

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: February 21, 2020

CLAIM NO. 201801490 & 201602535

KEN AMERICAN RESOURCES

PETITIONER

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

GARY HATFIELD
and HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

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

STIVERS, Member. Ken American Resources (“Ken American”) appeals from the October 16, 2019, Opinion and Award on reopening and the November 7, 2019, Order ruling on Ken American’s petition for reconsideration of Hon. Jonathan Weatherby, Administrative Law Judge (“ALJ”). The ALJ, in resolving Gary Hatfield’s (“Hatfield”) January 11, 2019, motion to reopen alleging a worsening of condition and that he is now permanently totally disabled, awarded permanent total disability

(“PTD”) benefits commencing on January 11, 2019. The ALJ also awarded medical benefits for Hatfield’s work-related injuries, including hearing loss.

On appeal, Ken American asserts the ALJ erred by not setting forth additional findings of fact regarding a second acute injury allegedly occurring in December 2017. It further asserts substantial evidence compels a finding Hatfield suffered a subsequent injury in December 2017.

BACKGROUND

The Form 101, filed on November 11, 2016, alleges Hatfield sustained work-related injuries on November 12, 2014, while in the employ of Ken American as an mining foreman in the following manner: “I was in the basement of the prep plant attempting to open a 14 ft step ladder and I was having trouble with it and ended up falling into and with the step ladder injuring myself.” Hatfield sustained the following injuries: “Multiple abrasions to the face; right distal radius fracture; left distal radius fracture; transverse fracture of the left patella; zygomatic fracture, maxillary fracture (orbit), carpal tunnel syndrome in both hands and arms, right and left; and injury to right knee.”

Hatfield filed a Form 103 on October 12, 2018, alleging work-related hearing loss with a final date of exposure occurring on December 5, 2017. The claims were consolidated by order dated July 16, 2019.

The record contains a Form 110-I settlement agreement entered into by the parties and approved by Hon. Brent E. Dye, Administrative Law Judge, on March 22, 2017. The agreement indicates the following diagnoses: “Status-post left zygoma/orbital fracture; left knee non-displaced patella fracture; bilateral wrist

fractures with internal fixation; bilateral carpal tunnel syndrome.” Dr. Michael Best assessed a 14% whole person impairment rating, and Dr. David E. Muffly assessed a 19% whole person impairment rating.

On January 11, 2019, Hatfield filed a Motion to Reopen alleging a worsening of his condition. Attached to the motion is the December 18, 2018, report of Dr. Muffly. After performing a physical examination and medical records review, Dr. Muffly set forth the following assessment:

Post-traumatic bilateral carpal tunnel syndrome related to bilateral wrist fractures from injury dated 11-12-2014. No improvement after bilateral carpal tunnel release and he has continued symptoms of residual bilateral carpal tunnel syndrome with chronic pain, numbness and weakness. Unchanged left knee examination from work related patella fracture. Overall his condition is worse when compared to 1-18-2017.

Dr. Muffly assessed a 25% whole person impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment, and further opined as follows:

3% impairment related to the left knee patella fracture on Table 17-33. 11% whole person impairment related to the left upper extremity (see attached worksheet) and 14% impairment to the right upper extremity (see attached worksheet). The 5th Edition AMA Guidelines are used.

Previously I had assigned 19% impairment after my examination dated 1-18-2017. His current impairment is now 25% to the whole person. His condition has progressed and is worse.

Dr. Muffly’s July 1, 2019, supplemental report was introduced. After reviewing additional medical records, including an EMG/NCV test, he opined as follows:

Bilateral carpal tunnel release surgery had been performed – right on 2-19-2018 and left on 2-21-2018. The post-operative EMG/NCV performed on 6-5-2019 is unchanged when comparing the pre-operative EMG/NCV test done on 2-15-2018. I conclude that residual post-operative carpal tunnel syndrome is present, moderate on the right and mild/moderate on the left.

This post-operative EMG/NCV test provides objective evidence. Gary Hatfield has post-traumatic bilateral carpal tunnel syndrome that was not improved with surgical treatment in February 2018. His subjective complaints are consistent with the objective findings of this most recent EMG/NCV test. The increased impairment that I assigned on 12-18-2018 is supported by objective evidence.

Hatfield was deposed on January 7, 2019. He described the November 12, 2014, accident:

A: Oh, I was in the basement trying to open up a stepladder and I jerked it open and it took my feet out from under me and the ladder closed upon my hands and down I went.

Q: So, according to the paperwork you filed- I'll just kind of quickly go over some of the injuries you sustained, that you filed on the paperwork. A facial abrasion, a right distal radius fracture, a left distal radius fracture. It looks like you also fractured your left patella and you had some facial fractures and carpal tunnel syndrome in both hands, and you also injured your right knee. Does that sound correct?

A: (Witness nods head affirmatively.)

Q: Okay.

A: Yes. I'm sorry.

Hatfield's last day at work for Ken American was December 5, 2017.

He explained:

Q: And why did you leave Ken American?

A: Well, I actually hurt my wrist again at work and the doctor that I was going to pulled me out on account of my breathing.

Hatfield also testified at the August 21, 2019, hearing. He offered further testimony regarding why he quit working for Ken American on December 5, 2017:

Q: Okay. And after you'd settled the injury claim, you went back to work for a period of time, didn't you?

A: Yes, I did.

Q: And you worked up until December 5, 2017.

A: Yes.

Q: What happened then? Why did you come off work on December 5, 2017?

A: We was in a tight spot, and salary people had to work, hourly people stayed home. And we was rebuilding a heavy mini pump. Heavy pump. Anyway, we changed the barrel out, and I was coming along, it slipped and jerked me, and then the second episode was the guard off of it, and when it fell, it jerked me, and when it jerked me, that was it.

Q: Okay. So you just couldn't take it anymore.

A: That was it.

He once again recounted the events of November 12, 2014:

A: I was in the basement opening a stepladder. And I pulled one half of it out a little bit, the other half out. I reached around and grabbed ahold of it to jerk it open, and when I did, I knocked my feet out from under me. And I know when I went down, the ladder was actually closed in on my hands.

Q: And what different parts of your body did you injure at that time?

A: Fractured both wrists, kneecaps, my eye orbit is broke in I think he said four places. My left knee was in a cast for a while or a brace.

After the claim settled, Hatfield underwent carpal tunnel surgery on both wrists. The right carpal tunnel release took place on February 19, 2018, and the left on February 21, 2018. Concerning his current symptoms in his hands and wrists, Hatfield testified as follows:

A: They just burn, they hurt all the time. It's just like a burning sensation in my fingers. And trying to pick something up just hurts it. I got to slide it to the edge of the table to get ahold of it if I'm picking it up off the table.

Q: Okay. How's your grip?

A: Not good.

Q: Do you have problems gripping and holding things?

A: Yes.

Q: Give us some examples of the problems you have.

A: If I pick up something that's laying loose, I've got it, but I don't have it. When I pick it up, it's not there.

Q: Okay. Now, since you've settled the claim and you had these carpal tunnel releases, do you think your condition has worsened?

A: Yes.

Q: In what ways has it worsened?

A: They're just – when I do do something with hands, it's, I mean, constant. I've got to stop because they'll cramp up and they'll start hurting so bad, I don't – I can't keep going. I just have to stop, let them rest, go back, try it again.

...

Q: Since the surgeries, do you feel your condition has improved any? Has it got worse, stayed about the same? How would you characterize it since you had these two surgeries we discussed?

A: I actually think it's gotten worse.

Q: In what ways?

A: They're just, like I said, just like right now, my hands through here is just like they're on fire –

Q: You're referring to the top of your hands and your fingers.

A: Yeah, right through here, this one is right across it –

Q: And then your wrist area.

A: - wrist – yeah.

Q: Palm, back from your palm.

A: This way.

Q: Is it both hands?

A: Yeah.

Q: Do you have pain in that consistently, or does it come and go?

A: It comes and goes to the severities, but far as burning, it's like they're burning all the time.

Q: What level of pain do you have just that you consider to be the lightest pain you have on a scale of zero to ten that – before it gets more severe? On a consistent basis.

A: On a consistent? Four.

Q: And then when it gets really severe, how – I know it probably varies from day to day. What different levels does it get to?

A: It will go all the way to an eight. Say eight. It doubles.

Hatfield wears braces when asleep and takes Neurontin. The cold affects his hands.

The August 21, 2019, Benefit Review Conference Order and Memorandum lists the following contested issues: benefits per KRS 342.730 (worsening), PTD, and benefits per KRS 342.7305.

In the October 16, 2019, Opinion and Award, the ALJ set forth the following findings of fact and conclusions of law:

Worsening of Condition/PTD

10. The Kentucky Supreme Court has established in *Colwell v. Dresser Instrument Div.* 217 S.W.3d 213 (Ky. 2006), that a Plaintiff need not establish a greater permanent impairment rating in order to reopen a claim and that the burden on reopening is to prove by objective medical evidence that she sustained a post-settlement worsening of impairment from the injury; to prove that the change is permanent and to prove that the change causes her to permanently and totally disabled.

11. The Plaintiff has submitted the opinion of Dr. Muffly to establish the worsening of condition. The ALJ finds that Dr. Muffly relied upon objective medical evidence and that his opinion is credible and convincing.

12. Dr. Muffly assessed a 19% whole person impairment on January 18, 2017, but examined the Plaintiff again on December 18, 2018, and diagnosed post-traumatic bilateral carpal tunnel syndrome related to bilateral wrist fractures from the injury dated November 12, 2014. Dr. Muffly noted decreased motion in both wrists with a non-displaced left patella fracture and found that there was no improvement following the releases. Dr. Muffly credibly concluded that the Plaintiff's condition had become worse when compared to January 18, 2017, and assigned a 25% whole person impairment. He apportioned 3% to the left knee, 11% to the left upper extremity, and 14% to the right upper extremity.

13. The ALJ further finds that the review of Dr. Best's opinion by Dr. Muffly is also convincing. Following the review of Dr. Best's opinion along with the EMG/NCV studies, Dr. Muffly again concluded that the increased impairment assigned on December 18, 2018, was supported by objective evidence. This opinion has convinced the ALJ and the ALJ thus finds that the Plaintiff has sustained a worsening of condition as evidenced by objective medical findings.

14. Permanent total disability is defined in KRS 342.0011(11)(c) as the condition of an employee who, due to an injury, has a permanent disability rating and has a complete and permanent inability to perform any type of work as a result of an injury. *Hill v. Sextet Mining Corporation*, 65 SW3d 503 (KY 2001).

15. "Work" is defined in KRS 342.0011(34) as providing services to another in return for remuneration on a regular and sustained basis in a competitive economy. The statutory definition does not require that a worker be rendered homebound by his injury, but does mandate consideration of whether he will be able to work reliably and whether his physical restrictions will interfere with his vocational capabilities. *Ira A. Watson Department Store v. Hamilton*, 34 SW3d 48 (KY 2000).

16. Dr. Muffly stated that Plaintiff's condition had progressed and worsened and determined that the Plaintiff was unable to return to his prior work. He further issued permanent restrictions of no lifting of over 10 pounds, to avoid repetitive use of the hands, and to avoid repetitive gripping or fine manipulation.

17. The Plaintiff testified that he had worked in the coal mining industry for 40 years and it has been stipulated that he has no specialized or vocational training. Given the Plaintiff's advanced age of 64, his lack of any other vocational skills, and his history of almost exclusive manual labor, the ALJ finds that the Plaintiff is unlikely to be able to provide services to another in return for remuneration on a regular and sustained basis in a competitive economy. The ALJ consequently finds that the Plaintiff is permanently and totally disabled.

Benefits Per KRS 342.7305

18. Pursuant to KRS 342.315(2), the clinical findings of the designated evaluator in the university review process is to 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.

19. The university evaluator in this matter, Dr. Casey Roof, has assessed a 6% impairment to the whole person due to the work-related noise exposure and the record lacks any evidence sufficient to overcome the presumptive weight afforded this assessment.

20. The Plaintiff shall therefore be entitled to medical expenses incurred as a result of the work-related hearing loss found herein.

In its petition for reconsideration, Ken American asserts the same arguments it now makes on appeal. Specifically, Ken American requested additional findings regarding the evidence upon which the ALJ relied to determine Hatfield is unable to perform any type of work and that his disability is the result of the November 12, 2014, work injury.

In the November 7, 2019, Order, the ALJ set forth the following additional findings regarding his finding of permanent total disability:

This matter is before the ALJ upon the Petition for Reconsideration filed by the Defendant Employer. The ALJ finds that the Petition fails to point out patent error. Out of an abundance of caution however, the following additional findings are issued regarding the finding of permanent total disability:

1. The ALJ finds that despite the Plaintiff's promotion to a supervisory position in 2012, his 40 year history of working in the mining industry underscores his suitability for manual labor. The duties that he described performing that ultimately caused the injury are an example of the duties that he could no longer perform on an ongoing basis.

2. The ALJ is not persuaded by the fact the the [sic] Plaintiff was required to complete paperwork as a small portion of his supervisory duties as established by his testimony, that he could find employment on a sustained basis in a competitive economy.

The Defendant Employer's Petition is therefore hereby **OVERRULED**.

ANALYSIS

Ken American first asserts the ALJ committed reversible error by failing to provide additional findings regarding an alleged second acute injury occurring in December 2017. We affirm on this issue.

The burden of proof in a motion to reopen based on a worsening of condition falls on the party seeking to increase the award. Griffith v. Blair, 430 S.W.2d 337 (Ky. 1968); Jude v. Cubbage, 251 S.W.2d 584 (Ky. 1952). Since Hatfield was successful in meeting his burden, the question on appeal is whether there was substantial evidence of record to support 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). 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). Although a party

may note evidence supporting a different outcome than 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). 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).

When reviewing a decision on appeal, the function of the Board 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, 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).

We acknowledge Hatfield's deposition and hearing testimony regarding an incident that occurred on December 2, 2017, and that he left his employment at Ken American shortly thereafter. However, there is no medical evidence in the record supporting Ken American's theory that a second acute injury occurred on this date. There is no medical testimony establishing Hatfield sustained a strain, a sprain, a fracture, or even a bruise on December 2, 2017, or any other date in December 2017.

Ken American filed two reports of Dr. Best in this reopening. Even though Dr. Best, in his March 12, 2019, Independent Medical Examination ("IME") report, noted the December 2, 2017, incident in the "history" section of his report, he did not offer an opinion that the incident resulted in a second acute injury. Dr. Best's

opinions, both in the March 25, 2018, IME and his July 8, 2019, supplemental report, focus exclusively on responding to Hatfield's allegations of a worsening of his original condition. The ALJ was not obligated to offer any opinions on a defense put forth without any substantiating proof.

Ken American's next argument is mostly a repeat of its first argument. It asserts substantial evidence compels a finding that Hatfield sustained a subsequent injury in December 2017. It requests this Board to remand the claim to the ALJ with instructions to set forth additional findings regarding the occurrence of a subsequent injury occurring in December 2017, as well as additional findings on whether Hatfield satisfied his burden of proving a worsening of his original injury occurring on November 12, 2014. We affirm.

We have already resolved the first part of Ken American's second argument. As stated herein, the ALJ was not required to set forth any analysis regarding an issue for which Ken American offered no proof. Despite Ken American's argument to the contrary, there is no evidence in the record demonstrating a second acute injury occurred in December 2017.

Regarding the need for the ALJ to set forth additional findings as to whether Hatfield sustained his burden of proving a worsening of his original injury, we conclude it is unnecessary. Authority generally establishes an ALJ must effectively set forth adequate findings of fact from the evidence in order to apprise the parties of the basis for his decision, although he is not required to recount the record with line-by-line specificity nor engage in a detailed explanation of the minutia of his reasoning in reaching a particular result. 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). The ALJ must only provide findings sufficient to inform the parties of the basis for the decision to allow for meaningful review, and his recitation of the evidence must be accurate. Kentland Elkhorn Coal Corp. v. Yates, 743 S.W.2d 47 (Ky. App. 1988); Shields v. Pittsburgh and Midway Coal Mining Co., *supra*; Big Sandy Community Action Program v. Chafins, *supra*. Here, the ALJ has accurately recited the evidence and adequately set forth the reasoning behind his ultimate decision.

The ALJ relied upon the medical opinions of Dr. Muffly concluding Hatfield's condition has indeed worsened. In Dr. Muffly's December 18, 2018, report, he opined several times that Hatfield's condition, at least with respect to his carpal tunnel syndrome, has "progressed and is worse" as compared to when Dr. Muffly originally examined Hatfield on January 18, 2017. Dr. Muffly acknowledged Hatfield underwent unsuccessful bilateral carpal tunnel releases that resulted in "continued symptoms of residual bilateral carpal tunnel syndrome with chronic pain, numbness and weakness." Dr. Muffly expressed the opinion Hatfield's impairment rating increased to 25% from the original 19% he assessed at the time of Hatfield's original settlement.

Dr. Muffly's opinions regarding a worsening of Hatfield's carpal tunnel syndrome are indeed substantiated by objective medical evidence. While we acknowledge Dr. Muffly, as stated in his July 1, 2019, supplemental report, opined Hatfield's post-operative EMG/NCV test is "unchanged" when compared to the pre-operative test, the results of Dr. Muffly's physical examination of Hatfield's

hands/wrists clearly firmly demonstrate a worsening of his condition when compared to his examination of Hatfield on January 18, 2017. Therefore, as substantial evidence in the form of Dr. Muffly's medical opinions support the ALJ's determination Hatfield has sustained a worsening of his condition since the original settlement of his claim, we must affirm.

Accordingly, on all issues raised on appeal, the October 16, 2019, Opinion and Award on reopening and the November 7, 2019, Order are **AFFIRMED**.

ALVEY, CHAIRMAN, CONCURS.

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