Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: September 5, 2014

CLAIM NO. 201276095

BLEDSOE COAL CORPORATION PETITIONER

VS. **APPEAL FROM HON. J. LANDON OVERFIELD, CHIEF ADMINISTRATIVE LAW JUDGE**

KENDAL BROCK
HON. EDWARD HAYS,
ADMINISTRATIVE LAW JUDGE
and HON. J. LANDON OVERFIELD,
CHIEF ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
VACATING IN PART AND REMANDING

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

ALVEY, Chairman. Bledsoe Coal Corporation ("Bledsoe") seeks review of the opinion, award and order rendered March 28, 2014 by Hon. Edward D. Hays, Administrative Law Judge ("ALJ") awarding Kendal Brock ("Brock") temporary total disability ("TTD") benefits, permanent total disability

("PTD") benefits, and medical benefits. Bledsoe also appeals from the May 15, 2014 order denying its petition for reconsideration, issued by Hon. J. Landon Overfield, Chief Administrative Law Judge ("CALJ")[1].

On appeal, Bledsoe argues the award of PTD benefits is not supported by substantial evidence because the ALJ did not outline the results of the Functional Capacity Evaluation ("FCE"), administered by Mr. Rick Pounds, and erroneously recited the restrictions assigned by Dr. David Dome. Because the ALJ's decision contained an error in outlining the restrictions assessed by Dr. Dome, upon whom he relied in part in finding Brock permanently totally disabled, we vacate and remand for a determination of occupational disability based upon an accurate assessment of the evidence. We direct no particular result, and after consideration of the evidence, the CALJ may issue a decision which he determines appropriate.

Brock filed a Form 101 on August 20, 2013 alleging he sustained an injury to his right knee on August 2, 2012 when his right foot became stuck in the mud as he attempted to lift a block while building a brattice. At the time of the accident he was a scoop operator and building brattices

[1] ALJ Hays retired on March 31, 2014 and the claim was transferred to the CALJ.

was one of his job duties. He sought medical treatment that evening, and later underwent surgery to his anterior collateral ligament ("ACL") and his medial meniscus. He has never returned to work since the accident. Brock began working as a coal miner in 1995, and his jobs thereafter consisted of working on a belt line, as a miner operator and scoop operator.

Brock testified by deposition on November 4, 2013, and at the hearing held January 29, 2014. He was born on December 29, 1975, and resides in Hyden, Kentucky. He completed the eleventh grade, and quit school shortly before the end of the twelfth grade. He has not obtained a GED. While in high school, he attended courses in electricity, carpentry and welding. He also obtained a miner's card which allowed him to work underground.

Brock began working for Bledsoe in 2010 as a miner operator. He stated the miner was operated by a control box, which he operated while walking beside the machine. He was subsequently moved to scoop operator which he described as a heavy job requiring loading and unloading material, in addition to building brattices. On August 2, 2012, he was asked to finish stacking a brattice which had been started by someone else. His right foot became stuck in the mud, and when he attempted to pick up a block, his right leg

twisted causing the injury. This occurred two hours before quitting time, and he was unable to finish his shift.

Later that evening, Brock went to the emergency room at the Hyden Hospital, and was then referred to Mary Breckinridge Hospital. He followed up with Dr. Chaker Dahhan who ordered an MRI of the right knee. He was later referred to Dr. Dome, an orthopedic surgeon in Lexington. Right knee surgery was unsuccessful, and he continues to complain of pain and swelling. He has no ongoing treatment except for taking over-the-counter Ibuprofen three to four times per day. He had no problems with his right knee prior to the accident. He now wraps his right knee with an ACE bandage at night. He also engages in home exercises which he was taught in physical therapy. Brock stated he is unable to return to the job performed at the time of the accident, and he is unaware of any job he is able to perform in the coal mines. He also stated he has difficulty reading and comprehending.

In support of his claim, Brock filed the August 3, 2012 record from the Mary Breckenridge Hospital. This record reflects Brock sustained an injury to his right knee while working in a coal mine on August 2, 2012.

Brock later filed records of Dr. Dome outlining the treatment rendered from August 13, 2012 through May 20,

2013. Those records reflect Brock sustained a right knee injury on August 2, 2012 while working in a coal mine. The injury consisted of an ACL tear, as well as medial and lateral meniscus tears. Dr. Dome performed surgery on Brock's right knee on August 28, 2012 consisting of arthroscopic ACL reconstruction and arthroscopic partial medial meniscectomy. Brock continued to exhibit symptoms with the right knee after the surgery. Physical therapy was ordered. Dr. Dome noted Brock's quadriceps were slow to recover. On January 30, 2013, he ordered EMG/NCV tests due to persistent quadriceps atrophy. This testing revealed right femoral nerve neuropathy due to a femoral block administered for the ACL reconstruction surgery. On April 17, 2013, Dr. Dome indicated Brock had poor results from the ACL reconstruction and recommended an FCE. On May 20, 2013, Dr. Dome stated Brock had reached maximum medical improvement ("MMI") and released him to modified duty consisting of no kneeling, squatting, climbing, pushing, pulling or lifting in excess of fifty pounds. He assessed a 15% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides").

Bledsoe filed the same records as those filed by Brock. Included in those records was the report of the FCE administered by Mr. Pounds.

Brock also filed the Form 107-I prepared by Dr. Arthur Hughes who evaluated Brock on October 22, 2013. Dr. Hughes noted the history of work injury and subsequent surgery. He diagnosed ACL and medial lateral meniscus tears of the right knee; status post ACL reconstruction and partial medial meniscectomy; persistent right knee pain, swelling, and limitation of motion post-operatively; antalgic gait secondary to right knee pain; and right femoral neuropathy, improving. He assessed an 11% impairment rating pursuant to the AMA Guides. Dr. Hughes opined Brock does not retain the physical capacity to return to the type of work performed on the date of injury. Regarding restrictions, Dr. Hughes stated Brock is unable to do tasks involving standing or walking, and cannot operate vehicles or equipment requiring foot controls. He stated Brock could do tasks which allow him to sit and move his right leg.

Bledsoe submitted the report of Dr. Phillip Corbett from the evaluation performed on December 10, 2013 at its request. Dr. Corbett diagnosed Brock as status post ACL reconstruction with moderate laxity and partial medial

meniscectomy; recovering femoral neuropathy with ongoing dysesthesias; and evidence of maculopopular vesicular lesion in the right lower extremity (which he stated was unrelated). Dr. Corbett assessed an 11% impairment rating pursuant to the AMA Guides, and agreed with the findings in the FCE report.

A benefit review conference ("BRC") was held on January 14, 2014. The BRC order reflects the issues preserved were whether Brock retains the capacity to return to the type of work performed at the time of injury; benefits per KRS 342.730 (including multipliers); unpaid/ contested medical expenses; TTD overpayment (rate); permanent total disability benefits; and the proper impairment rating.

On March 28, 2014, the ALJ rendered a decision awarding TTD benefits, PTD benefits and medical benefits. The ALJ provided no discussion regarding the FCE performed by Mr. Pounds, but did note Dr. Dome made his determination of impairment and restrictions after it was performed. It is noted the FCE report was not filed separately, but was submitted by Bledsoe as part of Dr. Dome's records. Therefore, we do not find error in failing to discuss that report separately.

As noted by Bledsoe, on page 7 of his decision, the ALJ first noted Brock was limited to lifting no more than five pounds, and in the next sentence stated the lifting restriction was fifty pounds. It is also noted, Dr. Dome, while indicating Brock is limited to lifting no more than fifty pounds, placed other significant restrictions on his activities.

Bledsoe filed a petition for reconsideration on April 11, 2014, arguing, as it does on appeal, the ALJ's decision was not supported by substantial evidence. The petition for reconsideration was denied by the CALJ on May 15, 2014.

As the claimant in a workers' compensation proceeding, Brock had the burden of proving each of the essential elements of his cause of action, including the extent of his disability. *See* KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since he 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).

Authority has long acknowledged in making a determination granting or denying an award of PTD benefits, an ALJ has wide ranging discretion. Seventh Street Road Tobacco Warehouse v. Stillwell, 550 S.W.2d 469 (Ky. 1976); Colwell v. Dresser Instrument Div., 217 S.W.3d 213, 219 (Ky. 2006). KRS 342.285 designates the ALJ as the finder of fact. Therefore, the ALJ has the sole discretion to determine the quality, character, and substance of evidence. Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). The ALJ, as fact-finder, may choose whom and what to believe and, in doing so, 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 party's total proof. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15, 16 (Ky. 1977); Pruitt v. Bugg Brothers, 547 S.W.2d 123 (Ky. 1977).

Here the ALJ's decision contains an inconsistency regarding the restrictions imposed by Dr. Dome. While this may well be a scrivener's error as asserted by Brock, such mistake could have impacted the ALJ's determination. Therefore, because the ALJ's decision is based, in part, on an apparent misinterpretation or misstatement of the medical

evidence, it must be vacated, and the claim remanded for a determination of Brock's occupational disability based upon a correct recitation of the evidence of record.

On remand, the CALJ is directed to conduct an analysis in accordance with both the statutory and case law referenced above, and provide his rationale supporting his determination. This Board may not, and does not direct any particular result because we are not permitted to engage in fact-finding. *See* KRS 342.285(2); Paramount Foods, Inc. v. Burkhardt, supra.

Accordingly, the ALJ's determination Brock is permanently totally disabled and the award of income benefits as set forth in the March 28, 2014 opinion rendered by Hon. Edward D. Hays, Administrative Law Judge and the May 15, 2014 order denying Bledsoe's petition for reconsideration rendered by Hon. J. Landon Overfield, Chief Administrative Law Judge are **VACATED**. This claim is **REMANDED** for additional findings and entry of an amended opinion and award consistent with the views expressed herein.

ALL CONCUR.

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