Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: June 27, 2014

CLAIM NO. 201300782

JAMES RIVER COAL SERVICES PETITIONER

VS. **APPEAL FROM HON. JONATHAN R. WEATHERBY, ADMINISTRATIVE LAW JUDGE**

IVAN WIREMAN
and HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

ALVEY, Chairman. James River Coal Services ("James River") seeks review of the Opinion and Award rendered February 14, 2014 by Hon. Jonathan R. Weatherby, Administrative Law Judge ("ALJ") finding Ivan Wireman ("Wireman") sustained low back injuries due to work-related cumulative trauma for which he awarded temporary total disability ("TTD") benefits,

permanent partial disability ("PPD") benefits and medical benefits. James River also seeks review of the March 11, 2014 order partially denying its petition for reconsideration.

On appeal, James River challenges the ALJ's award of TTD benefits and application of the three multiplier. James River also argues Dr. Bruce Guberman's opinion cannot constitute substantial evidence since he did not review all of Wireman's prior medical records. Because the ALJ's opinion is supported by substantial evidence, we affirm.

Wireman filed a Form 101 on May 23, 2013, alleging repetitive, cumulative trauma to his low back resulting from his work as a dozer operator with James River manifesting on April 27, 2012. The Form 104 indicates Wireman has worked either as a dozer or heavy equipment operator in the coal mining industry since 1995. He previously worked as a welder from 1980 to 1992. Records from the Division of Unemployment Insurance indicate Wireman was laid off by James River on April 27, 2012.

Wireman testified by deposition on August 9, 2013 and at the final hearing held December 17, 2013. He was born on June 24, 1963 and resides in Gunlock, Kentucky. He completed the ninth grade and is certified as a Boss, surface miner and MET. Wireman testified he had worked as

a rock truck driver or dozer operator for the same coal mining site for approximately nine years, which changed ownership several times, with James River being the most recent owner. Wireman stated his back and body endured constant “beating and jarring” from loading big rocks and operating the dozer and was “just a constant wear and tear on my body . . . .” He moved shot rock, built loader pads and drill benches, maintained roads for haulage trucks, pushed dump and reclaimed. Prior to working in the coal mines, Wireman worked as a welder.

Wireman testified his low back pain began in mid-2010 while working for James River. He sought treatment, and was prescribed muscle relaxers and Ibuprofen by Mr. Michael Williams, a physician’s assistant for Dr. Prem Verma. Although he continued to take Ibuprofen, his back pain gradually worsened and increased in intensity. Despite his pain, Wireman worked full time, fifty plus hours a week, until he was laid off. However, he stated by the time he was laid off, the low back pain had worsened to the point he would have been unable to continue working much longer. Wireman currently sees Mr. Williams every three months, who prescribes pain medication and muscle relaxers. Wireman also stated Mr. Williams has restricted him from any activity which would put stress on his back.

Wireman testified after he was laid off, and he received unemployment benefits for approximately one year during which time he applied for two jobs a week but was unable to find employment. Although he applied for a heavy equipment operator position, he did not think he could perform the job duties due to his low back condition. Wireman also applied for Social Security disability benefits, which were denied.

Wireman admitted he experienced previous intermittent low back pain but "it's not as bad as it is now. It was mild. . . . Before was like normal, like everybody. It wasn't nothing concerning like I am now." Although he sought treatment, his symptoms were occasional, he did not take medication consistently, and was never referred to a surgeon for further treatment. His occasional back pain did not prevent him from working. On cross-examination, Wireman did not dispute medical records from 1988, 2001, 2002, 2004, 2008, and 2010 referencing low back pain complaints.

Wireman testified he is unable to walk, sit, stand or drive for prolonged periods of time. He experiences difficulty sleeping and described several daily activities he is unable to do, including hunting and fishing, although he admitted he purchased several hunting licenses following

the lay-off. Wireman stated in his present condition, he is unable to operate a dozer, and does not believe he can return to work.

In support of his claim, Wireman attached the April 22, 2013 medical questionnaire completed by Dr. Verma. Dr. Verma indicated Wireman's current back condition was brought on by his work-related activities which required repetitive cumulative use of his back on a daily basis. He opined Wireman is unable to maintain gainful employment due to his low back pain.

Wireman also submitted the August 15, 2013 report of Dr. Jerry Lewis, D.O., who noted when Wireman was laid off on April 27, 2012, he was experiencing low back pain due to performing heavy labor since the age of sixteen. Dr. Lewis diagnosed neuroendocrine disorder and chronic progressive lumbago with work-related aggravation and provocation of lumbar degenerative joint disease resulting in left-sided L4-5 foraminal stenosis and persistent bilateral radiculopathy. Dr. Lewis opined Wireman had reached maximum medical improvement ("MMI") and assessed an 11% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"). Dr. Lewis recommended ongoing pain management and opined Wireman is

disabled from work. Dr. Lewis opined Wireman's low back symptoms are the direct result of the work-related injury to his low back which culminated on April 27, 2012. He also found: "The repetitive heavy labor involved in his job since the age of 16 was altogether of sufficient force and duration to cause this harm and his back to his human organism."

Wireman also submitted the September 23, 2013 report of Dr. Guberman. Wireman reported he began experiencing low back pain as a teenager, which gradually progressed when he began running heavy equipment in 2002. Wireman reported he was a welder prior to 2002. He also reported an automobile accident at age fifteen resulted in neck and low back injuries. Under the medical record review section, Dr. Guberman outlined Wireman's current treatment with Mr. Williams. He also noted an August 7, 2012 lumbar spine MRI and a September 6, 2012 lumbar CT scan requested by Dr. Martin. Dr. Guberman diagnosed acute and chronic lumbosacral strain, and post traumatic degenerative disc disease. He stated Wireman attained MMI on September 16, 2013. He assessed an 8% impairment rating for Wireman's low back condition pursuant to the AMA Guides, apportioning 2% to pre-existing conditions and 6% to the April 27, 2012

injury. Regarding causation, Dr. Guberman stated as follows:

> . . . the Claimant's low back symptoms are causally related to his work operating heavy equipment and being jarred from 2002 until 2012. In my opinion, the significant jarring he experienced is the primary cause for his low back pain, which has persisted even after he discontinued that type of work.

Dr. Guberman opined Wireman is unable to perform his former position and assigned various restrictions.

James River filed the records from Dr. Martin Lowell of the Martin Clinic and office records from "RHC", both of which are handwritten and largely illegible. It appears Wireman complained of low back pain on March 8, 1988; April 5, 1988; July 23, 2001; February 20, 2002 and July 29, 2002. Wireman again complained of low back pain in August 2002. A September 6, 2002 CT scan of the lumbar spine demonstrated minor degenerative changes with small Schmorl's nodes. Wireman next complained of low back pain during office visits to the RHC office on August 31, 2004 and then again on December 16, 2008.

RHC office notes dated January 20, 2010 and November 24, 2010 indicate a diagnosis of degenerative disc disease. Wireman returned to RHC for a medication refill and complaints of a hemorrhoid, for which he was referred to

and treated by Dr. Judy Johnson, on April 25, 2012, two days before he was laid off. In July 2012, Mr. Williams ordered a lumbar MRI. The August 17, 2013 MRI report diagnosed minimal foraminal narrowing on the left at L4-5. Wireman returned to the RHC office on October 10, 2012 and February 22, 2013 for unrelated complaints.

James River filed records from Kentucky Fish & Wildlife indicating after the April 27, 2012 lay off, Wireman applied for a deer permit, hunting license, turkey license and an elk antlered archery lottery. James River also filed records from the Social Security Administration indicating his application for disability benefits had been denied on August 22, 2012.

James River also submitted the September 13, 2013 report of Dr. Chris Stephens. Dr. Stephens noted Wireman reported a twenty year history of manual labor as a welder and heavy equipment operator and stated he had a twenty-five year history of low back pain for which he has intermittently received treatment. He diagnosed chronic intermittent back pain likely secondary to degenerative disc disease. Based upon the history reported by Wireman and his review of the medical records, Dr. Stephens found no evidence of a cumulative trauma injury to his back. He therefore assigned no impairment rating, found no permanent

injury, declined to assign restrictions and found the treatment Wireman received was not work-related. He further opined that if Wireman had not been laid off, he would still be working as a heavy equipment operator.

James River filed the September 23, 2013 vocational report of Ralph C. Haas, Ed.D., Vocational Counselor. He concluded the testing results and work history indicate Wireman is incapable of competing for unskilled to semi-skilled jobs and would not benefit from retraining in a formal education setting.

After summarizing the medical and lay evidence, the ALJ found Wireman sustained a work-related cumulative trauma injury to his low back. The ALJ adopted the opinion of Dr. Guberman who he found most credible regarding impairment ratings and restrictions. The ALJ stated as follows:

> 21. The Plaintiff has provided the medical opinions of Drs. Morris, Verma, and Guberman. Dr. Verma opined in response to a questionnaire that the Plaintiff's injuries are the result of work-related cumulative trauma and that he is no longer employable. Dr. Morris opined that the Plaintiff has an 11% impairment due to lumbar disease and Dr. Guberman has assessed a 6% work related whole person impairment related to a cumulative trauma injury to the lumbar spine. The ALJ notes that Dr. Stephens has opined on behalf of the Defendant that the Plaintiff's lumbar

> spine condition is degenerative in nature and not work-related. Additionally, the ALJ notes that the Plaintiff's most recent MRI noted minimal foraminal narrowing on the left at L4-5 with no focal disc protrusion or spinal stenosis. The ALJ is more persuaded however by the testimony of the Plaintiff and the consensus of opinion regarding causation and injury that the Plaintiff does suffer from the effects of a work-related cumulative trauma injury.
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> 22. The ALJ finds however that Dr. Guberman is the most credible with regard to impairment rating and restrictions because his rating accounts for other contributing factors such as the prior automobile accident which is ignored by Dr. Morris. The ALJ therefore finds in accordance with the opinion of Dr. Guberman, that the Plaintiff has an 8% whole person impairment but that 2% of that total is due to a pre-existing condition.
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> 23. The ALJ also finds in accordance with the credible opinion of Dr. Guberman that the Plaintiff is unable to return to his prior employment due to the repetitive jarring and the associated risk for additional injury.

The ALJ found Wireman was not permanently and totally disabled based upon Mr. Haas' report. The ALJ then stated Wireman "shall therefore be entitled to the three multiplier pursuant to KRS 342.7301(c)1." Based upon Dr. Guberman's opinion, the ALJ found Wireman reached MMI on September 16, 2013 and awarded TTD benefits from April 27, 2012 through September 16, 2013. He also awarded PPD

benefits and medical benefits.

James River filed a petition for reconsideration requesting the ALJ offset the award of TTD benefits by receipt of unemployment benefits during the same period of time. James River also raised the same arguments now made on appeal. In the March 22, 2014 order, the ALJ ordered James River is entitled to a credit against TTD benefits for unemployment benefits received. Regarding the application of the three multiplier, the ALJ stated as follows:

> The ALJ reiterates the finding that the Plaintiff was credible in his testimony regarding his inability to return to the same type of work due to the excessive jarring and the resulting pain and difficulty that it causes him. This testimony is supported by the medical evidence provided by Dr. Guberman who opined that the Plaintiff could not return due to the repetitive jarring and the associated risk of further injury. The opinion of Dr. Guberman and the consistent and supporting testimony of the Plaintiff has convinced the ALJ that the Plaintiff is unable to return to the same type of employment.

On appeal, James River argues the ALJ's award of TTD benefits is not supported by substantial evidence. James River asserts the ALJ failed to properly consider the timeline of and stimulus for Wireman's alleged disability.

It points to the fact Wireman worked over fifty hours a week, with no restrictions or absences, up until the day he was laid off. Wireman then asserts he became totally disabled after the lay-off. James River also argues the ALJ failed to make a finding Wireman's inability to work during the period of total temporary disability was actually caused by cumulative trauma from the mine. James River noted during the period of temporary total disability, Wireman applied for at least two jobs a week after he was laid off while receiving unemployment benefits and purchased several hunting licenses.

James River argues the ALJ erred in not properly analyzing why Wireman is entitled to the three multiplier. James River asserts the ALJ failed to make a finding whether Wireman retains the physical capacity to return to the type of work he performed at the time of injury.

Finally, James River asserts Dr. Stephens was the most credible physician to assess Wireman's physical condition since he was the only one to review all the medical records. It notes Dr. Guberman did not specifically discuss Wireman's prior back problems when he worked as a welder and is unclear whether he reviewed any records other than two diagnostic tests done in 2012. James River insists Dr. Stephen's opinion is the most

credible since he reviewed all the medical records. Therefore, it asserts the ALJ's decision to award PPD benefits based on a 6% impairment rating was not supported by substantial evidence.

Wireman, as the claimant in a workers' compensation proceeding, had the burden of proving each of the essential elements of his cause of action, including TTD benefits, extent and duration of disability, and entitlement to multipliers. *See* KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Wireman was successful in his burden the question on appeal is whether substantial evidence supports 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).

As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the sole authority to judge all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581

S.W.2d 10 (Ky. 1979). Where evidence is conflicting, the ALJ may choose whom or what to believe. Pruitt v. Bugg Brothers, 547 S.W.2d 123 (Ky. 1977). The ALJ 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 adversary party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000); Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). Mere evidence contrary to the ALJ's decision is not adequate to require reversal on appeal. Id. In order to reverse the decision of the ALJ, it must be shown there was no substantial evidence of probative value to support his decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

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, 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).

Although the issue of injury and causation was not directly challenged by James River, we find the opinions of Drs. Verma, Guberman and Lewis, together with Wireman's testimony, constitute substantial evidence upon which the ALJ could rely in determining he suffers from the effects of a work-related cumulative trauma injury.

In his report, Dr. Verma agreed Wireman's current back condition is due to his work-related activities which required repetitive cumulative use of his back. Dr. Lewis diagnosed neuroendocrine disorder, chronic progressive lumbago with work-related aggravation, provocation of lumbar degenerative joint disease resulting in left-sided L4-5 foraminal stenosis, and persistent bilateral radiculopathy. He further found Wireman's back symptoms the direct result of the work-related injury to his low back culminating on April 27, 2012, noting the repetitive heavy labor involved in his job since the age of sixteen. Dr. Guberman diagnosed acute and chronic lumbosacral strain, post traumatic, degenerative disc disease. He likewise opined Wireman's low back symptoms are causally related to his work operating heavy equipment and being jarred from 2002 until 2012. These opinions constitute substantial evidence supporting

the ALJ's determination regarding injury and causation. Dr. Stephen's opinion amounts to conflicting evidence, which the ALJ was free to reject.

We likewise find substantial evidence supports the ALJ's determination Wireman is entitled to the three multiplier pursuant to KRS 342.7301(c)1. In the February 14, 2014 opinion, the ALJ relied upon Dr. Guberman in finding Wireman is unable to return to his prior employment and adopted his assessment regarding impairment and restrictions. In the order on reconsideration, the ALJ found Wireman to be a credible witness regarding his inability to return to the same type of work due to the excessive jarring and the resulting pain and difficulty it caused him. He again cited to Dr. Guberman's opinion Wireman could not return due to the repetitive jarring and the associated risk of further injury.

Wireman's testimony and the opinion of Dr. Guberman constitute substantial evidence supporting the ALJ's application of the three multiplier. Here, Dr. Guberman opined Wireman is unable to return to the type of work performed at the time of his injury. He also was restricted to lifting/carrying twenty pounds occasionally; ten pounds frequently; stand/walk two hours in an eight hour day; sit less than six hours with the ability to

alternate between sitting and standing; no repetitive activities and limited pushing/pulling; never balance, kneel, crouch, crawl, or stoop; avoid humidity/wetness; and no exposure to vibration and hazards such as machinery and heights. In addition, a claimant's self-assessment of his ability to labor based on his physical condition is evidence upon which the ALJ may rely. Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979). Therefore, substantial evidence exists supporting the ALJ's application of the three multiplier and the ALJ performed the proper analysis in the opinion and order on reconsideration in reaching his determination. Because Wireman never returned to work at the same or greater wage after the injury, an analysis pursuant to Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003) is not required.

Next, TTD is the condition of an employee who has not reached MMI following a work-related injury *and* who has not reached a level of improvement that would permit a return to employment. KRS 342.0011(11)(a). Both conditions must be satisfied for an employee to qualify for TTD benefits. *See* W.L. Harper Construction Company v. Baker, 858 S.W.2d 202, 205 (Ky. App. 1993); Double L Const., Inc. v. Mitchell, 182 S.W.3d 509, 513-4 (Ky. 2005). Regarding the second prong, until MMI is achieved, an employee is entitled to a continuation of TTD benefits so long as he

remains disabled from his customary work or the work he was performing at the time of the injury. Magellan Behavioral Health v. Helms, 140 S.W.3d 579, 580-581 (Ky. App. 2004); Double L Const., Inc. v. Mitchell, 182 S.W.3d 509, 513-514 (Ky. 2005).

In the case *sub judice*, the ALJ relied upon Dr. Guberman's opinion in awarding TTD benefits from April 27, 2012 through September 16, 2013. Dr. Guberman found Wireman attained MMI one week prior to the date of his report, on September 16, 2013. As noted above, Dr. Guberman found Wireman is unable to return to his former position and assigned various restrictions. Again, Dr. Guberman's opinion constitutes substantial evidence supporting the ALJ's decision.

We acknowledge James River's ability to point to contradictory and conflicting statements made by Wireman at the deposition and hearing. However, it is the ALJ's role as fact-finder, not the Board's, to determine the credibility of the evidence. The ALJ may also choose whom and what to believe when faced with conflicting evidence. It was the prerogative of the ALJ to rely on Dr. Guberman's opinion and find Wireman totally and temporarily disabled from April 27, 2012 through September 16, 2013.

Finally, we are not persuaded by James River's argument the opinion of Dr. Guberman cannot constitute substantial evidence. While Dr. Guberman's report does not specifically itemize each medical record reviewed, it does contain a medical review section outlining Wireman's treatment with Mr. Williams and specifically discussed the two diagnostic studies performed in 2012. He specifically noted a "September 6, 2012" CT scan of the lumbar spine demonstrating minor degenerative changes with small Schmorl's nodes. A review of the medical records submitted by James River indicates the date is a typographical error, and the actual date was September 6, 2002. Therefore, it appears Dr. Guberman may have been in possession of medical records prior to 2012. Regardless, the record does not clarify what records Dr. Guberman had in his possession at the time he formed his opinion since neither party requested such information or deposed him. We also note Wireman reported his prior work as a welder and an automobile accident at the age of fifteen which resulted in a low back injury.

Although not cited by James River, the facts of this case are distinguishable from those in Cepero v. Fabricated Metals Corp., 132 S.W.3d 839 (Ky. 2004). Cepero involved not only a complete failure to disclose, but

affirmative efforts by the employee to cover up a significant injury to the left knee only two and a half years prior to the alleged work-related injury to the same knee. Here, we cannot say Dr. Guberman had such an inaccurate or incomplete history that his opinion was completely lacking in probative value.

Accordingly, the February 14, 2014 Opinion and Award rendered by Hon. Jonathan R. Weatherby, Administrative Law Judge, and the March 11, 2014 order on petition for reconsideration are hereby **AFFIRMED**.

STIVERS, MEMBER, CONCURS IN RESULT ONLY.

RECHTER, MEMBER, CONCURS.

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