Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: February 27, 2015

CLAIM NO. 201393666

BOOTH ENERGY PETITIONER

VS. **APPEAL FROM HON. DOUGLAS W. GOTT, ADMINISTRATIVE LAW JUDGE**

JOHN DANIEL MILLS, JR.
HON. DOUGLAS W. GOTT,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

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

RECHTER, Member. Booth Energy ("Booth") appeals from the July 28, 2014 Opinion and Order rendered by Hon. Douglas W. Gott, Administrative Law Judge ("ALJ"), finding John Mills ("Mills") permanently totally disabled, and from the August 27, 2014 Order overruling its petition for reconsideration. Booth argues the ALJ's finding of a permanent total

disability is not supported by substantial evidence. We disagree and affirm.

Mills testified by deposition on March 28, 2014 and at the hearing held July 16, 2014. Born June 30, 1974, Mills has a tenth grade education and earned a GED. His work as a “ground man” for Booth involved lifting pins, working on a miner, operating a forklift and other heavy work. He sustained multiple injuries on February 20, 2013 while operating a forklift when a high-wall fell and covered him with rock. Mills suffered fractures of his right arm, four broken ribs, a broken nose, a collapsed lung, eight fractured vertebrae, facial fractures, a severed tip of his right ring finger, chipped teeth, contusions, a laceration to the head, and a brain injury.

At the final hearing, Mills indicated his chief complaint is constant low back pain. He doubted he could lift objects weighing ten pounds or more without experiencing increased pain. He is unable to sit through a movie. Mills’ trip to the hearing took more than two hours and he had to stop along the way to walk around to ease his pain. Mills could not sit during the hearing because of his pain. He is unable to bend or squat without pain. Mills has pain in his right arm and feels heat and pain in his

ribs, which interrupts his sleep. He experiences pain in his finger if he bumps it.

Dr. Steven Spady performed a disability examination and evaluation on November 13, 2013. Due to continued significant pain and trauma, Dr. Spady opined Mills had no probability of returning to mining work or of performing any type of gainful employment in manual labor at this time. Dr. Spady noted Mills has significant pain syndromes in the cervical, thoracic and lumbosacral spine, ribs, and right forearm that will probably last the rest of his life. In his Form 107, Dr. Spady characterized Mills' restrictions as "100% work disabled." Dr. Spady assigned an 8% impairment rating for each of the cervical, thoracic and lumbar spinal conditions, 3% for the fingertip amputation, and 3% for moderately severe pain for a combined 33% whole person impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides").

Mills submitted medical records from Dr. Diana Hussain of King's Daughters Medical Center. In a September 5, 2013 note, Dr. Hussain indicated Mills was about to complete work conditioning and hardening. His primary complaint remained low back pain radiating into his legs. She discontinued muscle relaxers and Lidoderm patches and

recommended tapering Lortab to use at night as needed. She placed Mills at maximum medical improvement ("MMI") as of the date of examination and ordered a functional capacity evaluation.

Dr. Tigran Garabekyan treated Mills for the arm fracture. On June 26, 2013, Dr. Garabekyan recommended continued activities as tolerated and allowed Mills to return to work with no lifting restriction relative to his arm. On October 23, 2013, Dr. Garabekyan indicated he believed Mills' continued pain is related to adhesions over the plate in his arm. Massage therapy was recommended with a follow up in four months at which time removal of the plate would be considered.

Dr. Anbu Nadar evaluated Mills on December 10, 2013. Referencing the AMA Guides, Dr. Nadar assessed a 26% impairment rating consisting of 23% for the spinal injuries, 2% for the finger and 1% for scarring of the forehead and ear. He restricted Mills from heavy lifting, bending, twisting, turning, prolonged sitting, standing, and walking. Dr. Nadar indicated Mills does not retain the physical capacity to return to the type of work performed at the time of the injury. Mills will require periodic care for ongoing residuals secondary to the injury.

Dr. David Jenkinson examined Mills on September 15, 2013. Dr. Jenkinson indicated Mills had recovered well from his major injuries. His arm had healed in anatomic position and he had normal function of the right forearm. Although he had complaints of chest pain, there was no objective abnormality. A recent MRI showed degenerative changes in the lumbar and thoracic spine with no residual traumatic abnormality. Dr. Jenkinson indicated Mills exhibited multiple non-physiological signs and excessive pain behaviors. Dr. Jenkinson opined Mills requires no restrictions and can return to his former job. Dr. Jenkinson assigned a 1% impairment rating for the amputation of the fingertip, 5% for the cervical spine, 8% for the thoracic spine and 7% for the lumbar spine for a combined 19% whole person impairment rating pursuant to the AMA Guides. He opined Mills requires no further treatment and there is no objective abnormality requiring continued use of narcotic analgesics.

Dr. Gregory Snider performed an independent medical evaluation on May 2, 2014. Mills complained of back pain, decreased range of motion, burning pain in his ribs radiating into his shoulder, intermittent right arm pain, decreased range of motion in his arm, neck pain with headaches and some memory loss. Dr. Snider observed Mills

used a cane and frequently grasped at nearby objects for support but did not appear to be in any danger of falling. Dr. Snider indicated Mills exhibited obvious submaximal effort on static grip testing. In his summary of past medical treatment, Dr. Snider noted Dr. Hussain opined on June 27, 2013, Mills was not at MMI but would probably need permanent restrictions. On June 27, 2013, she approved Mills to return to light duty work with a ten pound lifting restriction, no bending, no thoracolumbar extension, and sitting and standing no more than thirty minutes with a ten minute break.

Dr. Snider diagnosed a closed-head injury; facial and scalp lacerations; chipped upper teeth; C4-5 left facet fracture; T6 through T8 spinous process fractures; L1 through L3 transverse process fractures; L5-S1 pars defect with grade 1 spondylolisthesis (likely developmental); right partial ring fingertip amputation; forearm fracture, post open reduction and internal fixation; and multiple rib fractures. Dr. Snider opined Mills could return to work with restrictions of twenty pounds lifting, pushing, pulling and positional changes as needed. He recommended Mills not work above step ladder height, operate heavy equipment or work on uneven terrain. Referencing the AMA Guides, Dr. Snider assigned impairment ratings of 3% for rib pain and

other areas not otherwise accounted for, 2% for the elbow and wrist, 7% for the lumbar spine, 8% for the thoracic spine, 5% for the cervical spine and 3% for scarring/scalp laceration/chipped teeth for a combined 25% whole person impairment rating. Dr. Snider noted a functional capacity evaluation had been attempted on September 9, 2013, but Mills completed only six of twenty-one tasks due to complaints of back pain.

After setting forth the definitions of permanent total disability, work, permanent partial disability and noting the factors set forth in Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000), the ALJ found as follows:

> The ALJ relies on the evidence of impairment and restrictions from Dr. Hussain, Dr. Snider, and Dr. Nadar, and Mills' testimony as to his pain and restrictions, to find that Mills suffers from permanent total disability. As for the factors from the *Ira Watson* case, his age of 43 years is somewhat neutral in the analysis. His GED level of education is also somewhat neutral, although it is unlikely that he has the educational qualifications for a sedentary job even if one is available or capable of being performed. He has certain vocational skills, but he cannot sit, stand, or lift as would be required on a regular and sustained basis in holding down a full-time job. But his medical restrictions, primarily from pain following multiple fractures in all three levels of his spine, prevent any

> likelihood that he can resume some type of work under normal employment conditions. In resisting to the claim of total disability, the Defendant acknowledged the many significant injuries suffered by Mills, but emphasized that his fractures had healed; that he received quality treatment for his injuries; and that he has essentially been released without the need for further care (although Mills pointed out that he has been denied medications and still has not been authorized to have his teeth fixed). Accepting all of that as true, such does not negate the residual pain and limitations from the work injuries that compel a finding of total disability in this instance.

Booth filed a petition for reconsideration making essentially the same arguments it raises on appeal. In his August 27, 2014 order, the ALJ overruled the petition as a re-argument of the merits of the claim and stated the evidence did not reasonably support a finding Mills is capable of sustained sedentary work.

On appeal, Booth argues the ALJ's decision is not supported by evidence of probative value. Booth contends the opinions of Drs. Hussain, Snider and Nadar would not preclude a forty-year-old with a high school level education from employment. Booth argues the ALJ did not properly weigh the evidence in determining whether Mills sustained a partial or total disability. It further asserts the restrictions assigned by Drs. Snider and Nadar would allow

gainful employment. Booth also emphasizes that Mills' own assessment of his physical abilities is not accurate or credible so as to overcome the medical findings.

Because Mills, the party with the burden of proof, was successful before the ALJ, the issue on appeal is whether the ALJ's decision is supported by substantial evidence. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979), Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). The ALJ, as fact-finder, has the sole authority to determine the weight, credibility, substance and inferences to be drawn from the evidence. Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). Furthermore, the ALJ has the absolute right to believe part of the evidence and disbelieve other parts, 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 (Ky. 1977). It is not enough to show there was some evidence which would support a contrary conclusion. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). So long as the ALJ's opinion is supported by any evidence of substance, ordinarily we may not reverse. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

Consideration of a total disability award depends on many of the same factors enunciated in Osborne v.

Johnson, 432 S.W. 2d 800 (Ky. 1968). It remains within the broad authority of the ALJ to translate an impairment rating into either partial or total disability. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). The factors which the ALJ may consider in making the determination include the worker's post-injury physical, emotional, intellectual and vocational status and how those factors interact. McNutt Construction/First General Services v. Scott, 40 S.W.3d 854 (Ky. 2001). Furthermore, the ALJ may rely on both the medical testimony and a worker's self-assessment of ability to labor. Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979).

In this case, the ALJ clearly understood the appropriate standard to be applied and sufficiently explained why Mills is permanently totally disabled as a result of the work injury. The ALJ found Mills' testimony regarding his pain and restrictions from the work injury to be credible. There was no question Mills sustained significant impairment ratings as a result of fractured vertebrae in his cervical, thoracic and lumbar spine. Dr. Spady noted continued pain syndromes in the three areas of the spine, ribs and the right arm. The ALJ could reasonably conclude Mills' lifting and postural restrictions would preclude employment, even sedentary, on a regular and

sustained basis in a competitive economy. We cannot say the ALJ's conclusion that Mills is permanently totally disabled is clearly erroneous. Substantial evidence supports the ALJ's conclusion Mills is permanently totally disabled as a result of the work injury.

Accordingly, the July 28, 2014 Opinion and Order rendered by Hon. Douglas W. Gott, Administrative Law Judge, and the August 27, 2012 Order overruling Booth's petition for reconsideration are hereby **AFFIRMED**.

ALL CONCUR.

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