RENDERED: JULY 1, 2016; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000163-WC

LKLP CAC INC. APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-09-97826

BRANDON FLEMING; HON. R. ROWLAND
CASE, ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, COMBS AND STUMBO, JUDGES.

STUMBO, JUDGE: LKLP CAC Inc. appeals from an Opinion of the Workers' Compensation Board affirming an Opinion, Award and Order rendered by Hon. Roland Case, Administrative Law Judge (ALJ). ALJ Case sustained Brandon Fleming's Motion to Reopen his Workers' Compensation Claim upon finding a

worsening of Fleming's physical and psychiatric condition. The reopening resulted in an award of increased benefits. LKLP now argues that the report and testimony of Dr. John Vaughan do not constitute substantial evidence supporting an increase in impairment, and that the ALJ erred in relying solely on this testimony. We find no error, and AFFIRM the Opinion of the Workers' Compensation Board.

On July 30, 2010, Hon. James L. Kerr, Administrative Law Judge, rendered an Opinion and Award finding that Fleming sustained a work-related injury on October 22, 2007. Fleming underwent a discectomy and spinal fusion at the L5-S1 level performed by Dr. Duane Densler. Relying on the opinion of Dr. David Herr, ALJ Kerr determined that Fleming sustained a 13% impairment rating pursuant to the 5th Edition of the American Medical Association *Guides to the Evaluation of Permanent Impairment* ("AMA Guides"). ALJ Kerr then accepted the opinion of Dr. Robert Granacher to conclude that Fleming sustained a work-related 5% psychiatric impairment. ALJ Kerr awarded benefits based on a combined 17% impairment rating. LKLP did not appeal the award.

On March 26, 2014, Fleming filed a motion to reopen the claim. In support of the motion, he alleged a worsening of the work-related physical and psychiatric conditions. Fleming submitted an affidavit, as well as evidence of a 47% impairment rating assessed by Dr. Jerry Brackett for physical injury, and a 12% impairment rating assessed by Dr. Megan Green for the psychiatric injury.

The claim was reopened and proceeded before ALJ Case. Medical reports and deposition testimony were adduced, including LKLP's submission of a report and deposition of Dr. Vaughan. Dr. Vaughan assessed a 23% impairment rating for Fleming's physical injury pursuant to the AMA *Guides*. In assessing the reopening, ALJ Case characterized the issue as whether Fleming suffered a change of condition increasing his permanent partial disability (PPD). ALJ Case went on to find persuasive the IME report provided by Dr. Vaughan finding a 23% physical impairment rating. The ALJ rejected the impairment rating of Dr. Brackett because it included impairment ratings for the thoracic and cervical area. ALJ Case also considered a report from Dr. Bruce Guberman which assessed an additional 15% impairment rating for physical injury over and above the 13% impairment rating found by ALJ Kerr, but found the assessment of Dr. Vaughan more persuasive. ALJ Case also relied on the opinion of Dr. Green who assessed a 12% psychiatric impairment. Based on these findings, the ALJ found that Fleming's physical impairment had increased from 13% to 23%, in addition to an increase of his psychiatric impairment from 5% to 12%. The net result was an increase in Fleming's combined impairment rating from 17% to 32%.

The ALJ then rendered an increased award based on the new impairment rating. He determined that the 32% impairment had a 1.5 multiplier and that Fleming would also be entitled to the 3 multiplier. As this would result in more than 100%, ALJ Case determined that Fleming was entitled to 99% of two-thirds of his average weekly wage of $598.40 equaling $394.95. The rate was

applied after the date of reopening and for a term of 425 weeks calculated from December 3, 2005. LKLP's petition for reconsideration was denied. The matter then proceeded before the Board, which rendered an Opinion affirming the ALJ's Opinion and Award on January 8, 2016. This appeal followed.

LKLP now argues that Dr. Vaughan's report and testimony do not constitute substantial evidence supporting an increase in impairment or disability subsequent to the original Opinion and Award. It also contends that the ALJ erred in relying solely on this testimony in determining an increase in impairment and disability due to the physical injury. LKLP directs our attention to the Board Chairman Alvey's dissent from the Opinion on appeal, wherein Chairman Alvey notes that Dr. Vaughan opined that Fleming had a 23% impairment rating in July 30, 2010, when the ALJ awarded PPD benefits. Since Dr. Vaughan also assessed a 23% impairment upon reopening, there was no evidence of an increased impairment. LKLP adopts this view, arguing that the ALJ erred as a matter of law in relying on Dr. Vaughan's opinion as a basis for finding an increased impairment. That is to say, it contends that since Dr. Vaughan determined that Fleming's 23% impairment is the same that it would have been in 2010, it does not evince an increased impairment, and the ALJ and Board erred in failing to so rule.[1]

Upon reopening, the claimant has the burden of proof to establish that he sustained a worsening of his physical injury. See Kentucky Revised Statutes (KRS) 342.0011(1); *Snawder v. Stice*, 576 S.W.2d 276 (Ky. App. 1979). Since

[1] LKLP did not appeal the finding of an increased psychological impairment.

Fleming was successful in that burden, the question on appeal is whether there is substantial evidence of record to support the ALJ's decision. *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735 (Ky. App. 1984). Substantial evidence is defined as evidence of "relevant consequence having the fitness to induce conviction in the minds of reasonable men." *Smyzer v. B.F. Goodrich Chemical Company*, 474 S.W.2d 367, 369 (Ky. 1971).

In rendering a decision, KRS 342.285 grants the ALJ as fact-finder the sole discretion to determine the "quality, character, and substance of the evidence." *Square D Company v. Tipton*, 862 S.W.2d 308, 309 (Ky. 1993). An ALJ may draw reasonable inferences from the evidence, reject any testimony, and believe or not believe any part of the evidence, regardless of whether it came from the same witness. *Jackson v. General Refractories Company*, 581 S.W.2d 10 (Ky. 1979). "Although a party may note evidence which would have supported a conclusion contrary to the ALJ's decision, such evidence is not an adequate basis for reversal on appeal." *Whittaker v. Rowland*, 998 S.W.2d 479, 482 (Ky. 1999) (citation omitted). Rather, it must be shown that there is no evidence of substantial probative value to support the decision. *Special Fund v. Francis*, 708 S.W.2d 641 (Ky. 1986).

At first blush, Fleming's argument appears meritorious because Dr. Vaughan expressly stated that he did *not* find an increase in Fleming's physical impairment from 2010 to the present. The dispositive question in this matter, however, is not whether Dr. Vaughan found an increase in impairment at the time

of reopening. Rather, the issue before the ALJ, the Board, and now this Court is whether Fleming's physical impairment at the time of reopening increased relative to the impairment rating found by the ALJ and made *res judicata* in the 2010 proceeding. That is to say, the baseline for comparison properly employed by the ALJ in the present matter is not the baseline relied upon by Dr. Vaughan.

In *Gipson Farms Trucking, LLC v. Ballard*, No. 2009-CA-001784-WC, 2010 WL 1405442 (Ky. App. 2010), upon which the Board relied in affirming the ALJ's Opinion, a panel of this Court noted under similar facts that the ALJ's original award is *res judicata* at such time when all appeals are extinguished. In the matter before us, ALJ Kerr determined that as of July 30, 2010, Fleming had a 13% physical impairment rating. Because there was no appeal, and the matter otherwise reached finality, this impairment rating and the award of benefits arising therefrom were *res judicata*. Accordingly, the question before the ALJ upon reopening was whether the record demonstrated that Fleming suffered an increased physical impairment relative to the original 13% impairment.

Dr. Vaughan opined that Fleming did not experience an increased impairment. However, his assessment relied not upon the *res judicata* impairment of 13%, but upon what Fleming's assessment *would have been* subsequent to the 2008 fusion surgery. Said Dr. Vaughan,

> In historical hindsight, if asked on 7/30/10 what his impairment rating was, I would say it would be 23%. That is what I think his impairment rating is today. I do not think it has changed. There is no objective reason that his impairment rating would increase or decrease.

Pursuant to *Gipson Farms*, in assessing upon reopening whether Fleming experienced an increased physical impairment, the baseline for comparison was the *res judicata* impairment of 13% and not the 23% impairment retroactively employed by Dr. Vaughan. The medical evidence relied upon by ALJ Case, to wit, Dr. Vaughan's present day assessment of a 23% physical impairment, constitutes substantial evidence in support of the ALJ's finding of increased impairment.

In sum, we conclude that substantial evidence of record support's the ALJ's conclusion that Fleming's physical impairment increased relative to the 2010 baseline impairment of 13%. Accordingly, we find no error and AFFIRM the January 8, 2016 Opinion of the Workers' Compensation Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

H. Brett Stonecipher
Lexington, Kentucky

BRIEF FOR APPELLEE BRANDON FLEMING:

John Earl Hunt
Allen, Kentucky