Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: February 27, 2015

CLAIM NO. 201391604

ESTILL COUNTY FISCAL COURT PETITIONER

VS. **APPEAL FROM HON. R. SCOTT BORDERS, ADMINISTRATIVE LAW JUDGE**

DONALD EDGE
HON. R. SCOTT BORDERS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

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

ALVEY, Chairman. Estill County Fiscal Court ("Estill County") appeals from the November 5, 2014 decision rendered by Hon. R. Scott Borders, Administrative Law Judge ("ALJ") awarding Donald Edge ("Edge") permanent total disability ("PTD") benefits and medical benefits. Estill County also

appeals from the December 29, 2014 order denying its petition for reconsideration.

On appeal, Estill County argues the ALJ erred in finding it failed to meet its burden of proving Edge suffered from a pre-existing active disability. Because the ALJ's determination is supported by substantial evidence, and a contrary result is not compelled, we affirm.

Edge filed a Form 101 on March 3, 2014 alleging he sustained injuries to his neck and right shoulder radiating into his right arm to the fingertip and across both shoulders on March 11, 2013 while shoveling coal mix to fill potholes. As a result of the injury, Edge alleged he is unable to return to work. The Form 104 filed with the claim indicates Edge's employment history consists of working as a road crewman, truck driver, road construction worker, delivery driver, yard driver, carpenter, forklift driver and paratrooper.

Edge testified by deposition on June 9, 2014 and at the hearing held September 23, 2014. Edge is a resident of Irvine, Kentucky. He was born on October 24, 1958. Edge completed the ninth grade, and obtained a GED while serving in the Army.

He began working for Estill County in June 2009. He stated he had a pre-employment physical examination

before he began working there. He stated he also obtained a commercial driver's license ("CDL") which required a physical examination. He stated he was a laborer for Estill County which required many activities including driving a truck, performing maintenance on vehicles, and various other duties, including filling potholes. He stated the job required him to lift up to a hundred pounds.

Edge first experienced neck pain when he was in his twenties due to a whiplash injury he sustained from riding on a roller coaster. He stated he had periodic neck problems afterward. He also testified he sustained a low back injury in 1999 due to a motor vehicle accident. Edge began treating with Dr. O.C. James for neck and right arm pain in December 2012. Approximately one year prior to seeing Dr. James, Dr. Hammad Malik administered a cervical epidural steroid injection which Edge stated worsened his pain, and he refused to have any more. Dr. James prescribed pain medication and muscle relaxers which Edge continued to take until the date of his work injury. Edge stated the medications he received from Dr. James were for both his neck and low back complaints stemming from the 1999 injury. He also treated with Dr. Rondal Goble prior March 2013.

On March 11, 2013, Edge was working on a road crew for Estill County shoveling a coal mix to repair potholes.

As he was doing this, he experienced a pop and an immediate onset of pain on both sides of his neck, primarily on the right, radiating into the right shoulder, arm and fingertips. After he and a co-worker completed the task of filling the pothole, he was taken to the emergency room at a hospital in Irvine. He was then referred to Dr. Tabitha Culver at the Whitehouse Clinic. Dr. Culver referred him to Dr. James Bean, a neurosurgeon, who performed a fusion at C5-C6. While he was treating with Dr. Bean, Edge also treated with Dr. Paula Robinson at the Estill Clinic so he could obtain medications.

Edge stated the fusion surgery did not help, and his condition has continued to worsen. He stated his neck pops and cracks. He has numbness from his right shoulder to the fingertips of his right hand. He has no grip strength in the right hand. He also stated he has experienced depression and anxiety since his work accident for which he has treated with Dr. Goble and Dr. Tripp Grieser, a psychologist. He takes medication including Effexor and Xanax for his mental problems stemming from the accident. He stated he treated for depression for a short period of time after the 1999 accident, but those problems resolved, and he was not treating for any mental condition prior to the accident.

Edge stated he is unable to perform most of the activities he engaged in prior to the accident, including camping, fishing, using his riding mower, working on cars or riding in boats. He stated he is unable to drive, except locally on occasion, because of his inability to turn his head due to the surgery and pain. Edge stated although he had neck problems prior to the work accident, he had no restrictions, and was able to perform heavy manual labor work for Estill County. He stated he would be unable to return to any of the jobs he performed in the past.

In support of his claim, Edge filed Dr. Bean's records. In his note dated April 10, 2013, Dr. Bean noted Edge had a history of chronic neck pain for three years which was under control until the March 11, 2013 accident. Dr. Bean initially diagnosed chronic foraminal stenosis at C5-C6 on the right with a probable herniated disk on the right at the same level. An MRI confirmed the disk herniation. Dr. Bean performed an anterior cervical discectomy and fusion at C5-C6. Dr. Bean saw Edge for follow-up office visits on multiple occasions after the date of surgery. On October 22, 2013, he recommended Edge see Dr. James for pain management. On January 7, 2014, Dr. Bean stated Edge is unable to drive because of pain with jarring or turning his head. He noted the fusion appeared to be

solid, and Edge had reached maximum medical improvement ("MMI"). He assessed a 25% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"). Dr. Bean also restricted Edge from activities which would twist his neck, or cause bouncing or jarring. He also restricted Edge from lifting over twenty to twenty-five pounds occasionally, with no repetitive heavy lifting. He stated Edge was unable to return to his previous occupation.

Edge filed a voluminous amount of treatment notes and lab studies from Dr. Goble reflecting treatment from January 21, 2011 through May 16, 2014. The notes reflect treatment for cervical degenerative disk disease, hypertension, hepatitis-C, hypothyroidism, general anxiety disorder and depression. The notes outline the medications prescribed including those for depression and anxiety.

Edge also submitted Dr. James' records for treatment from December 26, 2012 through February 5, 2014. Dr. James noted on December 26, 2012, Edge was taking Endocet, Zanaflex and Neurontin for longstanding problems with cervical disk disease. He noted a previous epidural steroid injection had worsened Edge's neck condition. He noted Edge complained of neck pain into the right arm. On April 18, 2013, he noted Edge's complaints, and the

complaint of the work injury. On August 20, 2013, Dr. James noted Edge's continued complaints of neck, bilateral shoulder and right arm pain after the fusion surgery performed by Dr. Bean. On December 10, 2013, he noted Edge's continued physical complaints and was moderately depressed.

Edge submitted the June 26, 2014 report Dr. E. Paul Evensen, Ph.D. Dr. Evensen was provided the history of the March 11, 2013 accident, and the previous history of briefly treating with psychiatric medication subsequent to the 1999 motor vehicle accident. Dr. Evensen diagnosed Edge with major depression, moderate, and alcohol abuse in remission. He stated Edge's Global Assessment of Function was 55. Dr. Evensen stated, "It is my belief the work-related injury significantly exacerbated the patient's psychological condition resulting in a significantly increased impairment rating that was present prior to the work-related injury". He assessed a 25% impairment rating pursuant to the AMA Guides, Second Edition, of which he apportioned 70% to the work injury, and 30% to a pre-existing active condition. Dr. Evensen stated Edge lacks the psychological capacity to perform his previous job, and cannot participate in regular and sustained employment.

Dr. Joseph Zerga, a neurologist, evaluated Edge on June 4, 2014 at Estill County's request. He noted Edge's complaints of stiffness in the neck and pain in the right arm. He also noted Edge's complaints of difficulty looking up or down. Dr. Zerga was also informed of the whiplash due to riding a roller coaster in the past, and the work incident of March 11, 2013 for which Dr. Bean had performed a cervical fusion. Dr. Zerga opined Edge had pre-existing active neck symptoms, but he sustained a work-related injury on March 11, 2013, which exacerbated his pre-existing degenerative disk changes at C5-C6 with increased symptoms. Dr. Zerga assessed a 25% impairment rating pursuant to the AMA Guides, of which he apportioned half to the work-related injury, and half due to the pre-existing active condition. He stated Edge can work at waist level, but cannot perform overhead work. He limited Edge to lifting no more than thirty pounds. He stated Edge should taper off his medications and be more active.

Dr. Tim Allen, a psychiatrist, evaluated Edge on July 18, and 19, 2014 at Estill County's request. In his report dated July 28, 2014, Dr. Allen noted Edge had pre-existing anxiety and depression for which he treated with Xanax. He stated the March 11, 2013 work injury exacerbated his psychological symptoms. He stated Edge had reached MMI.

Dr. Allen assessed a 10% impairment rating pursuant to the AMA Guides, Second Edition, of which he apportioned half to the work-related injury and half as a pre-existing active condition.

A benefit review conference was held prior to the hearing on September 23, 2014. The issues preserved were whether Edge retained the physical capacity to return to the work he was performing on the date of injury; benefits per KRS 342.730; work-relatedness/causation; unpaid or contested medical expenses; injury as defined by the Act; TTD; exclusion for pre-existing active disability/impairment; and whether Edge sustained a psychological injury.

The ALJ issued an Opinion, Order and Award on November 5, 2014 finding Edge permanently totally disabled due to the March 11, 2013 injury he sustained while working for Estill County. He noted the records from Drs. Goble and James outline Edge received treatment for neck and right upper extremity pain prior to March 11, 2013, but their notes do not address causation, impairment or restrictions. The ALJ noted Dr. Bean's records reflect that while Edge had chronic neck pain prior to the work-related injury, it was controlled through physical therapy and pain management. Citing to FEI Installation Inc. v. Williams, 214 S.W.3d 313 (Ky. 2007), the ALJ determined Edge is entitled to medical

benefits related to his work injury. The ALJ next set forth a detailed analysis of the direction in Ira Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000), and Osborne v. Johnson, 432 S.W.2d 800 (Ky. 1968) in reaching his determination Edge is permanently totally disabled.

Finally, the ALJ found as follows regarding whether Edge's award should be apportioned, in part, due to a pre-existing active disability:

> The last issue for determination is whether or not the Plaintiff suffered from any pre-existing impairment/ disability. It is undisputed that there is evidence in the record indicating that Plaintiff suffered from pre-existing active chronic neck pain, conditions which he admitted to, and in fact received medical treatment for as recently as December 2012, and was taking narcotic pain medications at the time of the March 11, 2013, work-related incident.
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> In addition, the record is clear in indicating the Plaintiff did have prior psychological problems back in the 1990's for which he received psychiatric treatment. In addition, both Dr. Allen and Dr. Evensen were of the opinion the Plaintiff had a pre-existing psychiatric impairment and Dr. Zerga was of the impression that 50% of the 25% functional impairment rating assessed for the Plaintiff cervical spine condition was pre-existing and active.
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> However, in the case of *Roberts Brothers Coal Company v. Robinson*, 113 SW3d 181 (KY 2003) the Kentucky Supreme Court set forth that KRS 342.730 (1)(a) requires

the ALJ to determine the workers[sic] disability while KRS 342.730 (1)(b) requires ALJ to determine the workers[sic] impairment. Impairment and disability are not synonymous. The court therefore concluded that an exclusion from the total disability award must be based upon pre-existing disability, while an exclusion from partial disability award must be based upon pre-existing impairment. The court further concluded that for that reason, if an individual was working without restrictions at the time the work-related injuries are sustained, a finding of pre-existing impairment does not compel a finding a pre-existing disability with regard to an award that is made under KRS 342.730 (1)(a).

The court further stated that KRS 342.730 (1)(a) specifies that non-work related impairment "shall not be considered" when determining whether an individual is totally disabled.

Therefore, the true question in this case is whether or not the pre-existing active impairment the Plaintiff suffered from can be determined to have been a pre-existing disability and therefore apportioned out of the pre-existing total disability to be awarded herein.

In this instance, the Plaintiff testified, quite credibly, that he was not working under any restrictions at the time of the March 11, 2013, work-related accident either physically or psychiatrically. In addition, while the Plaintiff was taking narcotic pain medication and was seeking medical treatment for chronic neck pain there is simply no evidence in the record to indicate that the Plaintiff was not able to perform all of his job duties for the Defendant/Employer or for that matter to

> indicate that he had he[sic] disability in existence as a result of these conditions at the time of the March 11, 2013, work-related incident.
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> Therefore, in this specific instance, the Administrative Law Judge does not believe that the Defendant/Employer has met their[sic] burden of proving that Plaintiff suffered from any pre-existing disability that immediately existed prior to the occurrence of the March 11, 2013, work-related incident to entitle them to have the same apportioned out of the permanent total disability award.

On November 17, 2014, Estill County filed a petition for reconsideration arguing the ALJ should amend the award to reflect Edge suffered from a pre-existing active disability. It further argued Edge clearly had pre-existing active problems which interfered with his activities of daily living and work-related responsibilities. On December 29, 2014, the ALJ issued an order denying the petition for reconsideration because it was a re-argument of the merits of the case.

On appeal, Estill County argues the ALJ erred in finding it did not prove Edge suffered from a pre-existing active disability. Estill County had the burden of proving Edge had a pre-existing active disability which should be carved out of the award of PTD benefits. Since Estill County was unsuccessful on this issue before the ALJ, the

question on appeal is whether the evidence compels a different result. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Compelling evidence" is defined as evidence that is so overwhelming no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985). The function of the Board in reviewing the ALJ's decision is limited to a determination of whether the findings made by the ALJ are so unreasonable under the evidence that they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, supra.

As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the discretion to determine all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). The 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). Although a party may note evidence supporting 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). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to the weight and credibility to be afforded the evidence or by noting reasonable inferences that otherwise could have been drawn from the record. Whittaker v. Rowland, 998 S.W.2d 479, 481 (Ky. 1999). So long as the ALJ's ruling with regard to an issue is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

In this instance, the evidence does not compel a finding in Estill County's favor regarding the presence of a pre-existing disability. The fact Edge treated for chronic cervical and right upper extremity problems prior to the March 11, 2013 work-related injury is not in dispute. However, the record is completely devoid of any evidence establishing his ability to work was in any way restricted or he was disabled prior to the date of the injury due to those conditions. The evidence establishes, despite treatment for the neck and right upper extremity, Edge was able to work on a daily basis performing a heavy manual labor job. As noted by the ALJ, "impairment and disability are not synonymous". While the medical evidence was

introduced regarding apportionment of the impairment ratings assessed, there is no evidence Edge had any active disability prior to the date of injury due to the neck and upper extremity conditions.

In Roberts Brothers Coal Co. v. Robinson, 113 S.W.3d 181 (Ky. 2003), the Kentucky Supreme Court distinguished between pre-existing impairment and pre-existing disability. The Court held a finding a claimant had a pre-existing impairment was not synonymous with a finding of a pre-existing disability. Id. at 183. The Court explained there should not be a carve out from a total disability award for pre-existing impairment if there was no pre-existing disability. Id. Although Estill County offered evidence supporting apportionment of an impairment rating due to Edge's pre-existing cervical, right upper extremity and psychological conditions, it failed to produce any evidence the prior condition produced a pre-existing disability prior to the work injury.

It is noted Edge was able to pass a pre-employment physical examination before he was employed by Estill County. Likewise, it is noted he was able to obtain his CDL. Edge testified regarding his ability to perform heavy manual labor prior to the date of the accident, and there is no evidence he was limited or needed assistance in

performing his job prior to the March 11, 2013 injury. Therefore, the ALJ's determination finding Edge permanently totally disabled due to the March 11, 2013 injury, and had no pre-existing disability, is supported by the record. The record does not compel a finding of pre-existing disability, and the ALJ's determination will not be disturbed.

Accordingly, the November 5, 2014 Opinion, Order and Award and the December 29, 2014 Order on Reconsideration rendered by Hon. R. Scott Borders, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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