Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: January 16, 2015

CLAIM NO. 201400424

KENTUCKY TRANSPORTATION CABINET PETITIONER

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

CHARLES D. HOLBROOK
HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

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

RECHTER, Member. The Kentucky Transportation Cabinet ("KTC") appeals from the August 14, 2014 Opinion and Order rendered by Hon. William J. Rudloff, Administrative Law Judge ("ALJ") finding Charles Holbrook ("Holbrook") permanently totally disabled. KTC's sole argument on appeal is that the ALJ's finding of permanent total disability is

not supported by substantial evidence. For the reasons set forth herein, we affirm.

Holbrook testified by deposition on June 9, 2014 and at the hearing held July 23, 2014. Holbrook was born July 10, 1964 and has a college degree in industrial technology. He has also received training in heavy equipment operation while employed by KTC. He began his employment with KTC in July 1989, and has worked primarily as an equipment operator and in maintenance. During the last seven or eight years, he worked as a superintendent or working foreman.

Holbrook's work at KTC required physical labor 90% of the time. He operated heavy equipment in addition to using lighter equipment such as chainsaws and jackhammers. The work required standing, crouching, crawling, bending and pulling up his body weight. His job description included the requirement to be able to lift seventy-five pounds, but at times he lifted tires weighing two hundred pounds. He was consistently exposed to vibration from equipment and jackhammers.

Holbrook retired early, on July 31, 2012, due to pain in his back, legs and upper extremities. Moreover, his carpal tunnel syndrome ("CTS") was causing him to drop things and lose grip strength. He had difficulty standing

and frequently stumbled. Holbrook had been off for most of July before deciding to retire, though he previously maintained an outstanding attendance record. In fact, he had accumulated over 1000 hours of unused sick leave prior to 2012.

Holbrook continues to have lower back pain radiating down his legs. He experiences pain, numbness and aching in his hands and loss of grip strength. He testified he did not believe he was capable of performing any work due to his physical condition. He noted his degree in industrial technology is obsolete.

Dr. Robert C. Hoskins evaluated Holbrook on February 5, 2014. Dr. Hoskins diagnosed residual bilateral median neuropathy at the wrists, electrophysiologically verified, moderate severity; lumbosacral sprain/strain; right S1 radiculopathy, electrophysiologically verified; multilevel lumbar degenerative disc disease; L5-S1 spondylolisthesis; and diabetic sensorimotor polyneuropathy. Dr. Hoskins opined Holbrook's lumbar impairment is due to cumulative trauma sustained over his many years of employment with KTC and his median nerve impairments are due to occupational cumulative trauma superimposed upon diabetic sensorimotor polyneuropathy. Dr. Hoskins aassessed a 26% impairment pursuant to the American Medical Association

Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides") and indicated Holbrook did not have an active impairment prior to the work injury. Dr. Hoskins stated Holbrook does not retain the physical capacity to return to the type of work performed at the time of injury. He assigned restrictions against lifting greater than fifty pounds or twenty-five pounds from below waist level and no heavy pushing, pulling or carrying. Dr. Hoskins recommended a number of positional requirements, restricting the amount of time Holbrook should sit, stand and walk. Holbrook is further restricted from prolonged or repetitive use of equipment subjecting the spinal column to vibration, and no prolonged or repetitive use of vibratory tools. Holbrook is also prohibited from prolonged or repetitive stooping, crouching, overhead work, or forceful and repetitive gripping, handling or pinching.

Dr. Ronald Burgess performed an independent medical evaluation on June 18, 2014. Dr. Burgess opined Holbrook's bilateral CTS is related to his work at KTC with the additional risk factor of morbid obesity. Dr. Burgess assigned a 6% impairment pursuant to the AMA Guides for CTS. Dr. Burgess opined no further treatment for either hand was indicated and Holbrook required no restrictions relative to his upper extremities.

KTC submitted the June 27, 2014 report of Dr. J. Rick Lyon who diagnosed spondylolisthesis; degenerative disc disease, lumbar spine; degenerative arthritis, lumbar spine; bilateral CTS; residual nerve compression; degenerative disc disease and degenerative arthritis of the cervical spine. Dr. Lyon felt the degenerative changes in the lumbar spine are unrelated to any cumulative work event. He further opined it was possible Holbrook's CTS is related to his work. Dr. Lyon questioned the reliability of Holbrook's subjective complaints. He assigned a 2% impairment rating for CTS.

In a July 21, 2014 supplemental report, Dr. Hoskins indicated he reviewed and disagreed with the reports of Drs. Lyon and Burgess. Dr. Hoskins stated Dr. Lyon failed to follow the AMA Guides in assessing impairment for CTS and Dr. Burgess failed to adhere to the AMA Guides in performing his evaluation.

The ALJ determined Holbrook sustained work-related injuries to his back and upper extremities rendering him permanently totally disabled. The ALJ based his determination upon Holbrook's credible testimony and the medical opinion of Dr. Hoskins.

KTC did not file a petition for reconsideration. On appeal, it asserts the ALJ's determination is not

supported by substantial evidence. It argues the opinions of its evaluating physicians, Drs. Lyon and Burgess, should be afforded more weight due to their medical specialties. Furthermore, KTC characterizes Holbrook's testimony as "self-serving statements of limitations". KTC contends the overwhelming and compelling medical evidence is such that no reasonable person could reach the conclusion Holbrook is permanently totally disabled.

We begin by noting KTC did not file a petition for reconsideration and appealed directly to the Board. When no petition for reconsideration is filed, the ALJ's award or order is conclusive and binding as to all questions of fact. KRS 342.285(1). Absent a petition for reconsideration, questions of fact, including the adequacy of the ALJ's findings of fact, are not preserved for appellate review. Brasch-Barry General Contractors v. Jones, 175 S.W.3d 81, 83 (Ky. 2005). *See also* Hornback v. Hardin Memorial Hospital, 411 S.W.3d 220, 223 (Ky. 2013). The issue is narrowed to whether the ALJ's decision is supported by substantial evidence in the record. Halls Hardwood Floor Co. v. Stapleton, 16 S.W.3d 327 (Ky. App. 2000).

As the claimant in a workers' compensation proceeding, Holbrook had the burden of proving each of the essential elements of his cause of action. Snawder v.

Stice, 576 S.W.2d 276 (Ky. App. 1979). Because he was successful in that burden, the question on appeal is whether the decision is supported by substantial evidence. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). Substantial evidence is proof of relevant consequence sufficient 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. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000).

While KTC has identified evidence supporting a different conclusion, there was substantial evidence presented to the contrary. The ALJ was not required to assign greater weight to the opinions of Drs. Burgess and Lyon. The ALJ may consider the qualifications of the medical witnesses, but need not give greater weight to testimony from a particular specialist over another. Yocom vs. Emerson Elec. Co., 584 S.W.2d 744 (Ky. App. 1979).

Dr. Hoskins assigned significant restrictions regarding lifting and postural limitations that preclude Holbrook's employment in the jobs he performed for KTC, his only employer for the past twenty-five years. Additionally, it is well-established that a 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). Holbrook testified the majority of his work involved heavy physical labor and his industrial technology degree is obsolete because of rapid technological changes. His testimony indicates he would have difficulty standing, walking or sitting and that even lifting a glass of water can send pain shooting up his arm. The ALJ could reasonably conclude Holbrook's limitations would affect any level of physical employment.

An ALJ has wide discretion in granting or denying an award of permanent total disability. Colwell v. Dresser Instrument Div., 217 S.W.3d 213 (Ky. 2006). Based upon the medical evidence and restrictions therein, as well as Holbrook's testimony, the ALJ could reasonably conclude Holbrook was not capable of performing work on a regular and sustained basis in a competitive economy. KRS 342.0011(11)(c). Holbrook's testimony, along with the medical opinion of Dr. Hoskins, constitutes the requisite substantial evidence to support the ALJ's decision. For that reason, we cannot say the decision of the ALJ finding Holbrook entitled to an award of permanent total disability benefits is so unreasonable under the evidence the decision must be reversed as a matter of law. The ALJ acted within

his discretion to determine which evidence to rely upon, and it cannot be said the ALJ's conclusions are so unreasonable as to compel a different result. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974).

Accordingly, the August 14, 2014 Opinion and Order rendered by Hon. William J. Rudloff, Administrative Law Judge is hereby **AFFIRMED**.

ALL CONCUR.

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