

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: September 11, 2015

CLAIM NO. 201400686

AARON CLAYTON

PETITIONER

VS. APPEAL FROM HON. JONATHAN R. WEATHERBY,  
ADMINISTRATIVE LAW JUDGE

ABLE JANITORIAL  
and HON. JONATHAN R. WEATHERBY,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION  
REVERSING AND REMANDING

\* \* \* \* \*

BEFORE: ALVEY, Chairman, STIVERS and RECHTER, Members.

**STIVERS, Member.** Aaron Clayton ("Clayton") appeals from the May 4, 2015, Opinion and Order and the May 29, 2015, Order on Petition for Reconsideration of Hon. Jonathan R. Weatherby, Administrative Law Judge ("ALJ"). In the May 4, 2015, Opinion and Order, the ALJ dismissed Clayton's claim against Able Janitorial ("Able") for income and medical benefits finding Clayton's injury is pre-existing and

active, and unrelated to the December 30, 2013, incident. On appeal, Clayton asserts the ALJ committed reversible error by finding Clayton's entire injury is pre-existing and active.

The Form 101 alleges Clayton sustained injuries to his low back and left hip on December 30, 2013, while in the employ of Able Janitorial in the following manner: "Moving and lifting steel tables."

Clayton's June 26, 2014, deposition was introduced. He testified he sustained a back injury while working in California in 1994 for which he underwent "full disc surgery."

After the December 30, 2013, injury, Clayton was off work two days for New Year's Eve and New Year's Day. He worked his full shift on January 2, 2013. On January 3, 2013, he treated at the Caritas Hospital emergency room. Clayton was given muscle relaxers and was told to put a heating pad on his back. Hospital personnel did not provide work restrictions. Clayton has not worked for Able Janitorial since that date.

Clayton also testified at the March 4, 2015, hearing. He testified he underwent back surgery on January 19, 2015. He has not received workers' compensation benefits since the injury.

Clayton introduced a June 18, 2014, Independent Medical Examination ("IME") report and a "medical questionnaire" of Dr. Jules Barefoot. After performing an examination, Dr. Barefoot diagnosed: "Degenerative disc disease of the lumbar spine with evidence of a right-sided L5 radiculopathy." Dr. Barefoot opined Clayton has reached maximum medical improvement ("MMI"), and assessed a 35% whole person impairment rating of which 10% is apportioned to a pre-existing active condition. Dr. Barefoot opined the December 30, 2013, injury more likely than not brought the condition into disabling reality.

The July 31, 2014, report of Dr. Martin Schiller was introduced by Able. After performing a physical examination of Clayton, he offered the following diagnosis: "It appears that the patient suffered a low back strain or a lumbosacral strain, or soft tissue injury, giving him low back symptoms without evidence of leg pain." He further opined:

3. Are any of the plaintiff's injuries work related?

Answer: Yes. I believe the patient has low back pain symptoms secondary to a lumbosacral strain or soft tissue injury to the lumbar spine.

4. Do you believe any part of the plaintiff's current complaints or

diagnosis are preexisting, idiopathic or otherwise non-work related?

Answer: I believe the patient has had a soft tissue injury to his low back from a lifting injury at work. Treatment has not been very aggressive in trying to remedy the situation. Any impairment coming from this injury must be apportioned to the surgery in 1994.

5. Are there any objective findings of radiculopathy?

Answer: None whatsoever.

6. What is my diagnosis of the injury suffered on 12/30/2013?

Answer: I think the patient suffered a low back strain or soft tissue injury to his lumbar spine.

Dr. Schiller believed Clayton had yet to reach MMI, but opined as follows regarding an impairment rating:

The patient has not reached maximum medical improvement and, therefore, I cannot enter an impairment rating for his low back injury. Usually a soft tissue injury of this type results in a DRE Category I, which gives him 0% impairment.

Regarding the presence of a pre-existing impairment, Dr. Schiller stated:

The patient would have a preexisting impairment that would have to be apportioned. The previous surgery to his low back with good result would be a DRE 3 Classification, and would result in a 10 to 13% impairment to the

body as a whole as seen in Table 15-5. The injury that he has suffered recently would have to be apportioned to the preexisting abnormality as a result of the disk surgery that he underwent in 1994.

The December 21, 2014, "Chart Review" of Dr. Schiller reveals he opined, in part, as follows:

There must now be a calculation of ("apportionment") TO reflect THE DISC REMOVAL IN California. That would be a DRE3 [sic] or 10-13%. Thus his impairment from 2013 could be 29%-13% or 16%, contingent upon a decision that the claimant is at MMI, and that the injury at work was a bona fide injury, which reached MMI and is more than a simple strain, which has no long lasting impairment value. This has yet to be decided.

Finally, in a January 9, 2015, supplemental report, Dr. Schiller provides the following opinions:

This is an answer to your letter of January 8, 2015. In your first paragraph, you acknowledge that I criticized Dr. Barefoot's IME report and concluded that if those range of motion findings were accepted, the patient would have a 16% whole person impairment as related to the 2013 injury. The information that I received from California indicates that my examination and that of the examining doctors in California was almost identical including the ranges of motion. It was clear from the records in California that the patient had not only had back surgery that had relieved the leg pain, but still had back pain,

and they recommended that he be placed on a light duty job. This of course is long before the accident in Kentucky. Thus, Dr. Barefoot is confusing the patient's result of prior treatment in California and the new injury that he claims occurred in 2013 here in Kentucky. The veracity of the report by the patient of the injury here in Kentucky is not supported by another worker who was present and was deposed, said he watched the entire episode and could not see where an injury had occurred. Thus, the injury itself as a work-related injury here in Kentucky in 2013 is controversial. Dr. Barefoot makes no mention of this. Finally, the patient had subsequently [sic] what Dr. Thornewill and Dr. Joshi considered to be a low back strain. I thought also that the patient had a history and findings of a low back strain, but this is a diagnosis which is not granted an impairment rating by the AMA Guides because it is a soft tissue injury which generally gets better by itself. Thus, the patient would not have an impairment rating based on the injury of 2013 and he has not been treated nor has reached MMI, nor given a diagnosis based on objective imaging or clinical examinations that would give him a work-related injury in 2013 other than a back strain, which does not have an impairment value.

During my first IME, I had very little of this important past history, which must be present during a competent and valid IME evaluation. Thus, my initial ime [sic] conclusions were not entirely correct and I am endeavoring now to correct my first impressions. I am willing to present myself for a deposition if this will further clarify the issue for the court.

The January 12, 2015, Benefit Review Conference Order lists the following contested issues: benefits per KRS 342.730; work-relatedness/causation; notice; average weekly wage; exclusion for pre-existing disability/impairment; and TTD. Under "other" is the following: "Whether Plaintiff has reached MMI."

In the May 4, 2015, Opinion and Order, the ALJ set forth the following findings of fact and conclusions of law:

**Work-Relatedness and Causation/Pre-existing Active**

12. In order to be characterized as an active disability, an underlying pre-existing condition must be symptomatic and impairment ratable pursuant to the AMA Guidelines immediately prior to the occurrence of the work-related injury. *Finley v. DBM Technologies*, 217 SW3d 261 (2007).

13. The Defendant, maintains the burden of proving the existence of a pre-existing condition. *Wolf Creek Collieries v. Crum*, 673 SW2d 735 (Ky.App. 1984).

14. The medical evidence in this matter relevant to this contested issue consists primarily of the opinions of Drs. Schiller and Barefoot. The ALJ finds that the supplemental report of Dr. Schiller wherein he indicated that his findings and those of the examiner in California were almost identical including the range of motion measurements is quite persuasive. It is also notable that even Dr. Barefoot

admits that the Plaintiff had a pre-existing impairment ratable condition and that the Plaintiff had permanent restrictions from the prior injury and a prognosis that was not much better than fair.

15. The testimony of the co-worker Mr. Jones is also persuasive in that Mr. Jones was not aware that any injury took place during the trip to Tennessee. This is consistent with the skepticism shown by Dr. Schiller regarding the happening of an injury at all while in the employ of this Defendant.

16. The ALJ finds that the opinion of Dr. Schiller is the most convincing and that it is not clear that Dr. Barefoot was aware of all of the medical evidence available regarding the Plaintiff's prior injury. The ALJ therefore finds that the Plaintiff's injury is pre-existing and active and unrelated to the alleged incident in Tennessee on December 30, 2013.

Clayton filed a petition for reconsideration asserting the ALJ misinterpreted the medical and lay evidence concerning causation. By order dated May 29, 2015, the ALJ denied Clayton's petition for reconsideration.

We reverse the ALJ's dismissal of Clayton's claim and remand for additional findings and entry of an appropriate award.

In the May 4, 2015, Opinion and Order, the ALJ failed to determine if or when Clayton reached MMI. This

oversight is significant because Dr. Schiller, the physician upon which the ALJ relied in dismissing Clayton's claim, opined Clayton had not reached MMI from the December 30, 2013, injury.

In his July 31, 2014, report, Dr. Schiller stated Clayton had not yet reached MMI stating as follows:

The patient has not reached maximum medical improvement and, therefore, I cannot enter an impairment rating for his low back injury. Usually a soft tissue injury of this type results in a DRE Category 1, which gives him 0% impairment. (emphasis added).

In his December 21, 2014, report, Dr. Schiller stated whether Clayton has reached MMI for the December 30, 2013, injury is uncertain:

There must now be a calculation of ("apportionment") TO reflect THE DISC REMOVAL IN California. That would be a DRE3 [sic] or 10-13%. Thus his impairment from 2013 could be 29%-13% or 16%, contingent upon a decision that the claimant is at MMI, and that the injury at work was a bona fide injury, which reached MMI and is more than a simple strain, which has no long lasting impairment value. This has yet to be decided. (emphasis added).

Finally, in his January 9, 2015, report, Dr. Schiller unequivocally states Clayton has not yet reached MMI by stating as follows:

I thought also that the patient had a history and findings of a low back strain, but this is a diagnosis which is not granted an impairment rating by the AMA Guides because it is a soft tissue injury which generally gets better by itself. Thus, the patient would not have an impairment rating based on the injury of 2013 and he has not been treated nor has reached MMI, nor given a diagnosis based on objective imaging or clinical examination that would give him a work-related injury in 2013 other than a back strain, which does not have an impairment value. (emphasis added).

The above medical records firmly establish Dr. Schiller believes Clayton sustained a work injury on December 30, 2013, and has yet to reach MMI from that injury.

On remand, the ALJ must determine if and when Clayton has reached MMI. If the ALJ determines Clayton has not yet reached MMI, he must hold the claim in abeyance until MMI is obtained. However, Dr. Barefoot opined Clayton reached MMI, and the law permits the ALJ to simultaneously rely upon Dr. Barefoot's opinion regarding MMI and Dr. Schiller's subsequent impairment rating. In other words, where evidence in a workers' compensation claim is conflicting, the ALJ as fact-finder is free to pick and choose whom and what to believe. Caudill v. Maloney's Discount Stores, 560 S.W. 2d 15 (Ky. 1977). The ALJ 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 (Ky. 2000); Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999); Halls Hardwood Floor Co. v. Stapleton, 16 S.W.3d 327 (Ky. App. 2000). Thus, the ALJ, on remand, may simultaneously rely upon Dr. Barefoot's MMI date and Dr. Schiller's impairment rating as long as he provides clear and definitive findings of fact to that effect in the amended opinion and award. Stated another way, if the ALJ fails to provide findings of fact to the effect he is relying upon Dr. Barefoot's MMI date, he cannot rely upon Dr. Schiller's impairment rating, as he repeatedly opined Clayton has yet to reach MMI from the December 30, 2013, work injury.

The equivocal nature of Dr. Schiller's impairment rating for the December 30, 2013, injury has not gone unnoticed. In the July 31, 2014, report, Dr. Schiller opined that while Clayton had yet to reach MMI, a soft tissue injury such as the type Clayton sustained on December 30, 2013, "results in a DRE Category 1, which gives him 0% impairment." However, in his December 21, 2014, report, Dr. Schiller opined Clayton's "impairment from 2013 could be 29% - 13% or 16%." Notably, this was

contingent upon Clayton reaching MMI and the December 30, 2013, injury being "more than a simple strain." Finally, in the January 9, 2015, report Dr. Schiller seemingly returns to his original impairment rating of 0% by stating as follows: "Thus, the patient would not have an impairment rating based on the injury of 2013 and he has not been treated nor has reached MMI, nor given a diagnosis based on objective imaging or clinical examination that would give him a work-related injury other than a back strain, which does not have an impairment rating." (emphasis added).

On remand, should the ALJ rely upon Dr. Barefoot's MMI date and Dr. Schiller's 0% impairment rating for the December 30, 2013, injury, the ALJ must enter new findings of fact regarding the nature of Clayton's pre-existing condition and whether it was affected by the subject work injury. If the ALJ determines the pre-existing condition was adversely affected by the subject work injury, he must then determine whether the affect was temporary or permanent. Should the ALJ still rely upon Dr. Schiller's opinions and impairment rating regarding the pre-existing condition, the ALJ must find Clayton's underlying pre-existing condition, pursuant to Dr. Schiller's opinions, was dormant at the time of the December 30, 2013, injury. The ALJ concluded in the May 4,

2015, Opinion and Order that Clayton suffers from a "pre-existing and active" injury unrelated to the December 30, 2013, injury based upon the opinions of Dr. Schiller. However, a review of Dr. Schiller's opinions reveal they do not meet the standard articulated in Finley v. DBM Technologies, 217 S.W.3d 261 (Ky. App. 2007) in order to characterize an underlying pre-existing condition as "active." In Finley, supra, the Court of Appeals of Kentucky stated that to be "characterized as active, an underlying pre-existing condition must be symptomatic and impairment ratable pursuant to the AMA Guidelines immediately prior to the occurrence of the work-related injury." Id. at 265. (emphasis added). Even though Dr. Schiller opined Clayton's pre-existing impairment rating ranges from 10%-13%, he did not opine Clayton's pre-existing condition was *symptomatic* immediately prior to the December 30, 2013, injury. Consequently, since Dr. Schiller's opinions do not support a finding Clayton's pre-existing condition was both symptomatic and impairment ratable immediately prior to the occurrence of the work-related injury, the ALJ cannot rely upon Dr. Schiller's opinions as support for a finding Clayton suffered from a pre-existing active condition at the time of the December 30, 2013, injury.

Finally, on remand, the ALJ must make a finding, based upon the medical evidence in the record, as to the nature of Clayton's December 30, 2013, injury. Should the ALJ once again rely upon the opinions of Dr. Schiller, he must specify precisely the opinions and impairment rating of Dr. Schiller upon which he is relying, as Dr. Schiller's opinions and impairment ratings vary from report to report.<sup>1</sup> For instance, in the December 21, 2014, report, Dr. Schiller opines Clayton's impairment from December 30, 2013, "could be" 16%. However, in the January 9, 2015, report, Dr. Schiller opines Clayton sustained a back strain with no impairment rating.

At a minimum, on remand if the ALJ again relies upon the opinions of Dr. Schiller, Clayton is entitled to an award of medical benefits, which could potentially include future medical benefits, since Dr. Schiller opined Clayton sustained a back strain on December 30, 2013, with no impairment rating. See Robertson v. United Parcel Service, 64 S.W.3d 284 (Ky. 2001) and F.E.I. Installation, Inc. vs. Williams, 214 S.W.3d 313 (Ky. 2007). The ALJ must also determine whether Clayton is entitled to temporary total disability benefits.

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<sup>1</sup> We emphasize the ALJ may not rely upon any impairment rating assessed by Dr. Schiller without also relying upon Dr. Barefoot's MMI date.

However, should the ALJ rely upon Dr. Schiller's impairment rating set forth in the December 21, 2014, report or Dr. Barefoot's impairment rating, Clayton is entitled to permanent income benefits.

Accordingly, the ALJ's dismissal of Clayton's claim as set forth in the May 4, 2015, Opinion and Order and the May 29, 2015, Order on Petition for Reconsideration is **REVERSED**. This claim is **REMANDED** to the ALJ for additional findings and an amended opinion, award, and order in conformity with the views expressed herein.

ALL CONCUR.

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