

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: March 20, 2015

CLAIM NO. 201274433

JBS SWIFT & COMPANY

PETITIONER

VS.

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

HASAN DIZDAR  
HON. R. SCOTT BORDERS,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION  
AFFIRMING

\* \* \* \* \*

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

**RECHTER, Member.** JBS Swift and Company ("JBS") appeals from the September 4, 2014 Opinion, Order and Award and the October 9, 2014 Order on Reconsideration rendered by Hon. R. Scott Borders, Administrative Law Judge ("ALJ"). JBS challenges the ALJ's conclusion Hasan Dizdar ("Dizdar") is

permanently totally disabled. For the reasons set forth herein, we affirm.

Dizdar is a 58 year-old Bosnian immigrant who speaks limited English. He came to the United States in 1998. Previously, in Croatia, he worked as a taxi driver and in the hospitality industry, as well as serving time in the national army. After arriving in Louisville in 1998, he has worked as a machine operator and packer. He worked at Casa D'Oro, a food processing company, operating machinery from 1998 to 2007. In 2007, he began working in the casing department at JBS, a pork processor and distributor.

In his Form 101, Dizdar alleged three separate work-related injuries. He first alleged a cumulative trauma injury to his right wrist, manifesting on August 7, 2011. He next alleged an injury on November 18, 2011 when he was in the process of hooking a pig. He fell approximately two feet and injured his right elbow and right shoulder. Finally, Dizdar alleged an injury on October 11, 2012, when he slipped and fell while cleaning a cooler. He injured his low back.

Following his recovery period from the November 18, 2011 injury, Dizdar returned to light duty for a period of 180 days. Because a collective bargaining policy restricts periods of light duty to 180 days, Dizdar was

thereafter placed on a medical leave of absence for one year because no light duty work was available. Pursuant to company policy, he was terminated after one year of leave of absence.

The ALJ determined Dizdar had not met his burden of proving a work-related cumulative trauma injury to his wrist. He found Dizdar suffered work-related injuries as a result of the November 18, 2011 and October 11, 2012 accidents. Relying on the independent medical evaluation of Dr. Anthony McEldowney, the ALJ concluded Dizdar injured his right shoulder as a result of the November 18, 2011 fall and assigned a 4% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5<sup>th</sup> Edition ("AMA Guides"). Regarding the October 11, 2012 incident, the ALJ concluded Dizdar suffered a work-related low back injury. Dr. Ellen Ballard and Dr. McEldowney assessed a 7% impairment rating pursuant to the AMA Guides for Dizdar's low back condition. The ALJ adopted this impairment rating.

Neither party has challenged these conclusions on appeal. Therefore, it is not necessary to discuss the medical proof in more detail. Rather, the crux of JBS Swift's appeal concerns the finding Dizdar is permanently

totally disabled. After citation to relevant case law, the ALJ explained:

In this specific instance, when you compare [Dizdar's] present situation to the principles announced by the Supreme Court in Osborne v. Johnson, the Administrative Law Judge finds that [Dizdar] has met his burden of proving that as a result of both his right shoulder and low back injury that he is permanently and totally occupationally disabled.

In so finding, the Administrative Law Judge notes that [Dizdar] is 58 years of age, is an immigrant from Croatia, and speaks very little English. [Dizdar] has worked primarily as a machine operator and as a laborer in the manufacturing industry as a labor for the Defendant/Employer who butchers and processes hogs. It is undisputed that [Dizdar] does not retain the physical capacity to return to the type of work he was performing at the time of the injury and the Administrative Law Judge further opines that the chances of [Dizdar] finding work consistently under normal employment conditions is nonexistent. [Dizdar] has been restricted by Dr. Ballard regarding his low back condition, he has been restricted by Dr. McEldowney to no lifting greater than 20 pounds as well as to no lifting over 25 pounds with no repetitive bending and push and pull or stooping.

The Administrative Law Judge notes that Dr. Shrey, who performed the vocational evaluation for the Defendant/Employer, opines [Dizdar] is capable of performing many jobs in the light to medium range of physical demand. However, the Administrative Law

Judge finds more persuasive and relies upon the vocational opinion of Dr. Tiell who evaluated [Dizdar] at his request and opined that for all practical purposes [Dizdar] is 100% occupationally disabled.

While the Administrative Law Judge acknowledges that there may well be some jobs that [Dizdar] could theoretically perform, due to his advanced years of 58, his lack of knowledge of the English language, and the fact that he has been a laborer his entire life in the undersigned's opinion makes his chance of finding work nonexistent.

JBS petitioned for reconsideration. In denying the petition, the ALJ further explained:

The undersigned Administrative Law Judges also reviewed the evidence and once again finds based on [Dizdar's] advanced years of 58, the fact that he has been a laborer his entire life, and that coupled with his restrictions that have been assessed by both Dr. Ballard and Dr. McEldowney would clearly, in and of itself, prevent Dizdar from finding work consistently under normal employment conditions and therefore render him permanently and totally disabled. The Administrative Law Judge is of the opinion that the restrictions assessed [Dizdar] as a result of his low back and right shoulder condition are sufficient to entitle him to award permanent total disability.

On appeal, JBS challenges the conclusion Dizdar is permanently totally disabled. The crux of its complaint is the ALJ's reliance on the vocational report of Mr. Robert Tiell, and his consideration of the fact Dizdar speaks

limited English. Mr. Tiell performed a vocational evaluation of Dizdar and concluded he was "at an occupational loss of 100%".

Mr. Tiell noted Dizdar's work history consisted mainly of unskilled to semiskilled positions which entailed "at least medium level exertional requirements." He also noted the permanent work restrictions imposed by Dr. Ballard, which include a 25-pound weight restriction and no repetitive bending or stooping. Mr. Tiell also considered Dizdar's language deficit. He concluded:

[G]iven the physical nature of his work history, given his lack of communication skills which in turn drastically reduces his capacity for transferring into other non-physical kinds of jobs in the workforce, given his advanced age..., given the limited behavioral tolerance he displayed during the course of my evaluation, and given further his lengthy absence from the workforce, all of these factors taken as a whole serve to rule out as I see it any return to gainful, competitive employment.

JBS urges Mr. Tiell's vocational report is unreliable, and the ALJ should have relied on the report of Dr. Donald Shrey. Dr. Shrey conducted a vocational evaluation and concluded Dizdar is capable of performing many jobs in the light to medium duty category. He noted these positions would fall within the physical restrictions

imposed on Dizdar, and would be unaffected by any language barrier.

Essentially, JBS has asked this Board to reweigh the evidence and reach an alternate conclusion, which we may not do. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). The ALJ enjoys the sole authority to determine the weight and credibility of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Because Dizdar was successful in carrying his burden of proof, the single 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). In order to reverse the decision, 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).

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 an injury." KRS 342.0011(11)(c). In determining whether an employee is

permanently totally disabled, the ALJ must consider the worker's "post-injury physical, emotional, intellectual and vocational status and how those factors interact." Ira A. Watson Dept. Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

There is substantial evidence, which the ALJ fully articulated, to support the conclusion Dizdar is permanently totally disabled. The ALJ noted his advanced age and the fact he has performed manual labor of some type his entire life. He considered how Dizdar's physical restrictions would impact his ability to find another job involving physical labor. He also was persuaded by Mr. Tiell's vocational report, which he found most compelling. Finally, he took into account Dizdar's language barrier.

Contrary to JBS's assertions, we find no error in the ALJ's consideration of Dizdar's inability to speak fluent English in making his decision. The ALJ is required to consider "the likelihood that the particular worker would be able to find work consistently under normal employment conditions." Ira A. Watson, 34 S.W.3d at 51. While the Kentucky Supreme Court, in Ira A. Watson, enumerated several factors for the ALJ to consider, we do not read these factors as an exclusive list of what may be considered. Rather, the Court requires an "individualized determination" of disability. In making such a determination, the ALJ is

required to consider the particular circumstances of each claimant, including whether an inability to speak English would affect future employment. Furthermore, we conclude the ALJ's decision did not turn on Dizdar's language barrier. The ALJ has made abundantly clear that Dizdar's language deficit was merely one factor in his overall consideration of disability.

The ALJ, as fact-finder, chose to rely on Mr. Tiell's report. We find no error in this decision. He also satisfactorily articulated his reasoning and the factors he considered, so as to apprise the parties of the basis of his decision. Big Sandy Community Action Program v. Chafins, 502 S.W.2d 526 (Ky. 1973). Substantial evidence supports the ALJ's decision and, for that reason, it will not be disturbed.

For the foregoing reasons, the September 4, 2014 Opinion, Order and Award and the October 9, 2014 Order on Reconsideration of Hon. R. Scott Borders, Administrative Law Judge are hereby **AFFIRMED**.

ALL CONCUR.

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