need for that test to the 2001 injury, but rather indicates a need to asses (sic) progression of the pre-existing L5-S1 degenerative disc disease over the preceding four years. Dr. Fadel noted that [Bowling's] current complaints do not substantively differ from new findings in 2001 and that, since he is not a surgical candidate, an MRI would not change the symptomatic treatment.
>
> Based upon the foregoing opinions of Drs. Vaughan and Fadel, it is found that the proposed MRI is not medically necessary for treatment of the 2001 work injury. While it could demonstrate the presence or absence of further degenerative changes, it would not substantially change the type of treatment afforded in this non-surgical back case and is not medically necessary for treatment of that injury. Therefore, the request for approval of an MRI is denied.

Without petitioning the ALJ to reconsider her opinion and order, Bowling appealed to the Workers' Compensation Board which entered a twenty-three page opinion on July 6, 2007. Bowling advanced five arguments: the ALJ failed to make a specific finding as to Bowling's disability at the time of settlement in 2003; the ALJ erroneously found Bowling's condition had not changed in the three years since the settlement; the ALJ erred in not ordering the employer to pay for a new lumbar MRI scan; the ALJ misconstrued Dr. Bean's 2003 opinion; and, finally, the ALJ overlooked a 2005 medical report from Dr. Page that was proffered during the 2007 hearing.

In affirming the ALJ's opinion and order, the Board deemed Bowling's failure to file a petition for reconsideration a waiver of any complaint about the lack of a specific finding as to his condition at the time of settlement in 2003 and the alleged misstatements regarding the medical opinions of Drs. Bean and Page. Despite the lack of preservation, the Board went on to state that while the ALJ may not have made a specific finding as to Bowling's condition at the time of settlement, the opinion clearly

showed she compared his condition in 2003 to his condition in 2006. Furthermore, based upon the substantial evidence in the record, especially the opinion of Dr. Vaughan, it was more likely that any change in Bowling's health was the result of his pre-existing Parkinson's disease and degenerative disc disease rather than his 2001 work injury. Additionally, the Board stated there was no error in the ALJ relying upon Dr. Vaughan's opinion instead of Dr. Muffly's opinion since the ALJ has sole discretion to evaluate and weigh witness credibility. Finally, the Board found Greer satisfied its burden of showing a new lumbar spine MRI was unnecessary to determine the proper treatment for Bowling's 2001 injury since neither Dr. Vaughan nor Dr. Fadel saw any value in a new MRI. Medical reports in the record established Bowling's complaints at reopening were virtually the same as those he had expressed previously, disc degeneration is commonly expected in people of his age, and Dr. Bean had deemed Bowling a non-surgical candidate as early as October 2001. Thus, in their opinion, a new image would not impact the course of treatment for Bowling's work-related injury. Based upon the foregoing, the Board affirmed the ALJ's opinion and order in all respects. Bowling appealed to this Court and we now affirm.

Bowling shouldered the burden of proof before the ALJ. As he was unsuccessful, the issue before us on appeal is whether the evidence compels a different conclusion. *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735, 736 (Ky.App.1984). Compelling evidence is that which is so overwhelming no reasonable person could reach the same conclusion as the ALJ. *REO Mechanical v. Barnes*, 691 S.W.2d 224, 226 (Ky.App.1985). The ALJ has sole authority to judge the weight, credibility, substance and to determine the inferences to be drawn from the evidence. *Paramount*

Foods, Inc. v. Burkhardt, 695 S.W.2d 418, 419 (Ky.1985). Where the evidence is conflicting, the ALJ alone determines what to believe or disbelieve, whether it comes from the same witness or the same adversary party's total proof. *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15, 16 (Ky.1977). So long as the ALJ's opinion is supported by any evidence of substance it cannot be said a different result is compelled. *Special Fund v. Francis*, 708 S.W.2d 641 (Ky.1986). Our role, as an appellate court, "is to correct the Board only where [we perceive] 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." *Western Baptist Hospital v. Kelly*, 827 S.W.2d 685, 687-88 (Ky.1992).

Bowling's first allegation is that the ALJ failed to make a distinct finding of his disability at the time of settlement in 2003. Before reviewing this claim, we must determine whether it is properly preserved for our review. To preserve an issue in a workers' compensation case, a petition for reconsideration must be filed. *Halls Hardwood Floor Co. v. Stapleton*, 16 S.W .3d 327, 330 (Ky.App.2000). No petition was filed in this case. As a result, the Board said its review was:

> limited to a determination of whether there is substantial evidence contained in the record to support the ALJ's conclusion. Stated otherwise, inadequate, and incomplete, or even inaccurate fact finding on the part of an ALJ will not justify reversal or remand if there is identifiable evidence in the record that supports the ultimate conclusion. *Eaton Axle Corp. v. Nally,* 688 S.W.2d 334 (Ky. 1985).

We agree with the Board. Had Bowling called the alleged error to the ALJ's attention in a petition for reconsideration, it could have been addressed prior to review by the Board and prior to the filing of an appeal in this Court.

We note with interest that Bowling's brief ignores CR[1] 76.12(4)(c)(v) which requires "at the beginning of the argument a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner." His brief also ignores the Board's reference to KRS[2] 342.281 and KRS 342.285(1) which require the filing of a petition for reconsideration. Having determined the issue was not properly preserved, we consider the evidence as a whole to determine whether reversal is warranted. We hold it was not. *Hodges, supra,* cited by the ALJ, required a comparison of Bowling's condition at the time of settlement in 2003 with his condition at reopening in 2006. The ALJ clearly performed the required comparison as evidenced by her recitation of medical opinions spanning 2001 through 2006. Thus, absence of a specific statement as to Bowling's condition in 2003, in light of the evidence as a whole, does not merit reversal.

Bowling's second complaint is that the ALJ erred in finding his condition had not changed since 2003. The relevant question is whether there is objective medical proof establishing that Bowling's condition is worse today than in 2003 as a result of the ongoing effects of the 2001 work-related injury. KRS 342.125(1)(d). Bowling testified pain now radiates into his right leg and he has more difficulty sleeping, both of which are changes from 2003. In a letter dated July 13, 2006, Dr. Muffly, an orthopedic surgeon, stated Bowling's condition is worse today than in December 2001. He also stated Bowling has lumbar radiculopathy and his "mild degenerative disease" is now "advanced." Dr. Muffly's July 2006 letter did not attribute Bowling's worsened

[1] Kentucky Rules of Civil Procedure.

[2] Kentucky Revised Statutes.

condition to the 2001 work-related injury. However, a supplemental letter from Dr. Bowling dated September 27, 2006, stated:

> In my opinion, the injury of 6/10/01 is the cause of his current low back condition. His low back has deteriorated and (sic) a direct result of the June, 2001 low back injury. This progression has caused the lumbar radiculopathy and his impairment rating has increased to 13% from 8% as set forth in the report dated 7/13/06.

Another orthopedic surgeon, Dr. Vaughan, saw Bowling on September 27, 2006. He conducted an independent medical exam which Bowling suggests was too short to be of any value and lacked the specificity seen in Dr. Muffly's reports. After examining Bowling and his medical records, Dr. Vaughan diagnosed Bowling as having:

> lower back pain due to lumbar spondylosis (combination disk degeneration and arthritic changes).
>
> By virtue of my exam I think patient remains at DRE Category II injury of 5% to the body as a whole due to the 2001 work injury. This is due to a decreased range of motion to his back. He does have radicular symptoms, but no evidence of radiculopathy.
>
> The natural history of disk degeneration as this man had in his back in 2001 is not of progressive neurologic deficit. I believe his functional decline is more likely related to his Parkinson's disease as noted by his constant tremor and slow movement as opposed to any progression of his 2001 injury.
>
> In my opinion his impairment and restrictions as result of the 2001 injury remain the same as Dr. Bean assigned at that time.

As was her prerogative under *Paramount, supra*, the ALJ found Dr. Vaughan's opinion to be more convincing than the one provided by Dr. Muffly. While Bowling characterizes Dr. Vaughan's opinion as "irrational," the ALJ's description of his diagnosis is entirely reasonable. Bowling's current complaints were similar to those expressed in 2003 and

were entirely appropriate for his age. Of particular interest was Dr. Vaughan's opinion that Bowling's functional decline was more attributable to Parkinson's disease, with which he was diagnosed in the 1990's, rather than any change resulting from the 2001 work-related injury. Contrary to Bowling's suggestion, the ALJ correctly found Bowling failed to demonstrate a change in his condition due to the 2001 injury. Thus, there was no error justifying reversal under *Francis, supra.*

Bowling's third allegation is that the ALJ erred in stating Dr. Bean had found him to be "totally disabled at the time of settlement." Again, this is precisely the type of issue that should have been, but was not, raised in a petition for reconsideration. This claim is wholly unpreserved and we will not address it further.

Bowling's fourth claim is that the ALJ should have required Greer to pay for an updated lumbar spine MRI. After examining Bowling on December 20, 2005, Dr. Page, an orthopedic surgeon, requested a new MRI because the last scan had been made four years prior. In a follow-up letter dated November 10, 2006, Dr. Page stated a new image was needed "to completely assess any progression in the disc at L5-S1 and further deterioration over the four year period. EMG/NCV, in order to promote quality care and treatment options for the patient, might be required." In neither letter did Dr. Page attribute the need for an updated MRI to the 2001 work injury. Nor did he identify the treatment options being considered and how a new MRI would confirm or negate them, although he did say he would "try to optimize conservative treatment."

Dr. Page was one of four orthopedic surgeons to review Bowling's medical records in 2005/2006 and one of three to physically examine him. When Dr. Muffly examined Bowling in July 2006 he did not mention the need for a new MRI. Thereafter,

two other orthopedic surgeons, Drs. Fadel and Vaughan, reviewed Bowling's case. Upon completing his paper review, Dr. Fadel saw no need for a new MRI as a result of the 2001 work injury because:

> [i]t has now been nearly 5 years since this man injured himself. He underwent appropriate evaluation including MRI in the early post injury period and his pathology was well documented. He received treatment, was judged to be MMI, assigned an impairment rating and released. At this point in time a logical rationale which would relate current findings or changes to the injury of so long ago is not apparent to me at all especially since the patients in his age group are well known to exhibit axial degenerative findings with or without a history of trauma. It is already known he has age appropriate discopathy at several levels of his lumbar spine and given the comorbidities he is not now a surgical candidate and clearly was not a candidate based on the findings in 2001. Furthermore, it is not evidence that his current complaints substantively differ from what they have always been and all things considered his ongoing symptomatic treatment will remain essentially unchanged regardless of current imaging findings.

Dr. Vaughan not only reviewed medical records, he also performed a physical exam. Bowling testified Dr. Vaughan's examination lasted only about fifteen minutes so he discounted its value. He also criticized it as lacking fine detail and suggested it was suspect because Dr. Vaughan was paid by the employer. Our review of Dr. Vaughan's report shows a reasonably detailed summary consistent with the medical records provided to us. Like Dr. Fadel, Dr. Vaughan saw no reason for an MRI "as it relates to the injury of 2001."

As noted previously, the ALJ has sole authority to weigh witness credibility. In this case, the ALJ found Dr. Vaughan's opinion the most credible of the four orthopedic surgeons who evaluated Bowling around the time of reopening. The medical evidence in this case was conflicting and the ALJ chose to rely upon the

diagnosis and opinion of Dr. Vaughan and to reject the opinion of Dr. Page. Picking and choosing from conflicting evidence is entirely permissible since the ALJ, as fact-finder, has sole authority to weigh the "quality, character, and substance of" the proof and "may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it came from the same witness or the same adversary party's total proof . . . ." *Whittaker v. Rowland*, 998 S.W.2d 479, 481 (Ky. 1999). *See also Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418, 419 (Ky. 1985). The ALJ's conclusion, affirmed by the Board, is based upon substantial evidence and therefore must be affirmed. *Daniel v. Armco Steel Company, L.P.*, 913 S.W.2d 797, 798 (Ky.App. 1995).

Bowling's final complaint is that the ALJ mistakenly wrote in her opinion and order that the only evidence in the record from Dr. Page was a letter dated November 10, 2006. In fact, Dr. Page also documented an office visit that occurred on December 20, 2005. Again, this factual misstatement could have been corrected had a petition for reconsideration been filed. Without a petition, however, this claim is not preserved for our review and warrants no further discussion.

Based upon our review of the record, the Board has not "overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice." *Western Baptist Hospital, supra,* 827 S.W.2d at 687-8. For the foregoing reasons, the Board's decision is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

BRIEF FOR APPELLEE,
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