OPINION ENTERED: February 8, 2013

CLAIM NO. 201200016

AK STEEL CORPORATION PETITIONER

VS. **APPEAL FROM HON. WILLIAM J. RUDLOFF, ADMINISTRATIVE LAW JUDGE**

WILLIAM KIDD
and HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
VACATING AND REMANDING
* * * * * *

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

STIVERS, Member. AK Steel Corporation ("AK Steel") seeks review of the September 11, 2012, opinion and order rendered by Hon. William J. Rudloff, Administrative Law Judge ("ALJ") determining William Kidd ("Kidd") has a work-related hearing loss which did not reach the impairment threshold necessary to award income benefits and awarding medical benefits for the hearing loss. AK Steel also

appeals from the October 15, 2012, opinion and order on reconsideration overruling its petition for reconsideration.

AK Steel challenges the ALJ's decision on two grounds. First, citing KRS 342.315(2) and Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000), it asserts the ALJ erred in not specifically stating in his opinion and order and the opinion and order on reconsideration the reasons he rejected the opinions of the university evaluators. AK Steel asserts as follows:

> In the Opinion and Order dated September 11, 2012, the ALJ must specifically state the reasons for rejecting the university evaluator's findings in his decision, and that the basis for such rejection must be reasonable.

Accordingly, AK Steel argues the ALJ's statement "The ALJ finds more persuasive the opinion of Dr. Manning" does not comply with the mandates of KRS 342.315(2) and Magic Coal Co. v. Fox, supra as the ALJ did not specifically state his reason for rejecting the opinion of the university evaluators, Drs. Raleigh Jones and Abby B. Mattingly.

Next, AK Steel asserts the award of medical benefits is arbitrary and capricious based on the evidence in the record. It asserts the university evaluators unequivocally stated Kidd's hearing loss in the left ear is

not related to noise exposure. It contends at most, Dr. Robert Manning, upon whom Kidd relied, stated he noted the start of some noise-induced pathology but it was difficult to determine how much of the hearing loss is noise-induced and to what degree the loss is attributable to congenital pathologies. AK Steel also asserts Dr. Manning did not have its records to review which clearly establish a significant portion, if not all, of Kidd's hearing loss in his left ear is related to a childhood illness and not noise exposure.

With respect to the right ear, AK Steel asserts there is no evidence of any harmful change or impairment and there should have been no award of medical benefits for treatment of right ear hearing loss. It asserts Dr. Jones stated Kidd's right ear hearing was "quite good" and any hearing loss would be "extremely mild." Dr. Manning stated Kidd's right ear hearing was "borderline normal." AK Steel maintains the audiometric testing performed by the university evaluators and Dr. Manning do not permit an impairment rating to be assigned for a hearing loss in the right ear pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"). Therefore, medical benefits should not have been awarded.

Kidd introduced Dr. Manning's December 19, 2011, letter. Concerning the results of the hearing tests he administered, Dr. Manning stated as follows:

> The audiogram today shows borderline normal hearing in the right ear with a very mild 4K notch configuration indicating possibly the start of some noise induced pathology. The left ear shows a moderate to moderately severe nerve impairment hearing loss with a high frequency notch configuration. Pure tone and SRT are in agreement in the right ear at 20dB and in the left ear at 70dB. Speech intelligibility is excellent in both ears at 96% in the right ear and at 92% in the left ear. Otoacoustic emissions are present in the right ear and absent in the left ear. The overall impression of testing today is that Mr. Kidd demonstrates borderline mild hearing loss in the right ear and moderate to severe hearing loss in the left ear. The unusually good speech discrimination abilities on the left side and that Mr. Kidd cannot recall a traumatic incident on the left side it is suspected that the left ear represents hearing loss either present at birth or in relation to a childhood pathology. He does demonstrate some high frequency notch configuration in both ears which is consistent with noise induced pathology; unfortunately, it would be difficult to determine how much of this hearing loss is related to loud noise exposure versus congenital pathologies. I have advised Mr. Kidd that he is an excellent candidate for amplification to bring the hearing in the left ear equal to the right ear. This would allow him to better localize and hear significantly better in the presence of background noise. ...

Pursuant to the AMA Guides, Dr. Manning assessed a 4% impairment.

Pursuant to KRS 342.315(2) and 803 KAR 25:010(11), the Form 108-HL completed by the university evaluators, Drs. Jones and Mattingly, was introduced. Based on the audiograms and tests administered, they determined Kidd has a 4% impairment. However, the physicians opined the audiograms and other testing did not establish a pattern of hearing loss compatible with that caused by hazardous noise exposure in the workplace. Similarly, they concluded Kidd's hearing loss was not caused by repetitive exposure to hazardous noise over an extended period of employment and was not due to a single incident of trauma.

In a report attached to the Form 108-HL, Dr. Jones noted Kidd had worked for thirty-six years at AK Steel and had been exposed to loud noise on a regular basis. He occasionally wore hearing protection. Approximately thirty years ago Kidd began noticing "an onset of hearing loss in his left ear." It progressed over time and he has not had any "known hearing in his ear on the left side for many years." Dr. Jones stated the etiology of this loss had not been determined. Dr. Jones

stated Kidd had never had trouble with his right ear. The hearing test revealed normal hearing in the right ear. However, "in the high frequencies there seemed to be a slight drop maybe suggestive of some early noise induced hearing loss but it is extremely mild and overall his hearing in the right ear is quite good." The left ear has a moderately severe sensorineural hearing loss. Dr. Jones opined there is a significant hearing loss in the left ear but he did not believe "it is anyway related to his occupational noise exposure." He posited if it was due to noise exposure "[they] would have seen some significant hearing loss in the right ear as well." Therefore, he did not believe Kidd had an occupational sensorineural hearing loss. Based on the AMA Guides, Dr. Jones assessed a 4% impairment for Kidd's hearing loss. Dr. Jones emphasized since the hearing in Kidd's right ear was normal, he did not think this was a noise induced hearing loss.

At the August 2, 2012, hearing, Kidd testified he started working with Allied Chemical on May 14, 1974, at the location which is currently AK Steel's plant. During the course of his employment with AK Steel, Kidd was exposed to loud noise on a regular basis. Kidd provided the following testimony regarding his disagreement with Dr.

Jones' opinion that his hearing loss was not caused by noise exposure:

> Q: Do you disagree with him?
>
> A: Yes.
>
> Q: And why so?
>
> A: Well, I do not believe that all of the hearing loss I've got comes simply from industry. Some of it I may have had, but my hearing has gotten worse over the years. And where this doggone left ear is pretty much dead, my right ear seems to be getting worse to me. And I'm having a – maybe I'm getting off the question.
>
> Q: You're doing fine.
>
> A: Okay. I'm having more and more trouble hearing, and I know it's not related back to industrial noise exposure. And part of my question is is [sic] it related back to the previous noise exposure because I haven't had any noise exposure other than what you have at your home or anywhere else, mowing the grass or something in the last couple of years, since I left on January 11th.
>
> Q: Have you noticed whether or not, since you've stopped working, say, since six months after you stopped working, did you have any more difficulty in being able to hear conversation or watch TV or any of that sort?
>
> A: My right ear seems to – seems to be less receptive. And my wife is on me all the time about turn that damn TV down, would you please. I say I can't hear it. I mean it's – and like I say,

> I think that has to have some bearing on the cumulative effects of the stuff I've been in over the years. I mean I've worked 37 years in that place, 36 years.

Kidd testified he probably needed hearing aids, and if awarded medical benefits he would at least try to use them.

On cross-examination, Kidd acknowledged the first hearing test administered occurred when he was hired by AK Steel. Kidd acknowledged telling personnel at AK Steel when the annual audiograms were performed that his hearing loss was due to a case of measles. He explained that is what his mother told him. When he was young, Kidd did not know he had hearing loss in his left ear. However, after he started working and was exposed to "so much noise" it became "readily apparent" he could not hear as well as others. He testified he did not believe hearing aids would help his left ear because "it's just like it's [sic] dead." Kidd believed the hearing in his right ear had gotten worse since he stopped working.

In the September 11, 2012, opinion and order, after summarizing the lay and medical evidence, the ALJ acknowledged the parties agreed Kidd's impairment did not rise to the statutory requisite 8% impairment necessary to award income benefits. Thus, the remaining question was causation and entitlement to medical benefits. In

determining Kidd had sustained a work-related hearing loss, the ALJ entered the following findings of facts and conclusions of law:

> In rendering a decision, KRS 342.285 grants the ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. *AK Steel Corp. v. Adkins*, 253 S.W.3d 59 (Ky. 2008). The defendant argues that the opinion of university evaluator, Dr. Jones, bears presumptive weight. While this is true, the presumption is not irrefutable. The ALJ finds more persuasive the opinion of Dr. Manning.
>
> Finding the plaintiff's hearing loss work-related, I further find the defendant responsible for his hearing-related medical expenses.

AK Steel filed a petition for reconsideration asserting the university evaluator's opinion Kidd did not have noise induced hearing loss was uncontradicted and requested the ALJ reconsider his decision. In the alternative, it requested the ALJ state with particularity the reasons he rejected the university evaluator's opinion which is afforded presumptive weight pursuant to KRS 342.315(2). Similarly, if upon reconsideration, the ALJ did not accept the opinion of the university evaluator, it requested the ALJ make specific findings of fact regarding the cause of Kidd's hearing loss and entitlement to hearing-related medical expenses for each ear.

In the October 15, 2012, opinion and order on reconsideration, without further explanation, the ALJ stated "there are no patent errors here and the defendant is attempting to reargue the case." The ALJ further stated as follows: "The Opinion and Order dated September 11, 2012 contains the detailed evidence relied upon by this Administrative Law Judge in awarding to the plaintiff medical benefits."

Because the ALJ did not comply with the mandates of KRS 342.315(2) and Magic Coal Co. v. Fox, supra, we vacate and remand.

KRS 342.315(2) reads as follows:

> The physicians and institutions performing evaluations pursuant to this section shall render reports encompassing their findings and opinions in the form prescribed by the commissioner. Except as otherwise provided in KRS 342.316, the clinical findings and opinions of the designated evaluator shall be afforded presumptive weight by administrative law judges and the burden to overcome such findings and opinions shall fall on the opponent of that evidence. When administrative law judges reject the clinical findings and opinions of the designated evaluator, they shall specifically state in the order the reasons for rejecting that evidence.

Regarding the requirements of KRS 342.315(2), in Magic Coal Co. v. Fox, supra, the Supreme Court stated as follows:

> We do not view KRS 342.315(2) as restricting the fact-finder's authority to weigh conflicting medical evidence. We construe it to mean only that because it is presumed that the clinical findings and opinions of a university evaluator will accurately reflect the worker's medical condition, a reasonable basis for disregarding that testimony must be specifically stated by the fact-finder. In other words, the parties are entitled to be informed of the basis for the decision. See *Shields v. Pittsburgh & Midway Coal Mining Co.*, Ky.App., 634 S.W.2d 440, 444 (1982). The presumption created by KRS 342.315(2) neither shifts the risk of nonpersuasion to the defendant nor "raises the bar" with regard to the claimant's burden of persuasion.

Id. at 97-98.

The Supreme Court then directed as follows:

> KRS 342.315(2) creates a rebuttable presumption which is governed by KRE 301 and, therefore, does not shift the burden of persuasion. Pursuant to KRS 342.315(2), the clinical findings and opinions of the university evaluator constitute substantial evidence of the worker's medical condition which may not be disregarded by the fact-finder unless it is rebutted. Where the clinical findings and opinions of the university evaluator are rebutted, KRS 342.315(2) does not restrict the authority of the fact-finder to weigh the conflicting medical evidence. In instances where a fact-finder chooses

> to disregard the testimony of the university evaluator, a reasonable basis for doing so must be specifically stated.

Id. at 97.

The mere statement made by the ALJ that he found more persuasive the opinion of Dr. Manning does not comply with KRS 342.315(2) since the ALJ did not specifically state his reasons for rejecting the opinions of Drs. Jones and Mattingly. In addition, as required by Magic Coal Co. v. Fox, supra, that statement alone does not provide a reasonable basis for disregarding the opinions of the university evaluator.

The Supreme Court in Magic Coal Co. v. Fox, supra, held that the term "presumptive weight" as used in KRS 342.315 (2) amounts to nothing more than a rebuttable presumption that may be overcome by countervailing evidence. Id. at 94. The presumptive weight given to a university evaluator's opinion can be rejected by the ALJ if there is a reasonable basis for doing so. Id. at 94. However, as set out above, the ALJ must specifically set out his reasons for rejecting the university evaluator's opinion in the decision. Id. at 95.

Certainly, the university evaluator's opinion is not controlling and can be rejected by the ALJ if there is

a reasonable basis for doing so AND so long as the ALJ provides an explanation as to why he is rejecting the university evaluator's opinion.

In the case *sub judice*, the ALJ has failed to provide a reasonable basis for rejecting the university evaluator's opinions. Since the ALJ failed to provide a reasonable basis and/or his reasons for rejecting the university evaluator's opinion, this matter must be remanded to the ALJ for entry of additional findings of fact and an opinion in conformity with the views expressed herein. On remand, if the ALJ cannot provide a reasonable basis for rejecting the opinions of the university evaluators, then he must accept their opinions and dismiss Kidd's claim. However, if he chooses to reject the opinions of Drs. Jones and Mattingly he must provide a reasonable basis for rejecting those opinions. In either case, the ALJ must make additional findings of fact in order to explain his decision regarding Kidd's alleged work-related hearing loss.

Because we have vacated the ALJ's determination Kidd sustained a work-related hearing loss, we decline to address the second issue raised by AK Steel on appeal.

Accordingly, the September 11, 2012, opinion and order finding Kidd sustained a work-related hearing loss

and awarding “hearing-related medical expenses” and that portion of the October 15, 2012, opinion and order on reconsideration overruling AK Steel’s petition for reconsideration requesting the ALJ state with particularity the reasons he rejected the opinions of the university evaluators are **VACATED**. This matter is **REMANDED** to the ALJ for entry of a decision consistent with the views expressed herein.

ALL CONCUR.

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