Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: March 27, 2015

CLAIM NO. 201400061

TECO/PERRY COUNTY COAL CORP. PETITIONER

VS. **APPEAL FROM HON. JONATHAN R. WEATHERBY, ADMINISTRATIVE LAW JUDGE**

JOEY RICE and
HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING IN PART,
VACATING IN PART & REMANDING

* * * * * *

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

ALVEY, Chairman. TECO/Perry Coal Corp ("TECO") appeals from the August 25, 2014 Opinion and Award and the November 24, 2014 Order on Petition for Reconsideration rendered by Jonathan R. Weatherby, Administrative Law Judge ("ALJ"). The ALJ awarded Joey Rice ("Rice") permanent partial disability ("PPD") benefits and medical benefits for

injuries to his neck, back, upper extremities, and knees which he sustained due to cumulative trauma he experienced while working as a mechanic in the coal industry for over twenty-five years.

TECO argues the ALJ's finding Rice sustained multiple work-related injuries due to cumulative trauma is not supported by substantial evidence. Specifically, TECO argues the ALJ erred in awarding benefits based upon the 6% impairment rating assessed by Dr. Jeffrey Uzzle for a biceps injury, because it occurred in 2003 when Rice worked for a previous employer. Likewise, TECO argues the ALJ failed to find the impairment assessed for the right knee was due to an unrelated 2003 surgery following an injury Rice sustained while water skiing. TECO argues Rice concealed the cause of the right knee surgery at his deposition. Because the ALJ failed to perform an adequate analysis regarding whether Rice sustained compensable injuries to his right bicep and right knee, we affirm in part, vacate in part the award of PPD benefits, and remand for additional findings.

Rice filed a Form 101 on January 10, 2014 alleging he sustained injuries to his back, right knee, wrists, neck and legs on December 7, 2012 due to cumulative trauma he sustained from working in the coal mining industry for twenty-five years. There was no allegation in the Form 101

of an injury to the right bicep, or an injury to the right knee. Rice stated as a mechanic for surface mining operations he engaged in bending, stooping, lifting, pushing, pulling and twisting. He alleged he worked primarily as a mechanic, but also worked as a welder and a machinist during the twenty-five year time period.

Rice testified by deposition on April 14, 2014, and again at the hearing held June 26, 2014. He was born on October 13, 1967, and is a resident of Viper, Kentucky. Rice is a high school graduate, and began working in the coal mining industry in 1991. He began working for TECO in October 2008, and last worked there when he was laid off on December 7, 2012. He worked at the prep plant for TECO where he worked on heavy equipment including loaders, dozers, backhoes, and excavators. His work involved changing components including final drives, tracks, engines, transmissions, hydraulic pumps, and starters, as well as changing oil in the equipment. Hoists and lifts were available, and he did not lift greater than thirty pounds on his own.

Rice began experiencing low back pain approximately two years before he was laid off. Although he now takes Norco for his low back pain, he sought no treatment for the condition prior to the layoff. His back pain is in the

small of his back, at the belt-line, and goes primarily down his right leg on a daily basis. The back pain is worsened by changes in weather and inactivity. He denied sustaining a specific back injury. He also complained of daily pain in his shoulders. He stated he was first apprised his multiple complaints were work-related when he saw Dr. Dale Williams, D.C., with East Kentucky Chiropractic for evaluation on November 20, 2013. Rice also stated he began having neck pain in 2010 which is worsened by pulling or lifting. He also stated he has problems with both wrists, left greater than right. Rice has had no treatment for his wrist complaints.

Rice did not mention his right bicep at his April 14, 2014 deposition. At the hearing, Rice testified he experienced a work-related right bicep injury in 2002 or 2003 while working for a previous employer. He was not working for TECO at that time, and has never had any treatment for that condition. He made no allegation of ongoing problem or difficulty with the right bicep.

Rice stated he underwent a right knee surgery in 2003 for problems which began a year prior. At his deposition, Rice could not recall the cause of his knee problem, but at the hearing he stated it was due to a water skiing accident. He stated his knee did well for two years

after surgery, but he then experienced increasing pain. He had physical therapy in 2012 after he quit working until his health insurance stopped approving it. Although he has treated in the past for myasthenia gravis, an auto immune disorder, he has received no treatment for that condition for several years. Rice stated he can no longer perform the type of work he performed for TECO due to his various problems.

Rice supported his claim with Dr. Williams' November 20, 2013 report. Dr. Williams' diagnoses included lumbalgia with radiculitis and mild to moderate degeneration, cervicalgia with moderate degeneration, and severe right knee pain. Dr. Williams did not address the right bicep. He stated the occupational hazards of the mining industry contributed to the degeneration.

Rice also filed the Form 107 report prepared by Dr. Uzzle subsequent to the March 15, 2014 evaluation. Dr. Uzzle noted Rice is a poor historian who has been a mechanic in the mining industry for over twenty-five years and experienced various injuries. Rice reported he sustained cumulative trauma from heavy labor which has worn out his body and left him with chronic low back pain, right knee arthritis, chronic neck pain, and weakness from a right bicep rupture. He also noted the history of myasthenia

gravis. Dr. Uzzle diagnosed a chronic lumbar sprain/strain, chronic cervical sprain/strain, mild right knee osteoarthritis, and a right bicep rupture from an old injury with residual weakness.

Dr. Uzzle stated Rice had reached maximum medical improvement ("MMI") and he assessed a 20% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"), of which 6% was due to the lumbar spine, 5% to the cervical spine, 4% to the right knee, and 6% to the right bicep. Dr. Uzzle stated Rice should avoid bending, twisting, crawling, squatting, stooping, using vibratory tools, climbing, working at heights, and kneeling, and should limit any pushing, pulling or carrying to fifteen pounds occasionally. Dr. Uzzle opined Rice is unable to perform the job duties he was performing at the time he was laid off.

In a questionnaire completed on June 18, 2014, Dr. Uzzle stated Rice had a 5% pre-existing active "disability" before his employment with TECO. Dr. Uzzle then inconsistently stated all of Rice's disability was, "brought about because of his most rec[sic] employment and that the dormant non-disabling medical condition was

aroused into disable[sic] reality by the work performed at his most recent employment."

Dr. Daniel D. Primm, Jr., evaluated Rice at TECO's request on April 29, 2014. Dr. Primm noted Rice is right hand dominant, and worked for TECO for four years. Rice denied any problems with his left knee, and had no history of problems with either of his shoulders, ankles or hips. On examination, Rice walked slowly, but exhibited no limp. He used no cane or brace and could walk on his heels and toes as requested. No muscle spasm was detected.

Dr. Primm diagnosed a history of right knee injury with partial meniscectomy. He also diagnosed probable early medial compartment arthritis to the right knee; history of bicep rupture, right arm; history of chronic neck and low back pain; significant cardiomyopathy with history of atrial fibrillation, and chronic congestive heart failure with reduced ejection fraction; chronic anxiety/depression; and history of myasthenia gravis with symptoms of chronic fatigue and weakness.

Dr. Primm disagreed with the assessment by Drs. Williams and Uzzle of the problems being work-related. He stated Rice has no work-related impairment to his neck or back. He assessed a 1% impairment rating pursuant to the AMA Guides for the right knee due to the 2003 medial

meniscectomy which he stated was chronic and active. He stated Rice is disabled from his chronic, unrelated heart condition.

TECO also filed treatment records from P.T. Pros in Hazard, Kentucky for treatment rendered on December 17, 2012 through March 27, 2013. The notes reflect Rice injured his right knee years ago while water skiing, for which a meniscectomy was performed in 2002. The records reflect Rice's right knee gradually worsened over the past year, with frequent swelling.

TECO also filed records from the Hazard Clinic for treatment beginning on February 27, 2001 through January 16, 2014. Those records reflect treatment for the right knee and ankle, spina bifida occulta with decreased L5-S1 disc space, heart palpitations, myasthenia gravis, lumbar strain, sleep disorder, ringing in the ears, sinusitis, shortness of breath, joint pain, arthritis, gout, depression, rashes, chest pain, Bell's palsy, anxiety and hypertension.

A benefit review conference ("BRC") was held on June 10, 2014. The BRC order and memorandum notes the issues preserved included benefits per KRS 342.730; work-relatedness/causation; notice; unpaid/contested medical expenses; injury as defined by the Act; exclusion for pre-

existing disability/impairment; and, whether Rice retains the physical capacity to return to the type of work performed on the date of injury.

In his decision rendered August 25, 2014, the ALJ found Rice had no pre-existing active disability, and awarded PPD benefits based upon the 20% impairment rating assessed by Dr. Uzzle. The ALJ found Rice sustained injuries to his cervical and lumbar spines due to the cumulative trauma sustained while working in the mining industry. Although he stated Rice also sustained a right lower extremity injury, he did not specifically address the right knee. The ALJ provided no analysis and did not distinguish the current complaints from those due to the unrelated knee surgery in 2002 or 2003. Likewise, the ALJ provided absolutely no discussion regarding the right bicep condition.

TECO filed a petition for reconsideration on September 2, 2014. TECO first argued Dr. Uzzle erred in his method of combining the impairments he assessed to the various body parts. Next, TECO argued Dr. Uzzle erred by including an impairment rating for the bicep injury because it was clearly unrelated to Rice’s employment with Teco. Finally, TECO argued the ALJ erred in failing to exclude 5% of the impairment rating which Dr. Uzzle had attributed to

a pre-existing active disability in his supplemental report.

The ALJ entered an order denying the petition for reconsideration on November 24, 2014. The ALJ declined to carve out the impairment rating assessed by Dr. Uzzle for the bicep condition, "as Dr. Uzzle credibly explained the current bicep impairment".

On appeal, TECO argues the ALJ erred in awarding benefits for the bicep injury, and his award in general is not supported by substantial evidence. Likewise, TECO argues the ALJ erred in failing to exclude the impairment assessed for the right knee because the only surgery for that condition was performed in 2003. Citing Cepero v. Fabricated Metals Corp., 132 S.W.3d 839, 842 (Ky. 2004), TECO argues the ALJ erred in relying upon Dr. Uzzle who failed to address the 2003 right knee injury as being not work-related.

As the claimant in a workers' compensation proceeding, Rice had the burden of proving each of the essential elements of his cause of action. *See* KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky.

1993). Similarly, the ALJ has the discretion to determine all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). The ALJ 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 adversary party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). Although a party may note evidence supporting a different outcome than that reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974).

The function of the Board in reviewing an ALJ's decision is limited to determining whether the findings made are so unreasonable under the evidence they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to weight and credibility 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). So long as the ALJ's ruling with regard to an

issue is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

First, we determine Cepero v. Fabricated Metals Corp., supra, has no applicability here. Cepero is a case involving 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 which left the claimant confined to a wheelchair for more than a month. The physician upon whom the administrative law judge relied was not informed of this prior history by the employee, and every physician who was adequately informed of this prior history opined that Cepero's left knee impairment was not work-related but was instead attributable to the non-work-related injury two and a half years previous. In this instance, unlike Cepero, there is no evidence Rice attempted to conceal the existence of the right knee injury and surgery. Likewise, this information was clearly presented to the ALJ for consideration.

That said, we acknowledge KRS 342.285 designates the ALJ as the finder of fact, and as such he is granted the sole discretion in determining the quality, character, and substance of evidence. Paramount Foods, Inc. v. Burkhardt,

695 S.W.2d 418 (Ky. 1985). Likewise, 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).

However, such discretion is not unfettered. In reaching his determination, the ALJ must also provide findings sufficient to inform the parties of the basis for his 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); Big Sandy Community Action Program v. Chafins, 502 S.W.2d 526 (Ky. 1973).

We note the ALJ made minimally sufficient findings to support his award of PPD benefits for both the cervical and lumbar conditions. However, the ALJ made no findings regarding the causation and compensability of either the right bicep or right knee conditions. Merely accepting the impairment rating without making a determination or providing a factual analysis falls well short of what is necessary in reaching a decision.

On remand, the ALJ is directed to conduct an analysis in accordance with both the statutory and case law referenced above, and provide with specificity both his findings and the evidence relied upon in support of his decision concerning Rice's alleged work-related injuries to his right knee and right bicep due to cumulative trauma while working for TECO.

Although Dr. Uzzle assessed a 20% impairment rating upon which the ALJ relied, the only testimony regarding a right bicep injury is that Rice sustained the injury in 2002 or 2003 while working for a previous employer. It is noted Rice never sought treatment for his right bicep, and did not reference it as a problem in the Form 101 or at his deposition. There appears to be no evidence his right bicep condition was occasioned by the cumulative nature of Rice's work for TECO. Therefore, the ALJ's inclusion of this impairment does not appear to be supported by the record. On remand, the ALJ is directed to make a determination of whether the right bicep condition is work-related and compensable. The ALJ must cite to the evidence supporting his conclusion. If it is determined the right bicep condition is not compensable, the impairment assessed for it must be excluded from the award of PPD benefits.

Likewise, the evidence clearly establishes Rice sustained an unrelated injury to the right knee for which he underwent surgery in 2002 or 2003. On remand, the ALJ is directed to make a specific determination of the cause of any problem Rice may have with his right knee, and whether he sustained a compensable injury. If he determines the right knee condition was not caused by the cumulative nature of the work at TECO, the impairment rating assessed to the right knee is due to unrelated conditions, and must be excluded from the award of PPD benefits.

While substantial evidence may very well exist supporting the ALJ's determination on all of the issues raised on appeal, he must make a specific determination of the injuries Rice sustained, based upon the evidence, and provide an adequate explanation of the basis for his decision. This Board may not, and does not direct any particular result because we are not permitted to engage in fact-finding. *See* KRS 342.285(2); Paramount Foods, Inc. v. Burkhardt, supra.

For the foregoing reasons, the August 25, 2014 Opinion and Award and the November 24, 2014 Order on Reconsideration rendered by Hon. Jonathan Weatherby, Administrative Law Judge are hereby **AFFIRMED IN PART**, **VACATED IN PART** and **REMANDED** to the Administrative Law Judge

for additional findings and entry of an amended opinion and award in conformity with the views expressed herein.

ALL CONCUR.

COUNSEL FOR PETITIONER JOEY RICE:

HON MCKINNLEY MORGAN
921 SOUTH MAIN STREET
LONDON, KY 40741

COUNSEL FOR RESPONDENT TECO:

HON SARAH K MCGUIRE
PO BOX 351
PIKEVILLE, KY 41502

ADMINISTRATIVE LAW JUDGE:

HON JONATHAN R WEATHERBY
PREVENTION PARK
657 CHAMBERLIN AVENUE
FRANKFORT, KY 40601