RENDERED: MARCH 22, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001851-WC

DAVID DAUGHERTY — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-15-02067

WARRIOR COAL, LLC;
HON. R. ROLAND CASE,
ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; DIXON AND JONES, JUDGES.

CLAYTON, CHIEF JUDGE: David Daugherty petitions for review of a Workers' Compensation Board (Board) opinion affirming the June 19, 2017 opinion, award, and order rendered by the Administrative Law Judge (ALJ). In its order, the ALJ found Daugherty was entitled to income benefits and medical benefits due to a

25% disability rating resulting from coal workers' pneumoconiosis (CWP) under Kentucky Revised Statutes (KRS) 342.732(1)(b)(1). In his subsequent arguments to reconsider and before the Board, Daugherty contended he was instead entitled to permanent total disability (PTD) benefits under KRS 342.730(1)(a) or benefit enhancement under KRS 342.730(1)(c)(1). After careful consideration, we affirm the Board.

I. BACKGROUND

Daugherty worked as a coal miner in Kentucky for thirty-two years. His last day of employment in the mines with appellee Warrior Coal, LLC (Warrior) occurred on April 12, 2014, at which time he was fifty-eight years old. On December 17, 2015, Daugherty filed his "Application for Resolution of Coal Workers' Pneumoconiosis Claim" (Form 102-CWP) under KRS Chapter 342, the Workers' Compensation Act. Warrior filed its "Notice of Claim Denial or Acceptance" (Form 111), denying liability. Following discovery, the ALJ held a benefit review conference (BRC). The ALJ subsequently prepared a BRC order and memorandum listing the contested issues as "benefits per KRS 342.732," "credit for prior CWP," and "prior CWP settlement – effect of prior claim." The last two items referred to Daugherty's settlement of a prior CWP claim with a previous employer in 1996 and have no relevance to these proceedings. The

parties acknowledged the contents of the BRC order and memorandum telephonically.

Thereafter, the parties waived a hearing and submitted the matter on the briefs to the ALJ for a decision. The Board summarized the medical evidence before the ALJ in its opinion:

> In support of his claim, Daugherty filed the August 30, 2015 x-ray report of Dr. Michael Alexander, M.D., a radiologist. Dr. Alexander is a B-reader who resides in North Carolina. Dr. Alexander stated the August 18, 2015 x-ray he read was a film quality 2 due to scapular overlay. He found Daugherty has CWP in all six lung zones. He noted p/p opacities, and found a 1/1 profusion.
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> On May 23, 2016, Daugherty was evaluated by Dr. Bruce Broudy, a pulmonologist in Lexington, Kentucky, at Warrior's request. Dr. Broudy noted Daugherty began smoking a pack of cigarettes per day while in his twenties, and continues to smoke cigars. He noted Daugherty takes blood pressure medication. Pulmonary function studies demonstrated an FVC of 79% of predicted value, and an FEV1 of 63% of predicted value. Dr. Broudy reviewed a chest x-ray taken on May 23, 2016. He stated the film was a quality 1, and he read it as 0/0 for CWP. Dr. Broudy diagnosed Daugherty with Chronic Obstructive Pulmonary Disorder due to cigarette smoking, and found his lung disease was not due to coal dust exposure.
>
> On January 18, 2017, the Acting Commissioner of the Kentucky Department of Workers' Claims scheduled Daugherty for an evaluation to be conducted by Commonwealth Respiratory Consultants in Lexington, Kentucky. Dr. Westerfield of that group conducted the evaluation. In his report dated March 1, 2017, Dr. Westerfield noted Daugherty had over thirty years of coal

> mining employment. He noted Daugherty complained of shortness of breath with exertion. Pulmonary function studies revealed a pre-bronchodilator FVC of 76% of predicted value, and FEV1 of 61% of predicted value. Post-bronchodilator testing revealed an FVC of 86% of predicted value, and FEV1 of 65% of predicted value. Dr. Westerfield stated an x-ray taken on the day of the evaluation was a film quality 1, and demonstrated q/p opacities in all six lung zones with a 1/1 profusion. He diagnosed Daugherty as having CWP with pulmonary impairment due to coal dust exposure. Dr. Westerfield also stated Daugherty is totally disabled due to respiratory disease, and does not have the breathing capacity to return to coal mining work.

The ALJ found Warrior was not entitled to credit for Daugherty's previous CWP claim. Furthermore, the ALJ found Daugherty was entitled to an award of benefits based on 25% disability, pursuant to KRS 342.732(1)(b)(1). The award granted Daugherty "the sum of $144.20 commencing on April 12, 2014 and continuing for a period not to exceed 425 weeks[,]" as well as medical treatment benefits. In support of the award, the Board's opinion quotes the ALJ's findings, in pertinent part, as follows:

> **Although the report of Dr. Westerfield is not entitled to presumptive weight pursuant to KRS 342.315(2) since it was not performed by a University Evaluator,** the [ALJ] finds the report of Dr. Westerfield to be the most persuasive. Dr. Westerfield was independently selected by the Commissioner of the Department of Workers' Claims for his evaluation. Dr. Alexander was selected by the plaintiff with Dr. Broudy selected by the employer. The [ALJ] has considered all of the evidence in accordance with *Magic Coal v. Fox*, 19 [S.W.3d] 88 (Ky. 2000). The [ALJ] chooses to rely

> on and is persuaded by the opinion of Dr. Westerfield who was independently selected by the Commissioner of the Department of Workers' Claims. It is therefore found the plaintiff has established the presence of x-ray evidence of coal workers' pneumoconiosis Category 1/1. Dr. Westerfield opined the plaintiff's respiratory disability was due to both coal workers' pneumoconiosis and chronic obstructive pulmonary disease related to cigarette smoking. Dr. Westerfield opined the plaintiff did not retain the breathing capacity to return to his previous position in coal mine employment. . . .
>
> Pursuant to KRS 342.732(2), the [ALJ] must use either the highest FVC value or highest FEV1 value determined from the totality of all such spirometric testing. *See Watkins v. Ampak Mining Inc.*, 834 [S.W.2d] 699 (Ky. App. 1992). Additionally, pursuant to *Fields v. Carbon Coal Company*, 920 [S.W.2d] 880 (Ky. App. 1996), the [ALJ] does not have the discretion to choose between pre-bronchodilator or post-bronchodilator testing, but must accept the highest. Therefore, consistent with the above, the [ALJ] must accept the post-bronchodilator study performed by Dr. Westerfield indicating FVC function of 86% of predicted values and FEV1 function of 65% [of] predicted values. The [ALJ] can rely on either the highest FVC or highest FEV1.
>
> Since the plaintiff's post-bronchodilator FEV1 functions were less than 80% but greater than 55%, as found by Dr. Westerfield, the plaintiff will be entitled to a 25% disability rating pursuant to KRS 342.732(1)(b)(1).

(Emphasis added in Board's opinion.)

Daugherty filed a petition for reconsideration with the ALJ, arguing he was entitled to PTD benefits under KRS 342.730(1)(a) or, alternatively, the benefit multipliers found in KRS 342.730(1)(c)(1). As support, Daugherty quoted

a line from Dr. Westerfield's report indicating he was "totally disabled" and alleged the ALJ found he suffered from "a 25% whole person impairment." Because the ALJ gave Dr. Westerfield's report the greatest weight, Daugherty contended, the ALJ should have adopted Dr. Westerfield's opinion *in toto* and assigned PTD benefits to him. As a second argument, and for the first time in these proceedings, Daugherty raised an issue regarding the constitutionality of the underlying statutes. He contended the ALJ's grant of benefits pursuant to KRS 342.732, instead of considering him disabled under KRS 342.730, constitutes a violation of his constitutional right to equal protection. As support, Daugherty cited *Vision Mining, Inc. v. Gardner*, 364 S.W.3d 455 (Ky. 2011), which he contended stood for the proposition that there is no rational basis to treat coal miners differently from those who suffer from other occupational diseases.

In its response to the petition, Warrior argued *Kentucky Harlan Coal Co. v. Holmes*, 872 S.W.2d 446 (Ky. 1994), which upheld the constitutionality of KRS 342.732, was still valid despite the *Vision Mining* decision. Warrior asserted the *Vision Mining* decision was limited to CWP consensus panel procedures under KRS 342.316. Warrior also contended Daugherty erred procedurally, in that the constitutionality of a statute must be listed as a contested issue in the BRC memorandum, pursuant to *Austin Powder Co. v. Stacy*, 495 S.W.3d 732 (Ky. App. 2016). Additionally, Daugherty had not provided notice to the Attorney General of

Kentucky regarding his challenge to the constitutionality of the statute, as required under KRS 418.075.

The ALJ subsequently entered an order denying reconsideration. He disputed Daugherty's characterization of his findings, stating he did *not* find Daugherty had a "25% whole person impairment," but instead

> [Daugherty] had Category 1 coal workers' pneumoconiosis and an FEV1 of less than 80% and further found [Daugherty] was entitled to a 25% disability rating pursuant to KRS 342.732(1)(b)1. The ALJ did not find a specific impairment rating but a disability rating pursuant to the statute.

The ALJ distinguished *Vision Mining* from the instant case, stating *Vision Mining* "did not change KRS 342.732(1)(b)1 but dealt with the correct procedure to be used." The ALJ further noted the Kentucky Supreme Court had upheld the constitutionality of income benefits under KRS 342.732 in the *Holmes* decision, *Holmes* had not been overruled, and, in any event, the ALJ lacked the authority to declare a statute unconstitutional.

In his appeal to the Board, Daugherty repeated his previous arguments and, at this time, notified the Attorney General of his constitutional challenge to the statutes. Daugherty subsequently moved to include the Attorney General, asserting he was an indispensable party to this action. The Board denied the motion, stating the Attorney General must only be notified and then the Attorney General "determines whether he will enter an appearance." Despite Daugherty's

notification, nothing in the record indicates the Attorney General's office responded to the constitutional challenge.

In its well-reasoned opinion, the Board focused on Daugherty's argument that Dr. Westerfield's report should have been afforded presumptive weight as to disability. After quoting the ALJ's findings, as discussed above, the Board noted how its review is limited to a determination of whether the ALJ's findings "are so unreasonable based on the evidence they must be reversed as a matter of law." The Board pointed out how the ALJ, as factfinder, has the sole authority to determine the weight and credibility of the evidence. The Board then particularly stressed how

> **[t]he ALJ may 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.** *Magic Coal Co. v. Fox*, [19 S.W.3d 88, 96 (Ky. 2000)]; *Whittaker v. Rowland*, 998 S.W.2d 479 (Ky. 1999). Mere evidence contrary to the ALJ's decision is not adequate to require reversal on appeal. *Id*. In order to reverse the decision of the ALJ, it must be shown there was no substantial evidence of probative value to support his decision. *Special Fund v. Francis*, 708 S.W.2d 641 (Ky. 1986). (Emphasis added).

Addressing Daugherty's issue regarding the weight afforded to Dr. Westerfield's report, the Board reasoned KRS 342.315(2) only requires presumptive weight as to the clinical findings and opinions of a *university evaluator*. The Board held the ALJ correctly found "Dr. Westerfield was not a

university evaluator as described in KRS 342.315[,]" and thus "[t]he ALJ's decision to rely on portions of Dr. Westerfield's report falls squarely within the discretion afforded to him." The Board ultimately affirmed, holding

> the ALJ did not err in relying upon Dr. Westerfield's opinions to find Daugherty is entitled to an award of benefits based upon a 25% disability pursuant to KRS 342.732(1)(b)1. The ALJ was not, however, compelled to rely upon the gratuitous assertion by Dr. Westerfield that Daugherty is totally disabled.

Finally, in considering Daugherty's constitutional argument, the Board agreed with the ALJ that the Kentucky Supreme Court's decision in *Holmes* controlled; however, like the ALJ, the Board also concluded it lacked authority to rule on the constitutionality of the statute. This petition for our review followed.

II. STANDARD OF REVIEW

Our review of the Board's opinion is limited. "When reviewing the Board's decision, we reverse only where it has overlooked or misconstrued controlling law or so flagrantly erred in evaluating the evidence that it has caused gross injustice." *GSI Commerce v. Thompson*, 409 S.W.3d 361, 364 (Ky. App. 2012) (citing *Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992)). The Board's review of the ALJ's decision is likewise limited:

> KRS 342.285(2) provides that the Board shall not reweigh the evidence and substitute its judgment for that of the ALJ with regard to a question of fact. The standard of review with regard to a judicial appeal of an administrative decision is limited to determining whether

> the decision was erroneous as a matter of law. Where the ALJ determines that a worker has satisfied his burden of proof with regard to a question of fact, the issue on appeal is whether substantial evidence supported the determination. Substantial evidence has been defined as some evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable people. Although a party may note evidence which would have supported a conclusion contrary to the ALJ's decision, such evidence is not an adequate basis for reversal on appeal. The crux of the inquiry on appeal is whether the finding which was made is so unreasonable under the evidence that it must be viewed as erroneous as a matter of law.

Ira A. Watson Dep't Store v. Hamilton, 34 S.W.3d 48, 52 (Ky. 2000) (citations omitted). The ALJ "has the sole authority to judge the weight to be afforded the testimony of a particular witness" and "may 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." *Magic Coal Co.*, 19 S.W.3d at 96 (citations omitted). Finally, "[i]t has long been the rule that the claimant bears the burden of proof and the risk of nonpersuasion before the fact-finder with regard to every element of a workers' compensation claim." *Id*.

III. ANALYSIS

As presented for our review, Daugherty presents two separate arguments. First, he asserts the ALJ erroneously declined to award him PTD benefits for his CWP on the basis of Dr. Westerfield's report. Second, he asserts a constitutional challenge to the statutory scheme whereby the ALJ granted him

benefits under KRS 342.732 instead of KRS 342.730. We consider each argument in turn.

Daugherty first argues the ALJ erred in not considering him to be completely disabled, and thus eligible for PTD benefits, on the basis of Dr. Westerfield's report. He contends Dr. Westerfield's opinion on his total disability was not contradicted. Additionally, he asserts a university evaluator was not available to process his CWP case; therefore, Dr. Westerfield, as a physician under contract with the Department of Workers' Claims, should be afforded the same presumptive weight as a university evaluator.

KRS 342.315 only affords presumptive weight to the opinions of university evaluators. "To be a university evaluator, one must be employed by or on the staff of a medical school at the University of Kentucky or the University of Louisville." *Morrison v. Home Depot*, 279 S.W.3d 172, 175 (Ky. App. 2009) (citations and internal quotation marks omitted). Daugherty concedes Dr. Westerfield is not affiliated with a university medical school, but effectively asks us to apply a statutory presumption outside the plain language of the statute. We decline his invitation to do so. "Where a statute is intelligible on its face, the courts are not at liberty to supply words or insert something or make additions which . . . cure an omission." *Commonwealth v. Harrelson*, 14 S.W.3d 541, 546 (Ky. 2000).

Although the ALJ found Dr. Westerfield to be the most convincing of the medical experts and used his report to grant benefits to Daugherty under KRS 342.732, the Board correctly determined the ALJ was free to reject the portions of his report asserting Daugherty was "totally disabled." A factfinder "may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness[.]" *Magic Coal Co.*, 19 S.W.3d at 96 (citations omitted). "Not only does the ALJ weigh the evidence, but the ALJ may also choose to believe or to disbelieve any part of the evidence, regardless of its source." *Abbott Laboratories v. Smith*, 205 S.W.3d 249, 253 (Ky. App. 2006). Accordingly, we conclude the Board did not err in affirming the ALJ's decision to reject the "total disability" portions of Dr. Westerfield's report.

For Daugherty's second argument, he contends KRS 342.732, a statute specifically intended for coal workers, discriminates against that group compared to those suffering from pneumoconiosis resulting from a different occupation, who may claim benefits under KRS 342.730. He avers this statutory distinction results in a violation of equal protection principles under the Fourteenth Amendment of the United States Constitution and Sections 1, 2, and 3 of the Kentucky Constitution. Although Warrior argued the constitutionality issue should have been asserted in the BRC memorandum, the Kentucky Supreme Court does not require exhaustion of administrative remedies to challenge a statute as

unconstitutional. "This is because an administrative agency cannot decide constitutional issues. Thus, to raise the facial constitutional validity of a statute or regulation at the administrative level would be an exercise in futility." *Commonwealth v. DLX, Inc.*, 42 S.W.3d 624, 626 (Ky. 2001) (citation omitted).

Daugherty correctly points out the uncertain constitutionality of the current workers' compensation scheme as applied in CWP cases. The Kentucky Supreme Court has cited with approval Chief Justice Stephens's dissent in *Holmes*, stating "pneumoconiosis is pneumoconiosis is pneumoconiosis." *Vision Mining*, 364 S.W.3d at 458 (quoting *Holmes*, 872 S.W.2d at 456 (Stephens, C. J., dissenting)). Daugherty's constitutional argument is that KRS 342.732, which he acknowledges governs his claim, is unconstitutional because it treats workers who are disabled due to coal-related pneumoconiosis differently than workers who are disabled as a result of non-coal dust pneumoconiosis. Workers who are disabled as a result of non-coal dust pneumoconiosis are afforded different (and according to Daugherty) more favorable benefits, including total disability benefits and multipliers of permanent partial disability benefits based on age, education and inability to return to former employment.

The issue Daugherty raises is complex, and it requires a consideration of the continuing validity of *Kentucky Harlan Coal Co. v. Holmes*, 872 S.W.2d 446 (Ky. 1994), in light of other similar, but not identical challenges recently

considered by our courts, chiefly *Vision Mining, Inc. v. Gardner*, 364 S.W.3d 455 (Ky. 2011).[1] In *Vision Mining*, the Kentucky Supreme Court held that "[a]lthough the disease is given different names depending upon the source of the dust, there is no 'natural' or 'real' medical distinction between coal workers' pneumoconiosis and other occupational pneumoconiosis." *Id*. at 457.

Although *Vision Mining* abrogated *Holmes* to some extent, it did not as Daugherty contends amount to a wholesale rejection of it. *Vision Mining* held that subjecting CWP claims to different standards of proof and different procedures served no legitimate state interest. It did not hold the same with respect to benefits. In fact, *Vision Mining* noted that the *Holmes* court explicitly held that treating CWP claims differently with respect to benefits did serve a reasonable government interest. *Id.* at 470. The *Vision Mining* court noted that "there was a rational basis for the disparate treatment we reviewed *at the time*." *Id*. (emphasis added).

The rationale in *Holmes* centered largely on Special Fund assessments occasioned by the numerous CWP claims at that time:

> Clearly, KRS 342.732 applies equally to all coal workers who have contracted pneumoconiosis and the legislative history provides distinctive and natural reasons for classifying them separately from workers in other industries who have also contracted pneumoconiosis. The problem was caused, not by pneumoconiosis, but by coal workers' pneumoconiosis. Therefore, there was no

[1] The Kentucky Supreme Court has recently cited *Holmes* as having been abrogated by *Vision Mining*. *See Zuckerman v. Bevin*, 565 S.W.3d 580, 595 (Ky. 2018).

> necessity to include workers with other occupational pneumoconiosis in order to remedy the problems which the legislation sought to correct. Coal workers' pneumoconiosis accounted for 95% of the Special Fund's liability for occupational disease, and over 90% of awards for the disease were for total disability. Other pneumoconiosis comprised only part of the remaining 5% of occupational disease claims, and there was no indication that over 90% of awards for other pneumoconiosis were for total, occupational disability. The sheer number of coal workers' pneumoconiosis claims involving the Special Fund and the economic impact of those particular claims on the entire system is further justification for a more standardized treatment of those claims.

Holmes, 872 S.W.2d at 453.

Both the structure of the Workers' Compensation Act as well as the coal industry in Kentucky have changed dramatically since *Holmes* was decided in 1994. Nevertheless, the Commonwealth could still have a reasonable basis to treat CWP benefits differently. The coal industry has an impact on the economy of the state as does the number of coal workers unable to continue in that line of work due to CWP. The statute in question provides incentives to CWP claimants to obtain retraining and further education. *Vision Mining* did not address these issues.

We conclude *Holmes* remains binding on this Court with respect to the validity of KRS 342.732. "The Court of Appeals is bound by and shall follow applicable precedents established in the opinions of the Supreme Court and its predecessor court." *Matlock v. Commonwealth*, 344 S.W.3d 138, 139 (Ky. App.

2011) (quoting SCR 1.030(8)(a)). Unless *Holmes* is overturned by the Kentucky Supreme Court because a reasonable basis no longer exists to treat CWP benefits differently, we must follow it. Whether that day has arrived is a question only the Supreme Court can answer.

IV. CONCLUSION

For the foregoing reasons, we affirm the opinion of the Workers' Compensation Board.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Thomas E. Springer, III Madisonville, Kentucky	Brandy B. Hassman Lexington, Kentucky