Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: October 16, 2015

CLAIM NO. 201201210

LARRY E. HALEY PETITIONER

VS. **APPEAL FROM HON. R. ROLAND CASE, ADMINISTRATIVE LAW JUDGE**

ICG KNOTT COUNTY, LLC and
HON. R. ROLAND CASE,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

ALVEY, Chairman. Larry E. Haley ("Haley") seeks review of the Opinion and Order rendered April 28, 2015 by Hon. R. Roland Case, Administrative Law Judge ("ALJ") dismissing his coal workers' pneumoconiosis ("CWP") claim against ICG Knott County LLC ("ICG") with an alleged last injurious exposure

date of March 9, 2012. Haley also seeks review of the May 22, 2015 Order denying his petition for reconsideration.

On appeal, Haley argues the ALJ's conclusion is not supported by substantial evidence, and a reversal in his favor is compelled. Because the ALJ's decision is supported by substantial evidence, and a contrary result is not compelled, we affirm.

Haley filed a Form 102 on September 7, 2012 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 March 9, 2012 while employed by ICG. Haley was born on May 26, 1953 and he worked for various coal mines from 1973 through March 9, 2012.

Haley testified by deposition on October 25, 2012, and at the hearing held March 4, 2015. He worked between thirty-six and thirty-eight years in the severance and processing of coal. Of this period, between two and six years of that employment was on the surface. He was employed by ICG in 2006, and began working on the surface there in 2008 or 2009. While working on the surface, he stocked parts, loaded coal trucks, cleaned, and performed myriad other tasks. Haley testified he completed the ninth grade, although the Form 102 indicates he completed the

tenth grade. Haley denied any specialized vocational training, however he obtained foreman papers in 1973 or 1974.

Haley filed a claim for retraining incentive benefits in the 1990's while working for Kiah Creek, but received no award. He stated no doctor has ever told him he has CWP or Black Lung. Haley stated he treated for pneumonia in both 2010 and 2011 and continues to use an inhaler and take breathing treatments. He stated he has also been diagnosed with emphysema. He stated he smoked a half to a full pack of cigarettes daily until he contracted pneumonia in 2010. He admitted he continues to smoke one to two cigarettes per day. He stated he continues to have difficulty breathing, and does not believe he could physically return to the job duties required at ICG due to a combination of shortness of breath and complications from diabetes.

In support of his claim, Haley filed the x-ray report of Dr. Matthew Vuskovich dated May 7, 2012. Dr. Vuskovich classified the film as a quality 1, and interpreted it as 1/2 for CWP. Haley also filed the x-ray interpretation report of the same film by Dr. Michael S. Alexander dated May 23, 2012. Dr. Alexander also read the film as a quality 1 and interpreted it as showing 2/1 for

CWP. Haley later filed pulmonary function studies performed by Dr. Ammisetty[1] with the Highest FVC 64% of predicted value, and the FEV1 as 59% of predicted value. Haley subsequently filed the x-ray report of Dr. J. Randolph Forehand who also reviewed the May 7, 2012 x-ray. Dr. Forehand read the film as 1/2 for CWP. Finally, Haley filed the March 31, 2015 report of the review of the November 20, 2014 x-ray as 2/1 for CWP.

ICG filed the report of Dr. Robert Tarver who read an October 9, 2012 x-ray as a quality 1, and demonstrated no abnormalities consistent with CWP.

Due to the inability to schedule a university evaluation pursuant to KRS 342.316, the Commissioner of the Department of Workers' Claims scheduled an evaluation with Dr. B.T. Westerfield of Commonwealth Respiratory Associates. Dr. Westerfield read an x-ray dated November 20, 2014 as 0/1, and performed pulmonary function studies which yielded the highest FVC as 80% of predicted value and the highest FEV1 as 66% of predicted value. He diagnosed chronic obstructive pulmonary disorder and determined Haley had no disease or impairment due to exposure to coal dust in the severance or processing of coal.

[1] Dr. Amissetty's first name was not provided.

None of the physicians whose reports were introduced were deposed or cross-examined by either party.

A benefit review conference ("BRC") was held January 8, 2015. At the BRC, the parties stipulated Haley had multiple exposure and is no longer working. The issue preserved was benefits per KRS 342.732.

After the parties filed briefs, the ALJ rendered a decision on April 28, 2015 dismissing Haley's claim. Regarding the issue on appeal, the ALJ stated as follows:

> 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. Alexander, Dr. Vuskovich and Dr. Forehand were selected by the plaintiff and Dr. Broudy was selected by the employer. 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. It is therefore found the plaintiff failed in establishing the presence of x-ray evidence of coal workers' pneumoconiosis.

Haley filed a petition for reconsideration on May 8, 2015 noting the ALJ incorrectly referenced Dr. Broudy rather than Dr. Tarver as the report filed by ICG. He also argued the ALJ erred in classifying Dr. Westerfield's interpretation as 0/0 instead of 0/1. He also argued Dr. Westerfield is not a university evaluator and therefore not entitled to preferential weight. He urged the ALJ to reverse his opinion. In an order issued May 22, 2015, the ALJ acknowledged he incorrectly included the name of Dr. Broudy rather than Dr. Tarver. He also noted Dr. Westerfield indeed read the film as 0/1; however this still does not meet the minimum level for the classification of CWP. The ALJ denied the remainder of the petition for reconsideration.

As the claimant in a workers' compensation proceeding, Haley had the burden of proving each of the essential elements of his cause of action, including causation/work-relatedness. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because Haley 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.

Despite Haley's argument to the contrary, 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 both Haley's allegation of suffering from CWP, and ICG's contention he does not. However, 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).

Haley's 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 and his opinion constitutes substantial evidence supporting the ALJ's determination. Although contrary evidence exists in the record, this does not compel a different result.

The ALJ provided a sufficient explanation for his reliance upon Dr. Westerfield's report in dismissing Haley's claim. The ALJ explained why he found the opinions of Dr. Westerfield more credible than those of others in the record. 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.

Accordingly, the Opinion and Order rendered April 28, 2015 and the May 22, 2015 order on reconsideration by Hon. R. Roland Case, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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