

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: June 12, 2015

CLAIM NO. 201496165

CUMBERLAND RIVER COAL COMPANY

PETITIONER

VS. APPEAL FROM HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE

DONNIE CORNETT
HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING IN PART,
VACATING IN PART
AND REMANDING

* * * * *

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

RECHTER, Member. Cumberland River Coal Company ("Cumberland") appeals from the December 22, 2014 Opinion and Award and the January 26, 2015 order denying its petition for reconsideration rendered by Hon. Jonathan R. Weatherby, Administrative Law Judge ("ALJ"). The ALJ found

Donnie Cornett ("Cornett") permanently totally disabled as a result of cumulative trauma injuries to his neck, upper extremities and low back. Cumberland argues the ALJ's findings of a 32% impairment rating and total disability due to his injuries are clearly erroneous based upon the reliable, probative and material evidence contained in the record as a whole. For the reasons set forth below, we vacate in part and remand for additional findings.

Cornett filed his application on May 8, 2014 alleging a January 9, 2014 injury when he struck his head on a waterline, hyperflexing his neck. Cornett also alleged a cumulative trauma injury affecting his upper extremities (carpal tunnel syndrome) and his low back.

Cornett testified at the hearing held October 21, 2014. Born October 29, 1954, he has a high school education and obtained certification as a mine foreman and mining electrician. He has been employed as an underground coal miner for 39 years, of which 34 were with Cumberland. He worked as a roof bolter for approximately 22 years and has also worked as a shuttle car operator, belt tender, ram car operator, and scoop operator. Cornett worked the last eleven years as a belt tender but would fill in as a roof bolter. As a belt tender, he was required to frequently lift up to 80 pounds by himself. Additionally, he shoveled

coal and spliced belt line, which involved using a chain and ratchets and working levers to pull the belt. He would cut the belt and drive rivets through it with a hammer to splice it.

Operating mining equipment required frequent use of the hands to grasp controls, use joysticks, and push and pull levers and use of his feet to push pedals. He had to frequently flex and twist his arms and wrists, crawl, and twist his body. Cornett regularly lifted heavy objects including cables, waterline, roof bolt supplies, bags of rock dust, timbers and curtains that were often muddy and wet.

On January 9, 2014, he was riding in a buggy exiting the mine when he struck his head on a suspended waterline, hyperextending his neck. Cornett had neck pain, pain and numbness in his arms, and increased back pain. He was seen at the emergency room, given pain medication and x-rays were taken. He worked one half of a day on January 10, 2014 and then saw Dr. Van Breeding, his family doctor, who took him off work.

Cornett acknowledged sustaining a back injury in 2008 when he was lifting a bag of rock dust. Dr. Matthew Wood administered injections and took Cornett off work for a few months. He subsequently experienced occasional flare-

ups. He recalled a flare-up in 2011 when lifting a box of glue and another in 2013. He had back pain for a few weeks following the 2011 incident, and then it went away. The 2013 problem was not a new injury, but it did not spontaneously resolve as the 2011 incident. Despite the prior back problems, Cornett was able to work overtime performing his normal job duties. However, the injury in January 2014 worsened his back pain. Cornett first noticed problems with his hands in the late 1990s, but did not seek treatment. Cornett explained "It didn't get bad enough to really bother me a whole lot until here lately."

Cornett continues to have low back pain and burning pain in his legs down to his ankles, worse in the left leg. He has pain in his neck, especially when he turns it a lot. He has a tingling sensation in his hands, especially at night, and has a loss of grip strength.

Cornett submitted treatment records from Dr. Matthew Wood documenting treatment for a low back injury in 2008. An MRI revealed a small protrusion at L4. Dr. Wood placed Cornett at maximum medical improvement ("MMI") and allowed him to return to unrestricted work on September 25, 2008. He predicted Cornett may have additional flare-ups of spondylitic pain. After a recurrence of back pain in October 2008 an additional MRI was obtained that showed no

change. Dr. Wood administered lumbar epidural steroid injections in December 2008 and February 2009. He placed Cornett at MMI with no impairment on February 16, 2009.

Cornett returned on April 1, 2011 after a new work injury. A new MRI was very similar to his past studies with no new lesions and only mild bulging at L4 that was less apparent than prior studies. Dr. Wood recommended Cornett remain on light duty for two weeks, but stated he was at MMI from the new strain on April 4, 2011.

Cornett submitted medical records from Dr. Van S. Breeding, who evaluated him in April 2013 for complaints of low back pain due to his 2008 work injury. He did not relate the recurrence of back pain to any new trauma. Cornett was also seen following the January 9, 2014 injury. He gave a history of striking his head on the waterline, causing neck pain and worsening low back pain radiating into the left lower extremity. An MRI revealed a moderate annular bulge at L4-5 and neural foraminal narrowing, worse on the left. Cornett had moderate cervical degenerative changes with disc herniation at C3-4, C4-5, and C5-6. Dr. Breeding believed Cornett's complaints of neck, low back, and upper and lower extremity pain and numbness were work related, and opined he is totally disabled due to his neck and back condition.

Dr. Robert Hoskins performed an independent medical evaluation ("IME") on April 21, 2014. Dr. Hoskins diagnosed cervical sprain/strain; left cervical radiculitis; cervical degenerative joint disease; C3-4 and C5-6 disc herniation; median neuropathy at the wrists, electrophysiologically verified; lumbosacral sprain/strain; L3-4, L4-5, and L5-S1 disc bulging; and left S1 radiculopathy, electrophysiologically verified. Dr. Hoskins opined Cornett's complaints were caused by his work, explaining the lumbar impairment is secondary to occupational cumulative trauma sustained over many years of work as a coal miner, superimposed upon pre-existing, intermittently-active, and somewhat disabling lumbar pain stemming from the 2008 work injury. The median nerve impairments are secondary to occupational cumulative trauma. Dr. Hoskins stated the cervical impairment is secondary to the January 9, 2014 event at work. Dr. Hoskins assessed a 32% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides") consisting of 12% for the lumbar spine and 20% for the cervical spine and upper extremities. He stated Cornett had a 5% impairment rating for the lumbar spine attributable to the 2008 work injury with the remaining 7% attributable to cumulative trauma.

Dr. Hoskins opined Cornett does not retain the physical capacity to return to the type of work he performed at the time of injury. He assigned extensive permanent restrictions that are set forth in the ALJ's findings below.

Dr. David Muffly performed an IME on July 29, 2014. He diagnosed temporary cervical and lumbar strains with no sign of harmful change as a result of the January 9, 2014 incident. Based upon negative physical examination and normal EMG/NCV testing, Dr. Muffly did not diagnose carpal tunnel syndrome. He noted there was active chronic low back pain related to the 2008 injury. He was concerned with symptom exaggeration identified during the examination, and by invalid findings in a functional capacity evaluation documented by Dr. Hartman. Dr. Muffly assigned a 0% impairment rating related to the work incident and 0% for carpal tunnel syndrome. He did not detect any impairment related to cumulative trauma disorder. Dr. Muffly assigned no restrictions and indicated Cornett could return to his prior employment.

In an October 2, 2014 supplemental letter, Dr. Hoskins indicated he reviewed Dr. Muffly's report. Dr. Hoskins found Dr. Muffly's opinions contradictory in that he stated Cornett had no lumbar impairment, yet found a pre-existing active chronic back condition. Dr. Hoskins stated

Dr. Muffly did not follow the rules of apportionment of causation set out in the AMA Guides. He further indicated Dr. Muffly performed insufficient testing regarding the carpal tunnel syndrome. Dr. Hoskins explained in detail the findings and methodology he used to assign impairment ratings for Cornett's conditions.

The ALJ concluded Cornett suffered cumulative trauma injuries to his cervical spine, upper extremities and lumbar spine. He determined Cornett is permanently totally disabled as a result of these cumulative trauma injuries. His specific findings of fact are as follows:

10. The ALJ is compelled to reference that Plaintiff's testimony and demeanor at the final hearing [sic]. The ALJ finds that the Plaintiff was forthright and credible in his testimony.

11. The ALJ is presented with the medical opinion of Dr. Muffly who has opined that the Plaintiff has 0% whole person impairment and that he is able to return to his former occupation without restrictions. Dr. Muffly cited symptom exaggeration as part of the basis for his findings and opined that the Plaintiff has chronic active low back pain attributable to the 2008 injury. The ALJ finds that it is inherently inconsistent to have a thirty year history working in the coal mines, along with active, chronic low back pain and a 0% impairment rating for cumulative trauma. The ALJ also finds that it is inconsistent to cite symptom exaggeration while also noting that the Plaintiff said his cervical spine pain

wasn't that bad except when he tried to sleep. The ALJ finds that the opinion of Dr. Muffly is less credible than that of Dr. Hoskins or of the treating physician, Dr. Breeding.

12. The Plaintiff's treating physician, Dr. Breeding concluded that his complaints were indeed genuine and that he is permanently and totally disabled from work. Dr. Hoskins has opined that the Plaintiff has a 32% whole person impairment for the lumbar spine, cervical spine and the distal upper extremities and that he does not retain the physical capacity to return to the type of work performed at the time of his injury. Dr. Hoskins also restricted the Plaintiff to no lifting more than 20 pounds; no lifting 10 pounds below waist level; no heavy pushing, pulling, or carrying; no continuous sitting for longer than 90 minutes; no continuous standing or walking more than 60 minutes; no activities that involve sustained posturing of the lumbosacral at extremes of motion or repetitive movements into extremes of lumbosacral motion; no prolonged repetitive use of equipment that subjects the spinal column to vibration; no prolonged or repetitive stooping or crouching; no prolonged or repetitive overhead work; no activities that involve sustained posturing of the cervical spine at extremes of motion or repetitive movements into extremes of cervical motion; no forceful and repetitive gripping, handling, or pinching; and no prolonged or repetitive use of vibratory hand tools. Dr. Hoskins' impairment rating and extensive restrictions have convinced the ALJ and the ALJ thus finds that the Plaintiff has suffered a 32% whole person impairment as a result of cumulative trauma suffered while employed by the

Defendant and that the Plaintiff does not retain the ability to return to the same type of work.

13. Permanent total disability is defined in KRS 342.0011(11)(c) as the condition of an employee who, due to an injury, has a permanent disability rating and has a complete and permanent inability to perform any type of work as a result of an injury. *Hill v. Sextet Mining Corporation*, 65 SW3d 503 (KY 2001).

14. "Work" is defined in KRS 342.0011(34) as providing services to another in return for remuneration on a regular and sustained basis in a competitive economy. The statutory definition does not require that a worker be rendered homebound by his injury, but does mandate consideration of whether he will be able to work reliably and whether his physical restrictions will interfere with his vocational capabilities. *Ira A. Watson Department Store v. Hamilton*, 34 SW3d 48 (KY 2000).

15. The Plaintiff credibly testified that he has worked in the coal mining industry for 39 years. The Plaintiff's work history and skills qualify him for little else. The ALJ finds that the Plaintiff, due to his restrictions, is not likely to be able to [provide] services to another in return for remuneration on a regular and sustained basis in a competitive economy. Consequently, the ALJ finds that the Plaintiff is permanently and totally disabled.

Cumberland filed a petition for reconsideration asking the ALJ to reconsider the finding of permanent total

disability. It also requested more specific findings regarding statements in paragraph 11 concerning the inconsistency of a thirty year history of working in the mines and having no impairment for cumulative trauma, and the inconsistency of Dr. Muffly finding symptom exaggeration but noting Cornett said his cervical pain wasn't bad except when he tried to sleep. Cumberland sought additional findings to explain the basis for concluding the impairment for the lumbar spine was the result of alleged cumulative trauma rather than the 2008 injury or the 2013 lifting incident. In his January 26, 2015 Order denying the petition for reconsideration, the ALJ indicated he found Cumberland failed to allege any patent error appearing on the face of the Opinion and Award.

On appeal, Cumberland challenges both the award of permanent total disability benefits and the ALJ's assessment of a 32% impairment rating, advancing several individual arguments. It first notes the ALJ found Cornett totally disabled due to cumulative trauma. However, Cornett only alleged cumulative trauma injuries to his low back and upper extremities. Dr. Hoskins' impairment rating, relied upon by the ALJ, includes a rating for the cervical spine injury, which is a single trauma injury and not the result of cumulative trauma.

Cumberland is correct that Cornett alleged the cervical condition was the result of a single trauma on January 9, 2014. The ALJ made no finding regarding the occurrence of a single trauma cervical injury. Dr. Hoskins unequivocally stated the cervical injury was the result of the single trauma on January 9, 2014. Dr. Muffly found only a temporary cervical injury related to the single trauma. No physician testified Cornett sustained a cumulative trauma cervical injury. The ALJ relied on Dr. Hoskins' impairment rating and restrictions, which included cumulative trauma injuries to the upper extremities and low back caused by cumulative trauma and for the cervical condition caused by a single acute trauma. Therefore, the ALJ's finding that Cornett suffered a cumulative trauma injury appears inconsistent. Arguably, by adopting Dr. Hoskins' rating, the ALJ implicitly found a single trauma injury to Cornett's cervical spine. However, the parties are entitled to a specific finding on the issue. Accordingly, it is necessary to remand for additional findings regarding whether Cornett sustained a traumatic injury to his cervical spine on January 9, 2014.

Cumberland next challenges the finding of permanent total disability, asserting there is no evidence in the record that his skills as an electrician are not

transferable to jobs outside the mining industry and within his restrictions. Until the extent of Cornett's injuries is clarified, it is premature to review the award of permanent total disability benefits. Thus, we decline to address this issue until more meaningful review may be conducted.

Cumberland also challenges the ALJ's determination that Cornett did not have a pre-existing active impairment. Cumberland notes Dr. Breeding attributed Cornett's back pain to prior acute trauma, and Dr. Wood had advised Cornett in 2008 that he would have flare-ups. Cumberland argues the evidence compels a finding the back condition is attributable to the 2008 injury and periodic flare-ups which progressively worsened over time, rather than being attributable to cumulative trauma.

Cumberland bears the burden of proving Cornett had a pre-existing active disability which should be carved out of the award of permanent total disability benefits. Because Cumberland was unsuccessful on this issue before the ALJ, 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)

superseded by statute on other grounds as stated in Haddock v. Hopkinsville Coating Corp., 62 S.W.3d 387 (Ky. 2001). 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 supporting 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).

In this instance, the evidence does not compel a finding in Cumberland's favor regarding the presence of a pre-existing occupational disability. Pursuant to Roberts Bros. Coal v. Robinson, 113 S.W.3d 181 (Ky. 2003), a finding of pre-existing impairment does not amount to a finding of pre-existing occupational disability. While Dr. Hoskins opined Cornett had a pre-existing ratable impairment after the 2008 injury, he offered no opinion as to whether the injury produced occupational disability.

In Roberts Bros. Coal Co. v. Robinson, the Supreme Court explained:

In other words, KRS 342.730(1)(a) requires the ALJ to determine the worker's disability, while KRS 342.730(1)(b) requires the ALJ to determine the worker's impairment. Impairment and disability are not synonymous. We conclude, therefore, that an exclusion from a total disability award must be based upon pre-existing disability, while an exclusion from a partial disability award must be based upon

pre-existing impairment. For that reason, if an individual is working without restrictions at the time a work-related injury is sustained, a finding of pre-existing impairment does not compel a finding of pre-existing disability with regard to an award that is made under KRS 342.730(1)(a).

Id. at 183.

Cornett testified he was able to perform his regular duties without restriction and frequently worked any available overtime prior to the January 9, 2014 injury. Therefore, the fact Cornett may have had a pre-existing impairment does not compel a finding of pre-existing occupational disability. On remand, the ALJ need not address pre-existing impairment unless he concludes there was no cervical injury and Cornett would not be permanently totally disabled without consideration of the cervical condition. In the event the ALJ determines Cornett is not permanently totally disabled, he is requested to make a specific finding regarding his consideration of Dr. Hoskins' impairment rating for pre-existing impairment.

Finally, Cumberland asserts the ALJ's reliance on Dr. Breeding's opinion is misplaced, as he did not diagnose carpal tunnel syndrome and his records are void of any complaints or findings consistent with carpal tunnel syndrome. We disagree. The ALJ was well within his role

as fact-finder in determining Dr. Hoskins' opinions were more persuasive than those of Dr. Muffly. Although Cumberland objects to the ALJ's reliance on the opinion of Dr. Breeding because he did not diagnose carpal tunnel syndrome, the ALJ's "reliance" appears to consist of the single statement that Dr. Breeding concluded Cornett's complaints were genuine. Dr. Hoskins' opinion, alone, constitutes the requisite substantial evidence to support the award. Francis, 708 S.W.2d at 643.

Accordingly, the December 22, 2014 Opinion and Award and the January 26, 2015 order denying Cumberland's petition for reconsideration rendered by Hon. Jonathan R. Weatherby, Administrative Law Judge are hereby **VACATED IN PART** and this matter is **REMANDED** for additional findings consistent with the views expressed herein.

ALVEY, CHAIRMAN, CONCURS.

STIVERS, MEMBER, CONCURS IN RESULT ONLY.

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