Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: July 25, 2014

CLAIM NO. 201201742 & 201201741

PERRY COUNTY COAL CORPORATION PETITIONER

VS. **APPEAL FROM HON. J. LANDON OVERFIELD, CHIEF ADMINISTRATIVE LAW JUDGE**

JERRY TAYLOR
and HON. J. LANDON OVERFIELD,
CHIEF ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

ALVEY, Chairman. Perry County Coal Corporation ("Perry County") seeks review of the Opinion and Order on Remand rendered March 21, 2014, and the Opinion, Order and Award rendered July 26, 2013 by Hon. Edward D. Hays, Administrative Law Judge ("ALJ"). In the Opinion and Order on Remand, the ALJ awarded Jerry Taylor ("Taylor") permanent

total disability ("PTD") benefits and medical benefits for neck, low back and right leg pain due to work-related cumulative trauma. Perry County also appeals from the April 16, 2014 and August 19, 2013 orders on reconsideration. Perry County argues the ALJ's findings are not supported by substantial evidence. We disagree and affirm.

Taylor filed a Form 101 alleging cumulative trauma injuries to his neck and back, manifesting on September 7, 2012, due to repetitive use. Taylor also alleged an occupational hearing loss claim, which was dismissed by the ALJ.[1] Taylor attached to the Form 101 a questionnaire completed by Dr. Chad Morgan, D.C., on October 4, 2012. Dr. Morgan stated Taylor's current medical issues related to the neck and back were caused, either in whole or in part, by his job activities.

Taylor testified by deposition on March 5, 2013 and at the hearing held May 23, 2013. Taylor was born on September 2, 1956, and is a high school graduate. Other than an underground mining license, Taylor has no specialized or vocational training. Taylor began working as a miner when he was eighteen years old. Except for a four month period when he was employed at a sign factory,

[1] We will not summarize the evidence concerning the hearing loss claim since this is not an issue raised on appeal.

Taylor worked continuously in underground coal mines until September 7, 2012.

Taylor worked for Perry County from 2001 until September 7, 2012. In his first year there, he was a scoop operator. For the remainder of his employment he worked as a bridge operator. When he was not operating equipment, Taylor shoveled while on his knees or laid out belt structure. He estimated he operated the bridge eight to nine hours a day.

Taylor began experiencing back and neck pain approximately four to five years before he quit working. Taylor first saw Dr. Morgan, a chiropractor, for his back and neck pain in June 2012. Dr. Morgan ordered MRIs of his lumbar and cervical spine, and treats Taylor twice a week. Taylor testified the chiropractic treatment helps his back and neck. Taylor missed no work due to neck or back pain before September 7, 2012. Taylor acknowledged he had been treated by Dr. Hubert Williams at the London Urgent Care Center five to six years in the past for a pulled muscle in his lower back.

As a bridge operator, Taylor worked in a sitting position and used both foot controls and hand levers. At the hearing, Taylor testified as follows regarding what his 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.

Taylor explained as a bridge operator he sat "cramped up in the deck of the carrier" which caused pain in his low back and neck. He also 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 stated coal mining is heavy work. He estimated he worked between eight to ten hours daily, five to six days per week. Taylor voluntarily quit his job with Pike County stating he "just couldn't do it" due to his neck and back pain. 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.

In support of his claim, Taylor introduced a Form 107 completed by Dr. Arthur Hughes on January 9, 2013. Taylor reported a thirty-nine year history of working as an underground miner. Taylor reported he first experienced neck pain approximately three to five years ago, back pain

twelve to fifteen years ago, and right leg pain two years ago with tingling from the hip to the foot. Taylor could not recall a specific injury, but reported he operated a bridge carrier in a seated position, was required to do repairs on the equipment, and had to “duck walk” or crawl in some areas of the mine. Taylor reported he stopped working on September 7, 2012, because he could no longer perform his job.

Dr. Hughes reviewed the chiropractic records of Dr. Morgan beginning June 15, 2012, which consistently documented complaints of low back and neck pain, numbness, and tingling. Dr. Hughes indicated the July 10, 2012 lumbar and cervical x-rays revealed multi-level degenerative changes. A July 25, 2012 lumbar MRI showed multi-level degenerative changes; 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. 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; foraminal narrowing at C4-C5; and severe narrowing of the canal at C3-C4.

Dr. Hughes performed a physical examination and diagnosed neck pain without radiculopathy and low back pain

with right lumbar radiculopathy. Dr. Hughes opined Taylor's injuries caused 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.
>
> . . . .
>
> 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, resulting in a combined 15% impairment rating. He stated 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, low back, and trunk. Due to his neck and low back pain, Dr. Hughes

imposed a lifting limit of five pounds regularly and twenty pounds on occasions.

Perry County introduced Dr. Daniel Primm's March 19, 2013 report. Taylor reported a gradual onset of neck and low back pain beginning approximately two years ago, but could not recall a specific injury. Taylor reported treating with a chiropractor two times a week since June 2012, which provides temporary relief. Dr. Primm reviewed the medical records, including those of Dr. Morgan. Dr. Primm noted Dr. Morgan requested MRIs of both the cervical and lumbar spine; however, he discussed only the findings of the cervical 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 related 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. Accordingly, Dr. Primm did not relate Taylor's 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.

In an opinion rendered July 26, 2013, the ALJ found "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." After finding Taylor sustained an injury as defined by the ACT, the ALJ relied upon Dr. Hughes' opinion in finding a 15% impairment rating appropriate. He also found Taylor entitled to PTD benefits, stating as follows:

> 8. . . . 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[sic] 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.

The ALJ awarded PTD benefits and medical benefits. Both parties filed petitions for reconsideration, and Pike County appealed to the Board. The Board vacated in part and remanded the ALJ's decision in an opinion rendered January 23, 2014, stating as follows:

> 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.
>
> (Emphasis added)

On March 21, 2014, the ALJ issued an Opinion and Order on Remand, stating as follows:

> In the original Opinion, the ALJ erroneously found that Plaintiff, Jerry Taylor, had sustained degenerative changes that were dormant conditions aroused into disabling reality by a work-related event. This finding was not supported by medical evidence contained in the record.
>
> Upon current review, the ALJ is drawn to the opinion of Dr. Arthur Hughes wherein he states that Plaintiff's neck pain is a consequence of cumulative injury in his work as an underground miner and his lower back and right leg pain are the consequences of Plaintiff's work as an underground miner. Based on Dr. Hughes' opinions, the ALJ does hereby vacate those portions of the earlier Opinion which indicate or suggest that Plaintiff is suffering from a dormant condition aroused into disabling reality. The earlier Opinion is hereby amended to include a finding that Jerry Taylor sustained a work-related injury, as defined by the Act, that was caused by his work activities. More specifically, the ALJ finds Plaintiff's neck pain to be a consequence of cumulative injury sustained and caused by his work as an underground miner. The ALJ does further find that Plaintiff's lower back and right leg pain are also the consequence of cumulative injury caused by Plaintiff's work as an underground miner. The ALJ finds the opinions of Dr. Hughes to be persuasive and to

> constitute substantial evidence that supports the ALJ's findings herein.

Pike County filed a petition for reconsideration, asserting the same arguments it now makes on appeal. In an Order rendered April 16, 2014, Hon. J. Landon Overfield, Chief Administrative Law Judge ("CALJ")[2], stated after reviewing the record, he found no errors patently appearing on the face of the opinion on remand, and therefore denied Pike County's petition.

On appeal, Pike County argues substantial evidence supports neither the ALJ's finding of a work-related injury due to cumulative trauma nor permanent total disability. It asserts pain is not a harmful change in the human organism which can be evidenced by objective medical findings and is not a cumulative trauma pursuant to KRS 342.0011. It asserts Dr. Hughes' opinion does not constitute substantial evidence, attacking his assessment of impairment pursuant to the AMA Guides and stating he did not sufficiently "identify the mechanism of injury, or causal nexus between Taylor's work and his findings." It reiterates pain cannot be a basis of a finding of

[2] In the Order, the CALJ noted he was acting as caretaker of claims assigned to the ALJ, who retired in March 2014.

cumulative trauma injury and therefore a finding to the contrary is not supported by substantial evidence.

Pike County also argues both the original opinion and the decision on remand contain insufficient findings of fact permitting meaningful review of "what injuries Taylor suffered, how they were suffered, what the impairment assessed was derived from, on what basis is Taylor totally disabled and why he relied exclusively on the flawed medical opinion of Dr. Hughes in finding Taylor sustained work-related injuries that were permanently disabling."

Pike County argues the ALJ exceeded his authority as the fact-finder since he assumed coal mine work causes cumulative trauma rather than identifying the nature of Taylor's work and injury which a medical expert attributed to cumulative trauma. Likewise, it argues Dr. Hughes' recitation of work duties is neither accurate nor consistent with Taylor's testimony regarding his work duties. It asserts Taylor's work with Pike County was not heavy manual labor and did not involve repetitive motion of the neck and back.

As the claimant in a workers' compensation proceeding, Taylor had the burden of proving each of the essential elements of his cause of action, including injury, causation and the extent of his disability. *See* KRS

342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Taylor was successful in that 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).

Authority has long acknowledged in making a determination granting or denying an award of PTD benefits, an ALJ has wide ranging discretion. Seventh Street Road Tobacco Warehouse v. Stillwell, 550 S.W.2d 469 (Ky. 1976); Colwell v. Dresser Instrument Div., 217 S.W.3d 213, 219 (Ky. 2006). KRS 342.285 designates the ALJ as the finder of fact. Therefore, the ALJ has the sole discretion to determine the quality, character, and substance of evidence. Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). The ALJ, as fact-finder, may choose whom and what to believe and, in doing so, 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 party's total proof. Caudill v. Maloney's Discount

Stores, 560 S.W.2d 15, 16 (Ky. 1977); Pruitt v. Bugg Brothers, 547 S.W.2d 123 (Ky. 1977).

At the outset, we conclude the ALJ followed the directives of the Board in the Opinion and Order on Remand in determining Taylor sustained work-related cumulative trauma injuries to his low back, right leg and neck. We reiterate Dr. Hughes' report constitutes substantial evidence supporting the ALJ's decision. Despite this statement, Pike County asserts Dr. Hughes' opinions do not constitute substantial evidence on several grounds. For the reasons set forth below, we disagree and affirm.

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." In Gibbs v. Premier Scale Co./Indiana Scale Co., 50 S.W.3d 754 (Ky. 2001), the Court recognized in addition to objective diagnostic tools such as x-ray, CT scan, EMG/NCV or MRI, there is a wide array of standardized laboratory tests and tests of physical

and mental function available to the medical practitioner. Therefore, the Court held the existence of a harmful change can be established indirectly, through information gained by direct observation, and/or by testing which applies objective or standardized methods demonstrating the existence of symptoms of such a change. Id. at 762.

Based upon the above standard, Dr. Hughes' report supports a finding of an injury since he diagnosed a harmful change based on information gained through reviewing Taylor's chiropractic treatment records and MRI reports, as well as direct observation. Dr. Hughes specifically reviewed Dr. Morgan's records from June 2012 to August 2012, along with the cervical and lumbar x-rays and MRI reports. He also performed a physical examination, stating as follows:

> He can flex the neck to 45 degrees, extend to 20 degrees, laterally bend to the right 15 degrees and to the left 15 degrees and he can rotate to 45 degrees bilaterally. Spurling sign is negative bilaterally. Muscle strength is normal in the upper and lower extremities. Tendon reflexes are 1+ at the biceps and triceps, 2+ at the knees, 1+ at the ankles and the plantar responses are flexor. There is diminished light touch sensation of the right big toe. Straight leg raising on the right produces lower back pain extending to the distal calf at 45 degrees and straight leg raising on the left produces lower back pain at 60 degrees.

> Strength of the legs is normal. His gait is unremarkable. He can stand on toes and heels. He can forward flex and touch his toes but he is unable to laterally bend or extend at the lumbar spine.

Therefore, we find Dr. Hughes' report constitutes substantial evidence and supports the ALJ's finding Taylor sustained injuries to his neck, low back, and right leg.

We likewise find Dr. Hughes' opinion constitutes substantial evidence regarding causation, i.e., Taylor's injuries are the result of work-related cumulative trauma. 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, Dr. Hughes opined Taylor's "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." In support of findings regarding causation, Dr. Hughes noted Taylor's thirty-nine year history of working as an underground miner, a job which required bending, twisting, lifting, crawling, pushing and pulling, stooping, crouching, and prolonged walking and standing. The ALJ acted within his authority in relying upon Dr. Hughes' opinion regarding causation. The deficiencies of Dr. Hughes' opinions alleged by Pike County go to the weight of the evidence, and do not render it unsubstantial.

The ALJ's determination Taylor is permanently totally disabled is in accordance with the Kentucky Supreme Court's holding in Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). Taking into account Taylor's age of 56, twelfth grade education, lack of specialized or vocational training, and his exclusive work history in underground coal mining, in conjunction with the restrictions assigned by Dr. Hughes, the ALJ was persuaded due to the effects of the work-related injury, he is totally disabled. Because the outcome selected by the ALJ is supported by substantial evidence, we are without authority

to disturb his decision on appeal. *See* KRS 342.285; Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The ALJ provided a sufficient basis to support his determination regarding injury, causation and total disability. Parties are entitled to findings sufficient to inform them of the basis for the ALJ's decision to allow for meaningful review. Kentland Elkhorn Coal Corp. v. Yates, 743 S.W.2d 47 (Ky. App. 1988); Shields v. Pittsburgh and Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982). This Board is cognizant of the fact an ALJ is not required to engage in a detailed discussion of the facts or set forth the minute details of his reasoning in reaching a particular result. The only requirement is the decision must adequately set forth the basic facts upon which the ultimate conclusion was drawn so the parties are reasonably apprised of the basis of the decision. Big Sandy Community Action Program v. Chafins, 502 S.W.2d 526 (Ky. 1973). We also find instructive the holding of the Kentucky Supreme Court in New Directions Housing Authority v. Walker, 149 S.W.3d 354, 358 (Ky. 2004), where the claim was remanded to the ALJ "for further consideration, for an exercise of discretion, and for an explanation that will permit a meaningful review." In this instance, we find the Opinion and Order on Remand,

the Opinion, Order and Award and the orders on reconsideration meet this standard.

Therefore, the March 21, 2014 Opinion and Order on Remand; the July 26, 2013 Opinion, Order and Award; and the orders on reconsideration rendered April 16, 2014 and August 19, 2013, by Hon. Edward D. Hays, Administrative Law Judge and Hon. J. Landon Overfield, Chief Administrative Law Judge, are hereby **AFFIRMED.**

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON SARAH K MCGUIRE
P O BOX 351
PIKEVILLE, KY 41502

COUNSEL FOR RESPONDENT:

HON MCKINNLEY MORGAN
921 SOUTH MAIN STREET
LONDON, KY 40741

CHIEF ADMINISTRATIVE LAW JUDGE:

HON J LANDON OVERFIELD
PREVENTION PARK
657 CHAMBERLIN AVENUE
FRANKFORT, KY 40601