Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: September 11, 2015

CLAIM NO. 201200390

NALLY & HAMILTON ENTERPRISES, INC. PETITIONER

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

MALCOLM ASHER and
HON. R. ROLAND CASE,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

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

ALVEY, Chairman. Nally & Hamilton Enterprises Inc. ("Nally & Hamilton") seeks review of the Opinion, Award and Order rendered March 23, 2015 by Hon. R. Roland Case, Administrative Law Judge ("ALJ") finding Malcolm Asher ("Asher") contracted coal workers' pneumoconiosis ("CWP") during his employment with a last injurious exposure date of

July 23, 2007. The ALJ awarded Retraining Incentive Benefits ("RIB") pursuant to KRS 342.732(1)(a)1 because the results of the pulmonary function studies were above 80% of predicted values. Nally & Hamilton also seeks review of the May 22, 2015 Order denying its petition for reconsideration.

On appeal, Nally & Hamilton argues the ALJ erred in affording presumptive weight to the opinions rendered by Dr. Sanjay Chavda. Nally & Hamilton additionally argues Dr. Chavda's opinion is invalidated due to his reliance upon the x-ray interpretation of Dr. Crum[1] who is biased in favor of diagnosing CWP. Because we determine the ALJ did not improperly afford presumptive weight to the opinion of Dr. Chavda, and his decision is supported by substantial evidence, we affirm.

Asher filed a Form 102 on March 19, 2012 alleging he contracted CWP due to his exposure to coal dust in the course and scope of his employment as a dozer operator in the coal mining industry with his last injurious exposure occurring on July 23, 2007 while employed by Nally & Hamilton. Asher was born on July 18, 1951 and worked for various coal mines from 1985 through July 23, 2007. Asher stated he earned $18.50 per hour for a 58 hour work week.

[1] This physician is referenced only as Dr. Crum throughout the file, and no first name is provided.

Asher testified at the hearing held February 12, 2015. He worked for thirty-three and one-half years in the coal mining industry as a surface miner, primarily operating a bulldozer. The last twenty-two years he worked for Nally & Hamilton. He primarily worked in overburden and breathed coal, sand and rock dust. He has difficulty breathing when walking or climbing, and has occasional coughing. He carries an inhaler with him which he uses periodically. He does not believe he could physically return to the job duties required at Nally & Hamilton.

In support of his claim, Asher filed the x-ray report of Dr. Glen Baker dated February 25, 2012 which he classified as a quality 1, and interpreted as 1/1 for CWP in five lung zones. Asher subsequently filed the reports of the pulmonary function studies administered by Dr. Baker on February 25, 2014.

Nally & Hamilton filed the June 18, 2012 report of Dr. Alexander Poulos who read an x-ray, which he stated was a film quality 1, as negative for CWP. Nally & Hamilton also filed the report of Dr. Ralph Shipley dated January 2, 2015, who reviewed the October 23, 2014 x-ray as film quality 2 and demonstrated no findings consistent with CWP. Nally & Hamilton also filed the January 13, 2015 report of Dr. Christopher Meyer who reviewed the October 23, 2014 film

as a quality 2 and demonstrated no findings consistent with CWP.

Dr. Chavda examined Asher on October 23, 2014 upon direction of the Commissioner of the Kentucky Department of Workers' Claims by scheduling order dated September 28, 2014 directing an evaluation to be performed at the Muhlenberg Community Hospital – Coal Miner's Respiratory Clinic in Greenville, Kentucky. Dr. Chavda completed a Form 108-CWP report. He determined Asher had no pulmonary impairment. However, he determined there was the presence of CWP resulting from coal dust in the severance and processing of coal. Attached to the report was the x-ray interpretation of Dr. Crum stating the October 23, 2014 x-ray was a film quality 1 which he interpreted as 1/1 for the presence of CWP with opacities in all six lung zones.

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

A benefit review conference ("BRC") was held telephonically on December 18, 2014. At the BRC, the parties stipulated Asher had thirty-three years of coal dust exposure, with a last exposure date of July 23, 2007 while working for Nally & Hamilton. The issues preserved were benefits per KRS 342.732 and the correct calculation of the average weekly wage.

After the parties filed briefs, the ALJ rendered a decision on March 23, 2015 awarding RIB benefits pursuant to KRS 342.732(1)(a)1. Regarding the issue on appeal, the ALJ stated as follows:

> Although the report of Dr. Chavda **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. Chavda to be the most persuasive. Dr. Chavda was independently selected by the Commissioner of the Department of Workers' Claims for his evaluation. Dr. Baker was selected by the plaintiff and Dr. Poulos, Dr. Shipley, and Dr. Meyer were 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. Chavda who was independently selected by the Commissioner of the Department of Workers' Claims.
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> It is further found the plaintiff has established the presence of x-ray evidence of coal workers' pneumoconiosis Category 1/1, however, the pulmonary function studies were above 80% and the plaintiff will only be entitled to a Retraining Incentive Benefit pursuant to KRS 342.732(1)(a)1. (Emphasis added).

Nally & Hamilton filed a petition for reconsideration on April 1, 2015 arguing the ALJ erred in relying upon the opinions of Drs. Chavda and Crum. It

argued Dr. Crum's opinion is not credible. Nally & Hamilton noted statistical data regarding Dr. Crum's interpretations, but did not confront him with that information. Nally & Hamilton also referenced reports regarding the prevalence of CWP. The ALJ issued an order on May 22, 2015 overruling the petition for reconsideration. The ALJ provided the basis for his determination, and noted reasons why he relied upon report of Dr. Chavda.

As the claimant in a workers' compensation proceeding, Asher 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 Asher 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, 34 S.W.3d 48 (Ky. 2000). 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 ALJ provided a sufficient explanation for his reliance upon Dr. Chavda's report in determining Asher is entitled to benefits pursuant to KRS 342.732(1)(a)1. The ALJ explained why he found the opinions of Dr. Chavda more credible than those of others in the record. Likewise, the ALJ clearly stated he did not afford presumptive weight to Dr. Chavda since he was not a university evaluator as described in KRS 342.315. The ALJ's decision to rely on the report of Dr. Chavda falls squarely within the discretion afforded to him. While Nally & Hamilton argues statistical data supports its position, it is noted neither Dr. Chavda nor Dr. Crum were cross-examined, nor is there any opinion presented which directly outlines deficiencies in their opinions. In this instance, Dr. Chavda's report constitutes substantial evidence upon which the ALJ could rely, and his decision will not be disturbed. It is noted constitutional issues have been raised which this Board cannot address. Those issues are acknowledged and preserved for appeal to the Kentucky Court of Appeals.

Accordingly, the opinion, award and order rendered March 23, 2015 and the May 22, 2015 order on reconsideration

by Hon. R. Roland Case, Administrative Law Judge, are **AFFIRMED**.

ALL CONCUR.

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