

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: October 19, 2018

CLAIM NO. 201702078 & 201702075

JAMES PENDERGRAFF

PETITIONER

VS.

APPEAL FROM HON. W. GREG HARVEY,  
ADMINISTRATIVE LAW JUDGE

KEN AMERICAN RESOURCES  
and HON. W. GREG HARVEY,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION  
AFFIRMING

\* \* \* \* \*

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

**STIVERS, Member.** James Pendergraff (“Pendergraff”) appeals from the June 18, 2018, Opinion, Order, and Award and the July 16, 2018, Order denying his petition for reconsideration of Hon. W. Greg Harvey, Administrative Law Judge (“ALJ”). In the June 18, 2018, Opinion, Order, and Award, the ALJ awarded Pendergraff permanent partial disability (“PPD”) benefits and medical benefits for a work-related cumulative trauma hearing loss injury. The ALJ dismissed Pendergraff’s consolidated

claim for alleged work-related cumulative trauma injuries to his low back, cervical spine, left shoulder, right knee, right foot, and hands.

On appeal, Pendergraff asserts he is entitled to PPD benefits enhanced by the three multiplier pursuant to KRS 342.730(1)(c)1 due to his work-related hearing loss.

The Form 101 for Claim No. 201702075, filed on December 5, 2017, alleges Pendergraff sustained work-related cumulative trauma injuries on August 18, 2017, to his left shoulder, neck, right knee, right foot, and hands while in the employ of Ken American Resources (“Ken American”). On March 6, 2018, Pendergraff filed a motion to amend his Form 101 to include a cumulative trauma back injury. By order dated March 20, 2018, the ALJ sustained Pendergraff’s motion.

The Form 103 for Claim No. 201702078, also filed on December 5, 2017, alleges Pendergraff sustained work-related hearing loss due to “[r]epetitive exposure to loud noise in the work place.” The claims were consolidated by order dated April 16, 2018.

Pendergraff testified by deposition on March 6, 2018. He last worked for Ken American as a shift foreman. Concerning his reasons for quitting work, Pendergraff testified:

Q: And then when you did retire in 2017, you filled out just a little exit interview here. And it looked like you were pretty pleased with your employment, but when it says please explain your reasons for leaving, that part is blank. And I was just curious did you just decide to retire, or did a doctor take you off work?

A: I just got down to the point I couldn’t function, I couldn’t go. I’d lost 30 pounds and –

Q: And what was that because of?

A: I felt like it was because of my medical conditions and not being able to sleep.

Q: Okay. And is that because of your Crohn's disease?

A: No, it was the pain.

Pendergraff also testified at the April 23, 2018, Final Hearing.

Pendergraff testified that he does not believe he could return to work in the coal mines.

He explained why hearing is so important in the context of underground mining:

A: Well, in the mines, you know, if you're around equipment moving or running, you want to be aware of what's around you. And if you're in adverse conditions underground, which is the top mainly, you want to be able to hear if it pops or cracks or, you know, gives you some indication that it's time to move, time to run, if you can.

Q: Could you wear that real heavy-duty hearing protection like you would wear if you were out shooting guns and do your job in the underground mining industry?

A: Not at all times, no.

The Form 107 Medical Report of Drs. Raleigh Jones and Petra Osetinsky, university evaluators from the University of Kentucky was filed in the record. The Form 107 indicates Pendergraff was examined on February 8, 2018.

Attached to the Form 107 is an explanatory letter which reads as follows:

Mr. Pendergraff is 60 years of age, and he is here for a Worker's Compensation evaluation of his hearing loss. He tells me that he worked as an underground coal miner for 38 years. He drove a coal truck for a few months, but this is really the only job he has ever really had for any prolonged period of time. He last worked in August 2017. He would intermittently wear hearing protection, but not regularly, while he was in the mines. He does hunt some,

but it does not sound too significant. He has no history of any ear infections, ear trauma, or ear surgery. He has never worn hearing aids.

He does complain of some bilateral constant tinnitus. As best I can determine, there is no history of any exposure to ototoxic medications.

On exam today, his external canals and tympanic membranes are normal.

His hearing test revealed a bilateral sloping high-frequency sensorineural hearing loss.

I do believe within a reasonable degree of medical certainty that Mr. Pendergraff suffers from an occupation-related noise-induced sensorineural hearing loss. Using 5<sup>th</sup> edition AMA guidelines, he has a 22.2% hearing impairment, which translates to an 8% impairment of the whole person.<sup>1</sup> I think this reasonably reflects his current level of disability. I do think he would benefit from bilateral hearing aids, and I have talked to him about the importance of proper hearing protection in the future.

The “Worker’s Compensation Information Sheet” attached to the Form 107, contains the following question concerning restrictions: “Which restrictions (if any) should be placed upon work activities due to hearing loss?” The following answer was provided: “Use of hearing protection.”

In a letter dated April 18, 2018, Ken American requested Dr. Jones clarify the impairment rating he assessed for Pendergraff’s hearing loss condition, as there was a discrepancy between the 7% impairment rating listed in the Form 107 and the 8% impairment rating set forth in the correspondence attached to the Form 107. Dr. Jones noted the correct impairment rating is 8%.

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<sup>1</sup> The whole person impairment rating listed on the Form 107 is 7%.

The April 11, 2018, Benefit Review Conference (“BRC”) Order and Memorandum lists the following contested issues: work-relatedness/causation; benefits per KRS 342.730/.7305; pre-existing active; medical benefits; and extent and duration. Under “other” is the following:

1) application of Parker v. Webster County Coal; 2) whether or not retroactivity of limits on medical benefits is constitutional; 3) constitutionality of attempt to make limit on income benefits retroactive; 4) constitutionality of 8% threshold on hearing loss claims; 5) traumatic injury vs. cumulative trauma; 6) delay in payment in benefits such that 6% interest applies to any past due benefits.

The BRC Order also indicates that the “[r]ecord will remain open for clarification of the UE’s impairment rating.”

In the June 18, 2018, decision the ALJ set forth the following findings of fact and conclusions of law regarding Pendergraff’s hearing loss claim:

### **C. Hearing Loss Claim**

Plaintiff also has a claim for hearing loss. Consistent with the Act, he was referred for a university evaluation by Dr. Raleigh Jones. Dr. Jones opined Plaintiff suffers from hearing loss from occupational exposure to hazardous noise and has 8% impairment as a result. KRS 342.315(2) affords Dr. Jones’s opinion presumptive weight. Pendergraff is entitled to an award based on Dr. Jones’s 8% impairment rating.

#### **1) Extent and Duration/Multipliers**

Plaintiff is entitled to an award in his hearing loss claim. He seeks the three times multiplier found in KRS 342.730(1)(c)1 which would require a finding that he is unable to perform his work due to his impaired hearing. The university evaluator did not indicate any restrictions resulting from the 8% impairment. Pendergraff testified he left employment due to his overall medical condition and loss of weight. He indicated he was just not able to function the same. He did not, however, attribute any

limitations to his ability to work from his hearing. Based on the evidence, the undersigned does not believe the three times multiplier applies here to Pendergraff's hearing loss award.

The parties stipulated Pendergraff's pre-injury average weekly wage was \$2,850.00. He is a maximum wage earner and his PPD award subject to the maximum rate in 2017 when he was last exposed. It is calculated as follows:  $\$626.29 \times .08 \times .85 = \$42.59$  per week. In light of the decision in *Parker v. Webster County Coal*, 529 S.W.3d 759 (Ky. 2017), the duration of the award shall be subject to subject [sic] to [sic] the tier down provision found in former KRS 342.730(4).

The undersigned is aware Plaintiff has raised the issue of the constitutionality of retroactivity of limits on medical benefits and the constitutionality of HB 2's retroactive limit on income benefits. That bill is not yet law until July 14, 2018 and will not be applied here to Pendergraff's claim. The same holds true as to HB 2's requirement that a delay in payment in benefits be proven before 6% interest applies to past due benefits.

The undersigned does not have the authority to address constitutional arguments and no comment will be made [sic] herein as to the constitutionality of HB 2.

## **2) Medical Benefits**

Given the finding above on the hearing loss claim and the opinion in Dr. Jones's report that Pendergraff needs hearing protection, the undersigned finds Pendergraff is entitled to an award of medical benefits for his bilateral hearing loss.

Pendergraff filed a petition for reconsideration asserting entitlement to PPD benefits enhanced by the three multiplier. By order dated July 16, 2018, the ALJ denied Pendergraff's motion.

On appeal, Pendergraff argues he is entitled to the three multiplier contending it is "nearly impossible" to work as an underground coal miner while wearing hearing protection. Pendergraff requests this Board to reverse the decision of

the ALJ regarding his entitlement to the three multiplier and remand with instructions to award PPD benefits enhanced by the three multiplier. We affirm.

Pendergraff bore the burden of proving each of the essential elements of his cause of action, including entitlement to income benefits enhanced by the three multiplier. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because Pendergraff was unsuccessful in carrying his burden of proof with respect to the three multiplier, the question on appeal is whether the totality of 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 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) *superseded by statute on other grounds as stated in* Haddock v. Hopkinsville Coating Corp., 62 S.W.3d 387 (Ky. 2001).

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 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). As 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).

While we acknowledge Pendergraff's testimony regarding the potential problems associated with wearing hearing protection in the context of underground mining, it cannot be said the totality of the evidence compels a different result, and that is the standard to which this Board is held. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). Persuasive to the ALJ was Pendergraff's testimony he stopped working in the mines because he lost weight and was unable to function in the same manner as he had been functioning. Indeed, in his deposition, Pendergraff testified he had lost 30 pounds which he attributed to not being able to sleep and the "pain" from his "medical conditions." As the ALJ noted in the June 18, 2018, Opinion, Order, and Award, Pendergraff did not attribute any limitations to his hearing loss.

We note the ALJ's statement in the June 18, 2018, Opinion, Order, and Award that the "university evaluation did not indicate any restrictions resulting from the 8% impairment." This is an error, as the university evaluator clearly wrote "use of hearing protection" under "restrictions" in the Worker's Compensation Information Sheet attached to the Form 107. However, we believe the ALJ was aware of the

university evaluator's opinion regarding Pendergraff's need for hearing protection, as he specifically addressed it in his award of medical benefits.<sup>2</sup> Therefore, the statement regarding no restrictions appears to be nothing more than harmless error. Further, Pendergraff, in his petition for reconsideration, failed to point out the ALJ's erroneous statement regarding no restrictions, and this is a patent error which must be addressed in a petition for reconsideration or the issue is waived. See Bullock v. Goodwill Coal Co., 214 S.W.3d 890 (Ky. 2007).

As substantial evidence supports the ALJ's decision not to enhance the PPD benefits by the three multiplier, and a different result is not compelled, this Board may not disturb the ALJ's decision.

Accordingly, the June 18, 2018, Opinion, Order, and Award and the July 16, 2018, Order are hereby **AFFIRMED**.

ALL CONCUR.

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<sup>2</sup> As stated by the ALJ, "Given the finding above on the hearing loss claim and *the opinion in Dr. Jones' report that Pendergraff needs hearing protection*, the undersigned finds Pendergraff is entitled to an award of medical benefits for his bilateral hearing loss." (emphasis added.)

**DISTRIBUTION:**

**METHOD**

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