

RENDERED: OCTOBER 6, 2017; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth Of Kentucky**  
**Court of Appeals**

NO. 2016-CA-001333-WC

CDR MINERALS

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-13-00439

RANDY RICHIE; HON. WILLIAM  
J. RUDLOFF, ADMINISTRATIVE  
LAW JUDGE; HON. JEANIE  
OWEN MILLER, ADMINISTRATIVE  
LAW JUDGE; AND WORKERS'  
COMPENSATION BOARD

APPELLEES

OPINION  
AFFIRMING

\*\* \*\* \* \*\* \* \*\* \*

BEFORE: MAZE, TAYLOR, AND THOMPSON, JUDGES.

TAYLOR, JUDGE: CDR Minerals petitions this Court to review an August 12,  
2016, Opinion of the Workers' Compensation Board affirming an Amended

Opinion and Order of the Administrative Law Judge (ALJ) finding Randy Richie totally permanently disabled.

Richie worked as a heavy equipment operator for thirty-eight years and was hired by CDR Minerals to operate a grader on November 19, 2009. On March 23, 2013, Richie filed a workers' compensation claim for injuries to his lower back, right hip, and right leg due to cumulative trauma. Thereafter, on September 10, 2013, the ALJ rendered an Opinion and Order finding that Richie was totally permanently disabled due to cumulative trauma. In its opinion, the ALJ relied upon the expert opinion of Dr. Arthur Hughes. CDR then sought review with the Workers' Compensation Board (Board).

By Opinion entered March 12, 2014, the Board affirmed in part, vacated in part, and remanded the ALJ's Opinion and Order. The Board concluded that Dr. Hughes' medical opinions expressed in his prepared medical report differed from his opinions expressed in his depositional testimony as to the onset and scope of Richie's injuries. The Board believed that the ALJ may have held an erroneous understanding of the medical evidence. The Board directed the ALJ to make additional findings of fact detailing the work-related injuries to Richie. The matter was then appealed to the Court of Appeals, and in Appeal No. 2014-CA-000625-WC, the Court of Appeals affirmed the Opinion of the Board.

Upon remand, the ALJ rendered an Amended Opinion and Order.

The ALJ made numerous findings of fact and clarified its view of the medical evidence, including Dr. Hughes' medical opinions. In finding Richie to be totally permanently disabled, the ALJ specifically found:

(1) Based upon the credible and convincing lay testimony of Mr. Richie and the persuasive, compelling and reliable medical evidence from Dr. Hughes, all of which is covered in detail above, I make the determination that Mr. Richie's diagnoses were bilateral hip pain, right worse than left, right knee pain, low back pain and right shoulder pain and that the plaintiff's multiple pains and restrictions are the consequences of his years of working for the defendant CDR as a heavy equipment operator, which caused repetitive injuries to those multiple areas of his body accumulated over his period of employment with the defendant. Mr. Richie's cumulative trauma injuries became disabling on January 8, 2012.

(2) Based upon the persuasive, compelling and reliable medical evidence from Dr. Hughes, the examining physician, I make the determination that the plaintiff will under the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, sustain a permanent impairment of 8% to the body as a whole.

(3) I next make the determination pursuant to the persuasive, compelling and reliable medical evidence from Dr. Hughes that Mr. Richie will sustain a very serious occupational disability. Dr. Hughes stated that the plaintiff does not retain the physical capacity to return to the type of work which he performed at the time of his injuries and that he has restrictions as follows: A lifting limit of 10 pounds regularly and 25 pounds on occasion, and further that Mr. Richie should avoid repetitive bending and twisting of his lumbar spine and is also

limited to brief periods of standing and sitting and cannot forward flex at the waist to pick up objects. Mr. Richie's work history shows that he worked in the coal mining industry as a heavy equipment operator from 1999 to January 8, 2012. He has a very good work history showing a good work ethic. His work history has been at strenuous physical labor jobs. I make the determination that if Mr. Richie could work he would still be working. I make the determination pursuant to the persuasive, compelling and reliable medical evidence from Dr. Hughes that Mr. Richie cannot return to work at any physical labor jobs and further that he is totally disabled from his former work as a result of his work-related injuries sustained during the period of three years while he worked for CDR Minerals.

(4) At the time of the Final Hearing on August 29, 2013, Mr. Richie was 58 years old and is, therefore, an older worker with severe limitations for any reemployment in the highly competitive job market. I make the determination that Mr. Richie will not be able to return to any regular gainful employment in the highly competitive job market. He last worked back on January 8, 2012, which is over 1 1/2 years before the Final Hearing. He has had no earnings since January 8, 2012.

....

(5) All of the above factors led me to the legal conclusion that Mr. Richie is totally disabled due to his cumulative trauma injuries sustained while working for the defendant and that the plaintiff became totally disabled on January 8, 2012.

Amended Opinion and Order on Remand at 14-17. CDR Minerals again sought review with the Board. By Opinion entered August 12, 2016, the Board affirmed

the ALJ's finding that Richie was totally permanently disabled. This review follows.

Upon review of the Board's decision, our role is limited to determining whether "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." *W. Baptist Hospital v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992). When the ALJ's opinion is favorable to the claimant, there must be substantial evidence of a probative value to support the ALJ's findings. *Garrett Mining Co. v. Nye*, 122 S.W.3d 513 (Ky. 2003).

CDR Minerals initially contends that "the evidence failed to establish a work[-]related injury to the right knee, right shoulder, and right hip" and "failed to establish a work[-]related injury to the lumbar spine while working at CDR." CDR Minerals' Brief at 7, 9. Specifically, CDR asserts that no objective evidence exists demonstrating a cumulative trauma injury to Richie's right knee, right shoulder, right hip, or lower back.

The ALJ relied upon the medical testimony of Dr. Hughes to support the findings of a work-related injury to Richie's right knee, right shoulder, right hip, and lower back. In his medical report filed of record, it is apparent that Dr. Hughes considered Richie's complaints of pain, physical restrictions, and work history. Dr. Hughes additionally considered medical records from Daniel

Williams, D.C., who reported that Richie suffered from “lower back pain with radiculitis into the right hip and leg.” Dr. Hughes Medical Report at 2. Dr. Hughes also performed a physical examination upon Richie. It was Dr. Hughes’ expert opinion that “within a reasonable medical probability, [Richie’s] multiple pains and restricted motions of the joints is a consequence of his 40 years as a heavy equipment operator causing repetitive injury to multiple areas of the body.” Dr. Hughes Medical Report at 4. And, while Dr. Hughes’ depositional testimony was ambiguous, it is within the sole province of the ALJ to judge the weight and credibility of the evidence. *Square D Co. v. Tipton*, 862 S.W.2d 308 (Ky. 1993). An ALJ may accept certain portions of an expert’s opinion and disregard other portions of the same expert opinion. *Magic Coal Co. v. Fox*, 19 S.W.3d 88 (Ky. 2000). Upon the whole, we cannot say that the Board erred by concluding that substantial evidence supported the ALJ’s finding that Richie suffered a work-related injury to his right knee, right shoulder, right hip, and lower back.

CDR next asserts that the evidence does not support the ALJ’s finding that Richie was totally and permanently disabled. We disagree with CDR’s assertion of error and adopt the erudite Opinion of the Board upon this issue:

Permanent total disability is defined as the condition of an employee who, due to an injury, has a permanent disability rating and has a complete and permanent inability to perform any type of work as a result of an injury. KRS 342.0011(11)(c). "Work" is defined as providing services to another in return for remuneration

on a regular and sustained basis in a competitive economy. KRS 342.0011(34). In Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000), the Kentucky Supreme Court noted the statute requires an individualized determination of what the worker is and is not able to do after recovering from the work injury. The determination includes consideration of factors such as the worker's post-injury physical, emotional, intellectual, and vocational status and how those factors interact, the likelihood that the particular worker would be able to find work consistently under normal employment conditions, whether the individual will be able to work dependably, and whether the worker's physical restrictions will interfere with vocational capabilities. A worker is not required to be homebound in order to be found to be totally occupationally disabled.

The ALJ considered Richie's age, education, work experience, medical conditions and restrictions in finding Richie permanently totally disabled. Dr. Hughes opined Richie does not retain the physical ability to return to his previous work, and restricting him from lifting 10 pounds regularly and repetitive bending and twisting. He also recommended only periods of sitting, which is required in Richie's work as a heavy equipment operator. These restrictions prevent any heavy physical labor employment, the ALJ noted.

Additionally, the ALJ relied upon Richie's credible testimony. Richie testified about his current symptoms and his belief he can no longer perform any work due to the effects of his condition. He is 58 years old and has a high school education. He has worked exclusively as a heavy equipment operator his entire adult life. Richie's testimony regarding his post-injury ability to work and his symptoms is substantial evidence, as 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).

These circumstances constitute the requisite substantial evidence to support the ALJ's determination Richie is permanently totally disabled. The ALJ undertook the analysis required under Ira A. Watson and sufficiently articulated the evidence upon which he relied in reaching the conclusion. He acted within his discretion to determine which evidence to rely upon, and it cannot be said his conclusions are so unreasonable as to require reversal.

Workers' Compensation Board Opinion, August 12, 2016, at 12-15. Thus, we agree with the Board that substantial evidence supported the ALJ's finding that Richie was totally permanently disabled.

In sum, we cannot conclude that the Board overlooked or misconstrued controlling law or committed an error in assessing the evidence to cause gross injustice. *See W. Baptist Hospital*, 827 S.W.2d 685.

For the foregoing reasons, the Opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

James B. Cooper  
Guillermo A. Carlos  
Lexington, Kentucky

BRIEF FOR APPELLEE, RANDY  
RICHIE:

McKinnley Morgan  
London, Kentucky