

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2010-CA-001573-WC

DOUGLAS JUSTICE.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-07-99325

SOUTH AKERS MINING CO.; HON.  
CHRIS DAVIS, ADMINISTRATIVE  
LAW JUDGE; AND WORKERS'  
COMPENSATION BOARD

APPELLEES

OPINION  
AFFIRMING

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BEFORE: NICKELL AND VANMETER, JUDGES; SHAKE,<sup>1</sup> SENIOR JUDGE.

VANMETER, JUDGE: Douglas Justice petitions for the review of an opinion of the Workers' Compensation Board ("Board") affirming an opinion of the

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<sup>1</sup> Senior Judge Ann O'Malley Shake sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

Administrative Law Judge (“ALJ”) dismissing Justice’s case for failure to prove a work-related injury. Finding no error, we affirm.

Justice claims to have sustained a work-related injury on March 13, 2006 while employed at South Akers Mining Co. (“South Akers”) as an underground mechanic and electrician. Justice filed a claim for injuries to his right shoulder and lumbar spine, as well as an emotional component, which South Akers denied. Following a hearing on the matter, the ALJ dismissed Justice’s claim for failure to meet his burden of establishing the occurrence of any work-related injury. Justice filed a petition for reconsideration, which the ALJ denied. Justice then appealed to the Board, which affirmed the ALJ’s decision on the basis that the ALJ’s findings were supported by substantial evidence. This appeal followed.

Justice argues the evidence does not support the ALJ’s finding that he did not sustain an “injury” as defined by the Workers’ Compensation Act. We disagree.

The standard for appellate review of a Board decision “is limited to correction of the ALJ when the ALJ has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice.” *Bowerman v. Black Equip. Co.*, 297 S.W.3d 858, 866 (Ky.App. 2009) (citing *W. Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992)). We review an award by the ALJ to determine whether its findings were

reasonable under the evidence. *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986). 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) (citation omitted).

For a work-related injury to be compensable, the injury must be “the proximate cause producing a harmful change in the human organism evidenced by objective medical findings.” KRS 342.0011(1). In this case, the ALJ determined that Justice’s low back condition was pre-existing and active at the time of the alleged injury, and that the alleged injury did not cause a change in his right shoulder or psychological condition. Accordingly, the ALJ concluded that Justice’s claim of injury was not work-related.

With regard to Justice’s claim of injury to his low back, we note that “a pre-existing condition that is both asymptomatic and produces no impairment prior to the work-related injury constitutes a pre-existing dormant condition.” *Finley v. DBM Technologies*, 217 S.W.3d 261, 265 (Ky.App. 2007). Further, “the work-related arousal of a pre-existing dormant condition into disabling reality is compensable.” *Id.* (citing *McNutt Constr./First Gen. Servs. v. Scott*, 40 S.W.3d 854 (Ky. 2001)).

Alternatively, a pre-existing condition is deemed active if “symptomatic and impairment ratable pursuant to the AMA<sup>[2]</sup> *Guidelines* immediately prior to the occurrence of the work-related injury.” *Finley*, 217 S.W.3d at 265. Thus, we must

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<sup>2</sup> American Medical Association.

look to the record to determine whether evidence was presented to show that Justice's low back condition was symptomatic and impairment ratable immediately prior to the occurrence of the alleged injury.

In determining that Justice's low back condition was pre-existing and active at the time of the alleged injury, the ALJ relied on the history of treatment records from the Spine and Brain Neurosurgical Center ("the Center"), and the testimony of Drs. Anbu Nadar and Russell Travis. The ALJ found that the records from the Center reflect a history of a pre-existing, active condition prior to the occurrence of the alleged injury. In fact, as recently as January 31, 2006, less than two months before the alleged work-related injury, the Center diagnosed Justice with disc degeneration lumbar and lumbar low back syndrome.

Dr. Nadar diagnosed Justice with lumbosacral strain with radiculopathy and right shoulder strain with rotator cuff tendinitis in a report dated June 16, 2009. Using the *AMA Guidelines*, Fifth Edition, Dr. Nadar assessed a 20% impairment rating for the low back condition, attributing 10% to the pre-existing, active condition and 10% to the work-related condition.

The ALJ found most persuasive the September 24, 2009, report of Dr. Travis, who performed an independent medical examination ("IME") of Justice and found that Justice had significant pain in his low back and in both lower extremities long before the alleged incident of March 13, 2006. Dr. Travis opined that Justice's low back pain was not related to the alleged work-related injury and assigned the entire 10% impairment rating as being pre-existing and active.

The ALJ emphasized that Dr. Travis's opinion, unlike other evidence presented, was based on a complete and factual medical history. The ALJ further noted that it exercised its discretion in using Dr. Nadar's testimony to find that no work-related injury occurred. *See Magic Coal Co. v. Fox*, 19 S.W.3d 88, 96 (Ky. 2000) (the ALJ as 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.") (citation omitted). The record reflects that the ALJ considered and weighed the totality of the evidence to conclude that Justice's low back condition was pre-existing and active at the time of the alleged injury. Upon review of the entire record, we are unable to say the ALJ's findings are not supported by substantial evidence.

In dismissing Justice's claim of injury to his right shoulder, the ALJ relied on the opinion of Dr. Philip Corbett, who conducted an IME of Justice on September 3, 2009. Dr. Corbett opined that the alleged work-related injury of March 13, 2006 did not result in any harmful change to Justice's right shoulder and found no evidence of an impairment related to the alleged injury. In light of this medical opinion, substantial evidence exists to support the ALJ's determination that Justice's claim of injury to his right shoulder was not work-related.

With respect to Justice's claim of a psychological or emotional injury, the ALJ relied on the testimony of Dr. Douglas Ruth, who performed a psychiatric evaluation of Justice on May 7, 2008. Dr. Ruth diagnosed Justice with resolved adjustment disorder due to back pain and personality disorder. He opined that

Justice did not have any permanent psychiatric condition as a result of the alleged March 13, 2006, incident and attributed the entirety of his assessed 3% impairment rating to a pre-existing, active condition, namely a personality disorder. Although medical testimony was presented to show that Justice's psychological condition was work-related, the ALJ found that only Dr. Ruth's opinion was based on an adequate medical history. Our review of the record discloses that substantial evidence exists to support the ALJ's decision on this issue.

The opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

John Earl Hunt  
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BRIEF FOR APPELLEE SOUTH  
AKERS MINING CO.:

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