

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: December 20, 2019

CLAIM NO. 201800143 & 201800142

HOPKINS COUNTY COAL LLC

PETITIONER

VS. APPEAL FROM HON. CHRISTINA D. HAJJAR,
ADMINISTRATIVE LAW JUDGE

BENNIE WOODBURN
and HON. CHRISTINA D. HAJJAR,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

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

STIVERS, Member. Hopkins County Coal LLC (“Hopkins Co.”) appeals from the November 29, 2018, Opinion, Order, and Award, and the December 19, 2018, Order ruling on its petition for reconsideration of Hon. Christina D. Hajjar, Administrative Law Judge (“ALJ”). In the November 29, 2018, Opinion, Order, and Award, the ALJ awarded Bennie Woodburn (“Woodburn”) permanent partial disability benefits for a work-related low back injury and medical benefits for his low back and work-related

hearing loss. The ALJ dismissed Woodburn's claim for income benefits for his hearing loss claim and dismissed his claim in full for alleged injuries to his knees.

On appeal, Hopkins Co. asserts the ALJ's finding of a work-related cumulative trauma lumbar spine injury is not supported by substantial evidence.

BACKGROUND

The Form 101 in Claim No. 201800143 alleges Woodburn sustained cumulative trauma culminating on September 28, 2012, to multiple body parts "from performing the duties of an underground coal miner."

The Form 103 in Claim No. 201800142 alleges Woodburn sustained work-related hearing loss, with a final date of exposure on September 28, 2012, in the following manner: "Exposure to noises produced by machinery and the mining process." By order dated June 19, 2018, the claims were consolidated under Claim No. 201800143.

Woodburn testified by deposition on April 23, 2018, and at the October 23, 2018, hearing. However, his testimony is not relevant to the limited issue now on appeal.

Woodburn filed in evidence the June 29, 2018, Independent Medical Examination report of Dr. Joseph Zehner. After performing a physical examination and a medical records review, Dr. Zehner diagnosed work-related spondylolisthesis of the lumbar spine and assessed a 22% whole person impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment. He opined, in relevant part, as follows:

Spondylolysis is a break in the posterior part (pars intrarticularis) of the fifth lumbar vertebra is found in 5%

of the population. Spondylolisthesis is a rare condition where the vertebra above slips or moves forward in relationship to the vertebra below....It is more common in female gymnasts from hyperextension of their spine. It has been found to be more common in football lineman, and solders [sic] who carry heavy back packs presumable [sic] from hyperextension and repetitive loading of the lower spine. [ibid Page 265] It is my observation that [sic] underground mine roof bolter in a position of kneeling in a low coal seam must hyperextend and repetitively load his lower back. Mr. Wood [sic] has 37 years of exposure to this activity.

Dr. Zehner opined spondylolisthesis can be found in severe osteoarthritis of the lumbar spine; however, Woodburn does not have severe osteoarthritis of the lumbar spine. The following questions and answers are also contained within his report:

Do you believe that the conditions/diagnoses of spondylolisthesis and bilateral knee arthritis are work related? Yes.

Do you believe that all treatment to date has been reasonable, necessary and related to the alleged work accident? Yes.

Did your evaluation reveal any signs of symptom magnification or malingering? No.

Do you believe that the injured worker has attained MMI? Yes.

Do you believe that the injured party had any pre-existing conditions to either his back or knees? No – with respect to his knees. No – with respect to congenital spondylolisthesis [Type One].

If the injured party did have a pre-existing injury to his knee or spine was the pre-existing condition active (i.e. symptomatic) at the date of employment? No.

...

What permanent restrictions, if any, would you recommend? Sedentary work or restriction of walking to one-half mile at one time.

Does the injured party retain the capacity to return to his/her previous employment? No.

Hopkins Co. filed in evidence the June 13, 2018, report of Dr. Rick Lyon. After performing a physical examination of Woodburn and a medical records review, Dr. Lyon set forth the following diagnoses: “1. Low back pain. 2. Bilateral knee pain.” Dr. Lyon opined Woodburn did not sustain a cumulative trauma injury to the lumbar spine as a result of his employment at Hopkins Co. and assessed no impairment rating. He also opined Woodburn could return to the same type of work he was performing on September 28, 2012, his last day of employment.

The June 15, 2018, Benefit Review Conference Order and Memorandum lists the following contested issues: “work-related injury, physical capacity to return to the type of work performed at time of injury, permanent income benefits per KRS 342.730 including multipliers, benefits per KRS 342.7305, application of Napier [sic], and application of House Bill 2.”

In the November 29, 2018, Opinion, Order, and Award, the ALJ set forth the following findings of fact and conclusions of law regarding Woodburn’s cumulative trauma back injury:

Causation and Injury as Defined by the Act

...

It has long been held in Kentucky courts that a worker is entitled to be compensated for all the harmful changes that flow from a work-related injury that are not attributable to an independent, intervening cause. *Elizabeth Sportswear v. Stice*, 720 S.W. 2d (Ky. App. 1986). KRS 342.0011(1) defines an injury as being a work-

related traumatic event or series of traumatic events, including cumulative trauma, that causes a harmful change in the human organism, as evidenced by objective medical findings. “Objective medical findings” are defined by KRS 342.0011(33) as being information gained through direct observation and testing of a patient, applying objective or standardized methods. In *Gibbs v. Premier Scale Co.*, 50 S.W. 3d 754 (Ky. 2001), the Kentucky Supreme Court held that a diagnosis of a harmful change may comply with the requirements of KRS 342.0011(1) and (33) if it is based on symptoms which are documented by means of direct observation and/or testing applying objective or standardized methods. The Court in *Staples, Inc. v. Konvelski*, 56 S.W.3d 412 (Ky. 2001), concluded though that while objective medical evidence must support a diagnosis of a harmful change, it is not necessary to prove causation of an injury through objective medical findings.

The Court first recognized the compensability of injuries that resulted from cumulative trauma or gradual wear and tear in 1976. *Haycraft v. Corhart Refractories Co.*, 544 S.W.2d 222 (Ky. 1976). Where an individual continues to perform the same repetitive activity after a gradual injury becomes manifest, additional incidents of workplace trauma may well cause additional harmful changes. In other words, the individual may well sustain subsequent gradual injuries. *Special Fund v. Clark*, 998 S.W.2d 487 (Ky. 1999). The test is whether the nature and duration of the work probably aggravated a degenerative condition into an active physical impairment sooner than would have been the case had the work been less strenuous. *Haycraft, supra*.

The Kentucky Supreme Court recently addressed which employer bears the responsibility of compensating an injured worker for an alleged cumulative trauma injury:

In hearing loss and occupational disease claims—which are quite similar in nature to cumulative trauma because they occur gradually over time—the employer at the time of the last injurious or hazardous exposure is liable. The employee is entitled to the same amount of compensation

whether he worked for one employer or many. An employee who sustains a harmful change in his human organism due to cumulative trauma over many years working for the same employer is entitled to compensation to the full extent of his resultant disability.

Hale v. CDR Operations, Inc., 474 S.W. 3d 129 (Ky. 2015).

After a careful review of the evidence, the ALJ is convinced by Dr. Zehner that Woodburn's work activities at Hopkins County Coal contributed to his spondylolisthesis. Dr. Zehner referred to literature explaining that it is more common for gymnasts and linemen to have this condition due to the hyperextension and loading. He compared this to Woodburn's work activities, which included repetitively hyperextending and loading his lower back while kneeling in a low coal seam. This ALJ also found Dr. Zehner's testimony convincing that the unusual degree of forward slip limits the motion of the last segment of the lumbar spine and increases the impairment rating. He stated that the segment was at best painful and not functional. This is consistent with Woodburn's testimony that he suffers from low back pain.

As for the alleged knee injuries, this ALJ is convinced by Dr. Lyon that the x-rays do not show hastened changes. Although Dr. Zehner and Dr. Oliver attributed his knee arthritis to his work activities, Dr. Lyon stated that the degenerative changes were not in excess of what would be expected of individuals Woodburn's age, regardless of work history. He concluded that Woodburn did not sustain cumulative trauma to his knees. Further, this ALJ finds it significant that he has not sought treatment in over five years for the pain, and he only had physical therapy for two weeks before returning to work full duty until retirement. Thus, this ALJ find [sic] that Woodburn did not sustain cumulative trauma to his knees as a result of his work at Hopkins Co. Coal.

Permanent Partial Disability

In order to qualify for permanent partial disability under KRS 342.730, the claimant is required to prove not

only the existence of a harmful change as a result of the work-related traumatic event, but also required to prove that the harmful change resulted in a permanent disability as measured by an AMA impairment.

After a careful review of the evidence, this ALJ finds Dr. Zehner's impairment rating most credible, and assigns a 22% impairment rating due to the injury. Although Dr. Lyon disagreed with Dr. Zehner's causation analysis, and found no impairment, as discussed herein, this ALJ is convinced that the loss of motion in the lumbar spine is due in part to the cumulative trauma he sustained at work, and that the DRE Category IV impairment is appropriate.

3X Multiplier

Under KRS 342.730, if, due to an injury, an employee does not retain the physical capacity to return to the type of work that the employee performed at the time of the injury, the benefit permanent partial disability shall be multiplied by three (3) times. However, this ALJ relies upon Dr. Lyon to find that Plaintiff retains the ability to return to the work he was performing at the time of the injury. Woodburn was working full-time until he retired from the coal mines in 2012. He stated that his primary care nurse practitioner has not recommended any restrictions, and surgery has not been recommended. At the time of retirement, he was working as a face boss, which had fewer physical duties as his first position with Hopkins Co. Coal, as a general laborer. Further, Woodburn continues to work, although in a different job, at his son's poultry farm five to six days per week for 3-6 hours per day. Thus, this ALJ also finds that Woodburn is not permanently totally disabled. PPD benefits are calculated as follows: $\$552.13 \times .22 \times 1.15 = \139.69 per week for 425 weeks.

The parties have raised the issue of the applicability of House Bill 2. However, no permanent total disability benefits have been awarded, and the 425 weeks of benefits will cease before he reaches the age of 70. However, to the extent applicable, this ALJ finds that House Bill 2 applies and that all income benefits shall cease at age 70 pursuant to KRS 342.730.

Medical Expenses

Having found that Woodburn sustained an injury his low back, this ALJ finds that Defendant is responsible for the reasonable and necessary medical expenses pursuant to KRS 342.020. However, his claim for medical benefits for his bilateral knees is dismissed.

Hopkins Co. filed a petition for reconsideration making the same argument it now raises on appeal. By order dated December 17, 2018, the ALJ overruled the petition.

On appeal, Hopkins Co. contends the ALJ's finding of a cumulative trauma lumbar spine injury is not supported by substantial evidence. Specifically, Hopkins Co. asserts the medical opinions of Dr. Lyon, who found Woodburn sustained no cumulative trauma, are "the only logical and coherent" medical opinions in the record.

By order entered April 2, 2019, this Board placed the appeal in abeyance pending a final resolution of Napier v. Enterprise Mining Company, Claim No. 2014-CA-001473-WC.¹ By order entered November 20, 2019, the appeal was removed from abeyance since the Kentucky Supreme Court's decision in Napier, Claim No. 2018-SC-000217-WC, is now final and this appeal is ripe for decision. We affirm.

ANALYSIS

It is well-established the claimant has the burden of proving each of the essential elements of his claim, including injury as defined by the Act. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Woodburn was successful in proving he

¹ The appeal was placed in abeyance because the ALJ found Woodburn had sustained work-related hearing loss meriting a 4% impairment rating. If the Kentucky Supreme Court had affirmed the decision by the Court of Appeals in Napier, finding the hearing loss statute unconstitutional, Woodburn would have also been entitled to an award of income benefits due to his hearing loss.

sustained a permanent work-related cumulative trauma injury to his lumbar spine; therefore, Hopkins Co. has the burden on appeal to show there was no substantial evidence to support the ALJ's determination. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986). 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).

As the fact-finder, the ALJ has the sole authority to determine the quality, character, and substance of the evidence. Square D Company v. Tipton, 862 S.W.2d 308 (Ky. 1993). The ALJ has the sole authority to determine the weight to be accorded and the inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997). The ALJ, as fact-finder, 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). Mere evidence contrary to the ALJ's decision is not adequate to require reversal on appeal. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

The ALJ relied upon Dr. Zehner's medical opinions establishing Woodburn sustained work-related spondylolisthesis in the lumbar spine. As Dr. Zehner opined, even though spondylolisthesis can be caused by severe osteoarthritis of the lumbar spine, Woodburn does not have severe osteoarthritis of the lumbar spine. However, this condition can be caused by engaging in underground mine roof bolting because the individual is kneeling in a low coal seam and hyperextending and

repetitively loading his lower back, something, as noted by Dr. Zehner, Woodburn had engaged in for thirty-seven years.

We acknowledge the contradictory opinions of Dr. Lyon, however the ALJ was not mandated to rely upon his opinions. 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). Although a party may point to evidence supporting a different outcome than reached by an ALJ, such proof is not an adequate basis to reverse on appeal as long as substantial evidence supports the ALJ’s ultimate determination. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). Here, substantial evidence firmly supports the ALJ’s ultimate determination that Woodburn sustained a cumulative trauma lumbar spine injury; consequently, we must affirm.

Notably, the ALJ failed to determine a date of manifestation for Woodburn’s cumulative trauma low back injury. However, as neither party raised this as an issue on appeal, this Board will not raise it on its own.

Accordingly, the November 29, 2018, Opinion, Order, and Award, and the December 19, 2018, Order are **AFFIRMED**.

ALL CONCUR.

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