

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: March 27, 2015

CLAIM NOS. 201400496 & 201400495

MCCOY ELKHORN COAL CORP

PETITIONER

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

DONALD LOWE
HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING IN PART
AND REMANDING

* * * * *

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

RECHTER, Member. McCoy Elkhorn Coal Corporation ("McCoy") appeals from the September 17, 2014 Opinion and Award and the November 4, 2014 Order on Petition for Reconsideration rendered by Hon. Jonathan R. Weatherby, Administrative Law Judge ("ALJ"). The ALJ awarded Donald Lowe ("Lowe") permanent total disability benefits and medical benefits for

cumulative trauma injuries to his neck, back, bilateral shoulders, upper extremities, and bilateral hips.¹ McCoy argues the ALJ erred in finding timely notice was given of Lowe's spine injury, erred in finding an injury as defined by the Workers Compensation Act (the "Act"), and erred in awarding permanent total disability benefits. For the reasons set forth herein, we affirm in part and remand for further fact finding.

Lowe was born August 1, 1961 and is a high school graduate and certified electrician. He worked in the coal mining industry, performing a variety of jobs, from 1979 until September, 2013. The ownership of the mine changed numerous times over the 34 years, but Lowe remained an employee with no changes. For the final nine months of his employment he worked as a belt examiner, which required him to inspect and service all the belts going into the mine. For the preceding three years, he worked as a safety tech, which involved enforcing safety regulations, investigating violations, and accompanying injured employees to the hospital. Prior to his role as a safety tech, he performed manual labor in the mines. He worked in coal seams 28 to 42 inches high, and was required to crawl or duck walk.

¹ Lowe also filed a claim for hearing loss which does not relate to the issues on appeal, and therefore will not be discussed.

Lowe was laid off work on September 4, 2013. He filed a Form 101 on February 28, 2014, alleging cumulative trauma injuries to his neck, back, hips, left and right upper extremities, and left and right lower extremities. He attached a medical statement from Dr. Dale Williams, a chiropractor, dated October 24, 2013. Dr. Williams diagnosed cerviclagia with widespread moderate/severe degeneration throughout the cervical spine. He also diagnosed shoulder and mid back pain, lumbalgia with moderate degeneration throughout the lumbar spine, and radiculitis in both lower extremities. He opined these conditions are "consistent with the occupational hazard of the mining industry with 34+ years as a coal miner."

McCoy introduced the medical records of Dr. Paul Maynard from 2002 through 2013. In 2002, Lowe reported severe back pain and was prescribed pain medication. He next complained of back pain on October 8, 2013. Lowe followed up with Dr. Maynard on October 29, 2013 and November 26, 2014, and both times reported his back pain had worsened. Lowe testified Dr. Maynard restricted him from heavy lifting during the last nine months of his employment, although there is no indication of such restriction in the medical records.

Following his layoff, Lowe also began seeing Dr. Sujata Gutti, a neurologist. A nerve conduction study of both legs was performed on November 21, 2013. Dr. Gutti concluded the findings are consistent with bilateral tibial neuritis, with no evidence of radiculopathy. A lumbar MRI was performed on December 4, 2013. The report of the scan indicates Lowe's "disc spaces are normal in height. There is slight desiccation of the disk material between L3 and S1. No herniated disks are seen. The spinal canal is normal in caliber."

Dr. Arthur Hughes performed an independent medical evaluation ("IME") on March 27, 2014 at Lowe's request. Dr. Hughes performed a physical examination and reviewed medical records including diagnostic studies. He diagnosed neck pain with radicular symptoms, bilateral ulnar neuropathy, right shoulder pain with restricted range of motion, left shoulder pain with restricted range of motion, lower back pain with radicular symptoms, and bilateral hip pain. He determined Lowe's complaints were caused by his work. He assessed a 37% whole person impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"). Dr. Hughes further opined Lowe does not retain the physical capacity to return to the type of work performed at the time

of the injury. In a supplemental questionnaire, Dr. Hughes stated Lowe had no pre-existing active disability prior to being employed by his most recent employer. Rather, Lowe's disability was brought about because of his most recent employment.

Dr. Daniel Primm performed an IME on May 16, 2014 at McCoy's request. Dr. Primm conducted a physical examination and medical records review. He diagnosed chronic complaints of neck and back pain, mechanical in nature, with no evidence of significant pathology. He interpreted the MRI scan as normal for a person of Lowe's age. He found no evidence of harmful trauma to the neck, back or shoulders, and assessed no impairment rating pursuant to the AMA Guides.

Lowe testified he visited his family physician, Dr. Baretta Casey, for back pain. He could not recall exactly when he visited Dr. Casey, but estimated it was more than ten years prior. He recalled she prescribed him arthritis medication and pain medication for his back pain. According to Lowe, Dr. Casey told him his back pain was due to "working, overexposure."

As to his current symptoms, Lowe testified he has throbbing pain in his neck, which has gradually worsened over time. It runs from his neck through his shoulders and

into his arms. He has lower back pain that shoots into his legs and hips. He continues to treat with Dr. Gutti for his back, hip and leg pain. In the months leading up to the layoff, he was unable to perform all of his duties and relied on coworkers for assistance. He did not believe he is physically capable of returning to his prior employment.

The ALJ was most persuaded by Dr. Hughes' opinion, and relied thereon to find Lowe had suffered work-related injuries as defined by KRS Chapter 342. He adopted Dr. Hughes' 37% whole person impairment rating resulting from cumulative trauma to the neck, bilateral shoulders, upper extremities, back, and bilateral hips. The ALJ then determined Lowe is permanently totally disabled.

Relying on Lowe's testimony concerning his treatment with Dr. Casey for back pain over ten years ago, McCoy raised a notice and statute of limitations argument. In the Opinion and Award, the ALJ noted Lowe provided written notice on February 25, 2014 and filed his claim on February 28, 2014. He then concluded due and timely notice was provided. In the Order denying McCoy's petition for reconsideration, the ALJ elaborated:

[McCoy] argues that because [Lowe] testified that he was told by his primary care physician approximately ten years prior that he had arthritis that was probably work related. The Supreme

Court of Kentucky addressed a similar issue in KenAmerican Resources, Inc. v. Warren, 2014 WL 2810960 (Ky. 2014), wherein the Plaintiff was told by a physician that he had developed an injury due to years of hitting his head on the mine ceiling but was not restricted from work and actually kept working. Likewise in this case, [Lowe] was told that he had arthritis that was probably related to work but was not taken off work and continued working for up to ten years.

The ALJ finds that [Lowe] in this case actually has a stronger case than the one in KenAmerican Resources, supra. [Lowe] testified to a general reference that he had arthritis that is probably related to work. The ALJ finds that this testimony does not establish that he was diagnosed with a harmful change to the human organism giving rise to the need for the giving of notice or triggering the tolling of the statute of limitations.

McCoy appeals, raising two issues. It argues the ALJ erred in finding Lowe provided timely notice of his spine claim, and that the statute of limitations should apply. It also challenges the findings an injury occurred, and Lowe is permanently totally disabled.

In a cumulative trauma injury claim, notice and filing requirements are triggered by the date the injury manifests itself. A cumulative trauma injury manifests when the worker is informed by a physician that he has an injury and it is work-related. Hill v. Sextet Mining Corp., 65

S.W.3d 503, 507 (Ky. 2001). McCoy argues Lowe's conversation with Dr. Casey triggered the notice and filing requirements, because he testified Dr. Casey informed him his arthritis and resulting back pain are work-related at least ten years ago. Its argument on appeal also implies the ALJ rejected this testimony because Dr. Casey was not an IME physician.

There is no indication the ALJ rejected Lowe's testimony simply because Dr. Casey was not an IME physician. Rather, he did not believe Lowe's "general reference" to Dr. Casey's statement constituted conclusive proof of "manifestation." Indeed, no records from Dr. Casey were introduced, and no physician who has recently treated Lowe diagnosed arthritis. Instead, the ALJ determined Lowe's cumulative trauma injury manifested on the date of the examination by Dr. Hughes, March 27, 2014.

The ALJ is the fact-finder, and has the authority to determine the weight of the evidence. Square D Company v. Tipton, 862 S.W.2d 308 (Ky. 1993). Here, the ALJ did not believe Lowe's testimony was sufficient to establish he had been informed of an injury and that it was work-related. Because the inferences drawn from this evidence are reasonable, the ALJ did not abuse his discretion. Ira A.

Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

McCoy next argues the ALJ erred in finding an injury as defined by the Act. It points to the fact Lowe only began treating for his cumulative trauma injuries after he was laid off. It also attacks the sufficiency of Dr. Hughes' report, arguing his opinion is based solely on subjective findings. McCoy further argues the ALJ's findings of fact on this issue are insufficient, because he did not assign a specific impairment rating for each injured body part.

Because Lowe successfully established he suffered cumulative trauma injuries, 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).

Dr. Hughes' opinion constitutes the requisite substantial evidence to support the ALJ's determination Lowe suffered cumulative trauma injuries to his neck, bilateral shoulders, upper extremities, back, and hips. Dr. Hughes conducted a physical examination, including range of motion

testing, and reviewed diagnostic studies, including the MRI, nerve conduction study, and x-rays. Objective medical findings, as required by KRS 342.0011(33), includes "information gained through direct observation and testing of the patient applying objective or standardized methods."

McCoy attacks several aspects of Dr. Hughes' report, including his method of range of motion testing, his identification of diagnostic studies upon which he relied, and his reliance on Lowe's subjective complaints of pain. It also argues Dr. Hughes failed to adequately explain why Lowe's range of motion testing was abnormal, and why any spine changes are not simply age-related. However, McCoy's challenge to Dr. Hughes' report goes to the weight of the evidence, not the sufficiency. The ALJ was more persuaded by Dr. Hughes than Dr. Primm, and stated his reason for rejecting Dr. Primm's report. McCoy has identified legitimate reasons why the ALJ might have chosen to reject Dr. Hughes' report. However, such is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). Rather, it must be shown there was no evidence of substantial probative value to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986). Combined with Lowe's testimony, which the ALJ found "extremely credible", Dr. Hughes' report is substantial

evidence supporting the ALJ's conclusion Lowe suffered cumulative trauma injuries.

McCoy also argues the ALJ erred by failing to assign a specific impairment rating for each individual body part included in the cumulative trauma injury. After stating his reliance on Dr. Hughes' opinion, the ALJ found Lowe

has a 37% whole person impairment as a result of cumulative trauma including neck pain with radicular symptoms, right ulnar neuropathy, left ulnar neuropathy, right shoulder pain and restricted range of motion, left shoulder pain and restricted range of motion, lower back pain with radicular symptoms, right hip pain, and left hip pain.

The ALJ also explained why he rejected Dr. Primm's report, and adopted Dr. Hughes' opinion. Given that these were the only two IME reports submitted, the ALJ may have intended to adopt Dr. Hughes' report in total, including the individual impairment ratings used to reach a whole person impairment of 37%. However, this Board has no fact-finding authority and, therefore, may not speculate as to the ALJ's intentions. Therefore, we must remand this matter and request the ALJ to assign a specific impairment rating to each cumulative trauma injury. Though the assignment of specific impairment ratings may not affect Wireman's current

award, it is necessary in the event of future litigation of this claim.

Finally, McCoy argues the evidence is insufficient to establish Lowe is permanently totally disabled. The Workers' Compensation Act states that a permanent total disability "means the condition of an employee who, due to an injury, has a permanent disability rating and has a complete and permanent inability to perform any type of work as a result of an injury." KRS 342.0011(11)(c). The factors that an ALJ must consider in determining whether an individual claimant is permanently and totally occupationally disabled are set forth in Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky.2000). They include: the worker's post-injury physical, emotional, intellectual, and vocational status and how those factors interact; a consideration of the likelihood that the particular worker would be able to find work consistently under normal employment conditions; whether the individual will be able to work dependably; and whether the worker's physical restrictions will interfere with vocational capabilities. *Id.* "An analysis of the factors set forth in KRS 342.0011(11)(b), (11)(c), and (34) clearly requires an *individualized determination* of what the worker is and is not able to do after recovering from the work injury."

McNutt Construction/First General Services v. Scott, 40 S.W.3d 854, 860 (Ky.2001).

The ALJ stated he considered Lowe's advanced age, and the fact he had worked as a coal miner since the age of 17. He noted the restrictions recommended by Dr. Hughes, including no repetitive bending, twisting of the neck or back, no use of the arms above shoulder level, and no tasks involving repetitive hand use. Additionally, the ALJ referenced Lowe's testimony that, in the months leading up to his layoff, he was unable to fully perform his duties as a belt examiner and relied on colleagues to assist him. He missed several days of work prior to his layoff, and doubted he would have been physically able to continue working much longer, regardless of the layoff. Finally, the ALJ considered Lowe's "limited work history", which is confined solely to work at the coal mine.

Based on these factors, the ALJ concluded Lowe will be unable to provide work on a regular and sustained basis in a competitive economy. The ALJ articulated substantial evidence, outlined above, which supports this conclusion. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986). McCoy has identified other circumstances, such as Lowe's experience as a safety tech which is a non-physical position, which might direct a different result.

Furthermore, while Lowe was working until the time of his layoff, as McCoy emphasizes, he testified he was unable to perform all of his duties without assistance. McCoy has simply noted evidence supporting a different outcome than reached by an ALJ and such is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). Because the ALJ identified substantial evidence supporting the conclusion Lowe is permanently totally disabled, the award of benefits will not be disturbed.

For the foregoing reasons, the September 17, 2014 Opinion and Award and the November 4, 2014 Order on Petition for Reconsideration rendered by Hon. Jonathan R. Weatherby, Administrative Law Judge, are hereby **AFFIRMED IN PART AND REMANDED** for further fact finding.

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON TERRI SMITH WALTER
PO BOX 1167
PIKEVILLE, KY 41502

COUNSEL FOR RESPONDENT:

HON MCKINNLEY MORGAN
921 SOUTH MAIN ST
LONDON, KY 40741

ADMINISTRATIVE LAW JUDGE:

HON. JONATHAN R. WEATHERBY
PREVENTION PARK
657 CHAMBERLIN AVE
FRANKFORT, KY 40601