Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: December 6, 2019

CLAIM NO. 201800758

MARTY SMITH PETITIONER

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

LETCHER COUNTY FISCAL COURT;
AND HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

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

RECHTER, Member. Marty Smith appeals from the June 11, 2019 Opinion and Order, and the July 23, 2019 Order on Reconsideration rendered by Hon. Jonathan R. Weatherby, Administrative Law Judge ("ALJ"). The ALJ dismissed Smith's claim for work-related hearing loss. On appeal, Smith argues the ALJ erred in

relying upon Dr. Raleigh Jones' deposition testimony to dismiss the claim. For the reasons set forth herein, we affirm.

Smith worked for Letcher County Fiscal Court as a mechanic for approximately eighteen years. He testified he worked primarily on a mowing machine, and sometimes wore hearing protection. During one year of his employment, he made mine timbers using chainsaws and bulldozers. Smith testified he began to notice hearing problems about three years ago and received hearing aids.

Smith visited Beltone on February 20, 2018 for an audiology evaluation. He reported difficulty hearing conversations in crowds and over background noise. The audiometric results revealed profound loss and speech discrimination. The audiologist stated the hearing loss was "due to noise in the mines." Hearing aids were recommended.

Smith visited Dr. Daniel Mongiardo on August 29, 2019. The hearing evaluation revealed moderate to profound sensory loss bilaterally. Dr. Mongiardo concluded that Smith's hearing loss was partially due to noise exposure as he showed a conductive component. He recommended Smith wear hearing protection.

Dr. Jones and Dr. Jennifer Shinn-Pettyjohn conducted a university evaluation on July 16, 2018. In the narrative portion of his report, Dr. Jones notes Smith reported that he had worked on a loud commercial mower for twelve years, but that the last few years were in a closed cab which reduced the noise significantly. Smith also told Dr. Jones he had hearing difficulty in high school, and has worn hearing aids for about fifteen years, though this note was disputed by Smith at the final hearing. Dr. Jones noted he was not provided any hearing tests, even though

such testing must have been conducted due to Smith's use of hearing aids. On examination, Dr. Jones noted Smith has severe-to-profound bilateral sensorineural hearing loss. Dr. Jones concluded his narrative report:

> This is a difficult situation because I do not have adequate documentation of his prior hearing. In my opinion, his hearing loss is far greater than would be expected by the degree of occupational noise exposure that he has had. I think there must be some sort of a genetic or metabolic cause of his hearing loss producing the vast majority of his hearing loss. It is certainly, possible that his noise exposure contributed to a slight degree, but I do not believe there is any way that his occupational noise exposure could have caused the degree of hearing loss he has.

Dr. Jones concluded Smith has 100% hearing loss resulting in a 35% whole person impairment. He explained this was not an accurate representation of the occupational portion of the hearing loss, which would be very small and impossible to specifically delineate. However, in the questionnaire portion of the Form 107, Dr. Jones checked "yes" to the question: "Do you believe the work event as described to you is the cause of impairment found?" Later in the Form 107, attached to his own narrative report, Dr. Jones checked "no" to the questions: "Do audiograms and other testing establish a pattern of hearing loss compatible with that caused by hazardous noise exposure in the workplace?" and "Within reasonable probability, is plaintiff's hearing loss related to repetitive exposure to hazardous noise over an extended period of employment?"

Dr. Jones' deposition testimony was taken on August 8, 2018. He was questioned about the discrepancy between his narrative report and the questionnaire portion of the Form 107. Dr. Jones explained he had made a clerical error. He also

stated he had been provided a hearing test conducted in 2015, which he reviewed immediately prior to the deposition during a conversation with the employer's counsel. Dr. Jones explained the 2015 test was identical to the test results he gathered in 2018. Dr. Jones also reiterated his conclusion that Smith's hearing loss was vastly due to a non-work-related cause. He estimated that it is possible 1-2% of his hearing loss is work-related, but he expected that figure would actually be 0% if further testing was conducted.

The ALJ relied upon Dr. Jones' testimony, in which he stated he could not confirm a pattern of hearing loss compatible with hazardous noise exposure in the workplace. The ALJ dismissed Smith's claim, and he petitioned for reconsideration. Smith argued Dr. Jones' Form 107 indicates his hearing loss is work-related, and he testified at least a portion of his hearing loss is work-related. Smith emphasized that Chapter 342 does not permit occupational hearing loss to be apportioned, and therefore the ALJ erred in dismissing his claim. The ALJ denied the petition.

Smith makes the same arguments on appeal. First, he argues that, by Dr. Jones' own admission, he marked "yes" on the Form 107 when asked if Smith's hearing loss is work-related. Dr. Jones stated the only additional information he received since completing the Form 107 is a 2015 audiology report given to him by the employer's counsel prior to the deposition. Smith also argues that Dr. Jones acknowledges a portion of his hearing loss is work-related. Because apportionment is not permitted in hearing loss claims, he reasons he is entitled to a finding the entire impairment is compensable.

The primary basis of Smith's appeal is the assertion that Dr. Jones impermissibly and arbitrarily changed his opinion from the time he completed the Form 107 and his deposition testimony. However, this assertion is simply not supported by anything other than mere inference. Dr. Jones unequivocally explained that the Form 107 questionnaire contained a clerical error. Furthermore, his original narrative statement, attached to the Form 107 and to his evaluation report, clearly sets forth his opinion in detail. This narrative detailed Dr. Jones' conclusion that Smith's hearing loss is vastly due to non-work-related reasons, and that he could not determine what portion, if any, is occupational. Dr. Jones' deposition testimony is in conformity with this narrative statement.

Moreover, we disagree with Smith's assertion that Dr. Jones acknowledged a portion of Smith's hearing loss is work-related, thereby requiring a finding the entirety of the hearing loss is compensable. Dr. Jones stated he believed a "very small" portion of Smith's hearing loss could be work-related, but "really impossible to delineate with any certainty." He also stated that the audiograms do not establish a pattern of hearing loss compatible with hazardous noise exposure in the workplace. During his deposition, Dr. Jones testified that he would guess the work-related portion of Smith's impairment rating would be zero. He later stated it would be "quite minimal, if at all." This testimony falls far short of establishing within reasonable medical probability that Smith has any work-related hearing loss.

While Smith advances a different explanation for Dr. Jones' testimony, 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). The ALJ is entitled to believe Dr. Jones' explanation that his Form 107 contained a clerical error. Furthermore, though not specifically argued by Smith, we note that Dr. Jones' opinion and testimony constitutes the requisite substantial evidence to support the ALJ's decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

For the foregoing reasons, the June 11, 2019 Opinion and Order, and the July 23, 2019 Order on Reconsideration rendered by Hon. Jonathan R. Weatherby are hereby **AFFIRMED**.

ALL CONCUR.

DISTRIBUTION:

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