Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: May 13, 2022

CLAIM NO. 202001231, 202000728 & 202000727

TENNCO, INC. PETITIONER

VS. **APPEAL FROM HON. MONICA RICE-SMITH, ADMINISTRATIVE LAW JUDGE**

DAVID M. DANIELS and
HON. MONICA RICE-SMITH,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

ALVEY, Chairman. Tennco, Inc. ("Tennco") appeals from the September 28, 2021 Opinion, Award, and Order rendered by Hon. Monica Rice-Smith, Administrative Law Judge ("ALJ"). The ALJ dismissed David M. Daniels' ("Daniels") claims for cervical and lumbar injuries caused by cumulative trauma he allegedly sustained while working for Tennco. The ALJ also found Daniels sustained a compensable hearing loss claim, but he is not entitled to income benefits pursuant to the 8%

threshold set forth in KRS 342.7305: however she awarded medical benefits for that condition. The ALJ also determined Daniels contracted complicated coal workers' pneumoconiosis ("CWP") due to his coal mine work with the last injurious exposure occurring on August 15, 2019. Based upon the finding of complicated CWP, the ALJ determined Daniels is permanently totally disabled. She awarded permanent total disability ("PTD") benefits at the rate of $938.80 per week until Daniels reaches age 70 pursuant to KRS 342.730(4). She also awarded medical benefits pursuant to KRS 342.020.

On appeal, Tennco argues Daniels did not provide due and timely notice of his CWP condition as required by KRS 342.316(2). It also argues he failed to disclose his previous claim for CWP benefits and the February 24, 1995 Opinion and Award issued by Hon. George S. Schuhmann, Administrative Law Judge ("ALJ Schuhmann") finding he was entitled to an award of Retraining Incentive Benefits ("RIB") at the rate of $142.50 for 208 weeks. Tennco additionally argues the ALJ improperly went outside the record to find the previous RIB award was reversed. It also argues the ALJ erred in finding Hon. Mark Webster, Administrative Law Judge ("ALJ Webster") subsequently determined Daniels did not have compensable CWP and dismissed his RIB claim. Finally, Tennco argues the ALJ did not make sufficient findings of whether Daniels' imaging abnormalities are those of complicated CWP. Because we determine the ALJ's decision is supported by substantial evidence, she properly exercised her discretion in reviewing the complete record contained in Claim No. 1992-45223, and she performed a sufficient analysis regarding whether Daniels has complicated CWP, we affirm.

Daniels filed a Form 102 on May 28, 2020 alleging he contracted CWP while working for Tennco, with a last injurious exposure date of August 15, 2019. On the same date, he filed a claim for work-related hearing loss (no Form number listed), also listing August 15, 2019 as his last exposure date. Daniels later filed a Form 101 on September 11, 2020, alleging he sustained injuries to multiple body parts on August 15, 2019. The claims were consolidated by Order dated October 22, 2020 and deconsolidated by Order entered September 28, 2021. Because this appeal only concerns Daniels' CWP claim, we will only discuss the evidence pertinent to that claim.

Daniels was born on December 24, 1956, and he resides in Morristown, Tennessee. He last worked for Tennco at Balkan, Kentucky. Daniels testified by deposition on July 28, 2020, and at the hearing held July 21, 2021. Daniels is a high school graduate, and he received some mechanical training. Daniels began working as an underground coal miner in 1976 which included working as a roof bolter, timberman, jack setter, and shuttle car operator. He worked as a repairman/mechanic in coal mining, primarily underground, during his last 20 years of employment. He last worked as a repairman for Tennco on August 15, 2019. All his work as a coal miner was underground until his last six months of employment when he repaired equipment aboveground. He was exposed to coal and rock dust for the 42 years he worked underground.

Daniels testified he has worsening difficulty with breathing. He had chest x-rays taken on March 18, 2020 in LaFollette, Tennessee. He also had pulmonary function studies and blood tests performed that day. He later had a chest

x-ray in July 2020 as part of his claim for Federal Black Lung benefits. He testified his attorney sent a notice letter to his employer on the date he was told he had CWP. At his deposition, Daniels denied he had previously filed a claim for state black lung benefits. At the hearing, Daniels agreed he had previously filed a RIB claim, but he received no benefits. He continued to work afterward until August 15, 2019. Daniels testified he is unable to be very active due to his physical condition and his breathing difficulty.

Daniels filed Dr. Kathleen DuPonte's April 16, 2020 report outlining her x-ray interpretation and her review of the results of pulmonary function studies. Dr. DuPonte, a radiologist B-reader, read the x-ray taken that day as a quality 2. She noted s/p opacities with a profusion of 1/2 in the upper four lung zones. She also noted what she considered likely a category A-large opacity. She noted the pulmonary function studies revealed an FEV1 as 99.74% of predicted value and the FVC was 68.8% of predicted value.

Daniels also submitted the July 14, 2020 x-ray report from Dr. J. R. Forehand who evaluated him on behalf of the U.S. Department of Labor, presumably for his Federal Black Lung claim. Dr. Forehand diagnosed Daniels with complicated CWP with progressive massive fibrosis. He stated Daniels' respiratory impairment prevents him from returning to his last job. He noted pulmonary function testing revealed an FEV1 of 96% of predicted, and an FVC of 108% of predicted. He stated the July 14, 2020 x-ray was of film quality 2, and he read it as a 1/2 profusion, positive for CWP, with q/r opacities in all six lung zones. Dr. Forehand noted Daniels has an A-opacity indicating he has complicated CWP.

Dr. Srinrivasa Ammisetty evaluated Daniels on behalf of the Kentucky Department of Worker's Claims on September 3, 2020. He found Daniels has CWP. He noted Daniels had borderline breath sounds and obstructive lung disease. Dr. Ammisetty read an x-ray taken that day as a film quality 1. He found a 1/1 profusion with p and q opacities in all lung zones except for the lower left. He also noted an A-opacity revealing complicated CWP. Pulmonary function testing revealed an FEV1 of 97% of predicted value and the FVC revealed 110% of predicted value. Dr. Ammisetty diagnosed chronic bronchitis, COPD, simple CWP, complicated CWP, and clinical CWP. Dr. Ammisetty requested a CT-scan.

In his November 20, 2020 report, Dr. Ammisetty stated the CT-scan confirmed a 1.8 cm A-opacity in the upper left lung. He opined Daniels has complicated CWP with emphysematous changes on CT-scan. He stated this is consistent with the x-ray he previously reviewed.

Dr. Thomas Jarboe evaluated Daniels at Tennco's request on September 3, 2020. Dr. Jarboe reviewed a September 3, 2020 x-ray as positive for simple CWP. He noted the film was a quality 2 and revealed p and q opacities in all six lung zones with a 1/1 profusion. He stated he did not find any large opacities. He diagnosed Daniels with simple CWP based upon the x-ray. He also diagnosed Daniels with chronic bronchitis. He found the simple CWP was caused by Daniels' exposure to coal dust in the mines. He stated Daniels does not have complex CWP, nor does he have any other respiratory impairment. He stated Daniels has the pulmonary capacity to return to his work at Tennco. He specifically stated he disagreed with Dr. DePonte's finding of complicated CWP.

Dr. Jarboe also reviewed Daniels' March 18, 2020 x-ray. He stated the x-ray was a film quality 2 and demonstrated p and q opacities in all six lung zones. He read the film as 1/1 for CWP with no large opacities. Dr. Jarboe additionally reviewed an August 12, 2020 x-ray as a film quality 2. He determined Daniels had p and q opacities with a 1/1 profusion in all six lung zones. Dr. Jarboe also reviewed the November 4, 2020 CT-scan as demonstrating simple CWP only, with no large opacities.

Dr. Jarboe testified by deposition on May 6, 2021. He is a pulmonologist who has been a B-reader since the mid 1980's. He evaluated Daniels on September 3, 2020. He reviewed additional x-rays dated March 18, 2020 and August 12, 2020. He also interpreted the November 4, 2020 chest CT-scan. Dr. Jarboe testified he found no evidence of complicated CWP, and he disagreed with Dr. Ammissety's assessment of the condition. He noted Daniels has no pulmonary impairment and has only simple CWP.

Tennco filed multiple x-ray review reports from Dr. William Kendall. On October 29, 2020, Dr. Kendall interpreted an August 12, 2020 x-ray as 1/2 with p and q opacities representing simple CWP in the upper four lung zones. He determined no large opacities were present. On January 6, 2021, Dr. Kendall interpreted a July 14, 2020 x-ray as 1/2 with p and q opacities in the upper four lung zones. He found the film was a grade 2. He stated there were no large opacities. On March 22, 2021, Dr. Kendall interpreted a March 18, 2020 x-ray as 1/2 with p and q opacities in the mid and upper lung zones.

Dr. Kendall testified by deposition on May 25, 2021. He is a radiologist who has also been a certified B-reader since 1999. Dr. Kendall reviewed x-rays taken on March 18, 2020, July 14, 2020, and August 12, 2020. He also reviewed the CT-scan. He noted a CT-scan is more sensitive. He found no evidence of complicated CWP. He found the large opacity observed by Dr. Ammisetty was scarring and not complicated CWP based upon its distribution and location.

Tennco filed Dr. Mahender Pampati's CT-scan report dated November 4, 2020. Dr. Pampati diagnosed bilateral bronchilectasis. His note stated, "Correlate for history of Pneumoconiosis. Emphysematous bullae and reiculonodular densities as well as scarring and fibrotic changes in the upper lung fields."

Tennco also filed the September 11, 2015 record from the Pineville Community Hospital. Daniels was treated for work-related injuries he sustained on that date. Chest x-rays taken that day revealed interstitial scarring and changes consistent with CWP.

Tennco additionally filed records from Daniels' previous claim for RIB benefits. Those records included the Form 103, the medical reports, and the decision rendered by ALJ Schuhmann awarding RIB benefits at the rate of $142.50 per week for 208 weeks. That filing of records did not include the decision from the Board reversing the ALJ's determination, nor did it include ALJ Webster's subsequent decision dismissing the claim.

A Benefit Review Conference was held on July 8, 2021. As noted above, this appeal only concerns the ALJ's award of benefits for Daniels' CWP

claim. Regarding this claim, the issues preserved include existence of CWP, whether Daniels is eligible to receive a RIB award, the existence of occupationally-related pulmonary disease, causation and work-relatedness of any pulmonary disease, benefits per KRS 342.732, and whether he is entitled to permanent total disability benefits.

In the September 28, 2021 Opinion, Award, and Order, as it pertains to the CWP claim, the ALJ acknowledged Tennco argued and submitted documentation that Daniels had previously been awarded RIB benefits in 1995 for his 1992 RIB claim. However, the ALJ determined Tennco had not submitted the entire record pertaining to that claim. She noted the complete record from that claim, which Tennco failed to disclose, reflects the Board reversed that decision in an Opinion rendered on December 15, 1995 and remanded for further determination. On remand, ALJ Webster found Daniels had category 0 CWP and dismissed the claim in a decision issued on February 28, 1996. That decision was not appealed. The ALJ noted Daniels initially did not remember his previous claim for RIB benefits until specific questioning at the hearing. Daniels testified that although the claim was filed, he did not appear before an ALJ, and he received no benefits. She found this testimony consistent with the record indicating the parties waived the hearing.

The ALJ also noted Daniels provided notice of his intent to file a CWP claim on March 12, 2020 despite the fact Dr. DePonte did not confirm his diagnosis until April 16, 2020. The ALJ found sufficient notice was provided since it was provided prior to that confirmation. The ALJ acknowledged Tennco's

argument that Daniels should have provided notice of his CWP after the September 11, 2015 x-ray taken in conjunction with a previous injury but stated, "however, the ALJ believes based on Daniel's testimony he was not aware of his diagnosis until confirmed by Dr. DePonte." She noted although the CT-scan report indicated Daniels had findings consistent with CWP, he was not advised of such diagnosis at that time. The ALJ found Daniels provided due and timely notice of his CWP claim.

The ALJ next found Daniels has complicated CWP caused by his exposure to coal dust during his employment with Tennco. She noted all the evaluating physicians found Daniels has CWP; however there is a disagreement as to the existence of complicated CWP. She afforded presumptive weight to Dr. Ammisetty's opinions, and she found Tennco had not overcome the presumption. She found the opinions of Drs. Ammisetty and Forehand, who both found Daniels has A-opacities consistent with complicated CWP, most credible because neither performed the evaluations on behalf of a party. Dr. Ammisetty performed his examination at the request of the Kentucky Department of Workers' claims, and Dr. Forehand performed his evaluation through the U.S. Department of Labor.

The ALJ also noted KRS 342.732(1)(e) establishes an irrebuttable presumption of total disability if an employee has radiographic evidence of complicated CWP. Based upon her review of the evidence and statutory presumption, the ALJ awarded PTD benefits beginning August 15, 2019, continuing until Daniels reaches age 70 pursuant to KRS 342.730(4). She also awarded medical benefits pursuant to the KRS 342.020.

Tennco filed a Petition for Reconsideration arguing the ALJ erred in finding Daniels provided due and timely notice despite previously filing the RIB claim. Interestingly, it argued Daniels was required to notify Tennco he had CWP prior to his ever having been employed there. In the alternative, Tennco argued Daniels was at least required to provide notice in 2015 when the x-ray report was performed indicating he had CWP. Tennco also argued the ALJ erred by affording conclusive rather than presumptive weight to Dr. Ammisetty's report contrary to the holding in Magic Coal v. Fox, 19 S.W.3d 88 (Ky. 2000). Tennco requested a finding of whether Dr. Ammisetty's report had been sufficiently rebutted. Finally, Tennco requested a finding regarding where in Dr. Forehand's report it is indicated that he performed his evaluation on behalf of any agency.

In her Order denying the Petition for Reconsideration issued on November 4, 2021, the ALJ stated the following *verbatim*:

> With regard to the issue of notice, the ALJ specifically related Daniels case to Blackburn v. Lost Creek Mining, 31 S.W.3d 921 (KY 2000), in which the Court found notice was given as soon as practicable where claimant was adjudged not to demonstrate that he suffered from the disease at the time of the previous diagnosis. The Court in Blackburn specifically distinguished the situation from Newberry v. Slone, 846 S.W.2d 694 (KY 1992). Daniel's 1992 claim was ultimately dismissed, with ALJ Webster finding that Daniel did not have the disease of CWP. After Daniels was adjudged to not have CWP, the ALJ specifically addressed Tennco's argument regarding the September 11, 2015 CT scan. The ALJ believed Daniels' testimony that he was not aware of the CWP diagnosis until confirmed by Dr. DePonte. Daniels testified in his deposition that he did have chest x-rays in 2015, but that he did not know he had black lung until Dr. DePonte's report. He advised the 2015 x-rays were to check his sternum after his traumatic injury. Further, the ALJ found the opinion of

> Dr. Ammisetty most persuasive. The ALJ reviewed all the evidence from Dr. Jarboe and Dr. Kendall, including their depositions. The ALJ did not find the evidence overcome the presumption afforded to Dr. Ammisetty. Finally, Dr. Forehand's examination was clearly a Department of Labor Exam as is evidenced by the form on which it was completed. The ALJ finds no error on the face of the Opinion, Order and Award.

Daniels bore the burden of proving each of the essential elements of his cause of action, including whether he contracted complicated CWP while working for Tennco. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since he was successful in his burden, the question on appeal is whether substantial evidence of record 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). The 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, this 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 function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings made are so unreasonable under the evidence that they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). 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).

Tennco first argues the ALJ erred in reviewing the Board's decision in Daniels' previous RIB claim, and the subsequent decision by ALJ Webster on remand. It points to the fact Daniels became aware of having CWP in 1991, as reflected in Claim No. 1992-45223 noting his request for RIB benefits. Tennco lists the physicians who read x-rays as positive for CWP at the time ALJ Schuhmann awarded RIB benefits; however it fails to point to the evidence reflecting he did not in fact have the disease. It argues that pursuant to the previous holding by this Board in Aggregate Processing, Inc. v. Daniel Peyton, WCB No. 2018-86946, the ALJ was prohibited from reviewing Daniel's previous RIB claim to determine its final disposition, and the fact it had been dismissed. We note the holding in Aggregate Processing, Inc. v. Daniel Peyton involved an ALJ performing "internet research" outside the record, not reviewing records from and taking judicial notice of a previous workers' compensation claim, and we find that determination has no

bearing under these circumstances, especially since Tennco failed to file the entire record from the previous claim in what amounts to an obvious attempt to deceive the ALJ, whether intentionally or inadvertently.

Although not directly on point, the courts have held that, upon a motion to reopen, the Board may examine the evidence from the original record. "The statute *supra* vests the Board with large discretion in the determination of such motions, and that it may and should look to the record made at a former hearing, or hearings, had before it with reference to the same accident." W.E. Caldwell v. Borders, 193 S.W.2d 453 (Ky. 1943); Clear Fork Coal Co. v. Gaylor, 286 S.W.2d 519 (Ky. 1956). We acknowledge this case does not involve the reopening of a previous claim, however Tennco opened the door to review that information when it filed the **INCOMPLETE** record from Daniels' prior RIB claim. We find the ALJ committed no error in reviewing the record of the previous claim. It is interesting that Tennco did not raise any concern regarding the ALJ's review of the complete record in a petition for reconsideration, thereby preventing her from addressing it below. More disturbing is the fact Tennco exercised a clear lack of candor by not submitting the complete record of the previous proceeding, and apparently attempted to mislead the ALJ. We find Tennco's argument is disingenuous. We find the ALJ committed no error in reviewing the **ENTIRETY** of the record in the previous proceeding. (Emphasis added).

We also find no error in the ALJ's determination Daniels provided due and timely notice of his CWP claim. Tennco argues Daniels was first apprised he had contracted CWP in 1992 when he filed his RIB claim. As noted above, that

claim was ultimately denied in 1996, and Daniels continued to work as an underground coal miner for an additional 23 years. Although imaging studies were performed in 2015, the ALJ adequately noted those were in conjunction with injuries Daniels sustained while working underground for Tennco. Daniels recovered from those injuries and returned to underground coal mining for Tennco until six months before he retired on August 15, 2019. There is no evidence in the record Daniels was provided notice of having CWP until he was informed by Dr. DePonte in April 2020.

KRS 342.316(4)(a) states as follows:

> The right to compensation under this chapter resulting from an occupational disease shall be forever barred unless a claim is filed with the commissioner within three (3) years after the last injurious exposure to the occupational hazard or after the employee first experiences a distinct manifestation of an occupational disease in the form of symptoms reasonably sufficient to apprise the employee that he or she has contracted the disease, whichever shall last occur; and if death results from the occupational disease within that period, unless a claim therefor be filed with the commissioner within three (3) years after the death; but that notice of claim shall be deemed waived in case of disability or death where the employer, or its insurance carrier, voluntarily makes payment therefor, or if the incurrence of the disease or the death of the employee and its cause was known to the employer. However, the right to compensation for any occupational disease shall be forever barred, unless a claim is filed with the commissioner within five (5) years from the last injurious exposure to the occupational hazard, except that, in cases of radiation disease, asbestos-related disease, or a type of cancer specified in KRS 61.315(11)(b), a claim must be filed within twenty (20) years from the last injurious exposure to the occupational hazard.

In Ford Motor Company v. Duckworth, 615 S.W.3d 26 (Ky. 2021), the Kentucky Supreme Court noted manifestation can have dual meanings in cumulative trauma claims, and we believe this is equally true in CWP claims. The date symptoms or disability arises may be the start date for liability. This differs from the manifestation date for providing notice which arises 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, 479 S.W.3d 78, 82 (Ky. 2015). A worker is not required to self-diagnose the cause of a harmful change as being a work-related cumulative trauma injury. *See* American Printing House for the Blind v. Brown, 142 S.W.3d 145 (Ky. 2004). Rather, a physician must diagnose the condition and advise it is work-related. We additionally note that date of injury and date of manifestation are not necessarily synonymous. This is equally true in a CWP claim. Daniels was not required to self-diagnosis his CWP. Here, the ALJ determined Daniels provided due and timely notice to Tennco even prior to Dr. DePonte's April 16, 2020 report advising him he had contracted the disease. We find no error in the ALJ's determination that Daniel's provided due and timely notice, and therefore we affirm on this issue.

We likewise find the ALJ did not err in determining Daniels has complicated CWP based upon the reports of Drs. Ammisetty and Forehand. Tennco argues the ALJ's findings were insufficient, and essentially argues a contrary result is

compelled based upon the opinions of Drs. Jarboe and Kendall. We disagree. The ALJ provided sufficient review and analysis of the medical evidence in both her decision and in the Order regarding the Petition for Reconsideration. She noted Dr. Ammisetty's report was afforded presumptive, not conclusive weight. However, she specifically found the opinions rendered by Drs. Jarboe and Kendall did not overcome that presumption and she provided an adequate explanation for this finding. We believe the ALJ provided findings sufficient to inform the parties of the basis for her decision to allow for meaningful review despite Tennco's arguments to the contrary. Kentland Elkhorn Coal Corp. v. Yates, 743 S.W.2d 47 (Ky. App. 1988); Shields v. Pittsburgh and Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982); Big Sandy Community Action Program v. Chafins, 502 S.W.2d 526 (Ky. 1973). Because the ALJ properly rendered a decision within the discretion afforded to her, and we find no error, we therefore affirm.

Accordingly, the Opinion, Award and Order rendered on September 28, 2021, and the Order denying Tennco's Petition for Reconsideration rendered November 4, 2021 by Hon. Monica Rice-Smith, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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