Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: May 20, 2016

CLAIM NO. 201501038

GREGORY RANDOLPH ANDERSON PETITIONER

VS. **APPEAL FROM HON. STEVEN G. BOLTON, ADMINISTRATIVE LAW JUDGE**

RHINO ENERGY, LLC/CAM MINING, LLC,
HON. STEVEN G. BOLTON,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

RECHTER, Member. Gregory Randolph Anderson ("Anderson") appeals from the January 15, 2016 Opinion and Order rendered by Hon. Steven G. Bolton, Administrative Law Judge ("ALJ"). The ALJ determined Anderson failed to establish he sustained an injury as defined by the Workers' Compensation Act, that the alleged cumulative trauma injury

was caused by work, or that he sustained a permanent, compensable physical impairment.

We note no petition for reconsideration was filed. On appeal, Anderson argues the ALJ erred in relying on the opinions of Dr. David E. Muffly and Dr. Joseph L. Zerga in concluding Anderson failed to prove impairment due to his cumulative trauma injuries. Additionally, Anderson argues the ALJ relied upon inappropriate standards to gauge the proof in the case. For the reasons set forth herein, we affirm.

Anderson filed his claim on July 2, 2015 alleging cumulative trauma injuries to his neck, low back and upper extremities on September 15, 2014, as a result of his employment with Rhino Energy, LLC/Cam Mining, LLC ("Rhino"). Anderson was employed by Rhino from 2008 to 2014, and stopped working as a result of a mass layoff. During his employment with Rhino, Anderson worked as a shuttle car operator, with the exception of a few months performing belt work. Prior to his employment at Rhino, Anderson worked 24 years in underground mines, primarily as a roof bolter.

Extensive medical proof was submitted. Anderson treated with Dr. Leon Bridges, M.D. in 2001 for low back

pain radiating down into his left thigh and into his shoulder. Anderson related this pain to an accident in the 1980s when he was caught between some mining equipment. Dr. Bridges diagnosed lumbar facet syndrome, bilateral sacrolititis, sacroiliac joint sprain and lumbar back pain with leg radiculopathy.

Dr. Salem Hanna, of Mountain Comprehensive Health Corporation ("MCHC"), treated Anderson from 2004 to 2014 for various medical conditions, including chronic neck and back pain. On March 23, 2005, Dr. Hanna cleared Anderson for new employment with an unremarkable back examination. His examination included a lumbar spine x-ray dated March 23, 2005, which revealed degenerative changes at L1-L2, L2-L3 and L3-L4.

Anderson treated with Kentucky Pain Physicians from August 30, 2013 to January 5, 2015 for neck and low back pain. On December 2, 2013, Anderson was placed on probation for noncompliance. The medical records at this time noted he developed low back pain caused from nonspecific injury.

While he was still working, Anderson treated with Dr. April Hall, whose report was submitted as proof. She began treating Anderson in March 2014 for neck and back

pain, diabetes, hypertension and high cholesterol. She referred Anderson to Dr. Sujata Gutti.

After Anderson began treating with Dr. Gutti, Dr. Hall reviewed imaging studies ordered by Dr. Gutti and prepared a report. In a November 5, 2015 letter, Dr. Hall opined Anderson suffers from cervical and lumbar degeneration that is far too advanced and extensive for his age. She compared imaging studies performed in 2011, 2013 and 2015. Dr. Hall interpreted these images as showing a rapid progression of degenerative changes not attributable to the natural aging process. Rather, she related this rapid degeneration to Anderson's work activities. She concluded Anderson is unable to continue working, and recommended restrictions against bending, stooping, pulling, pushing, crawling and lifting. She also diagnosed carpal tunnel syndrome based on testing performed by Dr. Gutti.

Dr. Gutti treated Anderson from October 2, 2014 to November 26, 2014 for neck and low back pain. Her treatment included physical examinations, neurological examinations, NCV/EMG studies, cervical and lumbar exercises and a referral to pain management. The NCV/EMG study revealed right S1 radiculopathy, peripheral

neuropathy, and right median nerve entrapment distally consistent with carpal tunnel syndrome. She diagnosed lumbar spondylosis at multiple levels, right S1 radiculopathy, cervical spondylosis, and carpal tunnel syndrome in the right upper extremity.

Thereafter, Anderson treated with Dr. Sai Gutti, from September 21, 2015 to October 19, 2015 for lower back pain, lower extremity radiculitis, lumbar disc disease, neck pain, mid back pain, and thoracic disc disease. Dr. Sai Gutti treated Anderson with physical exercises, medication and lumbar epidural steroid injections.

Dr. Jeffrey Uzzle conducted an Independent Medical Examination ("IME") on June 6, 2015 including physical examination and diagnostic testing. He also reviewed medical records since 2013. During the physical examination, Dr. Uzzle noted guarded range of motion in all four extremities and limited range of spinal motion. He also found a positive Phalen's test for right carpal tunnel syndrome. Dr. Uzzle diagnosed chronic pain syndrome, probable right carpal tunnel syndrome, chronic cervical sprain, chronic lumbar sprain, and cumulative trauma disorder relating to Anderson's work as a coal miner. Dr. Uzzle opined Anderson's dormant, non-disabling progressive

disease developed into disabling reality due to his last work performed. Using the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"), he assigned a 15% whole person impairment. He apportioned 7% to Anderson's occupational cumulative trauma and the remainder to non-occupational factors, though in a later supplemental letter he characterized this apportionment as an "estimate". He further opined Anderson is unable to return to employment.

Dr. Zerga conducted an IME on September 25, 2015. In addition to a physical examination and medical records review, Dr. Zerga ordered an EMG/NCV report. The report was normal and did not demonstrate any evidence of peripheral neuropathy, entrapment or radiculopathy. Dr. Zerga diagnosed osteoarthritis, but stated Anderson has no specific diagnosis related to his spine and does not suffer from carpal tunnel syndrome. Dr. Zerga believed any degenerative changes in Anderson's spine, as shown on MRI scans, are age-related. Dr. Zerga concluded Anderson has no permanent impairment rating under the AMA Guides.

Dr. Muffly, M.D., conducted an IME on October 14, 2015. He reviewed imaging studies, medical records and performed a physical examination. Dr. Muffly diagnosed

chronic low back pain for fifteen years and mild degenerative changes. He found no evidence of nerve root impingement or evidence of carpal tunnel syndrome. Using the DRE I Category of the AMA Guides, Dr. Muffly concluded Anderson has no permanent impairment to his cervical, thoracic or lumbar spine. He also found no permanent impairment due to carpal tunnel syndrome.

Rhino submitted the deposition testimony of Fred Newsome, Anderson's supervisor. Mr. Newsome worked with Anderson for four years prior to his layoff, and recalled no physical problems performing his job. Mr. Newsome remembered Anderson having trouble with high blood pressure, but was unaware of any problems with his neck, back or arms. Anderson missed no work for these conditions, and performed his job until the date of layoff. On occasion, Anderson was also required to assist in making repairs, which required moving cables.

The ALJ provided the following analysis and discussion of the medical proof in this claim:

> The primary and most significant medical proof in support of Mr. Anderson starts with Dr. Sujata R. Gutti, M.D., a board certified Neurologist who performed a NCV study on Mr. Anderson on October 2, 2014. He apparently began treating with her on that date. His complaints included

chronic neck and low back pain for several years, intermittent sharp pain from the neck down to the interscapular area, and both arms. Also tingling, burning and numbness in his bilateral feet with the low back pain radiating down to the leg.

Dr. Gutti performed a neurological examination that was essentially normal, a motor examination that was normal, found nothing remarkable about muscle strength or deep tendon reflexes, and a normal cerebellar examination except for unsteadiness when he walks with a limp. Her sensory examination found decreased sensation on the right lateral part of the arm, positive Tinel's sign at both wrists and decreased sensation on the first, second and third finger on both sides. Also decreased sensation on the right posterolateral of the thigh and leg.

Dr. Gutti also conducted an EMG/NCV on 10/2/2014 that resulted in findings of Right S1 radiculopathy, sensory motor type of peripheral neuropathy, mild secondary to diabetes and right median nerve entrapment distally consistent with clinical syndrome of carpal tunnel, electro physiologically mild to moderate.

This contrasts with an EMG/NCV performed by Dr. Zerga less than a year later on 9/23/2015 that shows no evidence of any entrapment in the right upper extremity, no evidence of carpal tunnel and no evidence of radiculopathy or any significant neuropathy.

KRS 342.0011(1) defines a compensable injury as being a work-related event that proximately causes a harmful change to the human organism as

evidenced by objective medical findings. In order to find that the Plaintiff has suffered either a "permanent partial disability" or a "permanent total disability", I must determine that he has a "permanent disability rating". This means that I must pick and choose from physicians who have assigned a percentage of whole person disability based on the AMA *Guides to the Evaluation of permanent Impairment, 5th Edition*. KRS 342.0011 (11) (b) & (c); KRS 342.0011 (35).

In this instance, I must choose between Dr. Uzzle and Drs. Zerga and Muffly, as they are the only physicians in the record to have expressed their opinions as to an accurate rating of whole person impairment for Mr. Anderson. However, I can and should consider other supporting medical evidence.

Here, Plaintiff has alleged cumulative trauma to his neck, back, and upper extremities (right wrist). The records of MCHC are instructive. There is no support found in these records for the presence of a harmful change. Plaintiff had been treated for back problems for at least 15 years and never mentioned his neck and right wrist to Dr. Hall, his primary care physician, until five days before his layoff. Evidence of work being performed every day until a layoff and without restriction cannot be viewed as facts supporting an ongoing work injury due to cumulative traumatic injury.

Plaintiff has filed two reports from Dr. Uzzle and one report from Dr. Hall. Dr. Uzzle is a medical doctor who focuses on rehabilitative medicine and Dr. Hall is an osteopathic physician.

In my opinion, Dr. Uzzle's reports are not persuasive and do not adequately support his findings. His physical examination was dramatically different from the examinations performed by Drs. Muffly and Zerga. Specifically, Dr. Uzzle noted a positive Phalen's test for right carpal tunnel syndrome as well as cervical and lumbar spasms when Drs. Muffly and Zerga's Phalen testing was negative and no spasms were noted. Further, Dr. Uzzle did not personally review any of the MRIs performed of the cervical and lumbar spines. In fact, he only reviewed the reports of the cervical and lumbar MRIs performed in 2013 when more current studies were available that were performed in 2015.

Dr. Uzzle diagnosed chronic pain syndrome, probable right carpal tunnel syndrome, chronic cervical sprain/strain, chronic lumbar sprain/strain, cumulative trauma disorder, and diabetic neuropathy. He assessed a 15% whole person impairment with 5% for the cervical spine, 6% for the lumbar spine, and 4% for right carpal tunnel syndrome. He attributed 7% of the total impairment to cumulative trauma and 8% to non-occupational factors. In his supplemental report, he listed those factors as diabetes with neuropathy, prior traumas injuring the multiple body regions, and aging. However, he provided no breakdown for the 7% assessed and stated it was his best "*estimate.*" Physicians' opinions must be expressed within the bounds of reasonable medical probability because medical causation must be proven by a medical opinion within "reasonable medical probability." Lexington Cartage

Company v. Williams, 407 S.W.2d 395 (Ky., 1966). The mere possibility of work-related causation is insufficient. Pierce v. Kentucky Galvanizing Co., Inc., 606 S.W.2d 165 (Ky. App., 1980). I do not believe an estimate is sufficiently probative to support an award of benefits.

Further, Dr. Uzzle's diagnoses are based upon subjective complaints and not objective evidence. First, EMG/NCV testing was performed by Dr. Zerga, a Neurologist, and the study showed no evidence of carpal tunnel syndrome or radiculopathy. Dr. Uzzle in his supplemental report points out the insufficiency of the EMG/NCV testing performed by Dr. Gutti. He stated the specific limb muscles and the EMG observations in each were not included with the report. Clearly, an examiner cannot provide a complete and correct diagnosis when significant information is missing. Further, Dr. Uzzle was the only examiner out of three that had a positive Phalen's test. Objective testing shows Plaintiff does not have right carpal tunnel syndrome.

Regarding the cervical and lumbar spines, Dr. Uzzle only reviewed reports of testing that occurred in 2013. Plaintiff underwent MRIs of the cervical and lumbar spines in 2013 and 2015. Unlike Dr. Uzzle, Dr. Zerga personally reviewed the studies and stated they were normal. Because the studies were normal and Plaintiff had no non-verifiable radicular complaints, Dr. Zerga stated Plaintiff could not be rated under Category II for either area. Moreover, Dr. Uzzle was the only examiner who purportedly noticed spasms in both areas. No spasms were noted in the cervical spine or lumbar spine

during Dr. Muffly's examination or Dr. Zerga's examination. Dr. Uzzle's report lacks probative value.

Dr. April Hall, D.O., has also prepared a report. She began providing primary care for Plaintiff in March 2014 and referred him to Dr. Gutti. She stated she reviewed diagnostic studies of the cervical and lumbar spines and stated the changes contained therein were in no way typical of patients forty-nine years old, but were more extensive and advanced. She also stated she advised him prior to the layoff that he was ". . . near being unfit for employment." She has also assessed numerous restrictions including no lifting greater than five pounds and avoid bending, stooping, crouching, crawling, working above shoulder level, pushing, pulling, flexing and extending his right upper extremity, and performing tasks that require more than minimal focus.

Dr. Hall's report also lacks probative value as she did not personally review the studies and is clearly not a specialist in this area. While she states she told Plaintiff he was near unfit for employment, this is not contained in her treatment records as there is no mention of any such statement or limitation on Plaintiff's work abilities before or after the layoff. Further, Dr. Hall based a diagnosis of carpal tunnel syndrome on the testing performed by Dr. Gutti, which was clearly incomplete and inadequate as pointed out by Dr. Uzzle. The restrictions she assessed were also without merit. She assessed severe restrictions including a five-pound lifting restriction, which simply is not supported by normal EMG/NCV testing

and normal MRIs of the cervical and lumbar spines. Her report also has little probative value because by her own report, she did not treat Mr. Anderson for the conditions about which she opines.

Dr. Muffly diagnosed chronic low back pain for more than 15 years, congenital fusion of the cervical spine, mild degenerative change of the lumbar spine appropriate for age, and no sign of carpal tunnel syndrome. He received medical records and diagnostic studies as well as performed two lumbar x-rays in his office. He found no evidence of cumulative trauma disorder and stated Plaintiff has had chronic low back pain since at least age 35 that has remained unchanged since that time. He assessed a 0% whole person impairment for the cervical spine, lumbar spine, and for carpal tunnel syndrome. He stated Plaintiff has mild degenerative change consistent with other similar age matched males with a long history of smoking exposure. In his opinion, Plaintiff does not require any medical treatment and should be weaned from opioid medications. He assessed no restrictions.

Along with his examination, Dr. Zerga personally reviewed the MRI studies of the cervical and lumbar spines and performed EMG/NCV testing. Dr. Zerga stated Plaintiff has some osteoarthritis, but no specific diagnosis related to his spine and he does not have carpal tunnel. He found no objective evidence of a harmful change due to cumulative trauma and stated Plaintiff has age-related changes in his spine consistent with his age. He noted Plaintiff’s complaints of symptoms were very

> similar to the type of symptoms he reported starting in 2000. He stated Plaintiff does not require treatment for cumulative trauma and does not have a permanent impairment under the *Guides*.

The ALJ also considered the lay testimony, and found Mr. Newsome's testimony persuasive, stating:

> Mr. Newsome's testimony is important because it establishes that during the period of time from 2013 through the lay-off of 2014, when Mr. Anderson was stating that his condition became disabling, he was not only not disabled, but performing work that consisted primarily of driving a shuttle car.

Ultimately, the ALJ was more persuaded by the opinions of Drs. Zerga and Muffly, and dismissed the claim.

On appeal, Anderson argues the ALJ improperly required objective findings to prove impairment under the AMA Guides. Anderson notes Dr. Zerga stated there was no objective evidence of a harmful change or non-verifiable radicular complaints. Anderson asserts the AMA Guides do not require objective findings in order to assess impairment. Rather, he avers Drs. Muffly and Zerga misread Table 15-3 and Table 15-5, which permit assessment of a DRE Category II cervical and lumbar rating where there is a history of a specific injury and either muscle guarding or

spasm, asymmetrical loss of range of motion, or non-verifiable radicular complaints. Anderson emphasizes Dr. Zerga found abnormal range of motion in the neck and low back, and Dr. Jeffrey A. Uzzle based his cervical and lumbar ratings on muscle spasm and loss of range of motion.

Anderson also attacks the decision on two related grounds. He argues the ALJ improperly discredited Dr. Uzzle's opinion because he did not personally review imaging studies. According to Anderson, Dr. Uzzle's failure to review the actual imaging studies did not detract from his credibility because he did not assign his rating based upon imaging studies. Finally, Anderson argues the ALJ erred in citing continued employment as a contraindication of impairment.

Anderson bore the burden of proving each of the essential elements of his claim. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because he 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)

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 determining whether the ALJ's findings are so unreasonable they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

The assessment of an impairment rating is a medical determination. Kentucky River Enterprises, Inc. v. Elkins, 107 S.W.3d 206 (Ky. 2003); George Humfleet Mobile Homes v. Christman, 125 S.W.3d 288 (Ky. 2004). The proper method to challenge an assessment is to depose the physician, or to offer a medical opinion addressing the propriety of the rating. Drs. Zerga and Muffly were not deposed regarding their methodology. Further, no medical opinion was offered critiquing their use of the AMA Guides or establishing a proper application. Further, no medical opinion established the ratings from Drs. Zerga and Muffly were not properly assessed according to the AMA Guides.

We also note that the admissibility of the impairment ratings was not designated as a contested issue at the benefit review conference, and no objection was made to the admission of their ratings. It is within the sole

discretion of the ALJ to select the impairment rating he believes best reflects the claimant's disability. The ALJ could rely on the opinions of Drs. Zerga and Muffly regarding the impairment rating and whether compensable cumulative trauma injuries exist. The opinions and impairment ratings provided by Drs. Zerga and Muffly constitute the requisite substantial evidence to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

We find no merit to Anderson's contention the ALJ rejected Dr. Uzzle's opinion on improper grounds. The ALJ's finding that Anderson did not sustain an injury as defined by the Act is supported by substantial evidence. Causation is a factual issue to be determined within the sound discretion of the ALJ as fact finder. Union Underwear Co. v. Scearce, 896 S.W.2d 7 (Ky. 1995); Hudson v. Owens, 439 S.W.2d 565 (Ky. 1969). Drs. Muffly and Zerga concluded Anderson does not have carpal tunnel syndrome. Even Dr. Uzzle acknowledged that the EMG/NCV testing report obtained for Dr. Sai Gutti was insufficient. Dr. Zerga placed Anderson in DRE Category I with a 0% impairment rating pursuant to the AMA Guides for the cervical and lumbar spine. Dr. Muffly also placed Anderson in DRE

Category I with 0% impairment ratings for the cervical and lumbar spine. Both doctors specifically found Anderson does not have a cumulative trauma injury. Dr. Zerga also expressly stated a harmful change to the human organism related to cumulative trauma does not exist. Anderson's symptoms are very similar to those he reported starting in 2000. His degenerative changes were identified as early as 2001. Dr. Uzzle noted Anderson had chronic neck and back pain over the past fifteen years.

When, as here, the evidence concerning an issue is conflicting, the ALJ as fact-finder is free to choose whom and what to believe. Copar v. Rogers, 127 S.W.3d 554 (Ky. 2003). Furthermore, the function of this Board is to determine whether substantial evidence supports the decision, not to analyze the reasons the ALJ rejected conflicting proof. Although a party may note evidence supporting a different outcome than 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).

Finally, we find no error in the ALJ's statement that "Evidence of work being performed every day until a layoff and without restriction cannot be viewed as facts

supporting an ongoing work injury due to cumulative traumatic injury." There is nothing in the ALJ's decision to suggest he believed Anderson was required to miss work as a result of the condition in order to find a work injury. Rather, this reference was part of a larger discussion of the evidence as to whether there was a harmful change to the neck, back and upper extremities. The ALJ did not base his determination solely on Anderson's ability to continue to labor. As noted above, the determination that Anderson did not sustain a harmful change is supported by an expert medical opinion.

The ALJ's thorough opinion evinces a comprehensive understanding and consideration of the conflicting evidence. He weighed the entirety of the proof and reached a conclusion supported by substantial evidence. Clearly, the record does not compel a different result. Therefore, the decision of the ALJ dismissing Anderson's claim for permanent income and medical benefits must be affirmed.

Accordingly, the January 15, 2016 Opinion and Order rendered by Hon. Steven G. Bolton, Administrative Law Judge, is hereby **AFFIRMED**.

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON SHERRY BRASHEAR
PO BOX 1626
HARLAN, KY 40831

COUNSEL FOR RESPONDENT:

HON TERRI WALTERS
PO BOX 1167
PIKEVILLE, KY 41502

ADMINISTRATIVE LAW JUDGE:

HON STEVEN G. BOLTON
PREVENTION PARK
657 CHAMBERLIN AVENUE
FRANKFORT, KY 40601