

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: September 29, 2014

CLAIM NO. 201301612 & 201301609

ARTHUR AUXIER

PETITIONER

VS.

APPEAL FROM HON. STEVEN G. BOLTON,
ADMINISTRATIVE LAW JUDGE

REVELATION ENERGY, LLC
and HON. STEVEN G. BOLTON,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

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

STIVERS, Member. Arthur Auxier ("Auxier") seeks review of the June 23, 2014, Opinion and Order of Hon. Steven G. Bolton, Administrative Law Judge ("ALJ") dismissing his claim for multiple cumulative trauma injuries.¹

¹ Auxier also filed a hearing loss claim and a coal workers' pneumoconiosis ("CWP") claim. The CWP claim was severed and the hearing loss and cumulative trauma claims were consolidated both of which were resolved by the June 23, 2014, Opinion and Order. As Auxier does not contest the ALJ's decision regarding the hearing loss claim, we will not discuss the ALJ's decision regarding the hearing loss claim.

On appeal, Auxier asserts the ALJ erroneously relied upon inapplicable case law and the decision is arbitrary, capricious, and an abuse of discretion as the credible medical evidence is overwhelmingly in his favor. He also argues the ALJ's finding there were no objective medical findings is contrary to the evidence.

Auxier's Form 101 alleges on May 30, 2013, he sustained cumulative traumas to his back, hips, knees, neck, and right shoulder.

Auxier testified he last worked for Revelation Energy, LLC ("Revelation") on May 30, 2013, and had worked for it since 2012. In February 2012, Revelation acquired his previous employer, Lexington Coal.² Auxier testified he worked as a bulldozer operator while working for Lexington Coal and Revelation. He began having low back problems in 2011 for which he saw a physician's assistant at the Salyersville Medical Center. He was prescribed Motrin to take as needed. Auxier denied missing any work prior to his last day of work. He explained that on May 31, 2013, he informed Revelation he was not coming to work. On that same date, he saw Dr. Charles Hardin who prescribed Motrin,

²Auxier's work history filed with his Form 104 represents he worked for Revelation from February 2012 through May 30, 2013, and for Lexington Coal from October 2004 through February 2012.

recommended an MRI, and told him to remain off work. Dr. Hardin also referred him to Dr. Phillip Tibbs. He was seen by Dr. Tibbs on one occasion.

Although his back and neck are stiff and sore, he has received no further treatment other than as enumerated above. He has also had soreness in his hips; more in the left than in the right. Because of his hip problems, he has trouble standing for more than fifteen minutes and sitting for over an hour and a half. Auxier testified he also has shoulder problems and was diagnosed with a torn rotator cuff sometime in 2011 by Dr. Keith Hall and Dr. Kevin Pugh who recommended surgery. Auxier refused surgery because the length of the recuperation period would cause him to lose his job. He testified his left shoulder is not very symptomatic but he has problems with the right shoulder whenever he attempts to raise his arm to the side or above his shoulder. Auxier has received no further treatment for his shoulder. He also has bilateral knee problems. After he received an injection in each knee, he received no further treatment. Auxier denied sustaining a specific injury to his back, neck, hips, knees, and shoulders.

Because of his physical problems, Auxier is unable to return to his job at Revelation. He explained

his neck, back, and shoulder problems worsened in 2011. However, the pain in his hips and knees have been present for several years. Auxier's Form 104 and testimony regarding his work history reveals he worked for the following employers: Horizon Natural Resources from October 2002 to 2004; Addington Mining from July 1997 to 2002; Magoffin County Road Department from 1995 to 1997; Magoffin County Board of Education from 1994 to 1995; Toyota in 1994; Branham & Baker from 1985 to 1994; National Mines from 1974 to 1984; Marty Corp. in 1974; and A Seam Coal Co. from 1971 to 1974. During the time he worked in the coal industry, Auxier either operated a bulldozer or some type of heavy equipment. When he worked for the Magoffin County Board of Education he drove a school bus.

Auxier submitted the July 18, 2013, medical statement from Dr. Dale Williams. Dr. Williams indicated his examination revealed low back, hip, and knee pain, shoulder pain with numbness in the right arm, and degeneration in both the cervical and lumbar spine. His diagnosis was as follows:

Cervicalgia with disc degeneration; multilevel, but most severe at C5-C6 disc. Hypolordosis of cervical spine. Lumbalgia with severe degeneration both disc and segmental. MRI reports disc bulges and herniation most severe at L4-L5, segmental level.

Based on the amount of degeneration and his understanding of Auxier's occupational hazards, Dr. Williams believes the thirty-six years Auxier worked as a heavy equipment operator was a major contributing factor to his degeneration.

Auxier submitted the Form 107 report of Dr. Arthur Hughes generated as a result of an examination conducted on November 25, 2013. In the Form 107, Dr. Hughes states Auxier had been employed in the strip mining industry for thirty-eight years driving all types of equipment but primarily dozers, rock trucks, and graders. He noted two or three years prior to the examination, Auxier developed low back pain without injury. Auxier had pain extending from the left leg into the calf. He also developed right shoulder pain several years ago for which surgery was recommended. Auxier declined the surgery because his time off work after the surgery would cause him to lose his job. Dr. Hughes noted Auxier continued to have right shoulder pain and some left shoulder pain. He also had bilateral hip pain for fifteen years and bilateral knee pain for many years. In addition, Auxier had neck pain for many years which Auxier attributed to eighteen years running a dozer. Dr. Hughes indicated the only report he had reviewed was Dr. Williams' July 18, 2013, report.

After conducting a physical examination, Dr. Hughes provided the following diagnosis:

1. Neck pain without radiculopathy.
2. Bilateral shoulder pain and limitation of motion.
3. Right carpal tunnel syndrome by history, resolved.
4. Lower back pain with history of left lumbar radiculopathy.
5. Bilateral knee pain.
6. Bilateral hip pain, right worse than left.

Dr. Hughes expressed the opinion that Auxier's symptoms are a consequence of cumulative trauma to multiple joints resulting from many years of operating heavy equipment. Concerning the explanation for causal relationship, Dr. Hughes stated as follows:

Mr. Auxier has been operating heavy equipment for over 30 years and has done other kinds of heavy work as well though mainly operating equipment in strip mining operations. This has caused repetitive jarring, twisting, etc., over many years, which caused pains in multiple joints and he improved in some areas when he was no longer subject to these multiple physical stresses after he stopped work. The pains have limited his activities in ordinary life such as sitting, standing, lifting, etc., and also in his recreational life.

Pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"), Dr. Hughes assessed a 22% impairment rating. Although Drs. Hall and Pugh diagnosed right rotator cuff tear, Dr. Hughes did not make such a diagnosis.

Revelation submitted the January 31, 2014, report of Dr. Daniel Primm generated as a result of an orthopedic examination conducted on that same date. After providing an in depth medical records review which included the report of Dr. Hughes, Dr. Primm provided the following:

IMPRESSION: Mild age-related degenerative changes with normal physical exam findings for a 61-year-old man.

DISCUSSION: I really cannot identify any objective findings in this individual that indicate any of his complaints are unusual for a man in his age group. The examination of his neck, back, knees, and shoulders actually is, in my experience, very unremarkable and certainly within normal limits for an individual in this age group, regardless of occupation. I disagree with Dr. Hughes' assessments, particularly since his examination shows no evidence of radiculopathy in the upper or lower extremities and also shows no signs of nerve root impingement or peripheral nerve problems, such as carpal tunnel syndrome. I know of no studies that have confirmed that these types of common musculoskeletal aches and pains

are in any way more common in patients who have worked as equipment operators, compared to the general population. In fact, if you research the medical literature, you can find studies that report these same findings basically in all occupations, including very sedentary light work occupations. From an objective standpoint, particularly as it relates in the context of his work, I do not believe there are any credible objective findings that would indicate any of this man's musculoskeletal symptoms are the direct result of or have been aggravated permanently by his work.

Accordingly, Dr. Primm did not assess a permanent impairment rating pursuant to the AMA Guides.

Significantly, the records of Drs. Hall and Pugh were introduced by Revelation and their July 24, 2012, record states that five years ago Auxier developed right shoulder pain which occurs constantly and has worsened. The record notes a diagnosis of right rotator cuff tear.

Regarding the cumulative trauma injury, the ALJ provided the following analysis:

As to Plaintiff's cumulative trauma claim, I note Plaintiff has sustained no identifiable work injuries during his employment with the Defendant/Employer. Instead, he has alleged injury to most of the joints between his head and feet. However, in describing the causal relationship between Plaintiff's complaints and work, Dr. Hughes has opined only that Plaintiff's work has caused pain. He was, at the time he saw Dr. Hughes, 61

years of age. Dr. Primm found that his complaints were unremarkable for a person of his age. The MRI reviewed by Dr. Hughes only revealed degenerative changes and Dr. Primm expressly opined that those degenerative changes were 'mild' and 'age related.'

The report of Dr. Hughes is insufficient to award income benefits for cumulative trauma because Dr. Hughes does not attribute any permanent physical condition or impairment to work, but merely indicates that work has caused the Plaintiff 'pain.' The simple fact is that there is no proof in the record that the Plaintiff's work has actually caused a 'harmful change in the human organism evidenced by objective medical findings.' KRS 342.0011(1). That statutory definition of 'injury' expressly 'does not include the effects of the natural aging process.'

The only changes found by anyone, including Dr. Dale Williams, were degenerative changes. It was the opinion of Dr. Primm that all the Plaintiff has is degenerative changes from the natural aging process consistent with any others in Plaintiff's age group regardless of occupation. All of the impairment ratings assessed by Dr. Hughes were expressly based on either complaints of pain or range of motion, or both, and both pain and range of motion are subjective findings and not objective findings. It is of concern that Dr. Hughes ordered only a MRI of the lumbar spine, without obtaining studies of the other areas of complaint voiced by the Plaintiff. Further, although Mr. Auxier asserts several x-ray studies done by Drs. Pugh and Hall, there is no mention of them in any medical report.

Dr. Hughes reports receiving a history of the Plaintiff having worked on surface mines for 38 years. Of that time, only the last 14 months were with Revelation Energy. Plaintiff's histories to the various evaluating doctors place the onset of his symptoms well before he began working for Revelation Energy and there is no evidence of record that the 14 months he worked there contributed in any way to any impairment or condition he may have. In fact, the Plaintiff noted that the bulldozer operated by him at Revelation was a newer model D11 with an 'air ride seat.' To the extent any degenerative changes could be work related, both Dr. Hughes and Dr. Williams attribute causation (and even then only in part) to the entirety of Plaintiff's work as a heavy equipment operator. That's 38 years according to Dr. Hughes, and of that, only 14 months were with Revelation Energy.

The only condition that Plaintiff has that is in any way evidence of trauma is his torn rotator cuff. The Plaintiff reported to Dr. Primm that he had injured that shoulder about five years earlier when he almost fell off a dozer when he jerked his arm holding on to the dozer. That is certainly a sufficient traumatic event to cause a rotator cuff tear and that specific event occurred well before the 14 months the Plaintiff worked for Revelation Energy.

Although, Plaintiff denied any shoulder injury at his discovery deposition, the date reflected in Dr. Primm's report is consistent with the history in the records of Dr. Keith Hall and Dr. Pugh indicating an onset date of right shoulder pain five years earlier.

In a decision issued by the Kentucky Court of Appeals on January 31st of this year, CDR Operations Inc. v. Ronnie Hale, No. 2013-CA-001030-WC, that Court affirmed the Workers' Compensation Board in finding that the Administrative Law Judge should determine what percentage, if any, of a claimant's impairment was attributable directly to his employment by his employer in that claim. The claim is presently on appeal to the Supreme Court and cannot be cited as precedent, but I note that the Court cited to the case of Southern Kentucky Concrete Contractors Inc. v. Campbell, 662 S.W.2d 221 (Ky. App. 1983) in reaching its conclusion. The Court in that case remanded the claim to the Workers' Compensation Board to "determine the percentage of Campbell's disability attributable to the work performed by him while employed by Southern, and Southern is to be liable to that extent." The Court continued: "absent evidence to the contrary, Southern shall be liable for that percentage of Campbell's disability which is equal to the percentage of Campbell's work life spent with Southern." (Id. at 222, 223).

As there is no objective evidence that Plaintiff's work with this employer has caused any permanent harmful change to the claimant, the injury claim must be dismissed. In making this finding, I rely on the medical report of Dr. Daniel Primm.

Further, as argued by the Defendant/Employer, if it were to be found that the Plaintiff has sustained some degree of injury caused by cumulative trauma from his work, there is no evidence that any of it was caused by his work at Revelation

Energy, and the claim against Revelation must be dismissed. I find that if Plaintiff did suffer from some degree of cumulative trauma, if was not caused by injuries sustained at Revelation as evidenced by the Plaintiff's own testimony and the medical report of July 24, 2012 from Dr. Pugh and the history given to Dr. Primm.

Relative to the cumulative trauma injury claim, the ALJ concluded there was no objective evidence establishing Auxier's work for Revelation caused any permanent harmful change and the claim must be dismissed. In making that finding, the ALJ stated he relied upon the medical report of Dr. Primm which he concluded was the most complete, compelling, and persuasive evidence. No petition for reconsideration was filed.

On appeal, Auxier cites the findings of Dr. Hughes and Dr. Williams in arguing the ALJ erroneously determined there are no objective medical findings. He also argues the ALJ's reliance upon Southern Kentucky Concrete Contractors, Inc. v. Campbell, 662 S.W.2d 221 (Ky. App. 1983) is misplaced as it is inapplicable to any work injury occurring subsequent to the abolishment of the Special Fund. Auxier concludes it is indisputable his injuries became manifest and disabling on the last date he performed work activities for Revelation and not while he

was employed by a prior employer. Finally, Auxier takes the position that the ALJ's decision is arbitrary, capricious, or an abuse of discretion since the credible medical evidence is so overwhelming in his favor. Auxier seeks reversal of the decision.

On review, we find Auxier's appeal to be nothing more than a re-argument of the evidence before the ALJ. Auxier impermissibly requests this Board to engage in fact-finding and substitute its judgment as to the weight and credibility of the evidence for that of the ALJ. That is not the Board's function. See KRS 342.285(2); Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985).

As the claimant in a workers' compensation proceeding, Auxier had the burden of proving each of the essential elements of his cause of action. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Auxier was unsuccessful in that burden, the question on appeal is whether the evidence compels a different result. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Compelling evidence" is defined as evidence that is so overwhelming no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985). The function of the Board in reviewing the ALJ's decision is limited to a determination

of whether the findings made by the ALJ are so unreasonable under the evidence that they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the discretion to determine all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). 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). Although a party may note evidence that would have supported a different outcome than that reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to the weight and credibility to be afforded the evidence or by noting reasonable inferences that otherwise could have been drawn

from the record. Whittaker v. Rowland, 998 S.W.2d 479, 481 (Ky. 1999). So long as the ALJ's ruling with regard to an issue is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

Furthermore, in the absence of a petition for reconsideration, on questions of fact, the Board is limited to a determination of whether there is substantial evidence contained in the record to support the ALJ's conclusion. Stated otherwise, inadequate, and incomplete, or even inaccurate fact-finding on the part of an ALJ will not justify reversal or remand if there is identifiable evidence in the record that supports the ultimate conclusion. Eaton Axle Corp. v. Nally, 688 S.W.2d 334 (Ky. 1985); Halls Hardwood Floor Co. v. Stapleton, 16 S.W.3d 327 (Ky. App. 2000).

We find no merit in Auxier's argument Campbell, supra, is inapplicable. We agree with the ALJ that Dr. Hughes did not offer an opinion attributing any of the impairment rating to the time Auxier worked for either Lexington Coal or its successor in interest, Revelation. Dr. Hughes assessed a 22% impairment based on Auxier's exposure to cumulative trauma over a thirty-six year period. He did not state any portion of Auxier's

impairment rating was directly attributable to his employment with Lexington Coal or Revelation.

That said, in the case *sub judice*, identifiable substantial evidence in the record supports the ALJ's finding Auxier failed in his burden of showing he sustained an injury while in the employ of Revelation. The ALJ specifically stated he relied upon the report of Dr. Primm in reaching this decision. In his report, Dr. Primm stated there was no credible objective findings which indicated any of Auxier's musculoskeletal symptoms were a direct result of or were permanently aggravated by his work. Consequently, Auxier had normal physical findings upon examination for a man his age. Leaving aside the applicability of Campbell, supra, Dr. Primm's report constitutes substantial evidence supporting the conclusion Auxier did not sustain a work-related injury or injuries as defined by the Act and the decision dismissing his cumulative trauma claim for income and medical benefits.

As previously noted, our only task on appeal is to determine if substantial evidence exists in the record in support of the ALJ's decision. Because there is substantial evidence in the record and the outcome selected by the ALJ is supported by substantial evidence, we are

without authority to disturb his decision on appeal.
Special Fund v. Francis, supra.

Accordingly, the June 23, 2014, Opinion and Order
of Hon. Steven G. Bolton, Administrative Law Judge, is
AFFIRMED.

ALL CONCUR.

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