Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: February 12, 2014

CLAIM NOS. 201300190 & 201300189

TECO COAL CORPORATION PETITIONER

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

WALTER ASHER,
and HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING IN PART, VACATING IN PART,
AND REMANDING

* * * * * *

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

RECHTER, Member. Teco Coal Corporation ("Teco") appeals from the July 29, 2013 Opinion and Order rendered by Hon. William J. Rudloff, Administrative Law Judge ("ALJ") and from the August 23, 2013 Opinion and Order on Reconsideration. The ALJ found Walter Asher ("Asher")

permanently totally disabled as a result of cumulative trauma injuries to his back and knees, manifesting on February 18, 2011. The ALJ also awarded medical benefits in Asher's hearing loss claim and held the 8% threshold for income benefits in KRS 342.7305 is unconstitutional. Teco argues the ALJ lacked subject matter jurisdiction to rule on any constitutional challenge, and the decision is not supported by substantial evidence. We agree the ALJ lacked jurisdiction to determine the constitutionality of KRS 342.7305, and we vacate that portion of the decision. In all other respects, the decision is supported by substantial evidence and we therefore affirm.

Asher testified at the hearing held July 25, 2013. He has experienced back pain since 2002, when he was employed by a different mining company. He was off work for approximately two years until starting his employment with Teco in 2004. Asher admitted he saw Dr. Dansereau every three months, and she prescribed Celebrex and Lorcet for back pain prior to the presently alleged work injury. As a result of the 2002 injury, Asher filed a workers' compensation claim which was settled based on a 5% impairment rating.

At Teco, Asher performed beltline maintenance which involved shoveling, belt splicing and moving rollers

that weighed 100 pounds. He worked in coal that was "pretty low", requiring him to maintain a "bent over" position and to crawl. Often, he had to "duck walk" or walk in a squatted position. Typically, he worked fifty-five to sixty hours per week.

His back pain worsened in December, 2010, and he noticed numbness in his right leg. He also felt constant pressure in his low back. He had no specific injury at that time, but his back condition just gradually worsened. He also noticed an increase in pain in his knees. Asher underwent surgery on his left knee, but has continued swelling. Asher believes he is unable to return to his position at Teco because of his low back and knee conditions. It is relevant to note Asher went off work in February 2011 for ulcer surgery, which took six months to heal, and he has not returned to work since.

Dr. Robert C. Hoskins evaluated Asher on January 24, 2013. In addition to the physical examination, Dr. Hoskins reviewed records from Lake Cumberland Neurosurgical Clinic. Asher provided a history of musculoskeletal complaints attributable to years of work in the coal mining industry. He also reported a gradual onset of back pain since 2002, when he was lifting, pulling and bending and "It felt like a pulled muscle in the lower lumbar that just

wouldn't go away." Dr. Hoskins noted Asher's medical records also documented a history of back pain since 2012. He further noted Asher reported having "fairly regular medical follow-ups secondary to his lower back for many years."

Dr. Hoskins diagnosed lumbosacral sprain/strain; right greater than left lumbosacral radiculitis; lumbar spondylosis; L2-3, L4-5, and L5-S1 disc protrusions; status post recent left knee arthroscopic partial meniscetomy; and bilateral patellofemoral osteoarthritis. Within a reasonable degree of medical probability, Dr. Hoskins concluded Asher's lumbar spine and bilateral patellofemoral impairments were secondary to years of cumulative trauma and repetitive strain associated with the physical demands encountered through his employment in the coal mining industry. He assigned a 12% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides").

Dr. Hoskins opined Asher did not have an active impairment prior to this injury. As to prognosis, Dr. Hoskins does not believe Asher retains the physical capacity to return to the type of work performed at the time of the injury. He recommended extensive restrictions

against lifting, crouching, kneeling, pushing, use of vibratory tools, or prolonged sitting or standing.

Dr. Daniel D. Primm, Jr. performed an independent medical examination on April 26, 2013. Asher indicated to Dr. Primm his lower back and knee pain had developed four years earlier. He denied any specific work-related injuries, and indicated he quit working in January 2011 due to problems with a peptic ulcer. Dr. Primm diagnosed probable degenerative arthritis and degenerative disc disease of the lumbar spine and probable early degenerative arthritis in both knees. Dr. Primm provided the following discussion:

> Overall, I cannot identify a specific work-related injury or condition. There is no study in the medical literature that has indicated patients engaged in heavy equipment operation or underground mining have a higher incidence of degenerative arthritis and back pain, compared to other individuals across the occupational spectrum. Also, in addition, there is no report that indicates these same individuals are at high risk of developing knee pain due to degenerative arthritis, compared to other patients in other occupations. Based on his exam and the above, I can find no work-related impairment to the body as a whole.

After reviewing the evidence, the ALJ found Asher sustained serious permanent injuries to his back and knees

due to cumulative trauma in the course of his work as an underground coal miner for Teco. The ALJ based his findings on the totality of the evidence, specifically identifying Asher's credible testimony and the "persuasive and compelling medical report" of Dr. Hoskins. After setting forth the standard for a carve-out for pre-existing active disability enunciated in Finley v. DBM Technologies, 217 S.W.3d 261 (Ky. App. 2007), the ALJ determined Asher did not have any pre-existing impairment or occupational disability prior to February 18, 2011. Again, the ALJ based his determination on Asher's credible testimony and Dr. Hoskins' report. Also in reliance on Dr. Hoskins' report, the ALJ determined Asher has a 12% impairment due to the cumulative trauma he suffered at Teco. After reciting the definition of permanent total disability, the ALJ made the following determination:

> In the present case, I considered the severity of the plaintiff's work injuries, his age, his work history, his education, his sworn testimony and Dr. Hoskins' specific opinions regarding the plaintiff's permanent impairment and occupational disability. Based on all of those factors, I make the factual determination that the plaintiff cannot find work consistently under regular work circumstances and work dependably. I, therefore, make the factual determination that he is permanently and totally disabled.

The ALJ denied any credit for short term disability benefits, noting Asher's sworn testimony and the documents filed by Teco which indicated the benefits were paid for treatment of his non-work-related ulcer. Finally, the ALJ determined KRS 342.7305, which disallows income benefits in hearing loss claims with less than an 8% impairment rating, is unconstitutional.

Teco filed a petition for reconsideration raising essentially the same arguments raised on appeal. By order dated August 23, 2013, the ALJ denied the petition for reconsideration without providing any additional findings.

On appeal, Teco challenges the sufficiency of the evidence supporting the ALJ's conclusion Asher suffered a cumulative trauma. As part of this argument, it attacks the reliability of Dr. Hoskins' opinion, claiming Asher failed to fully disclose his earlier back injury and resulting treatment in his medical history. At the outset, we note Asher, as the claimant in a workers' compensation proceeding, bore the burden of proving each of the essential elements of his cause of action. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because he was successful in that burden, the question on appeal is whether there is substantial evidence of record to support 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).

Teco's argument essentially concerns the weight given to the evidence, which is within the ALJ's discretion to determine. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Though Dr. Primm was the only orthopedic expert to offer an opinion in this claim, the ALJ was not obligated to give greater weight to a particular specialist in contradiction to a specialist in another medical field. Yocom v. Emerson Elec. Co., 584 S.W.2d 744 (Ky. App. 1979). Nor was the ALJ obliged to accept Dr. Primm's testimony that medical science has identified no relationship between occupation and degenerative changes or arthritis. The ALJ was well within his authority in choosing to rely on the opinion of Dr. Hoskins, who concluded Asher sustained cumulative trauma injuries to his back and knees resulting in permanent impairment.

We do not agree Dr. Hoskins' report is unreliable because he received an inaccurate medical history. Dr. Hoskins reviewed the report of Angel Peters, PA-C of Lake Cumberland Neurosurgical Clinic, which contained a history

of an injury in 2002 for which Asher was diagnosed with a muscle strain and was off work for two years. He was also informed by Asher of ongoing treatment for back pain.

Contrary to Teco's assertions, the facts in the present case are easily distinguishable from those in Cepero v. Fabricated Metals Corp., 132 S.W.3d 839 (Ky. 2004). In that case, a medical opinion could not be considered substantial evidence because the medical history provided to the evaluating physician was substantially inaccurate and incomplete. Cepero was an unusual case involving not only a complete failure to disclose, but affirmative efforts by the employee to cover up a significant injury to the left knee only two and a half years prior to the alleged work-related injury to the same knee. The prior, non-work-related injury left Cepero confined to a wheelchair for more than a month. The physician upon whom the ALJ relied was not informed of this prior history by the employee and had no other apparent means of becoming so informed. Here, we cannot say Dr. Hoskins had such an inaccurate or incomplete history so as to render his opinion completely lacking in probative value.

Teco also argues the ALJ erred in finding no exclusion for pre-existing active impairment. Asher's 2002

workers' compensation settlement was based on a 5% impairment for his back. According to Teco, this fact compels a finding Asher suffered a pre-existing active condition.

In Roberts Bros. Coal Co. v. Robinson, 113 S.W.3d 181 (Ky. 2003), the Kentucky Supreme Court instructed under KRS 342.730(1)(a), the provision governing awards for permanent total disability, an exclusion from a permanent total disability award based on pre-existing active disability must be determined under the same standard for disability established in Osborne v. Johnson, 432 S.W.2d 800 (Ky. 1968). In Ira A. Watson Dept. Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000), the Court held it is among the functions of the ALJ, as fact-finder, to translate the lay and medical evidence when determining the extent of an employee's occupational disability at a particular point in time. The burden of proving the existence of a pre-existing condition falls on the employer. Wolf Creek Collieries v. Crum, 673 S.W.2d 735, 736 (Ky. App. 1984). When the employer fails to satisfy that burden, the question on appeal is whether the evidence compels a different result. REO Mechanical v. Barnes, 691 S.W.2d 224, 226 (Ky. App. 1985) *superseded on other grounds by*

statute as stated in Haddock v. Hopkinsville Coating Corp., 62 S.W.3d 387 (Ky. 2001).

The evidence does not compel a finding of a pre-existing impairment/disability. Although Asher settled a claim for an alleged 2002 injury, the ALJ enjoys the discretion to make independent findings and determine, as in the case herein, the nature of the injury at the time of the settlement agreement. Beale v. Faultless Hardware, 837 S.W.2d 893 (Ky. 1992). The evidence in claim number 2002-90579 was not submitted in the present claim. However, nothing in the record indicates Asher missed work for back or knee problems after 2004 during his employment with Teco. The ALJ could reasonably conclude Asher had no active disability related to the 2002 condition.

Teco also challenges the determination Asher is permanently totally disabled. Authority has long acknowledged that in making a determination granting or denying an award of permanent total disability, an ALJ has wide ranging discretion. Seventh St. 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). It is not the Board's role to re-weigh the evidence. When the ALJ's findings are supported by substantial evidence, the Board may not disturb those findings. Because it is

clear from the ALJ's opinion, award and order he was laboring under no material misimpression as to the evidence or pertinent law, we affirm.

Dr. Hoskins assigned significant restrictions regarding lifting, pushing, pulling, and carrying as well as postural limitations regarding walking, standing, sitting, stooping, crawling, kneeling, balancing, and climbing. The entirety of Asher's work history consists of coal mine employment. The record contained evidence to support a conclusion Asher was unable to perform any of his past employment. Considering his age of 54, completion of only the ninth grade, and lack of any specialized or vocational training, we cannot say the ALJ's determination of a permanent total disability is so unreasonable under the evidence the decision must be reversed as a matter of law.

Teco next argues the ALJ erred in refusing to grant credit for short term disability payments from an exclusively employer funded plan. We find no error. The ALJ correctly held the payments were made for Asher's non-work-related ulcer condition. KRS 342.730(6) permits a credit for payments made pursuant to an exclusively employer-funded disability or sickness and accident plan which extends income benefits for the same disability

covered by this chapter and where there is no internal offset provision for workers' compensation benefits. It is uncontroverted the short term benefits in this claim were provided for the non-work-related condition and were thus not extended for the same disability covered by the Act. Further, the plan submitted in evidence has an internal offset provision indicating benefits will be reduced by amounts received for workers' compensation.

Finally, Teco argues the ALJ lacked subject matter jurisdiction to rule on the constitutionality of KRS 342.7305. This Board, as an administrative tribunal, has no jurisdiction to determine the constitutionality of a statute enacted by the Kentucky General Assembly. Blue Diamond Coal Co. v. Cornett, 300 Ky. 647, 189 S.W.2d 963 (Ky. 1945). Likewise, the ALJ lacks the power and jurisdiction to review and determine the constitutionality of the statute. Therefore, we vacate the ALJ's determination regarding the constitutionality of KRS 342.7305.

Accordingly we **VACATE and REMAND** that portion of the ALJ's decision ruling on the constitutionality of KRS 342.7305 for entry of an amended opinion striking said portion of the decision. In all other respects, the July 29, 2013 Opinion and Order rendered by Hon. William J.

Rudloff, Administrative Law Judge, and the August 23, 2013 Opinion and Order on Reconsideration are **AFFIRMED**.

ALL CONCUR.

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