

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: October 1, 2021

CLAIM NO. 201963163

TERI STURGILL

PETITIONER

VS. APPEAL FROM HON. CHRISTINA D. HAJJAR,
ADMINISTRATIVE LAW JUDGE

KING'S DAUGHTERS MEDICAL CENTER
and HON. CHRISTINA D. HAJJAR,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING AND REMANDING

* * * * *

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

STIVERS, Member. Teri Sturgill (“Sturgill”) seeks review of the June 20, 2021, Opinion and Order of Hon. Christina D. Hajjar, Administrative Law Judge (“ALJ”) dismissing her claim against King’s Daughters Medical Center (“KDMC”) for permanent income and medical benefits. The ALJ determined Sturgill did not meet her burden of proving she sustained a permanent injury due to exposures to bleach while working for KDMC. The ALJ also determined no additional temporary total

disability benefits were due and resolved a medical fee dispute filed by KDMC in its favor.

On appeal, Sturgill asserts the ALJ's decision is not based on substantial evidence since it is contrary to the University Evaluator's opinions.

BACKGROUND

Sturgill's Application for Resolution of a Claim asserting an occupational disease alleges January 3, 2020, as the date of last exposure. She claimed the occupational disease resulted in "airway injuries, collapsed lungs, severe coughing, shortness of breath, and high blood pressure from steroids." She listed the nature of the disease as "respiratory disorders (gases, fumes, chemicals, etc)." Sturgill alleged her first exposure occurred on December 4, 2018.

Sturgill testified at a June 15, 2020, deposition and the February 23, 2021, Hearing. Sturgill's deposition reveals she was born March 10, 1961, and began working for KDMC in June 2004. She was first injuriously exposed to chemicals on December 4, 2018, while working at KDMC as a dietary clerk. She provided the following description of that job:

Q: Can you tell me a little bit about what that job entails?

A: You work the tray line and you assemble their meals and check their diets for the patients to make sure they're getting what they're supposed to get.

Q: Okay. So are you actually then in the kitchen like putting those trays together?

A: Yes. There's an assembly line in the kitchen.

Q: Okay. And then once those trays are put together, do you have any involvement after that?

A: No.

Q: Okay. So it's just strictly in the kitchen putting the trays together?

A: Yes, ma'am.

As a dietary clerk, because she did not receive a flu shot, she was required to wear a mask during the flu season which encompassed the month of December. Although she was wearing a mask on December 4, 2018, she was unsure whether she wore a mask at the time of the subsequent alleged chemical exposures. KDMC placed her off work in January 2020 after informing her it could not offer a job which kept her safe because the chemicals which caused her adverse reactions are located throughout the hospital. Sturgill testified she had no issues with chemicals or cleaning products during her previous employment as a teacher's aide in the Boyd County school system.

After experiencing the December 4, 2018, exposure she was taken to the KDMC's emergency care. She described the treatment she received:

Q: When you went to the ER – or you went to the ER urgent care, what would they do for you?

A: They would give me breathing treatments and shots of steroids and steroids to go home. The first time, they had to give me – they gave me something to counteract the bleach, a breathing treatment for that, and then a regular breathing treatment. The first time I had to – the bleach was so strong, that I had to take my clothes off and they put them in a bag and I had to put their scrubs on. It was that bad. They thought I had poured bleach on myself, to be quite honest, it was that strong.

At the time of her deposition, Sturgill was taking Breo, Lisinopril, and Levothyroxine, and Ibuprofen as needed. She had taken Breo for asthma prior to December 4, 2018. She uses a nebulizer (Albuterol and Budesonide) when she suffers

a harmful exposure. She also takes steroids. She uses the nebulizer every four hours. However, the extended period over which she may use the nebulizer every four hours depends on the severity of the exposure. She takes steroids after an exposure to harmful chemicals which consists of a “16 to 20 day regimen where you taper off.” Prior to December 4, 2018, Sturgill was only taking Breo and Synthroid. Every other medication she began taking after the December 2018 exposure. Tina England (“England”), PA, prescribed Lisinopril for high blood pressure when she began taking steroids.

According to Sturgill, she first experienced breathing problems due to exposure to chemicals and cleaning products on December 4, 2018. Before that, she had not been diagnosed or treated for any such problem. She denied having a prior diagnosis or receiving treatment for diabetes, chest pain, cancer, allergies, stroke, COPD, tuberculosis, bronchitis, pneumonia, emphysema, or lung infection.

Well before December 4, 2018, Sturgill had developed acid reflux which was remedied surgically. She denied having any swallowing or breathing difficulty prior to December 4, 2018. She recounted the events of December 4, 2018:

Q: That’s okay. I’m going to shift gears now and talk some about the specific dates of exposure that have been noted. We have talked about the first one occurring on December 4th of 2018. Do you remember what you were doing that day when this happened?

A: Yes. We were working on tray line.

Q: Okay.

A: We had a code brown.

Q: What does that mean?

A: Sewer backup.

Q: Sewer backup?

A: Yes, ma'am.

Q: Was that like in a sink or where was that at?

A: No, ma'am. It was coming up through the floors.

Q: Okay.

A: Through all the drains.

Q: So what happened then with respect to the backup?

A: We had to clear out areas. We had to move our tray line out of the way so they could get it all cleaned up.

Q: Okay. Who was the one doing the cleanup? Was that a maintenance crew?

A: It was coworkers.

Q: Okay. What were they doing cleaning up?

A: They were using the vacuums, the big vacuums to vacuum it all up.

Q: Like a Shop-Vac kind of thing?

A: Yeah. It's a big one.

Q: Okay.

A: And bleach, of course.

Q: Was that just liquid bleach, like a bottle of Clorox?

A: Full strength, yes, ma'am.

Q: Okay. Do you have any knowledge or recollection about how much they used?

A: Just in the area where I was at, they used a whole gallon which is probably a four by four area just where I was standing [sic] do my job.

Q: Was that -- when you said in that area you were working in, did they just --- were they pouring it down the drain or were they pouring it on the floor?

A: No, they poured it all over the floor. Full strength.

Q: All right. So tell me what happened next then when they poured the bleach out.

A: Well, we were all standing back away until – while they were cleaning. When they said they were done, then we started moving everything back. I started coughing and choking and couldn't breathe. I felt like my airway was closing off on me. I went outside trying to get air. I went up in the break room and tried to sit down for a minute. Then I went to the ER.

Sturgill continued working until approximately December 15, 2018, when Dr. Mohammad Abul Khoudoud took her off work. She remained off work until March 5, 2019. During the period between December 15, 2018, and March 5, 2019, she “was on steroids, breathing treatments and everything.”

Sturgill's second exposure occurred on June 4, 2019, which she described as follows:

A: I was back around the dish area scraping plates, trace [sic]. Roger Walker came back to clean garbage cans and had a spray bottle of the Clorox and started spraying it in the garbage cans. He looked up and saw me and he's like, “Oh, I forgot.” But it had already hit me. So I ran outside to get air. I started – my throat started closing off on me. I started getting hoarse and coughing.

She immediately left work and went home to administer a breathing treatment. She may have missed a day of work.

When she experienced a third exposure on August 8, 2019, she went to the hospital. She was taken off work until November 2019. During that time, she received TTD benefits. Sturgill was placed on modified duty when she returned to work in November 2019 in the Medical Records Department located in a building

across the street from the hospital. Sometime thereafter, she successfully bid on that job and remained there until KDMC placed her off work in January 2020.

Approximately two days after she resumed work, Sturgill was exposed to bleach in the imaging center where she was undergoing blood work. She was not working at the time. She was taken to a side area to complete the blood work and then immediately to the emergency room.

She was also exposed to bleach in January 2020 while at work in medical records. She provided the following description of that exposure:

A: Well, a lot of people were sick. One of the supervisors over there did not know about the bleach. And somehow they got a hold of bleach because the main supervisor over there had taken all the bleach out of that area because I was there. Somehow they got a hold of some bleach wipes and started wiping stuff down. I had to – I'm sorry. Go ahead.

Q: Go ahead.

A: It's hard because you're kind of delayed. I had to immediately go out outside so I could get some air. She did go out with me.

She went home to administer a breathing treatment and called her doctor. Sturgill identified her continuing symptoms following the December 4, 2018, exposure:

Q: Tell me exactly what your injuries are.

A: Well, I can't get out around chemicals because I started having reactions, the bleach. Like I went out – tried to go to Rural King and I couldn't even get to the door. They had the bleach – I'm very sensitive. I get the hoarseness, the shortness of breath, the coughing, all of that, all over again every time I get around it.

Q: And all of that started in December of 2018?

A: Yes, ma'am.

The severity of her symptoms depends on the extent of her exposure. Although she experienced high blood pressure after the initial exposure, a physician has not linked her high blood pressure episodes to the harmful exposures. Dr. Khoudoud told her to see England because her blood pressure was elevated when she took steroids. Sturgill had a brief exposure to chemicals at Dr. Bruce Broudy's office prior to undergoing the independent medical evaluation.¹ Her coughing problems ended prior to her first exposure to bleach due to surgery successfully remedying her acid reflux. She recounted the types of exposure which cause her to become symptomatic:

Q: Okay. Is it only bleach that makes you ill or are there other substances?

A: The bleach is the main thing. But Khoudoud had told me that it would make me sensitive, so if there's a strong – a strong smell, I can't use – I don't use cleaners. I mean, I can't use bleach or nothing like that around the house. I haven't. I can't.

Q: Okay.

A: Any kind of strong stuff I can't use now because of this.

Q: Okay. Are you aware of any kind of fumes like specific to anything else that have caused you problems?

A: Not that I know of.

Q: What about perfumes?

A: No, I do not use perfumes.

Q: Do you have problems if somebody has perfume on?

¹ Dr. Broudy is KDMC's evaluating physician.

A: Something strong, yes. Strong stuff gets to me now. I've very sensitive now.

Q: What about air freshener?

A: I don't use those.

Q: Okay. Do those cause you problems if you come into contact with somebody using one?

A: Yes. They do now. ...

She experiences no problems with dust, mold, or weather conditions. Sturgill cleans her windows and counters using Dawn dish soap. She cleans the bathrooms and floors with a vinegar and lemon solution. She was able to tolerate stronger smells prior to December 4, 2018. Although she is able to paint, she does not use spray paint. She washes her car with soap and does the laundry without using bleach products. Dr. Khoudoud treated her breathing problems and prescribed breathing treatments and a steroid regimen. She sees Dr. Khoudoud every six months. He has not referred her to another medical provider for her breathing issues.

At the Hearing, Sturgill testified she first worked as a food service worker, moved a few years later to the position of cook, and then later to dietary clerk. All of her exposures occurred while she worked as a dietary clerk. Sturgill denied receiving a diagnosis of asthma or COPD prior to December 4, 2018. However, prior to that date she used an Albuterol inhaler because her "lips were turning blue." Dr. Khoudoud prescribed Breo which she took every day. She used the Albuterol inhaler during acute episodes of asthma rather than daily. She estimated she used the inhaler a couple of times before December 4, 2018.

Prior to December 4, 2018, Sturgill used bleach at home and every day at work without reaction. She again recounted what occurred on December 4, 2018.

When she was taken to the emergency room on that date, hospital personnel required her to remove her clothes because they believed she had come in contact with bleach while using it. That was the first time she experienced coughing and wheezing. Between December 2018 and March 2019, she took steroids and administered breathing treatments. However, she still experienced hoarseness, coughing, wheezing, and shortness of breath.

Sturgill returned to work on March 5, 2019. She described the events of June 13, 2019, which resulted in her missing one day of work. She also described the events of August 8, 2019. Because she experienced coughing, wheezing, and had shortness of breath, she was taken to the emergency room and was off work until November 2019. When she returned to work, she was moved to medical records in order to get away from the bleach. After she secured this job on a permanent basis, she experienced another exposure in January 2020. On that date, when she began coughing and wheezing she used a puffer and went home to administer a breathing treatment. When she called her doctor, he prescribed the steroid regimen. After the January 2020 work event, she worked a few more days until KDMC removed her from the job because it could not keep her safe. She has not worked since. She acknowledged she has had other exposures since then which she recounted as follows:

Q: Just give us – I'm not going to go through all of them, but just give us, say, three of the biggest ones, the three most severe ones.

A: I went out to Rural King – I was just trying to go to Rural King, and they had bleach at the entrance. And before I could even get to the door, I ended up in the ER because I was overcome by the bleach again.

Q: Okay.

A: And then I went down – when I went down for my test –

Q: And you're talking about the university evaluation?

A: Yes.

As soon as I walked in down there, they were using bleach wipes. And they had to give me breathing treatments, and I ended up in the ER.

And I've had the Dollar Store – I went in the Dollar Store, and they was coming out – they came with mop water that had bleach in it. And as soon as I smelled it, I ran out of the store.

I said, "That's bleach?" "Yes." I mean, they had just came out of the stockroom or whatever, and I had to run out and ended up in the ER again.

Q: Okay. And are there other – and, like I said, I don't know about the other occasions.

A: Yeah. There's been several. I mean, I have to watch everywhere I go.

Sturgill believes she cannot return to work at KDMC because bleach is everywhere. She has stopped using bleach at home and does not use aerosols. She uses vinegar, baking soda, and natural cleaners. Sturgill acknowledged that after each exposure the use of steroids and a nebulizer allow her to return to her base line condition. Currently, she is still able to exercise, clean her house, and engage in any activity she desires as long as certain products are not around.

After summarizing the medical and lay proof, the ALJ found Sturgill experienced a temporary exacerbation of her asthma but did not experience a permanent work injury. The ALJ provided the following findings of fact and conclusions of law:

...

Sturgill filed this claim as an occupational disease claim, and alleges the last exposure was on January 3, 2020. An occupational disease is defined in KRS 342.0011(2) as a disease arising out of and in the course of employment. An occupational disease is deemed to have arisen from employment if it is:

[A]pparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work performed and the occupational disease, and which can be seen to have followed as a natural incident to the work as a result of the exposure occasioned by the nature of the employment and which can be fairly traced to the employment as the proximate cause.” The disease must have followed as a natural incident to the work as a result of the exposure, been occasioned by the nature of employment, and proximately caused by the employment.

KRS 342.0011(3).

Sturgill relies on the opinion of Dr. Moldoveanu, who performed the university evaluation. Expert opinions in medical evaluation reports rendered pursuant to KRS 342.315 may not be disregarded by the fact finder. To the extent that a 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 opinion of the university evaluator constitutes substantial evidence with regards to medical questions which, if un-contradicted, may not be disregarded by the fact finder. *Magic Coal Company v. Fox*, 19 S.W.3d 88 (Ky. 2000). In order to reject a university evaluator's clinical findings and opinions, the administrative law judge must state a reasonable basis for rejecting such clinical findings and opinions. *Bullock v. Goodwill Coal Co.*, 214 S.W.3d 890 (Ky. 2007).

This ALJ finds based upon Dr. Broudy and Dr. Moldoveanu's reports and Sturgill's testimony that Sturgill's exposures to bleach in the workplace at least temporarily aggravated her asthma. Sturgill has been paid TTD benefits and it appears her medical expenses were paid from each exposure at KDMC. As she is no longer working for KDMC, and no longer being exposed while at KDMC, the only issue is whether the exposures caused a permanent injury. However, this ALJ finds that Sturgill has not met her burden to prove she developed a permanent condition as a result of the exposures at KDMC.

This ALJ has considered Dr. Moldoveanu's report, and rejects his findings of causation and permanency, as unlike Dr. Broudy, he had a limited and inaccurate understanding of her prior medical condition. Medical opinions that are based upon inaccurate or incomplete information furnished by the claimant during the independent medical examination do not constitute substantial evidence to support a finding of work-related causations. *Cepero v. Fabricated Metals Corp.*, 132 S.W.3d 839 (Ky. 2004). Dr. Moldoveanu relied on Sturgill's temporal association with the asthma symptoms with exposure to her work environment. However, Sturgill has proven to be an inaccurate historian, as she significantly discounted her prior treatment.

There is no evidence that Dr. Moldoveanu reviewed any prior treatment records which showed significant treatment in the year leading up to the first exposure. Dr. Moldoveanu believed, based upon Sturgill's explanation of her prior history, that Sturgill was first prescribed BREO after her bleach exposure at KDMC. However, prior to the alleged first exposure at KDMC, Sturgill treated with Dr. Khoudoud. At that time, Dr. Khoudoud considered reactive airway disease versus asthma, and stated he could not exclude underlying emphysema. He recommended pulmonary function tests and x-rays. He stated she has a history of severe reflux, and it is likely that reflux has an effect on her lungs and breathing and causing her wheezing and shortness of breath. He also prescribed BREO. This was all in year prior to her first exposure.

Sturgill has argued that she developed irritant-induced asthma, known as reactive airways dysfunction

syndrome (RADS), from her exposure to bleach at KDMC. Sturgill states the diagnosis requires evidence of functional abnormalities for more than three months, with no preexisting respiratory disease, as set forth in the *AMA Guides*, pp. 102 and 103. However, as set forth by Dr. Broudy, she had a pre-existing respiratory disease. Dr. Broudy stated it appeared that Sturgill has developed a sensitivity to certain substances, which she should avoid exposure to those substances which have triggered attacks in the past. Dr. Broudy also agreed with Dr. Moldoveanu's diagnosis of work-exacerbated asthma, but Dr. Broudy stated that this does not imply that the work caused the asthma. He explained that the exposure at the workplace may have aggravated it, but there is no evidence in the record that the initial exposure caused her to develop her underlying asthma condition or that it permanently worsened it.

In regard to causation, Dr. Moldoveanu's opinion was equivocal. He stated, "It is very difficult to prove or disprove that this is the source of her asthma worsening other than her report of having no other clear sources of allergens." Although this statement indicates he was at least aware she had some pre-existing asthma, it is unclear how Dr. Moldoveanu determined her asthma "worsened", as he was unaware of her prior condition. It is also unclear that he ever opined that her initial exposure caused her to develop a sensitivity to such substances.

Dr. Moldoveanu's assessment of a 10% impairment rating was only based upon the fact that she has been diagnosed with asthma and she is taking medication for such asthma. However, the prior treatment records show that Dr. Khoudoud treated Sturgill for shortness of breath and wheezing, and he prescribed the same medications Sturgill is currently taking before she was ever exposed. Dr. Broudy stated that Sturgill had an active physical condition, and she had been diagnosed with asthma prior to her initial episode of December 4, 2018, and she was on treatment for her asthma. Thus, this ALJ rejects Dr. Moldoveanu's opinion that the work exposure caused the 10% impairment rating.

This ALJ also finds that Sturgill has not met her burden to prove that her exposure at work was an injurious exposure. "Injurious exposure" means "that exposure to

occupational hazard which would, independently of any other cause whatsoever, produce or cause the disease for which the claim is made. KRS 342.0011(4). Dr. Broudy opined her condition can occur at the workplace, but also away from the workplace and it was not clear that the workplace caused this since exposure to substances away from the workplace also results in similar symptoms. This ALJ finds it relevant that she had breathing difficulties from non-work related exposures to asthma, such as while she was shopping at Rural King and Dollar General.

Dr. Broudy stated her chest x-ray and lung functions are completely normal, indicating no permanent damage, and he did not assign any permanent partial impairment rating. Thus, this ALJ finds there is no permanent impairment due to the work-related exposures.

This ALJ finds based upon the evidence that each exposure to the bleach while she was working caused a temporary exacerbation of her asthma, for which she received temporary total disability benefits and medical benefits. However, Sturgill herself admitted that she returned to her baseline breathing medications after each of the exposures. Sturgill has not set forth an argument that any additional temporary total disability benefits are due from these exposures. Thus, this ALJ finds that Sturgill's claim for permanent income benefits, and additional temporary total disability benefits due to her work exposures to bleach are dismissed. This ALJ further finds that Defendant is not responsible for continuing medical benefits for her alleged injury. Thus, the medical disputes are resolved in favor of KDMC.

Sturgill filed a Petition for Reconsideration taking issue with the ALJs assumption Dr. Bob Moldoveanu, the University Evaluator, did not review certain medical records. Sturgill also requested more specific findings of fact regarding the finding she proved to be an inaccurate historian because she significantly discounted her prior treatment. Sturgill also argued the ALJ had no basis for rejecting Dr. Moldoveanu's 10% impairment rating and relying upon Dr. Broudy's opinions. In

the June 29, 2021, Order overruling the Petition for Reconsideration, the ALJ provided additional reasoning for her decision.

First, Plaintiff contends that the ALJ did not set out what records Dr. Moldoveanu reviewed, and it was error for the ALJ to assume what records he reviewed. Based upon Dr. Moldoveanu's report, he set forth her past medical history, which did not include any indication he had reviewed medical records documenting her history of shortness of breath or turning blue and the differential diagnosis of reactive airway disease versus asthma in the year prior to her alleged exposure. Additionally, the report indicates the only diagnostic testing he reviewed and relied upon was dated June 10, 2020 or October 5, 2020. His summary of her "Treatment-Prior and Current" is not clear as to what records he reviewed. Although it is possible he may have reviewed prior treatment records, there is no specific indication that he did so. The ALJ finds that he did not do so, or did not adequately consider them if he did review them, as he indicated that she was diagnosed with asthma and placed on BREO after the episodes, which is inconsistent with her records.

Second, Plaintiff asserts that even if there were records that Dr. Moldoveanu did not review, the burden shifts to Defendant to present records and cross-examine Dr. Moldoveanu with such records. The ALJ finds Plaintiff did not meet the initial burden concerning causation, as even Dr. Moldoveanu stated "It is very difficult to prove or disprove that this is the source of her asthma worsening other than her report of having no other clear sources of allergens."

Even assuming this is sufficient to prove causation, he indicated that she had several exposures to bleach. Some of these exposures were outside the work environment. He also noted she had several episodes of bleach exposure. He never specifically opined that her initial exposure at work caused her to develop a sensitivity to the substance.

To the extent that Dr. Moldoveanu's report is sufficient to prove causation, Defendant met its burden to prove that the bleach exposure resulted in no injurious

exposure based upon the report of Dr. Broudy, which shifted the burden back to Plaintiff.

Third, Plaintiff asserts that the ALJ should set forth more specific findings of fact, concerning the ALJ's opinion that Sturgill was proven to be an inaccurate historian. To the extent that the ALJ needs to make a more specific finding of fact, the ALJ points to Plaintiff's testimony about her treatment history. In particular, she testified her hypertension did not start until after she was on steroids for the breathing issue, and Dr. Khoudoud recommended she see Tina England about the hypertension. However, the referral to England occurred in the spring of 2018, before her first alleged exposure in December 2018. Additionally, she denied having problems feeling short of breath before December 2018, but the medical records are replete with such symptoms, including in the year prior to her alleged first exposure.

Fourth, Plaintiff asserts that it was error for the ALJ to accept Dr. Broudy's opinion that Plaintiff had pre-existing airway disease and did not accept the presumption of Dr. Moldoveanu's 10% impairment rating. This ALJ rejected the 10% impairment rating, as Dr. Moldoveanu's opinion was not sufficient to prove causation, as it was based upon an inaccurate understanding of her prior medical history and treatment. The ALJ relied upon Dr. Broudy's report that Plaintiff has no impairment due to the work-related exposure, as set forth in the ALJ's decision.

On appeal, Sturgill contends the ALJ erroneously assumed Dr. Moldoveanu did not have or failed to review her medical history. She contends the ALJ's assumption must be irrefutable. She maintains Dr. Moldoveanu's report does not establish such an assumption is irrefutable as his report contains direct and indirect references to Sturgill's prior medical history. She notes Dr. Moldoveanu referenced Dr. Khoudoud's prior treatment and related her past medical history including unrelated medical problems.

Sturgill observes Dr. Moldoveanu opined that within a reasonable degree of medical probability, Sturgill's disease is causally related to her work environment resulting in a 10% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"). He also opined there was no active prior impairment.

Even though Dr. Moldoveanu did not provide the exact records he reviewed, in Sturgill's view his report establishes he was aware of her past treatment and her multiple prior physical problems including COPD and asthma. Therefore, it is not clearly irrefutable that Dr. Moldoveanu was unaware of all of Sturgill's history.

Alternatively, even if it is irrefutable that Dr. Moldoveanu did not have an accurate history, Sturgill insists the ALJ's opinions are not supported by substantial evidence as her rationale for concluding Sturgill had pre-existing problems is not consistent with Dr. Broudy's opinions. She ends with the following:

Dr. Broudy does not assess any pre-existing impairment, so even if Dr. Moldoveanu's history was irrefutable, there is not substantial evidence supporting that this would have affected his opinion since the Defendant's own IME did not assess pre-existing impairment.

Sturgill seeks remand with directions for the ALJ to enter an award based on Dr. Moldoveanu's impairment rating. We affirm.

ANALYSIS

After a careful review of Dr. Moldoveanu's June 10, 2020, Form 108-CWP report and Sturgill's medical records generated prior to her first alleged exposure to bleach on December 4, 2018, we conclude the ALJ did not err in concluding Dr. Moldoveanu did not have and/or review Sturgill's medical history.

In his report, Dr. Moldoveanu stated that after the alleged episodes while working at KDMC, Sturgill was diagnosed with asthma and placed on Breo and combined asthma medications. Further, in listing Sturgill's past medical history, Dr. Moldoveanu did not list asthma as a pre-existing condition. Similarly, Dr. Moldoveanu did not list Sturgill's medical records relating to her medical treatment prior to December 4, 2018, as information he reviewed in formulating his opinion. He also noted as follows: "It is very difficult to prove or disprove that this is the source of her asthma worsening other than her report of having no other clear sources of allergens."

The records of KDMS² Pulmonary and Gastroenterology reveal Sturgill suffered from asthma as well as other symptoms well before December 4, 2018, which is contrary to her testimony that these symptoms did not surface until after that date. The January 24, 2018, record of KDMS Pulmonary and Gastroenterology lists her chief complaint as follows:

She is here for evaluation of shortness of breath and wheezing. She has been wheezing for a while. She denies smoking however she was exposed to cigarette smoke in the past. She works in the dietary department. She says cold it [sic] might make her wheeze worse. She denies any exacerbating or remitting factors. She had a cardiac stress test that was negative. No pulmonary function study ordered chest x-ray recently on file. She says she's told that her lips turned blue occasionally.

Dr. Khoudoud's Assessment is as follows:

1. Wheezing
2. Shortness of breath
3. Cough

² KDMS and KDMC appear to be the same entity.

...

Wheezing and shortness of breath likely related to reactive airway disease versus asthma. Cannot exclude underlying emphysema. We will get follow-up chest x-ray and pulmonary function study. In the meantime we will start her on a simple bronchodilators (stiolto) and follow up.

When Dr. Khoudoud saw Sturgill on February 26, 2018, her chief complaint was as follows:

Wheezing, shortness of breath.

She is here for follow-up. She had a chest x-ray done and was unremarkable. She had a pulmonary function study done and was normal. Continues to wheeze occasionally maybe 3-4 times a week. She said that the Stiolto helped her symptoms some.

Dr. Khoudoud noted her current prescriptions were for Breo and Albuterol. His assessment was:

1. Mild intermittent asthma, unspecified whether complicated.
2. Wheezing
3. Shortness of breath
4. Cough

Dr. Khoudoud ordered a continuation of Breo and Albuterol.

England's records confirm that on April 16, 2018, Sturgill was diagnosed with asthma and had already developed many of the symptoms which she testified initially began after her first exposure to bleach on December 4, 2018.

England's records and those of KDMS Pulmonary and Gastroenterology reflect Dr. Moldoveanu was mistaken in stating Sturgill was placed on Breo and other medications after her first alleged exposure on December 4, 2018.

Rather, it is clear that approximately nine to ten months prior to December 4, 2018, she was prescribed Breo and an Albuterol inhaler for asthma and multiple breathing conditions. Consequently, the ALJ's conclusion that Dr. Moldoveanu had a limited and inaccurate understanding of Sturgill's prior medical condition is amply supported by the records of Dr. Khoudoud and England. Further, the ALJ's conclusion Dr. Moldoveanu did not review any prior treatment records revealing significant treatment in the year leading up to the first exposure is also supported by the medical records. The ALJ correctly noted that prior to Sturgill's first exposure at KDMC, Dr. Khoudoud had considered active airway disease instead of asthma and stated he could not exclude underlying emphysema. The ALJ also correctly noted the prior treatment records reflect Dr. Khoudoud treated Sturgill for wheezing and shortness of breath and had prescribed the same medications before her first exposure on December 4, 2018, which she subsequently took after that date. Sturgill's testimony also confirms she was taking Breo and had used an inhaler containing Albuterol prior to December 4, 2018.

The ALJ's additional findings set forth in the June 29, 2021, Order referenced Dr. Khoudoud's recommendation in the Spring of 2018 that Sturgill see England for hypertension, a condition Sturgill maintains she developed after December 4, 2018.

Conversely, in his February 26, 2020, report, generated after conducting a physical examination, Dr. Broudy provided the following opinions:

Patient has a history of developing respiratory symptoms, which seem to be coming from the upper airway when exposed to certain odors or fumes, such as bleach and other aerosolized chemicals. Currently her

chest x-ray and lung functions are completely normal, indicating no permanent damage. However, it appears that she has developed a sensitivity to certain substances. I would like to see her have a fiberoptic endoscopy during 1 of these episodes to rule out vocal cord dysfunction, which can be treated with certain breath techniques. If possible, she should avoid exposure to those substances which have triggered attacks in the past. At this time, she appears to be at maximum medical improvement and I cannot arrive at any permanent partial impairment rating. This condition can occur at the workplace but also away from the workplace and it is not clear to me that the workplace caused this since exposure to substances away from the workplace also results in similar symptoms. The patient claims that she had no symptoms whatsoever prior to the initial bleach exposure at the workplace. This is a difficult case to arrive at definitive conclusions at this time, but it appears that the patient will not be able to work effectively as long as she continues to have exposure to this bleach or other similar substances.

More importantly, Dr. Broudy's December 14, 2020, report reflects he reviewed previous medical records and Sturgill's deposition during which she testified she had been treated for asthma with an Albuterol inhaler prior to the first exposure to bleach. He noted she had "been on Breo which is a long-acting bronchodilator and inhaled corticosteroid." Dr. Broudy's examination revealed the following:

Spirometry is normal and unchanged from the previous visit in February. The vital capacity is 3.18 L, 96% predicted and the FEV1 is 2.49 L, 96% predicted. The FEV1 to FVC ratio is 78%.

Lung volumes are normal with total lung capacity 104% residual volume 109%, and thoracic gas volume 85% of predicted.

Diffusing capacity is normal at 86% predicted. Airway resistance is normal.

Arterial blood gases are normal on room air at rest with a PO₂ of 85 mmHg, PCO₂ of 39 mmHg, and pH 7.41. Total hemoglobin is 12.8 g and carboxyhemoglobin is 1.2%.

Dr. Broudy's diagnoses are as follows:

1. History of asthma with severe reaction to exposure to bleach.
2. Sciatica.
3. History of hypertension.
4. History of acid reflux.
5. Hypothyroidism.

Dr. Broudy answered, in relevant part, the following questions:

1. Please discuss your physical examination findings. If your findings differ from the date of your previous exam, please explain. The physical examination findings were unremarkable. I did not find any abnormality and there was no difference compared to the previous exam in February of this year.
2. Please discuss your diagnosis including your opinion as to the etiology of Ms. Sturgill's condition. If your diagnosis differs from the date of your previous exam, please explain. My diagnosis is basically the same as it was previously. I believe the patient probably has asthma or some type of reactive airways disease syndrome. The diagnosis apparently was made prior to the exposure to the bleach on 12/04/2018. If indeed the diagnosis of asthma is correct she has an inherent predisposition to asthma or bronchospasm and it can be triggered by exposures such as the one she had to bleach. I also raised the possibility on my last examination that she might have vocal cord dysfunction with laryngospasm but this could only be documented with endoscopy at the time of an episode. She says she had a methacholine challenge test which apparently was negative, indicating she may indeed not have asthma but could have symptoms related to vocal cord dysfunction. I would like to see the results of the methacholine

challenge test to see if indeed it confirmed asthma or ruled it out.

3. Is there any evidence Ms. Sturgill had an active physical condition prior to the work injuries, which contribute to her present limitations or impairments? If so, please explain. Yes there is. In my narrative report prior to answering these questions, I noted that she had been diagnosed with asthma prior to the initial episode of 12/04/2018 and was on treatment for same. She also confirmed this in her deposition.

...

5. What is the current level of permanent functional impairment pursuant to the 5th edition of the American Medical Association guides, if any, related to the alleged work injuries? At this time, the permanent functional impairment would be class I or 0% impairment according to the 5th edition of the American Medical Association guidelines.

6. What permanent restrictions, if any, would you recommend for Ms. Sturgill at this time, based on objective medical findings and are these related to the alleged work injury? I would recommend that she avoid exposure to those substances which exacerbate her symptoms which, in this case, largely consist of bleach.

7. In your opinion, does Ms. Sturgill retain the physical capacity to perform her pre-injury type work as a dietary clerk at KDMC? Please explain. I believe she does retain that capacity. She has normal pulmonary function studies, normal blood gases, and normal chest exam at this time.

...

9. Please review the University evaluation of Dr. Moldoveanu. Please discuss his findings. Do you agree with his findings? Dr. Moldoveanu diagnosed work exacerbated asthma which I believe is a reasonable diagnosis. This does not imply that the work caused the asthma but that exposure at the workplace may have aggravated it. Certainly, the exposure to bleach seems to have caused symptoms that may have been related to her underlying asthma. On the other hand, he goes on to

state that the plaintiff's disease or condition may be causally related to her work environment and that any pulmonary impairment is caused, in part, by factors in the patient's work environment. He found no evidence of pulmonary impairment at the time of his exam and had previously stated that the work had exacerbated the asthma. This is somewhat of a contradiction. Whereas someone with asthma can have exacerbations due to the workplace. It does not necessarily mean that asthma was caused by the workplace. As I have noted in my report and review of medical records, this patient had a diagnosis of asthma before the initial episode at the workplace. He assessed a 10% impairment rating which is very mild. He noted that the patient had normal lung function at the time of the exam so, if there was impairment, it was not permanent and therefore, I would disagree with his 10% rating.

Contrary to Sturgill's assertion, the medical records pre-dating December 4, 2018, and Dr. Broudy's opinions constitute substantial evidence upon which the ALJ was free to rely in reaching a decision on the merits. Kentucky Utilities Co. v. Hammons, 145 S.W.2d 67, 71 (Ky. App. 1940) (citing American Rolling Mill Co. v. Pack et al., 128 S.W. 2d 187, 190 (Ky. App. 1939)). The medical records firmly support the ALJ's finding Dr. Moldoveanu had a limited and inaccurate understanding of Sturgill's prior medical condition. Those records also support the ALJ's conclusion that Sturgill was an inaccurate historian because she significantly discounted her prior treatment. The records pre-dating December 4, 2018, also reveal that many of the symptoms Sturgill maintains only appeared after her first exposure on December 4, 2018, were present nine or ten months before she was first exposed to bleach at KDMC. Thus, we find no error in the ALJ's findings and rejection of Dr. Moldoveanu's opinions.

Dr. Broudy's opinions establish Sturgill only experienced an exacerbation of her pre-existing asthma on the dates in question and after each incident, her condition worsened and eventually resolved. According to Dr. Broudy, the exposure to bleach and the transient effects did not merit an impairment rating pursuant to the AMA Guides. Dr. Broudy's refusal to assess an impairment rating for the pre-existing medical condition was appropriate in light of his opinion that Sturgill sustained an exacerbation of her pre-existing asthma as a result of her exposure to bleach which ultimately resolved. For the ALJ to rely upon Dr. Broudy's opinion that Sturgill had an aggravation or exacerbation of her pre-existing asthma, Dr. Broudy was not required to assess an impairment rating for a pre-existing asthmatic condition. Moreover, Sturgill's testimony establishes she eventually returned to baseline after each exposure. Consequently, the ALJ did not err in relying upon Dr. Broudy's assessments and opinions.

While the contrary opinions espoused by Dr. Moldoveanu could have been relied upon by the ALJ to support a different outcome in Sturgill's favor, in light of the remaining record, the views articulated by Dr. Moldoveanu represent nothing more than conflicting evidence compelling no particular result. Copar, Inc. v. Rogers, 127 S.W.3d 554 (Ky. 2003). As previously stated, where the evidence with regard to an issue preserved for determination is conflicting, the ALJ, as fact-finder, is vested with the discretion to pick and choose whom and what to believe. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). Consequently, we find no error in the ALJ's conclusion that Dr. Moldoveanu had a limited or inaccurate understanding of Sturgill's medical condition, as he had not reviewed any of her

prior treatment records revealing significant treatment for the condition she claimed initially surfaced after her exposure to bleach on December 4, 2018.

Both KRS 342.315(2) and Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000) establish that a University Evaluator is to be afforded presumptive weight. On this, KRS 342.315(2) states as follows:

The physicians and institutions performing evaluations pursuant to this section shall render reports encompassing their findings and opinions in the form prescribed by the commissioner. Except as otherwise provided in KRS 342.316, 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.

However, the Kentucky Supreme Court in Magic Coal v. Fox, supra, held that the term “presumptive weight,” as used in KRS 342.315(2) amounts to nothing more than a rebuttable presumption that may be overcome by countervailing evidence. Id. at 94. The presumptive weight given to a University Evaluator’s opinion can be rejected by the ALJ if there is a reasonable basis for doing so. Id. at 94. As set out above, the ALJ must specifically provide his/her reasons for rejecting the University Evaluator’s opinion. Id. at 95. In Magic Coal v. Fox, supra, the Supreme Court addressed the significance of the mandate found in KRS 342.315(2) that the opinions of the University Evaluator be afforded presumptive weight. The Supreme Court held the statute merely creates a rebuttable presumption, imposing upon the party against whom it is directed the burden of going forward with evidence

to rebut or meet the presumption. *Id.* at 95. Citing the Kentucky Rules of Evidence, KRE 301, the Supreme Court clarified that a rebuttable presumption “does not shift to such a party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party upon whom it was originally cast.” *Id.* at 96. The Supreme Court distilled its holding as follows: “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.” *Id.* If the findings and opinions of the University Evaluator are contradicted, the ALJ may choose to disregard the testimony of the University Evaluator, so long as a reasonable basis for doing so is specifically stated. *Id.* at 97.

The ALJ amply provided her reasons for rejecting the University Evaluator’s opinion by citing to numerous medical records establishing the University Evaluator did not have a complete picture of Sturgill’s prior medical condition at the time he formulated his opinions. That being the case, the ALJ did not err in rejecting Dr. Moldoveanu’s opinions. Similarly, the ALJ did not err in relying upon the opinions expressed by Dr. Broudy in his February 26, 2020, and December 14, 2020, reports. The ALJ’s finding Sturgill did not sustain a permanent work injury meriting an award of future and income medical benefits is supported by substantial evidence. Because the outcome selected by the ALJ is supported by the record and does not compel a contrary result, we are without authority to disturb her decision on this issue. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

However, because the ALJ determined Sturgill sustained a temporary work injury meriting the award of temporary income and medical benefits, we

remand the claim to the ALJ for entry of an amended opinion and award. Notably, on page 13 of her decision, the ALJ stated as follows:

This ALJ finds based upon Dr. Broudy and Dr. Moldoveanu's reports and Sturgill's testimony that Sturgill's exposures to bleach in the workplace at least temporarily aggravated her asthma. Sturgill has been paid TTD benefits and it appears her medical expenses were paid from each exposure at KDMC. As she is no longer working for KDMC, and no longer being exposed while at KDMC, the only issue is whether the exposures caused a permanent injury. However, this ALJ finds that Sturgill has not met her burden to prove she developed a permanent condition as a result of the exposures at KDMC.

Further, on page 15 of the decision, the ALJ concluded as follows:

This ALJ finds based upon the evidence that each exposure to the bleach while she was working caused a temporary exacerbation of her asthma, for which she received temporary total disability benefits and medical benefits. However, Sturgill herself admitted that she returned to her baseline breathing medications after each of the exposures. Sturgill has not set forth an argument that any additional temporary total disability benefits are due from these exposures. Thus, this ALJ finds that Sturgill's claim for permanent income benefits, and additional temporary total disability benefits due to her work exposures to bleach are dismissed. ...

The ALJ ordered no additional TTD benefits are due. However, the above findings demonstrate Sturgill sustained a temporary injury on certain dates for which she is entitled to TTD benefits. We note KDMC has not cross-appealed asserting Sturgill was not entitled to the TTD benefits and medical benefits previously paid. Since KDMC has not cross-appealed asserting the ALJ erroneously found Sturgill sustained temporary injuries on those dates and challenging Sturgill's entitlement to TTD benefits and temporary medical benefits, the claim must be

remanded to the ALJ for an award of TTD benefits and medical benefits for the appropriate periods.

The January 11, 2021, Benefit Review Conference Order & Memorandum (“BRC Order”) establishes the parties stipulated Sturgill sustained work-related injury or injuries on August 8, 2019. The parties also stipulated Sturgill alleged she sustained an occupational exposure with last exposure on January 3, 2020. The parties agreed as to the last exposure date, but disputed whether the exposure caused a work injury. The BRC Order also reflects KDMC paid TTD benefits at \$462.13 per week from December 15, 2018, through March 8, 2019; August 13, 2019, through November 15, 2019; and January 10, 2020, through March 6, 2020, for a total of \$15,045.16. Significantly, the BRC Order does not identify overpayment of TTD benefits as a contested issue. Based on the parties’ stipulations contained in the BRC Order and the ALJ’s findings set forth in the June 20, 2021, Opinion and Order, Sturgill is entitled to temporary income and medical benefits.

Accordingly, those portions of the ALJ’s June 20, 2021, Opinion and Order and the June 29, 2021, Order overruling the Petition for Reconsideration finding Sturgill did not meet her burden of proving she sustained a permanent injury meriting an award of permanent income benefits and future medical benefits are **AFFIRMED**. However, this matter is **REMANDED** to the ALJ for entry of an amended opinion and order finding Sturgill sustained temporary work-related injuries on the stipulated dates and the appropriate award of TTD benefits and medical benefits.

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON JEFFREY HENSLEY
105 THOMPSON RD STE A
RUSSELL KY 41169

LMS

COUNSEL FOR RESPONDENT:

HON KERI HIENEMAN
1544 WINCHESTER AVE 5TH FLOOR
P O BOX 1111
ASHLAND KY 41105

LMS

RESPONDENTS:

MOHAMAD ABUL-KHOUDOUD MD
KDMS PULMONARY AND CRITICAL CARE MEDICINE
613 23RD ST
MEDICAL PLAZA B
ASHLAND KY 41101

USPS

KING'S DAUGHTERS FAMILY PHARMACY
613 23RD ST STE 110
ASHLAND KY 41101

USPS

ADMINISTRATIVE LAW JUDGE:

HON CHRISTINA D HAJJAR
MAYO-UNDERWOOD BUILDING
500 MERO ST 3RD FLOOR
FRANKFORT KY 40601

LMS