Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: December 17, 2013

CLAIM NO. 200901340

ICG HAZARD, LLC PETITIONER

VS. **APPEAL FROM HON. CHRIS DAVIS, ADMINISTRATIVE LAW JUDGE**

DEREK FARMER
and HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING IN PART,
VACATING IN PART, AND REMANDING
* * * * * *

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

STIVERS, Member. ICG Hazard, LLC ("ICG") appeals from the July 31, 2013, Opinion, Order, and Award of Hon. Chris Davis, Administrative Law Judge ("ALJ") and the August 26, 2013, Order on Petition for Reconsideration. In the July 31, 2013, Opinion, Order, and Award, the ALJ awarded permanent partial disability ("PPD") and medical benefits

for the care and relief of coal workers' pneumoconiosis ("CWP").

The Form 102-CWP alleges Derek Farmer ("Farmer") became affected by CWP while working for ICG as a drill operator. His last date of exposure was May 27, 2009.

The June 11, 2013, Benefit Review Conference order lists the following contested issues: existence of CWP; extent and duration, including multipliers; notice; work-relatedness/causation of pulmonary impairment; and injurious exposure.

The record contains the May 7, 2013, University Evaluation Report of Dr. Rodney Folz. Dr. Folz diagnosed the following: "1. Coal Workers Pneumoconiosis 2. Coronary Artery Disease 3. COPD 4. Prior Tobacco Use 5. Diabetes 6. Elevated Cholesterol 7. Chronic Back Pain 8. GERD 9. Dyspnea on Exertion due to #1-4 and deconditioning."

In his report, Dr. Folz relied upon the May 7, 2013, radiograph (x-ray) report of Dr. James Reed. Dr. Reed's report is based upon an x-ray taken on May 7, 2013. Notably, in Dr. Reed's report under "film quality" nothing has been checked. Dr. Reed's report indicates a finding of category 0/1 CWP.

The record also contains the reports of Dr. Matthew Vuskovich and Dr. Glen Baker which indicate a finding of category 2/1 CWP.

As a means of efficiently summarizing the facts in this claim, we set forth the ALJ's Statement of the Claim and Summary of the Evidence which is as follows:

> The Plaintiff has filed a claim alleging coal workers' pneumoconiosis. In this claim a Benefit Review Conference was held on June 11, 2013 and a Hearing was held on June 24, 2013. Both parties were represented by counsel. The issues for adjudication are work-relatedness/causation; injury as defined; notice; exclusion for pre-existing, active disability/impairment; existence of coal workers' pneumoconiosis; extent and duration; work-relatedness/causation of pulmonary impairment; and injurious exposure.
>
> SUMMARY OF THE EVIDENCE
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> 1. The following facts were stipulated and/or proven by the parties:
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> A. Coverage under the Workers' Compensation Act,
>
> B. An employment relationship existed between the parties at all times relevant,
>
> C. Plaintiff's last date of exposure is May 27, 2009,
>
> D. Plaintiff's average weekly wage is $1198.07,

E. Plaintiff's Date of Birth is August 31, 1951,

F. Plaintiff has finished the 11th grade.

2. Derek Farmer Derek Farmer is a sixty-one years old and has worked in the coal mines since 1972. He has operated dozers, loaders, trucks, and air track drills. Farmer has not worked since May 27, 2009. At that time, he was employed by the Defendant-Employer. Farmer testified he began having breathing difficulties a year or so before he stopped working. When his insurance paid for his medical treatment, Farmer had breathing treatment. He received RIB benefits in 1993. After the RIB award Farmer did not have ongoing medical treatment.

3. Glen R. Baker, Jr., M.D. Dr. Baker reviewed and [sic] x-ray date [sic] October 29, 2009 [sic] and classified it as showing changes consistent with pneumoconiosis, category 2/1.

4. Bruce C. Broudy, M.D. Dr. Broudy reviewed a chest x-ray made on February 8, 2010 and indicated the film was negative for abnormalities consistent with pneumoconiosis.

5. J. W. Selby, M.D. Dr. Shelby reviewed the February 8, 2010 chest x-ray on March 11, 2010. Dr. Shelby completed an ILO x-ray reported [sic] indicating a profusion of 0/0.

6. Matthew A. Vuskovich, M.D. Dr. Vuskovich reviewed the x-ray of October 23, 2009 and states it shows changes consistent with coal workers' pneumoconiosis, category, 2/1.

7. Rodney J. Folz, M.D., Ph.D. Dr. Folz conducted a university evaluation on May 7, 2013. Dr. Folz notes that the Plaintiff worked as a surface miner for thirty six years. Plaintiff had a thirty year history of smoking. Plaintiff has been diagnosed with COPD and a history of coronary artery disease.

Physical examination revealed a pacemaker but cardiac exam was normal. Pre-bronchodilator pulmonary function testing demonstrated a FVC best of predicated of 99% and FEV_1 best of predicated of 78%. Post-bronchodilator pulmonary function testing demonstrated a FVC best of predicted of 101% and FEV_1 best of predicated of 89%.

Dr. Folz diagnosed coal workers' pneumoconiosis, coronary artery disease, COPD, prior tobacco use, diabetes, elevated cholesterol, chronic back pain, GERD, and dyspnea on exertion due to the above diagnoses and deconditioning. Dr. Folz states the coal workers' pneumoconiosis and the pulmonary impairment are related to exposure to coal dust in the severance or processing of coal.

The ALJ set forth the following findings of fact and conclusions of law:

8. The issues to be decided are work-relatedness/causation; injury as defined; notice; exclusion for pre-existing, active disability/impairment; existence of coal workers' pneumoconiosis; extent and duration; work-relatedness/causation of pulmonary impairment; and injurious exposure.

As fact finder, the ALJ has the authority to determine the quality, character and substance of the evidence. *Square D Company v. Tipton*, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the sole authority to judge the weight and inferences to be drawn from the evidence. *Luttrell v. Cardinal Aluminum Co.*, 909 S.W.2d 334 (Ky.App. 1995). In weighing the evidence the ALJ must consider the totality of the evidence. *Paramount Foods Inc., v. Burkhardt*, 695 S.W. 2d 418 (Ky., 1985).

In analyzing this claim the Administrative Law Judge has reviewed all of the evidence in this claim, as summarized above. The Administrative Law Judge has also reviewed the parties' briefs and arguments.

The Administrative Law Judge must, first and foremost, address the findings of the University Evaluator, Dr. Folz, as assisted by Dr. Reed. It is clear that both on clinical examination and by the reading of the x-ray that these physicians have diagnosed the Plaintiff with coal workers' pneumoconiosis. (Form 108, Section G, Diagnosis; ILO Report, Section 2B.; Text Report, James Reed M.D. [05-07-13]) It is also clear, and not really disputed, however, that the level of CWP they have diagnosed the Plaintiff has [sic] having, 0/1, is insufficient for benefits.

However, the Plaintiff argues that the failure of Dr. Reed to comment on the quality of the x-ray he read is sufficient under *Magic Coal Company v. Fox*, 19 S.W.3d 88 (Ky. 2000) to overcome the conclusion of that x-ray. Indeed, the Plaintiff argues that that omission almost requires the

disregarding of Dr. Reed's conclusion regarding the degree of CWP.

The Administrative Law Judge believes and adopts the argument that failure to state the quality of the x-rays allows the rebuttable presumption afforded to Dr. Reed to be overcome. In any diagnostic proceeding, but in no situation more so than coal workers' pneumoconiosis, the quality of the x-ray is of paramount importance. The heart of the matter is whether or not a combination of black and white areas on a film forms sufficient nodules to reach such and [sic] such [sic] a conclusion. As such it is axiomatic that a poor quality x-ray is of less value and logical to conclude that a [sic] x-ray whose quality is unknown is of suspect value.

The next conclusion that must be reached then is what level of CWP the Plaintiff has. Due to the Plaintiff's extremely long exposure to coal dust, thirty six years, the diagnosis by Dr. Folz that he has CWP and the conclusions by Dr. Baker and Vuskovich, both of whom are highly respected, that he has 2/1, the undersigned concludes the Plaintiff has category 2/1 coal workers' pneumoconiosis and is entitled to benefits accordingly. Dr. Broudy is respected but his 0/0 conclusion is out of step with the evidence as a whole.

The Plaintiff's permanent partial disability award shall be $130.18 per week, pursuant to KRS 342.7302, for 425 weeks, from May 29, 2009, or until such time as he qualifies for normal social security retirement benefits, whichever comes first. He is also entitled to all reasonable and necessary, and work-related, medical expenses for the coal workers' pneumoconiosis.

The sole issue on appeal is whether the ALJ erred by not giving presumptive weight to Dr. Folz's opinions pursuant to KRS 342.315(2). ICG argues as follows:

> In this case, respondent did not present any additional proof after the university exam was conducted nor did they try to determine what the reader of the film, Dr. Reed, determined the film quality to be, as the quality section was simply unmarked. Instead respondent simply argued in their [sic] brief that because Dr. Reed left this portion of the ILO form unmarked, that this was a reasonable basis to defeat the presumptive weight of the university evaluator's opinions and ALJ Davis agreed.

KRS 342.315(2) governs medical evaluations by university medical schools and states as following:

> The physicians and institutions performing evaluations pursuant to this section shall render reports encompassing their findings and opinions in the form prescribed by the executive director. Except as otherwise provided in KRS 342.316, the clinical findings and opinions of the designated evaluator shall be afforded presumptive weight by administrative law judges and the burden to overcome such findings and opinions shall fall on the opponent of that evidence. When administrative law judges reject the clinical findings and opinions of the designated evaluator, they shall specifically state in the order the reasons for rejecting that evidence.

While KRS 342.315(2) generally requires presumptive weight to be afforded the clinical findings and opinions of the university evaluator, an ALJ has the discretion to reject such evidence where it is determined the presumption has been overcome by other evidence and the ALJ expressly states the reasons for the rejection within the body of his decision. Bullock v. Goodwill Coal Co., 214 S.W.3d 890, 891 (Ky. 2007); Morrison v. Home Depot, 197 S.W.3d 531, 534 (Ky. 2006); Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). Whether a party overcomes the presumption established under KRS 342.315(2) is not an issue of law, but rather a question of fact at all times subject to the ALJ's discretion as fact-finder to pick and choose from the evidence. Magic Coal Co. v. Fox, supra. As the Supreme Court cautions in Magic Coal Co. v. Fox, supra, the rebuttable presumption does not restrict the ALJ's ability to utilize the discretion afforded under the law to weigh the conflicting medical evidence. Should the ALJ choose to disregard the medical opinions of the university evaluator, the ALJ is merely required to set forth the rationale for disregarding the opinions.

Here, the ALJ provided a cogent explanation of his reasons for rejecting the opinions of Dr. Folz regarding the degree of Farmer's CWP and for relying upon

the opinions of Drs. Baker and Vuskovich. The ALJ has the discretion to reject Dr. Reed's x-ray report based on the fact that Dr. Reed did not indicate the film quality which is clearly required. We reject ICG’s suggestion that Dr. Reed somehow indicated the film quality was grade one. Clearly, the report required the reader to set forth the film quality by checking one of the four boxes provided under the heading of “Film Quality.” Dr. Reed checked none of the boxes. Consequently, the ALJ was free to reject both Dr. Reed’s and ultimately Dr. Folz's opinions regarding the degree of Farmer's CWP. The ALJ's explanation for the rejection of Dr. Folz's opinions is thorough and sound. Should the Board disturb the ALJ's determination, it would be wrongfully interfering with the discretion afforded to the ALJ under the law.

Our holding aside, remand is necessary for the ALJ to provide further findings as to whether Farmer has a breathing impairment due to CWP. After finding Farmer has category 2/1 CWP based on the opinions of Drs. Baker and Vuskovich, in the next paragraph the ALJ merely stated Farmer’s “permanent partial disability award shall be $130.18 per week, pursuant to KRS 342.730(2), for 425 weeks.” As noted, the ALJ made no finding regarding the nature of Farmer’s breathing impairment nor did he set out

the section of KRS 342.732 upon which his award was based. Therefore, the award of income benefits must be vacated and this claim remanded for these additional findings.

Accordingly, those portions of the July 31, 2013, Opinion, Order, and Award and the August 26, 2013, Order on Petition for Reconsideration relating to the ALJ's rejection of the opinions of the university evaluator are **AFFIRMED**. However, the award of income benefits is **VACATED** and this matter is **REMANDED** for entry of an amended opinion and award consistent with the views expressed herein.

ALL CONCUR.

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