

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: January 31, 2020

CLAIM NO. 2018-01427, 2018-01426, & 2018-00739

RONNIE HESS

PETITIONER/
CROSS-RESPONDENT

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

WOODMAN THREE MINE
and
HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE

RESPONDENT/
CROSS-PETITIONER

RESPONDENT

**OPINION
AFFIRMING IN PART,
VACATING IN PART, AND REMANDING**

* * * * *

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

ALVEY, Chairman. Ronnie Hess (“Hess”) appeals and Woodman Three Mine (“Woodman”) cross-appeals from the April 29, 2019 Opinion, Award and Order, and the May 29, 2019 and June 18, 2019 orders rendered by Hon. Jonathan R. Weatherby, Administrative Law Judge (“ALJ”). The ALJ found Hess is permanently totally disabled due to coal workers’ pneumoconiosis (“CWP”), with

the last exposure to coal dust occurring during this employment with Woodman. The ALJ also determined Hess has an occupational hearing loss and injuries to his neck, back, and knees caused by his work at Woodman.

On appeal, Hess argues the ALJ erred in not apportioning the award among his CWP, hearing loss and injury claims. We note that Hess initially raised issues regarding the ALJ's application of the age 70 limit on income benefits and the constitutionality of the amended version of KRS 342.730(4). The claim was placed in abeyance and following the decision in Holcim v. Swinford, 581 S.W.3d 37 (Ky. 2019), Hess withdrew those arguments on appeal. On cross-appeal, Woodman challenges the sufficiency of the ALJ's analysis, findings of fact, and application of the law regarding Hess's injury claim. We determine the ALJ did not err in finding Hess's claim was timely filed. We also determine he did not err in excluding the impairment for Hess's hearing loss in the calculation of the award in accordance with KRS 342.730(1)(a). However, based upon the holding in Beale v. Shepherd, 809 S.W.2d 845 (Ky. 1991), we determine the ALJ did not properly consider the impact of Hess's injury claim in conjunction with the determination regarding his CWP claim, therefore we vacate his decision, in part, and remand for additional determinations.

Hess filed a CWP claim on May 4, 2018, and hearing loss and injury claims on September 28, 2018. Hess alleged he sustained injuries to his neck, back, and knees caused by cumulative trauma sustained during the course of job with Woodman. Hess alleged he became affected by all three conditions on March 29, 2018, his last day of employment.

Hess worked in the mining industry for forty-five years. While employed by Woodman, Hess worked as a supervisor, electrician, and pre-shift examiner. Hess testified his work was physically demanding. He wore a belt containing his safety equipment weighing an estimated forty-five pounds. He lifted an average of fifty to seventy-five pounds throughout the day. He also worked on his hands and knees in forty-two to forty-three inch coal seams. He also claimed he “stove up” his neck once or twice per month while working. Hess quit working on March 29, 2018 due to problems with shortness of breath and pain in his lungs. Hess was last exposed to noise, coal dust, and repetitive trauma on his last day of work.

At the hearing, Hess testified regarding his past conversations with Dr. Michael Trivette, his family physician, prior to his last day of work with Woodman. He testified Dr. Trivette told him his work was “wearing out” his knees and joints, due to “tugging and struggling”. He also testified Dr. Trivette advised that his neck and low back pain down his legs were related to his bending, stooping, crawling, and straining. Essentially, Dr. Trivette advised Hess the work he was doing was wearing him out. He stated Dr. Trivette never advised him prior to his last work with Woodman, that he had a permanent injury. Hess testified regarding who advised him that he had sustained a work injury, that, “Nobody has ever told me that I had an actual injury to -- you know, that I had a, you know, problem with my elbows or my knees or nothing like that. They just told me that, you know, if you tug and lift, you know, then it's going to -- you know, you're going to pay for it, you know.”

The claims were consolidated. Because the hearing loss and CWP claims are not contested on appeal, we will not review the medical evidence concerning those conditions.

Hess submitted Dr. Bill Webb's treatment records from November 14, 2013 through March 14, 2018. Dr. Webb diagnosed low back pain in 2014. On numerous occasions in 2015, Dr. Webb treated Hess for low back pain, osteoarthritis, and cervicalgia. Hess also complained of shortness of breath on August 25, 2014 and again on May 4, 2016.

Dr. Anbu Nadar evaluated Hess on September 19, 2018. Dr. Nadar diagnosed Hess with cervical and lumbosacral strains with radiculopathy, lateral epicondylitis of both elbows, and patellofemoral arthrosis of both knees. Hess complained his problems were caused by cumulative trauma from many years of working as a coal miner. Dr. Nadar stated Hess had permanent soft tissue changes caused by cumulative trauma. Dr. Nadar restricted Hess from heavy lifting, frequent bending, twisting, turning, climbing, crawling, and other activities, and stated he does not retain the physical capacity to return to his prior employment. Dr. Nadar assessed Hess with a 5% impairment for the cervical spine based on cervical DRE Category II; a 5% impairment for the lumbar spine based on DRE Category II; and a 4% impairment for the knees resulting in a combined 14% impairment rating pursuant to the American Medical Association Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"). He assessed no impairment for the lateral epicondylitis. Dr. Nadar indicated Hess did not have an active impairment prior to the work injury.

Dr. David Muffly evaluated Hess on November 1, 2018. Hess complained of low back pain, and bilateral knee pain, left greater than right, but denied any specific injury. Dr. Muffly diagnosed Hess with chronic low back pain. He reported Hess had a normal examination and no signs of radiculopathy. He noted that lumbar x-rays revealed mild degenerative changes consistent with Hess's age. He also noted Hess complained of bilateral knee pain but he had a normal exam with minimal degenerative changes consistent with his age. He also noted Hess had a normal cervical examination. Dr. Muffly found no evidence of injury caused by cumulative trauma. He found Hess had mild degenerative changes consistent with his age. Dr. Muffly concluded Hess's work as an underground coal miner did not cause injuries to the lumbar spine or knees. Dr. Muffly assessed a 0% impairment pursuant to the AMA Guides and recommended non-prescription medications and self-directed exercises. Dr. Muffly found Hess had reached maximum medical improvement and disagreed with Dr. Nadar's opinion regarding causation and the assessment of a 14% impairment rating due to Hess's injuries caused by cumulative trauma.

The ALJ relied upon Dr. Byron T. Westerfield's opinion in determining Hess is permanently and totally disabled pursuant to KRS 342.732(10)(e) due to complicated CWP. The ALJ also found Hess sustained a 19% whole person impairment due to his work-related hearing loss.

In his April 29, 2019 decision, the ALJ stated as follows:

12. The ALJ relies upon the opinion of Dr. Westerfield who was independently selected by the Commissioner of the Department of Workers' Claims for the Plaintiff's evaluation and who found that the Plaintiff suffers from

complicated coal workers' pneumoconiosis with category "B" large opacities as the result of exposure to coal dust or the procession of coal and as such is permanently and totally disabled per KRS 342.732 (10)e.

...

13. The university evaluator in this matter, Dr. Raleigh Jones, has assessed a 19% impairment to the whole person due to the work-related noise exposure and the record lacks any evidence sufficient to overcome the presumptive weight afforded this assessment. The ALJ therefore finds that the Plaintiff has sustained a 19% whole person impairment due to work-related hearing loss.

...

14. Injury is defined as "any work-related traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings." KRS 342.0011(1).

...

17. The ALJ finds that this credible description of the Plaintiff's duties lends credibility to the opinion of Dr. Nadar who diagnosed cervical and lumbosacral strain with radiculopathy, lateral epicondylitis of both elbows, and patellofemoral arthrosis of both knees. Dr. Nadar concluded that the Plaintiff's complaints were due to cumulative trauma from repetitive work as a coal miner over the years and added that the Plaintiff's deteriorated condition was in excess of what would normally be expected in someone of the Plaintiff's age.

18. The ALJ is convinced by the opinion of Dr. Nadar and finds that the opinion of Dr. Muffly, who opined that the Plaintiff had mild degenerative changes consistent with his age is not credible in light of the credibility afforded to the testimony of the Plaintiff.

19. Dr. Nadar assessed a DRE Cervical Category II, with a 5% impairment, DRE Lumbar Category II, with

a 5%, a 4% impairment for the bilateral knees, and a 0% impairment for lateral epicondylitis resulting in a 14% whole person impairment. The ALJ is convinced by this opinion and finds based thereupon that the Plaintiff has sustained a 14% whole person impairment to the neck, low back and bilateral knees and that the mechanism of injury is cumulative trauma.

20. No proceeding for compensation for an injury or death shall be maintained unless a notice of the accident shall have been given to the employer as soon as practicable after the happening thereof...KRS 342.185

21. The ALJ finds that while the Plaintiff testified that his primary physician told him that he was wearing out his joints in or around 2008, the Plaintiff was not actually told that he had a work injury as a result of cumulative trauma until he was examined by Dr. Nadar on September 20, 2018. The record indicates that the instant claim for income benefits based upon cumulative trauma was thereafter filed on September 28, 2018.

22. The ALJ finds that the statement attributed to Dr. Trivette, the Plaintiff's primary care physician regarding his joints lacked the specificity to constitute the giving of notice of a work related injury and as such cannot be construed as the manifestation date for the purposes of this cumulative trauma claim.

23. The ALJ consequently finds that the Plaintiff's cumulative trauma injury became manifest upon the Plaintiff's being told by Dr. Nadar that he had suffered work-related cumulative trauma on September 20, 2018.

24. The ALJ therefore find[s] that the Plaintiff give[sic] timely notice and that his claim is not barred by the applicable statute of limitations.

The ALJ then awarded benefits as follows:

1. The Plaintiff, Ronnie Hess, shall recover from the Defendant, Woodman Three Mine, and/or its insurance carrier the sum of \$848.41 per week for 100% permanent total disability commencing on March 29, 2018, and continuing for so long as he is so disabled but subject to the limitation imposed by KRS 342.730(4) together with

interest at the applicable statutory rate on all past due and unpaid installments of such compensation such that 12% interest is to be paid on amounts due up to and including June 28, 2017, and 6% interest is to be paid for past due amounts thereafter.

The ALJ also awarded medical benefits “for the cure and relief from the effects of the work-related injuries found herein.”

Woodman filed a petition for reconsideration challenging the ALJ’s analysis regarding the injury claim and requested additional findings of fact. In the June 18, 2019 Order regarding Woodman’s petition for reconsideration, the ALJ provided the following additional findings:

2. The ALJ primarily relied upon the opinion of Dr. Nadar as supported by the Plaintiff’s credible testimony in this matter. The ALJ finds that the findings of Dr. Nadar are credible and constitute substantial evidence upon which the finding of an injury suffered due to cumulative trauma may be based and declines [sic] to disturb the result.

3. The Defendant Employer also seeks additional findings regarding the manifestation date. The ALJ reiterates the finding that the Plaintiff’s injury became manifest upon the examination of Dr. Nadar in September of 2018, wherein he was told that he had suffered an injury due to cumulative trauma from work. The ALJ specifically finds that the prior warnings to which the Defendant Employer has referred constituted the giving of general medical[sic] advice but lacked the specificity of the warning that the Plaintiff had suffered an injury due to cumulative trauma provided by Dr. Nadar. The ALJ therefore declines to disturb the result.

Hess filed a petition for reconsideration noting the ALJ found him permanently totally disabled per KRS 342.732(10)(e) due to his complicated CWP, a 19% whole person impairment due to work-related hearing loss, and a 14% whole

person impairment to the neck, low back, and bilateral knees injuries. Hess argued clarification is needed regarding apportionment among the three claims pursuant to Beale v. Shepherd, 809 S.W.2d 845 (Ky. 1991), which held “The dollar amount of the injury claim must be deducted from the maximum benefit allowed for total disability. The balance of the total disability allowable then becomes the effective amount of the occupational disease award.”

In a May 29, 2019 Order, the ALJ declined to provide an apportionment, explaining as follows:

The Plaintiff's total benefit amount is limited and as such he cannot be awarded any larger weekly amount. Additionally, any apportionment that might need to be performed could not be in dispute due to the impairment ratings and awards previously issued as outlined in the Plaintiff's Petition. The ALJ therefore declines to revisit this issue.

On appeal, Hess argues the ALJ erred in not making an apportionment of the award among the three claims. Hess argues the dollar amount of the injury claim must be deducted from the maximum benefit allowed for total disability. The balance of the total disability allowable then becomes the effective amount of the occupational disease award. Hess contends an apportionment of these awards is needed to determine whether he may also be eligible to receive a portion of Federal Black Lung benefits as well. Hess notes Federal Black Lung benefits offset dollar for dollar from any benefits payable as “State Black Lung” benefits. Accordingly, Hess requests this Board remand the claim to the ALJ with directions that an apportionment of the claims be made pursuant to the holding in Beale v. Shepherd, supra.

We conclude that a determination regarding the injury claim is required based upon the holding in Beale v. Shepherd, supra. While Hess cannot be awarded benefits in excess of a permanent total award, a determination must first be made regarding the injury claim, notwithstanding the finding he is permanently totally disabled by CWP. As stated in that case:

When an employee is totally and permanently disabled by an occupational disease, and has also suffered a permanently disabling work-related injury, the rule has been that the employer may not be relieved of liability on the injury claim by the existence of an occupational disease claim. The claim for the injury must be paid first. In the event that the injury award is for less than permanent total disability, the balance of benefits due, up to the maximum for permanent total disability, would be paid under the occupational disability claim. The net effect of this is to reduce the amount due on the occupational disease claim by the value of the injury claim.

...

This holding does not relieve the employer of liability on the injury claim by virtue of the concurrent 100% occupational disease claim. The dollar amount of the injury claim must be deducted from the maximum benefit allowed for total disability. The balance of the total disability allowable then becomes the effective amount of the occupational disease award.

On remand, since the ALJ has determined Hess sustained compensable work-related injuries, an award of income benefits is required. Because he has already determined Hess is permanently totally disabled, the amount awarded for the injury claim must be deducted from the award for CWP benefits for the duration of that award. In no event shall the total award exceed the amount

awarded for permanent total disability benefits, nor shall the total weekly award he receives be reduced by any apportionment or offset.

Woodman's cross-appeal concerns only the cumulative trauma injuries. Woodman argues Dr. Nadar's testimony cannot be considered substantial evidence supporting Hess's claim for injuries caused cumulative trauma. Woodman contends Dr. Nadar essentially made a diagnosis of injuries caused by cumulative trauma based on Hess's subjective complaints. Woodman asserts Dr. Nadar never referenced any medical evidence showing advanced or accelerated degenerative changes related to Hess's work. Woodman observes cumulative trauma is not a diagnosis. We agree cumulative trauma is not a diagnosis, or condition, it is the cause, or mechanism of injury.

Woodman's argument is essentially an attempt to have the Board to re-weigh the evidence to reach a different conclusion. As the claimant in a workers' compensation proceeding, Hess had 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 successful in his 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.

We believe Dr. Nadar's opinion constitutes substantial evidence supporting the ALJ's conclusions. Dr. Nadar conducted a physical examination, reviewed a CT scan, and reviewed Dr. Webb's treatment notes. Dr. Nadar noted tenderness of the cervical paravertebral muscles, tenderness over the lumbosacral area, joint line tenderness of the knees, decreased range of motion, and patellofemoral crepitus. Dr. Nadar was clearly aware of Hess's prior complaints from his review of Dr. Webb's records. He noted Dr. Webb treated Hess for chronic back, neck, and knee pain. Dr. Nadar observed, "These symptoms are not [what]

one would expect from someone of similar age but rather who has worked in underground coal mines, working in low coal and predisposed him to repetitive injuries resulting in chronic pain and change in his physical structure.” Dr. Muffly found Hess had mild degenerative changes consistent with his age and concluded Hess’s work as an underground coal miner did not cause cumulative trauma to the lumbar spine or knees. However, his opinions are merely conflicting evidence, and do not compel a contrary result.

Woodman argues the ALJ’s determination regarding manifestation is clearly a misapplication of the law regarding due and timely notice and the statute of limitations. Woodman contends the ALJ disregarded multiple statements Hess made in depositions and at the hearing that his former treating physicians advised him well in excess of two years prior to the filing of his claim that his treatment and symptoms related to his employment. Dr. Trivette advised Hess his joints were “wearing out” from working in the mining industry. Hess confirmed Dr. Trivette, as early as 2003 and subsequently Dr. Webb from 2008 to 2010, advised him that performing job duties such as pulling and straining were causing his conditions and he recommended Hess to stop engaging in those duties. Woodman argues the ALJ’s finding that Dr. Trivette’s statements “lacked the specificity to constitute the giving of notice of a work-related injury” is not supported by the evidence. Woodman notes the correct standard enunciated in Consol v. Goodgame, 479 S.W.3d 78 (Ky. 2015) is that the time limit to give notice begins when the claimant is informed of a work-related injury caused by cumulative trauma. Woodman notes a physician is not required to give legal advice to a patient regarding compensability of such a

potential claim. Woodman argues Hess's account of the statements of the treating physicians constitutes evidence he had notice at an earlier date than alleged, resulting in his claim being barred by the statute of limitations.

KRS 342.185(1) provides notice of an accident shall be given "as soon as practicable" and that the claim for benefits to a resulting injury must be filed within two years "after the date of accident" or following the suspension of payment of income benefits, whichever is later. In injury claims caused by cumulative trauma, the date for giving notice and for clocking the statute of limitations is triggered by the date of manifestation. Special Fund v. Clark, 998 S.W.2d 487 (Ky. 1999). In Randall Co. v. Pendland, 770 S.W.2d 687, 688 (Ky. App. 1989), the Kentucky Court of Appeals adopted a rule of discovery regarding injuries caused by cumulative trauma, holding the date of injury is "when the disabling reality of the injuries becomes manifest." In Special Fund v. Clark, 998 S.W.2d at 490, the Kentucky Supreme Court defined "manifestation" in a cumulative trauma injury claim as follows:

In view of the foregoing, we construed the meaning of the term 'manifestation of disability,' as it was used in Randall Co. v. Pendland, as referring to physically and/or occupationally disabling symptoms which lead the worker to discover that a work-related injury has been sustained.

An injury caused by cumulative trauma manifests when "a worker discovers that a physically disabling injury has been sustained [and] knows it is caused by work." Alcan Foil Products v. Huff, 2 S.W.3d 96, 101 (Ky. 1999). Consequently, "for cumulative trauma injuries, the obligation to provide notice arises and the statute of limitations does not begin to run until a claimant is advised

by a physician that he has a work-related condition.” Consol of Kentucky, Inc. v. Goodgame, *supra*. A worker is not required to self-diagnose the cause of a harmful change as being a work-related injury caused by cumulative trauma. American Printing House for the Blind v. Brown, 142 S.W.3d 145 (Ky. 2004). Merely experiencing symptoms at work does not necessarily equate to knowledge that the symptoms are caused by the work, or that a harmful change has been produced. Rather, a physician must diagnose the condition and its work-relatedness.

An ALJ must determine whether physician statements in the record are sufficient to apprise the claimant that he has sustained a work-related injury caused by cumulative trauma injury. Here, the records from Dr. Trivette were not introduced into evidence. Our only knowledge regarding what Dr. Trivette may have advised is from Hess. Hess never testified that Dr. Trivette diagnosed an actual work-related injury, took him off work, or told him the work caused a permanent harmful change.

The ALJ considered Hess’s statements regarding his interactions with Drs. Trivette and Webb. The ALJ was not convinced those statements sufficiently established that Hess was informed he had sustained work-related injuries caused by cumulative trauma. The ALJ determined Dr. Nadar was the first physician to advise Hess he had sustained a work-related injury. The ALJ’s determination that the manifestation date for purposes of statute of limitations and notice was when Hess received Dr. Nadar’s medical report is supported by substantial evidence. Thus, Hess’s filing of his claim within two years of Dr. Nadar’s notification is timely.

Assuming *arguendo* statements by Drs. Trivette and Webb sufficiently triggered the running of the statutory period to file the claim, Hess would still be entitled to benefits for the results of the injuries caused by cumulative trauma in the two years immediately prior to the filing of his claim. Brummitt v. Southeastern Kentucky Rehabilitation Industries, 156 S.W.3d 276 (Ky. 2005) (holding an individual continuing to perform the same repetitive activity after a gradual injury manifests may sustain subsequent gradual injuries) and Special Fund v. Clark, *supra* (holding an ALJ must consider the effect of work performed within the two-year period before the claim was filed). Hess testified he continuously sustained work-related traumas and his condition worsened over time. Although Woodman notes previous complaints regarding the cervical and low back conditions, no physician assessed an active impairment rating prior to the injury. Likewise, no physician expressed an opinion that any percentage of impairment from injuries caused by cumulative trauma arose more than two years prior to the filing of the claim. Indeed, Dr. Muffly, Woodman's evaluating physician, assigned no impairment rating for the cervical or lumbar spine at the time of his evaluation. Dr. Nadar assigned no portion of his impairment rating to a pre-existing active condition.

We conclude the ALJ considered the totality of the evidence, acted within his discretion to determine which evidence to rely upon, applied the correct standards regarding notice and the statute of limitations, and reached conclusions regarding those issues which are supported by the substantial evidence. We cannot say the ALJ's determinations are so unreasonable as to compel a different result. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

Accordingly, the April 29, 2019 Opinion, Award and Order, and the May 29, 2019 and June 18, 2019 Orders rendered by Hon. Jonathan R. Weatherby, Administrative Law Judge, are hereby **AFFIRMED IN PART** and **VACATED IN PART**. This claim is **REMANDED** for additional determinations as set forth above.

STIVERS, MEMBER, CONCURS.

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