Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: OCTOBER 10, 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
REVERSING AND REMANDING

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

RECHTER, Member. AK Steel Corporation ("AK Steel") appeals from the March 27, 2013, Amended Opinion and Order on Remand rendered by Hon. William J. Rudloff, Administrative Law Judge ("ALJ") awarding William Kidd ("Kidd") medical benefits for hearing loss. On remand, the ALJ was directed to make additional findings providing a reasonable basis

for rejecting the opinion of the university evaluator, or to accept the university evaluator's opinion and dismiss the claim. AK Steel challenges the ALJ's decision upon remand, arguing the ALJ again failed to provide a reasonable basis for rejecting the opinion of the university evaluator. Because Kidd presented insufficient evidence to rebut the university evaluator's opinion, we reverse the award.

Kidd began working for AK Steel's predecessor in 1974 in the coke plant. Over the course of nearly 37 years, Kidd performed various jobs in the plant, and was exposed to industrial noise on a nearly daily basis. Kidd testified he wore hearing protective devices, "especially [in] areas that were marked hearing protection required."

Kidd acknowledged he suffers from substantial hearing loss in his left ear, which he has experienced since he was a child. Kidd was told by his mother this hearing loss was due to a childhood case of the measles. AK Steel's audiology records from 1983 confirm Kidd had 75% hearing loss in his left ear, which he reported he had experienced "since childhood."

Kidd was evaluated by Dr. Robert Manning and by Raleigh O. Jones, a university evaluator.[1] Dr. Manning evaluated Kidd on December 19, 2011 and stated his overall impression that Kidd "demonstrates borderline mild hearing loss in the right ear and moderate to severe hearing loss in the left ear." As to causation, Dr. Manning theorized Kidd's left side hearing loss was "either present at birth or in relation to a childhood pathology." With respect to the "very mild 4K notch configuration" in the right ear, Dr. Manning indicated it is "possibly the start of some noise induced pathology." However, with respect to Kidd's high frequency hearing loss in both ears, Dr. Manning explained "it would be difficult to determine how much of this hearing loss is related to loud noise exposure versus congenital pathologies." Dr. Manning assigned a 4% whole person impairment according to the American Medical Association Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides").

Dr. Jones evaluated Kidd on February 21, 2012. He found normal hearing in Kidd's right ear but, like Dr. Manning, found a "slight drop" in the high frequencies. He indicated this drop "may be suggestive of some early noise

[1] Dr. Abby B. Mattingly performed the audiological evaluation and co-signed the medical report. However, she did not co-sign the "Workman's Compensation Evaluation."

induced hearing loss." Kidd's left ear revealed "moderately severe sensorineural hearing loss." Dr. Jones did not identify a specific cause of Kidd's left ear hearing loss, though he did explicitly reject occupational noise exposure. He further specified the results of his testing do not "establish a pattern on hearing loss compatible with that caused by hazardous noise exposure in the workplace." Referencing the AMA Guides, Dr. Jones assigned a 4% whole person impairment and specifically stated any hearing loss is not noise-induced.

In the original opinion and order rendered September 11, 2012, the ALJ rejected Dr. Jones' opinion, indicating the opinion of Dr. Manning was "more persuasive." AK Steel filed a petition for reconsideration asserting the university evaluator's opinion was uncontradicted and requesting the ALJ reconsider his decision. In the alternative, AK Steel 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). In the October 15, 2012, opinion and order on reconsideration, 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."

AK Steel appealed. In an opinion rendered February 8, 2013, this Board vacated the order and award, and remanded the matter. We determined the ALJ's conclusory statement he found Dr. Manning's opinion "more persuasive" to be insufficient pursuant to Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). We instructed the ALJ to provide a reasonable basis for rejecting the opinion of the university evaluator or, if unable to do so, to accept the university evaluator's opinion.

In the March 27, 2013 amended opinion and order on remand, the ALJ again rejected the university evaluator's opinion. He found Kidd's hearing loss and 4% permanent impairment are work-related, and awarded medical expenses. As his basis for rejecting the university evaluator's opinion, the ALJ stated:

> I personally saw and heard the plaintiff Mr. Kidd testify at the hearing. He went into great detail about the factual basis for his alleged work-related hearing loss. I made and again make the factual determination that he was a very credible and convincing lay witness.
>
> I very carefully read and considered the medical report of Dr.

Robert Manning, the audiologist who tested and examined Mr. Kidd. I made and again make the factual determination that Dr. Manning's evidence is persuasive and convincing. The history which Dr. Manning took from Mr. Kidd was very consistent with the plaintiff's sworn testimony. The results of Dr. Manning's testing are detailed, credible and convincing. I make the factual determination that based upon Mr. Kidd's sworn testimony and Dr. Manning's medical evidence Mr. Kidd demonstrated borderline mild hearing loss in his right ear and moderate to severe hearing loss in his left ear, which is consistent with noise-induced pathology in both ears, and being due to loud noise exposure on the part of Mr. Kidd during his 36 years of factory employment.

I carefully read the medical reports of Dr. Jones and Mattingly. I made and again make the factual determination that the evidence from Dr. Manning is more credible and convincing than the evidence from Dr. Jones and Dr. Mattingly. I do not disregard the evidence from Dr. Jones and Dr. Mattingly. However, I reject the evidence from the university evaluators because I do not make the factual determination that their clinical findings and opinions are consistent with Mr. Kidd's credible and convincing testimony about his 36 years of continuing exposure to work-related industrial noises. In making my factual determinations, I base my rejecting of the evidence from the university evaluators on their failure to properly consider the substance of the sworn testimony of Mr. Kidd and the very convincing and persuasive medical evidence from Dr. Manning. I also rely

> on the *Magic Coal Company* and the *Bullock* cases cited hereinabove.

On appeal, AK Steel again argues the ALJ improperly disregarded the opinion of the university evaluator. Indeed, the opinion of a university evaluator is afforded presumptive weight. KRS 342.315(2). If the ALJ chooses to reject the opinion of the university evaluator, he or she must articulate a "reasonable basis" for so doing. Magic Coal, 19 S.W.3d at 97. AK Steel argues the ALJ's stated basis is not reasonable.

We do not reach the specific question of whether the ALJ has stated a reasonable basis for rejecting Dr. Jones' opinion. "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*." Id (emphasis added). A careful reading of Dr. Manning's opinion reveals that it does not contradict Dr. Jones' opinion in virtually any way.

In Kidd's left ear, Dr. Jones found "moderately severe" hearing loss while Dr. Manning found "moderate to moderately severe" hearing loss. As to causation, Dr. Jones does not believe Kidd's left side hearing loss is related to occupational noise exposure. Dr. Manning

"suspected that the left ear represents hearing loss either present at birth or in relation to a childhood pathology."

Both doctors found normal hearing in Kidd's right ear with a very mild impairment at high frequencies. Dr. Jones explained this "slight drop may be suggestive of some early noise induced hearing loss." Dr. Manning similarly characterized the hearing loss as "possibly the start of some noise induced pathology." As to the high frequency notch configuration which Dr. Manning found in the right as well as the left ear, he further stated "it would be difficult to determine how much of this hearing loss is related to loud noise exposure versus congenital pathologies."

Thus, we have two evaluators who both assigned a 4% impairment pursuant to the AMA Guides. Both found substantial hearing loss in Kidd's left ear, and very mild hearing loss in the right ear. Neither identified a specific etiology of Kidd's left ear hearing loss. However, Dr. Jones rejected the idea it is noise induced while Dr. Manning strongly suspected childhood illness. Both acknowledged the possibility of some early-stage noise induced pathology in Kidd's right ear, but neither unequivocally identified industrial noise exposure as the cause.

"Rebut" means "to defeat, refute or take away the effect of something." Black's Law Dictionary 1267 (7th ed. 1999). Dr. Manning's opinion does not rebut Dr. Jones' conclusions; in fact, it essentially corroborates it. Where no evidence is introduced which rebuts the clinical findings and opinion of a university evaluator, they may not be disregarded by the fact-finder. Magic Coal, 19 S.W.3d at 96.

Even if we were to accept Dr. Manning's opinion constitutes rebuttal evidence, the ALJ has not provided a reasonable basis for rejecting the university evaluator opinion. The ALJ stated he rejected Dr. Jones' opinion because of his "failure to properly consider the substance of the sworn testimony of Mr. Kidd and the very convincing and persuasive medical evidence from Dr. Manning." There is no indication Dr. Jones' failed to consider Kidd's medical or work history. In fact, Dr. Jones noted Kidd was exposed to loud noise on a regular basis, he would occasionally wear hearing protection, and he has experienced hearing loss in his left ear for over 30 years. There is no evidence on the record to support the allegation Dr. Jones' opinion is inconsistent with Kidd's testimony. For this reason, the ALJ's stated rationale for

rejecting the university evaluator's opinion is insufficient.

Furthermore, as a matter of law, neither opinion is sufficient evidence of work-related causation upon which to base an award of medical benefits. When the cause of a condition is not readily apparent to the lay person, medical testimony supporting causation is required. Mengel v. Hawaiian-Tropic Northwest & Central Distributors, Inc., 618 S.W.2d 184 (Ky. App. 1981). Medical causation must be proven by medical opinion within "reasonable medical probability." Lexington Cartage Company v. Williams, 407 S.W.2d 395 (Ky. 1966). The mere possibility of work-related causation is insufficient. Pierce v. Kentucky Galvanizing Co., Inc., 606 S.W.2d 165 (Ky. App. 1980).

The physiological cause of hearing loss may not be established by lay testimony. Such a determination lies within the province of medical experts. Thus, Kidd's testimony that his hearing loss is work-related is unavailing. Further, neither doctor stated Kidd suffers from any noise induced hearing loss. Dr. Jones specifically rejected the notion, while Dr. Manning conceded it would be "difficult to determine" how much of Kidd's hearing loss, if any, is noise-induced. Neither of

these opinions is sufficient to establish Kidd's hearing loss is work-related.

Accordingly, the March 27, 2013, Amended Opinion and Order on Remand rendered by Hon. William J. Rudloff, Administrative Law Judge is **REVERSED** and this matter is **REMANDED** for entry of an order dismissing the claim.

ALL CONCUR.

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