Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: May 22, 2015

CLAIM NO. 201370103

JOHNNY WHEELS, INC. PETITIONER

VS. **APPEAL FROM HON. WILLIAM J. RUDLOFF, ADMINISTRATIVE LAW JUDGE**

JESSIE INMAN and
HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

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

ALVEY, Chairman. Johnny Wheels, Inc. ("Johnny Wheels") appeals from the decision on remand rendered January 13, 2015 by Hon. William J. Rudloff, Administrative Law Judge ("ALJ"), and from the order on reconsideration he issued on February 9, 2015. The ALJ found Jessie Inman ("Inman") permanently totally disabled due to a low back injury he

sustained on August 16, 2013, and awarded temporary total disability ("TTD") benefits, permanent total disability ("PTD") benefits and medical benefits.

This is the second time this claim has been appealed to this Board. Johnny Wheels argues the evidence does not support the award of PTD benefits. In the decision rendered on May 19, 2014, the ALJ erroneously noted Inman had neither completed high school nor obtained a GED. The decision was appealed to this Board based upon this mistake and on various other grounds. In an opinion entered October 14, 2014 affirming in part, vacating in part and remanding, the ALJ was directed to address the impact of the fact Inman indeed had obtained a GED. This Board also determined the ALJ did not err in relying upon the impairment rating assessed by Dr. Robert Hughes. The Board's opinion was not appealed. Because we determine on remand the ALJ, as directed, adequately addressed the impact of Inman having obtained a GED, we affirm.

The facts of this claim were recited previously and we adopt our summary found in our October 14, 2014 opinion which will not be further reviewed here. In that opinion, we held as follows:

> 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). As such, the ALJ is the sole judge of a witnesses' credibility. Here, the ALJ determined Inman was credible, and this Board would be committing egregious error should we hold otherwise.

That said, we vacate the ALJ's award of PTD benefits and remand to the ALJ for additional findings.

The May 19, 2014, Opinion and Order reveals the ALJ relied upon a host of factors in making the determination Inman is permanently totally disabled. One of those factors is the ALJ's erroneous belief Inman did not obtain a GED. However, the record indicates Inman obtained a GED. In the May 19, 2014, Opinion and Order, the ALJ stated "Dana Ward, the defendant's vocational witness, stated that Mr. Inman performed poorly on math and spelling testing and could not have passed the GED with his 4th grade scores in those areas." Indeed, this language mirrors Ward's April 7, 2014, vocational report in which she opined that because Inman scored poorly on math and spelling during her assessment that "[h]e could not have passed the GED with 4th grade scores in these areas." Ward's conclusion and the ALJ's assessment are at odds with Inman’s March 21, 2014, deposition testimony and hearing testimony that he obtained a GED. In fact, in Ward's vocational report, she listed GED under the "education" heading.

As to whether he had obtained a GED, during his deposition Inman testified as follows:

> Q: Are you a high school graduate?

A: No, sir.

Q: You did obtain a GED though, correct?

A: Yes, sir.

Q: When did you get that?

A: '05, I believe.

Q: And my records indicate you went to formal school through eighth grade. Is that right?

A: Yes, sir.

Q: Do you have any training beyond your GED, like a CDL, welding license, anything like that?

A: No, sir.

At the hearing, Inman testified as follows:

Q: Let's talk a little bit about some of your background. You went to the eighth grade in school?

A: Yes, sir.

Q: You did get a GED, correct.

Q: Yes, sir.

The ALJ may not base his analysis of Inman's occupational disability on an improper understanding of the record. The record clearly indicates Inman obtained a GED. The ALJ must factor this critical piece of information into his analysis concerning the extent of Ward’s occupational disability. Thus, on remand, the ALJ must conduct an

> analysis regarding the extent of Inman's occupational disability based on the fact Inman has a GED. We emphasize we are not suggesting a result on remand concerning the extent of Inman's occupational disability.
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> Johnny Wheels did not raise this issue in its May 29, 2014, petition for reconsideration, its June 9, 2014, supplemental petition for reconsideration, or in its appeal brief. However, this Board is permitted to *sua sponte* reach issues even if unpreserved. KRS 342.285(2)(c); KRS 342.285(3); George Humfleet Mobile Homes v. Christman, 125 S.W.3d 288 (Ky. 2004).

In his opinion on remand issued on January 13, 2015, the ALJ made the following analysis:

> As indicated above, I saw and heard Mr. Inman testify at the Final Hearing and again make the factual determination that he was a credible and convincing lay witness. I agree with the defendant's vocational witness, Dana Ward, that Mr. Inman is a friendly, capable and cooperative person. As indicated above, during his testimony I carefully observed his facial expressions, carefully listened to his voice tones and carefully observed his body language. His testimony rang true. I make the factual determination that before his work injuries on August 16, 2013 Mr. Inman had a good work history showing a good work ethic. The parties stipulated that Mr. Inman attended school to the 8th grade, but obtained a GED. However, Dana Ward, the defendant's vocational witness, stated that Mr. Inman performed poorly on math and spelling testing and could not have passed the GED with his 4th grade scores in those areas. It is

uncontradicted that the plaintiff has absolutely no specialized or vocational training. It is uncontradicted that Mr. Inman last worked on August 26, 2013. I make the factual determination that due to Mr. Inman's serious and permanent injuries he will experience serious difficulties in returning to work in the competitive job market.

In *Hush v. Abrams*, 584 S.W.2d 48 (Ky. 1979), the Kentucky Supreme Court stated that what it had in that case was lay testimony descriptive of and supportive of a permanent disability, together with medical testimony that was not in conflict with the lay testimony. The high court stated that where the medical evidence clearly and unequivocally shows the actual body condition, then the lay testimony is competent on the question of the extent of disability which has resulted from the bodily condition. The high court further stated that where there is medical testimony from which the decision maker could have concluded that the plaintiff did suffer from a work-related trauma, then, having reached that conclusion, the decision maker could then use the lay testimony to determine the extent, if any, of the occupational disability.

Pursuant to the Board's direction, I did factor into my analysis Mr. Inman's obtaining his GED. That is commendable. However, Dana Ward, the vocational witness handpicked by the defendant, stated emphatically that Mr. Inman performed poorly on math and spelling testing and could not have passed the GED with his 4th grade scores in those areas. <u>The plaintiff's current test scores are the most accurate reflection of his academic abilities and educational attainments</u>. When we take

> into consideration that Mr. Inman only attended school to the 8th grade and later obtained his GED and recently scored at the 4th grade level in both mathematics and spelling, we have a very accurate measure of his real world deficiencies. The record shows that Mr. Inman's entire work history since 1987 has been as a mechanic and as a bricklayer, which are strenuous physical labor jobs.
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> In this case, I considered the serious nature of the plaintiff's work injuries, which are covered in detail above, his work history, which is covered in Dana Ward's vocational report, Mr. Inman's very deficient academic attainments, his credible and convincing lay testimony, which is covered in detail above, and the medical opinions and stringent physical restrictions of Dr. Hughes, which are covered in detail above. Based on all of those factors, I make the factual determination that the plaintiff Mr. Inman cannot find work consistently under regular work circumstances and work dependably. I, therefore, make the factual determination that he is permanently and totally disabled.
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> In making the determination that Mr. Inman is permanently totally disabled, I weighed all of the above-specified factors in reaching the ultimate conclusion. As noted above, I weighed all of the pertinent lay and medical evidence and made findings of fact and then determined the legal significance of those findings.

Johnny Wheels filed a petition for reconsideration on January 28, 2015, arguing neither the medical nor the vocational evidence supports the ALJ's

award of PTD benefits. Johnny Wheels argues the ALJ's interpretation of the impact of having a GED is flawed and does not support the award of PTD benefits.

In his order denying Johnny Wheels' petition for reconsideration issued on February 9, 2015, the ALJ stated as follows:

> Pursuant to the Board's direction, I did factor into my analysis Mr. Inman's obtaining his GED. That is commendable. However, Dana Ward, the vocational witness handpicked by the defendant, stated emphatically that Mr. Inman performed poorly on math and spelling testing and could not have passed the GED with his 4th grade scores in those areas. The plaintiff's current test scores are the most accurate reflection of his academic abilities and educational attainments. When we take into consideration that Mr. Inman only attended school to the 8th grade and later obtained his GED and recently scored at the 4th grade level in both mathematics and spelling, we have a very accurate measure of his real world deficiencies. The record shows that Mr. Inman's entire work history since 1987 has been as a mechanic and as a bricklayer, which are strenuous physical labor jobs.
>
> In this case, I considered the serious nature of the plaintiff's work injuries, which are covered in detail above, his work history, which is covered in Dana Ward's vocational report, Mr. Inman's very deficient academic attainments, his credible and convincing lay testimony, which is covered in detail above, and the medical opinions and stringent physical

restrictions of Dr. Hughes, which are covered in detail above. Based on all of those factors, I make the determination that the plaintiff Mr. Inman cannot find work consistently under regular work circumstances and work dependably. I, therefore, make the determination that he is permanently and totally disabled.

In making the determination that Mr. Inman is permanently totally disabled, I weighed all of the above-specified factors in reaching the ultimate conclusion. As noted above, I weighed all of the pertinent lay and medical evidence and made findings of fact and then determined the legal significance of those findings.

In making the above determinations, I rely upon the unanimous Opinion of the Supreme Court of Kentucky in *Wilder v. Enterprise Mining,* 2014 WL 7239812 (Ky. 2014). There, the Supreme Court ruled that (1) the ALJ has the sole authority to determine the weight, credibility, substance and inference to be drawn from the evidence; (2) where the ALJ determines that a worker has satisfied his burden of proof with regard to a question of fact, the issue on appeal is whether substantial evidence supported the determination; (3) although a party may note evidence which would have supported a conclusion contrary to the ALJ's decision, such evidence is not an adequate basis for reversal on appeal; (4) the ALJ is free to interpret the expert evidence and reach conclusions; (5) while evidence has been presented to counter the ALJ's conclusion, the mere fact that contrary evidence could lead to a different result does not provide grounds to reverse the ALJ.

The ALJ, as fact-finder, 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 sole authority to judge 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); Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). Mere evidence contrary to the ALJ's decision is not adequate to require reversal on appeal. Id. In order to reverse the decision of the ALJ, it must be shown there was no substantial evidence of probative value to support his decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

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, supra.

Here, the ALJ correctly set forth the definition of permanent total disability and the analysis contained in Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). KRS 342.0011(11)(c) defines "permanent total disability" as the condition of an employee who has a permanent disability rating and "a complete and permanent inability to perform any type of work as a result of an injury." "Work" is further defined by KRS 342.0011(34) as meaning the ability of a person to perform services for another for pay on a "regular and sustained basis in a competitive economy." The Kentucky Supreme Court has considered the definition of permanent total disability as amended by the legislature in 1996 and has determined that whether a worker suffers from a total or partial disability requires a weighing of evidence and the consideration of numerous factors. Ira A. Watson Dept. Store v. Hamilton, supra. Those factors include the following:

> [T]he worker's post-injury physical, emotional, intellectual, and vocational status and how those factors interact. It also includes a consideration of the likelihood that the particular worker would be able to find work consistently under normal employment conditions. A

> worker's ability to do so is affected by factors such as whether the individual will be able to work dependably and whether the worker's physical restrictions will interfere with vocational capabilities.

Id. at 51.

After reviewing the ALJ's decision on remand, and order on reconsideration, we determine he performed a sufficient analysis pursuant to Ira A. Watson Dept. Store v. Hamilton, supra, and articulated his reasoning for awarding PTD benefits. We further determine the ALJ appropriately considered the fact Inman has a GED, and the impact upon his ability to work. The ALJ clearly noted although Inman may have indeed obtained a GED in the past, he currently has a low intellectual function. This coupled with Inman's history of performing physical manual labor and his own testimony of his current capabilities support the ALJ's assessment of permanent total disability.

It is well-established the claimant's own testimony as to his condition has some probative value and is appropriate for consideration by the ALJ. Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979). Inman testified he would be unable to return to the usual and customary duties of any of his previous work on a regular and sustained basis.

The ALJ clearly found Inman's testimony regarding his capabilities significant.

Although Johnny Wheels has pointed to evidence in the record which would support a different conclusion than reached by the ALJ, this is insufficient to warrant reversal of the award. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). The ALJ did as directed on remand and weighed the fact Inman had obtained a GED. This along with Inman's own testimony and the medical evidence from Dr. Hughes, which we addressed in our previous decision, constitute substantial evidence supporting the ALJ's determination he is permanently totally disabled. Therefore, we will not disturb the award of PTD benefits as requested. Special Fund v. Francis, supra. For the reasons set forth above, we conclude the ALJ has adequately articulated his reasoning and provided an adequate analysis to apprise the parties of the basis for his reasoning, taking into account the fact Inman has a GED. Cornett v. Corbin Materials, Inc., 807 W.W.2d 56 (Ky. 1991).

Accordingly, the January 13, 2015 decision on remand, and the February 9, 2015 order on petition for reconsideration by Hon. William J. Rudloff, Administrative Law Judge are hereby **AFFIRMED.**

ALL CONCUR.

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