Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: July 26, 2019

CLAIM NO. 201702050

LESTER HENSLEY PETITIONER

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

NALLY & HAMILTON ENTERPRISES
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. Lester Hensley ("Hensley") appeals from the April 22, 2019, Opinion and Order of Hon. R. Roland Case, Administrative Law Judge ("ALJ") in which the ALJ dismissed Hensley's claim for coal workers' pneumoconiosis ("CWP") for failure to meet his burden of proof. In dismissing Hensley's claim, the ALJ relied

upon the medical opinions of Dr. Byron Westerfield who determined Hensley does not suffer from CWP and has no pulmonary impairment or respiratory disability.

On appeal, Hensley asserts he established x-ray proof of CWP through the medical testimony of Dr. Glen R. Baker. Hensley also challenges the constitutionality of House Bill 2 ("HB2") asserting, "the requirement for Plaintiff in a CWP claim to undergo examination by only one physician in the Commonwealth of Kentucky is unconstitutional."

The Form 102 alleges Hensley became affected by work-related CWP while in the employ of Nally & Hamilton Enterprises. It further alleges Hensley's last date of exposure is December 2, 2015.

Hensley filed the December 13, 2016, report of Dr. Baker. Dr. Baker performed a chest x-ray and interpreted it as showing Category 1/0 profusion, p/t small opacities in all lung zones, no large opacities, and no pleural abnormalties.

Nally & Hamilton Enterprises filed the February 6, 2018, report of Dr. Bruce Broudy. After performing a physical examination and taking and interpreting chest radiographs, Dr. Broudy opined Hensley does not have CWP or any occupationally acquired pulmonary disease despite sufficient exposure. He assessed a 0% impairment rating.

The record contains the January 21, 2019, Form 108 report of Dr. Westerfield. On August 30, 2018, the Commissioner of the Department of Workers' Claims referred Hensley to Dr. Westerfield for a medical evaluation pursuant to KRS

342.315 and KRS 342.316(3)(b)4.b.[1] Dr. Westerfield performed a physical examination and obtained a chest radiograph which he interpreted "as negative for opacities that would represent Black Lung." He concluded as follows:

> Based on pulmonary function testing it is my opinion that Mr. Hensley has no pulmonary impairment and no respiratory disability. Mr. Lester has normal pulmonary function and he retains the breathing capacity to return to his previous position in coal mine employment, or he could enjoy work with equal energy requirements in other industries.

The February 27, 2019, Benefit Review Conference Order and Memorandum lists the following contested issues: occupational disease, physical capacity to return to the type of work performed at time of injury, KRS 342.732, and constitutionality of HB2 procedure.

In the April 22, 2019, Opinion and Order dismissing Hensley's claim, the ALJ set forth the following analysis regarding his reliance upon Dr. Westerfield:

> …
>
> **Benefits per KRS 342.732:** The university evaluation report of Dr. Westerfield is entitled to presumptive weight pursuant to KRS 342.315 and KRS 342.316 as amended effective July 14, 2018. The Administrative Law Judge finds the report of Dr. Westerfield to be the most persuasive.
>
> Dr. Westerfield was independently selected by the Commissioner of the Department of Workers' Claims for his evaluation. Dr. Baker was selected by the plaintiff with Dr. Broudy and Barbourville ARH Hospital selected by the defendant.
>
> 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

[1] We note the amendments to KRS 342.315 and .316, as reflected in HB2, became effective on July 14, 2018.

> chooses to rely on and is persuaded by the opinion of Dr. Westerfield who was independently selected by the Commissioner of the Department of Workers' Claims and found the plaintiff does not suffer from coal workers' pneumoconiosis, pulmonary impairment or respiratory disease resulting from exposure to coal dust.
>
> 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**
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> 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.
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> No petition for reconsideration was filed.

Hensley first asserts he established x-ray proof of the existence of CWP through the medical report of Dr. Baker. We affirm.

As the claimant, Hensley bore 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). Because he 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 they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

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). An ALJ is vested with broad authority in determining causation. Dravo Lime Co. v. Eakins, 156 S.W.3d 283 (Ky. 2003). Although a party may note evidence supporting a different outcome than reached by an ALJ, this 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).

The function of the Board in reviewing an ALJ's decision 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, supra. 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).

Importantly, Hensley failed to file a petition for reconsideration challenging any aspect of the ALJ's reliance upon Dr. Westerfield. Absent a petition for reconsideration, questions of fact, including the adequacy of the ALJ's findings of fact, are not preserved for appellate review. Brasch-Barry General Contractors v. Jones, 175 S.W.3d 81, 83 (Ky. 2005). *See also* Hornback v. Hardin Memorial Hospital, 411 S.W.3d 220, 223 (Ky. 2013). Stated otherwise, inadequate, incomplete, or even inaccurate fact-finding on the part of an ALJ will not justify reversal or remand if there is substantial evidence in the record supporting the ultimate conclusion. Eaton Axle Corp. v. Nally, 688 S.W.2d 334 (Ky. 1985).

KRS 342.315(1) reads, in relevant part, as follows:

> For workers who have had injuries or occupational hearing loss, the commissioner shall contract with the University of Kentucky and the University of Louisville medical schools to evaluate workers. For workers who have become affected by occupational diseases, the commissioner shall contract with the University of Kentucky and the University of Louisville medical schools, **or other physicians otherwise duly qualified as 'B' readers who are licensed in the Commonwealth and are board-certified pulmonary specialists**…. (emphasis added.)

Further, KRS 342.316 reads, in relevant part, as follows:

> Except as otherwise provided in KRS 342.316, the clinical findings and opinions of the designated evaluator shall 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. When administrative law judges reject the clinical findings and opinions of the designated evaluator, they shall specifically state in the order the reasons for rejecting that evidence.

In the case *sub judice*, after weighing the medical evidence in the record, the ALJ relied upon the report of Dr. Westerfield whose findings, as the B-reader and Board-certified pulmonary specialist designated by the Commissioner pursuant to KRS 342.315(2), "shall be afforded presumptive weight."[2] The ALJ could have relied upon Dr. Baker's opinions if he had specifically stated his reasons for rejecting Dr. Westerfield's findings and opinions. However, he chose to rely upon Dr. Westerfield who interpreted Hensley's chest x-ray "as negative for opacities that would represent Black Lung" and opined Hensley does not suffer from CWP despite having had a "sufficient history of exposure to coal mine dust to develop pneumoconiosis if he were a susceptible individual." The ALJ's reliance upon Dr. Westerfield is well within the discretion afforded to him under the law, particularly since Dr. Westerfield's opinions, as a KRS 342.315(1) designated physician, must be given presumptive weight.

Further, we note Dr. Broudy reached the same conclusion as Dr. Westerfield. Dr. Baker's differing opinions merely represent conflicting medical opinions, and it is not the function of this Board to re-weigh the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). 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). The ALJ certainly had the discretion to rely upon any physician in the record and since Hensley

[2] We note the ALJ erroneously referred to Dr. Westerfield as a university evaluator. Nonetheless, as Dr. Westerfield's opinions are entitled to presumptive weight pursuant to KRS 342.315(2) by falling within the "other physicians" statutory verbiage of HB2. Since Hensley failed to file a petition for reconsideration challenging the ALJ's error of fact, the ALJ's error constitutes nothing more than harmless error.

failed to file a petition for reconsideration challenging any aspect of the ALJ's reliance upon Dr. Westerfield, we must affirm.

Hensley's second argument raises a constitutional challenge to HB2 asserting, in part, as follows: "Petitioner argues the requirement for Plaintiff in a coal worker's pneumoconiosis claim to undergo examination by only one physician in the Commonwealth of Kentucky is unconstitutional." Hensley also appears to challenge the retroactive effect of HB2 by stating as follows: "In addition, Petitioner argues that any pending age discrimination cases on appeal could find portions of HB2 unconstitutional including the coal workers' pneumoconiosis university evaluation process and the retroactivity of HB2. [citation omitted]." This Board lacks the jurisdiction to rule on constitutional challenges. *See* Blue Diamond Coal Co. v. Cornett, 300 Ky. 647, 189 S.W.2d 963 (Ky. 1945) and Commonwealth v. DLX, Inc., 42 S.W.3d 624 (Ky. 2001). Therefore, we must also affirm on this issue.

Accordingly, the April 22, 2019, Opinion and Order is hereby **AFFIRMED**.

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON FRANK K NEWMAN **LMS**
P O BOX 250
BARBOURVILLE KY 40906

COUNSEL FOR RESPONDENT:

HON W BARRY LEWIS **LMS**
P O BOX 800
HAZARD KY 41702-0800

RESPONDENTS:

HON MARGY DE MOVELLAN **LMS**
DIRECTOR OF COAL FUND
250 W MAIN ST STE 900
LEXINGTON KY 40507

HON ANDY BESHEAR **USPS**
KENTUCKY ATTORNEY GENERAL
700 CAPITAL AVE STE 118
FRANKFORT KY 40601

ADMINISTRATIVE LAW JUDGE:

HON R ROLAND CASE **LMS**
657 CHAMBERLN AVE
FRANKFORT KY 40601