

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: March 12, 2014

CLAIM NOS. 201300439 & 201300438

CDR MINERALS

PETITIONER

VS.

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

RANDY RICHIE
and HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING IN PART,
VACATING IN PART
AND REMANDING

* * * * *

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

RECHTER, Member. CDR Minerals ("CDR") appeals from the September 10, 2013 Opinion and Order rendered by Hon. William J. Rudloff, Administrative Law Judge ("ALJ") and from the October 17, 2013 Opinion and Order on

Reconsideration. The ALJ determined Randy Richie ("Richie") is permanently totally disabled as a result of cumulative trauma injuries. In a consolidated hearing loss claim, the ALJ found Richie entitled to medical benefits.

On appeal, CDR challenges the ALJ's findings that Richie sustained cumulative trauma injuries during employment with CDR, sustained any injury or impairment to the right knee and shoulder, and is permanently totally disabled. CDR also argues the ALJ erred in awarding medical benefits in the hearing loss claim. This case must be partially remanded for further fact finding because it is not apparent the ALJ considered the entirety of the evidence in reaching his decision, and because the findings of fact are inconsistent. However, we affirm the award of medical benefits in the hearing loss claim.

Richie filed claim number 2013-00438 on March 23, 2013 alleging injuries to his low back, right hip and right leg on January 8, 2012 as a result of cumulative trauma. He acknowledged filing first reports of injury in claim numbers 2007-95154, 2002-97151 and 2011-75266, though no formal claims were filed. Richie supported his application with a one page medical statement from Dr. Dale Williams, who examined him on January 30, 2013. Dr. Williams diagnosed lumbalgia with radiculitis, right lower extremity

and disc degeneration L1-L5. Regarding causation, Dr. Williams opined "[Due] to patient history I feel the disc injury in 2002 and his work history as a heavy equipment operator since 1973 is a contributor to overall condition."

Richie testified by deposition and at the hearing. He was born on July 27, 1955 and is a high school graduate and certified miner. During his entire adult life, he has worked as a heavy equipment operator, most recently for CDR as a grader operator at mine sites. In 2001, Richie was injured when the blade of a grader he was operating struck a tree and he was whipped forward, striking the windshield. He missed nine weeks of work. Since the time of the 2001 injury to the present, Richie's back pain periodically flares up and he takes over-the-counter pain medication for relief. Similarly, his right hip has been hurting since the 2001 injury, and also periodically causes pain. Until the time of his layoff from CDR in January, 2012, Richie experienced low back and right hip pain while working.

Dr. Arthur L. Hughes examined Richie on April 24, 2013. He reviewed the July 21, 2005, October 18, 2005 and July 30, 2009 notes of Dr. Mitchell Wicker. These reports concerned treatment for conditions unrelated to the alleged work injuries. Dr. Hughes also reviewed Dr. Williams'

January 30, 2013 report regarding Richie's low back pain with radiculitis into the right hip and leg.

At the examination, Richie gave a history of forty years working as a heavy equipment operator. He reported the 2001 grader accident which resulted in severe low back pain, though it was unclear whether Dr. Hughes was aware the accident required Richie to miss nine weeks of work. Dr. Hughes noted:

He continues to have lower back pain extending into the right hip and he also has pain behind the right knee, which is of recent origin. He has had right shoulder pain for the past three years.

Dr. Hughes diagnosed low back pain; bilateral hip pain, right worse than left; right knee pain; and right shoulder pain. Regarding causation, he opined as follows:

Within reasonable medical probability, the plaintiff's multiple pains and restricted motion of joints is a consequence of his 40 years as a heavy equipment operator causing repetitive injury to multiple areas of the body. These have accumulated over a period of years.

Dr. Hughes further opined Richie had no prior active impairment, explaining his impairments were the consequence of accumulated trauma over many years of operating heavy equipment and are not due to any specific injury. He assessed an 8% impairment pursuant to the

American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"), consisting of 5% for the low back, 2% for the right hip and 1% for the right knee. Dr. Hughes assigned a lifting restriction of ten pounds regularly and twenty-five pounds occasionally, and recommended he sit or stand for only "brief" periods of time. He additionally cautioned Richie against repetitive bending and twisting of the lumbar spine, and forward flexing at the waist.

During a deposition on July 3, 2013, Dr. Hughes was informed the 2001 accident resulted in nine weeks of missed work, and acknowledged the injury was more substantial than he initially believed. Dr. Hughes was also presented with and reviewed Dr. Williams' intake note indicating an onset of low back and hip symptoms in 2002. Based upon the 2001 accident, a 2007 low back incident, and ongoing symptoms following the 2001 injury, Dr. Hughes agreed Richie would have had an impairment rating under the AMA Guides. Consequently, he conceded the 5% impairment he assigned for Richie's low back may have been in existence as early as 2002. Furthermore, because the rating for the hip was based upon range of motion, Dr. Hughes did not know what Richie's impairment rating would have been following the 2001 injury. It could have been more or less than the

2% he assigned based upon his examination. Finally, Dr. Hughes acknowledged the 1% rating for the knee is based solely on pain and there is no objective substantiation of the condition, particularly since Richie's range of motion of the knee was normal.

Dr. Hughes was questioned as follows regarding the impairment rating:

Q. Okay. Turning back to the impairment rating you've assessed in this case, and you've already agreed that the five percent to the lumbar spine, within reasonable medical probability, would have been in existence as early as 2001, 2002 because of his persistent low back pain; is that correct, sir?

A. Yes, that's correct.

Q. The two percent attributable to the hip, right hip, that likewise may have been in existence as early 2001, 2002 because of his prior accident; is that correct?

A. That's correct.

Q. And the one percent that is due to knee pain, that really is not supported by any objective findings; is that correct?

A. That's correct.

Dr. Daniel D. Primm evaluated Richie on July 26, 2013, and also received a history of the 2001 accident. Dr. Primm observed that Dr. Wicker's notes document

continued low back pain and right leg pain, as well as a 2002 MRI revealing a bulging disc. Dr. Primm concluded Richie's physical examination was essentially normal for a fifty-eight year old man, and found no evidence of lumbar radiculopathy or myelopathy. He placed Richie in DRE Category I with no objective signs of injury, and found no impairment of the knees, hips or lumbar spine pursuant to the AMA Guides.

Dr. Barbara Eisenmenger performed a University Evaluation in the hearing loss claim. She determined Richie has a high frequency sensorineural hearing loss consistent with long term noise exposure in employment. Richie did not qualify for an impairment rating pursuant to the AMA Guides. However, Dr. Eisenmenger opined "[t]he primary treatment is hearing aids or other assistive listening devices. Based on a communicative needs assessment, hearing aids are recommended."

The ALJ relied upon Dr. Hughes' April 24, 2013 report to find Richie had no pre-existing active impairment or occupational disability prior to January 8, 2012, and to find Richie sustained an 8% impairment as a result of cumulative trauma injuries. Again relying primarily upon Dr. Hughes, the ALJ determined Richie was permanently totally disabled.

CDR filed a petition for reconsideration raising essentially the same arguments it raises on appeal. In the October 17, 2013 Opinion and Order on Reconsideration, the ALJ indicated:

The case at bar is very similar to the facts in McNutt Construction/First General Services v. Scott, 40 S.W.3d 854 (Ky. 2001), where work-related trauma caused a dormant degenerative condition to become disabling and to result in a functional impairment and the trauma is the proximate cause of the harmful change and hence the harmful change comes within the definition of an injury. I make the factual determination based upon Mr. Richie's credible and convincing testimony and the medical evidence from Dr. Hughes that Mr. Richie's' [sic] work-related trauma while employed by the defendant caused a dormant degenerative condition to become disabling and to result in a functional impairment, and that that trauma is the proximate cause of the harmful change and hence the harmful comes within the definition of an injury.

On appeal, CDR challenges the ALJ's findings that Richie sustained cumulative injuries during employment with CDR, including the knee and shoulder, and that Richie is permanently totally disabled. Each argument concerning the cumulative trauma injuries relies, in part, on Dr. Hughes' deposition testimony.

There is no doubt Dr. Hughes' deposition testimony differed significantly from his report, primarily

because he was provided additional medical information which had not been previously available to him. He acknowledged the impairment he assessed for the low back condition would likely have been present prior to employment with CDR, and the 2001 grader incident was responsible for the low back and right hip pain. Further, Dr. Hughes admitted his assessment regarding the knee was based solely on complaints of pain, with no objective findings to substantiate the complaints.

All parties to a workers' compensation dispute are entitled to findings of fact based upon a correct understanding of the evidence submitted during adjudication of the claim. Where it is demonstrated the fact-finder may have held an erroneous understanding of relevant evidence in reaching a decision, the courts have authorized remand to the ALJ for further findings. See Cook v. Paducah Recapping Service, 694 S.W.2d 684 (Ky. 1985); Whitaker v. Peabody Coal Co., 788 S.W.2d 269 (Ky. 1990). In this case, the ALJ did not summarize Dr. Hughes' deposition testimony, nor did he discuss it in his findings of fact. Given the qualifying nature of the testimony in relation to the report, it was incumbent upon the ALJ to consider Dr. Hughes' testimony in rendering his decision and to demonstrate a comprehensive understanding of the evidence.

Upon remand, an additional consideration for the ALJ is that Richie's employment with CDR began in 2009, and Dr. Hughes' testimony strongly suggests he had a pre-existing impairment ratable condition following the 2001 accident. In Southern Kentucky Concrete Contractors, Inc. v. Campbell, 662 S.W.2d 221 (Ky. App. 1983), the Court of Appeals determined liability should be apportioned to the employer based upon the percentage of disability attributable to the work performed while in the employ of that particular employer. If it is concluded Richie had an impairment rating which pre-existed his employment with CDR, any award against it must be based upon the impairment rating and disability attributable to his employment with CDR.

In this appeal, CDR has also challenged the sufficiency of the evidence supporting the conclusions Richie suffered an injury to his right knee and shoulder, and is permanently totally disabled. The ALJ's decision is ambiguous as to the scope of the injury he found. At page nine of the opinion, the ALJ specifically finds Richie "sustained serious permanent injuries to his back." The ALJ makes no specific finding Richie sustained injuries to his right hip, right knee or shoulder. The ALJ adopted the 8% impairment rating assessed by Dr. Hughes, which included

impairment for the low back, right hip and right knee. It is unclear whether, by adopting that rating, the ALJ intended to also find impairment related to the hip and knee, or whether the ALJ mistakenly failed to subtract the impairment related to the hip and knee. Therefore, after consideration of all the evidence from Dr. Hughes on remand, the ALJ must make specific findings regarding what, if any, conditions are the result of the alleged cumulative trauma.

Because we are unclear as to the extent of Richie's injuries and whether the ALJ considered the entirety of the evidence, we are unable to perform any meaningful review of the award of permanent total disability benefits. Kentland Elkhorn Coal Corp. v. Yates, 743 S.W.2d 47 (Ky. App. 1988); Shields v. Pittsburgh and Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982). On remand, we remind the ALJ of the requirement to adequately set forth the basic facts upon which his ultimate conclusion is drawn, so the parties are reasonably apprised of the basis of the decision. Big Sandy Cmty. Action Program v. Chaffins, 502 S.W.2d 526 (Ky. 1973).

Regarding the award of medical benefits for the hearing loss claim, CDR argues an award of medical benefits is not proper because Richie was found to have no

impairment rating pursuant to the AMA Guides. Pursuant to FEI Installation, Inc. v. Williams, 214 S.W.3d 313 (Ky. 2007), the ALJ may award future medical benefits despite the lack of a permanent impairment rating after providing sufficient reasons for the award. Although Richie failed to establish an impairment rating for his hearing loss, Dr. Eisenmenger, the University Evaluator, opined Richie has a pattern of hearing loss compatible with that caused by hazardous noise exposure in the workplace and his hearing loss is related to repetitive exposure to hazardous noise over an extended period of employment. She stated Richie would benefit from hearing aids. Dr. Eisenmenger's opinion is entitled to presumptive weight and constitutes substantial evidence supporting the award of medical benefits.

For the foregoing reasons, the award of medical benefits in the hearing loss claim is **AFFIRMED** and the award of permanent total disability benefits contained in the September 10, 2013 Opinion and Order and October 17, 2013 order reaffirming the award of Hon. William J. Rudloff is **VACATED** and this case is **REMANDED** for further findings of fact as discussed herein.

ALL CONCUR.

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