OPINION ENTERED: February 8, 2013

CLAIM NO. 201176365

TECO COAL CORPORATION PETITIONER

VS. **APPEAL FROM HON. WILLIAM J. RUDLOFF, ADMINISTRATIVE LAW JUDGE**

CLAYTON COUCH
and HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING IN PART,
VACATING IN PART, AND REMANDING
* * * * * *

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

STIVERS, Member. Teco Coal Corporation ("Teco") appeals from the September 21, 2012, opinion and order and the October 15, 2012, order ruling on its petition for reconsideration rendered by Hon. William Rudloff, Administrative Law Judge ("ALJ"). In the September 21, 2012, opinion and order the ALJ awarded Clayton Couch

("Couch") permanent total disability ("PTD") benefits and medical benefits. The ALJ also awarded Teco credit for temporary total disability ("TTD") benefits paid.

The Form 101, filed on December 8, 2011, indicates Couch sustained injuries to his right shoulder and neck and a cumulative trauma injury to his left shoulder on August 22, 2011, in the following manner: "Stepped on belt line while it was off to cross to the other side, while crossing the belt it came back on and threw him off and he fell on his shoulder. Cumulative trauma to Left [sic] Shoulder [sic]."

The August 6, 2012, benefit review conference ("BRC") order lists the following contested issues: "injuries to neck & left shoulder; extent & duration; notice as to neck; work-relatedness; causation; pre-existing active; credit for disability benefits; overpayment of TTD." The BRC order indicates TTD benefits were paid in the amount of $721.97 per week from August 23, 2011, through April 11, 2012.

On appeal, Teco first asserts the ALJ's finding of a left shoulder impairment is not supported by substantial evidence. Teco next asserts the ALJ's failure to disclose the reasons he relied upon the opinions of Dr. Johnson instead of Dr. Snider, the treating surgeon, is

reversible error. Teco also asserts the ALJ's finding of permanent total disability is not supported by substantial evidence. Finally, Teco asserts the ALJ's finding Teco is not entitled to a credit for short-term disability ("STD") benefits paid is error. Teco does not contest the ALJ's finding Couch sustained work-related neck and right shoulder injuries.

Concerning the neck and shoulder injuries, in the September 21, 2012, opinion and order, the ALJ determined as follows:

> Based on the plaintiff's credible and convincing testimony and the comprehensive medical report of Dr. Johnson, I make the factual determination that the plaintiff sustained work-related injuries to his neck and right shoulder while working for the defendant on August 22, 2011 and cumulative trauma to his left shoulder caused by his work. KRS 342.0011(1) and KRS 342.0011(33).

Since Couch had the burden of proof regarding his alleged left shoulder cumulative trauma injury and was successful before the ALJ, our task is to determine whether substantial evidence supports the ALJ's determination. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986). Substantial evidence has been defined as some evidence of substance and relevant consequence, having the fitness to

induce conviction in the minds of reasonable people. Smyzer v. B.F. Goodrich Chemical Co., 474 S.W. 2d 367, 369 (Ky. 1971). This evidence has been likened to evidence that would survive a defendant's motion for a directed verdict. Kentucky Utilities Co. v. Hammons, 145 S.W. 2d 67, 71 (Ky. 1940). Although Teco may note evidence that would have supported a conclusion contrary to the ALJ's decision, such evidence is not an adequate basis for reversal on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974).

Couch introduced the Form 107-I dated May 16, 2012, prepared and signed by Dr. Robert K. Johnson. After performing a physical examination and a medical records review, Dr. Johnson set out the following opinions regarding Couch's left shoulder: “The left went bad gradually due to excessive stresses and strains that, in my opinion, greatly exceed what one would anticipate from a normal person doing more normal activities.” He further opined "[t]he left shoulder gradually occurred related to his work." Dr. Johnson assessed a 20% whole person impairment ("WPI") rating which included the following ratings for Couch's left shoulder:

- Ch. 16, Table 16-40, page 426. Flexion of 120 degrees on the left equals 4% upper extremity.

- Ch. 16, Table 16-43, page 477. 130 degrees on the left equals 2% upper extremity.
- Adduction of 30 degrees on the left equals 1% upper extremity.
- Sum on the left is 7% which equates to a 4% WPI.
- Impairment of both shoulders being such that Mr. Couch cannot work at shoulder level or above is 3% WPI.

Dr. Johnson's opinions and impairment ratings comprise substantial evidence which supports the ALJ's decision Couch sustained a left shoulder cumulative trauma injury. Therefore, we are without authority to disturb the ALJ's decision on this issue.

We find no merit in Teco's argument the ALJ's failure to disclose his reasons for relying upon Dr. Johnson's opinions instead of Dr. Snider's, constitutes reversible error. While authority establishes an ALJ must effectively set forth adequate findings of fact from the evidence in order to apprise the parties of the basis for his decision and to permit meaningful review on appeal, he is not required to recount the record with line by line specificity or engage in a detailed explanation of the minutia of his reasoning in reaching a particular result. Shields v. Pittsburgh and Midway Coal Mining Co., 634

S.W.2d 440 (Ky. App. 1982); Big Sandy Community Action Program v. Chaffins, 502 S.W.2d 526 (Ky. 1973).

As fact-finder, the ALJ determines the quality, character, and substance of all the evidence and is the sole judge of the weight and inferences to be drawn from the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993); Miller v. East Ky. Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997). He may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it was presented by the same witness or the same party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). If "the physicians in a case genuinely express medically sound, but differing, opinions as to the severity of a claimant's injury, the ALJ has the discretion to choose which physician's opinion to believe." Jones v. Brasch-Barry General Contractors, 189 S.W.3d 149, 153 (Ky. App. 2006).

The ALJ, by relying upon Dr. Johnson in lieu of Dr. Snider, was exercising the discretion and authority accorded him under the law. The ALJ was not obligated to set out, with specificity, the reasons he chose to rely upon Dr. Johnson's opinions. The ALJ was only required to specify the physician upon whom he relied in making his decision. Consequently, the fact the ALJ did not elaborate

upon the reasons for his reliance on Dr. Johnson's opinions is not error.

Similarly, we are unpersuaded by Teco's argument the ALJ erred by finding Couch is permanently totally disabled because his finding is not supported by the record.

Regarding extent and duration, the ALJ determined as follows:

> Based on the totality of the evidence in the record, including the plaintiff's convincing testimony and the medical report of Dr. Johnson, I make the factual determination that Mr. Couch sustained a significant whole person impairment as a result of his work injuries on August 22, 2011 and lacks the capacity to return to work.
>
> In rendering a decision, KRS 342.285 grants the Administrative Law Judge as fact-finder the sole discretion to determine the quality, character, and substance of evidence. *AK Steel Corp. v. Adkins*, 253 S.W.3d 59 (Ky. 2008). In the present case the ALJ finds most persuasive the opinion of Dr. Johnson. I, therefore, find that the plaintiff sustained a 20% whole person impairment.
>
> "'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 a result of an injury . . . ." Kentucky Revised Statutes (KRS) 342.0011. To determine if an injured employee is permanently totally

disabled, an ALJ must consider what impact the employee's post-injury physical, emotional, and intellectual state has on the employee's ability "to find work consistently under normal employment conditions . . . . [and] to work dependably[.]" *Ira A. Watson Dept. Store v. Hamilton*, 34 S.W.3d 48, 51 (Ky. 2000). In making that determination,

> "the ALJ must necessarily consider the worker's medical condition . . . [however,] the ALJ is not required to rely upon the vocational opinions of either the medical experts or the vocational experts. A worker's testimony is competent evidence of his physical condition and of his ability to perform various activities both before and after being injured."

Id. at 52. (Internal citations omitted.) See also, *Hush v. Abrams*, 584 S.W.2d 48 (Ky. 1979).

In the present case, I considered the severity of the plaintiff's work injuries, his age, his work history, his testimony and Dr. Johnson's specific opinions that he is occupationally disabled. Based on these factors, I make the factual determination that the plaintiff cannot find work consistently under regular circumstances and work dependably. I, therefore, make the factual determination that he is permanently and totally disabled.

In its petition for reconsideration, Teco requested additional findings of fact regarding the determination Couch was permanently totally disabled. In the October 15, 2012, order ruling on the petition for reconsideration, the ALJ provided the following additional findings:

> In the Opinion and Order dated September 21, 2012, I made the factual determination that the plaintiff's former job as a section foreman was a physical labor job, that he is still being treated by Dr. Chaney, that he has had two right shoulder surgeries and that in the spring of 2012 he was awarded Social Security total disability benefits. In his medical report Dr. Johnson found that the plaintiff's neck and shoulder injuries were caused by his work and that he will sustain a 20% whole person impairment under the AMA Guides, Fifth Edition, and further that Mr. Couch has reached maximum medical improvement and does not retain the physical capacity to return to his former work. Based upon the totality of the evidence and particularly on the plaintiff's testimony and the evidence from Dr. Johnson and the decision of the Kentucky Supreme Court in Ira A. Watson Dept. Store v. Hamilton, 34 S.W.3d 48 (Ky.2000), I determined that the plaintiff is permanently and totally disabled.

The language of the September 21, 2012, opinion and order and the October 15, 2012, order ruling on the petition for reconsideration clearly state the ALJ relied

upon Couch's testimony, the opinions of Dr. Johnson, and other factors as set forth in Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000), in determining Couch is permanently totally disabled. Again, our task is to determine if this evidence comprises substantial evidence in support of the ALJ's determination.

Couch's June 4, 2012, deposition testimony reveals Couch was fifty-five years old and completed the seventh grade. He did not have a GED, and his only specialized training was as a foreman and a MET. Couch began working for Teco in August, 2009, and worked as a section foreman the entire time he was employed by Teco. He lifted an average of forty to fifty pounds as section foreman. Couch worked at Blue Diamond Coal, Diamond May Coal, Calvary Coal, and Whitaker Coal prior to his employment with Teco. He worked in construction prior to working for Whitaker Coal and at a sawmill prior to working in construction.

Regarding his current left shoulder symptoms, Couch testified as follows:

> Q: Do you still have shoulder pain in your left shoulder?
>
> A: A little bit of a night if I lay on it.

> Q: Do you still use your left- you know, your left arm and shoulder to lift things and do things or do you limit yourself?
>
> A: I've really got to limit myself. You know, I can't- I can't lift probably more than ten pound [sic] anymore, and I don't do that very often.

Regarding his right shoulder symptoms, Couch testified as follows:

> Q: How does your right shoulder feel now?
>
> A: Pain just about every day. Well, actually, everyday it's painful.
>
> Q: Like on a scale of one to ten, with ten being the worst pain and one being very mild, where is your pain usually as related to the right shoulder?
>
> A: Usually around anywhere from- of [sic] a [sic] morning when I get up, it's usually around a nine or ten of [sic] a [sic] morning when I get up. And on up in the day it kind of eases up to maybe a four. And then late of [sic] a [sic] night when I lay down, the pain goes back up, you know. I'm never without pain in it.
>
> Q: So, I take it then your right shoulder is significantly worse than your left.
>
> A: Yes, ma'am.

Couch provided his limitations due to his right shoulder pain testifying as follows:

> Q: In your opinion, anyway. What do you limit yourself from doing, if anything, with your right shoulder?
>
> A: Just about everything. I can't- I can't reach behind me anymore. So, I've had to learn to, for example, keep my billfold in my left pocket because I can't reach and get it out of my right pocket. I can't lift it no more than straight out, if I can lift it straight out sometimes.
>
> Q: You're talking about your arm right out in front of you?
>
> A: Yeah. Yeah, and like, you know, I don't want to be rude to anybody when they reach out to shake my hand. If I meet people, you know, I like stick my left hand out because I can't- I can't stick my right hand out to shake hands, you know.
>
> Q: And you are right-handed?
>
> A: Yes, ma'am.

Regarding his current neck pain, Couch testified as follows:

> A: Mainly it's like if I try to lean back or try to turn my head, it hurts like up like the right side of my neck. It'll hurt up like the- feels like about the base of my skull. And I can't turn it but so much each way, you know. And I can't- I can't back my vehicle up like looking over your right shoulder. I can't do that without getting real excruciating pain, either.

Couch testified he is unable to return to his prior job at Teco, explaining as follows:

> A: I can't even hardly get out of the bed of [sic] a [sic] morning, let alone try to work, you know. I can't do anything hardly at home. I can't do hardly anything anymore without a lot of pain.
>
> Q: And the pain you are referring to is basically your...
>
> A: Basically my neck and my shoulders. My right shoulder more, you know, than the left, but...

Regarding his ability to return to work, Couch testified as follows at the August 28, 2012, hearing:

> Q: Okay. Do you think you could go back and do any of the jobs that you were trained for or equipped to perform that you have done in the past?
>
> A: No, I don't think I could.

In the May 16, 2012, Form 107-I, Dr. Johnson opined Couch does not have the physical capacity to return to the type of work he was performing at the time of the injury and imposed the following restrictions:

> In my opinion, Mr. Couch cannot place his head in awkward positions such as constantly looking up or turning his head to look backwards when backing up a vehicle. He should avoid jarring and any other stressful activities with the neck.

> Mr. Couch cannot utilize his right hand for delicate activities due to the weakness.
>
> He should not lift more than 8 to 10 pounds and only intermittently on the right. On the left side, 10 to 12 pounds and with a slightly increased repetitiveness.

The above-cited medical and lay evidence comprise substantial evidence supporting the ALJ's determination Couch is permanently totally disabled. In making a determination regarding permanent total disability, an ALJ is vested with broad discretion. *See* Seventh Street Road Tobacco Warehouse v. Stillwell, 550 S.W.2d 469 (Ky. 1976). Couch's testimony, standing alone, is substantial evidence supporting this determination, as a claimant's credible testimony is probative of his ability to labor post-injury. *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). It is evident from the language of the September 21, 2012, opinion and order and the October 15, 2012, order on petition for reconsideration that the ALJ also considered additional factors before concluding Couch is permanently totally disabled, including Couch's age and work history. *See* Ira A. Watson Dept. Store v. Hamilton, supra. Thus, the ALJ's determination Couch is permanently

totally disabled is supported by substantial evidence and cannot be disturbed.

Teco's final argument on appeal is the ALJ erred by denying it credit for STD benefits paid, since the benefits were "exclusively employer provided benefits that he has not paid back to date." Teco asserts the records shows Couch drew TTD benefits from August 23, 2011, through April 11, 2012, and drew STD benefits from September 3, 2011, through March 3, 2012.

Regarding entitlement to this credit, in the September 21, 2012, opinion and order, the ALJ determined as follows:

> KRS 342.730(6) provides that workers' compensation benefits shall be offset by payments made under an exclusively employer-funded disability or sickness and accident plan. The uncontradicted testimony of the plaintiff at the hearing was that the employees paid for the short-term disability benefits which he has received. Since the defendant's disability plan was not exclusively employer-funder, the defendant is not entitled to any credit or setoff for the disability benefits paid to the plaintiff.

In its petition for reconsideration, Teco noted Couch's testimony on the issue of payment for the STD benefits was not uncontradicted, as Couch testified at his

deposition the benefits were company-provided. Additionally, Teco noted it filed a copy of the STD plan which indicates the company paid the entire cost of the plan.

In the October 15, 2012, order ruling on the petition for reconsideration, the ALJ determined as follows:

> The defendant also argues that it is entitled to a credit or setoff for short-term disability benefits paid to the plaintiff. In the Opinion and Order dated September 20, 2012 I ruled that based on the plaintiff's sworn testimony at the hearing it was proven that it was his understanding that the employees paid for the short-term disability benefits and that so much of the employees' checks was deducted to pay for said benefits (H.T., P. 23). In light of the plaintiff's hearing testimony, which was credible and convincing, the Opinion and Order dated September 21, 2012 is corrected and amended to state that the plaintiff's testimony on this issue was credible and persuasive but not uncontradicted. KRS 342.730(6) provides that workers' compensation benefits shall be offset by payments made under an exclusively employer-funded disability or sickness and accident plan. Since the plaintiff testified persuasively that the employees paid for the short-term disability benefits, the statute does not apply and defendant is not entitled to any credit or setoff for the disability benefits paid to the plaintiff.

Teco bore the burden of proving entitlement to an offset for STD benefits pursuant to KRS 342.730(6). *See* Dravo Lime Co. v. Eakins, 156 S.W. 3d 283 (Ky. 2005). Kentucky law holds when the party with the burden of proof before the ALJ is unsuccessful, the sole issue on appeal is whether the evidence compels a different conclusion. *See* Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). Compelling evidence is defined as evidence that is so overwhelming, no reasonable person could reach the same conclusion as the ALJ. *See* REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985).

KRS 342.730(6), the applicable statute, reads as follows:

> All income benefits otherwise payable pursuant to this chapter shall be offset by payments made under an exclusively employer-funded disability or sickness and accident plan which extends income benefits for the same disability covered by this chapter, except where the employer-funded plan contains an internal offset provision for workers' compensation benefits which is inconsistent with this provision.

KRS 342.730(6) requires a three-part analysis in determining whether the statute applies to a particular income benefit; in this case, STD benefits received by Couch. The plan must be exclusively employer funded, it

must extend income benefits for the same disability covered by workers' compensation, and it must not contain an internal offset provision for workers' compensation benefits.

In his deposition, concerning the STD benefits he received, Couch testified as follows:

> Q: Any type of company-provided benefits, such as short-term or long-term disability?
>
> A: I drawed [sic] their short-term for awhile.
>
> Q: Do you mean like six months?
>
> A: I think it was six months.
>
> Q: And that is a company-provided benefit?
>
> A: Yes, ma'am.
>
> Q: And did you sign some type of reimbursement agreement regarding those short-term disability benefits?
>
> A: No, ma'am.
>
> Q: Have you ever had to- gotten any kind of correspondence or anything from your employer about you having to pay those benefits back if you're awarded Social Security or workers' comp, anything like that?
>
> A: No.
>
> Q: Okay. But as of now you've not paid back any part of the benefits you received, correct?

A: Correct.

At the hearing, Couch testified as follows:

Q: Okay. Now, as of today's date have you paid back any of the short-term disability benefits you received from TECO?

A: No, they- my understanding was that we paid for that, you know.

Q: Who?

A: The employees.

Q: Oh, paid for the short-term disability benefits?

A: Yeah. They cut that- so much out of my check I think for that, you know, so-

Q: Okay.

A: They didn't say anything about paying them back, you know, when I drawed [sic] it.

Q: So no one said anything to you about-

A: No.

On June 14, 2012, Teco filed a “Notice of Filing STD Information” and attached the following documents:

- "Application for Leave of Absence"
- "Authorization to Release Medical Information"
- "Reimbursement Agreement"
- "Application for Short Term Disability Income Benefits" (Sections II - IV)

- "Your Short-Term Disability (STD) Plan"
- "Clayton Couch STD Payments"

The document entitled "Your Short-Term Disability (STD) Plan" indicates as follows: "The company pays the entire cost of your short-term disability benefits." The document entitled "Clayton Couch STD Payments" indicates Couch received STD benefits from September 11, 2010, through March 3, 2012, for a total of $42,075.08.

Additionally, on August 9, 2012, Teco filed another "Notice of Filing STD Information" in which it attached a one-page "Application for Leave of Absence."

While none of the documents purportedly pertaining to the STD plan filed by Teco on June 14 and August 9, 2012, were authenticated by a Teco employee, Couch failed to take issue with this until he filed his December 28, 2012, response brief to this Board, asserting as follows:

> Couch acknowledges that the Employer submitted a portion of the Short-Term Disability Plan into evidence; however, there is no indication on the Plan (nor is there any testimony) indicating whether it was the Plan that was in effect when he drew short-term benefits in 2010 when he drew short-term disability benefits or whether it was the same Plan in effect in 2011 when he drew them for his work-related injury.

However, the record indicates Couch failed to assert this argument at any point during the pendency of the litigation. Indeed, in his position statement to the ALJ, Couch stated the following: "While the Defendant/Employer did file the STD ’Plan,’ it appears that the plan itself it [sic] inconsistent." Therefore, as Couch failed to question the relevancy and authenticity of any of the documents filed on June 14 or August 9, 2012, until his response brief to this Board, we cannot.

Since the STD plan was filed in the record, the ALJ cannot ignore unequivocal proof on the issue of whether the STD plan is "exclusively employer-funded." KRS 342.730(6). The plan filed in the record unmistakably indicates the company paid the entire cost of Couch's STD plan. In contrast, Couch's testimony on this issue is inconsistent and equivocal, as Couch testified in his deposition that the STD benefits were company-provided benefits and later testified at the hearing it was his “understanding” and he “thinks” the employees paid for the STD benefits. In light of the unequivocal proof in the record in the form of the STD plan which addresses the first-prong of the three-part KRS 342.730(6) analysis- i.e. whether the plan is "exclusively employer-funded"- the ALJ must rely on this proof versus the inconsistent and

equivocal testimony of the claimant. Accordingly, we vacate the ALJ's determination the STD plan was not exclusively employer-funded and Teco is not entitled to an offset for payment of STD benefits. On remand the ALJ must find the STD plan was exclusively employer-funded.

On remand, the ALJ must also make additional findings regarding Teco’s entitlement to a credit pursuant to KRS 342.730(6). As aforementioned, KRS 342.730(6) involves a three-part analysis. The STD plan must be exclusively employer-funded, must extend income benefits for the same disability covered by workers' compensation, and must not contain an internal offset provision for workers' compensation benefits.

On remand, the ALJ must decide whether Teco is entitled to the offset by reviewing the STD plan and other evidence in the record and determining whether the plan extends income benefits for the same disability covered by workers' compensation and also contains an internal offset provision for workers' compensation benefits. *See* KRS 342.730(6). As this Board is not a fact-finding tribunal, we offer no opinion as to whether the proof in the record adequately addresses the remaining analysis under KRS 342.730(6) or the result of such analysis.

Accordingly, the September 21, 2012, opinion and order and the October 15, 2012, order on petition for reconsideration are **AFFIRMED** in part and **VACATED** in part. This claim is **REMANDED** for entry of an amended opinion and award on the sole issue of Teco's entitlement to an offset pursuant to KRS 342.730(6) in accordance with the views expressed herein.

ALL CONCUR.

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