

OPINION ENTERED: July 2, 2012

CLAIM NO. 200989842

FOX KNOB COAL COMPANY, INC.

PETITIONER

VS.

APPEAL FROM HON. JEANIE OWEN MILLER,
ADMINISTRATIVE LAW JUDGE

MICHAEL C. GARRETT,
DR. JOSE ECHEVERRIA,
HARLAN ARH,
ARH MEDICAL ASSOCIATES,
DR. SYED RAZA,
MOUNTAIN MEDICAL ENTERPRISES,
and HON. JEANIE OWEN MILLER,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
AFFIRMING**

* * * * *

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

ALVEY, Chairman. Fox Knob Coal Company, Inc. ("Fox Knob") seeks review of the opinion and award rendered August 19, 2011 by Hon. Jeanie Owen Miller, Administrative Law Judge ("ALJ"), awarding permanent total disability ("PTD")

benefits and medical benefits to Michael C. Garrett, for a work-related injury occurring May 4, 2009 ("Garrett"), and finding contested medical expenses and treatment to be work-related, reasonable and necessary. Fox Knob also appeals from the September 22, 2011 order denying its petition for reconsideration.

On appeal, Fox Knob argues the ALJ's finding subjective complaints are "objective medical findings" is a misunderstanding of precedent, and erroneous as a matter of law. Fox Knob also argues the ALJ erred as a matter of law by relying upon Dr. Tibbs' opinion regarding causation because he was "critically unaware" of Garrett's pre-injury medical condition, and pursuant to Cepero v. Fabricated Metals Corporation, 132 S.W.3d 839 (Ky. 2004), his opinions should be disregarded. Fox Knob also argues the ALJ misunderstood precedent regarding apportionment for a pre-existing active condition. Finally, Fox Knob argues the ALJ erred as a matter of law by refusing to address the issue of vocational rehabilitation. We affirm.

Garrett, a resident of Cranks, Kentucky, testified by deposition on November 11, 2011, and again at the hearing held June 28, 2011. Garrett is a high school graduate who took special education classes in school. He later obtained a blasting license, surface mining card and

a Class B commercial driver's license. Garrett's work history includes working as a cashier in a grocery store, coal truck driver, driller, tippie worker, and blaster. He began working for Fox Knob's predecessor in 1993.

The Form 101 states as follows:

Was[sic] picking up a box of blasting caps and was twisting to turn and felt a sharp, burning pain in his lower back which went down his right leg. Both legs went out from under him and he fell to the ground. Was[sic] transported to the hospital by ambulance.

Garrett sustained a low back injury in 1995 for which no workers' compensation claim was filed. He underwent surgery, and returned to work eight weeks later. He continued to work for Fox Knob and its predecessor until May 4, 2009. Garrett described his job duties after returning to work in 1995 as consisting of lifting buckets of drill bits and parts weighing up to thirty to forty pounds. His later job as blaster, which he was performing on May 4, 2009, required lifting blasting material weighing up to fifty pounds. Garrett testified he had occasional flare-ups of back pain subsequent to the 1995 injury and surgery which required treatment. In 2008, he received lumbar injections which relieved an acute flare-up of Garrett's low back pain. He sought treatment for back pain

in March 2009, but missed no work. He was still taking pain medication on May 4, 2009.

Garrett testified the box of blasting materials he was lifting at the time of the accident weighed between fifteen and twenty pounds. As he turned with the box, he experienced pain in his low back into the right hip causing him to fall to the ground.

Garrett reported the injury immediately to his supervisor, Russell Miniard. He was unable to finish his shift, and he was taken by ambulance to the emergency room in Harlan, KY. He eventually treated with Dr. Phillip Tibbs who performed low back surgery on September 2, 2009. Garrett's condition did not improve after the surgery. He testified he continues to take Percocet and Neurontin, and now takes Lexapro for psychological conditions which developed subsequent to the May 4, 2009 accident. Garrett testified he had no depression or emotional problems prior to the accident.

Garrett testified that although he had some low back pain prior to the accident, for which he took medication, he was able to work. After the May 4, 2009 accident, his condition worsened, and his symptoms have continued to worsen despite surgery.

Vernon Russell Miniard ("Miniard"), the surface mining foreman with Fox Knob and Garrett's supervisor at the time of the accident, testified by deposition on July 7, 2011. Miniard began working for Fox Knob as the surface foreman in 2006. Miniard testified blasting materials were usually placed into a blasting hole by use of a powder truck. However, if the truck was unable to get to the hole or if the hole was wet, bagged powder was used. Dry powder bags weigh fifty pounds apiece. Wet bags weigh thirty-five pounds apiece. Until 2008 when the powder truck was acquired, bagged powder was used for every shot. Miniard was aware Garrett took medication for low back pain prior to May 4, 2009. Miniard testified he had no complaints regarding Garrett's work, and he could not recall Garrett missing any work due to low back pain prior to May 4, 2009. Miniard testified Garrett reported an injury on May 4, 2009, an accident report was completed, and he was taken to the hospital by ambulance.

Garrett and Knob Creek both filed numerous medical treatment records of Dr. Echeverria beginning in 2008. Likewise, numerous records were filed from the Lee Regional Medical Center, Appalachian Regional Medical Center in Harlan, and Stone Mountain Health Services detailing medical treatment both before and after May 4,

2009. As noted above, Garrett treated for low back and right lower extremity pain in 2008 and in 2009 prior to May 4, 2009. Garrett never returned to work after May 4, 2009, and complained his low back condition continued to worsen subsequent to the September 2009 surgery performed by Dr. Tibbs. The records reflect an increase of low back pain radiating into the right leg resulting from the work-related injury of May 4, 2009. No medical depositions were taken by either party.

Garrett filed records from University of Kentucky Healthcare, including notes of Dr. Tibbs and Randall Kindler, PA-C. On February 21, 2011, Dr. Tibbs stated Garrett had lumbar disk herniations at L4-L5 and L5-S1, with right radiculopathy. He noted this was a direct result of the May 4, 2009 work-related injury. He further stated the surgery he performed was due to the May 4, 2009 injury, not the 1995 injury. Dr. Tibbs assessed a 13% impairment rating pursuant to the American Medical Association Guides to Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"), all of which he attributed to the May 4, 2009 injury.

On March 12, 2010, Dr. Tibbs noted Garrett was unable to return to work. Mr. Kindler's note dated January 26, 2010 indicates Garrett had a worsening of symptoms

post-operatively, and he may require pain management. The September 21, 2009 note indicates he underwent a left lumbar micro-diskectomy in 1995, and sustained a lifting injury at work on May 4, 2009, resulting in low back pain radiating into the right leg.

Dr. Ronald Dubin, an orthopedic surgeon, evaluated Garrett on November 30, 2010. Dr. Dubin opined Garrett injured his low back on May 4, 2009 while lifting a box of dynamite caps and explosives, and since that time, had complaints of low back pain radiating into his right leg. He noted Garrett had a less than optimal result from the September 2009 surgery, and would never return to work. Dr. Dubin diagnosed failed back syndrome, status post-back surgery with microdiskectomy at L4-L5 and L5-S1 with foraminotomies. He noted Garrett had reached maximum medical improvement ("MMI"). He assessed restrictions of no repetitive bending, stooping, lifting, or crawling. He assessed 13% impairment pursuant to the AMA Guides, none of which he found to be pre-existing active.

Garrett filed records from Cumberland River Comprehensive Care covering the period from January 25, 2010 through October 11, 2010, reflecting treatment with Dr. Syed Raza. Dr. Raza diagnosed adjustment disorder with mixed anxiety and depression. Specifically, the records

reflect increasing depressive symptoms subsequent to July 10, 2010 when his worker's compensation benefits were discontinued.

Garrett submitted the Form 107-P of Reda Moore, Psy. S., dated November 22, 2010. Ms. Moore noted the prior low back surgery in June 1995, and his return to work thereafter. She noted the injury occurring May 4, 2009, resulting in surgery performed in September 2009, and his inability to return to work. Ms. Moore diagnosed mood disorder due to chronic pain with mixed factors. She also noted Garrett had mild mental retardation and had undergone two low back surgeries. She noted the psychological complaints were due to the May 4, 2009 injury, and he had no previous complaints. She assessed a 12% impairment rating pursuant to the AMA Guides, 2nd edition.

Dr. Tutt evaluated Garrett at Fox Knob's request on June 25, 2010. Dr. Tutt noted Garrett reported the 1995 surgery, and his ability to get along fairly well until May 4, 2009. Garrett described the events of May 4, 2009. Dr. Tutt opined Garrett had long-standing discogenic disease with a history of prior lumbar discectomy which he noted occurred "in 1985"[sic]. Dr. Tutt noted Garrett had worsening low back pain with right leg pain developing in October 2008. He found no evidence of alteration of

structural integrity subsequent to the May 4, 2009 event. Dr. Tutt diagnosed multi-level lumbar degenerative osteoarthritis, disk disease, facet disease and lumbar stenosis at L4-L5 unrelated to the May 4, 2009 event. He assessed 0% impairment for the May 4, 2009 event, but assessed a 3% impairment rating pursuant to the AMA Guides due to the September 2009 surgery. He noted Garrett should avoid heavy lifting, and excessive bending and stooping.

Dr. Snider evaluated Garrett at Fox Knob's request on January 13, 2011. He noted low back treatment in 2007 and 2008. Dr. Snider diagnosed L4-L5 diskectomy in 1995; chronic low back pain; pre-injury complaints of low back and right leg pain; epidural steroid injections; neurosurgical evaluation recommended previously; L4-L5 and L5-S1 diskectomies and foraminotomies; and narcotic habituation. Dr. Snider stated, "It is clear Mr. Garrett had active, significant, and pre-existing low back and right leg pain prior to the alleged work injury." Dr. Snider noted the post-injury MRI results were unchanged from the one performed in 2008. He found Garrett to be at MMI, and indicated the use of narcotics should be minimized. Dr. Snider assessed a 13% impairment rating pursuant to the AMA Guides, of which he attributed 10% to the 1995 surgery and to the May 4, 2009 incident. He

recommended Garrett refrain from lifting, pushing or pulling in excess of twenty pounds, and change position as needed. In a supplemental report dated June 1, 2011, Dr. Snider stated he would have recommended the same restrictions prior to May 4, 2009.

Dr. Ruth, a psychiatrist, evaluated Garrett at Fox Knob's request on July 28, 2010. He opined Garrett has a depressive disorder due to low back and leg pain and also a learning disorder, all unrelated to the work injury. He found Garrett to have reached MMI on April 7, 2010, and no additional treatment is required.

In the opinion and award rendered August 19, 2011, the ALJ found as follows:

The Defendant/employer argues there was not an injury as defined by the Act in large part because the Plaintiff was not able to demonstrate he suffered a permanent functional impairment as a result of the work accident.

The case of Koroluk vs. United Parcel Service, No. 2006-SC-000946-WC (Ky. 2007) provides some direct guidance on this issue. In that case, Kentucky's highest court stated in pertinent part:

KRS 342.020(1) entitles a worker to reasonable and necessary medical treatment at the time of the injury and thereafter during disability. In FEI Installation, Inc. vs. Williams, 214 SW3d 313,

318 (Ky. 2007), the court explained that "disability" is the equivalent of impairment for the purposes of the statute, regardless of whether impairment rises to the level that warrants a permanent impairment rating, permanent disability rating, or permanent income benefits. Using the Fifth Edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment, the court defined impairment as being a "loss, loss of use, or derangement of any body part, organ system, or organ function" and noted that it may be temporary or permanent. Relating the definition of impairment to the definition of "injury" found in KRS 342.0011(1), the court stated that impairment demonstrates the existence of a harmful change in the human organism.

Contrary to the claimant's assertion, Robertson vs. United Parcel Service, supra, makes it clear that when work-related trauma causes temporary symptoms requiring medical treatment, a harmful change has occurred. Thus, the worker has sustained an injury as defined by KRS 342.0011(1) and is entitled to whatever income and medical benefits the evidence supports. (Emphasis ours)

It is clear that in this case the Plaintiff suffered a "work-related trauma which caused temporary symptoms requiring medical treatment." There is no dispute he was injured on the job and it actually required that he be taken to the hospital by ambulance. Accordingly, in applying the above-

referenced case, the Plaintiff has suffered an injury as defined by the Act.

3. Work-relatedness/causation

When the causal relationship between an injury and a medical condition is not apparent to the lay person, the issue of causation is solely within the province of a medical expert. Elizabethtown Sportswear vs. Stice, 720 SW2d 732, 733 (Ky. 1986); Mengel vs. Hawaiian Tropic Northwest and Central Distributors, Inc., 618 SW2d 184 (Ky. 1981).

I find that there is a causal relationship between the injury sustained by Plaintiff on May 4, 2009 and his current condition. I find the injury was the event that ultimately required Plaintiff's surgery by Dr. Tibbs. In making this finding I have relied upon the testimony by report(s) of Dr. Tibbs and the testimony of the Plaintiff.

I further find there is a causal relationship between the physical injury sustained by Plaintiff on May 4, 2009 and his current psychological condition. I find the injury was the event that ultimately required Plaintiff's surgery and that the residual chronic and severe pain has resulted in the psychological condition of the Plaintiff. In making this finding I have relied upon the testimony by report(s) of Dr. Raza, Reba Moore and the testimony of the Plaintiff.

4. Extent and duration with multipliers.

The evidence is certainly contradictory on this issue. The Plaintiff argues he is permanently and totally disabled as defined by the Act. The Defendant/employer argues his occupational disability is no greater than it was immediately before the injury. After reviewing all of the evidence in this case I find Plaintiff now suffers from a permanent total occupational disability. In making this finding I rely on[sic] upon the testimony of the Plaintiff and the medical reports of Dr. Tibbs, Dr. Raza, Dr. Echervierra [sic] and Reba Moore.

Permanent total disability is defined in KRS 342.0011(11)(c) as 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. Hill vs. Sextet Mining Corp., 65 SW3d 503 (Ky. 2001).

"Work" is defined in KRS 342.0011(34) as providing services to another in return for remuneration on a regular and sustained basis in a competitive economy. The statutory definition does not require that a worker be rendered homebound by his injury, but does mandate consideration of whether he will be able to work reliably and whether his physical restrictions will interfere with his vocational capabilities. Ira A. Watson Department Store vs. Hamilton, 34 SW2d 48 (Ky. 2000).

In determining whether a worker is totally disabled, an Administrative Law Judge must consider several factors including the worker's age, educational level, vocational skills, medical restrictions, and the likelihood that

he can resume some type of "work" under normal employment conditions. Ira A. Watson Department Store vs. Hamilton, supra.[sic]

In applying the factors set out in Ira Watson, supra, it is apparent that Plaintiff's vocational factors infer his total and permanent disability. Those factors I have considered are: his age, 36, which is a younger worker, and his educational level - which technically is 12th grade but clearly he has a learning disorder and a lower than normal I.Q. However, he had been able to pass several licensing tests (CDL and blasting). His primary work experience however has been in the very labor intensive job of surface coal mining. In his physical condition, he is unable to perform any job including a sedentary job on a regular and sustained basis.

I find the Plaintiff's testimony credible. I observed him closely at the hearing and he moved very slowly, he seemed to have some difficulty understanding and responding to questions of counsel. It was obvious to this fact-finder that Plaintiff was in pain. This is not an individual who simply does not want to work. His work history speaks for itself - his has a proven record of work.

If one adopts either Dr. Tibbs' restrictions: [no lifting greater than 25-30 pounds occasionally or 10 pounds repetitively; and no repetitive bending or twisting at the waist] or Dr. Echevarria's[sic] restrictions: [occasional lifting 10 pounds /frequent-lifting no greater than 5 pounds; no standing/walking more than 30 minutes with a break every 15 minutes; sitting maximum of 2 hours

with interruption every 20 minutes; no stooping, crouching, kneeling or crawling; maximum of 30 minutes of occasional climbing or balancing with a break every 15 minutes; and no operation of moving-machinery] - and accepts Plaintiff's testimony as true - the Plaintiff could not return to any work on a regular and sustained basis.

With his physical restrictions the vocational and medical factors all leads this fact-finder to conclude that the plaintiff suffers from a permanent and total occupational disability.

5. Pre-existing active disability

As outlined above, there is evidence of a pre-existing active impairment of the plaintiff from numerous sources. Clearly Plaintiff had a ratable impairment prior to this work injury by the fact that he had a previous back surgery some 14 years before this injury. All of the doctors that testified in this case, except Dr. Dubin, opined Plaintiff had a pre-existing impairment before the work injury and rendered opinions as to apportionment between the pre-existing impairment and his current condition.

There is also substantial evidence that his back condition had worsened, requiring medical treatment, in the months before this work injury. Dr. Snider goes so far as to opine he would have placed the same restrictions on Plaintiff prior to this work injury as he does after the work injury and surgery.

In determining whether Plaintiff suffered from a pre-existing disability, I turn to the case of Roberts Bros. Coal Co. vs. Robinson,

113 SW3d 181 (Ky. App. 2003) for guidance. I find the medical evidence supports a conclusion that Plaintiff suffered from an active impairment and would have qualified for an impairment rating immediately before he injured his back on May 4, 2009 at work. However, I also find that Plaintiff did not suffer from a pre-existing disability immediately before his work injury.

In Roberts Bros., supra, a coal miner, while working without medical restrictions, injured his back. He had no pre-existing active disability, but medical testimony established one-quarter to one-half of his impairment was due to the natural aging process. As a result, the ALJ reduced Robinson's award by twenty-five percent but still attributed his total disability to his on-the-job injury. As stated in Roberts Bros.:

an exclusion from a total disability award must be based upon pre-existing disability, while an exclusion from a partial disability award must be based upon pre-existing impairment. For that reason, if an individual is working without restrictions at the time a work-related injury is sustained, a finding of pre-existing impairment does not compel a finding of pre-existing disability with regard to an award that is made under KRS 342.730(1)(a).

Id., at 183.

I find the Roberts Bros. case to be directly applicable to the facts of this case. In Roberts Bros., the court noted an award under KRS 342.730(1)(a)

is based upon a finding of disability. In contrast, the court pointed out an award of PPD under KRS 342.730(1)(b) is based on a finding the injury resulted in a particular AMA impairment rating, with the amount of disability being determined by statute. The court noted, in other words, KRS 342.730(1)(a) requires the ALJ to determine the worker's disability, while KRS 342.730(1)(b) requires the ALJ to determine the worker's impairment. The court concluded by noting an exclusion from a total disability award must be based upon a pre-existing disability, while an exclusion from a partial disability award must be based upon a pre-existing impairment. Roberts Bros. therefore underscored that if an individual is working without restrictions at the time a work-related injury is sustained, a finding of pre-existing impairment does not compel a finding of pre-existing disability with regard to an award made under KRS 342.730(1)(a).

Immediately before this injury, Plaintiff was working 10 to 11 hours daily at least 5 days a week in a job which required repetitive bending, lifting, twisting, pushing, pulling and generally medium to heavy labor. While he may have missed some work and admittedly was being prescribed pain medications, he performed his work without restrictions or accommodations. He also apparently performed his job without any comment from his employer prior to the injury. Not only his testimony but his wage statement (W-2 for 2009) evidences the fact that he was working regularly and without restriction before the injury.

The mere existence of a pre-existing functional impairment rating

is only one factor to be considered by the ALJ who must determine whether the pre-existing impairment rating was producing some occupational diminution of the worker's ability to work for wages in a competitive economy. The burden of proving the existence of a pre-existing active condition falls upon the employer. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984); Finley v. DBM Technologies, 217 S.W.3d 261 (Ky. App. 2007) and I find that the defendant did not meet that burden.

6. Compensability of psychological claim.

As previously discussed, I find that Plaintiff's psychological claim is compensable and a direct result of the work injury of May 4, 2009. In making this finding, I rely on the testimony of Dr. Raza and the Plaintiff. See KRS 342.0011(1) and Lexington Urban County Government vs. West, 52 SW3d 564 (Ky. 2001).

7. Medical fee disputes:

- a. Cumberland River Regional Hospital/Dr. Syed M. Raza
- b. Dr. José Manuel Echevarria[sic]
- c. ARH Medical Associates
- d. Mountain Medical Enterprises

In determining that Plaintiff's work injury resulted in the need for medical treatment, I find the medical expenses as outlined above, which are subsequent to the May 4, 2009 injury, are compensable, reasonable, necessary and are related to the work injury of the Plaintiff. See KRS 342.020

Fox Knob raised numerous issues in its petition for reconsideration filed on August 30, 2011. In the order dated September 22, 2011, the ALJ granted Fox Knob's request to correct a typographical error, but denied the remainder of the petition for reconsideration, as well as the supplemental petitions for reconsideration in all other respects.

As we have noted numerous times in the past, the ALJ's discretion is broad. The crux of the numerous issues raised by Fox Knob on appeal appears to concern that discretion. Since Garrett was successful before the ALJ, the question on appeal is whether the ALJ's finding concerning causation is supported by substantial evidence. 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).

In rendering a decision, KRS 342.285 grants an ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). The ALJ may draw reasonable inferences from the evidence, 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. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). In that regard, causation and the work-relatedness of a condition are factual questions to be determined within the sound discretion of the ALJ, and the ALJ, as fact-finder, is vested with broad authority to decide such matters. Dravo Lime Co. v. Eakins, 156 S.W.3d 283 (Ky. 2003); Union Underwear Co. v. Scearce, 896 S.W.2d 7 (Ky. 1995); Hudson v. Owens, 439 S.W.2d 565 (Ky. 1969). In addition, the Act does not require causation to be proved through objective medical findings. See KRS 342.0011(1); Staples, Inc. v. Konvelski, 56 S.W.3d 412, 415 (Ky. 2001). 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). Rather, it must be shown there was no evidence of substantial probative value to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

It is uncontroverted Garrett experienced an acute onset of low back pain on May 4, 2009 as he twisted to turn while lifting a box of blasting caps, causing him to fall.

Likewise, it is uncontroverted he underwent surgery in September 2009, and he has not returned to work since the May 2009 event.

In addressing Fox Knob's arguments, we agree the ALJ's reliance upon Koroluk vs. United Parcel Service, No. 2006-SC-000946-WC (Ky. 2007) is misplaced, and does not support her ultimate finding of injury and permanent total disability. That said, the ALJ's finding of a work-related injury and award of permanent total disability benefits is supported by the evidence, and consistent with the holding in Roberts Bros. Coal Co. vs. Robinson, 113 SW3d 181 (Ky. App. 2003).

Evidence of record exists which could have supported a contrary result. However, despite Fox Knob's assertions, Dr. Tibb's opinion regarding causation rises to the level of substantial evidence sufficient to support the outcome selected by the ALJ. Kentucky Utilities Co. v. Hammons, 145 S.W.2d 67, 71 (Ky. App. 1940); Smyzer v. B. F. Goodrich Chemical Co., *supra*; and Special Fund v. Francis, *supra*. Upon consideration of the ALJ's analysis, we are likewise satisfied the proper legal standard was utilized in deciding the issue of causation and the ALJ made adequate findings of facts sufficient to apprise the parties of the basis for her decision. Shields v.

Pittsburgh and Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982). Hence, we find no error.

Fox Knob's argument regarding Dr. Tibbs' credibility and his understanding of Garrett's previous medical history is without merit. Since Dr. Tibbs performed the September 2009 surgery, it is reasonable to assume he saw evidence of the previous surgery. Dr. Tibbs specifically stated the cause of the need for surgery, and the impairment rating he imposed was due to the May 4, 2009 work injury rather than the 1995 injury and surgery. Since Dr. Tibbs was not deposed, or in any other manner subjected to cross-examination, his understanding as to the previous medical history is unknown. Fox Knob failed to establish whether Dr. Tibbs was provided an erroneous medical history, or whether the medical history was concealed, and thereby failed to demonstrate a basis to impeach or disregard his opinions pursuant to Cepero, supra.

Fox Knob also argues the ALJ misunderstood precedent regarding apportionment to pre-existing active disability. We disagree. The determination regarding an alleged pre-existing active disability in the context of a total disability award is not one based exclusively on the factors enunciated in Finley v. DBM Technologies, 217 S.W. 3d 261 (Ky. App. 2007). It must incorporate an analysis of

certain factors enunciated in the applicable case law including, but certainly not limited to, whether Garrett was working with any physical restrictions at the time of his work injury. See Ira A. Watson Dept. Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000); See Roberts Brothers Coal Co. v. Robinson, *supra*.

In the case *sub judice*, the ALJ determined Garrett is totally occupationally disabled. Therefore, the inquiry, pursuant to Roberts Brothers Coal Co. v. Robinson, *supra*, is whether his pre-existing impairment also resulted in a pre-existing disability. The ALJ properly undertook the analysis of whether the pre-existing condition, which merited an impairment rating, caused a pre-existing disability. In order for there to be an exclusion from a total disability award pursuant to Roberts Brothers, *supra*, it must be established the pre-existing condition was symptomatic and restrictive, and affected Garrett's ability to work at his job immediately prior to the subject injury. In this instance, Garrett missed eight weeks of work in 1995 due to his prior back surgery. He continued to work for Fox Knob for fourteen years. No evidence was introduced indicating Garrett could not perform his job, or was restricted in any fashion, despite ongoing complaints, until the accident occurring on May 4, 2009. In fact,

Miniard testified he could not recall Garrett having missed any work due to back pain prior to May 4, 2009. He likewise testified he had no complaints with Garrett's work. In this instance, we do not believe the ALJ was compelled to carve an exclusion from the award of total disability benefits.

In her opinion, the ALJ correctly set forth the necessary analysis regarding apportionment when awarding permanent total disability benefits. The ALJ further cited Roberts Brothers Coal Co. v. Robinson, and it is readily apparent she was aware she was to exclude the amount attributable to an active *disability* from a permanent total disability award. The ALJ noted Garrett undoubtedly had a pre-existing impairment; however, she was not convinced he had a pre-existing disability, requiring a reduction in his award. We believe the ALJ conducted the correct analysis, and her findings are supported by the record.

Finally, Fox Knob argues the ALJ erred as a matter of law by refusing to address the issue of vocational rehabilitation benefits. It is noted this was not an issue preserved at the Benefit Review Conference, nor was it raised at the hearing. No evidence was presented regarding this issue. The ALJ did not *sua sponte* award vocational rehabilitation benefits. Likewise,

neither party argued whether vocational rehabilitation benefits should be afforded until Fox Knob filed its supplemental petition for reconsideration on September 2, 2011.

In support of its argument, Fox Knob cites to OSF Intern., Inc. v. Engleman, 2011 WL 832171 (Ky. App., March 11, 2011), an unreported case from the Kentucky Court of Appeals. In Engleman, the ALJ *sua sponte* awarded vocational rehabilitation benefits without affording the parties the opportunity to be heard on the issue. KRS 342.710(3), states in relevant part,

. . . The administrative law judge on his own motion, or upon application of any party or carrier, after affording the parties an opportunity to be heard, may refer the employee to a qualified physician or facility for evaluation of the practicability of, need for, and kind of service, treatment, or training necessary and appropriate to render him fit for a remunerative occupation.

Contrary to Engleman, in this instance the ALJ did not award vocational rehabilitation benefits, nor was she compelled to do so. KRS 342.710 is permissive, not mandatory. Had the ALJ *sua sponte* referred Garrett for a vocational evaluation, she could not have done so until the parties were afforded the opportunity to be heard. In this instance, the issue of vocational rehabilitation was not

addressed until the filing of a supplemental petition for reconsideration.

While KRS 342.710(3) allows for a motion for vocational rehabilitation benefits to be made at any time, by any party, carrier or on the ALJ's own motion, we do not believe a petition for reconsideration is an appropriate vehicle for making such a motion. KRS 342.281 provides that in considering a petition for reconsideration, the ALJ "shall be limited in the review to the correction of error patently appearing upon the face of the award, order, or decision. . . ." We do not believe the ALJ's failure to consider an issue that was never raised by any party can be considered an error patently appearing upon the face of the opinion. We further note KRS 342.710 requires the parties be given an opportunity to be heard before vocational rehabilitation may be ordered. This also indicates that a petition for reconsideration is not the appropriate vehicle for such a motion. Fox Knob could have filed a motion for the ALJ to consider a vocational rehabilitation referral, but it did not do so. The Court of Appeals' determination in Engleman is inapplicable to the claim *sub judice*. The ALJ was not compelled to make such finding, and we find no error.

Accordingly, the ALJ's decision rendered August 19, 2011, and the order on reconsideration entered September 22, 2011 are hereby **AFFIRMED**.

ALL CONCUR.

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