Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: March 20, 2015

CLAIM NO. 201270945

HIGHLAND ROOFING PETITIONER

VS. **APPEAL FROM HON. J. GREGORY ALLEN, ADMINISTRATIVE LAW JUDGE**

JOSEPH W. CLARK
HON. J. GREGORY ALLEN,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

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

RECHTER, Member. Highland Roofing appeals from the September 30, 2014 Opinion, Order and Award and the November 12, 2014 Order on Petition for Reconsideration rendered by Hon. J. Gregory Allen, Administrative Law Judge ("ALJ"). The ALJ awarded Joseph Clark ("Clark") temporary total disability benefits, permanent total disability benefits,

medical benefits and vocational rehabilitation benefits for a September 14, 2012 injury. On appeal, Highland Roofing challenges the award of permanent total disability benefits. For the reasons set forth herein, we affirm.

Clark was born November 29, 1978 and has an eighth grade education. He does not have a GED or other specialized training. He has worked his entire life as a laborer. Before Highland Roofing, he worked for a paving and concrete company, in a sawmill, and as a general laborer at a cord factory. He worked as a roofer for Highland Roofing.

On September 14, 2012, Clark fell twelve to fifteen feet from a roof, landing on his right ankle, lower back and buttocks. He was taken to the University of Louisville Trauma Center. He was diagnosed with open right distal tibial pilon fracture, distal fibula fracture with post traumatic arthrosis, ankle arthorofibrosis, fifth metatarsal fracture, and L5 lumbar spine compression fracture. He underwent surgery involving irrigation, debridement, external fixation and antibiotic beads. On October 1, 2012, he underwent definitive fixation.

Dr. Craig Roberts was Clark’s chief treating physician at the University of Louisville. In a November 7, 2013 report, Dr. Roberts believed Clark had reached maximum

medical improvement ("MMI"). Referencing the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"), Dr. Roberts assessed an 8% impairment for Clark's spine injury. For his right ankle injury, he assessed a 14% impairment. Combined, Dr. Roberts assessed a 21% whole person impairment rating.

Dr. Roberts characterized Clark's prognosis as "fair." He opined Clark will require periodic physician visits and, ultimately, multiple future surgeries on his ankle. He permanently restricted Clark from climbing ladders, heavy lifting, working on uneven surfaces, prolonged standing, or repetitive bending and squatting.

Dr. Thomas Loeb performed an independent medical evaluation ("IME") on May 20, 2014. He diagnosed Clark with open comminuted intra-articular distal tibial pilon fracture, closed fifth metatarsal fracture, and an L1 compression fracture. He placed Clark at MMI as of April 2013. Referencing the AMA Guides, he assessed a 5% impairment for the spine injury, 8% for the 2mm space at the talotibilal joint, and 8% for the ankle intra-articular fracture with displacement. Using the combined values chart, this resulted in an 18% whole person impairment rating. He agreed Clark could not perform any work

involving prolonged standing, climbing ladders, or uneven ground.

Dr. Bart Goldman performed an IME on May 23, 2013. Dr. Goldman diagnosed the same injuries as Drs. Loeb and Roberts. He found Clark was at MMI and assessed a 5% impairment rating for the spine injury pursuant to the AMA Guides. He assessed a 0% impairment rating for the fifth metatarsal injury, as he found no significant range of motion deficit. Regarding Clark's ankle injury, he assessed an 8% impairment rating, resulting in a combined impairment rating of 13%. He did not believe Clark could return to work as a roofer, but opined he should be able to perform work that required limited walking and the ability to unweight his right lower extremity as needed.

In a supplemental report dated March 20, 2014, Dr. Goldman stated he had reviewed Dr. Roberts' medical report dated November 7, 2013 report. Acknowledging he misunderstood the relevant portions of the AMA Guides, he agreed Dr. Roberts had assessed the proper impairment ratings pursuant to the AMA Guides.

Clark testified he experiences constant pain in his right ankle, with marked instability. He is unable to stand for longer than an hour before his ankle begins to throb and swell. He still has pain in his back, but it is

not nearly as severe as his ankle pain. Though he is able to walk his dogs, he must take frequent breaks and has difficulty on any uneven surfaces. His doctors have discussed the possibility of an ankle fusion in the future to alleviate the pain. He takes only Tylenol for the pain.

Highland Roofing also filed the vocational report of Dr. Ralph Crystal, dated May 29, 2014. Dr. Crystal noted Clark's injury had not caused any cognitive deficit. Therefore, he concluded Clark could work in positions consistent with his academic abilities, including manufacturing, non-hazardous security, service, cashier and clerical work. He recommended Clark obtain a GED and retraining.

The parties stipulated Clark suffered a work-related injury on September 14, 2012 and does not retain the physical capacity to return to his work as a roofer. The ALJ was most persuaded by Dr. Loeb and adopted his 18% whole person impairment rating. Considering the extent of Clark's disability, the ALJ provided the following analysis:

> In the case at bar, the plaintiff was only 33 years old at the time of injury. This mitigates against a finding of total disability.
>
> However, this is offset by the plaintiff's educational level of only 8th grade. Moreover, testing administered by Dr. Crystal found the

plaintiff's academic skills in reading, spelling and arithmetic were all below 8th grade level with the exception of reading which was at the 8th grade level. This is consistent with the plaintiff's testimony at the final hearing that he was a competent reader.

However, it is the plaintiff's restrictions and employability that are highly probative to the ALJ in reaching his decision herein. The parties stipulated that plaintiff did not retain the physical capacity to return to the type of work he was performing at the time of accident. This is consistent with the restrictions placed on the plaintiff by all medical opinions and that of Dr. Crystal. However, it is the extent of those restrictions that compromise the plaintiff's ability to return to any type of work as that term is defined, at this time.

Dr. Roberts simply stated that plaintiff was "unable to gainfully employed." While that is a profound statement, it adds little to the analysis of this issue. However, the restrictions and recommendations of Dr. Loeb are the most ominous the ALJ has seen in either practice or as an adjudicator when dealing with someone who is still capable of ambulation. Dr. Loeb provided the following summary of his recommended restrictions:

> "This gentleman really cannot have any prolonged standing or walking. He should not climb ladders. He absolutely cannot work on roofs. He should stay off uneven ground. He could autofuse his right ankle but more than likely may need an ankle fusion in the future."

> When broken down, Dr. Loeb seeming[ly] rules out any type of work requiring heights, and work taking place on unimproved ground such as construction[s] sites and that even if work could be found on ground or flooring that was level (i.e. concrete factory floors) plaintiff cannot do any prolonged standing or walking.
>
> These restrictions were no[t] lost on Dr. Crystal who opined the plaintiff would "do best with a job that is typically performed at a bench, desk, or work station."
>
> However, these recommended jobs are not consistent with that performed by plaintiff at the time of injury or the type he has performed in his past work history. Moreover, plaintiff has attempted to obtain employment after being released by Dr. Roberts but has been unable to find jobs that are consistent with his recommended restrictions.
>
> The ALJ believes the plaintiff is a very proud person and would like to return to employment. However, at present, there simply does not appear to be any jobs available to him that he has any experience in when considering his current restrictions.
>
> Therefore, the ALJ finds the plaintiff has sustained his burden of demonstrating permanent total disability and the ALJ finds as such.

Highland Roofing petitioned for reconsideration, which was denied. It now appeals, arguing the award of permanent total disability benefits was improper. It asserts the ALJ applied the wrong standard to his analysis,

and the evidence compels a finding Clark is permanently partially disabled. We disagree.

At the outset, we note Clark successfully bore his burden of proving he is permanently totally disabled. Therefore, the question on appeal is whether substantial evidence 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).

Permanent total disability is 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 the injury. KRS 342.0011(11)(c). In determining whether a worker is totally disabled, the ALJ must consider several factors including the workers' age, educational level, vocational skills, medical restrictions, and the likelihood he can resume some type of work under normal employment conditions. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). Authority has long acknowledged in making a determination granting or denying an award of permanent total disability benefits, an ALJ has wide ranging

discretion. Seventh Street Road Tobacco Warehouse v. Stillwell, 550 S.W.2d 469 (Ky. 1976); Colwell v. Dresser Instrument Div., 217 S.W.3d 213, 219 (Ky. 2006).

Highland Roofing claims the ALJ considered only Clark's past work and failed to consider whether there is work he could currently perform outside of his previous experience. It urges the ALJ overlooked Dr. Crystal's "unrebutted" report, which identified several positions Clark is able to perform within his physical restrictions. We first note the ALJ is not required to rely upon the opinions of a vocational expert. Eaton Axle Corp. v. Nally, 688 S.W.2d 334 (Ky. 2985). Moreover, the ALJ considered the positions recommended by Dr. Crystal in light of Clark's physical restrictions and work history. However, the ALJ also took into consideration the fact Clark had attempted working at three different positions after being released by Dr. Roberts, and was physically unable to maintain employment. Also, Clark's academic skills fall below his 8th grade education. Taking these circumstances into consideration, the ALJ simply was not persuaded Clark will be able to maintain employment at this time. As the fact-finder, the ALJ enjoys the discretion to draw such reasonable inferences from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997).

We likewise disagree with Highland Roofing's assertion the evidence compels a finding of partial disability. The ALJ conducted a thoughtful analysis of Clark's circumstances. He noted his young age and his desire to return to the workforce. However, the ALJ also took into consideration Clark has only an eighth grade education and scored below this level in several academic areas when tested by Dr. Crystal. The ALJ noted Clark's extensive physical restrictions, which effectively rule out any position involving physical labor or standing.

The above-cited evidence constitutes the requisite substantial evidence to support the conclusion Clark is permanently totally disabled. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986). Highland Roofing has simply noted evidence which would support a different outcome. Such proof is not an adequate basis to reverse the ALJ's decision. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974).

Therefore, the September 30, 2014 Opinion, Order and Award and the November 12, 2014 Order on Petition for Reconsideration rendered by Hon. J. Gregory Allen, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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