

RENDERED: AUGUST 1, 2014; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2013-CA-002168-WC

MAZAK CORPORATION

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-11-77581

JASPER SPARKMAN;
HONORABLE LANDON J. OVERFIELD,
ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: CLAYTON, COMBS, AND STUMBO, JUDGES.

CLAYTON, JUDGE: Mazak Corporation ("Mazak") petitions for review of a
Workers' Compensation Board ("Board") decision affirming the opinion of the
Administrative Law Judge ("ALJ"). On appeal, Mazak challenges the sufficiency

of the evidence relied upon by the ALJ in awarding Jasper Sparkman permanent partial disability benefits (“PPD”) and medical benefits. For the reasons set forth herein, we affirm.

FACTS

Sparkman was employed as a machine operator at Mazak when he slipped and fell on July 13, 2011, causing his right knee to make direct contact with the floor. He felt immediate pain in his knee and sought treatment the following day. Dr. Steve Vallegas, the treating physician, diagnosed a right knee contusion and placed Sparkman on light duty work restrictions.

Because Sparkman’s knee pain persisted, an MRI was ordered. The MRI revealed a tear in the medial meniscus and some degenerative changes in the knee. Sparkman was referred to Dr. John Larkin, an orthopedic specialist, and had surgery on his right knee. He was released to full duty on October 10, 2011, but he continued to complain of pain and swelling in the knee.

In mid-July 2012, Sparkman resigned from Mazak and accepted a position with Batesville Tool. Not only was this position closer to home but also he believed it involved lighter duty. Batesville Tool, however, terminated Sparkman after three weeks because of his right knee condition, which made him unable to perform the more physical aspects of the job. He has not worked since that termination.

On August 17, 2012, Sparkman filed a Form 101 Application for Resolution of Injury Claim against Mazak. He sought permanent total disability

benefits (“PTD”) or, in the alternative, PPD with multipliers on a 7% impairment rating under the *AMA Guides to Evaluation of Permanent Impairment 5th Edition* (“*AMA Guides 5th*). He also sought medical benefits. Mazak conceded that Sparkman sustained a compensable work-related injury but asserted that his benefits should be limited to PPD based on a 1% whole person impairment rating under the *AMA Guides 5th* without the application of any statutory multipliers.

After holding a benefit review conference and a hearing, the ALJ entered an Opinion and Order on May 6, 2013. Several physicians provided testimony in the case. Further, at Sparkman’s request, Dr. Jules Barefoot performed an independent medical evaluation (“IME”). Dr. David Randolph, at the request of Mazak, performed another IME.

In the order, the ALJ found that Sparkman’s fall at work resulted in a bone bruise and torn meniscus that aggravated his underlying degenerative knee condition. The ALJ based the award of PPD benefits on a 7% impairment rating and determined that Sparkman qualified for enhanced benefits pursuant to the three multiplier found in Kentucky Revised Statutes (KRS) 342.730(1)(c)(1). In addition, the ALJ awarded medical benefits.

Mazak petitioned for reconsideration, but the petition for reconsideration was denied. Mazak then appealed to the Board both the ALJ’s opinion and the order denying its petition for reconsideration. On November 25, 2013, the Board affirmed the opinion of the ALJ. Mazak now appeals the order denying its petition for reconsideration and requests that our Court review the

Board's decision. It maintains that the ALJ's decision was an abuse of discretion because it was not supported by substantial evidence.

STANDARD OF REVIEW

Appellate review of any workers' compensation decision is limited to correction of the Board only where the Court perceives 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).

In workers' compensation cases, the claimant bears the burden of proof and risk of non-persuasion with regard to every element of the claim. *Durham v. Peabody Coal Co.*, 272 S.W.3d 192, 195 (Ky. 2008). As Sparkman was the party with the burden of proof and was successful before the ALJ, the sole issue in this appeal is whether the Board correctly held that the ALJ's decision was supported by substantial evidence. *Special Fund v. Francis*, 708 S.W.2d 641 (Ky. 1986).

Substantial evidence has been defined as evidence of substance and relevant consequence and having the fitness to induce conviction in the minds of reasonable people. *Smyzer v. B. F. Goodrich Chemical Co.*, 474 S.W.2d 367 (Ky. 1971). Although a party may provide evidence that would have supported a conclusion that is contrary to the ALJ's decision, such evidence is not an adequate basis for reversal on appeal. *McCloud v. Beth-Elkhorn Corp.*, 514 S.W.2d 46 (Ky. 1974). With this standard in mind, we turn to the case at bar.

ANALYSIS

Mazak argues that the ALJ erred in determining that Sparkman's fall at work resulted in an aggravation of his underlying degenerative knee condition. The Board observed that the ALJ relied on the opinions of Drs. Larkin and Barefoot in reaching this conclusion. Mazak challenged the sufficiency of the proof because it suggests that the ALJ misconstrued Dr. Larkin's opinion and that Dr. Barefoot's opinion was based on an incomplete medical history.

In the case at bar, we concur with the Board that the ALJ had substantial evidence to support the conclusions in its opinion. As explained by the Board, substantial evidence is evidence that induces conviction in the minds of reasonable people. Here, not only did Sparkman provide substantial evidence to support his claim but also the ALJ's reliance on his evidence was not unreasonable or arbitrary. And even though Mazak highlights their proffered evidence that might support a conclusion contrary to the ALJ's, appellate courts have decided that conflicting evidence is not an adequate basis for reversal on appeal. *See McCloud, supra.*

The ALJ's responsibility as fact-finder is to determine the quality, character, and substance of all the evidence. Further, the ALJ is the sole judge of the weight and inferences to be drawn from the evidence. *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418 (Ky. 1985). Hence, the ALJ reaches a decision on the facts by accepting or rejecting testimony and/or believing or disbelieving various parts of the evidence. The ALJ makes these findings regardless of who

testifies, or which party is testifying, or the testimony in whole or in part. *Magic Coal Co. v. Fox*, 19 S.W.3d 88 (Ky. 2000).

Here, Mazak first argues that it was an error of law and an abuse of discretion for the ALJ to find that the July 2011 work-related injury resulted in an aggravation of Sparkman's underlying degenerative knee condition. The Board succinctly addresses this contention:

At his deposition, Dr. Larkin was questioned extensively about Sparkman's chondromalacia, and whether it was purely degenerative or caused by the accident. Dr. Larkin first expressed uncertainty, because he did not know whether Sparkman had any active treatment for his knee prior to the injury. On cross-examination, Dr. Larkin was asked to assume Sparkman had no active treatment prior to the work incident. In response, Dr. Larkin stated the work injury "certainly aggravated his patellofemoral disease."

Dr. Barefoot's opinion was far more definitive. He stated Sparkman "may well have had underlying degenerative osteoarthritis present in his right knee at the time of his workplace injury." However, Dr. Barefoot opined the condition "was asymptomatic, dormant, and non-disabling. Only because of his workplace injury has it now become symptomatic."

We acknowledge Dr. Larkin's opinion was somewhat equivocal, and can be interpreted to support the positions of both Mazak and Sparkman. Regardless of how Dr. Larkin's testimony is interpreted, however, the ALJ also stated her reliance on Dr. Barefoot's opinion, which constitutes the requisite substantial evidence to support the decision. *Special Fund v. Francis, supra*. Further, we find no indication Dr. Barefoot's opinion was based on a substantially inaccurate or largely incomplete history. *Cf. Cepero v. Fabricated Metals Corp.*, 132 S.W.3d 839 (Ky. 2004)(an unusual case involving a complete failure to disclose and an affirmative effort by

the claimant to cover up a significant prior injury). Rather, we find Dr. Barefoot's report constitutes a medical opinion which simply differs from Dr. Randolph. The ALJ possesses the discretion to select which sound medical opinion upon which she will base her decision. *Jones v. Brasch-Barry General Contractors*, 189 S.W.3d 149, 153 (Ky. App. 2006).

Next, Mazak argues the ALJ erred in relying on Dr. Barefoot's impairment rating because it does not comport with the AMA Guides. Again, we turn to the Board's opinion to illustrate the sufficiency of the evidence supporting the ALJ's findings:

In his IME report, Dr. Barefoot referenced table 17-5 of the Guides. Mazak argues this table is only applicable to an individual who is dependent on the usage of an assistive device full-time, which Sparkman is not.

While an ALJ may elect to consult the AMA Guides in assessing the weight and credibility to be afforded a physician's impairment rating, as finder of fact he or she is never required to do so. *George Humfleet Mobile Homes v. Christman*, 125 S.W.3d 288 (Ky. 2004). So long as sufficient information is contained within a medical expert's testimony from which an ALJ can reasonably infer the assessed impairment rating is based upon the AMA Guides, the ALJ, as fact-finder, is free to adopt that physician's impairment rating for purposes of calculating an injured worker's permanent disability pursuant to KRS 342.730(1)(b). The ALJ may also rely upon the physician's impairment rating in determining and excluding a pre-existing impairment. *Transp. Cabinet, Dep't of Highways v. Poe*, 69 S.W.3d 60 (Ky. 2001); *Roberts Brothers Coal Co. v. Robinson*, 113 S.W.3d 181 (Ky. 2003).

Dr. Barefoot's opinion is based on several tables contained in the AMA Guides, and he reached the 7% rating independent of his findings with respect to 17-5. As he stated in his IME report, "the lower limb

impairment percents shown in table 17-5 stand alone and are not combined with any other evaluation methods.” In light of these statements, we believe the ALJ could reasonably conclude Dr. Barefoot’s application of the AMA Guides was accurate, and the workplace injury resulted in the 7% impairment rating. While Dr. Randolph arrived at a different conclusion based on his examination of Sparkman, his opinions represent nothing more than conflicting evidence which the ALJ, as fact-finder, was free to reject. *Caudill v. Maloney’s Discount Stores*, 560 S.W.2d 15 (Ky. 1977). Hence, we find no error in the ALJ’s reliance upon Dr. Barefoot’s impairment rating.

Finally, Mazak alleges that it was patent error for the ALJ to conclude that Sparkman is unable to continue working at his pre-injury job position. Again, we find no error on the part of the ALJ or the Board in affirming the ALJ’s determination that Mazak could not return to his pre-injury employment. The ALJ heard Sparkman’s testimony and Dr. Barefoot’s proposed restrictions for him. As succinctly stated by the Board:

Dr. Barefoot opined Sparkman should not perform any jobs that require kneeling, crouching, squatting, crawling, operating foot controls, walking on un-level surfaces, and climbing or descending stairs repetitively. It is uncontroverted Sparkman’s employment at Mazak involved stair-climbing, bending and lifting. Further, Sparkman testified he experienced pain and swelling in his knee when he did return to work at Mazak. This evidence is substantial proof upon which to base application of the three multiplier found at KRS 342.730(1)(c)1. *Special Fund v. Francis, supra*.

CONCLUSION

The Board did not err by concluding that the ALJ had sufficient evidence to support its findings that Sparkman’s fall at work resulted in a work-

related injury that aggravated an underlying degenerative knee condition.

Furthermore, the Board did not err in upholding the ALJ's award of PPD and reasonable medical benefits under the Workers' Compensation Act.

We affirm the opinion of the Workers' Compensation Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

Walter A. Ward
Donald J. Niehaus
Lexington, Kentucky

BRIEF FOR APPELLEE, JASPER
SPARKMAN:

Wayne C. Daub
Louisville, Kentucky