

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-001886-WC

NORTH AMERICAN REFRACTORY CO.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NOS. WC-04-00302 AND WC-04-00940

THOMAS MURPHY; HON. DONNA H.
TERRY, ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * **

BEFORE: COMBS, CHIEF JUDGE; GUIDUGLI AND JOHNSON, JUDGES.

GUIDUGLI, JUDGE: North American Refractory Co. petitions this Court for review of an opinion of the Workers' Compensation Board that affirmed the Administrative Law Judge's award of 25% permanent partial disability benefits related to Thomas Murphy's asbestosis claim. We affirm.

Murphy began his employment with North American, a manufacturer of bricks for blast and steel furnaces, in 1966. He initially worked as a laborer, press operator, end loader

driver, kiln worker and maintenance worker. Since 1977, he has worked as a production superintendent. He retired in January 2000. On February 9, 2004, he filed an application for resolution of an injury claim for a knee injury he claimed was work-related. North American responded by alleging the claim should be denied because it was not work-related, that timely notice had not been given and that the claim was barred by the statute of limitations. Thereafter, on May 10, 2004, Murphy moved for leave to file an asbestos claim and to consolidate his two claims.

On May 27, 2004, Murphy filed his application for resolution of an occupational disease claim alleging asbestosis. His claim stated that his last exposure occurred on January 10, 2000. On that same date (May 27, 2004), Murphy filed his first report of injury or illness related to his asbestosis claim. North American filed a response in which it contested whether Murphy actually suffered from asbestosis, whether the disease was work-related, whether timely notice was given, and the applicable statute of limitations. Following the filing of medical records and depositions, Dr. Steve Kraman, a specialist in internal medicine and cardiology, performed a university evaluation pursuant to KRS 342.315. He filed his report on November 11, 2004. Dr. Kraman's report relating to asbestosis made the following relevant findings:

F.

DIAGNOSTIC TESTING

Check the applicable block for any testing reviewed and relied upon for medical consultation. Reports are attached.

<u>Test</u>	<u>Date</u>	<u>Summary of Results</u>
• Chest Radiographs	11/11/2004	Reticular pattern
• Pulmonary function tests	11/11/2004	Normal spirometry
• Other (diffusing capacity)	11/22/2004	Slightly decreased

G.

DIAGNOSIS

The radiograph is reported by Dr. Lieber to be consistent with:

- a. Positive for simple pneumoconiosis, primary s, secondary p, all zones, profusion 1/1.
- b.

Pulmonary function tests indicate:

- a. Normal spirometry.
- b. Mildly diminished diffusing capacity

H.

CAUSATION

Within reasonable medical probability, there is evidence of pulmonary impairment caused in whole or in part by occupational exposure to asbestos in the patient's work environment.

I.

IMPAIRMENT

1. Using the most recent AMA Physician Guides to Evaluation of Permanent Impairment, the patient's classification of impairment due to loss of pulmonary function is Class 2, 10-25% whole person impairment.
2. The above impairment was calculated as follows:

Chapter	Table	Page
5	5-12	107

J.

RESTRICTIONS

Should restrictions be placed upon subject's further exposure to asbestos in the workplace?

YES NO

Does the subject retain the physical capacity to return to the type of work performed at the time of injury?

YES NO

In response to Dr. Kraman's examination and findings, Dr. Prakash Goyal, a board-certified pulmonary specialist, performed an independent medical examination at the request of North American. Dr. Goyal opined that Murphy does not suffer from asbestosis, but his symptoms are more likely related to his history of smoking and inactivity or to his various other health problems. Following a hearing and briefing by the parties, the ALJ entered her opinion. As to Murphy's asbestos claim, the ALJ made the following findings of fact and conclusions of law:

The threshold issues for resolution in the occupational disease claim are the existence of the occupational disease and the work-relatedness/causation of Mr. Murphy's condition. Based upon the convincing and authoritative opinion of Dr. Kraman, the Administrative Law Judge finds that Mr. Murphy has sustained his burden of proving that he has acquired the occupational disease of simple pneumoconiosis as the result of exposure to asbestos during employment by North American. The Administrative Law Judge affords presumptive weight to this opinion as required by KRS 342.315(2). *Magic Coal Company v. Fox*, Ky. 19 S.W.3d 88 (2000). Further, the Administrative Law Judge adopts the measure of impairment assessed by Dr. Kraman as 25% under the *AMA Guides to the Evaluation of Permanent Impairment* due to mildly diminished diffusing capacity. Dr.

Kraman also opined that Mr. Murphy does not retain the physical capacity to return to the type of work performed on the date of injury, and the Administrative Law Judge adopts that expert opinion.

In reaching the above conclusion, the Administrative Law Judge has carefully considered the opinion of Mr. Tracy regarding the presence of asbestos in North American buildings. However, there is a strong likelihood that there were substances of which he was not aware or substances which were prevalent prior to his employment at North American. The testimony of Mr. Murphy and Mr. Dupuy is convincing that at least some asbestos products were utilized in and around the tunnel kilns in the early days of their employment.

The ALJ dismissed Murphy's claim related to his alleged knee injury. North American petitioned for reconsideration of the asbestosis award, arguing Murphy had failed to give timely notice and it was not based upon substantial evidence. In denying North American's petition, the ALJ emphatically stated that the notice was reasonable and that Dr. Kraman's opinion was afforded presumptive weight as required by KRS 342.315(2). North American timely appealed to the Board.

On appeal to the Board, North American raised three issues. It claimed Murphy failed to prove he was exposed to asbestos, that he failed to give timely notice of his asbestos claim, and that the ALJ erred in assessing a 25% impairment rating pursuant to the AMA Guides. In its opinion, the Board set forth a thorough statement of the facts and medical evidence

provided by the ALJ. It then set forth the standard of review it used in reviewing this case as follows:

It is well-established that a claimant in a workers' compensation claim bears the burden of proving each of the essential elements of his cause of action. Burton v. Foster Wheeler Corp., 72 S.W.3d 925, 928 (Ky. 2002). Among those elements is work-related causation. See Stovall v. Collett, 671 S.W.2d 256 (Ky.App. 1984). When the determination of the ALJ is in favor of the party with the burden of proof, the issue on appeal is whether the ALJ's decision is supported by substantial evidence. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky.App. 1984). "Substantial evidence" is defined as evidence of substance and relevant consequence, sufficient to induce conviction in the minds of reasonable people. Transportation Cabinet v. Poe, 69 S.W.3d 60, 62 (Ky. 2001). It is not enough for North American to show that the record contains some evidence that would support a contrary conclusion. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). So long as the ALJ's determination is supported by any evidence of substance, it may not be disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

As fact-finder, the ALJ has the sole authority to determine the quality, character, and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the sole authority to judge the weight and inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Luttrell v. Cardinal Aluminum Co., 909 S.W.2d 334 (Ky.App. 1995). The fact-finder may reject any testimony and believe or disbelieve various parts of the evidence, even if it comes from the same witness or the same adversary party's total proof. Magic Coal v. Fox, 19 S.W.3d 88 (Ky.

2000); Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999); Hall's Hardwood Floor Co. v. Stapleton, 16 S.W.3d 327 (Ky.App. 2000). In order to reverse the decision of the ALJ, it must be shown there was no substantial evidence of probative value to support the decision. Special Fund v. Francis, Ky., supra.

Utilizing this standard, the Board affirmed the ALJ's opinion. The Board's opinion addressed each of the issues raised by North American. In relevant part it held:

In the instant claim, the ALJ found Murphy's testimony regarding his history of exposure to asbestos at North American to be credible. As previously stated, that finding is supported by other credible substantial evidence from [Harold] Dupuy. Dr. Kraman's history of exposure is predicated upon the same history provided Murphy. Hence, we find North American's reliance upon the supreme court's holding in Cepero[v. Fabricated Metals Corp., 132 S.W.3d 839 (Ky. 2004)], to be misplaced.

We also find no merit in North American's argument the ALJ erred in finding due and timely notice. It is well established that for purposes of occupational lung disease, an afflicted worker's duty to provide notice to his employer only arises after a diagnosis of the disease has been made and the afflicted worker is informed by a physician that his disease is work-related. Blue Diamond Coal Co. v. Stepp, 445 S.W.2d 866 (Ky. 1969); Whitaker Coal Co. v. Melton, 18 S.W.3d 361 (Ky.App. 2000); Coal-Mac Inc. v. Wheeler Blankenship, 863 S.W.2d 333 (Ky.App. 1993). In the case *sub judice*, the record is noticeably void of any direct testimony by Murphy regarding when he was first informed by a doctor that he had developed asbestosis as a result of his employment with North

American. Moreover, while Dr. Querubin interpreted a chest x-ray as generically demonstrating evidence of pneumoconiosis, the August 27, 2003, report contains no opinion as to causation or any indication that Murphy was informed the diagnosis was related to his work. As noted by the ALJ, the first clear indication of the existence of a work-related occupational lung disease was set out in the report of the university evaluator, Dr. Kraman, rendered November 11, 2004. Given lack of evidence to the contrary, we find no error in the ALJ's determination that Murphy's obligation to provide notice arose at that time, and that since Murphy's claim for benefits had previously been filed, the notice requirements of KRS 342.185 and KRS 342.190 were either satisfied or excused pursuant to KRS 342.200.

While it is true counsel for Murphy in his initial brief before the ALJ alleged his client was informed on August 27, 2003, that he had asbestosis, nothing in the record supports that statement. The ALJ, therefore, was free to ignore that portion of the respondent's brief and arrive at a conclusion based upon the actual evidence of record. That is exactly what occurred. Hence, we find no error.

As to North American's last argument attacking the ALJ's reliance on the 25% impairment rating assessed by Dr. Kraman, we also affirm. It is well established that an ALJ has the authority to consult the AMA Guides when determining the weight and credibility to be assigned to the evidence. Caldwell Tanks v. Roark, 104 S.W.3d 753 (Ky. 2003). However, an ALJ is never compelled to do so. The AMA Guides is a tome consisting of 613 pages written for physicians. As a matter of law, the proper interpretation of the AMA Guides and any assessment of an impairment rating in accordance with the AMA Guides are medical

questions. Kentucky River Enterprises, Inc. v. Elkins, 107 S.W.3d 206 (Ky. 2003).

In this instance, Dr. Kraman plainly assessed a 25% impairment which, according to Dr. Kraman was in accordance with Chapter 5, Table 5-12, p. 107 of the AMA Guides. Dr. Goyal's 0% impairment rating references the same chapter, table and page. Neither party sought to cross-examine Dr. Kraman or Dr. Goyal as to: (1) why they applied the AMA Guides differently; or (2) whether one application was in error while the other was correct. As a result, the evidence regarding the correct impairment rating was merely conflicting, and the ALJ, as fact finder, was free to pick and choose which doctor's assessment to believe. Whittaker v. Rowland, supra.

That having been said, our own independent review of Chapter 5, Table 5-12, p. 107 of the AMA Guides, Fifth Edition, confirms to our satisfaction that Dr. Kraman's impairment assessment is in conformity with the dictates of the Guides and the Act. Unlike claims involving coal workers' pneumoconiosis, an ALJ is not limited solely to consideration of FVC and FEV1 values upon spirometric testing for purposes of determining impairment and disability in non coal-related occupational disease cases. Moreover, when granting weight and credibility to other relevant portions of conflicting pulmonary function tests from competing medical witnesses in occupational disease cases that are not coal-related, an ALJ is not statutorily compelled to accept the highest test value from all physicians of record regarding a particular measurement. Rather, value measurements that vary from one expert to the next succeed only as conflicting evidence from which the finder of fact may pick and choose. Magic Coal v. Fox, supra.

In this instance, both Dr. Goyal and Dr. Kraman are in agreement that spirometric values measuring Dco are significant under the AMA Guides when determining impairment where asbestosis is the diagnosis. Dr. Goyal confirmed that Murphy's spirometric testing performed August 27, 2003, revealed a Dco of 78% of predicted normal values. Dr. Goyal further verified that the pulmonary function studies performed November 11, 2004, at the University of Kentucky, produced a Dco of 74% of predicted normal values. A review of Table 5-12 at page 107 of the AMA Guides, expressly provides that when a patient's Dco measurement is greater than or equal to 60% of predicted and less than the lower limit of normal, then that individual qualifies as a Class 2 resulting in a 10% to 25% impairment of the whole person. Hence, assuming that 80% of predicted is the lower limit of normal for purposes of assessing impairment as argued in North American's brief, irrespective of which Dco measurement is more accurate Murphy would appear to satisfy the Guides' criteria for a Class 2 rating. That was the conclusion reached by the university evaluator, Dr. Kraman, and that was the impairment rating found most credible by the ALJ. Consequently, we find no error.

On appeal to this Court, North American makes the same arguments it made to the Board. In order to reverse the decision of the ALJ, it must be shown that there was no substantial evidence of probative value to support her decision. See Special Fund v. Francis, supra. The question on review is whether the evidence was so overwhelming, upon consideration of the entire case, as to have compelled a different finding. Wolf Creek Collieries v. Crum, 673 S.W.2d 735, 736 (Ky.App. 1984).

Compelling evidence is that which is "so overwhelming that no reasonable person could reach" the same conclusion as that reached by the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224, 226 (Ky.App. 1985). In Western Baptist Hospital v. Kelly, 827 S.W.2d 685 (Ky. 1992), the Supreme Court of Kentucky addressed its role and that of this Court in reviewing decisions in workers' compensation actions. "The function of further review of the [Board] in the Court of Appeals is to correct the Board only where the [] Court perceives the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice." Id. at 687-88.

While the evidence, especially the medical evidence, was conflicting before the ALJ, there was substantial evidence presented to support the ALJ's determination that Murphy was exposed to asbestos at North American and subsequently suffered the occupational disease of asbestosis. Also, we agree that notice was given in a timely manner in that Murphy was not made aware that the disease was occupationally related until the report of the university evaluator, Dr. Kraman. Although another ALJ may have concluded otherwise if sitting as the finder of fact, it cannot be said that the evidence compelled a different finding based upon the evidence presented. Thus, the

ALJ's findings as to notice, work-relatedness and a 25% permanent partial disability may not be disturbed.

For the foregoing reasons, the opinion of the Board, affirming the decision of the ALJ, is affirmed.

ALL CONCUR.

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