Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: November 14, 2014

CLAIM NO. 201364096

BLEDSOE COAL CORPORATION PETITIONER

VS. **APPEAL FROM HON. JEANIE OWEN MILLER, ADMINISTRATIVE LAW JUDGE**

DENNIS OSBORNE
HON. JEANIE OWEN MILLER,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

ALVEY, Chairman. Bledsoe Coal Corporation ("Bledsoe") appeals from the Opinion, Order and Award rendered July 25, 2014 by Hon. Jeanie Owen Miller, Administrative Law Judge ("ALJ") awarding Dennie Osborne ("Osborne") permanent total disability ("PTD") benefits and medical benefits for the effects of a work-related cumulative trauma injury which was

acutely aggravated on August 14, 2013. No petition for reconsideration was filed.

On appeal, Bledsoe argues the ALJ's finding Osborne is permanently and totally disabled is not supported by substantial evidence. We disagree and affirm.

Osborne filed a Form 101 on November 21, 2013 alleging he sustained acute injuries to his neck and back on August 14, 2013, when the buggy he was operating hit a rock and threw him into the top of the mine roof. He also alleged cumulative trauma injuries to his neck and back manifesting on August 14, 2013. The Form 104 indicates Osborne began working for Bledsoe in June 1977. Osborne also filed a Form 103 hearing loss claim, which is not relevant to this appeal. The ALJ consolidated Osborne's injury and hearing loss claims on January 21, 2014. She placed Osborne's pending coal worker's pneumoconiosis claim, which is also not relevant to this appeal, in abeyance.

In support of his claim, Osborne filed the August 14, 2013 accident report which reflects he injured his neck and back at 7:30 a.m. when his buggy ran over a rock. At the time of the accident, Osborne was a "mine examiner/ pumpman," a position he had held for eight months. Osborne also attached the August 15, 2013 note of Dr. A. Dahhan, who noted Osborne presented with work-related back and neck

injuries with associated pain occurring on August 14, 2013. Dr. Dahhan performed an examination and ordered a drug screen.

Osborne attached the August 30, 2013 initial examination record of Dr. Chad Morgan, D.C., who noted the work accident and complaints of severe low back and neck pain radiating into left hip, as well as occasional numbness and tingling in the arms and hands. Dr. Morgan diagnosed cervical subluxation, neuralgia/neuritis/radiculopathy unspecified, muscle spasms, lumbar subluxation, sciatica, and disc extrusion, prolapse, protrusion and rupture. In a September 9, 2013 medical questionnaire, Dr. Morgan indicated Osborne's neck and back conditions were caused, either wholly or in part, by his job activities, the continuation of which would have adverse health consequences. Finally, Osborne attached a September 13, 2013 certified letter notifying Bledsoe of his coal worker's pneumoconiosis, cumulative trauma, and hearing loss claims.

Osborne testified by deposition on March 4, 2014 and at the hearing held May 28, 2014. Osborne was born on February 5, 1954 and resides in London, Kentucky. He completed high school. He is certified in underground and surface mining, and holds a foreman's license, electrician's card, and EMT certificate. Osborne testified he began

working for Bledsoe, or its successor corporation, on June 28, 1977, and has spent over thirty-six years working underground. He has worked as a supervisor and as a general laborer. Osborne testified he assisted in rock dusting, setting up water pumps, building brattices with concrete blocks, moving belt structures, and moving electric hookups. Osborne indicated the largest cable he had to move was thirty feet long and weighed two hundred pounds. At the time of the August 14, 2013 accident, he worked as a pre-shifter and pumpman. As a pre-shifter, he visually inspected the mine to ensure it contained no hazards or safety violations. As a pumpman, he placed pumps in waterholes to remove water from the mines. Osborne testified an average pump weighed one hundred and fifty pounds, and he had assistance in setting it up.

On August 14, 2013, Osborne testified he was operating a buggy during his pre-shifting duties when it ran over a rock. The impact caused his head to strike the mine roof injuring his neck and back. Osborne reported the accident the same day, and completed his shift despite neck and back pain. When his symptoms did not improve, Osborne sought treatment the following day. Osborne did not return to work after August 14, 2013. Mass layoffs subsequently occurred and the mines closed in September 2013. Osborne

testified he experiences neck pain and low back pain radiating into his left hip. He also experiences numbness in his left leg and arm, but is unsure whether those symptoms are due to the work accident.

Since the accident, Osborne has treated with Dr. Dahhan, Dr. Morgan and Dr. Amr El-Naggar. His family physician is Dr. Roy Varghese, with whom he has treated for the past fifteen years. Dr. Varghese prescribes Lorcet for pain and Arthrotec for his arthritis. Dr. El-Naggar prescribes a muscle relaxer and Neurontin, and ordered therapy once a week with Dr. Morgan. Although Dr. Dahhan returned him to work without restriction on August 27, 2013, Drs. Varghese, El-Naggar or Morgan have not. Osborne testified he does not believe he can return to work either inside or outside the mines. At his deposition, Osborne testified he had no injuries or physical limitations prior to the August 14, 2013 accident. He was working full time and had not missed any work. Attached to the deposition, is the December 16, 2013 letter from the Social Security Administration finding Osborne became disabled on August 14, 2013, entitling him to monthly disability benefits.

Osborne stated he injured his head and shoulder blade in a motor vehicle accident in 1998. He injured his shoulders in 2008 at work which required surgery. Osborne

stated he had injured his back at work once or twice more than ten years ago, for which he sought treatment. Generally, Osborne indicated he had experienced back pain prior to the accident, but stated it “wasn’t real bad.” He likewise indicated he may have had a “crook” or “tweak” in his neck on occasion prior to the accident, but never experienced significant pain nor a serious injury to his neck. Osborne indicated he is prescribed Lorcet, Ibuprofen, aspirin, and Arthrotec. He stated he took Lorcet and Arthrotec on a monthly basis before the August 14, 2013 accident as needed. At both the hearing and the deposition, Osborne stated he is taking the same medication now, at the same level, as he was prior to the August 4, 2013 accident.

In support of his claim, Osborne filed the report of the August 26, 2013 cervical MRI which demonstrated mild degenerative disc changes with partial ankylosis of C6-7 with no evidence of fracture or ligamentous injury. The August 26, 2013 lumbar MRI demonstrated mild bilateral neural foraminal narrowing at L4-5 and L5-S1, with no evidence of malalignment, edema, or fracture deformity. He also filed the records of Dr. El-Naggar reflecting treatment from November 11, 2013 to February 10, 2014 for Osborne’s neck pain radiating into his left shoulder and low back pain radiating into his left

thigh and leg. Dr. El-Naggar ordered x-rays and a CT-Scan of Osborne's cervical spine, as well as a left shoulder MRI. He prescribed medication, physical therapy for the neck, and several cervical epidural steroid injections. On February 10, 2014, Dr. El-Naggar diagnosed low back pain, sacroiliitis, cervical radiculitis, cervical degenerative disc disease without myelopathy and neck pain.

Bledsoe filed pre-injury medical records from the University of Kentucky ("UK") Hospital, Dr. Varghese of the Hyden Clinic, Anne Wasson Clinic, and Mary Breckenridge Ambulatory. Osborne sustained a closed head injury and right scapula fracture due to a motor vehicle accident in July 1998, requiring treatment for five days at the UK Hospital. Osborne presented to Dr. Varghese on four occasions in 2003 and two occasions in 2004 complaining of neck and back pain. On January 29, 2003, Dr. Varghese noted Osborne's twenty-six year work history in the mines, and complaints of aches and pains all over his body, especially the back. Dr. Varghese ordered diagnostic studies. He diagnosed neck pain, back pain, and low back pain secondary to twenty-six years of working in the mines. In the subsequent visits in 2003 and 2004, Dr. Varghese continued to note Osborne's work history, and consistently diagnosed

neck and back pain, as well as degenerative arthritis. He prescribed Lorcet and Celebrex or Vioxx on each visit.

Osborne visited the Anne Wasson Clinic on five occasions from January 14, 2010 to August 26, 2011 for follow-up visits and medication refills for his arthritis and chronic low back pain. He likewise visited Mary Breckenridge Ambulatory on three occasions from March 7, 2012 to January 4, 2013 for arthritis, back problems and chronic pain, and was prescribed medication.

Osborne returned to Dr. Varghese on April 4, 2013, who noted his long work history in the coal mines. He diagnosed back pain, leg pain, knee pain, anxiety, degenerative arthritis, and chronic pain. He ordered diagnostic studies and stated as follows:

> Plan to continue his regular medication. He has a lot of problems in the back and knee. He works underground for the last 36 years. He has a lot of traumatic arthritis. Control pain with Hydrocodone . . . Control his anxiety with Alprazolam . . . Put him on Arthrotec 75/200 one twice a day for his work related arthritis . . . .

The May 13, 2013 cervical MRI demonstrated mild degenerative changes at C2-C3, C3-C4, C4-C5 with posterior disc osteophyte complex, and fusion of the C6-7 vertebral body. The May 13, 2013 lumbar MRI demonstrated mild degenerative changes at L1-L2 with degeneration of the disc

with small central penetration and mild degeneration of L2-L3 disc with degenerative changes with small anterior disc osteophyte complex. Osborne returned on July 3, 2013 for a medication refill.

Bledsoe also filed several post-injury medical records. On August 15, 2013, Dr. Dahhan noted diagnostic studies showed narrowing of C7-8 with multiple degenerative changes and moderate degenerative changes with osteophyte formation of the lumbar spine. On August 27, 2013, Dr. Dahhan allowed Osborne to return to regular work duty without restrictions. Osborne visited the Hyden Clinic on September 4, 2013, November 21, 2013 and February 24, 2014 for follow-up visits for arthritis, anxiety, back pain, and medication refills. Bledsoe also filed the October 11, 2013 NCV study requested by Dr. Morgan. The results demonstrated a normal NCV study of the bilateral lower extremities, but could not exclude a superimposed lumbosacral radiculopathy. Therefore, clinical correlation, including needle EMG of the lower extremities, as well as appropriate neuroimaging, was recommended.

Osborne submitted Dr. Arthur Hughes' January 21, 2014 report. He noted Osborne had a prior 2008 right rotator cuff surgery, left shoulder pain and low back pain. Dr. Hughes reviewed the August 26, 2013 MRIs, and the

records of Drs. Morgan and Dahhan. Dr. Hughes diagnosed neck pain with suspected radiculopathy, right shoulder pain and restricted range of motion ("ROM"), left shoulder pain and restricted ROM, left hip pain and restricted ROM, and lower back pain with suspected radiculopathy.

Dr. Hughes opined Osborne's injury is a cause of his complaints, though not the only cause, noting the prior neck, low back and bilateral shoulder pain substantially worsened following the August 14, 2013 injury, and he now experiences new left hip pain due to the accident. Dr. Hughes stated as follows regarding causation:

> Mr. Osborne has worked in underground mining for over 35 years and has developed neck pain, lower back pain, upper extremity pain and numbness, and bilateral shoulder pain as a consequence of his long years in underground mining and in repairing equipment used in mining. He sustained an injury when the buggy on which he was riding hit a rock and he was jammed against the roof. This caused an increase in multiple areas of pain as well as the development of left hip pain. He now has limited ability to do ordinary activities as he has described above including maintenance of his home and property and recreational activities.

Dr. Hughes assessed a combined 24% impairment rating pursuant to the American Medical Association, Guides the to the Evaluation of Permanent Impairment, Fifth Edition ("AMA Guides") apportioning 5% to the neck, 5% to the low back, 2%

to the left hip, 7% to the left shoulder and 8% to the right shoulder. Dr. Hughes opined Osborne had an active impairment prior to his injury stating as follows:

> The condition producing active impairment prior to the injury of August 14, 2013 was chronic neck pain, lower back pain, and bilateral shoulder pain as a consequence of many years working as an underground coal miner and servicing mining equipment. These are common consequences among miners particularly those who have worked underground and are consequences of repetitive cumulative trauma to the areas affected.
>
> The neck pain, lower back pain and bilateral shoulder pain predated the injury of August 14, 2013 but were made substantially worse by this incident. . . .

Of the 24% impairment rating, Dr. Hughes attributed 10% to Osborne's pre-existing condition and the remaining 14% to the August 14, 2013 injury. He recommended additional treatment and concluded Osborne does not retain the physical capacity to return to the type of work performed at the time of his injury. He stated Osborne should avoid repetitive bending and twisting of the neck and lumbar spine, and working above shoulder level. Dr. Hughes restricted Osborne from lifting over ten pounds regularly or twenty-five pounds occasionally and he should be allowed to stand or sit as needed.

Bledsoe filed the March 6, 2014 report of Dr. Rick Lyon. He reviewed the medical records, including those prior to the August 14, 2013 injury. Dr. Lyon diagnosed cervical strain, chronic degenerative disc disease of the cervical spine, lumbar strain, chronic degenerative lumbar disc disease, and history of rotator cuff tear. Dr. Lyon opined there is no harmful change to Osborne's lumbar spine due to the August 14, 2013 accident since there were no acute findings on the MRI. Rather, his lumbar condition is chronic and is a result of the aging process, and not the result of work-related cumulative trauma. Pursuant to the AMA Guides, Osborne qualified for DRE lumbar category II both before and following the work accident.

Dr. Lyon likewise opined Osborne sustained no harmful change to his cervical spine due to the August 14, 2013 event noting documented pre-existing cervical pain, the lack of an acute injury on the post-injury MRI, and the little difference between his pre- and post-injury cervical spine MRIs. Dr. Lyon also stated Osborne denied any repetitive trauma to his neck. Therefore, Dr. Lyon opined Osborne's cervical degenerative changes are the result of the aging process only and would warrant a 0% impairment rating.

Dr. Lyon opined Osborne aggravated his underlying cervical and lumbar degenerative conditions, has returned to baseline, and sustained no harmful change to the human organism. Osborne neither sustained an acute nor cumulative traumatic event to his cervical or lumbar spine as a result of his work with Bledsoe. Dr. Lyon declined to assign work-related restrictions or an impairment rating, and found Osborne is able to return to his previous employment.

In the July 25, 2014 opinion, after reviewing and summarizing the evidence, the ALJ stated as follows regarding whether Osborne sustained a work-related injury:

> . . . After considering Dr. Lyon's opinion and Dr. Hughes opinion as well as the medical records in this case, I find Plaintiff sustained a work-related injury as defined by the Act. Dr. Lyon's cursory statement that Plaintiff was pump man in a underground coal mine obviously does not take into consideration the physical requirements of his occupation. I find Dr. Hughes is the medical evaluator that considered the physical requirements of Plaintiff's employment and related those repetitive and cumulative traumas to his current condition. Also the review of Plaintiff's past medical records indicates that his own treating physician, Dr. Varghese related much of his pain and degenerative changes to his work in the underground coal mines. Relying on those records, Dr. Hughes' opinion and Plaintiff's testimony, I conclude that Plaintiff had an injury to his lumbar spine, cervical spine, bi-lateral shoulders and left hip both

> as an acute trauma on August 14, 2013 and in the nature of cumulative trauma.
>
> I find the records and opinions of Dr. Varghese, Dr. Hughes, together with Plaintiff's testimony and description of his work activities, constitute substantial and persuasive evidence upon which I rely in determining he suffers from the effects of a work-related cumulative trauma injury that was acutely aggravated on August 14, 2013. I agree with Dr. Hughes' opinion that Plaintiff suffered from degenerative disc disease, and that the cervical and lumbar DDD was active prior to the injury to the extent that he was taking medication for the condition. However, Plaintiff had been working without restrictions or limitations until the traumatic injury of August 14, 2013.

The ALJ determined Bledsoe had been sufficiently notified of Osborne's acute and cumulative trauma injuries. The ALJ next determined although the medical evidence supports a conclusion Osborne suffered from a pre-existing, active impairment, he did not suffer from a pre-existing disability immediately before his August 14, 2013 injury pursuant to Roberts Bros. Coal Co. vs. Robinson, 113 S.W.3d 181 (Ky. App. 2003). In support of this determination, the ALJ noted Osborne was working up to eleven hours a day, five days a week in a job which required repetitive bending, lifting, twisting, pushing, pulling and generally medium to heavy labor. While he may have missed some work and

admittedly was being prescribed pain medications, Osborne performed his work without restrictions or accommodations.

After defining PTD and work pursuant to KRS 342.0011(11)(c) and (34), and setting forth the analysis required in Ira A. Watson Department Store vs. Hamilton, 34 S.W.2d 48 (Ky. 2000), the ALJ determined Osborne suffers from a permanent total occupational disability, stating as follows:

> In applying the factors set out in Ira Watson, supra, it is apparent that Plaintiff's vocational factors infer his total and permanent disability. Those factors I have considered are: his age, 60 which is an older worker, his educational level – which is 12th grade. His primary work experience however has been in the very labor intensive job of underground coal mining. In his physical condition, he is unable to perform any job including a sedentary job on a regular and sustained basis.
>
> I find the Plaintiff's testimony credible. I observed him closely at the Hearing and he moved very slowly, sitting on his chair in a leaning manner. It was apparent to this fact-finder that Plaintiff was in pain. This is not an individual who simply does not want to work. His work history speaks for itself – he has a proven record of work. Thirty-six years in underground coal mine work, with injuries and even shoulder surgery in his past, he returned to the mine and worked a full day. I adopts[sic] Dr. Hughes' restrictions of avoiding tasks which involve repetitive bending and

> twisting of the neck and the lumbar spine – no work above shoulder level and lifting only 10 pounds regularly and 25 pounds on occasion – needing to sit and stand at will. Taking these restrictions into consideration and finding the testimony of the plaintiff credible, I find Plaintiff could not return to any work on a regular and sustained basis.
>
> With consideration of his physical restrictions, the vocational and medical factors -- these all lead this fact-finder to conclude that the plaintiff suffers from a permanent and total occupational disability.

No petition for reconsideration was filed. On appeal, in arguing the ALJ's finding of PTD is not supported by substantial evidence, Bledsoe asserts Osborne sustained no injury as defined by the Act. In support of its argument, Bledsoe asserts Osborne presented to Dr. Varghese with the same complaints of back pain, anxiety, and arthritis in the month prior to the accident. In the months following the alleged injury, the work accident was not documented in his family physician's records. Bledsoe points to Osborne's pre-injury and post-injury cervical and lumbar MRIs and the report of Dr. Lyon. Bledsoe argues the opinions of Dr. Hughes cannot constitute substantial evidence because he did not review the pre-injury medical records, or the records of Dr. Varghese. Bledsoe also argues the ALJ erred in failing to consider other potential

sources of Osborne's inability to return to work, namely the mass layoffs which have recently taken place in the Kentucky coal mining industry.

As the claimant in a workers' compensation proceeding, Osborne had the burden of proving each of the essential elements of his cause of action, including injury and the extent of his disability. *See* KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Osborne was successful in his burden, the question on appeal is whether substantial evidence existed in the record supporting 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 persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971).

Authority has long acknowledged in making a determination granting or denying an award of PTD benefits, an ALJ has wide ranging discretion. Seventh Street Road Tobacco Warehouse v. Stillwell, 550 S.W.2d 469 (Ky. 1976); Colwell v. Dresser Instrument Div., 217 S.W.3d 213, 219 (Ky. 2006). KRS 342.285 designates the ALJ as the finder of fact. Therefore, the ALJ has the sole discretion to determine the quality, character, and substance of evidence.

Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). The ALJ, as fact-finder, may choose whom and what to believe and, in doing so, 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 party's total proof. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15, 16 (Ky. 1977); Pruitt v. Bugg Brothers, 547 S.W.2d 123 (Ky. 1977).

Additionally, no petition for reconsideration was filed. Therefore, 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 differently, inadequate, incomplete, or even inaccurate fact-finding on the part of an ALJ will not justify reversal or remand if there is substantial evidence in the record that supports the ultimate conclusion. Eaton Axle Corp. v. Nally, 688 S.W.2d 334 (Ky. 1985).

Bledsoe challenges the ALJ's finding of PTD by arguing Osborne suffered no harmful change to the human organism as a result of the August 14, 2013 injury. This argument ignores Osborne also claimed cumulative trauma to his neck and back, in addition to the acute trauma claim. The ALJ ultimately determined Osborne injured his lumbar spine, cervical spine, bi-lateral shoulders and left hip

both in the acute traumatic accident occurring on August 14, 2013, and in the cumulative trauma sustained during his employment with Bledsoe. In relying upon Dr. Varghese, Dr. Hughes, and Osborne's testimony describing his work activities, the ALJ determined he suffers from the effects of a work-related cumulative trauma injury which was acutely aggravated on August 14, 2013.

As noted by the ALJ, Dr. Varghese related much of Osborne's pain and degenerative changes to his work in the underground coal mines. Dr. Hughes documented his findings upon examination of Osborne's neck, shoulders, lower extremities, and back. He specifically noted his findings on flexion, extension, reflexes and range of motion ("ROM"). He reviewed the August 26, 2013 cervical and lumbar MRIs and the records of Drs. Morgan and Dahhan. Dr. Hughes diagnosed neck pain with suspected radiculopathy, right shoulder pain and restricted ROM, left shoulder pain and restricted ROM, left hip pain and restricted ROM, and low back pain with suspected radiculopathy. He then stated Osborne developed neck pain, low back pain, upper extremity pain and numbness, and bilateral shoulder pain as a consequence of his long years in underground mining and in repairing equipment used in mining. The August 14, 2013

accident caused an increase in multiple areas of pain as well as the development of left hip pain.

The records of Dr. Varghese, the report of Dr. Hughes, and Osborne's testimony constitute substantial evidence supporting the ALJ's determination he sustained an injury as defined by the Act. Although Bledsoe identifies evidence in the record supporting its position, namely the opinion of Dr. Lyon, this is not adequate to require reversal on appeal. Likewise, Dr. Hughes' opinion constitutes substantial evidence regarding causation.

The ALJ's determination Osborne is permanently totally disabled is in accordance with the Kentucky Supreme Court's holding in Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). Taking into account Osborne' age of 60, twelfth grade education, and his exclusive work history in underground coal mining, in conjunction with the restrictions assigned by Dr. Hughes and Osborne's credible testimony, the ALJ was persuaded due to the effects of the work-related injury, he is totally disabled. Because the outcome selected by the ALJ is supported by substantial evidence, we are without authority to disturb her decision on appeal. *See* KRS 342.285; Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

We find unpersuasive Bledsoe's argument Dr. Hughes' opinion cannot constitute substantial evidence since it appears from his report he reviewed Osborne's pre-injury medical records in forming his opinion. We first note Bledsoe failed to file a petition for reconsideration requesting additional findings of fact on this issue. Second, although the report does not document a review of the pre-injury records, Dr. Hughes noted Osborne's pre-existing pain to several body parts and in fact apportioned a part of the combined impairment rating to an active pre-existing condition. Third, Dr. Hughes was not cross-examined or questioned regarding how the pre-injury records would have altered his opinion, if at all. Finally, the pre-injury records were properly before the ALJ, as well as the report of Dr. Lyon. She clearly rejected the theory submitted by Bledsoe and Dr. Lyon, and instead chose to rely upon Dr. Hughes, Dr. Varghese and Osborne. This is well within the ALJ's role as fact-finder. Bledsoe's argument goes to the weight of the evidence and does not serve to render the opinions of Dr. Hughes unsubstantial. The outcome selected by the ALJ is supported by substantial evidence, and will not be disturbed on appeal.

Therefore, the July 25, 2014 Opinion, Order and Award rendered July 25, 2014 by Hon. Jeanie Owen Miller, Administrative Law Judge, is hereby **AFFIRMED**.

ALL CONCUR.

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