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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000796-WC

SIDNEY COAL COMPANY, INC./ ROCKHOUSE ENERGY MINING COMPANY — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-05-01895

LARK SLONE; HONORABLE IRENE STEEN, ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: HOWARD AND MOORE, JUDGES; GUIDUGLI,[1] SENIOR JUDGE.

MOORE, JUDGE: The Honorable Irene Steen, Administrative Law Judge (ALJ), entered an opinion and award in favor of Lark Slone, a former employee of Sidney Coal Company, Incorporated/Rockhouse Energy Mining Company (Sidney Coal). Sidney Coal appealed the ALJ's decision to the Workers' Compensation Board arguing that the

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[1] Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

ALJ had ignored a crucial portion of medical evidence. The Board affirmed the ALJ's decision, and Sidney Coal now seeks review of the Board's decision. In its brief, Sidney Coal argues again that the ALJ and the Board ignored an allegedly crucial portion of the medical evidence. Finding that the Board did not misconstrue any law nor did it flagrantly err in evaluating the evidence, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

For most of Lark Slone's adult life, he worked in the coal mining industry. In December 2005, Slone filed a workers' compensation claim against Sidney Coal. In Slone's application for resolution of his claim, he asserted that he suffered from hearing loss due to repetitive exposure to work-related industrial noise.

Turning to the medical evidence found in the record, there are reports from three physicians. Dr. Robert Manning, a Doctor of Audiology, performed an audiological evaluation on Slone and opined that Slone suffered from severe sensorineural hearing loss in both ears, although the loss was greater in the left ear than in the right. According to Dr. Manning, the nature of Slone's hearing loss was "most commonly associated with long-term loud noise exposure." Furthermore, using the American Medical Association's PHYSICIAN GUIDES TO THE EVALUATION OF PERMANENT IMPAIRMENT (5th ed.) (Guides), Dr. Manning opined that Slone had a 3% impairment to his whole person.

Next, we consider the report of Sidney Coal's expert, Dr. Joseph Touma. After performing audiometric tests on Slone, Dr. Touma diagnosed Slone with "[h]igh frequency sensorineural loss, bilateral, more left side" and opined that the audiograms

established a pattern of hearing loss that was compatible with being caused by hazardous workplace noise exposure. Using the Guides, Dr. Touma deemed Slone to have a 5% permanent functional impairment. In addition, Dr. Touma noted that there was greater hearing loss in Slone's left ear and opined that this greater hearing loss was "most[] likely unrelated to noise exposure."

Finally, we turn to the report of Dr. Ian Windmill, who performed a university evaluation as required by Kentucky Revised Statute (KRS) 342.315(1). During Dr. Windmill's evaluation of Slone, he performed two audiometric tests, an otoacoustic emissions test and a communication needs assessment. According to Dr. Windmill, Slone's hearing loss was greater than expected from a person of Slone's age. Dr. Windmill opined that Slone's hearing loss was consistent with long-term noise exposure but was asymmetrical, being worse in the left ear. Windmill noted that this asymmetry was "unusual for a hearing loss due strictly to noise exposure. However, the majority of the hearing loss is likely due to long term [sic] noise exposure. Retrocochlear pathology, particularly on the left, should be ruled out prior to a definitive diagnosis of noise induced hearing loss." Despite this reservation on Dr. Windmill's part, he opined that Slone suffered from a 8% permanent whole person functional impairment.

Because the asymmetrical nature of Slone's hearing loss caused the parties some consternation, they subsequently deposed Dr. Windmill to clarify his opinion. During the deposition, the following exchange took place between Sidney Coal's counsel and Dr. Windmill

Sidney Coal: [Y]ou probably know you have to have a statutory minimum of an eight percent impairment rating before you can qualify for benefits. The question is, can you definitively tell us that your entire eight percent impairment rating is due to noise exposure, or did some other condition contribute, or can you say?

Dr. Windmill: Truthfully, I can't say that it's due to one, another, or both.

Sidney Coal: So, what you can't -- you cannot tell us -- and correct me if I'm wrong -- you cannot tell us that Mr. Slone has an eight percent impairment to the whole man based on a hearing loss that can be attributed to noise exposure?

Dr. Windmill: I -- I believe -- I'm going to answer that in the same manner, just so I -- I -- because I am -- I'm a little confused as well, I think. But, I -- I cannot say that the eight percent hearing loss -- eight percent impairment rating due to the hearing loss is strictly due to noise exposure. I cannot do that at this time.

Sidney Coal: And why do you -- why are you unable to make a definitive conclusion in that regard?

Dr. Windmill: Typically, hearing loss due to noise exposure affects both ears about the same, and -- and because there's differences between the two ears -- and this kind of standard operating protocol, whether it's a patient that comes from Workers' Claims Department or anywhere else -- whenever we have a difference the two ears that's fairly consistent -- and in this case, as you noted, there's the acoustic reflexes and discrimination tests, but also the pure tone tests on which the eight percent calculation is based. Those -- those are all different on the left ear than the right, and -- and that raises a red flag to look for things like tumors, which are hidden behind the ear that we can't evaluate. So, typically, we have to get a radiologic study first to rule that out, and then if we rule that out -- it tells us there's nothing going on with the nerve, then we kind of work our way backwards into the -- into the prior diagnosis of noise -- or a more definitive diagnosis, I should say, of noise exposure.

> **Sidney Coal:** So -- so, correct me if I'm wrong, you cannot tell us that noise exposure alone has caused an eight percent impairment to the whole person?
>
> **Dr. Windmill:** That's correct.

During cross-examination by Slone's attorney, the following exchange occurred:

> **Slone:** [Y]ou've also testified that typically noise induced hearing loss would be the same in both ears. But, have you seen situations in which someone may have a greater hearing loss on one side versus the other in noise related hearing loss situations?
>
> **Dr. Windmill:** Yes -- yes, I have. There are two common situations that we see with noise exposure. Well, I shouldn't say that. There -- there's multiple situations. But, for example, truck drivers, their left ear always is worse than their right ear, much like Mr. Slone's pattern is, and that's because the left ear is always exposed to a greater degree because of the open windows in the trucks and the road noise and things like that. Hunters -- people who use shotguns or rifles have differences. People who use ear phones, or people -- even like telephone operators have differences between ears that are due to what we classify as noise exposure. So, yes, it is possible to have asymmetry due to noise exposure.

Subsequently, Dr. Windmill testified that, during his evaluation of Slone, Slone indicated that, during his coal mining career, his left ear was often exposed to more noise than his right. In fact, during Slone's prior deposition, he testified that his hearing loss was worse in his left ear. When asked why, Slone explained

> I think where I might have run a scoop all the time. You face this way and my left ear was toward the motor, running the hydraulics and everything. It made a lot of racket and I'd always have my left ear that way. I don't know whether that would have caused it now.

After the parties' time for presenting evidence had expired, the ALJ handed down her opinion and award. In her opinion, the ALJ set forth the relevant medical evidence and determined that Slone meet his burden of proof that his hearing loss was work related. Regarding the appropriate impairment rating, the ALJ stated

> Dr. Windmill did assess an 8% impairment, but was unable to quantify any non work related portion. This appears to be much like the cases where a goodly portion of a claimants [sic] hearing loss was attributable to natural aging processes, which the Supreme Court, once and for all decided, should not be excluded when calculating a potential award, even when specific amounts of impairment ratings were assigned as such. In this case, Dr. Windmill did not even attempt to make a percentage to be excluded ... . Dr. Windmill had recognized that some people, who have work related hearing loss, could have it worse on one side over the other and in this particular case, Plaintiff had specifically testified that he had had more exposure to his left ear, than his right, due to the position in which he worked.

In sum, the ALJ concluded that Slone suffered from an 8% permanent partial disability and awarded him $30.97 per week for the next 425 weeks.

Within a very short span of time, Sidney Coal petitioned the ALJ to reconsider her opinion and award. In its petition, the coal company argued that the ALJ had overlooked a crucial portion of Dr. Windmill's testimony. The coal company came to this conclusion because the ALJ's opinion did not address this allegedly crucial piece of evidence. A few days after Sidney Coal had filed its petition, the ALJ summarily denied it.

In response, the coal company sought relief from the Workers' Compensation Board. Before the Board, Sidney Coal claimed again that the ALJ had ignored a crucial portion of Dr. Windmill's testimony; however, the Board rejected the coal company's arguments and affirmed the ALJ's opinion and award.

II. STANDARD OF REVIEW

When reviewing the Board's decisions, we will only reverse when the Board has overlooked or misconstrued controlling law or so flagrantly erred in evaluating the evidence that it has caused gross injustice. *Daniel v. Armco Steel Company,* 913 S.W.2d 797, 798 (Ky. App. 1995). To properly review the Board's decision, we must ultimately review the ALJ's underlying opinion. If the ALJ found in favor of the employee, who had the burden of proof, then we must determine whether the ALJ's findings were supported by substantial evidence. *Special Fund v. Francis,* 708 S.W.2d 641, 643 (Ky. 1986); s*ee also Wolf Creek Collieries v. Crum,* 673 S.W.2d 735, 736 (Ky. 1984). The Supreme Court of Kentucky has defined substantial evidence as some "evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable men." *Smyzer v. B.F. Goodrich Chemical Co.,* 474 S.W.2d 367, 369 (Ky. 1971) (citation omitted). In other words, substantial evidence is "evidence which would permit a fact-finder to reasonably find as it did." *Francis,* 708 S.W.2d at 643. And as the fact-finder, the ALJ, not this Court nor the Board, has sole discretion to determine the quality, character and substance of the evidence. *Whittaker v. Rowland,* 998 S.W.2d 479, 481 (Ky. 1999) (citing *Paramount Foods, Inc. v. Burkhardt,* 695

S.W.2d 418, 419 (Ky. 1985)). Not only does the ALJ weigh the evidence, but the ALJ may also choose to believe or disbelieve any part of the evidence, regardless of its source. *Whittaker,* 998 S.W.2d at 481 (citing *Caudill v. Maloney's Discount Stores,* 560 S.W.2d 15, 16 (Ky. 1977)).

III. ANALYSIS

Claims for work-related hearing loss are governed by KRS 342.7305. According to that statute, for an employee to be eligible for income benefits for his work-related hearing loss, he must have, at the very least, an 8% whole person impairment. KRS 342.7305(2).

Knowing this, Sidney Coal argues in its brief that the ALJ did not consider the entirety of the medical evidence because she failed to consider a crucial portion of Dr. Windmill's testimony. Specifically, Sidney Coal asserts that the ALJ ignored this exchange between its attorney and Dr. Windmill:

> **Sidney Coal:** So -- so, correct me if I'm wrong, you cannot tell us that noise exposure alone has caused an eight percent impairment to the whole person?
>
> **Dr. Windmill:** That's correct.

According to the coal company, this testimony undermines the ALJ's conclusion that Slone had the requisite 8% impairment because it demonstrates that Dr. Windmill could not definitively conclude that Slone's hearing loss was solely caused by noise exposure. Thus, Sidney Coal reasons that the opinions rendered by Dr. Windmill did not rise to the level of substantial evidence.

First, Sidney Coal labors under the misconception that the ALJ was required to discuss, in her analysis, the excerpt set forth above from Dr. Windmill's deposition. The ALJ has sole discretion to determine the quality, character and substance of the evidence and has broad discretion in determining the weight of the evidence presented before her. *Whittaker,* 998 S.W.2d at 481; s*ee also Burton v. Foster Wheeler Corp.,* 72 S.W.3d 925, 929 (Ky. 2002). The ALJ's opinion must be supported by, and therefore, set forth “facts drawn from the evidence ... so that both sides may be dealt with fairly and be properly apprised of the basis for [her] decision.” *Shields v. Pittsburgh and Midway Coal Mining Co.,* 634 S.W.2d 440, 444 (Ky. App. 1982); s*ee also* KRS 342.275(2). In sum, the ALJ was only required to discuss those basic facts that supported her ultimate conclusions. *Shields,* 634 S.W.2d at 444. In the ALJ's opinion, she relied upon the report and testimony of Dr. Windmill and relied on Slone's testimony as well. Even a cursory examination of the ALJ's opinion reveals that she more than adequately set forth the evidence underlying her decision, and we find that the parties were apprised of the basis of her decision. Nothing more was required.

Second, turning to the evidence relied upon by the ALJ, we find that, in Dr. Windmill's report, he assessed Slone with an 8% whole person impairment resulting from work-related hearing loss. During his deposition, Dr. Windmill testified that he could not definitively rule out the notion that part of Slone's hearing loss was caused by something other than industrial noise exposure, but he testified that it was possible to have greater hearing loss in one ear than the other due to noise exposure. He explained that truck

drivers, hunters and telephone operators often suffer from greater hearing loss in one ear as opposed to the other due to greater noise exposure on one side of the body. Moreover, in Slone's deposition, he testified that he was often exposed to greater noise on his left side as opposed to his right. These various pieces of evidence, when considered together, certainly permit the ALJ to reasonably find as she did. *See Francis,* 708 S.W.2d at 643. Thus, this evidence constituted substantial evidence that supported the ALJ's opinion and award. Because the ALJ's decision was so supported, the Board correctly affirmed the ALJ's decision.

In the alternative, Sidney Coal notes that the Board included the following sentence in its opinion regarding the ALJ's decision, "It appears that the ALJ relied on the KRS 342.315 evaluator's opinion that Slone had sustained an 8% whole body impairment due to exposure to industrial noise." According to Sidney Coal, because the Board used the word "appears" in this sentence when it analyzed the ALJ's decision, the Board tacitly acknowledged that the ALJ's analysis of the evidence was defective. Despite the Board's use of the word "appears," we are completely confident that if the Board had found the ALJ's analysis of the evidence to be defective, then it would have simply reversed the ALJ's opinion. Therefore, we find Sidney Coal's argument to be without merit and will not address it further.

Because the ALJ's decision was supported by substantial evidence and because the Board neither misconstrued the law nor erred in evaluating the evidence, we affirm the opinion of the Workers' Compensation Board.

ALL CONCUR.

BRIEF FOR APPELLANT:	NO BRIEF FOR APPELLEE
A. Stuart Bennett Lexington, Kentucky	