

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: December 13, 2019

CLAIM NO. 201800198

LARRY HELTON

PETITIONER

VS.

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

CAMBRIAN COAL CORPORATION
d/b/a PREMIER ELKHORN COAL 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. Larry Helton (“Helton”) seeks review of the January 30, 2019, Opinion and Order of Hon. R. Roland Case, Administrative Law Judge (“ALJ”), dismissing his coal workers’ pneumoconiosis (“CWP”) claim against Cambrian Coal Corporation d/b/a Premier Elkhorn Coal LLC (“Premier Elkhorn”). Relying upon the opinions of Dr. Bruce Broudy, the ALJ found Helton did not suffer from CWP or

any other occupationally acquired disease or impairment. Because the ALJ did not have the jurisdiction or authority to rule on Helton's claim that House Bill 2 is unconstitutional, the ALJ noted Helton had "preserved this issue for appellate purposes."

On appeal, Helton argues he has established x-ray proof of the existence of CWP. Helton also contends House Bill 2 enacted and signed into law on March 30, 2018, is unconstitutional.

BACKGROUND

Helton relied upon the x-ray interpretation of Dr. Glen Baker, a board certified pulmonary specialist and a certified B-reader. Dr. Baker interpreted the x-ray as revealing 1/0 CWP, t/t, bilateral mid and lower lung zones with pulmonary thickening. Dr. Broudy, a board-certified pulmonary specialist licensed in the Commonwealth and a certified B-reader, was appointed by the Commissioner of the Department of Workers' Claims, to perform an independent evaluation. After administering various tests and conducting an examination, Dr. Broudy concluded Helton did not suffer from CWP based on the x-ray evidence. He interpreted the x-ray as Category 0/0. He noted no large opacities nor pleural disease. The pulmonary function studies show pre-broncodilator function of 90% and FEV1 function of 87%. Consequently, Helton did not have CWP.

Helton testified at an April 19, 2018, deposition and at the December 20, 2018, hearing.¹ Helton's deposition and hearing testimony reveal his only

¹ Helton filed two other claims. One for a cumulative trauma injury, Claim No. 2018-00315, and one for hearing loss, Claim No. 2018-00196. At his deposition, Helton testified concerning all three claims.

employment has entailed working in surface coal mining operations. While working for Premier Elkhorn/Gatliff Coal Co., he operated heavy equipment. Helton has never worked underground.² The first ten years he worked for Premier Elkhorn he operated heavy equipment in the pit. He then ran a dozer for approximately the next nine years. The last ten years he operated a dozer at the coal preparation plant. He estimated he worked between 50 and 63 hours weekly. During 90% to 95% of his work day, he was exposed to coal dust. His last day of work for Premier Elkhorn was April 4, 2016, and he has not worked since that date. During the time he worked for Premier Elkhorn, he did not wear dust or breathing masks. Helton has performed no other jobs other than coal mining.³

Helton's regular medical provider, Alicia Cook, a nurse practitioner, took him off work because of physical problems. Helton takes Tramadol for back and neck pain. His only symptom which allegedly relates to CWP is shortness of breath. He has no coughing or wheezing and does not use an inhaler. He has never sought treatment for CWP.

After summarizing the evidence, the ALJ provided the following analysis in support of his dismissal of Helton's claim:

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

² Helton testified Premier Elkhorn and Gatliff Coal Co. were the same entity as both were owned by Teco.

³ Helton's Form 101 Employment History reveals he worked for Premier Elkhorn from February 1993 through April 4, 2016; Gatliff Coal Company from July 1988 through February 1993; Gambrel Coal Company from February 1978 through July 1988; and Sterling Garrett Coal Co., from July 1977 through February 1978.

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, and the plaintiff filed the report of Dr. Baker while the defendant did not file any medical reports or records in regards to this claim.

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 worker's pneumoconiosis or any other occupationally acquired disease or impairment.

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 therefore be dismissed.

CONSTITUTIONALITY OF HOUSE BILL 2 / KRS 342.315

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.

Helton did not file a petition for reconsideration.

Helton first contends he has established x-ray proof of CWP. Helton notes he was examined by Dr. Baker, a board-certified pulmonary specialist and certified B-reader, who diagnosed Category 1/0 CWP, t/t, bilateral mid and lower

lung zones with pulmonary thickening. Helton observes Dr. Broudy, a board-certified pulmonary specialist and certified B-reader, interpreted his x-ray as Category 0/0. However, Dr. Broudy noted scattered calcifications in the lung zones which are indicative of simple CWP. Helton concludes by stating he cannot dispute the pulmonary function study and arterial blood gas study results since he had never previously undergone those particular studies.

Helton also frames a constitutional argument asserting House Bill 2 enacted on March 30, 2018, is unconstitutional. Helton contends that for a claimant in a CWP claim to undergo an examination by only one physician in the Commonwealth of Kentucky is unconstitutional. Further, he argues any pending age discrimination cases on appeal could find portions of House Bill 2 unconstitutional including the CWP university evaluation process as well as the retroactivity of House Bill 2. Helton asserts he has met his burden of proof based on Dr. Baker's x-ray interpretation. He contends as follows:

The only difference between the qualifications of Dr. Baker [at the time he interpreted Helton's x-ray] and Dr. Broudy, as a university evaluator, is set out in KRS 342.794 "B" Reader List ... who have agreed to perform pulmonary examinations, interpret chest x-rays and review other medical evidence pursuant to KRS 342.316 for a fee to be fixed by the Commissioner.

Helton acknowledges the university evaluator report constitutes substantial evidence with regard to medical questions which, if uncontradicted, may not be disregarded by the fact-finder. Helton contends this presumption should neither shift the risk of non-persuasion to the defendant nor raise the bar with regard to his burden of persuasion. Helton maintains the changes contained in House Bill 2 limits

a claimant submitting reports of B-readers who are pulmonary specialists 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.” Helton argues these changes are arbitrary, capricious, and ultimately deprive him of due process of law.

Helton notes the ALJ stated he had no jurisdiction or authority to rule on the argument of the constitutionality of House Bill 2. Thus, no petition for reconsideration was filed, as the only issue on appeal is the constitutionality of the CWP Act as amended in House Bill 2.

After Helton filed his brief in which he requested the appeal be placed in abeyance, Premier Elkhorn filed a response stating it had no objection to the claim being placed in abeyance pending the outcome of Holcim v. Swinford, 581 S.W.3d 37 (Ky. 2019). By Order dated May 1, 2019, the Board entered an Order placing the appeal in abeyance and directed the parties to file status reports within 120 days from the date of the order.

On October 2, 2019, the Board entered an Order noting the Kentucky Supreme Court’s decision in Holcim became final on September 24, 2019. Accordingly, the Board removed the appeal from abeyance, granted Helton fifteen days to supplement his brief, and granted the Respondents thirty days thereafter to file a brief.

ANALYSIS

As the claimant in a workers’ compensation proceeding, Helton had 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). Since Helton 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 that they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

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 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). So 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).

Since Helton did not file a petition for reconsideration, our sole task on appeal is to determine whether substantial evidence supports the ALJ's decision.

The October 16, 2018, report of Dr. Broudy reveals he obtained a history, conducted a physical examination, and performed diagnostic testing. His report contains the following summary of the test results:

The chest x-rays consisted of 2 PA views of the chest, which are of good diagnostic quality and properly identified. Film letter capital A is used for interpretation. There is some scapular overlay, but this does not interfere with interpretation. The chest excursion was not optimal, with barely 8 posterior ribs visible. Otherwise, soft tissues, bony structures, cardiac silhouette, and mediastinal structures appear normal. Lung zones are notable for scattered calcifications. I have compared the films to the standard ILO radiographs and 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.

Pulmonary function testing pre-bronchodilator

Summary of result: Vital capacity 2.54, 2.43, 2.17, 90%.
FEV1 2.07, 1.75, 1.37, 87%.

Dr. Broudy diagnosed chronic back and neck pain, hypertension, and gastroesophageal reflux and provided the following comments:

Lung function and arterial blood gases are essentially normal, indicating no significant impairment due to any cause. There was not sufficient radiographic evidence to diagnose coal workers pneumoconiosis. I did consider his history of exposure sufficient to cause pneumoconiosis in a susceptible individual.

With respect to causation, Dr. Broudy stated:

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 above findings and opinions of Dr. Broudy comprise substantial evidence in support of the ALJ's determination that Helton did not have CWP and the dismissal of his CWP claim. Further, the fact that the record contains conflicting testimony from another medical expert contrary to the ALJ's conclusions does not compel a different result. Copar, Inc. v. Rogers, 127 S.W. 3d 554 (Ky. 2003). As fact-finder, the ALJ is vested with the authority to weigh the medical evidence, and 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). This Board has no authority to usurp the ALJ's reliance upon Dr. Broudy's findings and opinions. That being the case, the ALJ's decision must be affirmed.

Helton also frames a constitutional challenge to a portion of House Bill 2 which became effective July 1, 2018.

The parties do not dispute the Kentucky Supreme Court in Holcim held:

With no mention of retroactivity or any language from which retroactivity may be inferred, the express language of KRS 342.730(4) does not make the statute retroactive. However, the Legislative Research Commission note following the statute references the Act from which the statute was enacted and, as discussed, is exempt from the codification requirements, as it is temporary in nature.

Thus, the legislature has made a declaration concerning retroactivity in this case.

Since the newly-enacted amendment applies retroactively, it must be used to determine the duration of Swinford's benefits. We remand this matter to the ALJ to apply the time limits set out in the 2018 amendment to KRS 342.730(4).

Id. at 44.

This Board lacks jurisdiction to determine the constitutionality of House Bill 2. Blue Diamond Coal Company v. Cornett, 300 Ky. 647, 189 S.W.2d 963 (1945). *See also* Vision Mining, Inc. v. Gardner, 364 S.W.3d 455 (Ky. 2011); Abel Verdon Const. v. Rivera, 348 S.W.3d 749, 752 (Ky. 2011). Since this Board has no authority to rule on the propriety of the changes contained in portions of House Bill 2 about which Helton complains, we must affirm on this issue, as there is no judiciable issue for this Board to decide.

Accordingly, concerning the issues raised in the appeal, the January 30, 2019, Opinion and Order is **AFFIRMED**.

ALL CONCUR.

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