

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: January 21, 2016

CLAIM NO. 201000461

JERRY WILLIAMS

PETITIONER

VS.

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

CONSOL OF KENTUCKY, INC. and
HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

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

ALVEY, Chairman. Jerry Williams ("Williams") appeals from the Opinion and Order rendered July 27, 2015 by Hon. Grant S. Roark, Administrative Law Judge ("ALJ") dismissing his coal workers' pneumoconiosis ("CWP") claim against Consol of Kentucky, Inc. ("Consol"). Williams also seeks review of the September 4, 2015 order denying his petition for reconsideration.

On appeal, Williams challenges the ALJ's reliance on Dr. B. T. Westerfield's opinion. Williams also argues he is entitled to a university evaluation pursuant to statutory and case law. Since the issue of entitlement of a university evaluation was not properly preserved as an issue on appeal, and because Dr. Westerfield's opinions constitute substantial evidence and no contrary result is compelled, we affirm.

Williams filed a Form 102 on April 22, 2010 alleging he contracted CWP due to his exposure to coal dust in the course and scope of his employment in the coal mining industry, with his last injurious exposure occurring on August 1, 2009 while employed by Consol. Williams also alleged a pulmonary impairment due to coal dust exposure. His Form 104 states Williams was employed in the coal mining industry beginning in 1973, with his most recent employment with Consol from September 29, 1996 to August 1, 2009.

Williams testified by deposition on September 8, 2014 and at the hearing held May 28, 2015. Williams was born on April 24, 1952, and resides in McRoberts, Kentucky. Williams completed the eleventh grade and does not have a GED. Williams testified he has worked as an underground coal miner for thirty-six and a half years. He first began

shoveling the belt. At that time, water was not placed on the belt and it was, "nothing but dust." Thereafter, he was moved to the head drive which was also dusty. Williams also shot coal, which was "nothing but dust and smoke . . . I did that for a long time." Williams also assisted the cutting machine operator and was a miner helper. Williams then operated a roof bolter. During this time, he also rock dusted and shoveled on Sundays and at night. Williams testified he also ran the shuttle car, scoop, and haulage equipment called the pig.

Williams stated he is a former cigarette smoker. He used to smoke approximately five cigarettes at night, but stopped doing so a long time ago. For the past two years he has smoked a pipe.

Williams worked for Consol from September 1996 until August 1, 2009, the day the Kentucky coal mine shut down. Williams stated he did everything except run a miner while at Consol. When he last worked for Consol, Williams was operating the pig and worked approximately ten hours a day. He stated it was not unusual to work thirty-six hours straight.

Williams testified he breathed coal dust all the time at work and was covered in black dust at the end of his shift. The coal dust entered his throat, mouth and

ears. His secretions were black when he blew his nose or coughed. Williams testified he has experienced shortness of breath, "for quite a while," and had this symptom prior to the shutdown of the mining operation. However, he did not seek medical treatment for his breathing troubles until his attorney referred him for a chest x-ray. Williams stated he stopped working in the mines because, ". . . I got where I couldn't perform like I was doing, you know, with shortness of breath, you know, and hurting, coughing, gagging." Williams estimates he can only walk approximately one hundred feet before he has to stop due to shortness of breath. Even though Williams no longer works in the mines, he still coughs and gags. He also wheezes, which is worse at night. Williams states it also hurts to draw in a breath, and he experiences a smothering sensation. With his current breathing difficulties, Williams does not feel he can return to underground coal mining.

Williams had never had breathing tests or been diagnosed with a breathing or lung condition prior to the filing of his CWP claim. Williams has neither been hospitalized nor prescribed medication for his breathing symptoms, but does take over-the-counter Tylenol sinus medication. At the hearing, he denied leaving Consol

because the mine shut down. Williams explained the operation moved to West Virginia, and he felt he would be unable to drive to and from the mine in his current condition. Williams receives Social Security disability benefits for conditions unrelated to his alleged CWP or breathing trouble. Williams had also filed a federal black lung claim which has been withdrawn.

In support of his claim, Williams filed the February 3, 2010 x-ray report of Dr. Matthew Vuskovich. He classified the chest x-ray, taken March 3, 2010, as a quality 2 and interpreted it as 1/1 for CWP. Williams also filed pulmonary function studies performed by Dr. Srini Ammisetty on March 4, 2010, with a FVC of 114% of predicted value and FEV1 of 126% of predicted value.

Williams also filed documents related to his federal claim. Included are a June 6, 2013 x-ray report by Dr. Alex Poulos and a June 13, 2013 report by Dr. Ayesha Skider. Dr. Poulos classified a June 6, 2013 chest x-ray film as a quality 1, and interpreted as 1/0 for CWP. In her subsequent report, Dr. Skider interpreted the same x-ray as 1/0 for CWP. Dr. Skider opined Williams' CWP is one hundred percent attributable to coal dust exposure. Pulmonary function studies dated June 13, 2013, showed a FVC of 145% of predicted value and a FEV1 of 122% of

predicted value. Dr. Skider opined he had a normal spirometry study and is not disabled from a pulmonary standpoint.

Consol filed the June 9, 2010 x-ray report of Dr. Bruce Broudy. He classified the film as quality 1, and interpreted it as 0/0, negative of CWP. Pulmonary function studies were also performed. They showed pre-bronchodilator FVC 94% of predicted value and FEV1 105% of predicted value, and post-bronchodilator FVC 99% of predicted value and FEV1 112% of predicted value. Dr. Broudy found no evidence of any significant obstruction or restriction.

The Commissioner of the Department of Workers' Claims scheduled an evaluation with Dr. Westerfield of Commonwealth Respiratory Consultants. Dr. Westerfield read an x-ray dated August 12, 2014 as quality 1, and interpreted it as negative for CWP. Pulmonary function studies were also performed revealing pre-bronchodilator FVC as 107% of predicted value and FEV1 as 114% of predicted value. Dr. Westerfield specifically opined, "Williams does not suffer from [CWP] at this time . . . his chest x-ray is negative for the presence of opacities that would represent pneumoconiosis. There is no pathological evidence to make a diagnosis of pneumoconiosis." He also stated based on the normal pulmonary function studies,

Williams does not have a respiratory impairment. Dr. Westerfield opined Williams has the breathing capacity to return to his previous position in coal mining or to work in other industries with equal energy requirements.

Williams also filed the x-ray interpretation report of the August 12, 2014 film by Dr. Michael Alexander dated October 26, 2014. Dr. Alexander read the film as a quality two, and interpreted it as 1/2 for CWP.

A benefit review conference ("BRC") was held on May 28, 2015. At the BRC, the parties identified the existence of CWP as well as extent and duration as the contested issues.

In the July 27, 2015 Opinion and Order, the ALJ summarized the medical records and reports from Drs. Vuskovich, Ammisetty, Skider, Poulos, Westerfield, and Broudy. The ALJ found Williams failed to meet his burden of proof establishing the existence of CWP and dismissed his claim. After reviewing his general authority, the ALJ stated as follows:

Benefits per KRS 342.732: Although the report of Dr. Westerfield is not entitled to presumptive weight pursuant to KRS 342.315(2) since it was not performed by a University Evaluator, the Administrative Law Judge finds the report of Dr. Westerfield to be the most persuasive.

Dr. Westerfield was independently selected by the Commissioner of the Department of Workers' Claims for his evaluation. Dr. Vuskovich was selected by the plaintiff and the defendant submitted the report of Dr. Broudy.

The Administrative Law Judge has considered all of the evidence in accordance with Magic Coal v. Fox, 19 SW 3d 88 (Ky. 2000). The Administrative Law Judge chooses to rely on and is persuaded by the opinion of Dr. Westerfield who was independently selected by the Commissioner of the Department of Workers' Claims and whose opinion was rendered most recently so as to provide the most relevant determination as to the plaintiff's current condition.

Therefore, the ALJ finds the plaintiff has not carried his burden establishing the presence of x-ray evidence of Coal Workers' Pneumoconiosis. Moreover, plaintiff's breeding[sic] studies unanimously show he has no breathing or pulmonary impairment.

Based upon this finding, the other reserved contested issue of benefits under KRS 342.732 is rendered MOOT.

Williams filed a petition for reconsideration asserting the ALJ did not consider the October 26, 2014 report of Dr. Alexander. Williams also argued the weight of the evidence supports a finding of CWP given his testimony and the fact three of the five physicians have diagnosed him with CWP. Williams requested the ALJ consider this evidence, and find he contracted CWP. In the alternative,

Williams states he is entitled to at least medical benefits.

The ALJ denied Williams' petition in a September 4, 2015 order, providing the following additional findings of fact and analysis:

Having considered the plaintiff's petition, the ALJ agrees it was error not to point out that Dr. Alexander's report was also considered. As plaintiff correctly pointed out, Dr. Alexander reread plaintiff's chest x-ray film. He concluded the x-ray demonstrated category 1/2 pneumoconiosis.

Having now referenced the [sic] Dr. Alexander's evidence and having specifically considered it in combination with all the other evidence of record, the administrative law judge remains persuaded by the opinion of Dr. Westerfield, as his was the only opinion of record not solicited by either party. As such, Dr. Westerfield's opinion is still found most persuasive in this instance. Accordingly, the ALJ remains persuaded plaintiff does not have coal workers pneumoconiosis. Plaintiff's petition for reconsideration requesting a contrary finding on this point is denied.

Having concluded plaintiff does not have CWP, it follows that he is not entitled to an award of medical benefits for same and plaintiff's petition for reconsideration on this point is denied as well.

On appeal, Williams argues the ALJ should be required to make additional findings as to why he found Dr. Westerfield's opinion most persuasive. Williams asserts the ALJ's explanation Dr. Westerfield was independently selected by the Commissioner is not a sufficient ground for reliance. Williams further asserts the ALJ erred in stating the opinion of Dr. Westerfield was the only opinion of record not solicited by either party. Williams points out Dr. Poulos saw his x-ray randomly as part of the USDOL federal black lung examination. Williams asserts the ALJ's statement Dr. Westerfield's opinion was rendered most recently is inaccurate. Dr. Alexander interpreted the August 12, 2014 chest x-ray on October 26, 2014.

Williams also argues the ALJ erred in relying on Dr. Westerfield and this has caused a gross injustice. Williams states Dr. Westerfield is not a University Evaluator, and should not be afforded presumptive weight required by 342.315(2). Instead, Williams argues the ALJ had the discretion to, and should have, rejected Dr. Westerfield's opinion in light of the overwhelming evidence of CWP.

Finally, Williams argues the ALJ erred in relying on the evaluation scheduled by the Commissioner in dismissing his claim. Williams argues he should have been

referred to a university evaluation pursuant to Vision Mining, Inc. v. Gardner, 364 S.W.3d 455 (Ky. 2011), KRS 342.315(1) and 342.316(3)(b)4; and not a commissioner evaluation.

As the claimant in a workers' compensation proceeding, Williams had the burden of proving each of the essential elements of his cause of action. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because Williams was unsuccessful in his 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). The function of the Board in reviewing the ALJ's decision is limited to a determination of whether the findings made by the ALJ are so unreasonable based on the evidence they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

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). 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). 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 the weight and credibility to be afforded the evidence or by noting reasonable inferences which otherwise could have been drawn from the record. Whittaker v. Rowland, supra. So long as the ALJ's ruling with regard to an issue is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, supra.

We find Dr. Westerfield's opinion constitutes substantial evidence supporting the ALJ's dismissal of the claim, and no contrary result is compelled. An ALJ is vested with broad authority to decide questions including the presence or absence of an occupational disease. Dravo Lime Co. v. Eakins, 156 S.W.3d 283 (Ky. 2003). Whether an individual has contracted a work-related occupational disease is an 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).

In this instance, differing medical opinions in the record address whether Williams is suffering from CWP. If, "the physicians in a case genuinely express medically sound, but differing opinions as to the severity of a claimant's injury, the ALJ has the discretion to choose which physician's opinion to believe." Jones v. Brasch-Barry General Contractors, 189 S.W.3d 149, 153 (Ky. App. 2006). Williams' arguments discrediting the opinion of Dr. Westerfield go to the weight of the evidence and do not serve to render his opinions unsubstantial. In this instance, the ALJ found Dr. Westerfield's opinion most persuasive. Dr. Westerfield's opinion constitutes substantial evidence supporting the ALJ's determination.

Although contrary evidence exists in the record, a different result is not compelled.

The ALJ provided a sufficient explanation for his reliance upon Dr. Westerfield's report in dismissing Williams' claim. The ALJ explained why he found the opinions of Dr. Westerfield more credible than those of others in the record. While authority generally establishes an ALJ must effectively set forth adequate findings of fact from the evidence in order to apprise the parties of the basis for his decision, he is not required to recount the record with line-by-line specificity nor engage in a detailed explanation of the minutia of his reasoning in reaching a particular result. Shields v. Pittsburgh and Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982); Big Sandy Community Action Program v. Chaffins, 502 S.W.2d 526 (Ky. 1973). Likewise, the ALJ clearly stated he did not afford presumptive weight to Dr. Westerfield since he was not a university evaluator as described in KRS 342.315. The ALJ's decision to rely on the report of Dr. Westerfield falls squarely within the discretion afforded to him.

Finally, Williams failed to properly preserve whether he was entitled to a university evaluation as a contested issue at the BRC. The parties only identified

the existence of CWP, and extent and duration as contested issues at the May 28, 2015 BRC. 803 KAR 25:010 §13(14) provides as follows regarding BRCs: "Only contested issues shall be the subject of further proceedings." We also note Williams did not raise this issue in his petition for reconsideration.

Accordingly, the July 27, 2015 Opinion and Order, and the September 4, 2015 order on petition for reconsideration by Hon. Grant S. Roark, Administrative Law Judge, are **HEREBY AFFIRMED**.

ALL CONCUR.

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