Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: October 23, 2015

CLAIM NO. 201400915 & 201400914

CHARLES PARTIN PETITIONER

VS. **APPEAL FROM HON. OTTO DANIEL WOLFF, IV, ADMINISTRATIVE LAW JUDGE**

BLEDSOE COAL CORP.
and HON. OTTO DANIEL WOLFF, IV,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

STIVERS, Member. Charles Partin ("Partin") seeks review of the May 26, 2015, Opinion, Order, and Award of Hon. Otto Daniel Wolff, IV, Administrative Law Judge ("ALJ") awarding medical benefits for a work-related hearing loss but dismissing his cumulative trauma neck and back injury claim against Bledsoe Coal Corp ("Bledsoe"). Partin also appeals

from the July 1, 2015, Order denying his petition for reconsideration. We affirm.

Partin filed a Form 101 asserting a cumulative trauma injury claim to his neck and lower back and a Form 103 alleging a hearing loss claim against Bledsoe.[1] Partin relied upon the reports of Dr. Arthur Hughes and Dr. Chad Morgan. Bledsoe relied upon the report of Dr. David Jenkinson.

Partin testified at the March 25, 2015, hearing. His last day of work at Bledsoe was August 30, 2013, and has not worked anywhere since. Partin indicated he worked over twenty years for Bledsoe and approximately thirty-four or thirty-five years solely in underground coal mines. He estimated he worked between sixty and sixty-five hours for Bledsoe before the coal industry business slowed down. Thereafer, he worked between forty and forty-five hours. Partin primarily operated an underground roof bolting machine during his tenure as an underground coal miner. The last six years of his employment with Bledsoe he worked as a section foreman which required him to inspect the equipment and the section of the coal mine under his

[1] Partin also filed a coal workers' pneumoconiosis claim which was severed from these two claims. By Order dated May 9, 2014, the hearing loss claim and the cumulative trauma injury claim were consolidated.

control. Even though he was a foreman, because absenteeism was common he was often required to run equipment. If a problem existed he would fix it because he could not pull one of his men off of another piece of equipment. In performance of his job, Partin testified he worked harder than the other employees. He worked in sections of the coal mine no higher than five feet, and it was not unusual for him to bump his head.

Partin began experiencing stiffness and pain in his neck approximately two or three years ago. Because of his physical problems, he is unable to mow his lawn and ride for long trips in the car. He currently takes Lorcet, Gabapentin, and a muscle relaxer. Approximately two years ago his family physician increased his dosage of Lorcet. Occasionally, Partin wears a back brace and uses a cane. He testified he had significant neck and back pain prior to the date he was laid off in 2013, but he worked in spite of it because he had to support his family. Partin did not believe he could return to work in the coal mines because the coal industry no longer entails working in high coal. He testified he was only able to work with the benefit of the prescription medication. He underwent physical therapy approximately three or four times but quit because his neck

and back symptoms worsened. The only treatment he is currently receiving is medication.

After summarizing the medical and lay testimony, the ALJ provided the following regarding Partin's cumulative trauma claim:

> CUMULATIVE TRAUMA
>
> WORK-RELATEDNESS/CAUSATION
>
> Plaintiff claims to have sustained neck and back cumulative trauma type injuries as a result of his working 35 years as an underground coal miner.
>
> At the BRC Defendant reserved the issue of work-relatedness/causation as pertained to Plaintiff's alleged cumulative trauma injuries.
>
> There are two essential elements to every workers' compensation claim: (1) and injury and (2) causation. 'Causation' consists of two components, medical and legal.
>
> Medical causation is a question to be addressed by healthcare providers within the realm of 'reasonable medical probability.' Legal causation, commonly referred to as 'work-relatedness,' is a factual determination to be made by the ALJ. Medical evidence, although relevant and material, must be considered not as determinative but rather as a part of the 'totality of circumstances' upon which the ALJ must make the factual determination whether the alleged disability was caused by the work the alleged employee performed. *Hudson v. Owens*, 439 S.W.2d 565 (Ky., 1969).

In determining whether an injury is work-related, no single factor should be given conclusive weight, and the decision must be based on the quantum of aggregate facts rather than the existence or non-existence of any particular factor. *Hayes v. Gibson Hart Co.*, 789 S.W.2d 775 (Ky., 1990).

'Work-related' and 'arising out of and in the course of employment' are synonymous terms. *Armco Steel Co. v. Lyons*, 561 S.W.2d 676 (Ky., 1978).

Despite representing he experienced troubling back and neck problems before being laid off, the reality is Plaintiff could not remember missing a work shift, and often worked 65 or more hours per week up to August 30, 2013. The day of his layoff. But for Plaintiff being laid off, it is unclear how Plaintiff could work at full physical capacity on August 29, 2013, but then claim to be permanently totally occupationally disabled the next day, this simply is not reasonable and logical.

Plaintiff did testify, 'Well it (his back and neck problems) didn't stop me, but it still hurt me. Like I say, you've got to make a living for your family. I'd take my pills (Lorcet) with me and, if it got to bother me too bad, I take – you know, try to take what and it eases the pain a little bit and then I finished up my shift.' (FH p. 19).

To support his contention his neck and back injuries were the result of cumulative trauma, Plaintiff presented medical proof from Drs. Hughes and Morgan D.C. After Dr. Morgan's one-time evaluation, Dr. Morgan indicated Plaintiff's neck and back problems were caused, either wholly or in part, by

his job activities. Dr. Morgan did not have available to him any of Plaintiff's medical records or any pre-injury or post-injury diagnostic test reports to consider. The fact he did not have any medical records or any diagnostic test results to consider cause his input to have less evidentiary weight than the other participating medical experts who did have an opportunity to review some of Plaintiff's medical records and view Plaintiff's MRI studies.

As to work relatedness/causation Dr. Hughes opined, 'The pain and limitation of function is a consequence of a cumulative trauma to the affected areas including repetitive injuries to bones, joints, ligaments, tendons and muscles resulting in persisting pain and limitation of function. He reports that he is unable to return to this type of work because of these pains and limitation in function and his condition (condition not identify) rose to a level of disabling reality before his lay off. The underlying, dormant, non-disabling condition (condition not identified) was aroused into disabling reality by his last employment.'

Dr. Hughes did not identify the specific 'condition' that rose to the level of disabling reality before his layoff, nor did he identify the 'condition' that 'was aroused into a disability reality by his last employment. [sic]

It is also noted to be of substantial significance, that Dr. Hughes did not have, but Dr. Jenkinson did have, Plaintiff's 2014 MRI studies, and therefore, it was impossible for him (Dr. Hughes) to compare Plaintiff's February 5, 2008 lumbar spine MRI scan

and Plaintiff's June 10, 2010 cervical spine MRI scan with Plaintiff's July 2014 lumbar and cervical spine MRI studies. Dr. Hughes could not consider this objective, black-and-white proof to measure any changes in Plaintiff's spine while he worked from 2008 and 2010 to 2014.

On the other hand, Defendant's Dr. Jenkinson did have, and was able to compare, Plaintiff's 2008 lumbar spine MRI and Plaintiff's 2010 cervical spine MRI with Plaintiff's July 30, 2014 lumbar and cervical spine MRIs. Being able to make this objective, black-and-white comparison afforded Dr. Jenkinson a significant piece of proof to consider and actually measure, the effect, if any, if Plaintiff's work on his spine. Having the opportunity to make this comparison significantly enhances the weight to be afforded Dr. Jenkinson's input.

Based upon his opportunity to compare Plaintiff's 2008 and 2010 MRI studies with his 2014 studies, Dr. Jenkinson concluded, as to the work-relatedness and/or cause of Plaintiff's symptoms, 'Mr. Partin has no significant work-related condition.' It does seem that if Plaintiff's 2008 and 2010 MRI studies, when compared to his 2014 studies, do not reveal significant changes, despite Plaintiff continuing to do the same work between 2010 and 2014, it cannot be reasoned Plaintiff's work-related cumulative traumas caused Plaintiff's cervical and lumbar spine problems.

Based upon the totality of the facts pertaining to Plaintiff's contention he had a work related cumulative trauma injury to his cervical and lumbar spine, it is

> determined Plaintiff has not presented ample persuasive proof linking his neck and back problems to his work. Having made the above determinations, the remaining un-addressed issues are moot.

Partin filed a petition for reconsideration asserting the ALJ did not provide an explanation for the basis of his decision. He asserted Dr. Hughes was the only physician who took into account his work history and job duties. He contended Dr. Jenkinson attributed his lower back and neck pain to age related degeneration in finding no cumulative traumatic injuries. Partin requested additional findings of fact regarding medical causation and a finding more consistent with the opinions expressed by Dr. Hughes.

In the July 1, 2015, Order, the ALJ concluded the petition for reconsideration was an attempt to have him once again review and reweigh the evidence which was impermissible. The ALJ pointed out there was a thorough discussion of the law and facts in his decision which provided an explanation for the dismissal of Partin’s claim for cumulative trauma injuries.

On appeal, citing to the findings and opinions of Drs. Hughes and Morgan, Partin asserts the ALJ’s determination there was no objective medical findings linking his neck and back condition to his work is

erroneous and contrary to the evidence. Partin contends his testimony is competent evidence of his physical condition and his ability to perform various activities both before and after the injury. Partin asserts two physicians have expressed the opinion the hard manual labor he performed over thirty-five years in the coal mines, over twenty years of which with Bledsoe, caused him to suffer work-related injuries. Therefore, it is indisputable his injuries became manifest and disabling on the last day he worked for Bledsoe. Partin contends the ALJ's decision is arbitrary, capricious, and an abuse of discretion as the credible evidence is overwhelmingly in his favor and no reasonable person could reach the same conclusion as the ALJ. Partin requests reversal of the ALJ's decision with instructions to issue an award of income and medical benefits.

On review, we find Partin's appeal to be nothing more than a re-argument of the evidence before the ALJ. Partin 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, Partin had the burden of proving each of the essential elements of his cause of action, including causation. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Partin 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).

Dr. Jenkinson's August 20, 2014, report reflects he conducted a physical examination of the neck and lumbar spine. In addition, Dr. Jenkinson reviewed the July 30, 2014, MRI of the lumbar spine which revealed minor degenerative changes with no significant disc herniation or nerve root compression. With respect to the MRI, Dr. Jenkinson noted as follows: "[i]n the radiology report I

note that the scan had been compared with previous MRI date 02/05/08 and the radiologist described the recent scan as 'relatively stable exam.'" He also reviewed an MRI of the cervical spine conducted on the same date which he interpreted as revealing degenerative changes with a disc osteophyte at the C6-7 level. Dr. Jenkinson noted: "[t]he radiologist had compared this MRI to a previous scan dated 06/10/10 and he reported the changes as 'stable.'" Dr. Jenkinson also reviewed Dr. Morgan's report concerning his evaluation of January 28, 2014, and the questionnaire he completed.

Dr. Jenkinson concluded there was no significant abnormality on physical examination and indicated the evaluation was characterized by non-physiological signs and self-limiting behaviors. When Dr. Jenkinson examined his neck, Partin resisted all movement; however, during his conversation with Partin, Dr. Jenkinson noted Partin moved his head and neck quite freely. Dr. Jenkinson opined there were no clinical signs or symptoms for cervical or lumbar radiculopathy. The MRI scans of the cervical and lumbar spine demonstrated relatively minor age related degenerative change of no clinical significance. Dr. Jenkinson concluded there is no evidence Partin had a work-related condition in either his neck or back. The

relatively minor changes on MRI are consistent with age related degeneration and are not unusual for a fifty-four year old man.

With respect to Partin's neck condition, Dr. Jenkinson opined Partin had no significant work-related condition and had no permanent impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"). Concerning Partin's back condition, Dr. Jenkinson believed Partin did not have a significant work-related condition and again had no permanent impairment rating pursuant to the AMA Guides. Dr. Jenkinson believed Partin was fully capable of returning to work in his former occupation or any comparable employment without restrictions or limitations. Further, Partin has no current work-related condition that requires medical treatment either now or in the foreseeable future.

Although the ALJ did not specifically state he relied upon the opinions of Dr. Jenkinson in dismissing Partin's claim, we believe it is clear from the tenor of his opinion that Dr. Jenkinson's opinions were persuasive. As is his prerogative, the ALJ attributed "substantial significance" to the fact Dr. Jenkinson had the 2014 MRI studies of both the neck and back. The ALJ noted it was

impossible for Dr. Hughes to compare the February 5, 2008, lumbar MRI and the 2010 MRI of the cervical spine with the 2014 lumbar and cervical MRI studies. Thus, Dr. Hughes could not consider this important information in order to measure any change in Partin's spine during the period between the initial MRIs and the July 30, 2014, MRIs. Since Dr. Jenkinson was able to compare the 2008 lumbar spine MRI and the 2010 cervical spine MRI with the July 30, 2014, MRIs of the lumbar and cervical spine, the ALJ concluded Dr. Jenkinson had a significant piece of evidence to consider and measure. Thus, the opportunity to make this comparison significantly enhanced the weight the ALJ afforded Dr. Jenkinson's opinions. The ALJ also noted the comparison of the MRIs did not reveal significant changes despite the fact Partin had continued to perform the same work between 2010 and 2014. The ALJ could not conclude Partin's work-related cumulative traumas caused his cervical and lumbar spine problems. Consequently, Partin had failed to provide ample and persuasive medical evidence linking his neck and back problems to his work.

Contrary to Partin's assertions, the opinions of Dr. Jenkinson constitute substantial evidence upon which the ALJ was free to rely in reaching a decision on the merits. Kentucky Utilities Co. v. Hammons, 145 S.W.2d 67,

71 (Ky. App. 1940) (citing American Rolling Mill Co. v. Pack et al., 128 S.W. 2d 187, 190 (Ky. App. 1939).

While Partin is correct the contrary opinions espoused by Drs. Hughes and Morgan could have been relied on by the ALJ to support a different outcome in his favor, in light of the remaining record the views articulated by those physicians represent nothing more that conflicting evidence compelling no particular result. Copar, Inc. v. Rogers, 127 S.W. 3d 554 (Ky. 2003).

As previously stated, where the evidence relating to an issue preserved for determination is conflicting, the ALJ, as fact-finder, is vested with the discretion to pick and choose whom and what to believe. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). Consequently, we find no error in the dismissal of Partin's claim for cumulative trauma neck and back injuries. Because the outcome selected by the ALJ is supported by substantial evidence and the record does not compel a decision in favor of Partin, we are without authority to disturb the ALJ's decision on appeal. Special Fund v. Francis, supra.

Accordingly, the May 26, 2015, Opinion, Order, and Award and the June 1, 2015, Order ruling on the petition for reconsideration are **AFFIRMED**.

ALL CONCUR.

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