Commonwealth of Kentucky
Workers' Compensation Board

ORIGINAL OPINION ENTERED: June 7, 2019
OPINION WITHDRAWN: June 10, 2019
OPINION RE-ENTERED: June 10, 2019

CLAIM NO. 201702169, 201702162 & 2017-02161

PILKINGTON NORTH AMERICA, INC. PETITIONER

VS. **APPEAL FROM HON. BRENT E. DYE, ADMINISTRATIVE LAW JUDGE**

CLYDE LARRY BRYANT and
HON. BRENT E. DYE,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

ALVEY, Chairman. Pilkington North America, Inc. ("Pilkington") appeals from the January 25, 2019 Opinion, Award and Order rendered by Hon. Brent E. Dye, Administrative Law Judge ("ALJ"). The ALJ awarded Clyde Bryant ("Bryant") permanent partial disability ("PPD") benefits and medical benefits for an

occupational hearing loss. Pilkington also appeals from the February 18, 2019 Order denying its petition for reconsideration.

Pilkington argues the ALJ abused his discretion by failing to dismiss Bryant's claim because the Form 103 was not corrected within the time allotted by the ALJ. Pilkington also argues it is entitled to costs pursuant to KRS 342.310. Pilkington additionally argues Bryant's hearing loss claim should have been dismissed since the findings by the University Evaluator were unrebutted. We determine the ALJ did not abuse his discretion in extending the time for Bryant to correct the Form 103. We likewise determine the ALJ did not err by allowing the hearing loss claim to proceed on its merits and in denying costs pursuant to KRS 342.310. We affirm since substantial evidence supports the ALJ's determination Bryant sustained an occupational hearing loss.

Bryant filed three separate claims on December 20, 2017. In the Form 101, he alleged cumulative trauma injuries to his neck, back, and shoulders manifesting on December 20, 2017. In the Form 102, he alleged he contracted silicosis arising out of and in the course of his employment. In the Form 103, he alleged he sustained a hearing loss due to repetitive loud noise in the workplace, with December 5, 2016 as the last date of exposure. Bryant attached to the Form 103 a document containing the raw data of audiometry testing performed on December 4, 2017 at the Beltone Hearing Aid Center. The unsigned document contained no statements addressing diagnosis, causation or work-relatedness.

The three claims were consolidated, and we will not discuss the procedural history or evidence related to the cumulative trauma and occupational

disease claims since the ALJ dismissed both, and they are unrelated to the issues raised on appeal.

Pilkington filed motions to dismiss the Form 103 and for a protective order against evaluations pursuant to KRS 342.315. Pilkington alleged Bryant's hearing loss application failed to satisfy 803 KAR 25:010 §7(1)(d)2, requiring an application to be accompanied by a medical opinion establishing a causal relationship between the work-related events or the medical condition subject of the claim. Pilkington also argued 803 KAR 25:010 §10(4) requires all medical reports to include a statement of qualifications of the person making the report or a medical qualifications index number. Pilkington asserted the December 4, 2017 audiometry testing failed to satisfy either regulatory requirement, and requested dismissal of the hearing loss claim, and an order preventing a university medical evaluation pursuant to KRS 342.315 until he addressed the sufficiency of Bryant's hearing loss application.

The ALJ issued an order on January 28, 2018 passing on the motion to dismiss and providing Bryant, "30 days, from this Order's date, to file medical causation records and/or a report into evidence. If not, the Plaintiff shall show cause and explain why the ALJ should not dismiss this case."

Within the 30-day period, on February 8, 2018, Bryant filed a letter dated February 7, 2018 and signed by Tony Sammons ("Mr. Sammons") of Beltone Hearing Aid Center. It stated, "On December 4, 2017 we performed audiometry testing on Mr. Larry Bryant . . . . The results of his evaluation demonstrated hearing loss that is consistent with noise induced hearing loss."

In an order dated February 9, 2018, the ALJ made the following findings relevant to the hearing loss claim:

> The Plaintiff filed Tony Sammon's report into evidence. This report indicates noise exposure caused the Plaintiff's hearing loss. The Plaintiff's Form 103 states, "repetitive exposure to loud noise in the work place" caused his hearing loss. The ALJ is positive the Plaintiff, when deposed, will testify his work environment was loud and noisy.
>
> After reviewing the record, the ALJ finds the Plaintiff has satisfied . . . 803 KAR 25:010 §7(1)(d)2's requirement, as well as the 1/28/18 Order. Therefore, the Defendant's motion . . . is **Overruled.**

Pilkington filed motions to strike, to dismiss, for an expedited ruling and for a teleconference in response to the February 7, 2018 letter by Mr. Sammons filed by Bryant. It argued Mr. Sammons' statement failed to address work-relatedness/causation required by 803 KAR 25:010 §7(1)(d)2. It also argued Mr. Sammons is not qualified to offer a medical opinion since he is only an apprentice hearing instruments specialist. Therefore, Pilkington asserted Bryant again failed to comply with the regulations and the January 28, 2018 order. Pilkington also moved to cancel the University Hearing Evaluation. On February 14, 2018, Pilkington filed a petition for reconsideration from the February 9, 2018 Order essentially making the same arguments raised in the motions, requesting the ALJ either dismiss the hearing loss claim or bifurcate it to address whether the application is deficient. Pilkington also requested cancelation of the University Evaluation.

On March 1, 2018, the ALJ partially granted Pilkington's petition. The ALJ reviewed his previous orders, and noted he assumed Mr. Sammons was a

medical expert qualified to issue a valid causation opinion. The ALJ made the following findings:

> After reviewing the applicable statutes, the ALJ determines Mr. Sammons' February 7, 2018 causation opinion is invalid. The ALJ is **granting** the Defendant's motion to strike it. The letter is not evidence. The ALJ will not consider it, when/if he issues a decision on the merits.
>
> The ALJ is also **granting** the Defendant's motion to cancel the hearing loss claim's UME. In fact, on February 26, 2018, the ALJ canceled it.
>
> The Plaintiff's show cause period expired on February 28, 2018. Because the Plaintiff previously attempted to comply and the ALJ, on February 9, 2018, indicated the Plaintiff had satisfied the show cause order, the ALJ is extending the show cause period another 30 days. Thus, the Plaintiff has 30 days, from this Order's date, to satisfy 803 KAR 25:010 §7(1)(d)2 and file a medical causation report " . . . establishing a causal relationship between the work-related events of the medical condition that is the subject of the claim [.]"

Pilkington filed a petition for reconsideration from the March 1, 2018 Order. Pilkington noted Bryant failed to file a sufficient hearing loss application within fifteen days after filing the Form 103 pursuant to 803 KAR 25:010 §7(1)(d)2 or within the thirty day time period granted by the ALJ in the January 28, 2018 order. Pilkington argued 803 KAR 25:010 §7(1)(d)2 does not provide for extensions of time based on attempts at compliance and that the ALJ does not have authority to grant Bryant another extension. Citing to 803 KAR 25:010 §7(1)(d)2 and Scorpio Coal Co. v. Harmon, 864 S.W.2d 882, 884 (Ky. 1993), Pilkington requested the ALJ to dismiss the hearing loss claim. Pilkington again moved to bifurcate the claim and

for an assessment of costs due to unreasonable proceedings pursuant to KRS 342.310(1).

Within the thirty-day period allotted by the ALJ, on March 13, 2018, Bryant filed a questionnaire completed by Dr. Daniel Mongiardo dated March 12, 2018. It stated as follows:

> 1. Do you believe that the exposure to noise in the workplace is more likely than not because of his hearing loss that you found based upon your clinical examination and audiogram conducted on Mr. Bryant? ____ Yes ___ No
>
> Partially to Noise (handwritten response)
>
> 2. What was your diagnosis? More specifically, what type of hearing loss does Mr. Bryant suffer from?
>
> High frequency noise exposure type loss and bilateral low frequency loss likely due to Meniere's syndrome. (handwritten response)

Dr. Mongiardo recommended Bryant be placed in a noise free work environment and stated his opinions are within the realm of reasonable medical probability. On March 24, 2018, Bryant also filed a December 4, 2018 audiometry test, which was reviewed by Dr. Lisa Koch, Au.D. She diagnosed moderate to high frequency hearing loss and recommended binaural hearing aids.

Pilkington renewed its petition for reconsideration, motion to bifurcate, and motion for costs in response to the March 12, 2018 questionnaire by Dr. Mongiardo and the December 4, 2018 report by Dr. Koch.

In an Order dated March 27, 2018, the ALJ denied Pilkington's petition for reconsideration. The ALJ first disagreed with Pilkington's assertion he should not have extended Bryant's deadline to file a hearing loss causation report,

noting his broad discretion to control the taking and presentation of proof. The ALJ further stated as follows:

> The ALJ preliminarily determines the Plaintiff has satisfied 803 KAR 25:010 §7(1)(d)2 and the 3/1/18 Order's requirement. On March 12, 2018, the Plaintiff filed Dr. Daniel Mongiardo's report into evidence. The ALJ interprets that Dr. Mongiardo opined workplace noise exposure partially caused the Plaintiff's hearing loss. Although Dr. Mongiardo only wrote, 'partially to noise,' and did not specify workplace noise, the question clearly asked, '[d]o you believe that the exposure to noise in the workplace . . . [.]." (original emphasis)
>
> This report, the previously submitted audiogram chart, and the Plaintiff's statement (that his work exposed him to loud noises), is sufficient. Therefore, even if the ALJ dismissed the Plaintiff's hearing loss claim, because he did not meet the deadline, as the Defendant requests, the Plaintiff could simply refile the claim. The hearing loss claim is proceeding forward, and the ALJ will have the Department of Workers' Claims schedule a University Medical Evaluation.

The ALJ entered a separate order on the same day, overruling Pilkington's motion to bifurcate the consolidated claims. The ALJ also overruled the motion for costs. The ALJ noted he preliminarily determined Bryant satisfied 803 KAR 25:010 §7(1)(d)2 in the March 1, 2018 Order, and the hearing loss application deficiency within the extended time period. The ALJ determined the threshold hearing loss causation report established reasonable grounds for filing the claim.

Pilkington filed voluminous medical records that were also submitted to the University Evaluation, including records from Baptist Health Lexington, Bluegrass Community Hospital, Brookdale Nursing, Dr. Gordon Guthrie, Dr. Robert Mitchell, Versailles Family Medicine, Georgetown Community Hospital, and Woodford Family and Lexington Clinic. Pilkington also included periodic

employment hearing tests and audiograms, and a disability benefit application stemming from heart surgery in January 2017. Those records reflect Bryant's substantial treatment history for uncontrolled type 2 diabetes mellitus with diabetic neuropathy, hypertension and hyperlidemia. The records also reflect Bryant underwent a coronary artery bypass grafting times five on January 25, 2017, and completed rehab at Brookdale Nursing for several weeks in February 2017. The rehab records reflect Bryant reported adequate ability to hear.

A University Hearing Evaluation was conducted on May 8, 2018 by Dr. Casey Rutledge Roof, Au.D. Bryant reported a fifteen-year history of noise exposure at Pilkington, and gradual bilateral hearing difficulty for over a year. Bryant last worked on December 5, 2016 due to medical reasons. Dr. Roof noted a December 4, 2017 audiologic evaluation demonstrated asymmetric bilateral hearing loss. An audiometry performed at the evaluation revealed moderate sensorineural hearing loss in the right ear and mild to severe sensorineural hearing loss in the left ear. Dr. Roof noted it took multiple attempts and retests to obtain results. Dr. Roof stated as follows under diagnosis:

> Objective and behavioral measure are not consistent bilaterally (as reflex pattern in left ear is not consistent with hearing acuity at 4000Hz, and it took multiple attempts to gain pure tone results that make one question reliability). Diagnosis and causation cannot be determined without retest, and otoacoustic emissions should be completed if available at the follow-up assessment. Provided retest reveals hearing acuity similar to today's findings, asymmetry should be investigated by and[sic] Ear, Nose, and Throat physician and hearing aids bilaterally after medical clearance.

Dr. Roof left the causation portion of the Form 107 blank. She assessed a 9% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment, and noted Bryant did not have an active impairment prior to this injury. Dr. Roof advised Bryant should wear hearing protection devices whenever exposed to loud noise, and noted restrictions on work activities should be based on his ability to perform job requirements using hearing protection devices.

Pilkington submitted the job description of a glassworker, inspector, and packer, noting Bryant was occasionally exposed to noise equal to or greater than 85 dB. He worked an average of twelve hours a day, forty-two hours per week, with overtime opportunities. Bryant's job required hearing, talking, and the use of hearing protection.

Bryant testified by deposition on January 29, 2018, and at the hearing held December 10, 2018. Bryant resides in Georgetown, Kentucky and graduated from high school in 1974. Bryant worked for Pilkington from June 2001 or 2002 until December 5, 2016. He stopped working due to symptoms related to his uncontrolled diabetes. Bryant has not returned to any work since December 5, 2016. He underwent major cardiac surgery on January 24, 2017. He was admitted to the hospital for approximately one week, and completed two weeks of in-patient rehabilitation.

Bryant testified he worked for Pilkington as a forklift operator for the first eight years and then as a glass inspector. As a glass inspector, he checked for defects, and then packed the glass. Bryant wore hearing protection and underwent

periodic hearing tests during his employment with Pilkington. Bryant testified his work environment at Pilkington was noisy due to the blast heads used to cool the glass. Pilkington began experiencing hearing difficulty during the last eighteen months to two years working in the plant. Pilkington described his bilateral hearing problems, left worse than right. Beltone Hearing Aid Center was the first to inform Bryant he suffered from noise induced hearing loss sometime in 2017. Bryant is interested in hearing aids, but cannot afford them. Bryant does not feel he can return to work considering his hearing condition, and other unrelated maladies.

Elizabeth Smith, a plant nurse for Pilkington, testified at the hearing. She testified Bryant did not report any hearing issues during his employment with Pilkington. She acknowledged the plant is noisy, and that Pilkington conducted periodic hearing tests and supplied hearing protection to its employees.

The ALJ rendered his opinion on January 25, 2019. The ALJ determined Bryant sustained a compensable, occupational hearing loss, which did not result in permanent total disability. The ALJ awarded PPD benefits based upon the 9% impairment rating assessed by Dr. Roof, enhanced by the three multiplier contained in KRS 342.730(1)(c)1. The ALJ found December 5, 2016 was the last date Bryant experienced work-related hazardous noise. The ALJ also awarded future medical expenses related to his work-related hearing loss. The ALJ additionally made findings regarding the sufficiency of the Form 103 and Pilkington's entitlement to costs pursuant to KRS 342.310.

Pilkington filed a petition for reconsideration, arguing the ALJ made at least ten errors in his opinion, but did not request additional findings of fact. The

ALJ clearly outlined his reasons for denying the petition, and further explained the basis for his decision.

On appeal, Pilkington argues the ALJ acted arbitrarily in granting Bryant thirty additional days to correct the deficient Form 103 in the March 1, 2018 Order. Pilkington asserts it was arbitrary for the ALJ to disregard his own January 28, 2018 Order granting Bryant thirty days to correct his application or show cause why the claim should not be dismissed. It also asserts for the first time that the ALJ arbitrarily disregarded 803 KAR 25:010 §10(6)(b), which provides parties ten days to file an objection to a medical report. Bryant filed Mr. Sammons' letter on February 8, 2018 in response to the ALJ's January 28, 2018 Order. The next day on February 9, 2018, the ALJ entered an Order overruling Pilkington's motion to dismiss finding Bryant had satisfied 803 KAR 25:010 §7(1)(d)2 and the January 28, 2018 Order. Pilkington asserts the ALJ's conduct was arbitrary and capricious, and denied its due process rights.

We disagree with Pilkington's assertion that the ALJ acted arbitrarily in granting Bryant a second thirty day window to file a Form 103 compliant with 803 KAR 25:010 §7(1)(d)2. This regulation requires Bryant to file "a medical opinion establishing a causal relationship between the work-related events or the medical condition subject of the claim" at the time of or within fifteen days after the filing of the application. As noted by the ALJ, Bryant filed a Form 103, containing a December 4, 2017 audiogram chart. The ALJ entered a January 28, 2018 Order providing Bryant thirty days to file a medical causation report. Within thirty days, Bryant filed the letter authored by Mr. Sammons indicating Bryant suffered from

noise induced hearing loss. Based on an incorrect assumption Mr. Sammons was a qualified expert, and the ALJ found Bryant satisfied the January 28, 2018 Order and 803 KAR 25:010 §7(1)(d)2 in the February 9, 2018 Order. Subsequently, Pilkington argued Mr. Sammons was unqualified to render a causation opinion. On March 1, 2018, the ALJ agreed with Pilkington, struck Mr. Sammons report and granted Bryant an additional thirty days to provide a compliant causation report. The ALJ provided an additional thirty days since he had previously found Bryant had complied with the regulation.

Our review of the ALJ's March 1, 2018 Order granting Bryant an additional thirty days to file a causation report is based on the standard of whether it constituted an abuse of discretion. Abuse of discretion has been defined, in relation to the exercise of judicial power, as that which "implies arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision." Kentucky Nat. Park Commission, ex rel. Comm., v. Russell, 301 Ky. 187, 191 S.W.2d 214 (Ky. 1945).

We also recognize the ALJ as trier of fact is the gatekeeper and arbiter of the record both procedurally and substantively. For purposes of KRS Chapter 342, it has long been accepted that the ALJ has the authority to control the taking and presentation of proof in a workers' compensation proceeding in order to facilitate the speedy resolution of the claim and to determine all disputes in a summary manner. Dravo Lime Co., Inc. v. Eakins, 156 S.W.3d 283 (Ky. 2005); Yocum v. Butcher, 551 S.W.2d 841 (Ky. App. 1977); Cornett v. Corbin Materials, Inc., 807 S.W.2d 56 (Ky. 1991); Searcy v. Three Point Coal Co., 134 S.W.2d 228,

231 (Ky. 1939). The ALJ is empowered under KRS 342.230(3) to "make rulings affecting the competency, relevancy, and materiality of the evidence about to be presented and upon motions presented during the taking of evidence as will expedite the preparation of the case." The ALJ as fact-finder has the authority to control the taking and presentation of proof.

We do not believe the ALJ abused his discretion by granting Bryant an additional thirty days to file a causation report. In the March 1, 2018 Order, the Opinion, and the Order on reconsideration, the ALJ thoroughly explained that he granted the additional thirty days since he had incorrectly assumed Mr. Sammons was a qualified expert, leading him to find Bryant had satisfied 803 KAR 25:010 §7(1)(d)2 and the January 28, 2018 Order. Bryant additionally filed Mr. Sammons' report within the thirty days allotted by the ALJ in the January 28, 2018 Order and Mr. Mongiardo's report within the thirty days allotted by the ALJ in the March 1, 2018 Order.

The ALJ apparently acted prematurely when he entered the February 9, 2018 Order overruling Pilkington's motion to dismiss, one day after Bryant filed Mr. Sammons' report; however, this is not fatal to the claim and does not constitute an abuse of discretion by the ALJ. Pilkington timely challenged the report by filing a petition for reconsideration, and successfully argued Sammons was unqualified to render a causation opinion. The ALJ clearly considered and weighed Pilkington's objection to Mr. Sammons' report. Therefore, we hold the ALJ did not abuse his discretion in providing Bryant an extension of time in the March 1, 2018 Order to comply with 803 KAR 25:010 §7(1)(d)2.

Pilkington argues the ALJ acted arbitrarily when he declined to award costs pursuant to KRS 342.310(1) since it was unreasonable for Bryant to disregard 803 KAR 25:010 §7(1)(d)2 when he initially filed his claim, to argue that his claim application was not deficient, and in attempting to correct the deficiency by alleging Mr. Sammons was a qualified medical expert. Pilkington argues Bryant's conduct was unreasonable and forced it to prepare and file multiple pleadings.

The assessment of sanctions pursuant to KRS 342.310 is discretionary. KRS 342.310(1) provides:

> If any administrative law judge, the board, or any court before whom any proceedings are brought under this chapter determines that such proceedings have been brought, prosecuted, or defended without reasonable ground, he or it ***may*** assess the whole cost of the proceedings which shall include actual expenses but not be limited to the following: court costs, travel expenses, deposition costs, physician expenses for attendance fees at depositions, attorney fees, and all other out-of-pocket expenses upon the party who has so brought, prosecuted, or defended them. [Emphasis added]

Use of the word "may" indicates the determination to impose sanctions pursuant to KRS 342.310(1) is permissive and solely within the discretion of the ALJ. Carnes v. Parton Bros. Contracting, Inc., 171 S.W.3d 60 (Ky. App. 2005). Since this statute is purely discretionary, our standard of review is whether the ALJ's decision to impose sanctions pursuant to KRS 342.310(1) "constituted an abuse of discretion." Peabody Coal Co. v. Goforth, 857 S.W.2d 167, 170 (Ky. 1993). Our review of the record indicates the ALJ's refusal to impose sanctions pursuant to KRS 342.310(1) does not constitute an abuse of discretion, especially in

light of the fact he determined Bryant sustained a compensable work-related hearing loss.

As noted above, we do not believe the ALJ abused his discretion in allowing Bryant extensions of time to correct the deficient Form 103. The ALJ's holding that Bryant's filings were sufficient to satisfy the initial causation filing standard pursuant to 803 KAR 25:010 §7(1)(d)2 has not been appealed. Therefore, we find the ALJ did not abuse his discretion in finding Bryant did not unreasonably bring or prosecute his hearing loss claim. Bryant initially filed a Form 103 and a deficient causation opinion. Within the allotted time extension, Bryant attempted to correct the deficiency. Within the allotted second time extension, Bryant corrected his deficient Form 103. At all times, Bryant complied, or attempted to comply, with the ALJ's Orders in a timely manner. Although we understand Pilkington's frustration, we again conclude the ALJ did not abuse his discretion.

On appeal, Pilkington argues the findings of the university evaluator were unrebutted and Bryant's hearing loss claim should have been dismissed. Pilkington notes Dr. Roof concluded that, "diagnosis and causation cannot be determined without retest." It asserts the ALJ is not allowed to discard Dr. Roof's opinion since it is a university evaluation and is entitled to a rebuttable presumption. Pilkington argues the ALJ failed to specify his reasons for rejecting the university evaluation opinion and downplayed Dr. Roof's validity conclusions. Pilkington argues that Bryant failed to overcome the rebuttable presumption in its favor.

KRS 342.7305(4) establishes a rebuttable presumption that a hearing impairment is a compensable injury when audiograms and other testing reveal a

pattern of hearing loss compatible with a hazardous noise exposure and the employee demonstrates repetitive exposure to hazardous noise in the workplace. 803 KAR 25:010 § 11(1) mandates all persons claiming benefits for hearing loss be referred by the Commissioner for a medical evaluation. KRS 342.315(1) directs the Commissioner to contract with the University of Kentucky and the University of Louisville medical schools to evaluate workers who have had injuries or become effected by occupational diseases. KRS 342.315(2) states:

> 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.

The Supreme Court, in Magic Coal Co. v. Fox, 19 S.W.3d 88, 94 (Ky. 2000), explained the burden of proof in light of the rebuttable presumption contained within KRS 342.315(2) stating as follows:

> By operation of KRS 342.315(2), the clinical findings and opinions of the university evaluator are presumed to accurately reflect the claimant's medical condition. For that reason, unless evidence is introduced which rebuts the clinical findings and opinions of the university evaluator, they may not be disregarded by the fact-finder. To the extent that the university evaluator's testimony favors a particular party, it shifts to the opponent the burden of going forward with evidence which rebuts the testimony. If the opponent fails to do so, the party whom the testimony favors is entitled to prevail by operation of the presumption. Stated otherwise, the clinical findings and opinions of the university evaluator constitute substantial evidence with regard to medical questions which, if uncontradicted, may not be disregarded by the fact-finder.

The Court also stated the rebuttable presumption does not restrict the ALJ's authority to weigh conflicting medical evidence. An ALJ is only required to provide the rationale as to why the medical opinions and impairment rating of the university evaluator was not relied upon. The presumption neither shifts the risk of nonpersuasion to the defendant nor raises the bar with regard to the claimant's burden of persuasion. Id. at 94-95.

The ALJ provided an extensive analysis in the Opinion and made additional findings of fact regarding the rebuttable presumption in his Order on reconsideration. The ALJ specifically found Dr. Roof's opinion favors Pilkington since it did not, in and of itself, satisfy Bryant's causation burden. This finding is undisputed. Therefore, Dr. Roof's opinion shifted to Bryant the burden of going forward with evidence rebutting the testimony.

However, the ALJ did not simply discard Dr. Roof's opinions without explanation as asserted by Pilkington. The ALJ provided a thorough and detailed analysis explaining why he disregarded Dr. Roof's opinion addressing causation. In essence, the ALJ found Dr. Roof offered no opinion on causation since she stated causation could not be determined without a retest. The ALJ also refused to equate this to a finding that hazardous noise did not cause Bryant's hearing loss.

The ALJ found Bryant successfully rebutted the presumption with Dr. Mongiardo's opinion. After reviewing the record, we find Dr. Mongiardo's opinion constitutes substantial evidence supporting the ALJ's determination that Bryant sustained occupational hearing loss. The ALJ, on several occasions, explained why he found Dr. Mongiardo's opinion most persuasive. 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). Although a party may point to evidence supporting a different outcome than reached by an ALJ, such proof is not an adequate basis to reverse on appeal as long as substantial evidence supports the ALJ's ultimate determination. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). Pilkington's arguments discounting Dr. Mongiardo's opinions go to the weight of the evidence, and do not constitute an adequate basis to reverse on appeal. Id. The ALJ provided a reasonable basis for relying on the opinions of Dr. Mongiardo and for rejecting the opinions of Dr. Roof, the university evaluator.

Accordingly, the January 25, 2019 Opinion, Award and Order, and the February 18, 2019 Order rendered by Hon. Brent E. Dye, Administrative Law Judge, are hereby **AFFIRMED**.

RECHTER, MEMBER, CONCURS.

STIVERS, MEMBER, CONCURS IN RESULT ONLY.

The Board Opinion entered on June 7, 2019 did not indicate Board Member Stivers concurred in result only.

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