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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001766-WC

JAMES COMLEY — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-15-58150

ADVANCED PAVING AND CONSTRUCTION; HONORABLE MONICA RICE-SMITH, ADMINISTRATIVE LAW JUDGE; and WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CALDWELL, COMBS, AND LAMBERT, JUDGES.

LAMBERT, JUDGE: James Comley has petitioned this Court for review of the November 2, 2018, decision of the Workers' Compensation Board (the Board) affirming in part, vacating in part, and remanding the September 25, 2017 opinion,

award, and order, and October 30, 2017 order sustaining and overruling plaintiff's petition for reconsideration of the administrative law judge (ALJ). In his appeal, Comley contends that, as a matter of law, the ALJ committed numerous errors, as did the Board in affirming in part. We disagree and affirm the Board's decision.

We begin by repeating the pertinent facts about Comley's injury as set forth in the Board's opinion:

> Comley, who is fifty-four years old, graduated from high school, but stated he was in remedial reading and special education classes. While in high school, he completed vocational classes in shop and construction. Comley stated he had to have assistance with reading to complete his driver's license examination, and he cannot write a note to someone. He has never operated a computer and has never performed administrative or clerical work.
>
> Comley has worked as a laborer for a series of employers. He was hired as a heavy equipment operator for Advanced [Paving and Construction ("Advanced")] beginning on May 14, 2014. He operated bulldozers, highlifts, track hoes, backhoes, and other types of construction equipment. Operating the equipment over rough terrain caused him to be bounced, twisted and turned. He also helped with manual labor, lifting twenty-five to fifty pounds. On May 15, 2015, he was driving a dump truck that flipped over onto its side. Comley experienced pain in his lower back, leg, left shoulder, and neck. He returned to work the following Monday. Comley visited Dr. Chris Godfrey in June 2015 and continued to work until December 9, 2015. At that time, his pain had increased[,] and his doctor took him off work.

> Since the work injury, Comley has constant back pain, neck and right shoulder pain running down to his elbow, and stiffness in his left shoulder and arm. He can sit for fifteen or twenty minutes. Most of his pain is in his lower back, and requires him to frequently change position between sitting, standing, walking and lying down to relieve his pain.

Comley had received treatment from two doctors prior to his May 15, 2015 injury: Dr. Thad Jackson, who gave Comley injections for lower back pain; and Dr. Godfrey, who diagnosed Comley with bulging discs (from L-3 through S-1), lateral epicondylitis, tennis elbow (left arm), bilateral hand osteoarthritis with probable bilateral carpal tunnel syndrome, right foot plantar fasciitis, gout, and elevated cholesterol.

After the accident, Comley returned to Dr. Godfrey, who diagnosed neck, low back, and right shoulder pain as well as degenerative disc and joint disease. Comley next treated with the following physicians and specialists: Dr. Daniel Meece; Dr. Mitchell J. Campbell; Dr. James W. Jackson; Dr. John Guarnaschelli; Dr. James Farrage, Jr.; Dr. Michael Chunn; and Stephen B. Schnacke, Ed.D., a vocational therapist.

The Board summarized the ALJ's conclusions:

> The ALJ concluded Comley sustained a work-related injury to his low back and neck. She noted both Dr. Farrage and Dr. Guarnaschelli found Comley had a change in his condition because of the work-related event. Relying on Dr. Farrage's opinion and Comley's testimony, the ALJ determined Comley sustained an 11%

> whole person impairment. Based on the lack of proof that the prior back problems caused any impediment to his employment, and the opinions of Drs. Farrage and Schnacke, the ALJ was persuaded that Comley did not have a pre-existing active impairment or disability. She further determined Comley cannot return to the work he was performing at the time of his injury and is entitled to a 3.2 multiplier based on the lack of physical capacity and his age. The ALJ noted Dr. Farrage, Guarnaschelli, and Meece agree that Comley cannot return to the work he was doing at the time of his injury.

The ALJ found that Comley was not entitled to permanent total disability (PTD) and that he was not totally occupationally disabled. She held that Comley had failed to "satisfy his burden of proving the contested referral to pain management" and prescriptions as compensable, ruling in the employer's favor in that regard. In ruling on the petition for reconsideration, the ALJ granted Comley's petition concerning the issue of unreimbursed medical and travel expenses but denied the remaining issues of the petition.

We note at the outset that there is pending a motion by Comley to withdraw his constitutional argument regarding Kentucky Revised Statute (KRS) 342.730(1)(b) and (c) and the ALJ's use of the American Medical Association (AMA) *Guides to the Evaluation of Permanent Impairment* and the diagnosis-related estimate (DRE) method. After review of the record, we grant counsel's motion to withdraw the argument (including counsel's motion to dismiss the Attorney General as a party) by separate order entered this day. Comley's further

request, in that motion, to file an additional reply brief, is denied in that order. Comley later requested, and was granted by order dated August 20, 2019, leave to cite additional authority.

Our standard of review in workers' compensation appeals is well-settled in the Commonwealth. "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 overlooked or misconstrued controlling statutes or precedent, or 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).

Kentucky law establishes that "[t]he claimant in a workman's compensation case has the burden of proof and the risk of persuading the board in his favor." *Snawder v. Stice*, 576 S.W.2d 276, 279 (Ky. App. 1979) (citations omitted). "When the decision of the fact-finder favors the person with the burden of proof, his only burden on appeal is to show that there was some evidence of substance to support the finding, meaning evidence which would permit a fact-finder to reasonably find as it did." *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986). However, "[i]f the board finds against a claimant who had the burden of proof and the risk of persuasion, the court upon review is confined to determining whether or not the total evidence was so strong as to compel a finding in claimant's favor." *Snawder*, 576 S.W.2d at 280 (citations omitted). "The ALJ,

as the finder of fact, and not the reviewing court, has the sole authority to determine the quality, character, and substance of the evidence." *Square D Co. v. Tipton*, 862 S.W.2d 308, 309 (Ky. 1993) (citing *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418 (Ky. 1985)). "Not only does the ALJ weigh the evidence, but the ALJ may also choose to believe or to disbelieve any part of the evidence, regardless of its source." *Abbott Laboratories v. Smith*, 205 S.W.3d 249, 253 (Ky. App. 2006) (footnote omitted).

Here, the ALJ found that Comley had an impairment, but Comley argues that it was not enough, and that the Board erred in failing to correct the ALJ's finding of impairment, based on Dr. Farrage's testimony, of 11% rather than 13% (the combined value of 8% lumbar and 5% cervical impairments). The Board was similarly vexed by the apparent 2% difference in the whole body impairment rating, and it vacated and remanded the issue to the ALJ for clarification, stating: "On remand, the ALJ must clarify her interpretation of Dr. Farrage's opinion and determine whether Comley is entitled to a 6% or 8% impairment rating for his lumbar condition." We have reviewed the record and affirm this aspect of the Board's holding pursuant to *Western Baptist Hospital*, 827 S.W.2d at 688 ("the view [it] took of the evidence is neither patently unreasonable nor flagrantly implausible").

Comley next complains that counsel for Advanced engaged in "improper litigation conduct" which should be imputed to the employer. His specific allegation is that counsel improperly contacted Comley's expert witness (Dr. Farrage), disparaged his qualifications, and deemed Dr. Guarnaschelli (expert witness for Advanced) as "the most respected surgeon in the Commonwealth." The Board held that Comley had failed to properly preserve this issue for review, but Comley insists that he had preserved it and urges this Court to reverse the Board and the ALJ and remand the matter for "a trial on the merits, free of tainted evidence." We cannot agree. Even were this issue preserved for review, we fail to be convinced that any alleged behavior by opposing counsel affected the outcome of the proceedings. The ALJ chose to believe Dr. Farrage over Dr. Guarnaschelli when she found that Comley had no pre-existing active impairment or disability. Thus, Comley was not prejudiced, and we decline his invitation to reverse and remand for this unproven error.

Comley next maintains that the ALJ erred in denying his medical treatment, expenses, and travel. In this vein, Comley alleges several defects in the administrative proceedings which he believes required the ALJ to rule in his favor. The Board considered each of these allegations and found that they either were not sufficiently preserved for review or were not so egregious as to warrant reversal. We agree with the Board's language and repeat it here:

> We first note that KRS 342.020(7) is a permissive provision allowing the employer to file a motion to select a treating physician under certain specified conditions. It is not a mandatory provision, and such a motion is not a prerequisite to pursuing a medical fee dispute concerning the reasonableness and necessity of proposed medical treatment. The remainder of Comley's objections are raised for the first time on appeal and are not properly preserved. The issues regarding failure to comply with 803 KAR [Kentucky Administrative Regulations] 25:010 § 12 were not preserved in the BRC [Benefit Review Conference] order. Additionally, we note 803 KAR 25:012 Section 1 (6)(b) requires that a Form 112 "shall be served . . . upon the medical providers. If appropriate, the pleadings shall also be accompanied by a motion to join the medical provider as a party." The regulatory language with respect to notification is mandatory. Here, Dr. Meece and Dr. James Jackson received notice via the Form 112 on March 22, 2017. However, they made no attempt at any time to address the medical fee dispute. The regulatory language requires joinder "only if appropriate." The crucial question is whether the medical provider is an aggrieved person to the extent that an adverse ruling in the dispute would provide an independent basis for appeal. We believe that the provider in this instance is not so aggrieved that any failure to join it as a party is in error. The medical dispute involved a proposed referral for pain management and continued use of prescription medication. On reconsideration, the ALJ ordered reimbursement for any unreimbursed medical and travel expenses that comply with the statutes and regulations. Because the providers have no vested interest in prospective treatment, their inclusion was not necessary.

Comley was granted leave to cite as additional authority the case of *Conley v. Super Services, LLC*, 557 S.W.3d 917 (Ky. App. 2018), in support of his position that the ALJ may have used an incorrect standard in determining this

issue. We agree with Comley's argument that pain is a substantial factor causing disability. But we cannot agree that the ALJ used an incorrect standard because that was never the argument of Comley before the ALJ or the Board, and it would be improper for us to consider this for the first time on appeal. Also, because the ALJ ruled on the petition for reconsideration that certain medical and travel expenses would be reimbursed, it would be premature for us to rule on this until after the remand procedure is complete.

Comley's final assertion is that the ALJ erred, and the Board in affirming, in failing to find him permanently totally disabled. In support of this argument, Comley first maintains that the ALJ "failed to properly weigh and analyze the facts and determine the legal significance of those facts which if properly performed will show the evidence compels a finding of permanent total disability." Comley lists his physical and intellectual limitations assessed by the various medical and vocational experts, as well as his own testimony, and concludes that the ALJ should have found that "there are no jobs he can perform."

In its analysis of this issue, the Board examined the standard of review and the statutory definition of permanent total disability and held:

> It is clear from the ALJ's Opinion and the Order on reconsideration that she understood and applied the correct standard in determining the extent of Comley's disability. After a thorough review of the evidence, the ALJ simply was not convinced Comley sustained a permanent total disability. The ALJ accepted the

> restrictions of Dr. Meece, which do not preclude sedentary and some light work as acknowledged by Dr. Schnacke. The ALJ considered Comley's age and his below average intellectual ability. While Comley has identified evidence supporting a different conclusion, there was substantial evidence presented to the contrary. As such, the ALJ acted within her discretion to determine which evidence to rely upon, and it cannot be said the ALJ's conclusions are so unreasonable as to compel a different result. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

"Although a party may note evidence that would have supported a different outcome than reached by an ALJ, such proof is an inadequate basis for reversal on appeal. Rather, it must be shown there was no evidence of substantial probative value to support the decision." *Miller v. Go Hire Employment Development, Inc.*, 473 S.W.3d 621, 629 (Ky. App. 2015) (citations omitted). Here, Comley submitted evidence that would have supported a different outcome in this case, and had we been the fact-finder, we might have reached a different result. However, "the fact that we may have decided differently does not mean that the [ALJ's] decision . . . was completely unreasonable or that a different decision was compelled." *Special Fund*, 708 S.W.2d at 644. Hence, the ALJ's conclusion of permanent partial rather than total disability is affirmed.

Accordingly, the opinion of the Workers' Compensation Board affirming in part, vacating in part, and remanding the decisions of the administrative law judge is affirmed.

ALL CONCUR.

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