Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: June 10, 2016

CLAIM NO. 201200442

EXCEL MINING LLC PETITIONER

VS. **APPEAL FROM HON. JANE RICE WILLIAMS, ADMINISTRATIVE LAW JUDGE**

WOODY RATLIFF,
DR. AYESHA SIKDER,
HON. JANE RICE WILLIAMS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
VACATING IN PART
AND REMANDING

* * * * * *

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

ALVEY, Chairman. Excel Mining LLC ("Excel") appeals from the Medical Fee Opinion and Order rendered January 20, 2016 by Hon. Jane Rice Williams, Administrative Law Judge ("ALJ"), resolving a medical dispute partially in its favor by finding the request for pulmonary rehabilitation not

work-related, and therefore not compensable. The ALJ additionally found prescriptions for inhalers were related to Woody Ratliff's ("Ratliff") work-related disease and therefore compensable. Excel also appeals from the February 16, 2016 order denying its petition for reconsideration.

On appeal, Excel argues the evidence of record establishes the contested inhalers are not for the treatment of coal worker's pneumoconiosis ("CWP"), but instead are for the treatment of unrelated COPD. We vacate in part and remand for the ALJ to make additional findings regarding the work-relatedness of the contested inhalers.

Excel filed a Motion to Reopen, Form 112 Medical Fee Dispute and Motion to Join a Medical Provider on July 21, 2015 contesting the request for a referral to pulmonary rehabilitation by Dr. Ayesha Sikder as not reasonable, necessary or related to Ratliff's work injury. In support of the motion, Excel filed the settlement agreement approved on April 11, 2014, by Hon. R. Roland Case, Administrative Law Judge. The settlement agreement reflects Ratliff contracted CWP due to coal dust inhalation with his last date of exposure on April 17, 2011. The agreement lists, "lungs/breathing" as the body parts affected. The agreement indicates two reports were

provided. On March 27, 2012, Dr. Michael Alexander interpreted an x-ray as “2/1 O opacities” and on May 15, 2012, Dr. Bruce Broudy interpreted an x-ray as “0/1 O opacities.” It also listed pulmonary function studies as, “Dr. Potter: FVC: 59.4%, FEV1: 62.9%; Dr. Sikder: FVC: 82%, FEV1: 81%; Dr. Broudy: FVC: 63%, FEV1: 63%.” The claim was settled based upon a compromise of a 25% disability award, with Ratliff retaining his right to future medical benefits.

Attached to the motion to reopen is the June 11, 2015 letter by Dr. Sikder explaining pulmonary rehabilitation consists of both physical exercise and self-management. Excel included the pulmonary rehabilitation notes from May and June 2015.

Excel also attached the June 2, 2015 medical records review by Dr. Broudy and the June 20, 2015 utilization review denial by Dr. Douglas Jenkins. Dr. Broudy opined there is no evidence the requested pulmonary rehabilitation is either related to the inhalation of coal mine dust or to a diagnosis of CWP. He also stated the rehabilitation is not indicated for cure or treatment of CWP or silicosis. Likewise, Dr. Jenkins opined the pulmonary rehabilitation is not necessary or medically appropriate treatment, and stated home exercise with

outpatient monitoring would be an acceptable alternative. Dr. Jenkins noted an exercise program classically used in patients with COPD has uncertain, if any, benefits in CWP. Neither report addressed the contested inhalers.

In an order dated August 18, 2015, the ALJ found Excel had made a *prima facie* showing for reopening, joined Dr. Sikder as a party, and scheduled a telephonic conference. Subsequently on October 15, 2015, Excel filed a second medical fee dispute contesting, “prescriptions for Advair, Incruse Elptianh[sic] 62.5 mcg., Montelukast” as unrelated since they were “submitted with a diagnosis code of COPD.”

Excel filed the October 26, 2015 report of Dr. Broudy, who performed an evaluation at its request. He had previously evaluated Ratliff in August 2012. He noted Ratliff worked in underground coal mining for thirty-three years in several positions. Since his last evaluation, Dr. Broudy noted Ratliff was found to have a carcinoid tumor of the small intestine which was removed in March 2014. In October 2014, 70% of Ratliff’s liver was removed.

Dr. Broudy interpreted an x-ray taken the day of the evaluation, as film quality 1, category 0/1 CWP. Dr. Broudy noted Ratliff’s effort on spirometry was suboptimal.

He noted, “The vital capacity is 2.89 L 61% predicted and the FEV1 is 2.30 L 63% of predicted.”

Dr. Broudy diagnosed Ratliff as having a restrictive ventilatory defect with less than optimal effort on spirometry; obesity with abdominal protuberance; status post removal of small intestinal carcinoid; and liver metastasis. Dr. Broudy opined the restrictive ventilatory defect is due to a combination of obesity, less than optimal effort, and the previous surgery which can cause weakness in the abdominal muscles resulting in restrictive defect. Dr. Broudy stated even assuming Ratliff has simple CWP, it requires no specific treatment, including pulmonary rehabilitation. The primary benefit of the rehabilitation program is muscle reconditioning which would be good for any individual who has been incapacitated by surgery or some other illness. However, Dr. Broudy emphasized CWP was not the cause for the need of pulmonary rehabilitation or muscle reconditioning. Dr. Broudy stated as follows regarding the contested prescriptions:

> In addition, I question the need for the bronchodilators which are in the medications listed as Advair, Incruse, and Ventolin. Montelukast also is probably unnecessary as it is given for asthma which is a type of reversible airways obstruction.

Finally, Ratliff attached the treatment records from Dr. Sikder dated July 15, 2015 and October 14, 2015. In the July 15, 2015 note, Dr. Sikder noted Ratliff has CWP and COPD, as well as his past surgeries on his liver and small intestine. She noted Ratliff has baseline dyspnea, minimal cough, and mild but improved wheezing. Dr. Sikder noted past pulmonary function tests all indicate moderate to severe COPD. After performing an examination, Dr. Sikder provided the following assessments and treatment plans:

> **Assessments**
> 1. COPD- 491.20 (Primary)
> 2. [CWP]- 500
> 3. Carcinoid syndrome- 259.2
> 4. ASTHMA (ALLERGIC)- 493.90
> 5. LUNG NODULE- 518.89, PMF
> 6. HISTORY OF TOBACCO ABUSE- V15.82
> 7. HYPERTENSION- 401.9
>
> **Treatment**
>
> **1. COPD**
> Continue Advair Diskus Aerosol Powder Breath Activated, 500-50 Mcg/Does, 1, Inhalation, every 12 hrs, 1,1, Refills 3
> Continue Montelukast Sodium Tablet, 10 MG, 1 tablet in the evening, Orally, Once a day, 30 day(s), 30, Refills 3
> Continue INCRUSE ELLIPTA INHALATION, 62.5 MCG, one inhalation, PO, Q Day, 30, 1, Refills 1
> Notes: Has relief on Advair 500/50 and Incruse. He has no coverage for Pulmonary rehab.

2. [CWP]
Continue Ventolin HFA Aerosol Solution, 108 (90 Base) MCG/ACT, 2 puffs as needed, Inhalation, every 6 hrs prn, 1, 1, Refills 0
Notes: Has FEV1 dropped from 70-38%.

3. Carcinoid syndrome
Notes: S/p resection, no chemo or radiation, UK Gill cancer center, CT 6/15 was clear.

4. ASTHMA (ALLERGIC)
Notes: Continue Advair.

5. LUNG NODULE
Notes: CT chest 3/15 stable.

6. HISTORY OF TOBACCO ABUSE
Notes: Has quit many years.

7. HYPERTENSION
NOTES: Controlled.

On October 14, 2015, Ratliff was seen by Jaclyn Little, APRN. Dr. Sikder indicated she reviewed the medical note and electronically signed it. Ratliff was noted with having no change of his dyspnea, occasional cough, and minimal wheezing. After an examination, the following assessments and treatment plans were noted:

Assessments
1. [CWP] – J60 (Primary)
2. FLU VAC – Z23
3. Other disorders of lung – J98.4
4. Personal history of nicotine dependence – Z87.891
5. Essential (primary) hypertension – I10
6. Unspecified asthma, uncomplicated – J45.909
7. Chronic obstructive pulmonary disease, unspecified, J44.9

Treatment

1. [CWP]
Refill Advair Diskus Aerosol Powder Breath Activated, 500-50 MCG/Dose, 1 puff, Inhalation, Twice a day, 30 days, 1, Refills 2
Refill INCRUSE ELLIPTA INHALATION, 62.5 MCG, one inhalation, PO, Q Day, 30, 1, Refills 2
Refill Montelukast Sodium Tablet, 10 MG, 1 tablet in the evening, Orally, Once a day, 30 day(s), 30, Refills 2
Refill Ventolin HFA Aerosol Solution, 108 (90 Base) MCG/ACT, 2 puffs as needed, Inhalation, every 4 hrs prn dyspnea, 30 days, 1, Refills 2
Notes: SEEN BY JACLYN LITTLE APRN. REVIEWED BY DR. SIKDER.

Pt. has CWP and COPD for long term occupational exposure and tobacco use

2. Other disorders of lung
Notes: Has CT chest scheduled 11/15 at UK.

3. Personal history of nicotine dependence
Notes: quit 25 years ago.

4. Essential (primary) hypertension
Notes: controlled.

5. Unspecified asthma, uncomplicated
Notes: continued on Advair.

6. Chronic obstructive pulmonary disease, unspecified
Notes: better on Advair and Incruse.

Ratliff testified at the hearing held December 17, 2015. At the time of the hearing, Ratliff was sixty-five years old and had not smoked cigarettes for over

twenty years. He worked as an underground coal miner for thirty-three years, of which he operated a continuous miner for fifteen years. He last worked in April 2011. Ratliff confirmed he recently underwent treatment for cancer resulting in two surgeries in 2014.

Dr. Sikder has treated Ratliff's breathing problems since 2010. She was not involved in his treatment or recuperation after his 2014 surgeries. Ratliff settled his state black lung case in April 2014 and did not waive his right to future medical benefits. Ratliff was not sent to a university evaluator prior to the settlement. Since the settlement, Excel's worker's compensation insurance insurer has paid for the medical treatment related to his breathing, including inhalers, until August 2015. Since then, his breathing has worsened.

When the insurer was paying for Ratliff's treatment, he was prescribed Advair, Ventolin, and Incruse, which he indicated helped his breathing. Ratliff wishes for his breathing medication to be paid for, and he believes they are necessary. Although Ratliff is interested in the recommended pulmonary rehabilitation, he is more concerned with obtaining his medications. Since his most recent visit with Dr. Sikder in October 2015, Ratliff stated his cough has worsened.

The November 17, 2015 Benefit Review Conference Order notes the issues to be determined were the work-relatedness of the pulmonary rehabilitation request and the prescriptions for inhalers.

In the January 20, 2016 Opinion and Order, the ALJ provided a short summary of Ratliff's testimony, the reports from Drs. Broudy and Jenkins, and the March 27, 2017 report of Dr. Alexander. The ALJ provided the following summary of Dr. Sikder's records: "Plaintiff introduced the June 11, 2015 letter of Dr. Sikder who diagnosed COPD and CWP. She explained the pulmonary rehabilitation program to increase strength and muscle mass. Treatment notes have also been provided."

After noting Ratliff maintains the burden of proving the contested medical treatment is causally related treatment for the effects of his or her work-related injury, the ALJ provided the following analysis:

> In the specific instance, Defendant Employer has moved to reopen this claim to challenge the work relatedness of pulmonary rehabilitation and inhalers. The report of Dr. Sikder, coupled with the report of Dr. Alexander, is persuasive that Plaintiff is entitled to the inhalers as related to the work injury. The pulmonary rehab, however, appears related to strengthening for a post-surgical condition and general lack of conditioning. Therefore, the

> rehab is not work related, and found non-compensable.

As a result, the ALJ resolved the medical fee dispute challenging the work-relatedness of the pulmonary rehabilitation in favor of Excel, and the medical expenses for inhalers in favor of Ratliff.

Excel filed a petition for reconsideration, requesting the ALJ reconsider her decision, "finding the employer responsible for the contested payments of inhalers which Dr. Sikder prescribed for COPD up until a recent visit when she changed her electronic notes to show the inhalers under a treatment for CWP." Excel first asserted Ratliff only had simple CWP, which does not require treatment. Excel also pointed to Drs. Broudy's and Jenkins' opinions. In denying the petition, the ALJ stated as follows:

> . . . . The a [sic] review of the record shows that although Defendant Employer argues Plaintiff's condition is simple CWP with no needed treatment, the claim was settled prior to a university evaluation and prior to a finding of simple CWP. As noted in the opinion, Ratliff is 65 years old and worked as an underground coal miner for 33 years and has not smoked in more than 20 years. The ALJ relied upon the report of Dr. Sikder who diagnosed COPD and CWP and explained the pulmonary rehabilitation program increases strength and muscle mass. Also relied upon was the March 27, 2012 report of

> Michael S. Alexander, M.D., who diagnosed CWP category 2/1. Plaintiff has found the treatment with inhalers beneficial and this treatment has been paid by the employer since the April 11, 2014 settlement. Nothing in the Petition for Reconsideration compels a different outcome.

On appeal, Excel argues the ALJ's analysis regarding the inhaler prescriptions, specifically Advair, Incruse and Montelukast, is not based upon medical evidence addressing its work-relatedness to Ratliff's CWP. The March 27, 2012 report of Dr. Alexander provides only an x-ray interpretation, and does not address medical treatment for CWP. The June 11, 2015 letter from Dr. Sikder referenced by the ALJ only addresses the pulmonary rehabilitation program, and does not address CWP or treatment of the condition with use of the contested inhalers.

Even though not addressed by the ALJ, Excel argues the July 15, 2015 and October 14, 2015 treatment notes of Dr. Sikder do not expressly state the inhalers are for the treatment of CWP. Excel also points to the October 26, 2015 report of Dr. Broudy, in which he questioned the need of the contested inhalers. Excel argues Ratliff failed to prove the contested inhalers are for treatment of CWP rather than his COPD, and requests this Board to

reverse the decision of the ALJ finding it responsible for payment of the inhalers.

Notwithstanding the holding in C & T Hazard v. Chantella Stollings, et al., 2012-SC-000834-WC, 2013 WL 5777077 (Ky. 2013), an unpublished case from the Kentucky Supreme Court, a long line of reported decisions establish in a post-award medical fee dispute, the employer bears both the burden of going forward and the burden of proving entitlement to the relief sought, except that the claimant bears the burden of proving work-relatedness. National Pizza Company vs. Curry, 802 S.W.2d 949 (Ky. 1991); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979); Addington Resources, Inc. v. Perkins, 947 S.W.2d 421 (Ky. App. 1997); Mitee Enterprises vs. Yates, 865 S.W.2d 654 (Ky. 1993); Square D Company v. Tipton, 862 S.W.2d 308 (Ky. 1993). Since Ratliff was successful in his burden in proving the contested inhalers are related to his CWP, the question on appeal is whether there was substantial evidence of record to support the ALJ's decision. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Substantial evidence" is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971).

KRS 342.285 designates the ALJ as the finder of fact, and as such she is granted the sole discretion in determining the quality, character, and substance of evidence. Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). Likewise, the ALJ, as fact-finder, may choose whom and what to believe and, in doing so, 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 party's total proof. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15, 16 (Ky. 1977); Pruitt v. Bugg Brothers, 547 S.W.2d 123 (Ky. 1977).

However, such discretion is not unfettered. In reaching her determination, the ALJ must also provide findings sufficient to inform the parties of the basis for her decision to allow for meaningful review. 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); Big Sandy Community Action Program v. Chafins, 502 S.W.2d 526 (Ky. 1973).

In support of her finding the contested inhalers are work-related, the ALJ stated, "[t]he report of Dr. Sikder, coupled with the report of Dr. Alexander, is persuasive that Plaintiff is entitled to the inhalers as related to the work injury." In the order on

reconsideration, the ALJ reiterated her reliance upon, “the report of Dr. Sikder who diagnosed COPD and CWP and explained the pulmonary rehabilitation program increases strength and muscle mass” and on the March 27, 2012 report of Dr. Alexander, who diagnosed CWP category 2/1. In addition, the ALJ cited to Ratliff’s testimony indicating the inhalers have been helpful and paid for by Excel since the settlement.

In the March 27, 2012 report, Dr. Alexander merely provides an interpretation of an x-ray, 2/1 for CWP. The report does not address treatment, specifically the contested inhalers and whether they are related to the CWP diagnosis. Further, in the opinion, the ALJ does not specify which record of Dr. Sikder she relied upon in finding the inhalers work-related. The June 11, 2015 letter and accompanying notes only address the pulmonary rehabilitation, which is not an issue on appeal. The remaining treatment notes from July 15, 2015 and October 14, 2015 are conflicting on this issue. In the July 15, 2015 note, Dr. Sikder diagnosed COPD and recommended Advair, Montelukast, and Incruse. She also diagnosed CWP, and recommended continuing Ventolin. However, in the October 14, 2015 note, Dr. Sikder diagnosed CWP, and recommended Advair, Incruse, Montelukast, and Ventolin.

The ALJ did not provide any additional analysis with the exception of citing Ratliff's testimony establishing the inhalers helped his breathing problems in the Order on petition for reconsideration.

Therefore, we vacate in part and remand for the ALJ to identify the specific medical evidence she relied upon in determining the contested inhalers are related to Ratliff's work injury in light of the conflicting treatment records of Dr. Sikder, the lack of relevance of Dr. Sikder's June 11, 2015 letter, and the mere x-ray interpretation of Dr. Alexander. The ALJ must identify with specificity what evidence she relied upon in reaching her ultimate determination.

Accordingly, the January 20, 2016 Opinion and Order and the February 16, 2016 Order on petition for reconsideration by Hon. Jane Rice Williams, Administrative Law Judge, are hereby **VACATED IN PART** and **REMANDED** for additional findings and entry of an amended decision consistent with the views expressed herein.

RECHTER, MEMBER, CONCURS.

STIVERS, MEMBER, DISSENTS AND WILL NOT FURNISH A SEPARATE OPINION.

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