

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: July 15, 2022

CLAIM NO. 201900109 & 201900107

JD CONTRACTING, INC.

PETITIONER

VS.                   **APPEAL FROM HON. JOHN H. MCCRACKEN,  
ADMINISTRATIVE LAW JUDGE**

DAVID CAMPBELL and  
HON. JOHN H. MCCRACKEN,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION  
AFFIRMING**

\* \* \* \* \*

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

**ALVEY, Chairman.** JD Contracting, Inc. ("JD Contracting") appeals from the March 28, 2022 Opinion, Award and Order rendered by Hon. John H. McCracken, Administrative Law Judge ("ALJ"). The ALJ dismissed David Campbell's ("Campbell") claim for work-related injuries caused by cumulative trauma. The ALJ found Campbell sustained a work-related hearing loss for which he is only entitled to medical benefits since the impairment rating did not meet the 8% threshold required

by KRS 342.7305. JD Contracting also appeals from the April 27, 2022 Order denying its Petition for Reconsideration.

On appeal, JD Contracting argues Campbell failed to meet his burden of proof regarding causation. It submits the University Evaluator's report relied upon by the ALJ contained conflicting information and, therefore, was insufficient to stand as presumptive evidence of a compensable injury. We disagree, and affirm.

On February 1, 2019, Campbell filed a Form 101 in Claim Number 2019-00107 alleging he sustained injuries to his left shoulder, cervical spine, and lumbar spine caused by cumulative trauma. On the same date, Campbell also filed a Form 103 in Claim Number 2019-00109 alleging he sustained occupational hearing loss. The ALJ consolidated Campbell's claims by Order dated February 26, 2019. We will not discuss the evidence regarding Campbell's injury claim since that decision is not the subject of this appeal.

In support of his hearing loss claim, Campbell filed records dated November 6, 2018 from Beltone Hearing Care Center (physician's name not recognizable) wherein he reported to an audiologist he had worked in the mining industry for 30 years and was having difficulty following "conversations in a crowd, background, and telephone." The report stated audiometric results showed a mild to moderate hearing loss. The audiologist recommended Campbell use two Beltone Amaze 1763 hearing aids.

Campbell was also evaluated by University Evaluator Dr. Raleigh Jones on July 8, 2020. The Form 107 is supported by Dr. Jones' report, which is the subject of the present appeal. Under *Section I. Diagnosis*, Dr. Jones stated, "See

Attached Report.” Dr. Jones then provided a separate two-page narrative report specifying in detail his evaluation of Campbell and his diagnosis. Campbell reported he noticed progressive hearing loss over the past few years. Dr. Jones noted Campbell had “bilateral constant tinnitus. He said he intermittently would wear hearing protection during work. He denies any nonoccupational noise exposure. He was never in the military. He has no history of any ear infections, ear trauma or ear surgery.”

Dr. Jones’ narrative report further states, *verbatim*:

His audiogram today shows a sloping symmetric bilateral high-frequency sensory neural hearing loss consistent with noise exposure. On the exam today, his external canals and tympanic membrane are normal bilaterally.

I do believe within reasonable certainty that Mr. Campbell suffers from occupational-related noise induced sensory neural hearing loss. It is fairly mild at this point. . . . I do think that he needs to be very careful around further noise exposure. I do think it is important that he protect his ears from further noise exposure. I think he also would benefit from bilateral hearing aids.

Next, Dr. Jones’ report contained a checked box under *Section J. Causation*, which was marked “No” for the question, “Do you believe the work event as described to you is the cause of impairment found?” There is also a box marked “No” for the following question in that section, “Is any part of the impairment due to a cause other than the work event described?” These checked boxes appear to contradict one another.

However, continuing under *Section J. Causation*, there are two other boxes checked “Yes” for the questions, “If applicable, do audiograms and other

testing establish a hearing loss compatible with that caused by hazardous noise exposure in the workplace?” and also, “If applicable, within reasonable medical probability, is plaintiff/employee’s hearing loss related to repetitive exposure to hazardous noise over an extended period of employment?” Again, both of those boxes are marked in the affirmative and are corroborated by the narrative report.

Further, under *Section K. Impairment*, Dr. Jones indicated a 3% whole person impairment pursuant to the 5<sup>th</sup> Edition of the American Medical Association Guides to the Evaluation of Permanent Impairment. No further medical evidence regarding Campbell’s hearing loss was introduced.

Campbell testified by deposition on three occasions – September 23, 2019, March 1, 2021, and December 3, 2021 – and at the hearing held February 2, 2022. Campbell, a resident of Hazard, Kentucky, was born on September 25, 1971. He is a high school graduate who completed one year of vocational education. He is a master mechanic. The Form 104 indicates Campbell worked as a mechanic for several coal mines from 1991 to 2011, when he began working for JD Contracting. JD Contracting was a FedEx delivery contractor with a fleet of approximately 13 vans that was owned and operated by Jimmy Darrell Miller, Campbell’s brother-in-law. Campbell’s last day with the company was July 26, 2018. On that day, Campbell testified he was notified at noon the business had been sold and was closing effective immediately. Campbell stated the closure was abrupt and he had no knowledge his brother-in-law was contemplating closing or selling the business. He has not worked since.

At his first deposition on September 23, 2019, Campbell testified regarding his hearing loss claim. He stated he noticed issues with his hearing over the last five years and he has experienced some further impairment in terms of hearing loss, but “not a considerable amount.” He explained that his “ears ring constantly” on both sides. He testified he had physical examinations during his previous employment at the coal mines that included hearing tests, and he was never notified prior to working at JD Contracting that he had any hearing problems. He testified he does not recall any ringing in his ears prior to working at JD Contracting and he started experiencing those symptoms after he started working there. Campbell testified in the course of seven years at JD Contracting he was exposed to hammering noises and loud engines without exhaust systems. He stated the noise level “was as loud as the coal mines.” The source of the noise came from impacts using wrench drives and other air tools.

Campbell also testified at the hearing on February 2, 2022 regarding his hearing loss claim. He stated he was a mechanic who worked on “FedEx vans like a ton, one ton vans, ton and a half vans down to regular, you know, like a half a ton van. . . . I worked on everything they had.” He testified he rebuilt engines and transmissions, changing them out and repairing as necessary. He used tools connected to an air hose in the course of this work. He testified he used ear plugs while working at JD Contracting. “They were those EZ – they came with the EZ first aid kits. . . .” He testified his ears “ring all of the time” and he has difficulty hearing sharp noises and people talking. “I can’t hardly hear anybody anymore.”

He stated he did not see an ENT doctor until his ears started ringing and he denied having prior surgery on his ears.

A Benefit Review Conference was held on June 10, 2021 where, among other issues unrelated to this appeal, permanent income benefits per KRS 342.7305 were disputed.

In the Opinion, Order and Award issued March 28, 2022, the ALJ found Campbell is not entitled to income benefits for his hearing loss claim because he does not meet the threshold required, but he awarded medical expenses reasonably required for the cure and relief from the effects of the work-related hearing loss injury, terminating 780 weeks from the July 26, 2018 date of injury. As it relates to the hearing loss claim, the ALJ stated, *verbatim*:

...

**Hearing loss.**

The only physician that discusses Campbell's complaints of hearing loss, the level of hearing loss and its potential cause, is the University Evaluator, Dr. Jones. The ALJ is required to give his opinions presumptive weight. There is one discrepancy in Dr. Jones report. On the form with boxes to check, he checked that the work event as described to him did not cause the impairment found. However, he states "see attached report" in the diagnosis section. That report is typewritten and attached to the Form 107.

That report documents that Campbell told Dr. Jones that he worked as a mechanic around trucks and autos for approximately 29 years. Campbell denied any nonoccupational noises. Dr. Jones stated: "I do believe within reasonable certainty that Mr. Campbell suffers from occupational-related noise induced sensory neural hearing loss." He assessed a three percent impairment as a whole due to hearing loss. He recommended wearing

hearing protection around noise and that he may benefit from bilateral hearing aids.

KRS 342.7305 requires an impairment rating of at least 8% to be entitled to income benefits due to work-related hearing loss. The only evidence of records regarding an impairment assessment is from Dr. Jones. The ALJ is more persuaded that the typed opinion letter that states Campbell suffers from work-related occupational hearing loss is correct, and not the form checked. The ALJ relies on Dr. Jones to find that Campbell sustained a three percent hearing loss due to his work with JD Contracting. The ALJ dismisses his claim for income benefits due to hearing loss, but awards medical benefits related to his hearing loss.

JD Contracting filed a Petition for Reconsideration, making essentially the same arguments it now makes on appeal. In his April 27, 2022 Order overruling the Petition for Reconsideration, the ALJ stated, *verbatim*:

KRS 342.281 allows an ALJ to review patent errors contained in an order, decision or award that appear on the face of the order, decision or award. Defendant petitions on several requests relating to the award of medical benefits on Plaintiff's hearing loss claim. Defendant notes the inconsistency in Dr. Jones report. However, the ALJ chose to believe the typed portion of his report as opposed to the form where boxes were checked. 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 SW2d 308 (Ky. 1993). Similarly, the ALJ has the sole authority to judge all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 SW2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 SW2d 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 SW3d 88 (Ky. 2000); Whittaker v. Rowland, 998 SW2d 479 (Ky. 1999).

The ALJ chose to believe that portion of Dr. Jones' typed written report where he states that within

reasonable certainty Campbell sustained occupationally related noise induced sensory neural hearing loss representing a whole person hearing impairment of 3%. Additionally, Dr. Jones stated that Campbell needed to protect his ears from further noise exposure and that he would benefit from bilateral hearing aids.

Defendant's Petition does not present argument that rises to the level of demonstrating patent error on the face of the award. Defendant disagrees with the portion of Dr. Jones' report relied upon which does not allow the ALJ to alter, amend or vacate the original award. The ALJ is entitled to believe and disbelieve portions of evidence from the same witness. The ALJ overrules the Petition for Reconsideration.

On appeal, JD Contracting argues the University Evaluator's report is inconclusive and cannot qualify as presumptive evidence of a compensable injury. It argues the report contains an inconsistency and, therefore, does not qualify as substantial evidence establishing Campbell met his burden of proof regarding causation. We disagree.

As the claimant in a workers' compensation proceeding, Campbell bore 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). Since Campbell was successful in his burden, the question on appeal is whether substantial evidence supports 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).

KRS 342.315(2) generally requires affording presumptive weight to the clinical findings and opinions of a university evaluator. An ALJ has the discretion to



reject such testimony where it is determined the presumption has been overcome by other evidence and the reasons for doing so are expressly stated within the body of the decision. Bullock v. Goodwill Coal Co., 214 S.W.3d 890, 891 (Ky. 2007); Morrison v. Home Depot, 197 S.W.3d 531, 534 (Ky. 2006); Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). Whether a party overcomes the presumption established pursuant to KRS 342.315(2) is not an issue of law, but rather a question of fact at all times subject to the ALJ's discretion as fact-finder to pick and choose from the evidence. Magic Coal Co. v. Fox, Id.

We believe the outcome selected by the ALJ in awarding medical benefits for Campbell's work-related hearing loss is supported by substantial evidence and in conformity with the Act. The ALJ succinctly expressed in both Orders his rationale for relying on Dr. Jones' narrative report. We acknowledge the inconsistency in Dr. Jones' report; however, we reject the argument the ALJ is precluded from considering it as evidence simply because a conflict exists. In fact, Kentucky caselaw expressly negates this notion. The ALJ, as fact-finder, is free to pick and choose whom and what to believe. Copar, Inc. v. Rogers, 127 S.W.3d 554, 561 (Ky. 2003). As the 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, supra. Although a party may note evidence that would have supported 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 Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to the weight and credibility to be afforded the evidence or by noting reasonable inferences that otherwise could have been drawn from the record. Whittaker v. Rowland, 998 S.W.2d 479, 481 (Ky. 1999). In order to reverse the decision of the ALJ, 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).

Although Dr. Jones' report may contain an inconsistency, it qualifies as substantial evidence sufficient to support the ALJ's ruling. The ALJ's explanations of his inferences regarding the report establish substantial evidence as required by the statute. The ability of the ALJ to choose which evidence to believe, **even if it comes from the same witness**, is a core tenet of this body of law. (Emphasis added). We reject JD Contracting's argument that an internal inconsistency within the report, which clearly provided a detailed, express diagnosis and identified the hearing loss was causally work-related, renders it inconclusive. The Beltone Hearing Care Center's medical report also indicated Campbell had suffered hearing loss and recommended hearing aids, corroborating the ALJ's conclusion. More importantly, no other medical evidence was introduced to rebut or even contradict the presumptive weight afforded the University Evaluator's opinion.

As a matter of law, we believe the ALJ's decision to be supported by substantial evidence which will not be disturbed on appeal.

Accordingly, the March 28, 2022 Opinion, Award and Order, and the April 27, 2022 Order denying the Petition for Reconsideration by Hon. John H. McCracken, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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