**OPINION ORIGINALLY ENTERED: February 1, 2013**
**OPINION WITHDRAWN: February 8, 2013**
**OPINION RE-ENTERED: February 8, 2013**

CLAIM NO. 201189615

CHICK PACKAGING/NEFAB PETITIONER

VS. **APPEAL FROM HON. WILLIAM J. RUDLOFF, ADMINISTRATIVE LAW JUDGE**

EDGAR PAUL BOWMAN
and HON. WILLIAM J. RUDLOFF
ADMINISTRATIVE LAW JUDGE RESPONDENTS

**OPINION**
**AFFIRMING**
* * * * * *

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

**STIVERS, Member.** Chick Packaging/Nefab ("Chick Packaging") appeals from the September 25, 2012, opinion and award and the October 17, 2012, order ruling on the petition for reconsideration rendered by Hon. William J. Rudloff, Administrative Law Judge ("ALJ"). In the September 25, 2012, opinion and award, the ALJ awarded Edgar Paul Bowman

("Bowman") permanent total disability ("PTD") benefits at the rate of $383.39 per week and medical benefits. The ALJ also granted Chick Packaging a credit for temporary total disability ("TTD") benefits already paid.

On appeal, Chick Packaging asserts the ALJ erred by finding Bowman permanently totally disabled. Chick Packaging also asserts the ALJ erred by failing to make certain additional findings of fact.

The Form 101, filed on April 3, 2012, indicates Bowman sustained a "right biceps tendon tear" on April 13, 2011, in the following manner: "Moving equipment on roof of RR Downley Printers, lifted a steel platform, right arm popped causing immediate pain." The August 8, 2012, benefit review conference ("BRC") order lists the following contested issues: "extent & duration; underpayment of TTD; definition of 'injury.'"

In the September 25, 2012, opinion and award, the ALJ set forth the following findings supporting his award of PTD benefits:

> Based on the totality of the evidence, including the plaintiff's testimony, the testimony of his wife, the medical reports of Dr. Tarter and Dr. Burke and the report of Sharon Lane, the vocational expert, I make the factual determination that Mr. Bowman has sustained a significant whole person permanent impairment as a result

of his work injuries [sic] on April 13, 2011 and lacks the capacity to return to work.

In rendering a decision, KRS 342.285 grants the Administrative Law Judge as fact-finder the sole discretion to determine the quality, character, and substance of evidence. *AK Steel Corp. v. Adkins*, 253 S.W.3d 59 (Ky. 2008). In this case I find most persuasive the opinion of Dr. Burke and find that the plaintiff has sustained a 3% whole person permanent impairment.

"'Permanent total disability' means 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 . . . ." Kentucky Revised Statutes (KRS) 342.0011. To determine if an injured employee is permanently totally disabled, an ALJ must consider what impact the employee's post-injury physical, emotional, and intellectual state has on the employee's ability "to find work consistently under normal employment conditions . . . . [and] to work dependably[.]" *Ira A. Watson Dept. Store v. Hamilton*, 34 S.W.3d 48, 51 (Ky. 2000). In making that determination,

> "the ALJ must necessarily consider the worker's medical condition . . . [however,] the ALJ is not required to rely upon the vocational opinions of either the medical experts or the vocational experts. A worker's testimony is competent evidence of his physical condition and of his ability to perform various

> activities both before and after being injured."
>
> Id. at 52. (Internal citations omitted.) See also, *Hush v. Abrams*, 584 S.W.2d 48 (Ky. 1979).
>
> In the present case, I considered the severity of the plaintiff's work injury, his age, his work history, his education, the testimony of the plaintiff and his wife, and Dr. Burke's and Ms. Lane's specific opinions regarding his occupational disability. Based on all of those factors, I make the factual determination that the plaintiff cannot find work consistently under regular work circumstances and work dependably. I, therefore, make the factual determination that he is permanently and totally disabled.

The ALJ has cited the law relevant to the required analysis in resolving the issue of permanent total disability. Thus, we will not repeat the applicable law. The ALJ stated he considered Bowman's "work injury, his age, his work history, his education, the testimony of the plaintiff and his wife, and Dr. Burke's and Ms. Lane's specific opinions regarding his occupational disability" in determining Bowman is permanently totally disabled. These considerations are consistent with relevant case law. *See* Ira A. Watson Dept. Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

In workers' compensation cases, the claimant bears the burden of proof and risk of nonpersuasion with regard to every element of the claim, including entitlement to permanent total disability benefits. *See* Durham v. Peabody Coal Co., 272 S.W.3d 192 (Ky. 2008). As Bowman was the party with the burden of proof on the issue of permanent total disability and was successful before the ALJ, we are left to determine whether substantial evidence supports the ALJ's conclusion. *See* Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986). 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. *See* Smyzer v. B.F. Goodrich Chemical Co., 474 S.W.2d 367, 369 (Ky. 1971). Although a party may note evidence that would have supported a conclusion contrary to the ALJ's decision, such evidence is not an adequate basis for reversal on appeal. *See* McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974).

Attached to the Form 101 is an independent medical examination ("IME") report, dated March 22, 2012, of Dr. Frank Burke ("Dr. Burke"). After a physical examination and a medical records review, Dr. Burke expressed the following opinions:

> This patient does have a significant problem, but the body impairment rating system does not adequately encompass the patient's individual pain. The pain impairment does increase the burden of the patient substantially. He is credible. The patient's physical findings and MRI are consistent with a torn biceps tendon distally. This patient has a 3% whole person impairment utilizing the AMA's *Guides to the Evaluation of Permanent Impairment*, Fifth Edition. I believe he is at maximum medical improvement.
>
> This patient will not be able to use this arm for activities of labor that involve any lifting, pushing, or pulling, or use of the right upper extremity for tools, which require regular powered supination and pronation (i.e. screwdriver and similar tools). He should not be required to engage in activities, which involve strong gripping and pulling with this right upper extremity.

Dr. Burke opined Bowman is a poor surgical candidate because of “the chronic anticoagulation needed for his aortic valve replacement.”

Bowman introduced the June 25, 2012, report of Sharon Brown Lane ("Lane"), a vocational expert. After interviewing Bowman, reviewing medical records, and administering achievement tests, Lane opined as follows:

> It should be noted that the U.S. Department of Labor classifies jobs into three major categories depending on the basic nature of the job duties, i.e., whether the job primarily deals

> with Data, People, or Things. For over thirty years, Mr. Bowman's past work has dealt with Things. As a result of the April 13, 2011 injury, resulting [sic] functional limitations, and persistent symptoms however, Mr. Bowman has been effectively precluded from performing this type of work. Considering his vocational profile (Advanced age; 9th grade education; No high school diploma or GED; limited academic skills; no transferable skills; significant limitations in the use of his right dominant upper extremity; and, persistent pain, weakness, swelling, numbness and tingling), as well as his lack of occupational experience and/or training for occupations dealing with Data or People, it is in [sic] my opinion, vocationally, that Mr. Bowman has little to no prospect of becoming successfully employed in the competitive labor market. It is my opinion, based on this vocational evaluation, that as a result of the April 13, 2011 work-related injury, Mr. Bowman has sustained a 100% loss of access to not only his past work, but to all other jobs that exist in his geographic labor market [footnote omitted] and in the state of Kentucky.

Bowman testified at the August 28, 2012, hearing that he is fifty-five years old and is right-handed. Bowman completed the ninth grade and has had no other vocational training. He did not obtain a GED. Bowman's prior work experience includes "construction, steel fabrication, or machinery moving." Chick Packaging is a metal fabrication and machinery moving company. Bowman's job involved "a lot

of lifting, pulling, tugging, pushing, [and] climbing. It was always physical." At Chick Packaging, Bowman worked with a welding kit weighing approximately 25 to 30 pounds and several hand tools such as "[w]renches, screwdrivers, lots of power tools, drills, [and] grinders." He and his co-workers "moved anything from a filing cabinet to a 500-ton brake press."

Bowman described his current right arm symptoms as follows:

> It's-- it's very weak, it's painful. It takes very little to aggravate it. Like a coffee cup or anything would aggravate it. The longer you hold something, the more intense the pain gets.

When asked if he could return to his former job at Chick Packaging, Bowman testified:

> Q: All right. Do you think that you could go back to your job at Chick/NEFAB?
>
> A: No.
>
> Q: Why not?
>
> A: I have to deal with too much weight, too much repetition. Climbing would become very dangerous.
>
> Q: Why is that?
>
> A: Because whenever it acts up, I - whatever is in it, it don't [sic] matter what's in it, if my granddaughter is in my arm when it acts

> up, I've got to let go. That's the way it is.

The above-cited medical, vocational, and lay evidence comprises substantial evidence in support of the ALJ's determination Bowman is permanently totally disabled. In making a determination involving permanent total disability, an ALJ is vested with broad discretion. *See* Seventh Street Road Tobacco Warehouse v. Stillwell, 550 S.W.2d 469 (Ky. 1976). Bowman's testimony, standing alone, is substantial evidence supporting the ALJ’s determination, as an injured worker’s credible testimony, is probative of his ability to labor post-injury. *See* Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979); *See also* Carte v. Loretto Motherhouse Infirmary, 19 S.W.3d 122 (Ky. App. 2000). Additionally, while an ALJ is not required to rely upon the opinions of vocational experts in arriving at a decision with regard to permanent total disability, in his discretion as fact-finder he may accept and rely on such opinions when and if he so chooses. *See* Eaton Axle Corp. v. Nally, 688 S.W.2d 334 (Ky. 1985); *See also* Seventh Street Road Tobacco Warehouse v. Stillwell, supra.

It is evident the ALJ considered Bowman's age and education as well as other factors in combination with his post-injury physical capacity in concluding he is

permanently totally disabled. *See* Ira A. Watson Dept. Store v. Hamilton, supra. Thus, the ALJ's determination Bowman is permanently totally disabled is supported by substantial evidence and cannot be disturbed.

On appeal, Chick Packaging also argues the ALJ erred by refusing to make additional findings of fact as to whether Bowman's April 13, 2011, right arm injury "alone" caused him to be unable to return to work. Chick Packaging asserts the ALJ could not consider any non-work-related injury, such as Bowman's pre-existing low back condition, in determining whether he is permanently totally disabled. Thus, it asserts the ALJ should have specified he only considered the effects of the April 13, 2011, right arm injury in making this determination. In the alternative, Chick Packaging requests the claim be remanded to the ALJ for additional findings regarding the ALJ’s determination Bowman is permanently totally disabled.

Significantly, in its petition for reconsideration, Chick Packaging requested the ALJ to enter specific factual findings as to whether Bowman's April 13, 2011, right arm injury "alone" caused him to be unable to perform any type of work. The ALJ's October 17, 2012, order ruling on the petition for reconsideration contains a generic recitation of the applicable law and does not set

forth additional findings of fact pertaining to this specific issue. However, we believe no additional findings were necessary.

Prior to December 12, 1996, KRS 342.730(1)(a) provided, in part, that "non-work-related *disability* shall not be considered in determining whether the employee is totally disabled for purposes of this subsection." (emphasis added). This language was inserted into the statute by the 1994 amendments to KRS Chapter 342. In 1996, the General Assembly modified the language in KRS 342.730(1)(a) to read as follows:

> Non-work-related *impairment* and conditions compensable under KRS 342.732 and hearing loss covered in KRS 342.7305 shall not be considered in determining whether the employee is totally disabled for purposes of this subsection.

Thus, the ALJ is prohibited from awarding permanent total disability benefits based on the combined effects of a work injury and any other <u>non-work-related</u> impairment.

At the hearing, Bowman testified he sustained a <u>work-related</u> low back injury in 1994. According to the Form 104 (Plaintiff's Employment History) attached to the Form 101, at the time of the 1994 injury, Bowman was working for Braymer Equipment. Bowman testified as follows:

> Q: Okay. I notice the records mention a 1994 low back injury that was a Work Comp claim?
>
> A: Yes.
>
> Q: Did that end up settling for 5% impairment, or do you recall?
>
> A: I think it was five.
>
> Q: Okay. Did you have any problems with your low back after that?
>
> A: I still have problems with it.
>
> Q: Okay. What kind of problems are you currently having with it?
>
> A: It flares up quite often. It's pretty painful. I have to sit certain ways, and stuff like that.
>
> Q: Do you ever have any pain go down either leg?
>
> A: Yes.

Since Bowman's prior low back injury is a work-related, albeit for a different employer than Chick Packaging, the "non-work-related" exclusion articulated in KRS 342.730(1)(a) is not applicable in this case. Consequently, the ALJ could have considered the effects of the 1994 low back injury when determining whether Bowman is permanently totally disabled. In other words, the ALJ did not have to consider whether Bowman's April 13, 2011, right arm injury "alone" caused him to be permanently totally

disabled. However, this issue is moot as it is clear from the language in the September 25, 2012, opinion and order the ALJ considered *only* the effects of Bowman's April 13, 2011, right arm injury when determining whether Bowman is permanently totally disabled. Additionally, Dr. Burke only discussed the physical effects of the April 13, 2011, injury when assessing his 3% whole person impairment rating and work restrictions, and Lane's vocational assessment was based solely on the effects of this injury. As previously noted, the ALJ stated as follows in the opinion and order:

> Based on the totality of the evidence, including the plaintiff's testimony, the testimony of his wife, the medical reports of Dr. Tarter and Dr. Burke and the report of Sharon Lane, the vocational expert, I make the factual determination that Mr. Bowman has sustained a significant whole person permanent impairment **as a result of his work injuries on April 13, 2011** and lacks the capacity to return to work. (emphasis added).

Thus, the ALJ's award of PTD benefits, based exclusively on the April 13, 2011, injury, remains unaffected by the 1994 low back injury. *See* Roberts Bros. Coal Co. v. Robinson, 113 S.W.3d 181 (Ky. 2003).

Concerning Chick Packaging's request for us to remand to the ALJ to "clarify the reasons why he found [Bowman] permanently and totally disabled," we believe

additional findings are unnecessary. While the findings of fact regarding his determination of permanent total disability are admittedly limited, they are sufficient. Authority establishes an ALJ must effectively set forth adequate findings of fact from the evidence in order to apprise the parties of the basis for his decision and to permit meaningful review on appeal. He is not required to recount the record with line by line specificity or engage in a detailed explanation of the minutia of his reasoning in reaching a particular result. *See* Shields v. Pittsburgh and Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982); *See also* Big Sandy Community Action Program v. Chaffins, 502 S.W.2d 526 (Ky. 1973). We also note Chick Packaging failed to make this request for additional findings in its petition for reconsideration. Thus, it waived its right to request such relief for the first time on appeal.

Accordingly, the September 25, 2012, opinion and award and the October 17, 2012, order ruling on the petition for reconsideration are **AFFIRMED**.

ALL CONCUR.

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