

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: April 24, 2020

CLAIM NO. 201880963 & 201801364

MIKE FRENCH

PETITIONER/
CROSS-RESPONDENT

VS.

APPEAL FROM HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE

REAGENT CHEMICAL & RESEARCH;
HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE; AND
ATTORNEY GENERAL OF KENTUCKY

RESPONDENTS/
CROSS-PETITIONERS

OPINION
AFFIRMING

* * * * *

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

ALVEY, Chairman. Mike French ("French") appeals and Reagent Chemical & Research ("Reagent") cross-appeals from the Opinion, Award and Order rendered October 22, 2019 by Hon. Chris Davis, Administrative Law Judge ("ALJ"). The ALJ awarded permanent total disability ("PTD") benefits and medical benefits for injuries French sustained on May 15, 2018 when he was exposed to hydrochloric acid ("HCL") fumes at work. The ALJ dismissed French's claim for alleged right

ankle and left knee injuries for which he sought treatment on March 29, 2018. Both French and Reagent filed petitions for reconsideration. The ALJ denied the petitions by orders entered November 13, 2019 and December 4, 2019, except for ordering French's award of PTD benefits terminates on May 15, 2022.

On appeal, French argues the ALJ erred in retroactively limiting the duration of his award of PTD benefits pursuant to KRS 342.730(4) effective July 14, 2018. French also argues the retroactive application of KRS 342.730(4) is unconstitutional. We find the ALJ's decision conforms with the holding by the Kentucky Supreme Court in Holcim v. Swinford, 581 S.W.3d 37 (Ky. 2019). We also note this Board lacks the authority to make determinations on constitutional issues.

Reagent argues substantial evidence does not support the ALJ's award of PTD benefits. The ALJ relied upon the opinions of Dr. Fred Rosenblum, the university evaluator, who examined French at the request of the Kentucky Department of Workers' Claims. As noted by the ALJ, Dr. Rosenblum's opinions are afforded presumptive weight, which he determined were not sufficiently rebutted. We affirm.

French filed a Form 101 and a Form 102 on September 19, 2018. In the Form 101, French alleged he developed right ankle and left knee injuries due to repetitive motion at work, with an injury date of March 29, 2018. The ALJ ultimately dismissed that claim, and since no issues were raised regarding those alleged injuries, or the dismissal, we will not discuss that claim further. In the Form 102, French alleged that on May 15, 2018, he was moving trailers by use of a vehicle,

his usual job, when he was exposed to HCL fumes and developed pulmonary problems, throat burning, and chest pain.

French testified by deposition on March 7, 2019, and at the hearing held August 28, 2019. French was born on March 23, 1951, and is a resident of Irvington, Kentucky. He is a high school graduate. French testified he has held a CDL since 1976, and it is current. The only training he has undertaken since high school was for hauling hazardous materials. In addition to work for Reagent, French's employment history includes working as an assembler in a factory, operating a cigarette making machine, working in an auto body shop, owning and operating an auto body shop, and installing communication devices on microwave towers. For Reagent, French drove a yard dog, a vehicle used in moving trailers inside the chemical plant, where he was injured. He testified the chemical plant was DuPont Chemours, located in Louisville, Kentucky. He worked for Reagent, which purchased chemicals from DuPont. His job was to move empty trailers to be filled, and once filled, taking the trailers to a location to be picked up by "road" trucks to be taken off the premises. He worked for Reagent for six and a half years. He testified he had to repetitively climb up and down from the yard dog, and perform minor repairs on the vehicle.

As noted above, we will not discuss French's alleged lower extremity injuries since the determination regarding those alleged injuries was not raised on appeal. On May 15, 2018, French was operating the yard dog to move trailers. He drove through some fumes near the "acid shack" where HCL is loaded. He testified the fumes "took his breath away". He parked the yard dog, and made it to a

building to escape the fumes. He experienced a burning sensation in his throat, and a rattling/gurgling sensation in his lungs. He called the guard station to report the incident. Two guards came to his assistance. He was moved to a different area and given oxygen. He was then taken by ambulance to the emergency room at Sts. Mary and Elizabeth Hospital. He followed up with Baptist Health the next day. He then treated with Dr. Benjamin Smith, his family doctor. He was referred to Dr. William Cundiff, a pulmonologist, who he still sees once per year. He also saw Dr. Hawkins (no first name provided), an ear, nose, and throat physician on one occasion.

French testified he still uses an inhaler twice per day due to the accident. He testified he loses his voice if he talks much. He also testified he has problems being around fumes or odors, and occasionally has difficulty catching his breath. French has not returned to work since May 15, 2018. French testified he does not believe he is able to return to work based upon his breathing problems. He stated the fumes from chemicals in the plant would aggravate his condition, rendering him unable to work.

In support of his claim, French filed treatment records from Dr. Smith for treatment received on June 7, 2018. Dr. Smith noted French's acute exposure to HCL gas with persistent shortness of breath afterward. French complained of dyspnea with any exertion due to his exposure.

Dr. Rosenblum, a pulmonologist at the University of Louisville, evaluated French on October 16, 2018. Dr. Rosenblum noted the history of French's exposure to HCL at work on May 15, 2018. French reported he felt woozy, had shortness of breath, gurgling in his lungs, and a burning sensation in this throat. Dr.

Rosenblum noted French's pulmonary function studies revealed an FEV₁ of 100%, and FVC of 98% of predicted, both of which are in the range of normal. Dr. Rosenblum determined French sustained an acute injury from inhaling acid fumes on May 15, 2018. He noted French's condition had improved, but he assessed a 30% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"). He determined the impairment was due to French's exposure to chemicals at work, and particularly the well-documented inhalation injury. He recommended French avoid exposure to any fumes. Dr. Rosenblum determined French does not retain the capacity to return to the type of work performed on the date of the injury.

Dr. Rosenblum testified by deposition on February 8, 2019. He noted French was only exposed to HCL for a short period. He presumed the exposure was to HCL, since that was indicated in the Baptist Health notes. He noted French had worked around HCL for several years without recorded exposure. He stated French had recovered significantly from his exposure by the October 2018 evaluation. He stated that although French's pulmonary function studies were normal, the fact he had a 17% improvement after using a bronchodilator suggested he had an obstruction. He determined French sustained a work-related pulmonary injury. Based upon the cardiopulmonary stress test, French's impairment (category 3) was in the range of 26-50%, and he assessed 30% from that range. He stated this was based in part because the damage was caused by exposure to HCL. He noted French's high fractional exertion of nitric oxide on examination. He reiterated French could return to work as long as he is not exposed to odors or fumes.

Reagent filed the results of the pulmonary function testing performed by Dr. Cundiff on June 15, 2018. That testing revealed FEV₁ of 99% of predicted value, and an FVC of 93% of predicted value.

Dr. Bruce Broudy evaluated French at Reagent's request on November 26, 2018. Dr. Broudy noted French ran into a cloud of HCL gas while driving a vehicle at work on May 15, 2018 due to a ruptured hose. He noted that on pulmonary function testing, French's FEV₁ was 81% of predicted value, and his FVC was 81% of predicted value, both within the normal range. He diagnosed French with a history of exposure to HCL, which is a toxic gas. He assessed a 0% impairment rating based upon the AMA Guides. He believed French had recovered with no impairment. He also determined French retains the capacity to return to return to the type of work performed at the time of the injury.

Dr. Thomas Jarboe evaluated French at Reagent's request on March 21, 2019. He noted French drove through a cloud of HCL gas on May 15, 2018. French reported he immediately experienced a gurgling sound in his lungs, and his throat burned. He additionally noted French was taken to the emergency room. Dr. Jarboe diagnosed French with reactive airways dysfunction syndrome caused by his exposure at work. Dr. Jarboe stated, "In this case the claimant experienced a single exposure to a high concentration of an irritant agent (hydrochloric acid)." He stated the injury was to the lower airway and resulted in residual bronchial hyper-responsiveness. He assessed a 0% impairment rating pursuant to the AMA Guides. Dr. Jarboe stated French retains the capacity to return to the type of work performed at the time of the injury. He also stated French should not be exposed to irritating

fumes or dust. He additionally stated French needs continued treatment with inhaled corticosteroids and long-standing bronchodilators. Reagent filed a supplemental report from Dr. Jarboe dated April 24, 2019, reiterating his previous opinions.

A Benefit Review Conference was held on August 28, 2019. Reagent stipulated that French sustained a work-related injury on May 15, 2018. Reagent paid temporary total disability benefits from May 16, 2018 until July 30, 2018. The issues preserved for determination included benefits per KRS 342.730, work-relatedness/causation, notice, and whether French sustained an injury as defined by the Kentucky Workers' Compensation Act.

In the decision rendered October 22, 2019, the ALJ determined French had provided due and timely notice of his injuries. He dismissed the claim for alleged injuries to French's right ankle and left knee. He noted French's history of polio as a child. He also noted Dr. Rosenblum determined French sustained a work-related lung injury on May 15, 2018, resulting in a 30% impairment rating. He afforded presumptive weight to Dr. Rosenblum's opinions as a university evaluator. The ALJ noted that although the opinions provided by Drs. Broudy and Jarboe differed from those expressed by Dr. Rosenblum, they did not contradict or "assail" his determinations. He therefore found their opinions did not rebut the presumption afforded to those provided by Dr. Rosenblum. The ALJ determined French is permanently totally disabled, and awarded PTD benefits.

The ALJ specifically found *verbatim* as follows:

I adopt in their entirety the findings and conclusions of the University Evaluator, Dr. Rosenblum.

Dr. Rosenblum's findings, as the University Evaluator, are afforded the weight of a rebuttable presumption. There has been nothing herein that persuades me he has been rebutted. Neither Dr. Broudy or Dr. Jarboe, however skilled in their own right, have done anything to dent Dr. Rosenblum's findings. As the retained expert of the Defendant, they offer opinions which I do not find credible, namely that the hydrochloric acid inhalation caused no damage. In fact, they don't really assail Dr. Rosenblum's findings so much as they simply offer a different opinion. None of this suffices to convince me there is nothing wrong with Mr. French.

In reliance on Dr. Rosenblum, the Plaintiff has a 30% work-related impairment rating and lacks the capacity to return to the type of work done on the date of injury.

Mr. French is 68 years old and was 67 years old on his date of injury. Although he does have some experience in different employments, he would be limited in his ability to return to any of them. I also find it very unlikely that at 68 years of age and after disclosing his difficulties with breathing and strong scents that too many employers would be eager to employ him. His age is the primary factor, along with his inability to return to the type of work done on the date of injury, in why he is totally disabled.

The Plaintiff is permanently and totally disabled solely as a result of the May 15, 2018 chemical exposure.

Both French and Reagent filed petitions for reconsideration. Reagent argued the ALJ did not provide sufficient findings of fact supporting his determination. French argued the version of KRS 342.730(4) effective July 14, 2018 is not applicable; however, if it is found applicable, the date of termination of his benefits should be May 15, 2022. In his orders on reconsideration, the ALJ determined French's award of PTD benefits will terminate on May 15, 2022, or four years after the date of injury, based upon his age, and the application of the version

of KRS 342.730(4) effective July 14, 2018. The ALJ denied the petitions in all other respects.

On appeal, French argues the ALJ erred in retroactively limiting the duration of his award of PTD benefits pursuant to KRS 342.730(4) effective July 14, 2018. French also argues the retroactive application of KRS 342.730(4) is unconstitutional.

We first note French properly placed the Kentucky Attorney General on notice of the constitutional challenge to KRS 342.730(4) as required by KRS 418.075. We next note House Bill 2 became effective July 14, 2018. Section 13 of that bill amended KRS 342.730(4) to provide as follows:

All income benefits payable pursuant to this chapter shall terminate as of the date upon which the employee reaches the age of seventy (70), or four (4) years after the employee's injury or last exposure, whichever last occurs. In like manner all income benefits payable pursuant to this chapter to spouses and dependents shall terminate as of the date upon which the employee would have reached age seventy (70) or four (4) years after the employee's date of injury or date of last exposure, whichever last occurs.

In accordance with the holding by the Kentucky Supreme Court in Holcim v. Swinford, *supra*, we affirm the ALJ's application of KRS 342.730(4) as amended in 2018. There the Kentucky Supreme Court determined the amended version of KRS 342.730(4) regarding the termination of benefits at age seventy has retroactive applicability. We therefore find French's award is governed by the limitations set forth in the amended statute.

We additionally note this Board, as an administrative tribunal, has no jurisdiction to determine the constitutionality of a statute. Blue Diamond Coal

Company v. Cornett, 300 Ky. 647, 189 S.W.2d 963 (1945). Consequently, we are without authority to render a decision upon French's argument regarding the constitutionality of the amended statute. Thus, we affirm.

Regarding Reagent's appeal, we note that as the claimant in a workers' compensation proceeding, French had the burden of proving each of the essential elements of his claim. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because he was successful in that burden, the question on appeal is whether substantial evidence supports 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). 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 reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). If the ALJ's rulings are reasonable under the evidence, they may not be disturbed on appeal.

KRS 342.315(2) generally requires affording presumptive weight to the clinical findings and opinions of a university evaluator. An ALJ has the discretion to reject such testimony where it is determined the presumption has been overcome by other evidence and the reasons for doing so are expressly stated within the body of the decision. Bullock v. Goodwill Coal Co., 214 S.W.3d 890, 891 (Ky. 2007); Morrison v. Home Depot, 197 S.W.3d 531, 534 (Ky. 2006); Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). Whether a party overcomes the presumption established pursuant to KRS 342.315(2) is not an issue of law, but rather a question of fact at all times subject to the ALJ's discretion as fact-finder to pick and choose from the evidence. Magic Coal Co. v. Fox, Id.

An ALJ is vested with broad authority to decide questions including the presence or absence of an occupational disease. Dravo Lime Co. v. Eakins, 156 S.W.3d 283 (Ky. 2003). Whether an individual has contracted a work-related injury is an issue for determination within the sound discretion of the ALJ as fact-finder. Union Underwear Co. v. Scearce, 896 S.W.2d 7 (Ky. 1995); Hudson v. Owens, 439 S.W.2d 565 (Ky. 1969).

The report of Dr. Rosenblum, the university evaluator, constitutes substantial evidence supporting the ALJ's finding that French is permanently totally

disabled due to the May 15, 2018 work injury. We note differing medical opinions in the record address whether French suffers from a permanent work injury, the diagnosis, the medical treatment required, the appropriate impairment rating, and whether he is permanently totally disabled. 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 found Dr. Rosenblum's opinion established presumptive evidence that French sustained a compensable work-related injury resulting from his exposure to HCL. Dr. Rosenblum's opinion constitutes substantial evidence supporting the ALJ's determination.

We also note the ALJ analyzed the appropriate factors to be considered pursuant to the direction of the Kentucky Supreme Court in the City of Ashland v. Stumbo, 461 S.W.3d 392 (Ky. 2015). The ALJ specifically took into consideration French's inability to work around fumes or odors as opined by Dr. Rosenblum, his age, and his work experience. The ALJ performed the proper analysis, properly considered and weighed the evidence presented, and provided the basis for his factual determination. Because substantial evidence supports the ALJ's determination, we affirm.

Accordingly, the October 22, 2019 Opinion, Award and Order, and the November 13, 2019 and December 2019 Orders on the petitions for reconsideration rendered by Hon. Chris Davis, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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