

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: October 16, 2015

CLAIM NO. 201080391

CHARLES SCOTT HOWARD

PETITIONER

VS.

APPEAL FROM HON. J. GREGORY ALLEN
ADMINISTRATIVE LAW JUDGE

CUMBERLAND RIVER COAL CORPORATION
HON. J. GREGORY ALLEN
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

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

RECHTER, Member. Charles Scott Howard ("Howard") appeals from the April 14, 2015 Opinion, Order and Award and the June 3, 2015 Order on Petition for Reconsideration rendered by Hon. J. Gregory Allen, Administrative Law Judge ("ALJ"). The ALJ awarded permanent partial disability benefits for residual symptoms from a head injury and a shoulder injury,

but found Howard failed to prove his lumbar impairment resulted from cumulative workplace trauma. Howard argues the ALJ erred in relying on the 3% impairment rating assessed for an April 17, 2013 shoulder injury and in finding Howard did not prove his low back condition resulted from cumulative trauma at Cumberland River Coal Corporation ("Cumberland"). We affirm.

Howard filed his claim on May 1, 2013 alleging injuries on July 26, 2010, March 4, 2013 and April 17, 2013. He later amended his claim to include a February 28, 2014 cumulative trauma injury to his low back.

Howard testified by deposition on August 18, 2014 and at the hearing held February 25, 2015. He has worked in underground mining for 34 years. All of his work in the mining industry involved frequent lifting, including bags of rock dust weighing 50 pounds, rolls of belt weighing 200 to 300 pounds, pieces of top structure weighing 200 pounds, and bottom rollers weighing 50 to 60 pounds.

On July 26, 2010, Howard was struck in the head by an undetermined object while working alone in the belt corridor. He suffered a head injury and was diagnosed with post-concussive syndrome. His recovery from this injury was lengthy, but he eventually returned to work in July, 2011. The medical proof concerning this injury is not relevant to

the issues on appeal, and will only be further discussed as necessary.

Howard injured his right shoulder on March 4, 2013 while operating a roof bolter. He was reaching to pull a screen up when he felt a pop in his shoulder. He did not seek medical attention and continued working, but was reassigned to a position involving less overhead work.

Howard sustained a second injury to his right shoulder on April 17, 2013 while lifting a roller bracket. Dr. April Hall took him off work and referred him to Dr. Keith Hall ("Dr. Hall"), who eventually performed a right shoulder arthroscopy to repair the rotator cuff. On December 11, 2013 in response to a questionnaire, Dr. Hall assigned a 3% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides") for the right shoulder condition related to the April 17, 2013 injury. Dr. Hall placed Howard at maximum medical improvement and allowed him to return to work.

Howard last worked in February, 2014. He stated he resigned from his position a few weeks later because his doctor advised him he needed to quit his job. Shortly before he resigned his position, Howard was asked to take custody of his grandchildren.

Howard filed records from Wellmont Holston Valley Medical Center. On January 19, 2011, Howard was diagnosed with mild bilateral shoulder and sternoclavicular degenerative changes. Myelograms of the cervical, thoracic lumbar spine revealed a normal cervical and thoracic spine and mild L4-L5 and L5-S1 spondylosis without significant central canal stenosis; lower thoracic and upper lumbar spine endplate Schmorl's nodes suggestive of Scheuermann's disease; no significant thoracic spine central canal stenosis or neural foraminal narrowing and spondylosis facet joint arthropathy and ligamentum flavum hypertrophy at L4-L5 resulting in bilateral neural foraminal narrowing at these levels with no significant spinal canal stenosis.

Howard also filed records from Mountain Comprehensive Health Corporation. Dr. Van S. Breeding treated Howard from November 16, 2010 through February 27, 2013 for the residual effects of his head injury, as well as neck and low back pain. In a March 13, 2014 letter, Dr. Breeding opined the ongoing effects of the head injury, cervical and lumbar spine injuries, right shoulder injury, sciatica and pulmonary insufficiency in combination have rendered him unable to maintain regular employment. According to Dr. Breeding, continued work would be deleterious to Howard's health.

Dr. Sujata Gutti treated Howard in 2012 and ordered nerve conduction testing. The examination revealed right S1 radiculopathy, normal bilateral arm examination, and no evidence of myopathic unit noted.

Dr. Mukut Sharma treated Howard from July 22, 2004 through June 5, 2008 for complaints of back and neck pain related to a prior workers' compensation claim. X-rays revealed evidence of an old fracture of the T8 or T9 vertebra, and some degenerative changes in the lower thoracic spine. Cervical and lumbar x-rays were essentially normal. On January 17, 2005, Dr. Sharma noted nerve studies of the lumbar spine were essentially normal except for axonal degeneration at L5-S1 on the right. Howard was seen again on March 13, 2006 for complaints of thoracic pain and right leg pain. On June 5, 2008, Howard reported tenderness in his lumbar spine at L4-5 and L5-S1 as well as the left SI joint.

Dr. Robert Hoskins evaluated Howard on April 2, 2014. He diagnosed lumbosacral sprain/strain; left lumbar radiculitis; right S1 radiculopathy, clinically resolved; lumbar spondylosis and status post right shoulder arthroscopy with residual impingement and pain. Dr. Hoskins opined Howard's right shoulder impairment is secondary to the March and April 2013 events, and the lumbar impairment

is secondary to occupational cumulative trauma. Dr. Hoskins assessed a 21% impairment rating pursuant to the AMA Guides. The assessment included an 11% impairment rating for the lumbar condition and 3% for the right shoulder condition. Howard did not have an active impairment prior to the injury.

Dr. Gregory T. Snider performed an independent medical evaluation on April 21, 2014. Dr. Snider diagnosed a closed head injury and cervical strain as a result of the 2010 accident. He diagnosed a right shoulder sprain/strain with supraspinatus tendinitis, status post arthroscopy and other arthralgias and myalgias. Dr. Snider assigned a 1% impairment rating for the right shoulder pursuant to the AMA Guides. He based this impairment rating on the difference in range of motion between the affected shoulder and the unaffected baseline for the left shoulder. He attributed the impairment rating for the shoulder to both 2013 injuries. There is no gross abnormality of the lumbar spine. Dr. Snider noted there is no substantial evidence of objective changes for Howard's other musculoskeletal complaints.

In a June 16, 2014 supplemental report, Dr. Hoskins responded to Dr. Snider's 1% impairment rating for the right shoulder. Dr. Hoskins noted both he and Dr. Keith

Hall assigned a 3% impairment rating to the right shoulder, based upon range of motion. However, Dr. Hoskins stated Howard was entitled to additional impairment based upon the distal clavicle resection, resulting in a 9% impairment rating for the shoulder. Dr. Hoskins noted Dr. Snider's rating for range of motion differed because Dr. Snider compared range of motion between the two shoulders rather than calculating the motion using "100 percent motion unit scales" as required by the AMA Guides.

The ALJ determined Howard sustained a 5% impairment related to his 2010 head injury. He concluded the March 4, 2013 incident produced only a temporary injury to Howard's right shoulder. However, he found the April 17, 2013 incident resulted in a permanent injury, and relied upon Dr. Hall's 3% impairment rating. The ALJ made the following findings regarding the alleged cumulative trauma injury:

Here, Plaintiff supports his claim on this condition with the reports of Dr. Hoskins and Dr. Breeding. On his Form 107, Dr. Hoskins concluded that the plaintiff's injury was the cause of his complaints by marking "yes" on Section H. Under "explanation of causal relationship," section I, Dr. Hoskins testified that "within a reasonable degree of medical probability, Mr. Howard's lumbar spine impairment is secondary to occupational cumulative trauma."

Dr. Hoskins' report and form 107, wherein he reached this conclusion, does not include a comprehensive recitation of the physical requirements of his job duties. Instead, Dr. Hoskins documented history of plaintiff's work comes from one sentence which states;

"He (plaintiff) attributes his lower back pain to occupational tasks such as riding on equipment with little to no suspension, lifting belt structures, working in awkward postures in low coal (30" or less)."

However, this recitation does not include [the] type of jobs the plaintiff performed over his work history with the defendant, whether the activities described by the plaintiff to Dr. Hoskins were performed by the plaintiff with the defendant, the frequency or duration they were performed, if any, with the defendant, the weights plaintiff lifted, the duration of his use of the equipment over an 8 hour day and the heights of coal plaintiff worked in with the defendant and whether Dr. Hoskins felt any part of these conditions were instrumental to plaintiff's complaints as opposed to tasks performed by plaintiff with other employers.

Essentially, Dr. Hoskins recorded the plaintiff's statements of causation and concluded plaintiff's condition was secondary to occupational cumulative trauma. Dr. Hoskins did not make reference to the plaintiff's statements of his work when reaching this determination or the medical significance of plaintiff's statements of causation in reaching his conclusion.

The ALJ considers the determination of causation by Dr. Hoskins insufficient to persuade the ALJ the plaintiff's low back conditions are related solely to occupation[al] cumulative trauma of some sort.

Likewise, Dr. Breeding make[s] several findings of medical conditions and restrictions he felt necessary but did not make any attribution of causation of his low back findings to his alleged work with the defendant on a repetitive basis.

On the contrary, Dr. Snider found few abnormalities on his examination of the lumbar spine.

Overall, the ALJ does not find the plaintiff carried his burden of proof that his lumbar spine condition is due to work-related repetitive or cumulative trauma as defined by the Act either over totality of his work history or specifically caused, accelerated or aroused from a dormant condition by his work with the defendant. Thus, his claim for low back impairment is DISMISSED.

Howard filed a petition for reconsideration, arguing the evidence from Drs. Hoskins and Breeding is sufficient to establish the lumbar spine condition was caused by cumulative trauma. The ALJ overruled Howard's petition by order rendered June 3, 2015, stating he simply did not feel Howard provided sufficient evidence to make a causal connection between his work and his lumbar spine complaints.

On appeal, Howard first argues the ALJ erred in relying on the 3% impairment rating for the shoulder condition assessed by Dr. Hall, rather than the 9% impairment rating assessed by Dr. Hoskins. Dr. Hoskins opined Dr. Hall failed to comply with the AMA Guides in his assessment of the impairment rating. Howard contends the correct application of the AMA Guides, as explained by Dr. Hoskins, requires an assessment for the clavicle resection combined with the impairment for range of motion, resulting in a 9% impairment rating for the shoulder.

We find no error in the ALJ's reliance on the impairment rating assessed by Dr. Hall. First, we note the admissibility of Dr. Hall's rating and proper use of the AMA Guides were not preserved as contested issues. Thus, Howard is only permitted to challenge the appropriate weight to be afforded Dr. Hall's rating. Dr. Hall, the treating surgeon, used the AMA Guides in assessing his rating and rated the shoulder condition based solely on range of motion. Dr. Snider likewise concluded it appropriate to assess the impairment based solely on range of motion. While Dr. Hoskins arrived at a different conclusion based on his interpretation of the AMA Guides, his opinion represents nothing more than conflicting evidence which the ALJ, as fact-finder, was free to reject. Caudill v. Maloney's

Discount Stores, 560 S.W.2d 15 (Ky. 1977). Hence, we find no error in the ALJ's reliance upon Dr. Hall's impairment rating.

Howard next argues the ALJ erroneously concluded Dr. Breeding's treatment records did not document Howard's physical disability. Howard notes Dr. Breeding routinely recorded complaints and provided treatment regarding sciatica, arthropathy, low back pain and effects of osteoarthritis. Therefore the ALJ was mistaken in finding Dr. Breeding's treatment records did not document the conditions he diagnosed.

Contrary to Howard's contention, the ALJ did not reject Dr. Breeding's opinion on causation of the alleged cumulative trauma injury based on failure to document Howard's conditions or treatment for those conditions. In fact, the ALJ specifically noted Dr. Breeding treated Howard's low back pain and osteoarthritis. Rather, the ALJ rejected Dr. Breeding's opinion on causation because Dr. Breeding "did not make any attribution of causation of his low back findings to his alleged work with the defendant on a repetitive basis." As the fact-finder, the ALJ alone determines the weight to be afforded the evidence. Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky.

1985). We find no error in the ALJ's assessment and consideration of Dr. Breeding's medical opinion.

Finally, Howard argues that the ALJ, in the absence of contrary evidence, erred in finding Howard failed to prove workplace repetitive trauma caused his lumbar impairment. Howard asserts there is no affirmative evidence contradicting Dr. Hoskins' opinion that work activity caused his lumbar impairment and therefore the ALJ should have accepted Dr. Hoskins' opinion as probative.

An ALJ may reject even unrebutted medical testimony, so long as he or she adequately sets forth a rationale for doing so. Commonwealth v. Workers' Compensation Board of Kentucky, 697 S.W.2d 540 (Ky. App. 1985). The ALJ indicated he was not persuaded Dr. Hoskins had sufficient knowledge of the physical requirements of Howard's employment over his work history, and specifically with Cumberland. Additionally, the ALJ felt Dr. Hoskins merely adopted Howard's opinion regarding causation. The ALJ adequately set forth his rationale for rejecting Dr. Hoskins' opinion. Therefore, this Board is without authority to reweigh the evidence to reach a different result. Whittaker v. Rowland, 998 S.W.2d 479, 481 (Ky. 1999).

Accordingly, the April 14, 2015 Opinion, Order and Award and the June 3, 2015 Order on Petition for Reconsideration rendered by Hon. J. Gregory Allen, Administrative Law Judge are hereby **AFFIRMED**.

ALL CONCUR.

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