Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: October 3, 2014

CLAIM NO. 201273111

LONE MOUNTAIN PROCESSING INC. PETITIONER

VS. **APPEAL FROM HON. WILLIAM J. RUDLOFF, ADMINISTRATIVE LAW JUDGE**

MILLARD W. PERRY, JR., and
HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

ALVEY, Chairman. Lone Mountain Processing, Inc., ("Lone Mountain") seeks review of the Opinion and Order rendered April 21, 2014 by Hon. William J. Rudloff, Administrative Law Judge ("ALJ") finding Millard W. Perry, Jr. ("Perry") entitled to permanent total disability ("PTD") benefits due to low back injuries he sustained on November 1, 2011 and

August 9, 2012 while working as an underground coal miner. The ALJ awarded temporary total disability ("TTD") benefits from August 13, 2012 through May 21, 2013 at the rate of $736.19 per week, PTD benefits, medical benefits, and referred Perry for a vocational rehabilitation evaluation. Lone Mountain also seeks review of the May 22, 2014 order denying its petition for reconsideration.

On appeal, Lone Mountain argues the ALJ erred in awarding both PTD benefits and vocational rehabilitation benefits. Because we determine the ALJ's determination is supported by the evidence, and he minimally set forth the basis for his reasoning, we affirm.

Perry filed a Form 101 on October 3, 2013, alleging he injured his low back on two occasions while working for Lone Mountain. He alleged he injured his low back on November 1, 2011 "flipping over a wheel unit." He alleged he injured his low back a second time on August 9, 2012 as he was lifting a tool box. Perry's work history indicates he was a machine operator in a factory before he began working in the coal mines in 1993. His work as a coal miner involved operating a bridge, operating equipment, operating the miner, and as an electrician. He is a high school graduate, and he has mining papers allowing him to work as an electrician.

Perry testified at the hearing held on March 26, 2014. He stated in the factory jobs he held prior to working as a coal miner, he was on his feet eight hours per day. He currently has pain from the middle to the right side of his low back all the time, and also has pain in his right leg and foot. He stated the pain never diminishes, and he takes multiple medications including Lortab. He wears a back brace, and uses a cane. He stated the pain prevents him from walking long distances, and he can lift no more than a gallon of milk without causing pain. He treats with Dr. William Platt for his pain, which he stated has worsened.

Perry stated he can no longer engage in activities such as four-wheeling and vehicle repair which he enjoyed prior to the accidents. He stated he is unable to return to work either in the factories or coal mines due to his current condition. Perry indicated he is interested in vocational rehabilitation.

In support of his claim, Perry attached the August 21, 2013 Form 107-I report of Dr. Anbu K. Nadar, an orthopedic surgeon who examined him on July 2, 2013. Dr. Nadar recited the history of injuries occurring on November 1, 2011 and August 9, 2012. He also noted surgeries consisting of a decompressive laminectomy surgery and a

subsequent fusion at L4-L5. He stated Perry's injuries caused his complaints. He opined Perry had reached maximum medical improvement ("MMI"), and assessed a 31% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides") for Perry's work-related injuries. Dr. Nadar stated Perry does not retain the capacity to return to the type of work performed on the date of injury. He restricted Perry from heavy lifting, frequent bending, twisting, turning, prolonged walking, prolonged sitting, prolonged standing, or activities of such nature.

Perry also filed records from Dr. Jody Helms, a neurosurgeon, for treatment from November 28, 2011 through June 11, 2013. Those records included reports from radiographic and imaging studies. Dr. Helms stated Perry was initially seen in 2011 for a work-related back injury. Perry responded well to an epidural steroid injection and was released to return to work with no restrictions. Perry again injured his back on August 9, 2012. Dr. Helms performed a right L5 laminotomy with discectomy on August 24, 2012. A large herniated disk was found beneath the S1 nerve root deflecting it posteriorly. Perry continued to complain of low back pain, and Dr. Helms performed a fusion surgery on November 28, 2012. On May 23, 2013, Dr. Helms

stated Perry had reached MMI, and assessed a 30% impairment rating pursuant to the AMA Guides. Dr. Helms opined Perry was limited to lifting no more than twenty pounds, and could occasionally bend and stoop. A functional capacity evaluation was ordered.

Perry also filed records from the Harlan Appalachian Regional Hospital for treatment he received in the emergency room on November 1, 2011. An MRI dated November 18, 2011 revealed he had no disc herniation at that time, however he had degenerative disk disease at L3-L4 and L4-L5.

Perry also filed the Form 107-P report from Dr. Leigh Ann Ford, Ph.D., a psychologist who evaluated him on January 24, 2014. Dr. Ford diagnosed Perry with a pain disorder related to a general medical condition, depressive disorder not otherwise specified, and a generalized anxiety disorder. She stated his GAF at the time of the evaluation was 61. She opined Perry's psychological condition was caused by his work injury. Based upon the 5th and 2nd Editions of the AMA Guides, she assessed a 5% impairment rating for his psychological condition.

Dr. Gregory Snider evaluated Perry on December 20, 2013 at Lone Mountain's request, and testified by deposition on January 2, 2014. He noted the history of Perry's two

injuries and surgeries. He stated Dr. Helms improperly utilized the AMA Guides in arriving at the 30% impairment rating. He stated Dr. Nadar properly applied the range of motion method in arriving at the 31% impairment rating assessed. Dr. Snider assessed a 23% impairment rating pursuant to the AMA Guides. He stated Perry should avoid lifting, pushing or pulling greater than thirty pounds, with no repetitive bending or lifting, and should be allowed to change positions. He detected muscle spasm on physical examination which is consistent with Perry's complaints of back pain. He stated Perry could not return to his previous job with his restrictions, but there is no anatomical reason preventing his return to some type of employment.

Dr. David Shraberg, a psychiatrist, testified by deposition on March 6, 2014. Dr. Shraberg evaluated Perry at Lone Mountain's request on February 2, 2014. Perry has no psychiatric or psychological complaints on the date of the evaluation. He also had no memory problems. Perry complained of financial stress. He was taking no psychiatric medications, and was not pursuing anything vocationally. Dr. Shraberg stated there is no evidence Perry suffers from any psychiatric impairment, and there is no need for medications or counseling other than vocational counseling. In his February 18, 2014 report attached to the

deposition, Dr. Shraberg stated Perry has an adjustment disorder of adult lift associated with occupational uncertainty secondary to his injury of August 9, 2012. He noted Perry's GAF was 75. He further stated Perry needed physical rehabilitation to return to the workforce.

Dr. Ralph Crystal, a vocational expert, evaluated Perry at Lone Mountain's request on August 22, 2013. He stated Perry has the ability to perform a wide range of jobs in a competitive labor market and is not disabled from all employment.

A benefit review conference ("BRC") was held on March 13, 2014. The BRC order and memorandum reflects the contested issues were work-relatedness/causation, benefits per KRS 342.710, vocational rehabilitation benefits and whether Perry is permanently totally disabled.

The ALJ rendered his decision on April 21, 2014. The ALJ recited the evidence, and determined Perry was entitled to TTD benefits from "August 13, 2012 to and including May 21, 2013." The ALJ also awarded PTD benefits beginning May 22, 2013, and terminating when he qualifies for normal old age Social Security retirement benefits pursuant to KRS 342.730(4). The ALJ also awarded medical benefits pursuant to KRS 342.020, and referred Perry for a vocational evaluation.

In its petition for reconsideration, Lone Mountain argued the ALJ erred in finding Perry totally disabled. Lone Mountain also requested additional findings regarding the facial expressions, voice tones, and body language exhibited by Perry at the hearing which the ALJ referenced in his decision. Lone Mountain also requested the ALJ state with specificity the purpose of citing to the apparently superfluous comments from Judge E. R. Mills of Florida in Singletary v. Mangham Construction, 418 So. 2d 1138 (Fla. 1st DCA, 1982).

In his order denying Lone Mountain's petition for reconsideration, the ALJ addressed the issues raised. Regarding Judge Mill's comments, the ALJ stated this was included to stress the importance of worker's compensation law.

On appeal, Lone Mountain argues the ALJ's award of PTD benefits and vocational rehabilitation benefits is inconsistent. We disagree. As the claimant in a workers' compensation proceeding, Perry had the burden of proving each of the essential elements of his cause of action. *See* KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Perry was successful in his burden, the question on appeal is whether substantial evidence existed in the record supporting 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 discretion to determine 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). Although a party may note evidence supporting a different outcome than that reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974).

The function of the Board in reviewing an ALJ's decision is limited to determining whether the findings made are so unreasonable under the evidence they must be

reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, supra. 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 other conclusions or reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). 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, 708 S.W.2d 641, 643 (Ky. 1986).

Here the evidence relied upon by the ALJ supports the award of PTD benefits. In his opinion, the ALJ specifically noted Perry's complaints of pain, the fact he uses a both a cane and a back brace, and his difficulty walking. The ALJ noted based upon both the medical evidence and Perry's testimony, he is incapable of returning to his previous employment or any full time work. The ALJ's decision is supported by substantial evidence, and he provided a basis for his determination. The ALJ is not bound by Dr. Crystal's opinion regarding Perry's ability to work. Therefore the ALJ's award of PTD benefits will not be disturbed.

Regarding the referral for a vocational evaluation, again the ALJ's decision will not be disturbed. KRS 342.710, in relevant part, states as follows:

> (1) One of the primary purposes of this chapter shall be restoration of the injured employee to gainful employment, and preference shall be given to returning the employee to employment with the same employer or to the same or similar employment.
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> …
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> (3) An employee who has suffered an injury covered by this chapter shall be entitled to prompt medical rehabilitation services for whatever period of time is necessary to accomplish physical rehabilitation goals which are feasible, practical, and justifiable. When as a result of the injury he or she is unable to perform work for which he or she has previous training or experience, he or she shall be entitled to such vocational rehabilitation services, including retraining and job placement, as may be reasonably necessary to restore him or her to suitable employment. In all such instances, the administrative law judge shall inquire whether such services have been voluntarily offered and accepted. The administrative law judge on his or her own motion, or upon application of any party or carrier, after affording the parties an opportunity to be heard, may refer the employee to a qualified physician or facility for evaluation of the practicability of, need for, and kind of service, treatment, or training necessary and appropriate to render him or her fit for a remunerative occupation.

Here the ALJ determined Perry could not return to his previous employment. Therefore, we find no error in referring him for a vocational evaluation, despite the award of PTD benefits. If Perry at some point is able to return to employment, Lone Mountain's remedy lies in KRS 342.125(3). However, as stated above, we find no error in the ALJ's referral for an evaluation pursuant to KRS 342.710(3).

Accordingly, the April 21, 2014 Opinion and Order, the May 22, 2014 Opinion and Order on Reconsideration rendered by Hon. William J. Rudloff, Administrative Law Judge, are hereby **AFFIRMED.**

ALL CONCUR.

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