Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: October 17, 2014

CLAIM NO. 201300557

JAMES RIVER COAL COMPANY PETITIONER

VS. **APPEAL FROM HON. GRANT S. ROARK, ADMINISTRATIVE LAW JUDGE**

CARTER FRANCIS
and HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

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

ALVEY, Chairman. James River Coal Company ("James River") seeks review of the Opinion, Order and Award rendered April 2, 2014 by Hon. Grant S. Roark, Administrative Law Judge ("ALJ") determining Carter Francis ("Francis") sustained a work-related hearing loss which became manifest while he was working for James River, and awarding permanent partial

disability ("PPD") benefits and medical benefits. James River also appeals from the order denying its petition for reconsideration rendered May 13, 2014.

On appeal, James River argues the ALJ's finding it had not overcome the presumptive weight afforded to the university evaluator is clearly erroneous based upon the evidence contained in the record, specifically the conflicting medical reports of Dr. Robert Manning, Au.D. Because we determine the ALJ's decision is supported by substantial evidence, and he did not err in finding the evidence does not overcome the opinion of the university evaluator, we affirm.

Francis filed the Form 103, Hearing Loss claim on April 15, 2013 alleging he sustained a compensable occupational hearing loss on June 4, 2011 arising out of his employment with James River. In the Form 104 employment history form filed with the claim, Francis stated his work history consisted of driving a fuel truck, roof bolter helper, parts inspector at a factory, drill helper, general laborer for a gas company, and as a general mechanic at a tire company.

Francis testified by deposition on October 13, 2013. The hearing was waived by consent of the parties. Francis testified he worked in the coal mines for over

fifteen years, of which two years was underground as a helper on a roof bolting machine. He described his various jobs, and the machines he worked on. He further described how he was exposed to the noise from the various machines. He also described his noise exposure in jobs unrelated to the coal industry. Francis stated he has difficulty in hearing conversations, and he has a constant ringing in his ears. He stated his hearing is relatively unchanged since his last day of work. He stated he believes he would be a danger to himself and others if he attempted to return to work due to his hearing difficulty. Francis stated he was hired by Laurel Mountain which was later purchased by James River. At the time he last worked there, he was employed by James River.

In support of the Form 103, Francis attached Dr. Manning's February 26, 2013 report which stated he has a hearing loss consistent with long term exposure to loud noise. He assessed a 4% impairment rating due to the hearing loss pursuant to the American Medical Association Guides to Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"). James River filed a subsequent report from Dr. Manning dated August 13, 2013. Based upon the testing performed on that date, Dr. Manning assessed a 6% impairment rating pursuant to the AMA Guides, and stated Francis'

hearing loss was attributable to his long-term loud noise exposure in the workplace.

In accordance with KRS 342.7305, Francis was referred to Dr. Barbara Eisenmenger, Au.D., a physician at the University of Louisville, for evaluation. Dr. Eisenmenger opined Francis had sustained a work-related hearing loss, and assessed a 10% impairment rating pursuant to the AMA Guides. She stated Francis should wear hearing protection. She stated any restrictions upon his activities would be based on his ability to perform job requirements while using hearing protection devices.

Dr. Eisenmenger testified by deposition on December 20, 2013. She evaluated Francis at the request of the Kentucky Department of Workers' Claims on June 18, 2013. She stated Francis had sufficient occupational noise exposure to contract a hearing loss. She noted Francis' complaints of constant tinnitus in the left ear, and intermittent problems with his right ear. She stated he was last exposed to occupational noise on June 4, 2011. She stated there is some variance in tests. She did not believe Francis was exaggerating his symptoms. She stated, "[I]f somebody is going to exaggerate their hearing, usually they don't do it in one ear." She noted the findings on all tests for the left ear were consistent, and any variance was

in the right ear. She stated the findings on the speech test and pure tone test were matched up, so she did not believe Francis exaggerated his symptoms. She stated the test results she utilized were reliable, and her opinion remains unchanged.

In the Opinion, Order and Award, the ALJ found Francis sustained an injury as defined by KRS 342.0011(1). Despite James Rivers' arguments to the contrary, the ALJ found Francis had sustained a compensable hearing loss in excess of the 8% threshold limit contained in KRS 342.7305. He awarded PPD benefits based upon the 10% impairment rating assessed by Dr. Eisenmenger, and medical benefits. The ALJ pointed out although Dr. Eisenmenger did not invalidate Dr. Manning's testing, conversely he did not invalidate the testing she conducted. He stated merely providing a different result does not invalidate Dr. Eisenmenger's findings.

James River filed a petition for reconsideration requesting the ALJ set forth the specific analysis he utilized in arriving at his decision. In his May 13, 2014 Order denying the petition for reconsideration, the ALJ stated as follows:

> This matter comes before the Administrative Law Judge pursuant to the defendant employer's Petition for

Reconsideration of the Opinion, Order & Award rendered in this matter on April 2, 2014. In its Petition the defendant employer argues that it was error for the Administrative Law Judge to rely on the impairment rating from Dr. Eisenmenger, the University Evaluator, and points out that Dr. Manning was referred to in the Opinion as the defendant's expert when, in fact, Dr. Manning was the plaintiff's expert. Thus, the defendant points out that plaintiff's own expert examined plaintiff twice and came upon with a lower impairment rating. The defendant therefore requests additional findings to explain what would be required to overcome the presumptive weight of a university evaluator.

The defendant correctly points out that Dr. Manning was incorrectly referred to as the defendant's expert when he was actually plaintiff's. However, the analysis set forth in the Opinion remains the same. Dr. Manning's opinion may be credible, but Dr. Manning's findings do not indicate that Dr. Eisenmenger performed her test incorrectly or reached invalid results. For these reasons, it was determined that Dr. Eisenmenger's opinions remain entitled to presumptive evidentiary weight. That ALJ remains so persuaded.

With respect to the defendant's request to explain just what would be needed to actually overcome a University Evaluator' presumptive weight, such a request would require speculative findings wholly immaterial to the finding in the case *sub judice*. As such, the defendant's Petition for Reconsideration and request for additional findings is overruled.

On appeal, James River argues the ALJ's finding it had not overcome the presumptive weight afforded a university evaluator is clearly erroneous based upon the evidence contained in the record as a whole, and a contrary result is compelled.

In a workers' compensation case, the claimant bears the burden of proof and risk of non-persuasion regarding every element of his claim. *See* Durham v. Peabody Coal Co., 272 S.W.3d 192 (Ky. 2008). Since Francis was successful before the ALJ regarding his hearing loss claim, the question on appeal is whether there was substantial evidence 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).

In rendering a decision, KRS 342.285 grants the ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. AK Steel Corp. v. Adkins, 253 S.W.3d 59 (Ky. 2008). An ALJ may draw reasonable inferences from the evidence, 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. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15, 16 (Ky. 1977). Although a party may note evidence supporting a different outcome than that reached by the ALJ, such evidence 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 weight and credibility or by noting reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). It is well established, whether on reopening or at the time of an original proceeding, an ALJ is vested with wide ranging discretion. Colwell v. Dresser Instrument Div., 217 S.W.3d 213 (Ky. 2006); Seventh Street Road Tobacco Warehouse v. Stillwell, 550 S.W.2d 469 (Ky. 1976). So long as the ALJ's rulings are reasonable under the evidence, they may not be disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

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 be afforded the clinical findings and opinions of the university evaluator, an ALJ has the discretion to reject such testimony where it is determined the presumption has been overcome by other evidence and he expressly states his reasons for doing so 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, id. As the Supreme Court cautions, 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 and impairment rating of the university evaluator, which the ALJ is entitled to do under the discretion granted under the law, the ALJ is merely required to set forth the rationale as to why said testimony was disregarded.

That said, we believe the ALJ's finding of an occupational hearing loss is supported by substantial evidence. Dr. Eisenmenger, the university evaluator, rendered an opinion pursuant to KRS 342.315. Dr. Eisenmenger took a history, administered testing, and determined Francis sustained a 10% impairment rating pursuant to the AMA Guides.

James River's arguments on appeal are essentially an attempt to have this Board reweigh the evidence and direct a finding contrary to the ALJ's decision, a task we cannot do. The ALJ found persuasive the opinion of the university evaluator. While Dr. Manning administered testing on two different occasions, and arrived at a determination differing from that assessed by Dr. Eisenmenger, this does not compel a contrary result. Such opinion is neither dispositive nor an adequate basis to reverse on appeal.

Accordingly, the ALJ's decision rendered April 2, 2014, as well as the order ruling on the petition for reconsideration dated May 13, 2014, are hereby **AFFIRMED.**

ALL CONCUR.

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