Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: March 4, 2015

CLAIM NO. 201400010

DEWEY SMITH PETITIONER

VS. **APPEAL FROM HON. ROBERT L. SWISHER, ADMINISTRATIVE LAW JUDGE**

JAMES RIVER COAL
and HON. ROBERT L. SWISHER,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

STIVERS, Member. Dewey Smith ("Smith") appeals from the August 15, 2014, Opinion, Award, and Order and the October 27, 2014, Order on Petition for Reconsideration of Hon. Robert L. Swisher, Administrative Law Judge ("ALJ"). In the August 15, 2014, Opinion, Award, and Order, the ALJ awarded temporary total disability ("TTD") benefits and permanent partial disability ("PPD") benefits for work-

related cervical and lumbar spine cumulative trauma injuries; dismissed Smith's claim for income benefits for his hearing loss; and awarded medical benefits for both claims.

The January 2, 2014, Form 101 (Claim #2013-74362) alleges Smith sustained work-related injuries to his neck, back, and right leg in the following manner: "Picking up garbage from can and felt pain in back, also cumulative trauma due to repetitive use."

The January 2, 2014, Form 103 (Claim #2014-00010) alleges Smith sustained work-related hearing loss on July 11, 2013, due to repetitive exposure to loud noise.

The claims were consolidated by order dated February 20, 2014. The claims were severed for purposes of this appeal. As the issue on appeal only relates to the decision concerning Smith's hearing loss claim, the evidence cited herein will be limited to that issue.

The April 9, 2014, Form 108-HL report of Dr. Barbara A. Eisenmenger, the designated university evaluator, was introduced. After conducting an examination and audiological testing, Dr. Eisenmenger provided the following diagnosis:

> Mr. Smith has greater hearing loss than would be expected for an individual of 60 years of age. The hearing loss in

> the right ear does not exhibit a pattern that is consistent with noise exposure. Objective and behavioral measures in the left ear are consistent and show a pattern typical of that seen with long term noise exposure. Based on the reported history of noise exposure, the apparent absence of other factors associated with hearing loss, and the results of the hearing evaluation, the primary cause of the left ear hearing loss is long term noise exposure.

Concerning causation, Dr. Eisenmenger checked "yes in the left ear" next to the following two statements: "Audiogram and other testing establish a pattern of hearing loss compatible with that caused by hazardous noise exposure in the workplace"; and "Within reasonable medical probability, is plaintiff's hearing loss related to repetitive exposure to hazardous noise over an extended period of employment." Dr. Eisenmenger assessed a 12% whole person impairment rating pursuant to Chapter 11, Tables 11-1 through 11-3, of the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides").

In the August 15, 2014, Opinion, Award, and Order, the ALJ set forth the following findings of fact and conclusions of law regarding the hearing loss claim:

> As set forth above, plaintiff has concurrently filed a hearing loss claim along with his claim for cumulative

trauma injury, both of which have been consolidated and litigated in the context of this proceeding. In support of his claim for hearing loss, plaintiff has submitted audiometric testing from Appalachian Regional Head & Neck as performed on April 2, 2014. The audiologist interpreted the test results to demonstrate a large asymmetric sensory hearing loss and poor discrimination in the left ear. Pursuant to KRS 342.315, plaintiff was referred for a University Evaluation of his occupational hearing loss claim and as a result plaintiff was seen by Dr. Eisenmenger on March 11, 2014. In her report, summarized above, Dr. Eisenmenger opined that plaintiff has hearing loss in the left ear which is consistent with repetitive exposure to hazardous noise over an extended period of employment but that his right ear hearing loss "does not exhibit a pattern that is consistent with noise exposure." Dr. Eisenmenger assigned a 12% whole person impairment rating as a result of binaural hearing loss and recommended that hearing protection devices should be worn whenever exposed to loud noise along with recommending prescription of a hearing aid for the left ear.

Inasmuch as the evidence submitted by plaintiff with respect to his hearing loss does not specifically address work-relatedness/causation, the expert opinion or Dr. Eisenmenger to the effect that plaintiff's right ear hearing loss is not work-related is unrebutted. Unrebutted evidence compels a finding for the party that it favors unless the fact finder has a proper basis for rejecting it. *Franklin Ins. Agency, Inc. v. Simpson*, 2008 WL 5051613 (Ky.).

Expert opinions in medical evaluation reports rendered pursuant to KRS 342.315 are entitled to presumptive weight. To the extent that the University Evaluator's testimony favors a particular party, it shifts to the opponent the burden of going forward with evidence which rebuts that testimony. If the opponent fails to do so, the party whom the testimony favors is entitled to prevail by operation of the presumption. Stated otherwise, the clinical findings and opinions of the University Evaluator constitute substantial evidence with regard to medical questions which, if uncontradicted, may not be disregarded by the fact-finder. *Magic Coal Co. v. Fox,* 19 S.W.3d 88 (Ky. 2000). In order to reject a University Evaluator's clinical findings and opinions, the ALJ must state a reasonable basis for such rejection. *Bullock v. Goodwill Coal Co.,* 214 S.W.3d 890 (Ky. 2007).

Having carefully reviewed the evidence in the record, the ALJ finds no compelling medical evidence or other basis on which to reject the unrebutted expert testimony of Dr. Eisenmenger. While the ALJ acknowledges, as plaintiff asserts, that it is unusual that hearing loss is restricted to a single ear, the ALJ also notes that it is apparently the pattern of hearing loss on which Dr. Eisenmenger based her opinion of non-work-relatedness. Therefore, based upon the report of the University Evaluator, Dr. Eisenmenger, the ALJ finds that plaintiff's right ear hearing loss is not work-related and, therefore, non-compensable, but that the left ear hearing loss is work-related and, therefore, compensable. While Dr. Eisenmenger assigned a 12% whole person impairment rating as a result of binaural hearing loss without apportioning as between the two

affected ears, only one of which is work-related, she indicated on the form on which audiologic test results were recorded that the monaural percentage of impairment attributable to the right ear is 91.9% while 24.4% was attributed to the left ear. The ALJ must, therefore, review the AMA *Guides to the Evaluation of Permanent Impairment* in order to determine whether binaural hearing impairment can be ascribed thereunder by virtue solely of the left ear work-related impairment. In her audiological test result form, Dr. Eisenmenger indicates that the permanent monaural impairment of the left ear is equal to 24.4% which, pursuant to Table 11-1 is the result of a DSHL (decibel sum of the hearing threshold levels at 500, 1,000, 2,000 and 3,000 Hz) score of 165. By reference to Table 11-2, and assuming that the non-work-related right ear yields a score of zero for the purpose of computing binaural hearing impairment per Table 11-2 of the *Guides*, the binaural hearing impairment of 165/24.4 attributable to the left ear equals a value of 4.1. Carrying that value to Table 11-3, a 4.1 binaural hearing impairment is equal to a 1% whole person impairment rating. The ALJ finds, therefore, that plaintiff's whole person impairment rating with respect to his work-related left ear hearing loss is 1%. As such, the hearing loss impairment is less than the 8% threshold for an award of income benefits pursuant to KRS 342.7305(2). Although plaintiff is not entitled to an award of income benefits, the ALJ finds that plaintiff has work-related noise-induced hearing loss in his left ear for which he is entitled to an award of medical benefits pursuant to KRS 342.020.

In his August 25, 2014, petition for reconsideration, Smith asserted the ALJ erred by finding his right ear hearing loss is not work-related. Smith also contended the ALJ has no authority to assign an impairment rating. Smith requested the ALJ "unconsolidate" the claims so the hearing loss claim can be appealed without affecting the finality of the award for his cumulative trauma injuries.

The ALJ provided the following additional findings in the October 27, 2014, Order on Petition for Reconsideration:

> This matter is before the Administrative Law Judge on plaintiff's petition for reconsideration and motion to unconsolidated claims. Therein plaintiff requests the ALJ to reconsider his finding that plaintiff's right ear hearing loss is not work-related and avers that the ALJ is without authority to assign an impairment rating pursuant to the *Guides* because he is not a physician. In the event that the petition for reconsideration is denied, plaintiff requests that his injury claims be "unconsolidated" so that the hearing loss may be appealed without affecting the finality of the award in regard to the injury claim. The defendant/employer has filed a response to the petition for reconsideration indicating that plaintiff has not pointed to any error patently appearing on the face of the Opinion and Award, and that the petition for reconsideration must be denied.

With respect to plaintiff's request that the undersigned reconsider the finding that the hearing loss in the right ear is not work-related, an ALJ is precluded from re-weighing the evidence on petition for reconsideration and arriving at a conclusion contrary to that found in the Opinion and Award. KRS 342.281. Plaintiff seeks an impermissible reweighing of the evidence, and the ALJ is precluded from doing so on a petition for reconsideration. This aspect of the petition for reconsideration is, therefore, **OVERRULED.**

With respect to plaintiff's objection to the undersigned's assignment of an impairment rating pursuant to the AMA *Guides,* the ALJ notes initially that the situation presented is novel in that the University Evaluator determined that plaintiff's left ear hearing loss is work-related while the right ear hearing loss is not. The impairment rating assigned by the University Evaluator is for binaural hearing impairment, i.e., hearing impairment taking into consideration the function of both ears. In calculating the whole person impairment rating attributable to the left ear work-related hearing loss, the ALJ was forced to review Dr. Eisenmenger's impairment assessment with respect to each ear and apply Dr. Eisenmenger's own findings to the impairment rating tables set out in Chapter 11 of the AMA *Guidelines*. Doing so involved merely the mechanical application of the charts and tables set out in Chapter 11 without any independent interpretation on the part of the undersigned. While the ALJ certainly concedes that he is not a physician, the ALJ does have the discretion and authority to consult the

AMA *Guides* to convert evidence of hearing impairment to whole body impairment. *Caldwell Tanks v. Roark,* 104 S.W.3d 753 (Ky. 2003). Generally, the ALJ's authority to use the AMA *Guides* is limited to essentially mechanical applications where medical expertise is not required. In the present case, the undersigned merely applied the values listed in the pertinent tables from Chapter 11 to the objective measurements made and reported by Dr. Eisenmenger in order to attempt to arrive at a whole person impairment rating with respect to plaintiff's work-related left ear hearing loss. The only other option would have been to find that there was no competent and probative evidence of work-related binaural hearing loss thereby resulting in the dismissal of plaintiff's claim for both income and medical benefits. That result seemed both harsh and inappropriate, therefore leading the undersigned to examine Dr. Eisenmenger's report in great detail and apply the pertinent tables and charts from Chapter 11 to Dr. Eisenmenger's finding in order to determine a numerical value for plaintiff's work-related left ear hearing loss impairment. Accordingly, the ALJ is not persuaded that the Opinion, Award and Order contains error patently appearing on its face or is erroneous as a matter of law. Plaintiff's petition for reconsideration is, therefore, **OVERRULED.**

With respect to plaintiff's motion to unconsolidated [sic] the hearing loss claim from the injury claims, however, the ALJ finds that plaintiff's motion is well taken. **IT IS HEREBY ORDERED,** therefore, that Claim No. 2014-00010 is

> **DECONSOLIDATED** from Claim No. 2013-74362.

On appeal, Smith asserts the ALJ erred by failing to find Smith sustained work-related hearing loss in his right ear.

In workers' compensation cases, the claimant bears the burden of proof and risk of non-persuasion regarding every element of his or her claim. Durham v. Peabody Coal Co., 272 S.W.3d 192, 195 (Ky. 2008). In order to sustain that burden, a claimant must put forth substantial evidence, evidence sufficient to convince reasonable people, in support of each element. Id. This evidence has been likened to evidence that would survive a defendant's motion for a directed verdict. Id.

Kentucky law holds that when the party with the burden of proof is unsuccessful, the sole issue on appeal is whether the evidence compels a different conclusion. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984).

> The claimant bears the burden of proof and risk of persuasion before the board. If he succeeds in his burden and an adverse party appeals to the circuit court, the question before the court is whether the decision of the board is supported by substantial evidence. On the other hand, if the claimant is unsuccessful before the board, and he himself appeals to the circuit court,

> the question before the court is whether the evidence was so overwhelming, upon consideration of the entire record, as to have compelled a finding in his favor.

Id. at 735.

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). So long as any evidence of substance supports the ALJ's opinion, it cannot be said the evidence compels a different result. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986). For an unsuccessful claimant, this is a great hurdle to overcome.

> If the fact-finder finds against the person with the burden of proof, his burden on appeal is infinitely greater. It is of no avail in such a case to show that there was some evidence of substance which would have justified a finding in his favor. He must show that the evidence was such that the finding against him was unreasonable because the finding cannot be labeled "clearly erroneous" if it reasonably could have been made. Thus, we have simply defined the term "clearly erroneous" in cases where the finding is against the person with the burden of proof. We hold that a finding which can reasonably be made is, perforce, not clearly erroneous. A finding which is unreasonable under the evidence presented is "clearly erroneous" and, perforce, would "compel" a different finding.

Id. at 643

The evidence in this claim does not compel a different result than that reached by the ALJ. As noted by the ALJ, Smith attached audiometric testing to his Form 103 which did not address causation. Thus, in resolving the issue of causation the ALJ chose to rely upon the unrebutted opinions of Dr. Eisenmenger, who opined the hearing loss in Smith's left ear was work-related and the hearing loss in his right ear was not. The ALJ's reliance upon Dr. Eisenmenger's opinions regarding causation, even if rebutted by contrary medical evidence, is within the discretion afforded her. As such, Dr. Eisenmenger’s opinions comprise substantial evidence. Here, Dr. Eisenmenger's causation opinions were unrebutted, lending further support to the ALJ's reliance upon her opinions. The ALJ's determination Smith did not sustain work-related hearing loss in the right ear cannot be disturbed.

Smith acknowledges in his brief the ALJ "does have the discretion and authority to consult the AMA Guides to convert evidence of hearing impairment to whole body impairment." However, Smith appears to take issue with the ALJ's finding he has no work-related hearing loss in the right ear for purposes of calculating a whole person

impairment rating for Smith's work-related hearing loss in the left ear.

The ALJ acted within his discretion in converting Dr. Eisenmenger's binaural hearing loss impairment rating into a whole person impairment rating for Smith's work-related left ear hearing loss. The relevant case law firmly establishes the ALJ may elect to consult the AMA Guides. *See* Caldwell Tanks v. Roark, 104 S.W.3d 753 (Ky. 2003). There may even be instances where an ALJ can correct or adjust an impairment rating as long as the application of a chart is purely a mechanical exercise requiring no medical expertise. *See* Id. Utilizing Dr. Eisenmenger's permanent monaural impairment rating for the left ear hearing loss which is 24.4%, the ALJ performed purely mechanical calculations pursuant to Tables 11-1 through 11-3 of the AMA Guides.

*I*n assigning no impairment to Smith's right ear, the ALJ relied upon the opinions of Dr. Eisenmenger regarding causation. Dr. Eisenmenger clearly opined "[t]he hearing loss in the right ear does not exhibit a pattern that is consistent with noise exposure." Thus, logic and the record dictates that for the purposes of the ALJ's conversion of Dr. Eisenmenger's 12% whole person impairment rating for binaural hearing loss to a whole person

impairment rating for Smith's work-related left ear hearing loss, the value assigned to any work-related right ear hearing loss would be zero. Thus, the ALJ acted within his discretion in assigning no impairment rating and his decision cannot be disturbed.

Accordingly, the ALJ’s decision in regard to the hearing loss claim, the August 15, 2014, Opinion, Award, and Order and the October 27, 2014, Order on Petition for Reconsideration are **AFFIRMED**.

ALL CONCUR.

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