Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: February 7, 2014

CLAIM NO. 201277181 & 201201727

PERRY COUNTY COAL CORPORATION PETITIONER

VS. **APPEAL FROM HON. OTTO D. WOLFF, IV, ADMINISTRATIVE LAW JUDGE**

CLIFFORD COBB
and HON. OTTO D. WOLFF, IV,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

STIVERS, Member. Perry County Coal Corporation ("Perry County") appeals from the July 23, 2013, Opinion and Order and the August 19, 2013, Order ruling on Perry County's petition for reconsideration of Hon. Otto D. Wolff, IV, Administrative Law Judge ("ALJ"). In the July 23, 2013, Opinion and Order, the ALJ awarded Clifford Cobb ("Cobb") temporary total disability ("TTD") benefits, permanent

total disability ("PTD") benefits, and medical benefits for a low back injury. The ALJ also awarded permanent partial disability ("PPD") benefits and medical benefits for his hearing loss claim. On appeal, Perry County argues the ALJ's determination of permanent total disability due to the low back injury is not supported by substantial evidence. Additionally, Perry County argues the evidence is not supportive of the hearing loss claim.

The December 5, 2012, Form 103 alleges that on July 17, 2012, Cobb sustained hearing loss as a result of his employment with Perry County, and he became aware of this condition on October 25, 2012.

The December 5, 2012, Form 101 alleges on July 17, 2012, Cobb sustained a low back injury in the following manner: "Changing a water pump with the Superintendent and a co-worker squatted down working on pump, co-worker let go of the pump and the weight shifted and hurt back." Cobb was working as a conveyor belt repairman at the time of the July 17, 2012, injury.

By order dated January 25, 2013, the ALJ consolidated the two claims.

The May 24, 2013, Benefit Review Conference ("BRC") order lists the following contested issues: benefits per KRS 342.730, work-relatedness/causation, and

exclusion for pre-existing disability/impairment. Under "other" is handwritten the following: "entitlement to hearing medicals and indemnity benefits per KRS 342.7305."

Perry County's primary argument on appeal is that "substantial evidence does not support the ALJ's decision that plaintiff's lumbar strain superimposed over degenerative disc disease has caused a PTD."

In the July 23, 2013, Opinion and Order, the ALJ determined as follows regarding Cobb's low back claim:

> Defendant questions whether Plaintiff's alleged low back injury was caused by and/or related to the work incident of July 17, 2012. Defendant's proof consists of Plaintiff's Ergos Evaluation results and several records by Dr. Bean, the latter of which is interpreted so as to suggest the results it desires. Defendant does not present any other proof.
>
> Plaintiff testified that following his 2008 low back injury he received medical treatment from Drs. Kiefer and Wicker, completed a course of physical therapy, did not work for a period of approximately 3 months, returned to light-duty work for one month, and then was released to full-duty work. Plaintiff acknowledged his low back, "never did get completely well after that injury. It never did get all the way well, but I was able to work with it… We returned to work and we was able to perform our job like we was supposed to."
>
> As to medical proof on this issue, Plaintiff's Dr. Hughes specifically

indicated, in his Form 107, that prior to Plaintiff's 2012 injury, Plaintiff did not have a prior active impairment.

Both parties filed medical records generated by Dr. Bean, and a careful review of his records fails to find a clear indication on the issue of whether Plaintiff had a prior active condition before the 2012 work incident. Defendant writes in its brief (Page 6) that Dr. Bean saw Plaintiff on November 12, 2012 and, "Dr. Bean assessed 7% whole person impairment under the AMA Guidelines with an added 2% due to significant persistent pain and functional limitations. That rating is for pre-existing changes from age related changes." The last sentence in this quote from Defendant's brief is not a part of what Dr. Bean wrote; that sentence is Defendant conjecture of what it thinks Dr. Bean meant to indicate. A review of this particular record does not seem to indicate, at least to this ALJ, exactly what Defendant contends. In fact, portions of this record reads, "he has a history of an injury at work in 2008 to his lower back. He saw Dr. Kiefer and recovered from this with conservative management." This particular sentence written by Dr. Bean indicates to the undersigned, that from a medical expert's standpoint, Plaintiff fully recovered from his 2008 low back injury.

Dr. Bean continued, "His diagnosis is lumbar strain with degenerative pre-existing lumbar disc disease." This sentence indicates to the undersigned that Plaintiff sustained a lumbar strain as a result of his 2012 work incident, and that strain was placed upon Plaintiff's pre-existing

degenerative lumbar disc disease. Based upon Dr. Hughes, basically unchallenged input, it is determined Plaintiff's work incident of 2012 caused the lower back problems he presently experiences [sic] the 2008 incident did not play a role in Plaintiff's 2012 injury-producing incident.

Defendant next contends at least a portion of Plaintiff's disability is attributable to a pre-existing condition. The burden of proving the existence of a pre-existing condition falls upon the employer. Finley v. DBM Technologies, 217 S.W.3d 261 (Ky. 2007). From a legal standpoint, to prove a pre-existing condition is an active condition, and therefore non-compensable, Defendant must present persuasive evidence that the pre-existing condition was symptomatic and impairment ratable pursuant to the AMA Guides immediately prior to the occurrence of the work-related injury.

Defendant has not presented persuasive evidence Plaintiff had a pre-existing condition that was symptomatic and impairment ratable immediately prior to the 2012 work incident. Based upon there being a lack of persuasive evidence indicating Plaintiff was symptomatic immediately prior to his 2012 injury, and, that he had a back condition that was impairment ratable under the AMA Guides, it is determined Plaintiff did not have a non-compensable, pre-existing condition immediately prior to his 2012 low back work injury. Furthermore, that this is true is set forth in Dr. Hughes' Form 107 when, without qualification, he indicated Plaintiff did not have an active impairment prior to his injury.

Having determined Plaintiff's present low back complaints are a result of his 2012 work incident, and that immediately prior to this incident he did not have a pre-existing condition, it is next appropriate to ascertain the extent of Plaintiff's impairment. The choice is between Dr. Hughes' 10% and Dr. Bean's 7%. The most persuasive evidence on this point comes from Dr. Bean. This is true for several reasons, most importantly Dr. Bean has the insight from treating Plaintiff on at least three or four occasions since Plaintiff's 2012 injury. He has had an opportunity to treat and monitor Plaintiff's evolving low back condition. It is also noteworthy that Plaintiff was referred to Dr. Bean by other practicing physicians, obviously there is professional respect for Dr. Bean's expert opinions from the practicing medical community. Based upon Dr. Bean's input, it is determined Plaintiff has a 7% WPI as a result of his 2012 low back injury.

Plaintiff claims to be permanently totally disabled. Permanent total disability is defined in KRS 342.011 (11) (C) as 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 a work injury.

The term "work" is utilized in the above definition, has been statutorily defined as meaning, "providing services to another in return for remuneration on a regular and sustained basis in a competitive economy." KRS 342.0011 (34).

To determine whether Plaintiff's occupational status falls within the above-given definitions, an examination of Plaintiff's present status must be done using the factors set forth in Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky., 2000). These factors are the worker's age, the worker's education level, the worker's vocational skills, the worker's post-injury medical restrictions, and the likelihood that he can resume some type of "work" under normal employment conditions.

AGE - When Plaintiff was injured he was 50 years old. In this particular claim, Plaintiff's age does not suggest whether Plaintiff is PPD or PTD. It is noteworthy that KRS 342.730 (1) (c) 3 acknowledges that 50 years of age is an advancing age which negatively impacts an employee's post-injury earning capacity.

EDUCATION - Plaintiff has a very limited education. He indicated he dropped out of school in the middle of the 10th grade and only obtained a GED because a friend basically did the work required to obtain the GED. He also indicated he had a learning disability, and could only read and write "very little. I have to have help with a lot of my paperwork." He has basically no ability to operate a computer. Plaintiff's very limited formal education, his possible learning disability, his poor ability to read and write, his self- described limitations operating a computer, suggest Plaintiff is totally permanently disabled.

VOCATIONAL SKILLS - Plaintiff lacks transferable vocational skills. Plaintiff worked as a "low low [sic]

operator, running coal behind the miner (continuous miner) onto a conveyor belt." He also worked as an outside surface belt repair man. He briefly worked as a UG Mine Monitor/ Dispatcher. This last job required Plaintiff to watch a computer mine monitoring system, make sure Defendant's mining work was being done in accord with federal, state and company rules and regulations, to be sure the miners' work complies with safety and environmental policies, perform calibration checks on gas meters, etc., as previously mentioned. All of these jobs require heavy physical labor which required an uncompromised and strong back, which Plaintiff does not now have, or the job requires an intellect and sound ability to read and write, but again Plaintiff lacks these skills, suggesting he is permanently totally disabled.

POST-INJURY MEDICAL RESTRICTIONS - It cannot be denied that the involved medical experts saddle Plaintiff with numerous and extensive post-injury medical restrictions. In his last record dated November 12, 2012, Dr. Bean wrote, "he is not able to return to work. He is limited to a sedentary level of activity, occasional sit or stand, and no repetitive bending, twisting, stooping, kneeling or crawling. Lifting limit is 15 to 20 pounds maximum occasionally; no repetitive lifting at this level."

Likewise, Dr. Hughes wrote, "I would suggest that he avoid prolonged sitting or standing. He is unable to repetitively bend or twist the lumbar spine. He has restricted walking. He has a lifting limit of 10 pounds."

The only witness to indicate otherwise than Drs. Bean and Hughes, is Defendant's Rick Pounds, Vocational Rehabilitation Counselor, who administered at Defendant's request, an Ergos Functional Capacity Evaluation to help define Plaintiff's physical capacities and tolerances. As is often the case, Mr. Pounds found the examinee to exhibit self-limiting behavior, with inconsistent results, and, "he appeared to have pain perception issues. He demonstrated behavior consistent with probable symptom magnification."

Mr. Pounds' input pales when compared to the input of the medical experts. The input of Drs. Bean and Hughes, as well as Plaintiff's testimony concerning what he now can physically do or not do, is persuasive. This strongly suggests Plaintiff is permanently totally disabled. Furthermore, Mr. Pounds' characterization of Plaintiff runs directly counter to this ALJ's assessment of Plaintiff.

When all these factors are combined it is unlikely that Plaintiff will be able to resume some type of "work" under normal employment conditions. Plaintiff basically has a 10th grade education, few, if any, transferable vocational skills, and substantial post-injury restrictions and limitations, this combination makes it unlikely Plaintiff would be able to provide services to another on a regular and sustained basis in the competitive economy of eastern Kentucky. Based upon the review of Plaintiff's occupational status using the factors set forth in Watson, it is determined Plaintiff meets the definition of "permanent total disability." This is true despite the

> fact Plaintiff has not undergone surgery for his low back symptom and complaints. Plaintiff’s input, and the input of the involved medical experts, constitutes persuasive proof to determine Plaintiff is permanently totally disabled.

It is clear the ALJ relied, in part, on the February 13, 2013, Form 107 of Dr. Arthur L. Hughes to determine Cobb sustained a lumbar strain on July 17, 2012, which was superimposed upon dormant pre-existing degenerative disc disease. In the Form 107, Dr. Hughes indicated that he relied upon several diagnostic tests, including an MRI dated June 27, 2008. Under "summary of results," Dr. Hughes wrote as follows: "An MRI of the lumbar spine shows degenerative disc disease L3-4 and L4-5." Dr. Hughes diagnosed Cobb with "lower right pain with right lumbar radiculopathy, probably S1" and assessed a 10% whole person impairment rating. Dr. Hughes checked "no" to the following statement: "Plaintiff had an active impairment prior to this injury." Dr. Hughes checked "yes" to the question: "Within reasonable medical probability, was plaintiff's injury the causes of his/her complaints?" Regarding the causal relationship, Dr. Hughes opined as follows:

> Mr. Cobb experienced the sudden onset of lower back and right leg pain in a

> lifting incident. He has remained symptomatic and an EMG has shown a right S1 radiculopathy. A lumbar MRI scan was performed but the radiologist made no comment about the L5-S1 level, which presumably is the symptomatic level. This has caused a restriction in his home activities and placed a limitation on his activity tolerance such that he sit and stand for only brief periods, is unable to walk for more than short periods of time, and has a lifting restriction of 10 pounds or less. This has restricted his ability to do tasks at home (he lives alone) including driving, weed eating, hunting, and household tasks.

The ALJ also relied, in part, upon the medical records of Dr. James R. Bean. Specifically, the ALJ relied upon Dr. Bean's diagnosis, as set forth in a record dated November 12, 2012, which is as follows: "His diagnosis is lumbar strain with degenerative pre-existing lumbar disk disease." In this same record, regarding an impairment rating, Dr. Bean opined as follows: "His impairment rating is 7% by AMA guidelines based on the DRE 2 category with the added 2% due to significant persistent pain and functional limitation." He also opined as follows: "He has a history of an injury at work in 2008 to his lower back. He saw Dr. Kiefer and recovered from this with conservative management."

The ALJ, as is within his discretion, interpreted Dr. Bean's opinions in a manner different from that represented by Perry County. Perry County represented in its brief to the ALJ that Dr. Bean assessed a 2% impairment rating "for preexisting changes from age related changes"; however, the ALJ did not interpret Dr. Bean's 2% impairment rating "due to persistent pain" as pertaining to Cobb's pre-existing degenerative disc disease. The Board does not have the authority to second-guess the ALJ's interpretation of Dr. Bean's impairment rating, particularly in light of the fact that it was not addressed in Perry County's August 5, 2013, petition for reconsideration or its brief to this Board. Additionally, Dr. Hughes' opinions, standing alone, comprise substantial evidence in support of the ALJ's determination Cobb's degenerative disc disease was not active at the time of the July 17, 2012, injury.

These two reports taken collectively, comprise substantial evidence in support of the ALJ's determination Cobb sustained a lumbar strain on July 17, 2012, superimposed upon pre-existing degenerative disc disease of the lumbar spine that was dormant at the time of the strain. The burden of proving the existence of a pre-existing active condition is on the employer. Finley v. DBM Technologies, 217 S.W.3d 261 (Ky. App. 2007). In

Finley v. DBM Technologies, supra, the Court of Appeals instructed that in order for a preexisting condition to be characterized as active, it must be both symptomatic and impairment ratable pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides") immediately prior to the occurrence of the work-related injury. Since Perry County is the party with the burden of proof on this issue and it was unsuccessful before the ALJ, the sole issue is whether the evidence compels a different conclusion. *See* Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). In the case *sub judice*, the evidence does not compel a contrary result.

The ALJ's determination Cobb is entitled to PTD benefits utilizing the criteria set forth in Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000) is based on a thorough analysis spanning four pages. The ALJ found compelling Cobb's age at the time of injury (50), the fact he had no more than a 10th grade education, his employment history consisting of heavy physical labor, the restrictions imposed by Drs. Bean and Hughes, and Cobb's testimony regarding his physical capabilities.

Dr. Bean's restrictions, as set forth in the November 12, 2012, medical record are as follows:

> He is not able to return to work. He is limited to a sedentary level of activity, occasional twist or bend, and no repetitive bending, twisting, stooping, kneeling or crawling. Lifting limit is 15-20 lbs. maximum occasionally; no repetitive lifting at this level.

Additionally, Dr. Hughes' restrictions, as set forth in the March 18, 2013, Form 107, are as follows:

> I would suggest that he avoid prolonged sitting or standing. He is unable to repetitively bend or twist the lumbar spine. He has restricted walking. He has a lifting limit of 10 pounds.

Plaintiff's testimony regarding his physical limitations is contained within his April 1, 2013, deposition and his May 24, 2013, hearing testimony. In his deposition, Cobb testified as follows:

> Q: What would you describe are your current complaints or symptoms that you related to this 2012 injury?
>
> A: That my pain rating rates between eight to ten percent, and it's wrecked my whole entire lifestyle.
>
> Q: Where do you still feel pain?
>
> A: All in my lower right lumbar spine. Sciatic nerve damage that we came- that they said that we [sic] did have. In my right leg. My knees, both knees, left knee and right knee. Right foot, numb, tingling, just burning. Can't sit for a long period of time. Can't walk for a

> long period of time. And have to rest frequently.

At the hearing, Cobb testified as follows:

> Q: Okay. It's your opinion, is it not, that you're unable to work now?
>
> A: There's no way I can work now. I'm not able to work.
>
> Q: Why not?
>
> A: Due to my injury that I've had, due to the pain I have and due to the medication that I'm on, that I'm around other coworkers working with the medication I'm on taking and all that due for my pain to control- help me to have ease with my pain, that the fellow co-worker would be jeopardized by me, and no one's going to let me work with them kind of pills in my system anyway.

The above-cited evidence, including Cobb's testimony regarding his current ability to work, comprises substantial evidence in support of the ALJ's determination Cobb's lumbar strain, superimposed upon pre-existing dormant lumbar degenerative disc disease causes him to be permanently totally disabled. *See* Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979); *See also* Carte v. Loretto Motherhouse Infirmary, 19 S.W.3d 122 (Ky. App. 2000). Consequently, this determination cannot be disturbed.

Perry County's assertion the ALJ erred by relying on Dr. Hughes' opinions because he did not receive the

lumbar myelogram report, bears on the weight to be given Dr. Hughes' opinions which is solely within the discretion of the ALJ. It is well established that an ALJ, as trier of fact, is the gatekeeper and arbiter of the record both procedurally and substantively. Dravo Lime Co., Inc. v. Eakins, 156 S.W. 3d 283 (Ky. 2003). In that capacity, the ALJ has broad discretion in supervising the presentation of evidence and in receiving evidence and making rulings affecting the competency, relevancy, materiality, and admissibility of the evidence. *See* KRS 342.230. Just as a trial court judge bears responsibility for directing the flow of litigation through the judicial process, an ALJ has the authority to control the progression of a workers' compensation claim. Here, the ALJ chose to give significant weight to Dr. Hughes' medical opinions and rely upon those opinions. This Board cannot infringe upon the ALJ's discretion.

Regarding Perry County's assertions the ALJ made certain erroneous findings of fact which factored into his determination of permanent total disability, we find these arguments to be petty in light of the ALJ's thorough analysis as to whether Cobb is permanently totally disabled. Perry County asserts as follows:

> "The ALJ erroneously found on page 20 of the decision that Cobb has a 'possible learning disability'."
>
> . . .
>
> "The ALJ's erroneous finding on page 20 that Cobb has 'no ability to operate a computer' is not supported by substantial evidence."

The Board, as an appellate tribunal, cannot usurp the ALJ's role as fact-finder by superimposing its own appraisals as to weight and credibility of the evidence 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). This is particularly true in light of the fact Perry County failed to address these alleged errors in its August 5, 2013, petition for reconsideration. As Perry County failed to address these alleged errors with the ALJ, giving him an opportunity to respond and possibly correct the alleged mistakes, the Board will not address them.

Perry County argues "the ALJ found PTD under an unannounced employment standard" by finding Cobb will not be able to resume work under "normal employment conditions." As stated, the ALJ's determination Cobb is permanently and totally disabled is supported by substantial evidence. Perry County’s focus on the ALJ's use

of the phrase "under normal employment conditions," is misplaced. Additionally, this was not addressed in Perry County's petition for reconsideration.

Perry County's final argument concerns Cobb's hearing loss claim. It asserts the testimony from Dr. Barbara Eisenmenger "does not support the finding that Cobb has 21% permanent functional impairment from noise induced hearing loss at work," as Dr. Eisenmenger testified that the impairment rating included hearing loss from factors other than noise. Significantly, this argument was not contained in Perry County's petition for reconsideration. Nevertheless, this Board will address it.

In the record is the April 1, 2013, Form 108 by Dr. Eisenmenger. In the Form 108, Dr. Eisenmenger provided the following explanation:

> Mr. Cobb has greater hearing loss than would be expected for an individual of 51 years of age. Objective and behavioral measures are consistent and show a pattern in the high frequencies typical of that seen with long term noise exposure. The low frequency thresholds are poorer than typically seen with noise exposure alone. The hearing loss seems to be the results of long term noise exposure and other factors that cannot be separated.

Dr. Eisenmenger assessed a 21% whole person impairment rating. Under "causation," Dr. Eisenmenger

checked "yes" to the following statement: "Audiogram and other testing establish a pattern of hearing loss compatible with that caused by hazardous noise exposure in the workplace." Dr. Eisenmenger also checked "yes" to the following question: "Within reasonable medical probability, is plaintiff's hearing loss related to repetitive exposure to hazardous noise over an extended period of employment.[sic]"

Dr. Eisenmenger's May 28, 2013, deposition contains the following testimony:

> Q: And I take it that's the reason for your next sentence, indicating that there are possibly other factors involved here besides long-term noise exposure?
>
> A: Correct, but I have no idea, you know, based on him walking in that day, with just the information he had, as to what those might be. I don't have any history.
>
> Q: What are the possibilities for the other factors?
>
> A: Family history. We ask about that, but- so it could be family history. It could be hereditary stuff- which is family history. It could be- I don't know, there's just- I don't know. You know, I usually try to ask them about any illnesses or anything that they have that could have caused that to happen. There's a lot of different things that can cause it.

> I mean, I just don't know how long it's been there; when it appeared- you know, with a snapshot test like this, we know this is what it looks like on the day that we saw him, but that's about it.

It is clear from Dr. Eisenmenger's Form 108 and deposition that she believes Cobb's hearing loss is due to repetitive exposure to hazardous noise over the course of his employment. While Dr. Eisenmenger also expressed the opinion that "other factors" are involved, she has repeatedly stated that these potential "other factors" are *unable to be determined*. Thus, Dr. Eisenmenger's impairment rating and opinions regarding causation comprise substantial evidence in support of the ALJ’s decision, and the ALJ's award of PPD benefits based on those opinions will not be disturbed.

Accordingly, on all issues raised by Perry County on appeal, the July 23, 2013, Opinion and Order and the August 19, 2013, Order ruling on Perry County's petition for reconsideration are **AFFIRMED**.

ALL CONCUR.

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