

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: July 24, 2015

CLAIM NO. 201288162

AICHI FORGE USA, INC.

PETITIONER

VS.

APPEAL FROM HON. JEANIE OWEN MILLER,
ADMINISTRATIVE LAW JUDGE

MATT MARSH
and HON. JEANIE OWEN MILLER,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING
* * * * *

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

STIVERS, Member. Aichi Forge USA, Inc. ("Aichi") seeks review of the March 6, 2015, Opinion and Award of Hon. Jeanie Owen Miller, Administrative Law Judge ("ALJ") finding Matt Marsh ("Marsh") totally occupationally disabled and awarding permanent total disability ("PTD") benefits and medical benefits. Aichi also appeals from the

April 9, 2015, Order denying its petition for reconsideration.

On appeal, Aichi argues the ALJ erred in applying the definition of permanent total disability to the facts and evidence. It contends Marsh's testimony establishes he is working and the work he is performing is customary and consistent with his capabilities.

Marsh alleged he was injured on April 20, 2012, when he was "moving heavy pieces of steel in [his] job for several hours." He alleged his "left shoulder began to hurt and [he] kept working until he felt a pop in [his] left neck and shoulder."

Relying upon the opinions of Drs. Timothy Kriss and Ronald Burgess, Aichi contended Marsh was not injured. Marsh relied upon the opinions of Dr. Gregory D'Angelo, an orthopedic surgeon, and Dr. Dirk Franzen, a neurosurgeon, Marsh's treating physicians.

In a Benefit Review Conference Order and Memorandum dated August 14, 2013, the parties agreed to bifurcate the proceedings to determine the issue of necessary medical treatment and entitlement to interlocutory relief. The parties also agreed the ALJ would resolve the issues of "work-related/causation and injury as defined by the Act."

In an October 3, 2013, Interlocutory Opinion, Award, and Order, after summarizing the medical evidence and Marsh's testimony, relying upon the opinions of Dr. D'Angelo, the ALJ found Marsh sustained work-related left shoulder and neck injuries on April 20, 2012, while in the employ of Aichi. She also found the medical treatment recommended by Drs. D'Angelo and Franzen to be reasonable and necessary for the cure and relief of Marsh's injury. Therefore, Drs. D'Angelo and Franzen needed to make a determination whether Marsh should undergo anterior cervical disc fusion and/or shoulder surgery. Temporary total disability benefits were awarded from October 15, 2013, continuing so long as Marsh remained temporarily totally disabled. Thereafter, Dr. D'Angelo performed arthroscopic surgery on Marsh's left shoulder.

Dr. Franzen subsequently concluded Marsh had no impairment as a result of a possible neck injury, did not need surgery, and had no additional restrictions over and above those assessed for the shoulder. He opined the objective diagnostic studies and his clinical examination revealed Marsh was neurologically intact.

After entry of the Interlocutory Opinion, Award, and Order, medical, vocational, and lay evidence, was

introduced. Marsh testified at the January 27, 2015, hearing.

In the March 2015 decision determining Marsh permanently totally disabled, the ALJ provided the following analysis, findings of fact, and conclusions of law:

After reviewing the evidence in the record, I find that the Plaintiff has sustained his burden of proof that he is permanently totally disabled. In making this finding, I rely upon the testimony of the Plaintiff and the opinions of Dr. D'Angelo, Dr. Franzen and Dr. Crystal.

The Plaintiff argues he is permanently and totally disabled as defined by the Act. The Defendant/employer argues the Plaintiff's disability is partial, if any. After reviewing all of the evidence in this case, I find that Plaintiff now suffers from a permanent total occupational disability.

It is clear that Plaintiff injured his left shoulder at work on April 20, 2012. What was not as clear was whether his neck was also injured. In the Interlocutory Opinion, I found Plaintiff was temporarily totally disabled and entitled to medical treatment for both the shoulder and the neck. The Defendant/employer began paying TTD - as ordered - on August 25, 2013 and continued to July 9, 2014.

During this period, Plaintiff underwent shoulder surgery and also medical treatment for his neck. His shoulder impairment is 7% to the whole

body per the AMA Guidelines, 5th edition, per Dr. D'Angelo's opinion.

The medical evidence presented indicates that Plaintiff does not retain an impairment rating for his neck. I find that Plaintiff has returned to the pre-work injury "baseline" condition as it relates to the cervical spine/neck and he was entitled to the medical treatment as ordered in the Interlocutory Opinion and Order of October 3, 2013 for the temporary cervical spine/neck injury. However, he shall not be entitled to any future medical benefits for his cervical spine/neck. For this finding I rely on the opinion of Dr. Franzen.

It was stipulated that Plaintiff's last day of work was September 26, 2012, and he has not returned to work since that day. He apparently has filed for Social Security disability - but has not received any information on the status of that claim.

Permanent total disability is defined in KRS 342.0011(11)(c) 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. Hill vs. Sextet Mining Corp., 65 SW3d 503 (Ky. 2001). "Work" is defined in KRS 342.0011(34) as providing services to another in return for remuneration on a regular and sustained basis in a competitive economy. The statutory definition does not require that a worker be rendered homebound by his injury, but does mandate consideration of whether he will be able to work reliably and whether his physical restrictions will interfere with his vocational capabilities. Ira A. Watson

Department Store vs. Hamilton, 34 SW2d 48 (Ky. 2000).

In determining whether a worker is totally disabled, an Administrative Law Judge must consider several factors including the worker's age, educational level, vocational skills, medical restrictions, and the likelihood that he can resume some type of "work" under normal employment conditions. Ira A. Watson Department Store vs. Hamilton, supra.

In applying the factors set out in Ira Watson, supra, it is apparent that Plaintiff's vocational factors infer his total and permanent disability. Those factors I have considered are: his age, 38, which is a younger worker. His educational level - is technically 12th grade. However, the overwhelming evidence is that Plaintiff has many mental deficiencies, along with profound hearing loss and visual deficits. At the time of the injury he had the skills and ability [sic] perform a very limited and set type of job. The job(s) he had performed in the past required him to be able to do heavy to medium lifting on a repetitive basis. He had to do strenuous pushing and pulling --- hammering --- and "manipulating" heavy weights.

Dr. Crystal's opinion was that Plaintiff could perform entry-level jobs that did not require judgment or decision making and only simple repetitive tasks. His opinion was based upon his testing and taking into consideration Plaintiff's work experience and physical restrictions and limitations. It is clear to the undersigned that with the medical restrictions placed on Plaintiff by the doctors, he could not return to his

former work at the present time. Additionally, the jobs which have been available to him in the past - are all now unavailable due to his medical restrictions. His mental, hearing and sight deficits, coupled with the physical restrictions, would keep him from obtaining and maintaining work. Although Dr. Crystal's opinion is persuasive regarding Plaintiff's employability - I find that his lack of transferable skills, his lack of manual dexterity, coupled with his inability to adapt to many work environments would make him essentially unemployable. I agree with the Plaintiff's argument that Mr. Marsh's main ability was his physical strength. That along with his work ethic allowed him to work in the public workforce for 20 years. Without his full range of physical abilities to offer, he has only a minimal chance of obtaining employment.

Certainly Plaintiff would not be able to find suitable employment. "Suitable employment" has been defined as work which bears a reasonable relationship to an employee's experience and background, taking into consideration the type of work performed at the time of injury, age, education, income level, earning capacity, physical and mental abilities, vocational aptitude, and other relevant factors. See Wilson vs. SKW Alloys, Inc., 893 SW2d 800 (Ky. App., 1995).

Aichi filed a petition for reconsideration requesting additional findings of fact regarding the determination Marsh is totally occupationally disabled. Citing to the results of the functional capacity

evaluation, Dr. D'Angelo's restrictions, and the job description it introduced, Aichi argued Marsh retained the physical ability to obtain employment. It contended Dr. Crystal's report reflects Marsh has been performing farm work routinely since his injury which is considered medium work under Department of Labor standards. It maintained Marsh admitted to Dr. Crystal and in his deposition that he is capable of performing medium level work and had been performing that work. With respect to this issue, Aichi offered the same argument it now makes on appeal.

In the April 9, 2015, Order, the ALJ overruled Aichi's petition for reconsideration and consistent with its request provided the following additional findings of fact:

As the finder of fact, the undersigned was not persuaded that the "job description" introduced as Exhibit 1 at the Hearing accurately described Mr. Marsh's job at AICHI Forge. When asked about the description of his job, Mr. Marsh indicated that the "big ones that I was running, he said about 200 pounds." (Transcript of Hearing p 24) That is a far cry from the 21-50 pounds occasionally lift requirement described in the job description. The introduction of a written job description, without any supporting testimony, does not convince the undersigned that it was an accurate account of Mr. Marsh's job for the employer. Certainly other aspects of the job description tendered by the

defendant could not apply to Mr. Marsh. Mr. Marsh does not and could not: 1) read at a high school level; 2) write at a high school level and 3) Hearing/listening. It is undisputed and documented by Dr. Crystal that Plaintiff reads at a 4th percentile level and writes at a 3rd percentile level. Plaintiff's hearing is obviously impaired as he wears hearing aids, attended Kentucky School for the Deaf and even had difficulty hearing the conversation at the conference table in a quiet Hearing Room. Additionally, the job description is unsigned and undated - making its contents unverified by anyone - including the plaintiff.

The employer proffered a written document, unverified, unsigned, undated which is clearly at odds with the testimony of the plaintiff regarding his job duties. The Plaintiff testified 4 different times during the course of this litigation. His testimony was consistent that he lifted and manipulated steel billets weighing in excess of 100 pounds and up to 200 pounds and that he repetitively lifted, twisted, and maneuvered weights in various weights throughout the day.

Significant to the undersigned findings was an Exhibit attached to Dr. D'Angelo's deposition of 7/18/2014 entitled: "Matt Marsh Job Description" prepared from Matt Marsh's deposition. Dr. D'Angelo specifically stated that the impairment rating and the FCE were accurate - that Mr. Marsh showed no signs of functional overlay or secondary gain. He stated that Matt Marsh got "good pain relief" but he was "definitely going to be weaker in the future" and that he should not contemplate doing any kind of heavy work with the additional restrictions

of no overhead, meaning the elbow shouldn't go above shoulder height regardless of the weight.

In addition to his deposition testimony, Mr. Marsh testified before the undersigned on August 27, 2013 during the Hearing on Interlocutory Relief that the billets he continuously lifted and maneuvered could weigh from "50 to 200, 250 pounds", which he moved with tongs via leverage against a steel bar.

During the January 27, 2015 Hearing the Plaintiff again testified that he regularly lifted and manipulated heated billets weighing up to 200 pounds on a repetitive basis. It is significant to the undersigned that Mr. Marsh's description of his job duties, stated under oath on at least four occasions, was never countered by testimony from a company representative. The "job description" simply does not carry any weight when compared to Mr. Marsh's uncontested sworn testimony. Therefore, the defendant's request for additional specific findings on this matter by way of Petition for Reconsideration is granted. For the above stated reasons, I find the job description filed by the defendant at the Hearing lacks accuracy and is not useful to the undersigned when applying the job requirements to the FCE findings or Dr. D'Angelo's opinions.

For essentially the same reasons as noted above, I find Dr. D'Angelo's opinion regarding Mr. Marsh's ability to return to work (and the restrictions placed upon Mr. Marsh) was based upon accurate and substantial evidence in the form of Mr. Marsh's testimony as to his work activities and his job

description. Again, other than the unsubstantiated/unverified job description of Exhibit 1 to the Hearing transcript, there was nothing in the record to counter Mr. Marsh's description. It should be noted that the defendant never supplied Dr. D'Angelo with a copy of the proffered job description - making it impossible for him to have opined regarding same. The "further findings of fact" requested by the defendant is granted to the extent that it is explained above - as to what and why - the undersigned relied upon Mr. Marsh's testimony with regard to his job duties.

The defendant next avers that Dr. Crystal's report "clearly states that Plaintiff has been performing farm work routinely since his injury" which is medium work under DOL standards. The defendant requests "clarification" as to why Mr. Marsh can perform medium work in the form of farm work but is incapable of performing medium factory work. Plaintiff testified on January 27, 2015 that he drives a tractor and his father doesn't let him do much else. (Hearing Transcript, P. 16). Plaintiff may drive the tractor up to 3 hours or just minutes, depending on the tasks of the day. (Hearing Transcript, P. 16-17). He does not drive the tractor every day, just when needed.

Irrespective of exactly what Mr. Marsh does occasionally for his father on the family farm, the undersigned finds that Mr. Marsh is not capable of medium work on a regular and sustained basis - i.e. 8 hours per day, 5 days a week. Mr. Marsh's testimony is the basis of this finding. I found Mr. Marsh extremely believable - in part because I do not believe Mr. Marsh has

the mental cunning to exaggerate or manufacture facts which would be more favorable to him. Mr. Marsh is at most a part time helper on the family farm and is capable of only a few routine tasks, and is "embarrassed" to receive room and board from his parents. Plaintiff is in no sense a competitive farm worker and I find that he does not have the ability to perform medium work on a regular and sustained basis. For this finding I rely primarily on Mr. Marsh's testimony - but in part on Dr. D'Angelo's physical restrictions.

Plaintiff testified he could not now do his easiest job ever, which required lifting and moving 20 pounds cast aluminum and steel wheels. (Hearing Transcript, P. 12-14). That job involved lifting 20 pounds about 20 times per hour. Plaintiff testified that any repetitive use of his left arm causes the arm to quickly fatigue. His pain increases as his physical activity increases. (Transcript, P. 8-10). Dr. D' Angelo opined that Mr. Marsh should not:

"contemplate doing any kind of heavy work, especially - I would also add to the restrictions no overhead, meaning the elbow shouldn't go above shoulder height regardless of the weight... In other words, he shouldn't be reaching overhead even if he has light parts because that chronic overhead work can irritate this type of situation . . ."
(Dr. D' Angelo depo July 18, 2014)

Mr. Marsh also testified that his arm tingles as if it were going to

sleep with repetitive use and sometimes gets hard to lift. The pain and fatigue in the left extremity makes it difficult to get comfortable at night and he sleeps poorly. (Hearing Transcript, P. 14-15). Plaintiff's physical strength and his ability to perform that heavy work on a repetitive basis was the basis of his occupational ability. He has no skills transferrable to sedentary work and his digital manipulation skills are at the 1st percentile.

The language in the seminal case of Ira A. Watson Dept. Store v. Hamilton, 34 S.W. 2d 48 (Ky. 2000), provides the legal basis for finding Mr. Marsh permanently and totally disabled: [citation omitted]

Here I have considered Mr. Marsh's testimony and found it credible not only as to what his duties were for the defendant/employer, but also what he is now capable of doing post-injury. His mental functioning, as well as his medical restrictions, are significant factors in my deliberation. Essentially his age of 38, is the only vocational element he has in his favor. His age is a critical factor in my determination and subsequent order of a vocational rehabilitation evaluation. It should be determined if he can be re-trained into a job which would allow him to re-enter the workforce. The reasonable inference I have drawn from the evidence is that Mr. Marsh - without additional training - does not have the ability to maintain regular and sustained work. For this finding I have relied on Mr. Marsh's testimony - the findings of the FCE - Dr. D'Angelo's opinions and Dr. Crystal's report.

Aichi first argues pursuant to the definition of permanent total disability in KRS 342.0011(11)(c), Marsh is not permanently totally disabled. Aichi cites to several portions of Marsh's testimony acknowledging he works on his family farm and his wages for this farm work consist of room and board. It notes KRS 342.0011(17) classifies room and board as wages. Aichi contends an objective reading of Marsh's testimony provides the Board with sufficient evidence to overturn the ALJ's finding of permanent total disability. Aichi insists Marsh cannot be entitled to PTD benefits as well as wages as that would be a blatant abuse of the workers' compensation system.

Aichi also argues the farm work Marsh has been performing is customary since he has performed this work since 1996. Aichi notes Dr. D'Angelo assigned work restrictions of lifting up to sixty pounds with occasional lifting of fifty pounds. It also notes in his vocational assessment report, Dr. Crystal indicated these restrictions permit Marsh to work medium level work. Thus, Marsh has been doing customary and medium level work since the April 20, 2012, injury. It contends Marsh's testimony demonstrates his work injury did not negatively affect his physical ability to perform medium level farm work as he has continued to perform such work up until at least the

date of the final hearing on January 27, 2015. Aichi cites to Marsh's testimony he has "been around" farming his entire life and continues to perform various tasks even after his injury. It contends Marsh turned to farm work when he was having trouble finding a non-farm job, and the work injury did not result in an impairment sufficient to prevent him from returning to the farm work.

Aichi asserts Dr. Crystal's report and testimony reveal Marsh is capable of doing certain jobs which consist of bench work, manufacturing, service, sales, clerk, and cashier. It asserts the following testimony from Marsh's 2013 deposition is telling:

I've been told by a few people, well, if you go get another job and you got Workers' Comp, that's going to hurt you. So I said okay, best thing for me to do is not to do nothing [sic].

Aichi argues this testimony establishes a few people have informed Marsh he needed to refrain from obtaining employment not because of his physical condition but because if he gets a job it will negatively affect his workers' compensation benefits. It contends this statement by Marsh should give the Board some insight into his true motivation. Aichi posits that currently Marsh is receiving free housing, utilities, and sustenance from his employer/parents while collecting weekly PTD benefits. As

such, Marsh has no motivation to pursue further employment because he already has the best of both worlds. It contends the ALJ's finding of permanent total disability allows Marsh to game the system. We disagree and affirm.

Marsh's April 7, 2013, deposition reveals he lives with his parents, is a high school graduate, and has a CDL. He raised tobacco for thirteen years from 1996 to 2009. He has only performed jobs involving manual labor. Marsh testified he regularly lifted items weighing 100 to 200 pounds and would also tug and pull dyes weighing approximately 500 pounds. Marsh last worked for Aichi in mid-September 2012 performing light duty and he was terminated by Aichi in January 2013. He has not worked since his termination.

Marsh indicated he currently carries out the trash using his right arm. He testified he was born with "half [his] hearing." He has hearing aids which he cannot wear at work because he uses ear plugs. Marsh testified he is also "learning disabled." He experiences pain upon lifting heavy weights, straining, tugging, and pulling. He acknowledged he could lift a twenty-four can case of soft drinks to almost ear level. He is unable to change his car tire. Hard physical exertion causes pain from the left side of his neck to his shoulder. Marsh acknowledged he

had driven a tractor and has helped with baling hay. He also operates a lawn mower. He believes he is no longer able to split fire wood. Marsh stays with his parents who have asked him to do what he can; however, he has to be careful what tasks he performs. While Marsh did provide the testimony about which Aichi complains, just after offering that testimony he concluded with the following: "I'm the kind I don't give up. I'll always get out there and try."

During the August 27, 2013, hearing concerning the bifurcated issues, Marsh testified he could not return to work without first having his neck and shoulder fixed. At that time, he did not believe he was able to work. Since he cannot work, he did not seek unemployment benefits.

During his June 24, 2014, deposition, Marsh indicated the only work he performs is helping his father around the farm which would include driving a tractor or "something like that." He does not perform the hard labor he previously performed. Marsh has carried and poured a thirty pound bucket of feed which is the heaviest item he has lifted. He estimated he will lift two or three buckets of feed once a day. He will also hook up a tractor. He will try to help his dad if requested, but his parents will

not let him do much. Marsh testified he sits and watches his dad and brother work because they keep him from doing tasks which he should avoid. He also mows the yard using a riding lawn mower which takes approximately two hours. His labor is counted as rent. Marsh is unable to toss a ball with his son. He testified he "still has to watch" what he does and how he does it. If he drives a tractor quite a bit his shoulder hurts. Depending on how his shoulder feels, Marsh estimated he could drive a tractor between two and eight hours a day. He believes he cannot perform the work he was performing at Aichi. Marsh has not tried to do anything because he did not want to "jeopardize" his shoulder. He does not work every day but only when his father needs help. He estimated thirty hours was the most he had worked on the farm in a week, which occurred four weeks before his deposition, when he helped his dad put up hay. He has done nothing since. The work he does for his father is easier than some of the work he performed at Aichi. Marsh indicated his work at Aichi entailed a lot of heavy lifting, pushing, pulling, and tugging. Any work he performed on the farm is dissimilar to the factory work he performed.

During the January 2015 hearing, Marsh testified he has lost strength in his left shoulder and as a result

is very cautious when using his shoulder. If he uses the left shoulder frequently, pain forces him to stop his activity. Marsh testified his job at Aichi does not coincide with the job description Aichi introduced at the hearing. Marsh testified he cannot return to work because he has no strength in his left arm. His job at Aichi required a good deal of strength in grasping the steel using tongs. Marsh believed he is unable to perform even the easiest job within his work history which was working for CM-CLA. The job at CM-CLA required him to lift twenty pounds about twenty times an hour. He estimated he would last about an hour and a half to two hours at that job before needing to rest.

When his left arm tires he has trouble sleeping which affects his ability to function the next day. Marsh testified he is not an inside person and has only done factory work. He knows nothing about computers and does not wear dress clothes. He testified he was told he is not college material and "gave up trying." Consequently, he did "what he knew how to do." Marsh acknowledged he has farmed his entire life and only performed jobs which entail manual labor. He estimated the longest he had driven a tractor is five hours and he only drives it when needed. Marsh conceded he could carry a sixty pound bag of feed

with his right arm but cannot carry anything with his left. He is unable to move bales of hay, and as a result, he is merely a part-time worker. He has not drawn unemployment. Marsh was unable to think of any job he could perform for forty hours. His parents provide room and board for the work he performs on the farm.

Marsh's testimony does not demonstrate he was capable of performing any of the jobs within his job history. Contrary to Aichi's assertion, Marsh's testimony also establishes he is not capable of fully engaging in farm work as his left shoulder condition severely limits farm work.

Dr. D'Angelo diagnosed a labral tear in the left shoulder and performed arthroscopic surgery to repair the torn ligament and the acromioclavicular joint. Dr. D'Angelo believes Marsh was capable of carrying fifty pounds occasionally which he defined as being two to three times per hour. He did not believe Marsh retained the physical ability to return to the work he was performing at the time of the injury. D'Angelo believed carrying twenty pounds with the arms extended may be harder than carrying fifty pounds with his arms close to his body. He assessed a 7% impairment rating for the left shoulder condition which he opined was caused by the injury. Dr. D'Angelo did

not believe Marsh should consider any type of heavy work and is precluded from reaching overhead even while holding light parts. Consistent with this restriction, Dr. D'Angelo indicated Marsh's elbow should not be raised above shoulder height.

In his October 7, 2014, report under the heading "Physical and Psychological Functions," Dr. Crystal noted Dr. Joshua D. Gibson diagnosed Marsh with bilateral hearing loss and decreased visual acuity. Even though Marsh could perform activities involving sitting, standing, moving about, lifting, carrying and handling objects, speaking, and traveling, Dr. Gibson concluded Marsh would have difficulty performing activities involving hearing and seeing. With corrective lens, Marsh demonstrated normal vision in the left eye with slightly decreased vision in the right. Marsh was able to perform "all maneuvers within the specified ranges of normal and demonstrated no evidence of functional or neurological deficits," and normal gross manipulation and grip strength. However, Marsh had moderate difficulty with hearing and understanding normal conversation.

Under the heading "Psychological Functioning," Dr. Crystal noted the report of Dr. B. Paul Carney indicates Marsh was functioning within the borderline range

of overall intellectual ability, approaching the extremely low range. In addition, his academic skills appeared to be within the mid-third to mid-fourth grade level. Dr. Carney assessed a GAF of 52 and indicated Marsh had "a fair ability to understand, remember, and follow simple instructions; a fair ability to sustain attention and concentration to perform simple repetitive tasks; a fair ability to relate to others; and a fair ability to adapt or respond to the stress and pressures normally found in a day-to-day work setting."

Dr. Crystal's report also discusses the findings contained in the records of Drs. D'Angelo, A.C. Wright, Franzen, Burgess, and Kriss, as well as the finding of Robert H. Purden, who conducted a functional capacity evaluation. Dr. Crystal's testing revealed the following: reading at a grade level of 4.7, sentence comprehension at a grade level of 6.8, spelling and writing at a grade level of 4.4, and arithmetic at a grade level of 4.3. In all of these categories, Marsh did not exceed the fifth percentile. The test indicates Marsh had a reading level which enabled him "to read and understand a newspaper and general interest magazines." He could read and follow information and material needed for a range of jobs. As a result, he would not experience difficulty in "reading and

understanding information or reports as might be required for a clerical, clerk, cashier, service, and sales job." Marsh is able to write information, instructions, and orders permitting him to work in a clerical, cashier, inventory and shipping/receiving job. Marsh can subtract, multiply, and divide simple numbers. However, he would have difficulty "being able fractions, decimals, ratios, and percents." Marsh is literate for a wide range of jobs requiring academic abilities. However, Dr. Crystal noted a 9th to 10th grade level is needed for formal education and training which Marsh is below. The Kaufman Intelligence Test revealed Marsh was in the "lower extreme range of intellectual functioning." His verbal skill is below average, nonverbal skill is lower extreme, and composite is lower extreme.

Dr. Crystal assessed Marsh's vocational and academic abilities. Utilizing the assessments from Drs. Kriss, Franzen, and Burgess, Dr. Crystal believed Marsh is qualified to perform his past, related, and other work without a loss of employability "based on the cervical spine." He noted the assessments from Drs. Kriss and Burgess occurred prior to the January 2014 shoulder surgery. Mr. Purden's assessment permits Marsh to work at the medium physical demand level. However, he concluded

based on Dr. D'Angelo's assessment Marsh was precluded from his past factory and manual labor work activities. Although Dr. D'Angelo did not provide specific limitations it appeared Marsh could still perform a range of bench work manufacturing, service, sales, clerk, and cashier work activities. Dr. Crystal noted Marsh did not have transferable vocational skills to other work.

Dr. Crystal stated that "prior to having any impairment," Marsh was qualified to perform about 25% of the jobs in the economy including all of his usual customary work as well as related work. Following the January 2014 surgery, Dr. Crystal opined Marsh "does not have any loss of employability with Dr. Franzen." With the physical work assessment as noted by Dr. D'Angelo and the functional capacity evaluation from Mr. Robert Pruden, Marsh qualifies for about 2% to 5% of the jobs in the competitive labor market "for a reduction of about 80% to 92% to his pre-injury employment base." Upon factoring in Marsh's marginal educational abilities, borderline mental functioning, hearing loss, as well as tested dexterity abilities to non-repetitive work activities, Dr. Crystal concluded he is "precluded from jobs as jobs are found and performed in the competitive labor market." Dr. Crystal's conclusions are:

Work according to K.R.S. 342.0011(11)(c) and (34) means providing services to another for remuneration on a regular and sustained basis in the competitive economy. In addition to his physical abilities, his employment base is eroded when factoring in his hearing impairment, borderline mental abilities, marginal academic functioning, and dexterity limitations. Based on the factors described in this evaluation in these areas, Mr. Marsh is precluded from jobs as jobs are typically found and performed in the competitive labor market.

During his deposition, Dr. Crystal was questioned regarding the farm work Marsh performed and was asked to assume he typically worked approximately thirty hours per week. In response, Dr. Crystal indicated a farming operation is an environment in which there is not a lot other people working or ongoing work activities. Thus, people can take breaks. Further, one can spread out the amount of time over more than just what might be considered an "eight to five type job." Dr. Crystal noted Marsh's hearing loss could significantly affect his ability to work. Dr. Crystal testified given his intellectual functioning and other limiting factors, it appeared Marsh had done the best he could with what he had prior to the injury. Assuming the testimony of Dr. D'Angelo and Marsh is credible, Dr. Crystal believed Marsh did not have the

ability to sustain employment. Considering Marsh's testimony in combination with other factors, Dr. Crystal believed Marsh is precluded from performing work on a regular and sustained basis. He also believed Marsh's description of his pain prohibited him from working. During the course of his deposition, Dr. Crystal did not retreat from the opinions expressed within his report.

Marsh, as the claimant in a workers' compensation proceeding, had the burden of proving each of the essential elements of his cause of action, including causation. See KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Marsh was successful in that burden, the question on appeal is whether there was substantial evidence of record to support 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). An 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 (Ky. 2000). 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). Although a party may note evidence that would have supported a different outcome than that reached by an ALJ, such proof 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).

The function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings made are so unreasonable under the evidence that they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). The

Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to weight and credibility or by noting other conclusions or reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

Further, in Ira A. Watson Dept. Store v. Hamilton, supra, the Supreme Court instructed an analysis regarding whether a claimant is totally disabled entails the following:

An analysis of the factors set forth in KRS 342.0011 (11)(b), (11)(c), and (34) clearly requires an individualized determination of what the worker is and is not able to do after recovering from the work injury. Consistent with Osborne v. Johnson, supra, it necessarily includes a consideration of factors such as the worker's post-injury physical, emotional, intellectual, and vocational status and how those factors interact. It also includes a consideration of the likelihood that the particular worker would be able to find work consistently under normal employment conditions. A worker's ability to do so is affected by factors such as whether the individual will be able to work dependably and whether the worker's physical restrictions will interfere with vocational capabilities. The definition of "work" clearly contemplates that a worker is not required to be homebound in order to be found to be totally occupationally

disabled. See, *Osborne v. Johnson*,
supra, at 803.

Id. at 52.

The Supreme Court also noted that within the ALJ's prerogative is the authority to translate the lay and medical evidence into findings of occupational disability. Although the ALJ must consider the worker's medical condition when determining the extent of his occupational disability at a particular point in time, the ALJ was not required to rely upon vocational opinions of either the medical experts or vocational experts. In addition, it noted a worker's testimony is competent evidence of his physical condition and of his ability to perform various activities both before and after the injury. Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979).

In the case *sub judice*, the ALJ's analysis set out in both her March 6, 2015, Opinion and Award and the April 9, 2015 Order ruling on Aichi's petition for reconsideration fully complied with the requirements of Ira A. Watson Dept. Store v. Hamilton, *supra*. The opinions of Drs. D'Angelo and Crystal and Marsh's testimony constitute substantial evidence in support of the ALJ's determination Marsh is totally occupational disabled. It is clear Marsh has innate physical and mental limitations which curtail

his occupational opportunities. Here, the ALJ was faced with an individual who as noted by Dr. Crystal was doing the best he could within his innate abilities. In accordance with the Supreme Court's directive in Ira A. Watson Dept. Store v. Hamilton, supra, the ALJ considered Marsh's physical, emotional, intellectual, and vocational status and how those factors interacted post-injury. The ALJ concluded Marsh's innate physical and mental deficiencies and the limitations caused by the injury prohibit him from being gainfully employed.

The ALJ did not misapply the definition of permanent total disability in analyzing the extent of Marsh's occupational disability. Even though Marsh continued to work on his parent's farm, the ALJ concluded he is not a competitive farmer and is a part-time helper capable of performing only a few routine tasks. Since the ALJ's findings and conclusions regarding Marsh's occupational capabilities are supported by Marsh's deposition and hearing testimony, we may not alter them. As is her prerogative, the ALJ found Marsh's testimony credible regarding the post-injury tasks he performs on his parent's farm. Consequently, she concluded Marsh is not capable of performing medium work on a regular and sustained basis. Her conclusions are supported by Marsh's

testimony as well as the opinions of Drs. D'Angelo and Crystal.

The fact Marsh may be performing certain limited tasks on his parent's farm does not preclude a determination of permanent total disability. As noted by the Supreme Court in McNutt Construction/First General Services v. Scott, 40 S.W.3d 854, 859 (Ky. 2001), the definition of "work" does not require a worker to be homebound in order to be found to be totally occupationally disabled. Marsh's testimony demonstrates his parents would probably provide him room and board even if he did not perform limited chores for them.

Since substantial evidence supports the ALJ's finding Marsh is not physically capable of performing sedentary work and medium level work, we find no merit in Aichi's assertion Marsh is gaming the system. The opinions expressed by Drs. D'Angelo and Crystal constitute substantial evidence upon which the ALJ was free to rely in reaching her decision. In addition, the ALJ found Marsh a credible witness. Relying upon Marsh's testimony, the physical restrictions of Dr. D'Angelo, and the limitations discussed by Dr. Crystal, the ALJ concluded Marsh was precluded from being gainfully employed. We note Aichi does not take issue with Dr. D'Angelo's restrictions or the

results of Dr. Crystal's testing. Even though farming work may be customary work for Marsh, the ALJ concluded Marsh does not have the capacity to perform this work on a full-time basis. The ALJ clearly set out the reasons for her conclusions in her March 2015 decision and the order ruling on the petition for reconsideration. In addition, the ALJ chose to attribute no significance to Marsh's deposition testimony which Aichi contends proves his "true motivations." The ALJ specifically addressed this issue in the April 9, 2015, Order stating Marsh did not have the mental cunning to exaggerate or manufacture facts favorable to him. This finding is supported by Dr. Crystal's report.

Since the evidence discussed herein amply supports the ALJ's decision, we are unable to conclude the ALJ erred in determining Marsh is totally occupationally disabled. Further, since substantial evidence supports the ALJ's conclusions, we are without authority to disturb her decision on appeal. Special Fund v. Francis, supra.

Accordingly, the March 6, 2015, Opinion and Award and the April 9, 2015, Order ruling on the petition for reconsideration are **AFFIRMED**.

ALL CONCUR.

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