

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: January 22, 2020

CLAIM NO. 201701539

PREMIERE ELKHORN COAL CO.

PETITIONER

VS.

APPEAL FROM HON. JOHN B. COLEMAN,
ADMINISTRATIVE LAW JUDGE

GREGORY SMITH;
AND HON. JOHN B. COLEMAN,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

BEFORE: ALVEY, Chairman, STIVERS and RECHTER¹, Members.

RECHTER, Member. Premiere Elkhorn Coal Company (“Elkhorn”) appeals from the June 10, 2019 Opinion, Order and Award, and the July 1, 2019 Order on Reconsideration rendered by Hon. John B. Coleman, Administrative Law Judge

¹ Although Board Member Rechter’s term expired on January 4, 2020, she is permitted to serve until January 22, 2020 pursuant to KRS 342.213(7)(b), and will participate in decisions rendered by this Board through that date.

("ALJ"). The ALJ determined Ricky Smith suffers from coal worker's pneumoconiosis ("CWP"). Elkhorn argues the ALJ abused his discretion by rejecting the opinion of the university evaluator. For the reasons explained herein, we affirm.

Smith is a former miner who is sixty years old. He alleged he contracted coal workers' pneumoconiosis as a result of exposure to coal and limestone dust. His last date of exposure was December 3, 2015.

Smith filed the report of Dr. Michael Alexander, who interpreted an August 1, 2017 x-ray as Category 1/1 p/q in all lung zones. Pulmonary function studies revealed an FVC of 52% of predicted values, and an FEV1 as 49% of predicted values. Elkhorn filed the report of Dr. Kim Adcock who read the same film as negative for CWP 0/0.

Dr. Bruce Broudy interpreted the August 1, 2018 x-ray as negative for CWP 0/0. Dr. Brandon Crum viewed an October 30, 2018 x-ray and interpreted it as Category 1/1 p/q in all lung zones. Dr. Crum later interpreted a March 4, 2019 CT scan as consistent with simple pneumoconiosis. Dr. Broudy also viewed the October 30, 2018 x-ray and interpreted the film as negative for CWP 0/0.

Dr. B.T. Westerfield performed an evaluation pursuant to KRS 342.316. Dr. Westerfield concluded Smith does not suffer from CWP based on his interpretation of the October 30, 2018 x-ray. He noted profusion 0/1 q/p in both upper and middle lung zones, and FVC function of 89% of predicted value and FEV1 of 90% of predicted value. Dr. Westerfield noted pulmonary function studies

revealed no pulmonary impairment or respiratory disability. He opined Smith's slight decrease in breathing is due to cardiovascular disease.

After noting the presumptive weight which must be afforded to Dr. Westerfield's opinion pursuant to KRS 342.315(2), the ALJ provided the following analysis:

After considering his opinion, I must reject his determination that the plaintiff does not have CWP, as I am convinced that the more persuasive evidence in the record is that the plaintiff has CWP profusion 1/1. In making this determination, I note that both Dr. Alexander, a board-certified radiologist and B-reader, and Dr. Brandon Crum, also a B reader who is board certified in diagnostic radiology, agreed the plaintiff had CWP profusion 1/1 pq in all lung zones. I note that Dr. Westerfield considered interpreting the x-ray dated October 30, 2018 as category 1/0, as he found profusion 0/1 qp in both middle and upper lung zones. As noted in the plaintiff's brief, this indicates there was a consideration to place the x-ray interpretation as being positive 1/0, but instead the evaluator chose the alternative of placing the interpretation in the 0/1 or negative category. See Guidelines for the Use of the ILO International Classification of Radiographs and Pneumoconiosis, revised ed. (2000). Therefore, it is clear that Dr. Westerfield considered placing the plaintiff into profusion 1/0 and it is clear that he did interpret the shape and size of opacities as being qp in both upper and middle lung zones. Dr. Alexander and Dr. Crum both felt the primary opacity was p with the secondary capacity being q. Nevertheless, Dr. Alexander, Dr. Crum and Dr. Westerfield all noted the size and shape of q and p opacities. Additionally, Dr. Westerfield acknowledged the plaintiff's long history of exposure being certainly sufficient to cause CWP in a susceptible individual. Finally, the plaintiff presented the interpretation of a CT scan confirming the presence of bilateral numerous sub-centimeter pulmonary nodules primarily distributed within the upper and middle lung zones consistent with pneumoconiosis primarily corresponding to q and r nodules. While the CT scan cannot be interpreted to grade the classification of the x-

ray interpretation, it does verify the positive findings. Given this verification and the fact that Dr. Westerfield considered a positive interpretation, I am convinced that the plaintiff does have CWP profusion 1/1. I recognize that both Dr. Westerfield and Dr. Broudy are board certified pulmonologists and B-readers, who are qualified to perform evaluations under the Act. However, in an instance where the interpretation of diagnostic studies is crucial, the physicians with board certification in radiology are more persuasive. However, I am not persuaded that the plaintiff has a pulmonary impairment related to CWP, as the FVC and FEV1 were normal during Dr. Westerfield's pulmonary function studies. Therefore, the plaintiff has proven entitlement to Retraining Incentive Benefits under KRS 342.732 (1) (a) 1.

Elkhorn's petition for reconsideration was denied as a re-argument of the merits of the claim. On appeal, Elkhorn asserts the ALJ erred in rejecting Dr. Westerfield's opinion. It also challenges the ALJ's reliance on the opinions of Drs. Crum and Alexander, neither of whom are Board certified in pulmonary medicine. Finally, it claims the ALJ failed to afford equal weight to Dr. Adcock's opinion.

Dr. Westerfield performed his evaluation pursuant to KRS 342.315. Therefore, the ALJ is required to afford his opinion presumptive weight. KRS 342.315(2). If the ALJ chooses to reject the opinion of the evaluator, he must specifically state his reasons for doing so. Id. The requirement that the evaluator's opinion be afforded presumptive weight does not mean the opinion is conclusive. Magic Coal Co. v. Fox, 19 S.W.3d 88, 94 (Ky. 2000). The statute does not prohibit the ALJ from rejecting the evaluator's opinion; it requires only that the ALJ articulate his reasons. In essence the legislature "intended to create a rebuttable presumption." Id.

The ALJ articulated the reason he rejected Dr. Westerfield's opinion. He primarily relied on the opinions of Drs. Alexander and Crum, both of whom diagnosed CWP. He also explained his consideration of Dr. Westerfield's diagnosis, noting he considered placing Smith in profusion 1/0 and also interpreted opacities of q/p in two lung zones. The ALJ additionally noted that Smith's CT scan verified the positive findings.

The opinions of Drs. Alexander and Crum constitute substantial evidence. Notwithstanding the rebuttable presumption set forth in KRS 342.315, the ALJ is afforded the discretion to weigh the evidence. Fox at 96. The ALJ stated his rationale in rejecting Dr. Westerfield's opinion, as required by the statute, and relied instead on other substantial evidence in the record. There was no abuse of discretion.

In a related argument, Elkhorn asserts the opinion of the evaluator may only be rebutted by a physician Board certified in pulmonary medicine. Elkhorn claims the General Assembly has evinced a preference for pulmonary specialists, as such qualification is required to become an evaluator on behalf of the Department of Workers' Claims. It emphasizes that Drs. Alexander and Crum are radiologists, and the ALJ erred in affording greater weight to their opinions.

In the Order on Reconsideration, the ALJ stated that the interpretation of the x-rays was of paramount importance in this claim because Smith has no breathing impairment. For this reason, he determined the opinions of a radiologist was particularly compelling. Elkhorn is correct in restating the qualifications required to become a designated evaluator, and it is fair to conclude the legislature

believes such certifications rendered the physician reliable and qualified. However, there is nothing in the statute or relevant case law which states that the evaluator's opinion may only be rebutted by similarly qualified physicians. We are not at liberty to read a requirement into the statute which the legislature has declined to specifically state.

Finally, Elkhorn argues the ALJ failed to afford proper weight to Dr. Adcock, who is a certified B-reader and radiologist. As such, Dr. Adcock has the same credentials as Drs. Alexander and Crum. According to Elkhorn, the ALJ failed to adequately explain why he rejected Dr. Adcock's opinion.

This argument is essentially a request for this Board to re-weigh the proof and reach a finding in Elkhorn's favor. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). The ALJ was not required to state why he rejected Dr. Adcock's opinion. The statute required only he state his reasons for rejecting Dr. Westerfield's opinion, a requirement he satisfied. As explained above, the opinion is based on substantial evidence and therefore cannot be reversed. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

Accordingly, the June 10, 2019 Opinion, Award and Order and the July 1, 2019 Order rendered by Hon. John B. Coleman are hereby **AFFIRMED**.

ALL CONCUR.

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