

Commonwealth of Kentucky
Court of Appeals

NO. 2018-CA-000215-WC

KELLY BARNETT

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-15-67948

LEGGETT & PLATT, INC.;
CHRISTINA D. HAJJAR,
ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: LAMBERT AND L. THOMPSON, JUDGES; HENRY,¹ SPECIAL
JUDGE.

¹ Special Judge Michael L. Henry sitting by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

HENRY, SPECIAL JUDGE: Kelly Barnett petitions for review of an opinion of the Workers' Compensation Board (the Board) affirming a decision by the Administrative Law Judge (ALJ) awarding Barnett temporary total disability ("TTD") benefits and medical benefits but denying permanent partial disability ("PPD") benefits. On appeal, Barnett argues substantial evidence entitles him to an award of PPD benefits. For the reasons set forth below, we affirm.

I. BACKGROUND

The relevant facts and posture of this case were summarized by the Board as follows:

Barnett filed a Form 101 alleging he rolled his left ankle on September 22, 2015 while working at Leggett & Platt, Inc., ("Leggett & Platt"), a mattress manufacturer. Leggett & Platt filed a Form 111 denying the claim and asserted a special answer regarding Barnett's unreasonable failure to follow medical advice. The parties reserved for determination the following contested issues at the June 6, 2017 Benefit Review Conference: benefits per KRS 342.730, TTD, and failure to follow reasonable medical advice.

Barnett testified by deposition on April 13, 2017, and at the hearing held June 19, 2017. Barnett began working for Leggett & Platt in August 2014. Ultimately, Barnett successfully bid on a roll pack operator position, and was performing this job at the time of his injury. He described this position as fast-paced and physically demanding. Barnett pulled carts stacked with pocket coils of mattresses, and fed them into a machine that placed them in roll paper. He then removed the rolls, placing them on a pallet which he wrapped with plastic. Barnett stated he regularly lifted sixty to eighty pounds.

At the time of the accident, Barnett worked sixty to eighty hours a week, earning \$14.25 an hour.

Barnett testified that on September 22, 2015, he lost his balance and rolled his left ankle while transferring pallets. He sought treatment the following day, and was referred to an orthopaedic surgeon, Dr. Jason Harrod, who performed surgery on September 24, 2015. His post-operative care included medication, physical therapy, a brace, and a bone stimulator. Barnett was restricted from work until December 16, 2015. He then returned to light duty work for several months, before being released to regular duty without restriction in April 2016. Dr. Harrod informed him of the possibility of another surgery only if he quit smoking.

Barnett acknowledged Dr. Harrod advised him to cease smoking on several occasions and understood smoking would prolong the healing process. At the time of his injury, Barnett testified he smoked up to two packs of cigarettes a day. Subsequent to the work injury, Barnett tried various products to assist in cessation. He has cut his smoking down to four or five cigarettes a day, “for the past few months.”

Barnett returned to work in December 2015 where he ripped up coils in a seated position for approximately three months. In March 2016, he was moved to an assembler position, which he continues to perform. The assembler job is not as physically demanding as a roll pack operator, and Barnett is able to briefly sit and rest by his machine several times an hour. He currently earns less per hour than he did at the time of his injury, and is unable to work overtime hours due to his left foot problems.

Barnett continues to experience daily pain in the fifth metatarsal of his left foot. Barnett is unable to walk long distances, has to step onto flat, even surfaces, and is unable to operate a clutch. Barnett has not sought

medical treatment for his left foot since being released from Dr. Harrod's care in April 2016, and takes over-the-counter Ibuprofen.

Barnett filed the September 23, 2015 record from Baptist Health Occupational Medicine. That record reflects a diagnosis of left closed distal metatarsal displaced oblique fracture and a referral to an orthopaedic surgeon.

Both parties filed the records of Dr. Harrod, who treated Barnett from September 23, 2015 through August 2016. He diagnosed Barnett with comminuted displaced fifth metatarsal shaft fracture of the left foot and performed an open reduction internal fixation on September 24, 2015. Dr. Harrod restricted him to non-weight-bearing on his left foot, and prescribed crutches, a brace, and medication. In November 2015, Dr. Harrod prescribed physical therapy to address subjective dysesthesias in his left foot.

In December 2015, Barnett began to complain of left foot pain and limited mobility. Dr. Harrod eventually diagnosed Barnett as status post ORIF fifth metatarsal fracture left foot, delayed union, and advised Barnett to cease smoking on several occasions. Dr. Harrod prescribed additional physical therapy and a bone stimulator. Dr. Harrod eventually allowed Barnett to resume weight-bearing with his left lower extremity, but restricted him to sedentary work. Dr. Harrod opined the delayed union was due to Barnett's smoking. On May 3, 2016, Dr. Harrod noted Barnett had been doing well at work wearing work boots, and denied substantial foot pain. His left foot examination revealed good motion, and no discoloration, edema, ecchymosis, or any other acutely abnormal findings. Dr. Harrod noted Barnett had no clinical evidence of pain and removed all restrictions. On June 27, 2016, Dr. Harrod noted Barnett reported he had done well and experienced no limitations at work. Dr. Harrod's examination revealed no prominent pain,

functional deficits, Achilles tendinopathy or deep tendon reflex deficits, neurologic or vascular deficit or coloration or temperature changes. He again opined the nonunion is nicotine related, and Barnett is asymptomatic with no particular problems. Dr. Harrod placed Barnett at maximum medical improvement (“MMI”), but noted if symptoms developed he would need revision surgery, conditioned upon cessation of smoking. Dr. Harrod released Barnett from his care.

Dr. Harrod prepared a June 27, 2016 Permanent Partial Impairment Rating report. Dr. Harrod reviewed the treatment of the fracture and noted Barnett denied any pain at rest or activity, including work demands, and had returned to all previously normal activities. Dr. Harrod evaluated whether an impairment rating should be assessed pursuant to Chapter 17 of the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment (“AMA Guides”). He noted Barnett had no leg length discrepancy, significant atrophy or ankyloses. Barnett demonstrated independent ambulation without gait deviation, five out of five strength, and normal ankle and foot range of motion. Therefore, Dr. Harrod assessed a 0% impairment rating.

On August 29, 2016, Dr. Harrod noted Barnett had been working his normal job duties and activities outside of work, but experiences temporary swelling in the morning, which resolves in an hour. Dr. Harrod diagnosed Barnett with status post ORIF fifth metatarsal fracture with nonunion, asymptomatic clinically, left foot and noted the examination of the left foot was essentially normal. Dr. Harrod declined to assign formal restrictions and noted Barnett has done reasonably well with the nonunion, but will need revision surgery with grafting if it continues to bother him.

Barnett also filed Dr. Stephen Autry’s April 12, 2017 report. He reviewed Barnett’s job requirements and summarized his treatment for the work injury. His

examination revealed an antalgic gait with a slight limp. Dr. Autry diagnosed oblique fracture of the left fifth metatarsal with fibrous union and antalgic gait. Dr. Autry found Barnett's injury caused his complaints. He assessed a 7% impairment rating for the left foot based upon gait disturbance pursuant to the AMA Guides, and opined Barnett had attained MMI. Dr. Autry noted Barnett is currently working full time after returning to work in December 2015. Dr. Autry opined Barnett lacks the physical capacity to return to the type of work performed at time of injury. He restricted Barnett from working on uneven surfaces, and advised him to elevate his foot once every four hours for fifteen minutes. Dr. Autry noted Barnett may require revision of the internal fixation with grafting of the fifth metatarsal.

In the August 17, 2017 opinion, the ALJ first determined Barnett's actions to attempt to quit smoking were reasonable and the failure to follow medical advice is not a bar to his claim. The ALJ then determined Barnett is entitled to TTD benefits from September 23, 2015 to May 3, 2016, when Dr. Harrod returned him to work without restrictions. The ALJ provided the following analysis regarding permanent partial disability benefits and medical expenses:

PERMANENT PARTIAL DISABILITY
BENEFITS

Permanent partial disability means the condition of an employee who, due to an injury, has a permanent disability rating but retains the ability to work. . . KRS 342.0011(11)(b). The ALJ relies upon the report of the treating doctor, Dr. Harrod, to find that Plaintiff sustained no permanent partial impairment rating pursuant to the 5th Edition of the *AMA Guides*. On August 29, 2016, Dr. Harrod specifically noted that Plaintiff did not have gait derangement, which was the basis for the impairment

rating assessed by Dr. Autry. The ALJ finds that Dr. Harrod's opinion is the most credible and persuasive, as Plaintiff's treating doctor, who treated Plaintiff for nearly one year. The ALJ finds that Dr. Harrod, who treated Plaintiff multiple times, was in a much better situation to assess whether Plaintiff had gait derangement than Dr. Autry, who only observed Plaintiff on one occasion. Dr. Harrod also noted that Plaintiff had no coloration or temperature changes muscular atrophy, or neurologic or vascular deficits which would qualify Plaintiff for an impairment rating. He stated that Plaintiff was working his normal job duties, with no restrictions. Dr. Harrod noted that Plaintiff could return to him if he continued to have symptoms, but notably, Plaintiff never returned to Dr. Harrod. For these reasons, the ALJ finds that Plaintiff does not qualify for a permanent impairment rating, or permanent partial disability benefits at this time.

MEDICAL EXPENSES

Medical coverage for a work-related injury is not dependent upon a finding of a permanent partial disability; it is possible for a non-disabling condition to require medical care. *Combs v. Kentucky River District Health Department*, 194 S.W.3d 823 (Ky. App. 2006). The 5th Edition of the *Guides* defines impairment as being a loss, loss of use, or derangement of any body part, organ system, or organ function. Furthermore, disability exists for the purposes of KRS 342.020(1) for so long as a work-related injury causes impairment, regardless of whether the impairment rises to a level that it warrants a permanent impairment rating.

FEI Installation v. Williams, 214 S.W.3d 313 (Ky. 2007). Although the ALJ finds that Plaintiff's injury did not warrant a permanent impairment rating, the ALJ finds that Plaintiff is entitled to receive future medical care. The ALJ finds that Plaintiff did sustain a permanent injury to his foot, particularly in light of the fact that Plaintiff had surgery, which never fully healed. Dr. Harrod indicated that he may need to perform a revision surgery if he has symptoms in the future. Accordingly, the ALJ finds that Plaintiff is entitled to future medical benefits as a result of the injury.

Barnett filed a petition for reconsideration arguing the ALJ should have given more weight to Barnett's testimony and to Dr. Autry's opinion. Barnett also questioned how the ALJ could award TTD benefits and not PPD benefits. The ALJ overruled Barnett's petition finding it amounted to an impermissible re-argument of the merits of the claim. Further, the ALJ reiterated she relied upon Barnett's treating physician to determine the impairment rating, and found it significant he could have returned to Dr. Harrod if he continued to have symptoms, but had not [done] so.

In his subsequent appeal to the Board, Barnett argued:

[T]he ALJ should have given more weight to Dr. Autry's opinion since he examined him more recently than Dr. Harrod. Barnett argues the ALJ misinterpreted the medical evidence by finding it significant he had never returned for treatment with Dr. Harrod. Barnett points out he had no reason to return since he was released from Dr. Harrod's care and had not experienced an increase in pain or symptoms since his last appointment. Barnett points to his own testimony concerning his limitations and ability to work due to his left foot injury. Barnett points to the ALJ's statement in

awarding medical expenses, when she stated, “The ALJ finds that Plaintiff did sustain a permanent injury to his foot, particularly in light of the fact that Plaintiff had surgery, which never fully healed.” Barnett states as follows:

How she could find that Barnett sustained a permanent injury, how she awarded TTD benefits even upon his return to work, and how she could award future medical benefits for his injury, but did not award PPD benefits, especially considering his limitations and the fact that once he made a full return to work, it was not performing the same job as before, nor was he earning the same or greater wages.

The Board affirmed the ALJ’s award of TTD income and future medical benefits, concluding “Dr. Harrod’s opinion constituted substantial evidence supporting the ALJ’s finding Barnett does not qualify for a permanent impairment rating, and no contrary result is compelled. Although Barnett is able to point to evidence contrary to this determination, namely Dr. Autry’s opinion, a different result is not compelled.” This appeal followed.

II. STANDARD OF REVIEW

“The claimant in a workers’ compensation proceeding bears the burden of proving each of the essential elements of any cause of action[.]” *Miller v. Go Hire Employment Development, Inc.*, 473 S.W.3d 621, 628 (Ky. App. 2015) (citations omitted). If the claimant is unsuccessful before the Board,

his burden on appeal is infinitely greater. It is of no avail . . . to show that there was some evidence of substance which would have justified a finding in his favor. He must show that the evidence was such that the finding against him was unreasonable because the finding cannot be labeled ‘clearly erroneous’ if it reasonably could have been made.

Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986). “The function of further review of the [Board] in the Court of Appeals is to correct the Board only where the [] Court perceives the Board has . . . committed an error in assessing the evidence so flagrant as to cause gross injustice.” *Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992).

III. ANALYSIS

The only issue before this court is whether the Board erred in affirming the ALJ’s decision to award TTD income and future medical benefits instead of awarding PPD income benefits. Barnett argues Dr. Stephen Autry’s report is substantial evidence that supports an award of PPD benefits. The Supreme Court of Kentucky “has consistently held that a finding of the Board on a question of fact cannot be disturbed on appeal if there is *any* substantial evidence to support it. . . . When one of two reasonable inferences may be drawn from the evidence, the finder[] of fact may choose.” *Jackson v. General Refractories Co.*, 581 S.W.2d 10, 11 (Ky. 1979) (emphasis added) (citations omitted); *see also Square D Co. v. Tipton*, 862 S.W.2d 308 (Ky. 1993). “The fact-finder may reject

any testimony and believe or disbelieve various parts 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) (citing *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15, 16 (Ky. 1977)).

The ALJ was presented with conflicting reports from two doctors. Dr. Harrod treated Barnett for nearly a year, and he ultimately concluded Barnett's impairment rating was zero percent. Dr. Autry examined Barnett only once, and he determined Barnett's impairment rating was seven percent. Although Barnett believes the ALJ should have given greater weight to Dr. Autry's opinion, the ALJ was not required to do so. As factfinder, the ALJ used her discretion to give greater weight to Dr. Harrod's opinion. Dr. Harrod's report has substantive probative value as it was based on his treatment of Barnett. Dr. Autry's opinion may also be substantial evidence, but we cannot reverse merely because the ALJ chose to give more weight to Dr. Harrod's report. Thus, we conclude the Board correctly determined the ALJ had the discretion to choose which doctor's opinion was more credible.

IV. CONCLUSION

For these reasons, we affirm the decision of the Workers' Compensation Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

McKinnley Morgan
London, Kentucky

BRIEF FOR APPELLEE:

F. Allon Bailey
Patrick J. Murphy, II
Lexington, Kentucky