Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: January 23, 2014

CLAIM NO. 201201742 & 201201741

PERRY COUNTY COAL CORPORATION PETITIONER

VS. **APPEAL FROM HON. EDWARD HAYS, ADMINISTRATIVE LAW JUDGE**

JERRY TAYLOR
and HON. EDWARD HAYS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
VACATING IN PART AND REMANDING
* * * * * *

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

STIVERS, Member. Perry County Coal Corporation ("Perry County") seeks review of the July 26, 2013, opinion, award, and order of Hon. Edward Hays, Administrative Law Judge ("ALJ") finding Jerry Taylor ("Taylor") sustained work-related neck and low back injuries, and awarding permanent

total disability ("PTD") benefits and medical benefits.[1] Perry County also appeals from the August 19, 2013, order ruling on its petition for reconsideration.

Taylor's Form 101 alleges a cumulative trauma injury to his neck and back manifesting on September 7, 2012, due "to repetitive use of his neck and back."[2] Taylor's March 5, 2013, deposition was introduced and he testified at the May 23, 2013, hearing. Taylor, born September 2, 1976, is a high school graduate possessing no specialized training. He does not possess any mining certifications or licenses. Taylor began working in the mines when he was eighteen years old, and except for a four month period working in a sign factory, he worked continuously in underground coal mines until he stopped working on September 7, 2012.

Taylor worked for Perry County from 2001 until September 7, 2012. In his first year with Perry County he was a scoop operator. For the remainder of his employment with Perry County he worked as a bridge operator. Taylor

---

[1] Taylor also filed a Form 103 alleging a work-related hearing loss. The hearing loss claim was consolidated with the cumulative trauma claim. Based on the University Evaluator's opinion the ALJ concluded Taylor's hearing loss claim should be denied. The ALJ's determination is not contested on appeal.

[2] Although there was significant discussion regarding right leg pain, it is clear the parties treated the right leg pain as being part of the alleged low back injury.

explained a bridge operator operates machinery which is attached to the miner. When he was not operating equipment, Taylor would shovel while on his knees or lay out belt structure. He estimated he operated the bridge approximately eight to nine hours a day. As a bridge operator, Taylor worked in a sitting position and used foot controls and hand levers. He estimated he worked between eight to ten hours daily, and five to six days weekly.

Taylor began experiencing neck pain approximately four to five years before he quit working. He believes he began experiencing back pain about the same time he began experiencing neck pain. He acknowledged he had been treated by Dr. Hubert Williams at the London Urgent Care Center for a brief period for a pulled muscle in his lower back. Taylor first saw Dr. Chad Morgan, a chiropractor, for his back and neck pain. Dr. Morgan treats him twice a week. He testified the chiropractic treatment helps his back and neck and MRIs of his neck and lower back, requested by Dr. Morgan, were the first he had undergone. Prior to September 7, 2012, Taylor had missed no work due

to neck or back pain.[3] Taylor testified his job as a mobile bridge carrier operator consisted of the following:

> Q: And tell us, just briefly, what that job involved.
>
> A: Well, you sit in a deck with a canopy on it and it's attached to another bridge carrier, which is attached to the miner and you tram forwards, back, left, right and you go to the coal. You cut coal. And they set up chains that runs [sic] beside you that the coal comes through.
>
> Q: Okay. Do you work in close proximity to the coal; in other words, are you close to where the coal is actually being mined?
>
> A: Twenty-one – probably, it's bridge. Probably – maybe 50 to 75 feet from the coal, face of the coal. I'm the – I was the second bridge man back.

Taylor explained that as a bridge operator he worked "cramped up in the deck of the carrier" and sitting in this cramped position caused pain in his lower back. He also developed neck pain. In addition, he experienced right leg pain because he was required to keep the foot pedal pushed down at all times in order to keep the machine running. He explained his pain is "mostly all the right side." Taylor experiences low back problems when he bends or squats. He explained his work in the underground mines

[3] Taylor sustained a work-related left knee injury in 1992 or 1993 and was off work for surgery. He testified when he returned to work no further action was taken.

was heavy duty. Taylor did not believe he could return to work as a bridge operator primarily because of the physical problems he experienced in operating the machine. Taylor explained when he quit he told personnel at Perry County he could no longer do the job. He believes his neck problems are worse than his back problems.

Taylor introduced a questionnaire completed by Dr. Morgan on October 4, 2012, in which he stated Taylor's current medical issues related to the neck and back were caused, either in whole or in part, by his job activities. In addition, Dr. Morgan stated the continuation of Taylor's job duties would result in adverse health consequences.

Taylor also introduced a Form 107 completed by Dr. Arthur Hughes on January 9, 2013. Dr. Hughes indicated Taylor provided a history of having worked thirty-nine years in the mines and he first experienced neck pain approximately three to five years ago. Dr. Hughes noted Taylor had experienced low back pain some twelve to fifteen years ago and the pain in his right leg began approximately two years ago with tingling from the hip to the foot. Taylor had also experienced some "burning of both feet" for the past year. His pain is worse "when he is weight bearing" and the tingling in his feet is worse upon standing. Dr. Hughes noted Taylor stopped working on

September 7, 2012, because he could no longer perform that job. Taylor did not recall a specific injury to either his neck or back. His job involved running a bridge carrier and he sat in performing this job. Taylor was also required to do his own repairs on the equipment. When Taylor was working in some areas of the mines "he would have to look over and do the 'duck walk' or would have to crawl."

Dr. Hughes noted an evaluation by Dr. Morgan on June 15, 2012, indicated low back pain for the past two weeks with numbness and tingling. There was also left and right neck pain radiating to the wrists and hands. He noted the back pain had been present for several years and caused headaches. He observed the June 26, 2012, note of Dr. Morgan indicated persisting pain in the left and right side of the neck, bilateral wrist and hand pain, and low back pain. He noted Dr. Morgan subsequently saw Taylor on July 10, July 27, August 2, August 4, and August 16, 2012, and each time he expressed similar complaints.

Dr. Hughes indicated x-rays of the neck and back revealed degenerative changes of the lumbar spine and multi-level degenerative changes in the cervical spine. A July 26, 2012, MRI of the lumbar spine also showed multi-level degenerative changes. The MRI showed a bulge with

spurring at L3-4, bulging at L4-5 with spurring, and a Grade I spondylolisthesis at L5-S1 with disc bulge posteriorly. Similarly, a cervical MRI performed on the same date showed moderate to diffuse canal stenosis, bilateral foraminal narrowing at C6-C7, severe canal narrowing at C4-C5 and C5-C6, and foraminal narrowing at C4-C5. There was also severe narrowing of the canal at C3-C4. Dr. Hughes diagnosed neck pain with radiculopathy and lower back pain with right lumbar radiculopathy. Dr. Hughes opined Taylor's injuries were the cause of his complaints. Concerning "causation," he stated as follows:

> The neck pain is a consequence of cumulative injury in his work as an underground miner and his lower back and right leg pain is also the consequence of cumulative injury as a consequence of his work as an underground miner.

Under the heading "Explanation of Causal Relationship," Dr. Hughes provided the following:

> Mr. Taylor has worked as an underground miner for 37 years, a job which required bending, twisting, lifting, crawling, pushing and pulling, stooping, crouching, and prolonged walking and standing. This has also interfered with his home activities including mowing grass, weed eating, hunting and repairs around the house.

Pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent

Impairment ("AMA Guides"), Dr. Hughes assessed a 5% impairment rating for the neck pain and a 10% impairment rating for the low back and right leg pain which resulted in a combined impairment of 15%. Dr. Hughes believed Taylor did not have an active impairment prior to the injury. He stated Taylor informed him his work as a bridge operator required him to perform bending, twisting, crawling, crouching, lifting, reaching, pushing and pulling, and prolonged walking and standing. Dr. Hughes concluded Taylor does not retain the physical capacity to return to the type of work he previously performed. He recommended Taylor avoid repetitive bending and twisting of the neck and of the lower back. He should also avoid twisting the trunk. Due to his neck and lower back pain, Dr. Hughes imposed a lifting limit of five pounds regularly and twenty pounds on occasions.

Perry County introduced the March 19, 2013, report of Dr. Daniel Primm. Dr. Primm obtained a work history from Taylor and reviewed various medical records. He noted that on July 25, 2012, Dr. Morgan requested an MRI of both the cervical and lumbar spine. The cervical MRI revealed degenerative changes from C2-3 through C6-7. Those changes consisted of thickening of the ligamentum flavum as well as an endplate spurring. There was also

spurring at the facet joints, particularly at C4-5 and C5-6, producing foraminal narrowing. Notably, Dr. Primm did not discuss the findings concerning the lumbar MRI. After conducting a physical examination, Dr. Primm diagnosed "neck and lower back pain due to age-related degenerative changes." Dr. Primm found no unusual pathology in the neck or back which he would relate to Taylor's work as a coal miner or equipment operator. He believed Taylor's symptoms are "ubiquitous in the general population regardless of occupation." Dr. Primm disagreed with Dr. Hughes' assessment of lumbar radiculopathy since Dr. Primm's examination did not show any signs of radiculopathy. Further, he believed Dr. Hughes' examination seemed to contradict a diagnosis of radiculopathy since Dr. Hughes reported Taylor had full flexion to his toes, which was inconsistent with his report that Taylor reported leg pain on straight leg raising. Accordingly, Dr. Primm could not relate Taylor's current symptoms or any impairment to his back or spine on the basis of his examination. Further, he would not relate any impairment to Taylor's work as an equipment operator particularly with no history of any work-related injuries.

Concerning the claim for cumulative trauma to the neck and back, the ALJ entered the following Analysis, Discussion, Findings of Fact and Conclusions of Law:

> 2. The Plaintiff, Jerry Taylor, commenced working in the underground coal mines at age 18 years and has essentially worked as an underground coal miner his entire adult life. He is now 56 years of age. He last worked on September 7, 2012, at which time he terminated his employment with Perry County Coal Corporation because of his neck and low back pain and, in his opinion, he is unable to continue the physical activities required of him in his job. KRS 342.0011(1) defines "injury" as any work-related traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings. KRS 342.0011(33) defines "objective medical findings" as information gained through direct observation and testing of the patient applying objective or standardized methods. See Gibbs v. Premier Scale Co., 50 S.W.3d 754 (Ky. 2001). **Under applicable Kentucky law, a specific work-related trauma does not have to "cause" a condition or impairment, but it is sufficient that a preexisting dormant condition be aroused or aggravated by a work-related event or cumulative events, as defined in the Statute. See McNutt Construction/First General Services v. Clifford F. Scott, et al., 40 S.W.3d 854 (Ky. 2001). The Kentucky Supreme Court held long ago in Haycraft v. Corhart Refractories Co., 544 S.W.2d 222 (Ky. 1976), "To the extent that a dormant degenerative**

condition, itself, is proximately caused by work, the condition comes within the definition of an injury."

3. The ALJ finds that Jerry Taylor has worked approximately 39 years as an underground coal miner, requiring him to perform physically demanding activities which would have naturally accelerated the degenerative conditions detected by Dr. Hughes, as summarized above. It is evident from Plaintiff's history that he was not suffering from any preexisting active condition. In order for a condition to be preexisting active, it must be both symptomatic and impairment ratable prior to the work-related event. In the case at hand, the Plaintiff did not experience any neck or back pain until a few years ago (not more than five years). He recovered from a minor injury in 2009 within a month or two and was essentially asymptomatic until he commenced treatment with Dr. Williams and Dr. Morgan in 2012. Claimant's testimony of a gradual worsening of his neck and low back pain is unrebutted. His description of his increasing pain and symptoms as related to Dr. Hughes and Dr. Primm is consistent with testimony that he gave during his deposition and at the Formal Hearing. The ALJ finds that Claimant did sustain an injury as defined by the Act on September 7, 2012.

4. It is further found that Plaintiff now has a 15% permanent impairment based on the AMA Guides, 5th Edition, as the result of the work-related injury. This finding is based on the report and opinions of Dr. Hughes. Dr. Primm's report that Plaintiff's problems are due to the natural aging process discounts and disregards the fact that Plaintiff has

> worked approximately 39 years at hard labor in underground coal mines and it is likely that his degenerative changes in his spine were accelerated by the heavy and physically demanding activities of his job. These findings are supported by the opinions of Dr. Hughes.
>
> 5. The ALJ finds that all of Claimant's permanent impairment is attributable to the work injury as defined hereinabove and under the principles enunciated in McNutt Construction, *supra*.

(emphasis added).

In concluding Taylor was totally occupationally disabled, the ALJ reasoned as follows:

> 8. The real issue in this claim is whether Claimant's impairment and disability are limited to the AMA Guides, 5th Edition, and statutory multipliers of 3.4 as found above, or if the Plaintiff is entitled to permanent total disability benefits. 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 the result of an injury…." KRS 342.0011(34) defines "work" as providing services to another in return for remuneration on a regular and sustained basis in a competitive economy. In the case at hand, it is noted that Plaintiff is 56 years of age, has only a 12th grade education, has a work history exclusively involved in underground coal mining, and has no specialized or vocational training or skills other than underground mining. Claimant testified that he is unable to

> return to any of the jobs he has held in the past. A finding of permanent total disability is supported by the opinions of Dr. Hughes, and specifically by the severe restrictions that he placed upon Claimant. It is unlikely that Mr. Taylor could obtain employment under such severe restrictions and it is certainly unlikely that he would be unlikely to obtain such employment on a regular basis in a competitive job market. In determining this issue, the ALJ considered the principles enunciated in KRS 342.730; Osborne v. Johnson, 432 S.W. 2d 800 (Ky. 1968); Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000); and McNutt Construction, *supra*. Based upon the Plaintiff's age, limited variety of work experience, limited education of 12th grade, and the severe restrictions under which he has been placed, the ALJ finds the Plaintiff to be permanently totally disabled on the date of his last work and injury on September 7, 2012.

Perry County filed a petition for reconsideration pointing out Taylor did not allege a traumatic injury and therefore the evidence does not support the ALJ's findings. It asserted the ALJ's opinion and order contained insufficient findings of fact to permit meaningful review as to "whether consideration was given to Taylor's medical training, experience, impressive academic appointments, or board-certifications." Noting Taylor's Form 101 "claimed no trauma at work and none was alleged in the record," Perry County argued the ALJ should reconsider his reliance

upon McNutt Construction/First General Services v. Scott, 40 S.W.3d 854 (Ky. 2001) since there was insufficient evidence establishing a pre-existing dormant condition was aroused or aggravated by a work-related event or cumulative events. Further, the medical evidence did not support a finding that age-related changes were a dormant degenerative condition proximately caused by work, to bring them within the definition of an injury. Consequently, it requested the ALJ reconsider his reliance upon Haycraft v. Corhart Refractories Co., 544 S.W.2d 222 (Ky. 1976).

Taylor also filed a petition for reconsideration asserting the ALJ erred regarding the commencement date of the award of PTD benefits.

The ALJ sustained Taylor's petition for reconsideration, but overruled Perry County's petition for reconsideration deeming it to be a request for him to reconsider the definition of injury and re-examine the evidence as it pertained to the factors he relied upon in differentiating between permanent total disability and permanent partial disability. He stated all the matters raised by Perry County were duly considered when he rendered his opinion.

On appeal, Perry County challenges the ALJ's decision on two grounds. First, it argues substantial

evidence does not establish Taylor's degenerative disc disease was accelerated by his work resulting in an injury as defined by the statute. Next, it argues substantial evidence does not support a finding of permanent total disability.

With respect to its first argument, Perry County argues injury as defined by the statute does not include the effects of the natural aging process. Perry County argues there is no evidence Taylor's degenerative disc disease is a characteristic of coal mine employment and that the disease "is not an ordinary disease-of-life to which the public is equally exposed outside of employment." It notes Dr. Primm attributed the degenerative disc disease to the natural aging process and not to Taylor's work.

Perry County also argues the ALJ erred in evaluating the evidence and finding an injury based on McNutt, supra or Haycraft, supra. It notes Taylor did not allege a traumatic injury. Perry County argues since there was no "claimed injury at work" or evidence that the coal mine employment as a bridge operator aroused or caused degenerative disc disease, McNutt, supra, and Haycraft, supra, do not apply and the ALJ was precluded from finding a trauma or "arousal from work was the proximate cause of the degenerative disc disease."

Perry County also contends the opinions of Dr. Hughes, upon which the ALJ relied, are plagued with deficiencies of proof and he misstates Taylor's job duties.

Perry County argues the facts and medical evidence do not support the ALJ's findings as Taylor's work did not involve physically demanding or repetitive motion activities. Rather, Taylor worked as a bridge operator and used hand and foot controls. Further, Dr. Hughes never stated Taylor's work naturally accelerated degenerative conditions or that the degenerative conditions were caused by his work.

Perry County also contends the ALJ erred in discounting Dr. Primm's opinions because Dr. Primm disregarded the fact Taylor had worked thirty-nine years at hard labor in underground coal mines and it was likely the degenerative changes in the spine were accelerated by the heavy and physically demanding activities of his job.

Perry County concludes by noting no doctor used the word "accelerated." It contends the ALJ mischaracterized the opinion evidence since the word "accelerated" suggests a dormant disabling condition was aroused into disabling reality and no doctor expressed an opinion this occurred.

Perry County next argues the ALJ did not sufficiently summarize the conflicting evidence concerning disputed facts. It states the ALJ's determination of permanent total disability is not supported by sufficient findings of fact in order to permit meaningful review. In this regard, it argues the ALJ did not consider many factors related to Taylor's ability in resolving this issue. Therefore, the decision should be vacated and remanded.

Since Taylor, the party with the burden of proof, was successful before the ALJ, the issue on appeal is whether the ALJ's decision is supported by substantial evidence. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979), Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). The ALJ, as fact-finder, has the sole authority to determine the weight, credibility, substance and inferences to be drawn from the evidence. Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). Furthermore, the ALJ has the absolute right to believe part of the evidence and disbelieve other parts, whether it comes from the same witness or the same parties' total proof. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). It is not enough to show there was some evidence which would support a contrary conclusion.

McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). So long as the ALJ's opinion is supported by any evidence of substance, ordinarily we may not reverse. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

Here, Perry County argues the ALJ's conclusion Taylor's condition was caused by work is unsupported by substantial evidence. While medical causation usually requires proof from a medical expert, the ALJ may properly infer causation, or a lack of causation, from the totality of the circumstances as evidenced by the lay and expert testimony of record. *See* Mengel v. Hawaiian-Tropic Northwest & Central Distributors, Inc., Ky. App., 618 S.W.2d 184 (1981); Cf. Union Underwear Co. v. Scearce, 896 S.W.2d 7 (Ky. 1995). An ALJ is vested with broad authority to decide questions involving causation. Dravo Lime Co. v. Eakins, 156 S.W. 3d 283 (Ky. 2003). Causation is a factual issue to be determined within the sound discretion of the ALJ as fact finder. Union Underwear Co. v. Scearce, supra; Hudson v. Owens, 439 S.W. 2d 565 (Ky. 1969).

In this instance, we agree with Perry County's assertion the medical evidence does not establish Taylor's injury was due to either a specific incident or multiple incidents arousing degenerative conditions into disabling reality. Further, there is no medical evidence

establishing the cervical and lumbar degenerative changes were caused by Taylor's work. Dr. Primm believed Taylor's back and neck problems were due to age related degenerative changes and Taylor did not have an impairment as a result of his work as a bridge operator. On the other hand, Dr. Hughes believed Taylor sustained cumulative injuries at work to his lower back and neck. Dr. Hughes opined Taylor's lower back, neck, and right leg pain were a "consequence of cumulative injury" sustained in the course of his work as an underground miner.

There is no question the x-rays and MRIs performed in 2012 reveal significant degenerative changes in Taylor's back and neck. However, Dr. Hughes did not express the opinion those degenerative changes were dormant conditions aroused into disabling reality by a cumulative injury or injuries sustained during the course of Taylor's work for Perry County. In fact, Dr. Hughes did not specifically state the degenerative changes were related to the cervical and lumbar injuries. Therefore, the ALJ's determination Taylor sustained a work-related injury due his "physically demanding activities" at work "which would have naturally accelerated the degenerative conditions detected by Dr. Hughes" and the award of income and medical benefits must be vacated.

In McNutt, supra, the Supreme Court stated:

> Where work-related trauma causes a dormant degenerative condition to become disabling and to result in a functional impairment, the trauma is the proximate cause of the harmful change; hence, the harmful change comes within the definition of an injury.[footnote omitted] We are not persuaded that the legislature's decision to abolish Special Fund apportionment with regard to traumatic injury claims had any effect on the longstanding principle that a harmful change to a worker's body which is caused by work is an "injury" for the purposes of Chapter 342.

Id. at 859.

In the case *sub judice*, no doctor expressed the opinion a work-related trauma or multiple traumas caused a dormant degenerative condition to become disabling and result in a functional impairment. Consequently, the ALJ erred in finding Taylor's impairment is attributable to the work injuries "under the principles enunciated in McNutt Construction, supra."

Causation must be supported by the medical evidence. Here, the ALJ's conclusion regarding causation is not supported by the medical evidence. As the medical evidence does not support the finding of an arousal or acceleration of degenerative conditions, the claim must be remanded to the ALJ for a determination as to whether

Taylor sustained cumulative trauma injuries manifesting on September 7, 2012. While the Board has no fact-finding authority, we note that Dr. Hughes' report constitutes substantial evidence in support of such a finding.

In light of the fact we are vacating the ALJ's finding Taylor sustained a work-related injury and the award of income and medical benefits, there is no need to address Perry County's second argument regarding the ALJ's determination of permanent total disability.

Accordingly, those portions of the July 26, 2013, opinion, award, and order finding Taylor sustained work-related neck and low back injuries and awarding permanent total disability benefits and medical benefits and the August 19, 2013, order reaffirming the finding of those injuries and the award of income and medical benefits are **VACATED**. This matter is **REMANDED** to the ALJ for rendition of a decision in conformity with the views expressed herein.

Further, since the opinion did not order Taylor's hearing loss claim dismissed, on remand the ALJ shall also order Taylor's hearing loss claim dismissed.

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON SARAH K MCGUIRE
P O BOX 351
PIKEVILLE KY 41502

COUNSEL FOR RESPONDENT:

HON MCKINNLEY MORGAN
921 S MAIN ST
LONDON KY 40741

ADMINISTRATIVE LAW JUDGE:

HON EDWARD HAYS
657 CHAMBERLIN AVE
FRANKFORT KY 40601