Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: August 2, 2019

CLAIM NO. 201801036

CRAIG LEWIS PETITIONER

VS. **APPEAL FROM HON. R. ROLAND CASE, ADMINISTRATIVE LAW JUDGE**

ALDEN RESOURCES, LLC,
HON. MARGY DE MOVELLAN,
DIRECTOR OF COAL FUND,
and HON. R. ROLAND CASE,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

STIVERS, Member. Craig Lewis ("Lewis") seeks review of the April 22, 2019, Opinion and Order of Hon. R. Roland Case, Administrative Law Judge ("ALJ"), finding Lewis did not establish the presence of coal workers' pneumoconiosis ("CWP") or any other occupationally acquired disease related to the exposure to coal dust. Consequently, the ALJ dismissed Lewis' claim against Alden Resources, LLC

("Alden"). Concluding he did not have the authority or jurisdiction to rule on constitutional issues raised by Lewis concerning House Bill 2 ("HB2"), the ALJ declined to rule on the constitutionality of HB2. However, the ALJ noted Lewis had preserved the issue for appellate purposes.

On appeal, Lewis asserts Dr. Glen R. Baker, a physician who is Board-certified in pulmonary disease in the Commonwealth of Kentucky and a certified B-reader at the time of interpretation of his chest x-ray, diagnosed "Category 1/1 [CWP], q/q, in all lung zones with no large opacities." Lewis notes the only other proof in the record is the x-ray interpretation by Dr. Bruce Broudy, a Board-certified pulmonary specialist licensed in the Commonwealth of Kentucky and a certified B-reader. Dr. Broudy interpreted the x-ray as Category 0/0. Lewis argues he has met his burden of proof of establishing he has Category 1/1 CWP based on Dr. Baker's x-ray interpretation. Lewis acknowledges the University Evaluator report constitutes substantial evidence which, if uncontradicted, may not be disregarded by the fact-finder. However, Lewis argues this presumption should neither shift the risk of non-persuasion to Alden nor raise the bar with regard to his burden of persuasion.

Lewis also asserts HB2 requiring the claimant in CWP claims to undergo an examination by only one physician in the Commonwealth of Kentucky is unconstitutional. In addition, he asserts, "any pending age discrimination cases on appeal could find portions of HB2 unconstitutional including the [CWP] university evaluation process and the retroactivity of HB2 in Lafarge Holcim vs. James Swinford, et al (Claim No. 2018-CA-000414—WC/2018 Ky. APP. LEXIS 235)." Lewis contends the newly enacted HB2 limits him to a B-reader who is a pulmonary specialist

only and licensed in the state of Kentucky "without consideration of other physicians who are equally qualified "B" readers, physicians and licensed in another state." Thus, "these changes are arbitrary and capricious and ultimately deprives him of due process of law."

Lewis concludes by requesting the Board enter an order remanding this claim to the ALJ to place this claim in abeyance pending the outcome of the appeal in Holcim v. Swinford, 2018-SC-000627-WC.[1] We affirm.

As previously noted, Lewis relied upon the August 9, 2017, report of Dr. Baker. Alden did not submit any medical evidence. However, the record contains the January 7, 2019, Form 108–CWP report of Dr. Broudy. This report was generated as a result of a November 13, 2018, referral by the Commissioner of the Department of Workers' Claims directing that Lewis be evaluated by Dr. Broudy pursuant to KRS 342.315 and KRS 342.316(3)(b)4.b. Pursuant to his designation, Dr. Broudy performed a physical examination and obtained a chest radiograph. His diagnosis is:

> Chest x-rays are of good diagnostic quality and properly identified by photographic imprint with the patient's name, Lexington Clinic number, social security number, the x-ray date, and the notation Lexington Clinic, Lexington, Kentucky. Because of under-penetration due to soft tissue overlay, film letter capital B is used for interpretation. I have compared the films to the standard ILO radiographs. Soft tissues, bony structures, cardiac silhouette, and mediastinal structures are otherwise unremarkable. The lung zones are clear and show no evidence of coal workers pneumoconiosis, or silicosis. I would categorize the film as negative or category 0 according to the ILO classification system for pneumoconiosis. I see no large opacities or pleural disease.

[1] Lewis' brief does not contain a separate section entitled "conclusion."

Dr. Broudy provided the following comments:

> Although the history of exposure was considered sufficient to cause pneumoconiosis in a susceptible individual, there were neither the necessary radiographic or pathologic findings required to make such a diagnosis. Spirometry and arterial blood gases are normal, indicating no respiratory impairment due to any cause. Clearly this gentleman retains the respiratory capacity to do his previous work or work requiring similar effort.

Under the heading "Causation," Dr. Broudy answered the following questions:

> 1. Within reasonable medical probability, is plaintiff's disease the result of exposure to coal dust in the severance or processing of coal? No.
>
> 2. Within reasonable medical probability, is any pulmonary impairment the result of exposure to coal dust in the severance or processing of coal? No.

The February 28, 2019, Benefit Review Conference Order and Memorandum indicates the parties stipulated Lewis' last date of exposure is March 15, 2015. The contested issues were identified as occupational disease, physical capacity to return to the type of work performed at the time of the injury, KRS 342.732, and constitutionality of HB2 procedure.

Pursuant to Lewis' motion, on March 25, 2019, the ALJ entered an order cancelling the formal hearing scheduled for March 28, 2019, and directed the claim be submitted on the record for a decision as of the date of the order.

In the April 22, 2019, Opinion and Order, after summarizing the evidence, the ALJ provided, in relevant part, the following analysis:

> …
>
> **Benefits per KRS 342.732:** The university evaluation report of Dr. Broudy is entitled to presumptive

> weight pursuant to KRS 342.315 and KRS 342.316 as amended effective July 14, 2018. The Administrative Law Judge finds the report of Dr. Broudy to be the most persuasive.
>
> Dr. Broudy was independently selected by the Commissioner of the Department of Workers' Claims for his evaluation. Dr. Baker was selected by the plaintiff with the defendant-employer having filed no medical evidence of record.
>
> The Administrative Law Judge has considered all of the evidence in accordance with Magic Coal v. Fox, 19 SW 3d 88 (Ky. 2000). The Administrative Law Judge chooses to rely on and is persuaded by the opinion of Dr. Broudy who was independently selected by the Commissioner of the Department of Workers' Claims and found the plaintiff does not suffer from coal workers' pneumoconiosis, pulmonary disease or respiratory impairment resulting from exposure to coal dust.
>
> Therefore, the ALJ finds the plaintiff has not carried his burden of establishing the presence of x-ray evidence of coal workers' pneumoconiosis or any other occupationally acquired disease related to exposure to coal dust. The plaintiff's claim must be dismissed.
>
> **CONSTITUTIONALITY OF HOUSE BILL 2**
>
> The plaintiff raises an issue of constitutionality of KRS 342.315, otherwise known as House Bill 2, as it applies to his claim. The plaintiff argues House Bill 2 is unconstitutional because it limits the number of qualified physicians to complete examinations pursuant to KRS 342.315. The Administrative Law Judge has no jurisdiction or authority to rule on any constitutional issue. However, it is noted the plaintiff has preserved this issue for appellate purposes.

Since Lewis failed to meet his burden of proof establishing the existence of CWP, the ALJ dismissed his claim. No petition for consideration was filed.

As the claimant, Lewis 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 unsuccessful in that burden, the question on appeal is whether the evidence compels a different result. 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. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985). The function of the Board in reviewing the ALJ's decision is limited to a determination of whether the findings made by the ALJ 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).

In rendering a decision, KRS 342.285 grants an ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). An ALJ may draw reasonable inferences from the evidence, 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. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). An ALJ is vested with broad authority in determining causation. Dravo Lime Co. v. Eakins, 156 S.W.3d 283 (Ky. 2003). Although a party may note evidence supporting a different outcome than reached by an ALJ, this is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). Rather, it must be shown there was no evidence of substantial probative value to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings made are so unreasonable under the evidence that they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, supra. 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).

Significantly, Lewis failed to file a petition for reconsideration challenging any aspect of the ALJ's reliance upon Dr. Broudy. Absent a petition for reconsideration, questions of fact, including the adequacy of the ALJ's findings of fact, are not preserved for appellate review. Brasch-Barry General Contractors v. Jones, 175 S.W.3d 81, 83 (Ky. 2005). *See also* Hornback v. Hardin Memorial Hospital, 411 S.W.3d 220, 223 (Ky. 2013). Stated otherwise, inadequate, incomplete, or even inaccurate fact-finding on the part of an ALJ will not justify reversal or remand if there is substantial evidence in the record supporting the ultimate conclusion. Eaton Axle Corp. v. Nally, 688 S.W.2d 334 (Ky. 1985).

KRS 342.315(1) reads, in relevant part, as follows:

> For workers who have had injuries or occupational hearing loss, the commissioner shall contract with the University of Kentucky and the University of Louisville medical schools to evaluate workers. For workers who have become affected by occupational diseases, the commissioner shall contract with the University of Kentucky and the University of Louisville medical schools, **or other physicians otherwise duly qualified as 'B' readers who are licensed in the Commonwealth and are board-certified pulmonary specialists**…. (emphasis added.)

Further, KRS 342.316 reads, in relevant part, as follows:

> Except as otherwise provided in KRS 342.316, the clinical findings and opinions of the designated evaluator shall be afforded presumptive weight by administrative law judges and the burden to overcome such findings and opinions shall fall on the opponent of that evidence. When administrative law judges reject the clinical findings and opinions of the designated evaluator, they shall specifically state in the order the reasons for rejecting that evidence.

After weighing the medical evidence in the record, the ALJ relied upon Dr. Broudy's findings and opinions. As a B-reader and Board-certified pulmonary specialist designated by the Commissioner pursuant to KRS 342.315(2), his findings and opinions "shall be afforded presumptive weight."[2] The ALJ could have relied upon Dr. Baker's opinions had he specifically stated his reasons for rejecting Dr. Broudy's findings and opinions. However, he chose to rely upon Dr. Broudy who ultimately interpreted Lewis' chest x-ray as revealing no evidence of CWP or silicosis. He saw no large opacities or plural disease. The ALJ's reliance upon Dr. Broudy is well within the discretion afforded him under the law, particularly since Dr. Broudy, as a KRS 342.315(1) designated physician, must be given presumptive weight.

Dr. Baker's differing opinions merely represent conflicting medical opinions, and it is not the function of this Board to re-weigh the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). 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.

[2] We note that both Lewis and the ALJ erroneously referred to Dr. Broudy as a university evaluator. That fact aside, Dr. Broudy's opinions are entitled to presumptive weight since he fell within that provision of KRS 342.315(2) regarding "or other physicians" otherwise duly qualified as B-readers who are licensed in the Commonwealth and are Board-certified pulmonary specialists.

Brasch-Barry General Contractors, 189 S.W.3d 149, 153 (Ky. App. 2006). The ALJ certainly had the discretion to rely upon any physician in the record and since Lewis failed to file a petition for reconsideration challenging any aspect of the ALJ's reliance upon Dr. Broudy, we must affirm.

Lewis' second argument raises a constitutional challenge to HB2 and also appears to challenge the retroactive effect of HB2. This Board lacks jurisdiction to rule on constitutional challenges. *See* Blue Diamond Coal Co. v. Cornett, 300 Ky. 647, 189 S.W.2d 963 (Ky. 1945) and Commonwealth v. DLX, Inc., 42 S.W.3d 624 (Ky. 2001). Therefore, we will not address this issue.

Accordingly, the April 22, 2019, Opinion and Order is **AFFIRMED**.

ALL CONCUR.

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