

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: August 12, 2016

CLAIM NO. 201357391

FORD MOTOR COMPANY (LAP)

PETITIONER

VS.

APPEAL FROM HON. JEANIE OWEN MILLER,
ADMINISTRATIVE LAW JUDGE

LAMARR D. ASHWOOD and
HON. JEANIE OWEN MILLER,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

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

ALVEY, Chairman. Ford Motor Co., Louisville Assembly Plant ("Ford") appeals from the Opinion, Order and Award rendered March 21, 2016 by Hon. Jeanie Owen Miller, Administrative Law Judge ("ALJ") awarding Lamarr Ashwood ("Ashwood") temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits, and medical benefits

for a right ankle and foot injury. Ford also appeals from the April 25, 2016 Order denying its petition for reconsideration.

On appeal, Ford argues the evidence compels a finding Ashwood's right lower extremity condition was pre-existing and not casually related to the September 7, 2013 work injury. Ford argues the ALJ erred in awarding TTD benefits during the period Ashwood worked light duty through December 12, 2013. Ford also argues the ALJ improperly awarded vocational rehabilitation benefits. For the reasons outlined below, we affirm.

Ashwood filed a Form 101 on November 24, 2014, alleging he injured his right ankle on September 7, 2013 when he "slipped on stairs and bashed right ankle." At the time of his injury, Ashwood was working on Ford's assembly line. The ALJ subsequently granted Ashwood's motion to amend the Form 101 to reflect injuries to his right lower extremity, foot and ankle. Ford additionally filed two medical fee disputes. Ford first disputed the July 24, 2014 right flat foot reconstructive surgery performed by Dr. Timothy Hanna. Ford next disputed the amputation below the right knee performed by Dr. Nathaniel Liu on January 28, 2015. Both physicians were joined as parties.

Ashwood testified by deposition on March 31, 2015, and again on September 21, 2015. He was born on December 2, 1992, and currently resides in Hampton, Virginia with his mother. Ashwood was born with congenital foot problems, but could not provide specific details of the treatment he received when he was an infant. He confirmed he was born with a left club foot deformity which required surgery as an infant. He was also told a duplicate great toe was surgically removed from his right foot as an infant. Ashwood underwent additional surgery on his left foot in Virginia in 2010. Ashwood does not recall having any problems with his right foot, ankle or leg until September 7, 2013. Ashwood was not taking any medication at the time of the September 7, 2013 work injury.

Ashwood is a high school graduate and has no other specialized or vocational training. He began working at Ford in June 2012. At the time of his injury, Ashwood worked on the engine line where he was required to pull down a pneumatic gun to screw in one or two nuts, and to use a "popper." Ashwood was required to walk and stand all day.

On September 7, 2013, Ashwood was returning to his work station from a bathroom upstairs. As he was descending the stairs, he slipped and hit the outside of

his right ankle on one of the metal steps. Within an hour, Ashwood experienced right ankle pain and went to Ford's medical facility. Ford referred him to a podiatrist, Dr. Jason Pedersen, who treated him conservatively. Despite Ashwood's continuing symptoms, Dr. Pedersen eventually allowed him to return to work without restrictions. Unsatisfied, Ashwood began treating with Dr. Hanna, who performed surgery in July 2014. Despite surgery, Ashwood continued to experience stabbing pain and was unable to bear weight on his right foot. Dr. Hanna referred Ashwood to Dr. Liu, a vascular surgeon, who performed a successful amputation below the right knee in January 2015. Dr. Steve Frick fitted him for a prosthesis in April 2015.

Following his September 7, 2013 injury, Ashwood returned to work on light duty for Ford until December 13, 2013. He was restricted from bearing any weight on his right foot. Ashwood testified he sat in the cafeteria for approximately two months and did nothing. On cross-examination, Ashwood indicated this may have been for one month rather than two. He then affixed Velcro strips to radios at a table in the cafeteria for a month, and then worked on the assembly line for another month. When asked whether the Velcro job lasted an entire shift, Ashwood stated he would do it "until they ran out of stuff to bring

me." At first, Ford brought him Velcro jobs around lunch time, and he worked until approximately 2:00 p.m. When he was moved to the line, the Velcro job lasted an entire shift. Ashwood was the only employee doing this job, stating "I think it was just something to give me something to do." He agreed Ford's medical department created the job for him. Ashwood was sent home when Ford outsourced the Velcro job to another company.

Ashwood has not worked since December 13, 2013. He indicated he is unable to return to his former job at Ford or any other job he previously held. Ashwood believes himself to be totally disabled, and is unable to perform any work activities on a sustained basis. Since the work injury, Ashwood has not looked into additional schooling or retraining. However, he is willing to participate in vocational rehabilitation if the ALJ believes it is appropriate.

Ashwood's mother, Zadie Clark ("Clark"), testified by deposition on October 26, 2015. Ashwood was born with congenital problems related to his feet. As a newborn, surgery was performed to remove "the nubs that was on his left foot." He was also born with a duplicative toe on his right foot which was surgically removed a month or two after birth. No other treatment was rendered to

Ashwood's lower extremities until 2010. At that time, he underwent surgery for his left foot only. She is unaware of any other problems, limitations or treatment concerning Ashwood's right foot or ankle as either a child or teenager until the work injury.

Ford filed the medical records from Langley Air Force Base indicating Ashwood treated there on eight occasions in 2010. On September 2, 2010, Ashwood primarily complained of "left Achilles contracture and toe pain, right flat foot and toe malalignment." Under the subjective history section, it is noted Ashwood was born with bilateral congenital foot deformities:

Left foot born with three rays, medial two fused, s/p multiple surgeries. Right foot born with club foot and great toe duplication also s/p multiple surgeries. Patient states right foot has pain at the IP of the great toe particularly when struck. No other complaints of right foot. Left foot has pain at the most fibular ray MTP and tight Achilles.

Dr. Eric Shirley examined Ashwood and noted imaging studies showed a severe flat right foot and his left foot study showed two primary rays with two medial metatarsals fused. He recommended surgery on the left foot. Although no treatment recommendations were made for the right foot, Dr. Shirley noted Ashwood's left severe

flat foot with occasional pain due to hallux interphalangeus could be corrected down the road. The left foot procedure was performed on October 6, 2010. In the last note dated January 18, 2011, Dr. Shirley noted Ashwood was doing well post-operatively. He did not discuss or examine the right foot.

Ford filed the medical records from its Company/Occupational Health and Safety Information System. On September 7, 2013, Michelle Crumble, BSN, noted Ashwood reported tripping and falling down the stairs injuring his right ankle. She diagnosed Ashwood with a sprain or strain of the ankle, prescribed medication, and allowed him to return to work without restrictions. Ashwood returned there for treatment on May 2, 2014 reporting severe ankle pain. The records note Ashwood has an anatomically deformed flat pronated foot. The records reflect Dr. Ring Tsai diagnosed a sprain or strain of the right ankle and stated it had resolved to baseline. He then noted Ashwood's congenital foot problems may require further treatment.

Ford also filed treatment records of Dr. Pedersen, and a report of the November 26, 2013 right foot MRI. The MRI report reflects as follows:

Lateral calcaneal subluxation with hindfoot valgus deformity and resulting calcaneotibular impingement (AKA lateral hindfoot impingement) with area of chronic soft tissue swelling/impingement; short segment mildly hypertrophic distal PT tendinopathy with a small, thin pinhole tear; high grade atrophy and fatty infiltration of the abductor hallucis muscle; and lateral midfoot arthrosis and low grade first MTP arthrosis.

On February 24, 2014, Dr. Pederson diagnosed a right ankle sprain, joint pain-ankle, and posterior tibial tendinitis after Ashwood presented for a follow-up for severe ankle pain. He prescribed medication and restricted Ashwood to seated duty for two weeks. Dr. Pederson released Ashwood to work without restrictions on May 9, 2014, stating the work-related fall and ankle injury had resolved.

Ford filed the records from Dr. Hanna and Norton Brownsboro Hospital. On July 2, 2014, Dr. Hanna noted Ashwood presented with severe right ankle pain and had failed all conservative treatment. Dr. Hanna notes Ashwood "has been told for a number of years that he will eventually need surgical intervention." Dr. Hanna recommended surgery. Ashwood was admitted to the hospital on July 24, 2014 for "reconstructive surgery to right lower leg for long standing deformity." The operative note

reflects pre- and post-operative diagnoses of equinus deformity of right foot; degenerative arthritis of the subtalar, talonavicular, and calcaneocuboid joints; dislocation of the talonavicular, calcaneocuboid, and subtalar joints; and posterior tibial tendon dysfunction. Dr. Hanna performed the following procedures on July 24, 2014: 1) Tendo Achilles lengthening right leg and posterior capsule release of subtalar joint; 2) Triple arthrodesis of right subtalar joint, talonavicular joint, and calcaneocuboid joint; 3) Open repair of dislocations of talonacivular joint, calcaneocuboid joint; 4) External fixator placement of right hindfoot; 5) Kidner procedure right foot; 6) PRP placement; and, 7) Peroneal tendon lengthening right foot.

On December 15, 2014, Dr. Hanna noted Ashwood underwent flatfoot reconstruction with tendo Achilles lengthening five months previous, but continued to experience severe pain and the inability to bear any weight. Dr. Hanna noted Ashwood, "states that he is getting pain for 20 years now to this leg and would like to move forward with amputation." Ashwood was transferred for elective below-knee amputation of right leg.

In an undated letter, Dr. Hanna was unable to state whether Ashwood's pain was "secondary to congenital

malformations, secondary to previous surgical intervention the patient had at a young age is leading to malformations, or secondary to the fall that occurred at work." Dr. Hanna noted he did not examine Ashwood prior to the fall at work. Dr. Hanna also noted Ashwood claimed his pain began as a result of a work injury. Dr. Hanna stated he could not determine how much pain the patient was in before the fall due to his significant deformity.

Ford also filed records from Dr. Liu. On April 16, 2015, Dr. Liu noted he began treating Ashwood in December 2014 for a "non-salvageable foot related to club deformity and ankle fracture that was treated by podiatry." He performed an amputation below the right knee on January 28, 2015. Dr. Liu stated Ashwood's amputation site had completed healed and he was due to have his prosthesis to take home. Dr. Liu anticipated Ashwood would be ambulatory with his prosthesis. In a November 19, 2015 letter, Dr. Liu stated Ashwood reached medical maximum improvement ("MMI") on April 16, 2015.

Ashwood filed the January 13, 2015 report of Dr. James Farrage, who evaluated him prior to the amputation. He noted the September 7, 2013 work injury, and subsequent treatment, as well as his history of bilateral foot and ankle deformities. Following an examination, Dr. Farrage

diagnosed status post severe right ankle injury due to a work-related fall requiring eventual triple arthrodesis of the right subtalar, talonavicular, and calcaneal cuboid joints with associated tendon lengthening procedures. Dr. Farrage stated Ashwood has ongoing issues with bony nonunion, intractable pain, muscular atrophy, and impaired functional capacity with possible need to proceed with an amputation below the right knee. Dr. Farrage stated Ashwood's clinical presentation and historical account are consistent with the proposed mechanism of injury, and he has undergone an appropriate medical workup and surgical intervention. Dr. Farrage stated Ashwood is not at MMI, and will probably require the amputation.

Dr. Farrage restricted Ashwood to sedentary work and found he does not retain the physical capacity to return to his former position. Dr. Farrage assessed a 16% impairment rating for Ashwood's current condition pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"). However, if he undergoes a below the knee amputation, Dr. Farrage stated the impairment rating would increase to 28%. Dr. Farrage declined to apportion Ashwood's impairment rating for a pre-existing condition despite his history of correction of clubfoot deformity as

a child with associated congenital issues since he was asymptomatic and functional.

Ashwood also filed the May 4, 2015 report of Dr. Paul Maloof, who evaluated him after the amputation. Dr. Maloof performed an examination and reviewed the medical records provided to him. He diagnosed, "below-knee amputation of the right lower extremity secondary to intractable pain status post a failed attempted hindfoot fusion surgery which was performed by a podiatrist to treat an ankle injury that occurred while at work." He opined the diagnosed condition is causally related to the treatment which resulted from the September 7, 2013 injury. Dr. Maloof did not believe Ashwood had attained MMI since he was recently fitted for prosthesis. Dr. Maloof anticipated significant physical therapy and rehabilitation would be necessary for the next twelve months, but no ongoing medical treatment. Dr. Maloof found the amputation medically reasonable. He assessed a 28% impairment rating for the amputation pursuant to the AMA Guides, attributing the entirety of the rating to the September 7, 2013 work injury since, "his surgical treatment failed to improve his condition leading to intractable pain and ultimately a below knee amputation." Dr. Maloof opined Ashwood does not

retain the physical capacity to return to his former job, and would recommend permanent restrictions.

Ford filed the November 12, 2014 peer review report prepared by Dr. Richard Sheridan. He also testified by deposition on April 28, 2015. After reviewing the medical records, Dr. Sheridan stated Ashwood had right foot problems prior to the work injury, noting he had corrective surgery as an infant. He concluded the July 24, 2014 flat foot reconstructive surgery was necessary for a congenital abnormality of his right foot for which he had surgery as an infant, and was not a direct result of the work injury.

Dr. Sheridan's testimony is consistent with his report. He confirmed he did not interview or examine Ashwood. He diagnosed Ashwood with a right ankle sprain and posterior tibial tendinitis due to the September 7, 2013 work injury. He opined the July 2014 flat foot reconstruction surgery is unrelated to the ankle sprain. Even assuming Ashwood had no prior history of right lower extremity problems, Dr. Sheridan opined the work accident would not have brought his pre-existing, dormant degenerative condition into disabling reality. Ashwood would have needed the July 2014 surgery regardless of the work-related fall on September 7, 2013.

Ford also filed Dr. George E. Quill's October 22, 2015 medical records review report. Dr. Quill also testified by deposition on February 5, 2016. In his report, he noted the medical records from Ford and Dr. Pederson were consistent with a diagnosis of a right ankle sprain, and imaging studies demonstrated a longstanding, congenital clubfoot and hindfoot, as well as ankle subluxation. Dr. Quill concluded the July 24, 2014 surgery was the result of his hindfoot valgus deformity with resultant calcaneofibular impingement and hindfoot arthrosis. Ashwood then underwent a below the right knee amputation for the painful sequelae of clubfoot and the complications resulting from his July 2014 surgery. Dr. Quill stated Ashwood will require subsequent surgical treatment and eventual amputation due to osteoarthritis, contracture, tendinosis, and arthrofibrosis resulting from multiple-operated congenital right clubfoot.

Dr. Quill opined his diagnoses and the subsequent surgical intervention including the amputation are not causally related to the alleged work-related injury on September 7, 2013. The amputation was due to painful sequelae of clubfoot and triple arthrodesis nonunion. Dr. Quill stated Ashwood reached MMI from his work-related ankle sprain within twelve weeks of that injury, and from

his amputation by his last office visit with Dr. Liu. Although the amputation was not casually related to the September 7, 2013 work injury, the procedure was medically necessary and will require ongoing treatment. Likewise, Ashwood's permanent impairment rating and restrictions for the amputation would not be casually related to the ankle sprain or contusion sustained on September 7, 2013. Dr. Quill assessed a 0% impairment rating for Ashwood's work-related ankle sprain warranting no permanent restrictions.

In a November 18, 2015 addendum, Dr. Quill clarified the multiple operations he was referring to in his October 2015 report are those Ashwood received as an infant or child. He noted Dr. Hanna's letter stating he is unable to comment with reasonable medical certainty on causation.

Dr. Quill's testimony upon direct examination is consistent with his report. Dr. Quill confirmed he did not examine Ashwood. He testified the records indicate Ashwood had numerous congenital anomalies of both feet. He stated Ashwood had treatment, "for quite a few years even before the 2013 injury for what was classified as a club foot on one side, the right, and cleft foot on the left. He'd had numerous surgeries as an infant, toddler, a younger person for both. He'd even had an extra digit removed from his

left foot." Dr. Quill stated all the records, including those from Langley Air Force Base, indicate Ashwood had problems, conditions and deformities of his right foot from birth until he worked for Ford. He further opined his pre-existing conditions were active at the time of the work injury stating, "I would think it would be very difficult to have a foot shaped like that and not be symptomatic." Likewise, Dr. Quill stated the pre-existing, active condition would have qualified Ashwood for an impairment rating pursuant to the AMA Guides. Dr. Quill opined the July 2014 procedure was performed by Dr. Hanna to realign the foot, rebuild the arch, and address the existing arthritis. The procedure was not related to, nor reasonable or necessary for, the effects of the September 7, 2013 work injury. Likewise, Dr. Quill found the below the right knee amputation, although reasonable, not related to or caused by the work injury.

On cross-examination, Dr. Quill stated the only surgery Ashwood underwent on his right foot prior to his work injury was when he was an infant, which probably resulted in overcorrection of his clubfoot. He admitted Ashwood did not have active symptomology or medical treatment of his congenital and degenerative right ankle condition prior to September 7, 2013 other than his surgery

as an infant. However, Dr. Quill stated he would, "find it hard to believe" Ashwood's congenital problems were asymptomatic prior to work injury, but admitted he did not have any records indicating otherwise.

Dr. Quill stated Ashwood attained MMI from his ankle sprain when Dr. Pederson allowed him to return to work without restrictions. Dr. Quill testified Ashwood would reach MMI from his amputation three to six months after the surgery depending on how well the prosthetic went. Assuming the amputation is work-related, Dr. Quill agreed with the 28% impairment rating assessed by Drs. Farrage and Maloof. He also stated if Ashwood's prosthesis is successful, he should be able to return to his former job at Ford.

Ford filed the vocational report of Dr. Ralph Crystal. He stated Ashwood is able to perform sedentary to light duty work, and is not disabled from employment. He also stated a six month to a year certificate or diploma program in computer technology, business and office systems or computer and engineering technology can be considered as part of a rehabilitation and return to work program for Ashwood.

The following contested issues were listed at the BRC: Benefits per KRS 342.730, work-relatedness/causation,

unpaid or contested medical expenses, injury as defined by the Act, exclusion for pre-existing disability/impairment, TTD (underpayment as to rate and duration) and the medical fee disputes. The parties waived their right to have a hearing.

In the March 21, 2016 opinion, the ALJ provided a detailed thirty-two page summary of the lay and medical evidence. The ALJ stated in relevant part as follows:

2. Work-relatedness/causation.

Work-related causation is an essential element of a claim for workers' compensation benefits and the burden of proving that element rests with the Plaintiff. Snawder vs. Stice, Ky. App., 576 SW2d 276 (1979). KRS 342.0011(1) provides that an injury is a work-related traumatic event that is "the proximate cause producing a harmful change in the human organism." All of the harmful changes in the human organism that result from a work-related injury and that are not attributable to an independent, intervening cause are compensable. Beech Creek Coal Co. vs. Cox, 314 Ky. 743, 237 SW2d 56 (1951); Elizabethtown Sportswear vs. Stice, 720 SW2d 732 (Ky. App. 1986). Chapter 342 holds an employer liable for all of the injurious consequences of a work-related injury that are not attributable to an independent, intervening cause. When conflicting evidence is presented, the ALJ may choose whom or what to believe. Pruitt vs. Bugg Bros., 547 SW2d 123, 125 (Ky. 1977). The ALJ may also choose to accept portions and disregard other

portions of an expert witness' testimony. Copar, Inc. vs. Rogers, 127 SW3d 554 (Ky. 2003).

In this particular case I found the opinions of Dr. Farrage and Dr. Maloof were the most persuasive and in line with the medical proof. Here, Plaintiff suffered what would have to be described as a fairly minor injury to his right ankle at work. However, the medical treatment by Dr. Pederson, then by Dr. Hanna, and finally by Dr. Liu ultimately resulted in a significant impairment and painful condition requiring amputation of his right lower extremity below the knee. Dr. Maloof opined that the diagnosed condition is causally related to the treatment which resulted from the September 7, 2013 injury. Dr. Farrage and Dr. Maloof's opinions that Plaintiff's right foot and ankle condition were causally related to the work injury, is more in line with the medical history gleaned from the medical records and thereby, more persuasive. I find that Plaintiff suffered a work related injury that resulted in permanent impairment on September 7, 2013.

3. Pre-existing active impairment.

Kentucky law holds the arousal of a pre-existing dormant condition into disabling reality by a work injury is compensable. However, an employer is not responsible for a pre-existing active condition present at the time of the alleged work-related event. McNutt Construction/First General Services vs. Scott, 40 SW3d 854 (Ky. 2001). The correct standard regarding a carve-out for a pre-existing active condition is set forth in Finley vs. DBM Technologies, 217 SW3d 261 (Ky. App.

2007). In Finley, supra, the Court instructed in order for a pre-existing condition to be characterized as active, it must be both *symptomatic and impairment ratable* pursuant to the AMA Guides immediately prior to the occurrence of the work-related injury. The employer bears the burden of proving the existence of a pre-existing active condition. Finley, supra.

The evidence is that Plaintiff was working at Ford, performing all of his required duties, was under no restrictions, was taking no medication and was not being treated for any condition of his right lower extremity immediately before his September 7, 2013 injury.

The similarity between Mr. Ashwood's situation and the plaintiff's in Finley is noteworthy. In Finley, the ALJ found that her surgery was the result of the work-related injury, but that the lumbar fusion and all subsequent medical treatment was for treatment and revision of the pre-existing congenital deformity, rather than for the cure and relief of the work injury. Also in Finley, the ALJ and Workers' Compensation Board found that the lumbar fusion surgery changed some of plaintiff's symptomatology, and the ALJ determined that the surgery, post-surgical treatment, or other medical expenses for treatment of either the effects of the fusion surgery or the treatment of scoliosis should be the responsibility of the employer. The ALJ apportioned the impairment rating between the work injury and the pre-existing scoliosis.

However, the Court of Appeals noted that it is well-established that the work-related arousal of a pre-existing

dormant condition into disabling reality is compensable. McNutt Constr./First Gen. Servs. vs. Scott, 40 SW3d 854 (Ky. 2001). The Court went on to ask and answer the question:

What then is necessary to sustain a determination that a pre-existing condition is dormant or active, or that the arousal of an underlying pre-existing disease or condition is temporary or permanent?" To be characterized as active, an underlying pre-existing condition must be symptomatic and impairment ratable pursuant to the AMA *Guidelines* immediately prior to the occurrence of the work-related injury. Moreover, the burden of proving the existence of a pre-existing condition falls upon the employer. *WolfCreek Collieries v. Crum*, 673 S.W.2d 735, 736 (Ky. App. 1984).

Alternatively, where the underlying pre-existing disease or condition is shown to have been asymptomatic immediately prior to the work-related traumatic event and all of the employee's permanent impairment is medically determined to have arisen after that event—due either to the effects of the trauma directly or secondary to medical treatment necessary to address previously nonexistent symptoms attributable to an underlying condition exacerbated by the event—then as a matter of law the underlying condition must be viewed as previously dormant and aroused into disabling reality by the injury. Under such circumstances, the injured

employee must be compensated not just for the immediate physical harm acutely produced by the work-related trauma, but also for all proximate chronic effects corresponding to any contributing pre-existing condition, including any previously dormant problem strictly attributable solely to congenital or natural aging processes, as it relates to the whole of her functional impairment and subsequent disability rating, including medical care that is reasonable and necessary pursuant to KRS 342.020. Id.

The situation in Finley is duplicated in the present case of Mr. Ashwood. The Finley court goes on to state:

The arousal of a pre-existing dormant condition into disabling reality may be considered temporary when, upon attaining maximum medical improvement, the employee post injury fully recovers and reverts to her pre-injury state of health. *However, where the trauma or the underlying pre-existing defect exacerbated by the trauma results in a permanent impairment rating post injury, even though secondary to surgery or other medical treatment, the totality of the effects of the employee's condition must be judged compensable as a matter of law. Id. (Emphasis ours).*

I find Plaintiff's pre-existing condition was both asymptomatic and produced no impairment immediately prior to the work-related injury and thereby constitutes a pre-existing

dormant condition. I further find that Plaintiff's pre-existing dormant condition was aroused into disabling reality by a work-related injury and the medical treatment for the injury. The undersigned does not find compelling the medical records from at least three years prior to the work injury that discusses some vague pain and some "possible" future medical treatment. There is no evidence that Plaintiff was being treated for his right foot even remotely close in time to the work injury. Clearly, Plaintiff had a congenital deformity of his foot - but it was not causing restrictions, nor did it require medical treatment, nor was he taking any medications for said condition. Accordingly, Plaintiff's impairment and medical expense related to the pre-existing condition are compensable. For this finding I rely on the Plaintiff's testimony and the medical opinion of Dr. Farrage, Dr. Maloof and the medical records submitted regarding his treatment (or the lack thereof) prior to his work injury.

Relying upon the opinions of Dr. Farrage and Maloof, the ALJ found Ashwood has a 28% impairment rating due to the September 7, 2013 work injury. After performing an analysis pursuant to Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003), the ALJ found Ashwood is entitled to the three multiplier pursuant to KRS 342.730(1)(c)1. The ALJ determined Ashwood is not permanently totally disabled. The ALJ determined the medical treatment received by Ashwood was reasonable, necessary and related to his

September 7, 2013 work injury and resolved the medical fee disputes in favor of Ashwood.

After reviewing the cases of W.L. Harper Construction Co. v. Baker, 858 S.W.2d 202 (Ky. App. 1993), Central Kentucky Steel v. Wise, 19 S.W.3d 657 (Ky. 2000), Double L. Const., Inc. v. Mitchell, 182 S.W.3d 509 (Ky. 2005) and Livingood v. Transfreight, LLC, 467 S.W.3d 249 (Ky. 2015), the ALJ found Ashwood entitled to TTD benefits from September 7, 2013 through April 16, 2015, the date Dr. Liu found him to have reached MMI, stating as follows:

Here, the undersigned finds that Plaintiff is entitled to TTD of \$467.19 per week from September 7, 2013 to April 16, 2015. Although Plaintiff returned to Ford, he was placed in the cafeteria doing virtually nothing. He was then given some work to do from October 31, 2013 to December 11, 2015 placing velco (sic) on one of the automobile parts. He was "allowed" to work on this task so long as the parts were needed. It was not a steady work and the wages filed by Ford do not describe or categorize the wages received --- other than to note the total and some categories, i.e. overtime etc. It is undisputed that Plaintiff never returned to the work he was doing at the time of the injury. Even when he was actually doing substantive work, it was not a regular job and varied significantly as to hours worked etc.

Plaintiff testified he never returned to his regular job. The Plaintiff points out that he was never released

to perform the type that is customary or that he was performing at the time of his injury.

The job that Plaintiff performed for "about a month" was apparently not a regular job in the plant, as it was out-sourced and eliminated. All of the facts convinces the undersigned that the "job" the Plaintiff performed for about a month was minimal and certainly not his customary work.

Accordingly, Plaintiff is entitled to TTD for the period of September 7, 2013 through April 16, 2015, the date Dr. Liu testified Plaintiff had reached maximum medical improvement.

The ALJ also awarded vocational rehabilitation benefits.

She stated as follows in support of the award:

Although Plaintiff argues for a finding of permanent total disability, the undersigned is persuaded by Dr. Crystal's opinions and Plaintiff's vocational abilities. The undersigned finds that although the "contested issue" of vocational rehabilitation was not specifically preserved during the BRC, the undersigned is convinced that the parties have tried the issue by consent. The Plaintiff has testified he desires to be retrained and re-enter the work force. The Defendant/employer has argued that Plaintiff is not totally disabled, in part, because he would be able to be retrained. Indeed, Dr. Crystal in his report notes Plaintiff would benefit from more education and re-training. Accordingly, the undersigned find that Plaintiff shall undergo a vocational evaluation per KRS 342.710(3).

Ford filed a petition for reconsideration essentially making the same arguments it now asserts on appeal. Ford additionally asserted the ALJ did not address the conflicting testimony of Dr. Quill.

In the Order denying Ford's petition, the ALJ reiterated testimony from Dr. Quill she found persuasive as it relates to whether there was a pre-existing, active condition. The ALJ noted Dr. Quill testified: 1) the medical records he was provided showed Ashwood had only undergone one operation on his right foot, performed in infancy, before the occurrence of the work injury of September 7, 2013; 2) there were no medical records which indicated Ashwood was having any active treatment or any symptomatology or any complaints with his right foot or right ankle prior to the work-related injury of September 7, 2013; and, 3) he reviewed no records which indicated Plaintiff's congenital problem (which pre-dated the work injury) was symptomatic before September 7, 2013. The ALJ stated she thoroughly reviewed and considered Dr. Quill's opinions, as well as all of the other medical evidence in the record, and found no error in the analysis regarding Ashwood's pre-existing active impairment.

Likewise, the ALJ found no error in her analysis regarding entitlement to TTD benefits during the period

Ashwood continued to work. The ALJ noted the undisputed evidence demonstrates Ashwood was initially placed in the cafeteria doing essentially nothing. He was then given a job that required affixing Velcro strips to stereos while sitting in the cafeteria, and then later while on the assembly line. The ALJ noted Ashwood was often given only a few hours of work to perform. He was not allowed to perform any overtime and was also sent home on several occasions without compensation. The ALJ also found critical the lack of evidence countering the Plaintiff's assertions and testimony regarding his activities at Ford were not "customary" and he did not receive his regular wages.

Finally, the ALJ found no error in her order for a vocational rehabilitation evaluation. The ALJ acknowledged vocational rehabilitation was not listed as a contested issue at the BRC; however, she determined the issue was tried by consent. She noted Ashwood's current abilities, both physical as well as vocational, was much of the core of both parties' arguments. The issue of extent and duration of Plaintiff's disability, as well as whether he was entitled to a statutory multiplier, included evidence regarding Plaintiff's need for vocational rehabilitation. Specifically, the ALJ noted Dr. Crystal's

report discusses the Plaintiff's ability to avail himself to vocational retraining. The ALJ noted Dr. Crystal was hired by Ford as a vocational expert witness. Additionally, Ashwood testified he was interested in retraining if the ALJ found it appropriate. The ALJ found it disingenuous Ford now asserted it was without notice Ashwood was pursuing vocational rehabilitation.

On appeal, Ford argues, "the evidence compels a finding that Claimant's right lower extremity condition was pre-existing and not work-related." Ford argues, unlike the Claimant in Finley v. DBM Technologies, 217 S.W.3d 261 (Ky. App. 2007), there is evidence in the case *sub judice* that Ashwood returned to "pre-existing baseline given his congenital defects." It points to the records of the Ford medical facility, Dr. Quill, and Dr. Pedersen to demonstrate Ashwood sustained a right ankle sprain due to the work injury, and was released to return to work without restriction as of May 9, 2014 by Dr. Pederson. Further it argues there are "multiple indications in the treating physicians' records that claimant's condition was pre-existing and active despite the lack of medical treatment records pointed out by the ALJ," and pointed to portions of the records from Dr. Hanna's medical notes, and Dr. Quill's testimony. Therefore, Ford argues the evidence compels a

finding, pursuant to Finley, there was a return to Ashwood's prior baseline symptoms and that his condition was congenital and painful for over twenty years.

Ford also argues the ALJ erred in awarding TTD benefits during the time Ashwood continued to work through December 12, 2013, pursuant to Trane Commercial Systems v. Tipton, 481 S.W.3d 800 (Ky. 2016). Ford does not challenge the award of TTD benefits from December 13, 2013 through Ashwood's attainment of MMI on April 16, 2015. It asserts Ashwood worked through December 12, 2013 earning the same or greater wages. It asserts Ashwood's testimony "is less than clear" regarding his work tasks during this time period. Ford also argues the post-injury wage records are inconsistent with Ashwood's testimony he was allowed to go home once he completed the Velcro work for the day. Ford asserts the Velcro work performed by Ashwood was a legitimate job, and does not arise due to the extraordinary circumstance referred to by the Court in Tipton.

Finally, Ford argues the ALJ improperly awarded vocational rehabilitation benefits arguing it was not preserved as a contested issue at the BRC and the issue was not tried by consent.

As the claimant in a workers' compensation proceeding, Ashwood had the burden of proving each of the

essential elements of his cause of action. See KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Ashwood was successful in that burden regarding entitlement to TTD and vocational rehabilitation benefits, the question on appeal is whether substantial evidence of record supports 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). However, Ford bore the burden of any affirmative defenses, including whether Ashwood had any pre-existing active conditions.

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 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). 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).

The ALJ applied the appropriate analysis pursuant to Finley v. DBM Technologies, supra, and McNutt Construction/First General Services v. Clifford F. Scott, et al., 40 S.W.3d 854 (Ky. 2001), and substantial evidence supports her determination Ashwood's pre-existing dormant condition was aroused into disabling reality by his work-related injury. In McNutt, the Court held, "[w]here work-related trauma causes a dormant degenerative condition to become disabling and to result in a functional impairment, the trauma is the proximate cause of the harmful change;

hence, the harmful change comes within the definition of an injury." Id. at 859. However, as noted by the ALJ, an employer is not responsible for a pre-existing active condition present at the time of the work injury. To be characterized as an active condition, the underlying pre-existing condition must be symptomatic and impairment ratable pursuant to the AMA Guides immediately prior to the occurrence of the work-related injury. Moreover, the burden of proving the existence of a pre-existing condition falls upon the employer. Finley v. DBM Technologies, supra.

Since Ford was unsuccessful in proving a pre-existing, active condition, the question on appeal is whether the evidence compels a different result. Wolf Creek Collieries v. Crum, supra. "Compelling evidence" is defined as evidence 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, 34 S.W.3d 48 (Ky. 2000).

It is undisputed Ashwood had a congenital right foot condition. The ALJ determined Ashwood's congenital foot condition was both asymptomatic and produced no impairment immediately prior to the work injury, and was therefore a pre-existing dormant condition. The ALJ additionally found his pre-existing dormant condition was aroused into disabling reality by his work-related injury and the treatment for that injury. In support of her determination, the ALJ relied upon the opinions of Drs. Farrage and Maloof. Ford does not challenge their opinions on appeal, and we likewise find those opinions constitute substantial evidence supporting the ALJ's determination. Both physicians declined to apportion Ashwood's impairment rating for a pre-existing condition. Dr. Farrage specifically opined Ashwood was asymptomatic and functional at the time of the work injury.

The ALJ also noted the lack of medical evidence indicating any treatment for his right foot "even remotely close in time to the work injury." The ALJ specifically found the discussion of vague pain and possible future medical treatment in the 2010 Langley Air Force Base records was not compelling on this issue. She also noted the congenital condition did not cause Ashwood's restrictions and did not require medication at the time of

his work injury. In the order on reconsideration, the ALJ highlighted the portions of Dr. Quill's testimony she found persuasive. Dr. Quill admitted the medical records he was provided demonstrated Ashwood had only undergone one operation on his right foot as an infant, and there were no medical records indicating he had any active treatment, symptomology, or complaints with his right foot or ankle prior to the work injury. He noted he reviewed no medical records indicating Ashwood's congenital problems were symptomatic prior to the work injury.

The above-referenced evidence constitutes substantial evidence supporting the ALJ determination, and no contrary result is compelled. While Ford may be able to point to conflicting portions of Dr. Quill's testimony and report in support of its argument, the ALJ enjoys the discretion of believing or disbelieving 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, supra. Likewise, Ford's ability to note evidence supporting a different outcome is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., supra.

The ALJ applied the proper analysis based upon the applicable case law in determining Ashwood is entitled

to TTD benefits during the period he returned to modified work following his work injury, and substantial evidence supports her decision. TTD is statutorily defined in KRS 342.0011(11)(a) as "the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement that would permit a return to employment[.]" In Magellan Behavioral Health v. Helms, 140 S.W.3d 579 (Ky. App. 2004), the Court of Appeals instructed that until MMI is achieved, an employee is entitled to a continuation of TTD benefits so long as he remains disabled from his customary work or the work he was performing at the time of the injury. In Central Kentucky Steel v. Wise, 19 S.W.3d 657, 659 (Ky. 2000), the Kentucky Supreme Court explained, "It would not be reasonable to terminate the benefits of an employee when he is released to perform minimal work but not the type that is customary or that he was performing at the time of his injury." Thus, a release "to perform minimal work" does not constitute a "return to work" for purposes of KRS 342.0011(11)(a).

In Livingood v. Transfreight, LLC, et, al., supra, the Supreme Court declined to hold a claimant is entitled to TTD benefits so long as he or she is unable to perform the work performed at the time of the injury. The

Court stated, “. . . we reiterate today, Wise does not stand for the principle that workers who are unable to perform their customary work after an injury are always entitled to TTD.” Id. at 254. Most recently in Trane Commercial Systems v. Tipton, supra, the Supreme Court recently clarified when TTD benefits are appropriate in cases where the employee returns to modified duty. The Court stated:

As we have previously held, “[i]t would not be reasonable to terminate the benefits of an employee when he is released to perform minimal work but not the type [of work] that is customary or that he was performing at the time of his injury.” Central Kentucky Steel v. Wise, 19 S.W.3d at 659. However, it is also not reasonable, and it does not further the purpose for paying income benefits, to pay TDD benefits to an injured employee who has returned to employment simply because the work differs from what she performed at the time of injury. Therefore, absent extraordinary circumstances, an award of TDD benefits is inappropriate if an injured employee has been released to return to customary employment, i.e. work within her physical restrictions and for which she has the experience, training, and education; and the employee has actually returned to employment. We do not attempt to foresee what extraordinary circumstances might justify an award of TDD benefits to an employee who has returned to employment under those circumstances; however, in making any such award, an ALJ must take into consideration the purpose for

paying income benefits and set forth specific evidence-based reasons why an award of TDD benefits in addition to the employee's wages would forward that purpose.
Id. at 807.

The ALJ, in primarily relying upon Ashwood's testimony, determined he did not return to his customary work following his September 7, 2013 work injury. Ashwood testified he initially sat in the cafeteria for either one or two months doing nothing. He then affixed Velcro strips to radios at a table in the cafeteria for a month, and then on the line another month. When asked whether the Velcro job lasted an entire shift, Ashwood stated he did it "until they ran out of stuff to bring me." At first, Ford brought him Velcro jobs to do at lunch time, and he would do that until approximately 2:00 p.m. When he was moved to the line, the Velcro job lasted an entire shift. Ashwood was the only employee who performed this job, stating: "I think it was just something to give me something to do." He agreed Ford's medical department created the job for him. Ashwood was sent home when Ford outsourced the Velcro job to another company.

Ashwood's testimony constitutes substantial evidence supporting the ALJ's determination he did not return to customary work following his work accident in

accordance with Livingood v. Transfreight, LLC, et, al., supra, and Trane Commercial Systems v. Tipton, supra. Ford's argument the post-injury wages demonstrates he earned the same or greater wages is unpersuasive. The wage records do not shed light on whether Ashwood had returned to customary employment.

Finally, we find no merit in Ford's argument the ALJ improperly awarded vocational rehabilitation benefits. Although the issue of vocational rehabilitation was not listed as a contested issue at the BRC, the ALJ found in both the opinion and order on reconsideration the parties tried the issue by consent. If issues are not specifically raised in the pleadings, they are nonetheless treated as if they had been raised if they were tried by the express or implied consent of the parties. Kroger Co. v. Jones, 125 S.W.3d 241, 246 (Ky. 2004). The Kentucky Supreme Court has taken the view that the "theory of implied consent rest[s] on absence of actual prejudice, i.e., the ability to present a defense." Id. The determination of whether an issue was tried by consent rests within the sound discretion of the ALJ. Nucor Corp. v. General Electric Co., 812 S.W.2d 136, 145-46 (Ky. 1991).

In this instance, the ALJ provided a thorough explanation regarding why she believed the issue of

vocational rehabilitation had been tried by consent. She specifically noted, *at the request of Ford*, Ashwood underwent a vocational evaluation by Dr. Crystal. As part of his assessment, Dr. Crystal noted Ashwood hoped to return to work, and has thought about returning to school or obtaining additional training. Dr. Crystal found Ashwood is not disabled from work. He also stated, "A six month to one-year certification or diploma program . . . can be considered as part of a rehabilitation and return to work program for Mr. Ashwood." Likewise, as noted by the ALJ, Ashwood testified he would be interested in retraining if the ALJ feels it appropriate. For this reason, it cannot be said the ALJ abused her discretion in concluding the issue had been tried by the consent of the parties.

Accordingly, the March 21, 2016 Opinion, Order and Award and the April 25, 2016 Order on petition for reconsideration rendered by Hon. Jeanie Owen Miller, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON GEORGE T T KITCHEN III
600 EAST MAIN ST, STE 100
LOUISVILLE, KY 40202

COUNSEL FOR RESPONDENT LAMARR ASHWOOD:

HON CHED JENNINGS
401 WEST MAIN ST, STE 1910
LOUISVILLE, KY 40202

OTHER RESPONDENTS:

DR NATHANIEL LIU
3 AUDUBON PLAZA DR, STE 220
LOUISVILLE, KY 40217

DR JASEN PEDERSEN
6400 WESTWIND WAY, STE B
CRESTWOOD, KY 40014

DR TIMOTHY HANNA
9880 ANGIE'S WAY, STE 240
LOUISVILLE, KY 40241

ADMINISTRATIVE LAW JUDGE:

HON JEANIE OWEN MILLER
PREVENTION PARK
657 CHAMBERLIN AVENUE
FRANKFORT, KY 40601