

RENDERED: NOVEMBER 9, 2012; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2012-CA-000710-WC

NEIGHBORHOOD RESTAURANTS, INC./
EMPLOYEE RESOURCE GROUP

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-08-83868

RICKY SLONE, HON. EDWARD D. HAYS,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * **

BEFORE: CLAYTON, KELLER AND MAZE, JUDGES.

MAZE, JUDGE: Neighborhood Restaurants, Inc./Employee Resource Group

(Neighborhood Restaurants) petitions for review of a March 16, 2012, opinion by

the Workers' Compensation Board (Board) affirming an Administrative Law

Judge's (ALJ) award of income benefits and medical expenses to Ricky Slone.

Neighborhood Restaurants argues that the ALJ could not reasonably rely on the contradictory opinions of two physicians concerning the causation of Slone's left shoulder and cervical spine impairments. Consequently, it maintains that the award of income benefits and medical expenses for these conditions was clearly erroneous. We agree with the Board that the ALJ was entitled to rely on portions of each physician's opinions, and that the ALJ's assessment of the evidence was supported by substantial evidence. Hence, we affirm.

The parties agree that Slone was employed as a maintenance technician for restaurants owned by Neighborhood Restaurants. The parties also agree that Slone suffered a work-related injury on June 17, 2008. Subsequently, Slone filed an application for workers' compensation benefits, stating that he sustained injuries by falling "15 feet from a ladder onto [a] grease box and then onto [the] ground." Slone alleged the following injuries: "lungs, left ribs, fractured L1, L2, & L3, left shoulder, left arm, neck pain and chest pain." The July 26, 2011, benefit review conference order lists the following contested issues: "benefits per KRS 342.730, including multipliers as to left upper extremity/shoulder and cervical; work-relatedness/causation; and unpaid or contested medical expenses re cervical/shoulder."

In a September 23, 2011, opinion, award, and order, the ALJ found, in relevant part, that Slone has a 15% permanent impairment to the body as a whole. The ALJ based this conclusion on the opinion of Dr. Anbu Nadar, who assessed a 5% cervical spine impairment, 5% lumbar spine impairment, 2% left shoulder

impairment, and a 3% impairment due to residual pain from the multiple rib fractures, flail chest, and pneumothorax. But while Dr. Nadar assessed separate impairment for the left shoulder based on the limitation of Slone's range of motion and for the neck based on DRE Cervical Category II, he was of the opinion that Slone's symptoms of numbness and tingling were not related to the work injury because they began a year and a half after the accident.

Although the ALJ adopted Dr. Nadar's opinion of the allocation of permanent impairment under the AMA Guidelines, Fifth Edition, the ALJ was more persuaded by Dr. Thomas Jarboe's testimony about Slone's complaints of pain in his left arm and shoulder. Like Dr. Nadar, Dr. Jarboe also assessed a 5% impairment rating for the cervical spine condition and a 3% impairment rating for the neck and shoulder impairment. But unlike Dr. Nadar, Dr. Jarboe was of the opinion that Slone's symptoms in his left arm and shoulder were related to the rib fractures and were thus work related. Based on these findings, the ALJ awarded temporary total disability (TTD) benefits, permanent partial disability (PPD) benefits, and medical expenses.

On appeal to the Board, Neighborhood Restaurants challenged the ALJ's award of benefits based upon the award of benefits for the left shoulder and cervical spine impairments. It argued that the ALJ's simultaneous reliance upon the opinions of Dr. Jarboe and Dr. Nadar was clearly erroneous because their "opinions are irreconcilable." The Board disagreed, concluding that the ALJ was entitled to rely on their separate opinions despite their disagreement over

causation. The Board also concluded that the ALJ's award of medical expenses clearly set out the extent of Neighborhood Restaurant's responsibilities. This petition for review now follows.

When reviewing a decision of the Board, we will affirm the Board absent a finding that the Board has misconstrued or overlooked controlling law or has so flagrantly erred in evaluating the evidence that gross injustice has occurred. *W. Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687–88 (Ky. 1992). In order to properly review the Board's decision, we are ultimately required to review the ALJ's underlying opinion. *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986). Where, as here, the ALJ finds in favor of the employee—who bears the burden of proof—we must ask only whether there is “some evidence of substance to support the finding, meaning evidence which would permit [the ALJ] to reasonably find as it did.” *Id.* at 643. Substantial evidence is defined as evidence of relevant consequence which would induce conviction in the minds of reasonable people. *Smyzer v. B.F. Goodrich Chemical Co.*, 474 S.W.2d 367, 369 (Ky. 1971).

Neighborhood Restaurants again argues that the ALJ could not reasonably rely on the opinions of both Dr. Nadar and Dr. Jarboe, because their opinions regarding the causation of Slone's symptoms in his shoulder and neck were diametrically opposing. But, as the Board noted in its opinion, the ALJ as fact-finder has the sole discretion to determine the quality, character, and substance of the evidence. *Square D Co. v. Tipton*, 862 S.W.2d 308, 309 (Ky. 1993).

Moreover, the ALJ may choose to accept or reject any testimony, or to believe or

disbelieve any part 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, 96 (Ky. 2000).

The Board extensively reviewed the testimony of both Dr. Nadar and Dr. Jarboe, and concluded that the ALJ reasonably accepted Dr. Jarboe's testimony that Slone's left shoulder and cervical spine impairments were causally related to his June 17, 2008, injury. Although Neighborhood Restaurants takes issue with that conclusion, it concedes that the ALJ could reasonably rely on either Dr. Nadar or Dr. Jarboe's opinion. We agree with the Board that it was "proper for the ALJ to simultaneously rely upon Dr. Jarboe's 3% impairment rating for chronic chest wall pain and to rely upon Dr. Nadar's 5% impairment for Slone's cervical spine, 5% for Slone's lumbar spine, and 2% for Slone's left shoulder impairment." Since the ALJ was entitled to believe or "weigh more favorably" to some evidence over other portions in the record, we cannot find that the Board or the ALJ has flagrantly erred in evaluating the evidence.

Neighborhood Restaurants also argues that the ALJ erred by awarding medical expenses for the injury to Slone's cervical spine and shoulder. But as noted above, the ALJ reasonably accepted Dr. Jarboe's testimony that these conditions were related to Slone's June 17, 2008 injury. Therefore, the ALJ properly awarded medical expenses for these injuries. Furthermore, we agree with the Board that Neighborhood Restaurants "is free to move to reopen an award to contest the reasonableness or necessity of any medical treatment and also whether

the need for treatment is due to the effects of the injury.” Citing 803 Kentucky Administrative Regulations 25:12, and *FEI Installation, Inc. v. Williams*, 214 S.W.3d 313, 319 (Ky. 2007).

Accordingly, the opinion and order of the Workers’ Compensation Board affirming the ALJ’s September 23, 2011, opinion and award is affirmed.

ALL CONCUR.

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