Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: November 14, 2014

CLAIM NO. 201300211 & 201300210

TECO COAL CORPORATION PETITIONER

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

LLOYD PENCE
HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

ALVEY, Chairman. Teco Coal Corporation ("Teco") seeks review of the Order on Remand rendered June 17, 2014, and the order on reconsideration issued August 8, 2014 by Hon. Jonathan R. Weatherby, Administrative Law Judge ("ALJ"). Teco also appeals from the opinion rendered by the ALJ on September 9, 2013, and the order on reconsideration issued

October 7, 2013, from which it previously appealed, awarding Lloyd Pence ("Pence") permanent partial disability ("PPD") benefits and medical benefits.

On appeal, Teco argues the ALJ's decision is not supported by substantial evidence. Teco argues neither Dr. Chad Morgan nor Dr. Jared Madden offered scientific or medical studies supporting their opinions Pence's conditions were caused by his work. Because the ALJ's decision is supported by substantial evidence, and he provided an adequate basis for his determinations, we affirm.

We first note this Board previously rendered an opinion on March 21, 2014, remanding the claim to the ALJ to provide specific additional findings clarifying whether Pence sustained work-related injuries, the body parts injured, and the manifestation date for each injury. Although the ALJ did not completely comply with this direction in the June 17, 2014 order, this was cured by the order on reconsideration issued August 8, 2014.

As we noted in our previous opinion, Pence filed a Form 101 on February 8, 2013 alleging cumulative trauma injuries to his "neck and back" on March 31, 2011 due to repetitive use while employed by Teco as a flowman/ repairman beginning in 2000. In addition to the Form 101,

Pence filed claims for hearing loss and coal worker's pneumoconiosis. The hearing loss claim was consolidated with the injury claim, but was deconsolidated on remand. The coal worker's pneumoconiosis claim was bifurcated and is irrelevant to this appeal. The ALJ awarded PPD benefits based upon a 17% impairment rating assessed by Dr. Madden pursuant to the American Medical Association Guides to the Evaluation of Permanent Impairment 5th Edition ("AMA Guides").

Pence's testimony and the medical evidence were reviewed in the opinion rendered by this Board on March 21, 2014, and therefore will not be extensively outlined again. Teco now argues, as it did in its original appeal, the ALJ's decisions awarding PPD and medical benefits for cervical, thoracic and lumbar injuries were not supported by substantial evidence. In awarding benefits, the ALJ relied upon the opinions of Drs. Morgan and Madden, and chose not to rely upon the opinions of Dr. Daniel D. Primm, Jr. and Dr. John Vaughn. In our opinion rendered March 21, 2014, this Board outlined the discretion afforded ALJs in reaching their conclusions. We noted the ALJ needed to provide additional analysis regarding the basis for his decision, clearly noting he is the finder of fact. We specifically stated as follows:

Although the ALJ clearly infers Pence sustained some type of work-related injury during the course of his employment, he is unclear as to the scope of the injury. In the opinion, the ALJ concluded Pence has "suffered a 17% whole person impairment and that he is unable to return to the same type of employment." In reaching this conclusion, the ALJ relied upon Pence's testimony regarding the years of hard work he has endured in the coal industry, the resulting effects of his work on his body, his desire to continue working if possible and his inability to do so due to his work injures. The ALJ also relied upon the opinion of Dr. Madden who "opines that the Plaintiff has suffered a 17% whole person impairment related to his work activities over the last 38 years and that he is unable to return to the same type of employment." Therefore, the ALJ awarded PPD benefits based upon the 17% impairment rating assessed by Dr. Madden and enhanced by the 3.8 multiplier, and medical benefits "for the cure and relief from the effects of the work-related injury and hearing loss." In the order on reconsideration, the ALJ reiterated his reliance on Pence's testimony and on Dr. Madden's assessment of impairment.

Based upon the above-referenced limited findings of fact, we cannot discern whether the ALJ intended to adopt the entirety of Dr. Madden's opinion or just portions of it. This is especially true in light of the conflicting evidence regarding the scope of injuries allegedly sustained by Pence due to cumulative trauma.

Pence initially testified at his deposition he only experiences back problems due to his employment in the

coal mining industry. However, he later stated he also experiences neck pain and acknowledged he receives chiropractic treatment for both conditions. The chiropractic records of Dr. Morgan indicate Pence received treatment for low back and neck pain and stiffness from June to December 2012. Dr. Primm diagnosed age-related neck and back symptoms and noted his examination of Pence's cervical or lumbar spine were unremarkable. He likewise found no evidence of a cumulative injury or disorder produced by his work as a coal miner. In the July 8, 2013 report, Dr. Vaughan noted Pence only complained of low back pain. He diagnosed chronic low back pain due to Pence's age, which did not warrant an impairment rating. On the other hand, Dr. Madden noted Pence complained for low back, upper back and neck symptoms. He diagnosed cervical, thoracic and lumbar degenerative disc disease, chronic neck and back pain, chronic pain syndrome due to cumulative trauma, and lumbar radiculopathy most likely due to neuroforaminal and spinal stenosis. He also found Pence's current conditions stem from cumulative trauma due to his work in the mines. He assessed an impairment rating for the cervical, thoracic and lumbar spine, yielding a combined 17% impairment rating, although he made no specific finding Pence sustained a work-related injury or injuries.

Based upon the above-referenced evidence of record, the ALJ's findings are equivocal. Because the ALJ made no specific finding regarding the scope of Pence's injury or injuries, we are unable to perform a meaningful review. Kentland Elkhorn Coal Corp. v. Yates, supra; Shields v. Pittsburgh and Midway Coal Mining Co., supra. On remand, the

ALJ is directed to make additional findings regarding the scope of Pence's injury or injuries, as defined by the Workers' Compensation Act. The ALJ must specify the injuries Pence sustained, and the causation for each. The ALJ must also specify what evidence in the record he relied upon in making such finding. Although neither party directly raised this issue, this Board is permitted to *sua sponte* reach issues even if unpreserved. KRS 342.285(2)(c); KRS 342.285(3); George Humfleet Mobile Homes v. Christman, 125 S.W.3d 288 (Ky. 2004).

The ALJ determined Pence has suffered a 17% impairment rating, without specifically stating he sustained an injury or injuries. On remand, the ALJ must determine whether Pence sustained work-related injuries. If so, he must identify what was injured, and the manifestation date for each injury. We note a finding of a cumulative trauma injury is supported by the report of Dr. Madden and Pence's own testimony which constitute substantial evidence because an injured worker's credible testimony is probative of his ability to labor post-injury. *See* Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979); *See also* Carte v. Loretto Motherhouse Infirmary, 19 S.W.3d 122 (Ky. App. 2000).

In the March 29, 2013 opinion, Dr. Madden concluded Pence's current medical status directly resulted from his work history in the mines. He later reiterated Pence's complaints are due to the cumulative nature of recurrent and chronic trauma associated with his reported work environment. Dr. Madden then opined as follows:

> Pence suffered a workplace trauma over the course of 38 years in the

> mining industry, resulting in low back pain with radiculopathy, neck and thoracic pain due to degenerative changes and significant hearing loss. His reported work environment and complaints are consistent with the abnormal findings on physical examination.

Pursuant to the AMA Guides, Dr. Madden assessed a 17% impairment rating. He concluded Pence does not retain the physical capacity to return to the type of work performed at the time of injury and he assigned permanent restrictions.

Teco's arguments on appeal merely point to conflicting evidence of Drs. Primm and Vaughan, which does not constitute an adequate basis for reversal on appeal. McCloud v. Beth-Elkhorn Corp., supra. The ALJ, as fact-finder, has full discretion to determine the physician or physicians upon which he relies. We acknowledge the differing medical opinions in the record. However, if "the physicians in a case genuinely express medically sound, but differing opinions as to the severity of a claimant's injury, the ALJ has the discretion to choose which physician's opinion to believe." Jones v. Brasch-Barry General Contractors, 189 S.W.3d 149, 153 (Ky. App. 2006). The fact there is contrary evidence in the record does not compel a different result.

We find Teco's argument attacking Dr. Madden's qualifications unpersuasive. The AMA Guides, at page 18 states, "impairment evaluations are performed by a licensed physician." The AMA Guides do not require impairment ratings to be assessed only by certain specialties of practice. We likewise

> find no provision in the AMA Guides stating causation may only be assessed by certain specialties of practice. KRS 342.0011(32) states the following:
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> > "Physician" means physicians and surgeons, psychologists, optometrists, dentists, podiatrists, and osteopathic and chiropractic practitioners acting within the scope of their license issued by the Commonwealth;
>
> Teco does not contend Dr. Madden is not a licensed physician. Therefore, Dr. Madden was qualified to render an opinion regarding whether Pence sustained cumulative trauma injuries due to lifetime employment in the coal mining industry. The fact Dr. Madden's specialty is not orthopedic medicine does not render his medical opinion unsubstantial; it merely goes to the weight of the evidence which the ALJ could freely consider.

In the order on remand issued June 17, 2014, the ALJ again stated he based his determinations upon the opinions of Drs. Morgan and Madden without adequately complying with the direction from this Board. Teco filed a petition for reconsideration on June 26, 2014, arguing the ALJ had not complied with the direction of this Board. In the order on reconsideration issued August 8, 2014, the ALJ outlined the requirements for determining a manifestation date. The ALJ then determined Pence sustained cervical and lumbar injuries which manifested on January 4, 2013 per the report of Dr. Morgan. He determined Pence sustained a

thoracic injury which manifested on March 9, 2013, the date of Dr. Madden's evaluation. The order on reconsideration, when coupled with the order on remand issued June 17, 2014, constitute compliance with the directives of this Board and are sufficient to support the award of benefits.

As we previously noted, Pence, the claimant in a workers' compensation proceeding, had the burden of proving each of the essential elements of his cause of action, including the extent of his occupational disability. *See* KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since 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).

In rendering a decision, KRS 342.285 grants an ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). An ALJ may draw reasonable inferences from the evidence, reject any testimony, and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same

witness or the same adversary party's total proof. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). In that regard, an ALJ is vested with broad authority to decide questions involving causation. Dravo Lime Co. v. Eakins, 156 S.W. 3d 283 (Ky. 2003). An ALJ may reject, 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. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). Although a party may note evidence supporting a different outcome than reached by an ALJ, such 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).

On remand, the ALJ complied with the direction of this Board, and made the determinations necessary to support his decision. The ALJ, not this Board, is the finder of fact. The ALJ made the requisite findings to support the award of benefits. Although his findings were minimal, the ALJ provided a sufficient explanation and basis for his decision. While Teco points to evidence upon which the ALJ could have relied, he was not compelled to do

so. Because the ALJ made the findings directed by this Board, and his determinations are supported by substantial evidence, his decision will not be disturbed.

Accordingly, the opinion, subsequent orders by Hon. Jonathan R. Weatherby, Administrative Law Judge, on September 9, 2013; October 7, 2013; June 17, 2014; and August 8, 2014 are hereby **AFFIRMED.**

ALL CONCUR.

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