OPINION ENTERED: July 25, 2012

CLAIM NO. 201101315

PAULA ROOP PETITIONER

VS. **APPEAL FROM HON. RICHARD M. JOINER, ADMINISTRATIVE LAW JUDGE**

AK STEEL CORPORATION
and HON. RICHARD M. JOINER,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

STIVERS, Member. Paula Roop ("Roop") seeks review of the March 28, 2012, opinion, order, and award of Hon. Richard M. Joiner, Administrative Law Judge ("ALJ") finding Roop sustained a work-related hearing loss while in the employ of AK Steel Corporation ("AK Steel") and awarding only

medical benefits. Roop also appeals from the April 17, 2012, order denying her petition for reconsideration.

Rejecting the opinion of the university evaluator and relying upon the opinions of Dr. Joseph B. Touma, the ALJ found Roop had a 5% impairment as a result of a work-related hearing loss. After citing KRS 342.7305 and KRS 342.315, the ALJ provided the following explanation for rejecting the opinions of the university evaluator, Dr. Raleigh O. Jones:

> This section, as stated in *Magic Coal Company v. Fox, Ky., 19 S.W.3d 88 (2000)* does not evince a legislative intent for the clinical findings and opinions of a university evaluator to be conclusive. It anticipates that the opponent of a university evaluator's report may introduce countervailing evidence which will overcome the report. It does require the Administrative Law Judge to specifically state the reasons for rejecting the finding or opinion of a university evaluator. In this case, I reject the opinion of the university evaluator and instead find that the report of Dr. Touma is a more accurate assessment of the impairment that is attributable to noise exposure in the workplace. I do so for several reasons. First, Dr. Jones did not have a full family history from the plaintiff. Second, the shape of the curve produced by the audiogram is one that is not generally consistent with noise induced hearing loss. Dr. Jones acknowledged that those two things were important in assessing the cause of a hearing loss. In the absence of

> another explanation, Dr. Jones opted to attribute the hearing loss to the employment. He appeared to do so reluctantly by being unable to identify other causes. In his deposition Dr. Jones expressed concern about attributing the hearing loss to noise. The pattern of hearing loss was not typical for noise induced hearing loss. Also, Ms. Roop is younger than most to develop a sensorineural hearing loss from noise exposure. On the other hand Dr. Touma stated quite clearly that the low frequency hearing loss has nothing to do with noise exposure. This warrants adjusting the results of the test which reduces the impairment. I accept the opinion of Dr. Touma and I find that the work-related portion of Ms. Roop's hearing loss is 5%.

Accordingly, since Roop's impairment rating was less than the mandatory 8% threshold set forth in KRS 342.730(5), no income benefits were awarded. Roop filed a petition for reconsideration making the same arguments she now makes on appeal. The ALJ overruled her petition for reconsideration.

On appeal, Roop asserts the ALJ erred in rejecting the opinions of the university evaluator, Dr. Jones, and in relying upon the opinions of Dr. Touma. Roop asserts that while the ALJ rejected the opinions of Dr. Jones because he did not have a full family history, a review of Dr. Touma's report reflects Dr. Touma likewise had no family history of hearing loss. Roop asserts there

is no medical evidence indicating the lack of a family history would affect an opinion as to the cause of the hearing loss; therefore, the ALJ did not have a valid reason for rejecting Dr. Jones' opinion. Roop asserts the testing performed by Dr. Jones revealed "a pattern of hearing loss compatible with that caused by hazardous noise exposure consistent with KRS 342.7305(4)." Further, since Dr. Touma provided no basis for his opinion that the audiogram and other testing did not establish a pattern of hearing loss compatible with that caused by hazardous noise exposure in the workplace, it was unreasonable for the ALJ to accept Dr. Touma's opinion "as to the shape of the audiogram and the pattern of hearing loss and to reject Dr. Jones' opinion."

Roop also argues the evidence does not establish "younger individuals" cannot develop work-related hearing loss. Further, Roop argues Dr. Touma did not provide an explanation why her low frequency hearing loss "could not have been caused or contributed to by her occupational noise exposure." Likewise, Roop asserts Dr. Touma did not provide an alternative explanation for the cause of the low frequency hearing loss. Therefore, she argues the ALJ erred by not relying on Dr. Jones' opinion. Roop asserts

the decision of the ALJ should be reversed and remanded for entry of an award consistent with the opinion of Dr. Jones.

KRS 342.315(2) reads as follows:

> (2) The physicians and institutions performing evaluations pursuant to this section shall render reports encompassing their findings and opinions in the form prescribed by the commissioner. Except as otherwise provided in KRS 342.316, the clinical findings and opinions of the designated evaluator shall be afforded presumptive weight by administrative law judges and the burden to overcome such findings and opinions shall fall on the opponent of that evidence. When administrative law judges reject the clinical findings and opinions of the designated evaluator, they shall specifically state in the order the reasons for rejecting that evidence.

During his February 3, 2012, deposition, Dr. Raleigh Jones, the University Evaluator, testified Roop had moderate to moderately severe sensorineural hearing loss in both ears. Dr. Jones acknowledged Roop provided a history of only her grandmother having hearing problems resulting in the need for hearing aids. Roop said nothing about her father's hearing loss.[1] Dr. Jones characterized Roop as "young for a patient with hearing loss," and stated it is

[1] The record reflects Roop characterized her father's hearing loss as a "little bit" of hearing loss.

particularly important to evaluate the family history in a patient such as Roop. Dr. Jones explained as follows:

> A: Well, I think that there's two reasons in Mrs. Roop's case:
>
> The first is that she is younger than most to develop a sensorineural hearing loss from noise exposure. I didn't say in all, but I said in most.
>
> And the second is that I was concerned because the pattern of her hearing loss was not typical for noise-induced hearing loss. It would be more typical of some other problem. And that's where my evaluation was really directed, to see if I could find some other problem that might explain her hearing loss. I was unable to find one, and hence my conclusion that I thought she did most likely have a noise-induced hearing loss.
>
> But those were the two areas of concern in her evaluation.

Dr. Jones also testified Roop had explained to him "her noise exposure in recent years was not nearly as great as that previously." Roop advised him there were still times when she would work around the coal ovens for up to eight continuous hours and would be exposed to loud noise. Dr. Jones also stated since Roop's exposure to loud noise did not occur on a regular basis there would be less danger to her. Regarding his concerns about the test results, Dr. Jones testified as follows:

Q: Would you agree that over the course of time audiologists and otolaryngologists have determined that hearing loss is documented in the 3 to 4,000 hertz range as opposed to the lower frequency ranges – I'm sorry – noise-induced hearing loss?

A: Noise-induced hearing loss is typically greater in the higher frequencies. So that's the classic pattern that I had spoken of earlier, where in most patients who have a noise-induced hearing loss, the high frequencies are affected significantly more than the lower frequencies are.

Q: Okay.

A: In Mrs. Roop's case, that's only slightly so. Her higher frequencies are affected more but not dramatically more. And that was one of the areas of concerns that I had in this evaluation.

Q: Would you agree that in a classic pattern there is a specific slope that you would notice in classic noise-induced hearing loss cases?

A: Yes.

Q: What kind of slope did you observe Mrs. Roop?

A: She had very, very little slope. There was just a very slight drop from the low frequencies to the high frequencies. She was at 40 decibels at 250 hertz and 60 decibels at 8,000 hertz. So there is some slight slope, but not nearly as much as is seen in the classic pattern.

Q: Now, the causal association that you made in your report between her unconventional audiogram pattern and

her reported noise exposure at work, was that based in large part on your inability to find any other cause?

A: Yes.

Q: Is it equally plausible that her low-frequency hearing loss could be related to some other cause?

A: No.

Q: Why do you believe that?

A: Because I think – I did not say it was impossible, but your question was is it equally as likely. And I think that in most other causes, we'll be able to identify those causes. It will be something specific we can see or come up with. In her case, I could not. That's why I could never say that it was impossible that it was another cause, but I don't think it's as likely a cause as her occupational noise exposure.

Q: Given that her pattern of hearing loss is atypical, do you believe that it would be unreasonable for an otolaryngologist to discount in some measure the lower-frequency hearing loss when coming up with an impairment rating?

A: Impairment ratings rely primarily on the lower-frequency hearing loss, because that's the most important part of the impairment rating. You could not discount those figures and come up with an impairment rating using the AMA Guidelines.

Q: I'm just curious here, what have ENT specialists identified over time as the most common cause for low-frequency hearing loss?

> A: Probably the most common cause of low-frequency hearing loss would be a conductive hearing loss, where you have a problem with the eardrum or the bones of hearing in the middle ear or chronic ear infections, some other source like that. That would be the most common cause of a low-frequency hearing loss.

Regarding the significance of Roop's failure to provide a history of her father's hearing loss, Dr. Jones testified as follows:

> Q: If you had been given the history by Ms. Roop that her father also had hearing loss, and given the fact that her grandmother had hearing loss, would that have changed your opinion in any way regarding causation, given that you have said that a family pattern of hearing loss could be the cause?
>
> A: It could. Especially if I saw a hearing test from her father that showed a similar pattern of hearing loss to the one she has. If I on the other – if he, on the other hand, had, you know, worked in coal mines all his life and had a high-frequency hearing loss, then no, it probably would not change my opinion in any way.

Dr. Touma's Form 108-HL reflects the following diagnosis:

> The patient has moderate mixed deafness sensorineural hearing loss in both ears. The majority of the loss is sensorineural. Her discrimination score is 64% on the right and 56% on the left. The patient has low amplitude sympanogram and no superior reflexes. That patient pops her ears

> very easily without an evidence of fluids.
>
> MIXED HEARING LOSS, BILATERAL 389.22

Relative to causation, Dr. Touma stated the audiograms and other testing do not establish a pattern of hearing loss compatible with that caused by hazardous noise exposure in the workplace. In response to the question, "Within reasonable medical probability, plaintiff's hearing loss is related to repetitive exposure to hazardous noise over an extended period of employment?," Dr. Touma marked "yes" and "no." He explained only the high-frequency sensorineural hearing loss is noise-induced and the low frequency hearing loss has nothing to do with noise exposure. Dr. Touma assessed a 5% impairment for Roop's work-related hearing loss and stated a portion of her hearing loss was due to an active impairment prior to acquiring the work-related condition. Dr. Touma explained as follows:

> I adjusted the 500 and 1000 Hz to 20dB level since the loss in these two frequencies is not noise-induced and the percentage I gave above is only for the noise-induced high-frequency sensorineural hearing loss.

Both KRS 342.315(2) and Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000) establish that a university

evaluator's findings and opinions are to be afforded presumptive weight. KRS 342.315(2) states as follows:

> (2) The physicians and institutions performing evaluations pursuant to this section shall render reports encompassing their findings and opinions in the form prescribed by the commissioner. Except as otherwise provided in KRS 342.316, the clinical findings and opinions of the designated evaluator shall be afforded presumptive weight by administrative law judges and the burden to overcome such findings and opinions shall fall on the opponent of that evidence. When administrative law judges reject the clinical findings and opinions of the designated evaluator, they shall specifically state in the order the reasons for rejecting that evidence.

The Supreme Court in Magic Coal Co. v. Fox, supra, held the term "presumptive weight" as used in KRS 342.315(2) amounts to nothing more than a rebuttable presumption that may be overcome by countervailing evidence. Id. at 94. The presumptive weight given to a university evaluator's opinion can be rejected by the ALJ if there is a reasonable basis for doing so. Id. at 94. However, as set out above, the ALJ must specifically set out his reasons for rejecting the university evaluator's opinion in the decision. Id. at 95. Citing the Kentucky Rules of Evidence, KRE 301, the court clarified that a rebuttable presumption "does not shift to such party the burden of proof in the sense of the

risk of nonpersuasion, which remains throughout the trail upon the party upon whom it was originally cast." Id. at 96. The court distilled its holding accordingly:

> Stated otherwise, the clinical findings and opinions of the university evaluator constitute substantial evidence with regard to medical questions which, if uncontradicted, may not be disregarded by the fact-finder.

If the findings and opinions of the university evaluator are contradicted, the ALJ may choose to disregard the testimony of the university evaluator, so long as a reasonable basis for doing so is specifically stated. Id. at 97.

In the case *sub judice*, we believe the ALJ adequately stated his reasons for rejecting the opinions of the university evaluator. The ALJ cited to Dr. Jones' testimony explaining the significance of not having the history of Roop's father's minor hearing loss. The ALJ also cited to Dr. Jones' testimony regarding the significance of Roop's age. Finally, the ALJ noted Dr. Jones' testimony revealed "the shape of the curve produced by the audiogram is one that is not generally consistent with noise induced hearing loss." Therefore, we believe the ALJ's reasons for rejecting the opinions of Dr. Jones

were based on substantial evidence and he provided a reasonable basis for rejecting the opinions of Dr. Jones.

In addition, we believe the ALJ correctly characterized Dr. Touma's opinions as being clearly enunciated. In the Form 108-HL, Dr. Touma stated the low frequency hearing loss has nothing to do with noise exposure. Dr. Touma stated the test results did not establish a pattern of hearing loss compatible with that caused by hazardous noise exposure at work.

Therefore, we believe there is substantial evidence in the record supporting the ALJ's decision to reject the presumptive weight afforded to the university evaluator's opinion.

The ALJ complied with the mandates of KRS 342.315(2) as he specifically stated in the opinion, award, and order his reasons for rejecting the university evaluator's opinion. Since his reasons are supported by substantial evidence in the record, we are without authority to disturb the ALJ's decision on appeal. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986). The ALJ's determination Roop's work-related hearing loss did not produce a permanent partial impairment sufficient to warrant the award of income benefits is not so unreasonable under the evidence that it must be reversed as a matter of

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

Accordingly, the March 28, 2012, opinion, order, and award and the April 17, 2012, order ruling on the petition for reconsideration of the Hon. Richard M. Joiner, Administrative Law Judge, are **AFFIRMED**.

ALL CONCUR.

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