

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: December 14, 2018

CLAIM NO. 201702190

SEBREE MINING, LLC

PETITIONER

VS.

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

GEORGE DRIVER  
And HON. JONATHAN R. WEATHERBY,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION  
AFFIRMING IN PART  
VACATING IN PART  
AND REMANDING

\* \* \* \* \*

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

**RECHTER, Member.** Sebree Mining, LLC appeals from the July 23, 2018 Opinion and Award, and the September 4, 2018 Order on Reconsideration rendered by Hon. Jonathan R. Weatherby, Administrative Law Judge ("ALJ"). The ALJ determined

George Driver suffered cumulative trauma injuries to his neck, knees and shoulders. Sebree argues there is insufficient evidence to support the ALJ's conclusions, and that the impairment rating relied upon by the ALJ is erroneous. For the reasons set forth herein, we affirm in part, vacate in part and remand this claim to the ALJ.

Driver worked as a coal miner for twenty-eight years, and began working for Sebree in 2009 as an aboveground laborer. His work involved a lot of heavy lifting and repair work of machinery and tools. Prior to his work at Sebree, he was employed as an underground miner and a gob truck driver. On December 23, 2015, Driver injured his lumbar spine while lifting heavy objects. He settled the claim for a lump sum and retained his right to future medical benefits. As part of the settlement agreement, the parties acknowledged Driver is unable to perform his pre-injury job as a coal miner. He was laid off shortly after the December 23, 2015 injury and has not returned to work since.

Driver testified his work as a coal miner and gob truck driver caused significant strain and jarring to his neck and shoulders. Over the years, he noticed increasing pain in his neck and shoulders when he lifted, which later developed into tingling in his upper extremities. He never had a specific injury to his neck or shoulders, and did not take any time off for treatment. Driver explained his neck and shoulder pain would ebb and flow, and he would take over-the-counter pain medication and anti-inflammatories to continue working.

At the final hearing, Driver testified his neck twists and pops, and causes pain constantly. He experiences reduced range of motion in his neck, particularly when the weather is cold. Similarly, his shoulders cause him constant

pain, particularly when he lifts even lighter objects. Driver described his right shoulder pain as more severe than his left. He acknowledged he quit working at Sebree because of his low back injury, but opined he would not have been able to continue working due to his neck and shoulder pain.

Dr. James Rushing, D.C., evaluated Driver on December 20, 2017. Driver complained of neck pain with tingling into his left hand, low back pain radiating into his right leg, bilateral knee pain and bilateral shoulder pain. Dr. Rushing diagnosed cervical osteoarthritis, and degenerative joint disease in both shoulders and both knees. He concluded these conditions are causally related to Drivers' work.

Dr. Stephen Autry conducted an independent medical evaluation on March 8, 2018. Dr. Autry reviewed Driver's medical records and performed a physical exam, though there were no diagnostic tests submitted for his review. Dr. Autry diagnosed cumulative trauma injuries to Driver's neck due to an aggravation of cervical spondylosis. He also diagnosed an aggravation of rotator cuff tendinosis and impingement in both shoulders, and chondromalacia patella in both knees. He attributed these conditions to Driver's work as a coal miner, which involved heavy lifting and high stress loading on the knees and shoulders. Referencing the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5<sup>th</sup> Edition, Dr. Autry assigned a 2% impairment rating for the cervical spine condition, a 7% impairment rating for the right shoulder condition, and a 4% impairment rating for the left shoulder condition. He assigned a 0% impairment rating for the bilateral knee conditions. He assigned a 6% impairment rating for Driver's lumbar spine

injury, which he noted was an “acute injury.” Dr. Autry also concluded Driver lacks the physical capacity to return to his work at Sebree due to the neck, shoulder and knee conditions.

Dr. Rick Lyon conducted an independent medical evaluation on May 2, 2018. He performed a physical examination and reviewed medical records. Driver complained of bilateral knee pain, particularly when using stairs, bilateral shoulder pain and constant neck pain. Dr. Lyon diagnosed bilateral chondromalacia patella, bilateral shoulder impingement syndrome, cervical spondylosis and degenerative disc disease. He assigned a 2% impairment rating for the bilateral shoulder condition, half of which is attributable to Driver’s work and the other half of which is degenerative. Dr. Lyon concluded Driver’s bilateral knee condition is age-related and not caused by his work history. Likewise, he determined Driver’s cervical spine condition is age-appropriate and not caused by any work-related cumulative trauma. Because Driver was able to work until his December 23, 2015 back injury, Dr. Lyon concluded the work-related shoulder injury would not prevent him from returning to his pre-injury employment.

The ALJ determined Driver suffered work-related cumulative trauma injuries to his neck, shoulders and knees. He relied on Dr. Autry’s opinion to reach this conclusion:

Dr. Autry credibly diagnosed aggravation of cervical spondylosis, aggravation of rotator cuff tendinosis and impingement of the right shoulder, aggravation or rotator cuff tendinosis and impingement of the left shoulder, chondromalacia patella of the right knee, and chondromalacia patella of left knee. Dr. Autry concluded that the Plaintiff’s injuries were due to

cumulative trauma because he worked in the mining industry for nine years and that his repetitive duties caused his conditions to be aroused into a disabling reality by his latest employment.

The ALJ finds that the opinion of Dr. Autry is directly consistent with the Plaintiff's credible description of his repetitive duties of many years.

Dr. Autry assessed an 18% impairment pursuant to the AMA Guides and determined that the Plaintiff had no prior active impairment. Dr. Autry also determined that the Plaintiff did not retain the physical capacity to return to the type of work performed at the time of the injury. This opinion has convinced the ALJ and the ALJ finds that the Plaintiff has sustained an 18% whole person impairment and that the mechanism of injury was cumulative trauma. The ALJ further finds in accordance with the opinion of Dr. Autry that the Plaintiff's cumulative trauma injuries were aroused into a disabling reality by his work in the coal mining industry for the Defendant.

Sebree petitioned for reconsideration, challenging the sufficiency of the evidence and the ALJ's determination Driver sustained an 18% whole person impairment rating as a result of cumulative injury. The ALJ summarily denied the petition as a reargument of the merits of the claim. On appeal, Sebree argues there is insufficient evidence to support the findings that Driver suffered cumulative trauma injuries to his neck, knees and shoulders, and that he is unable to perform his pre-injury work. It also claims the reliance on Dr. Autry's 18% impairment rating is clear error.

Driver bore the burden of establishing each element of his claim. Because he was successful, 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). The function of the Board in reviewing an ALJ’s decision is limited to determining whether the findings made are so unreasonable under the evidence they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

Substantial evidence exists to support the ALJ’s determination Driver suffered cumulative trauma injuries to his neck, shoulders and knees. Dr. Autry diagnosed conditions in Driver’s neck, shoulders and knees, and attributed these conditions to his work as a coal miner. Driver testified to the pain he experiences in his neck, shoulders and knees. Dr. Autry’s medical opinion and Driver’s testimony constitute substantial evidence upon which to base the determination he suffered cumulative trauma injuries to his neck, shoulders and knees.

Sebree has identified proof which would support an alternative conclusion. It attacks the diagnoses made by Drs. Autry and Rushing because neither reviewed any imaging studies. Dr. Lyon, in contrast, took x-rays of Driver’s neck. However, Dr. Autry and Dr. Rushing both physically examined Driver, and Dr. Autry recorded his range of motion testing results. KRS 342.0011(1) requires that a harmful change in the human organism be evidenced by objective medical findings, but it does not require that the diagnosis be supported by imaging studies. Staples, Inc. v. Konvelski, 56 S.W.3d 412, 415 (Ky. 2001). Rather, direct observation and testing are valid methods to support a diagnosis. Id. We note also

that even Dr. Lyon diagnosed work-related bilateral shoulder impingement based on range of motion testing.

Sebree also emphasizes that Driver never missed any work for his neck, shoulder or knee conditions. It also draws our attention to Driver's testimony that his right shoulder bothers him more than his left shoulder. Yet, Dr. Autry assessed a 4% impairment rating for the left shoulder. We find no inherent inconsistency between Dr. Autry's opinion and Driver's testimony that would render the evidence unreliable. Driver testified his right shoulder bothers him more than his left, but did not testify he has no left shoulder pain. This reality is reflected in Dr. Autry's impairment rating, which is 7% for the right shoulder and 4% for the left shoulder.

Finally, substantial evidence supports the finding Driver suffered a cumulative trauma to his knees, even if the condition does not warrant a permanent impairment rating. Dr. Autry diagnosed bilateral chondromalacia patella. He attributed these conditions to Driver's work. Likewise, Driver testified to ongoing knee pain. The fact that the record does not currently contain recommended treatment does not impact Driver's entitlement to an award of future medical benefits for the work-related injury.

Sebree has identified evidence supporting a different outcome than reached by the ALJ, but such is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). Dr. Autry's opinion constitutes the requisite substantial evidence to support the award. 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 other conclusions or reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). As such, we affirm the determination Driver suffered cumulative trauma injuries to his neck, shoulders and knees.

Sebree next challenges the finding Driver suffers an 18% whole person impairment rating as a result of the work-related cumulative trauma injuries. Dr. Autry took a history of Driver's 2015 low back injury. He assigned a 6% impairment rating for the lumbar spine condition and categorized it as an "acute injury". He identified the conditions in Driver's neck, shoulders and knees as "cumulative trauma injuries." Dr. Autry assigned a 7% impairment rating for the right shoulder, 4% for the left shoulder, and 2% for the neck condition. Dr. Autry's combined impairment rating of 18% includes the 6% impairment rating for the lumbar spine condition. Driver did not allege a cumulative trauma injury to his lumbar spine. There is no other proof in the record to support the conclusion that Driver's cumulative trauma injuries to his neck, shoulders and knees resulted in an 18% whole person impairment rating. We therefore vacate the finding Driver has sustained an 18% whole person impairment as a result of work-related cumulative trauma injuries. We remand this claim to the ALJ for a determination of Driver's impairment rating supported by the medical proof in the record.

Finally, Sebree challenges the finding Driver does not retain the physical capacity to return to his pre-injury labor. Although the ALJ did not make an express finding that Driver lacks the physical capacity to return to his pre-injury



employment, he noted Dr. Autry's opinion to this effect. Additionally, the amount of Driver's weekly permanent partial disability benefit reflects application of the three multiplier found at KRS 342.730(1)(c)1. That provision permits enhanced benefits when the employee does not retain the physical capacity to return to the type of work he performed at the time of the injury, due to the effects of the work injury.

Sebree emphasizes Driver's deposition testimony, in which he opined he would not have been able to return to work based on his acute lumbar injury alone. However, in his final hearing testimony, Driver also opined he would not have been able to return to work due to his neck and shoulder pain, even if he had not suffered the acute lumbar spine injury. A claimant's assessment of his ability to labor constitutes substantial evidence which may be relied upon by the ALJ. Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979). Dr. Autry also opined Driver's cumulative trauma injuries prevent him from returning to his pre-injury work. Substantial evidence supports application of the three multiplier found at 342.730(1)(c)1.

Accordingly, the July 23, 2018 Opinion and Award, and the September 4, 2018 Order on Reconsideration rendered by Hon. Jonathan R. Weatherby, Administrative Law Judge, are hereby **AFFIRMED IN PART, VACATED IN PART, and REMANDED**. The award of permanent partial disability benefits is vacated insofar as the award is based on an 18% whole person impairment rating. As explained herein, the ALJ is directed to assign an impairment rating which is supported by the record.

ALL CONCUR.

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