

OPINION ENTERED: October 19, 2012

CLAIM NO. 200973813

LARRY GEARY

PETITIONER

VS.

**APPEAL FROM HON. STEVEN G. BOLTON,
ADMINISTRATIVE LAW JUDGE**

PATRIOT COAL (HIGHLAND MINES)
and HON. STEVEN G. BOLTON,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
AFFIRMING AND REMANDING**

* * * * *

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

STIVERS, Member. Larry Geary ("Geary") appeals from the April 26, 2012, opinion, award, and order of Hon. Joseph W. Justice, Administrative Law Judge ("ALJ") awarding permanent partial disability ("PPD") benefits and medical benefits for a work-related injury to his left ankle and foot sustained while in the employ of Patriot Coal

(Highland Mines) ("Patriot").¹ Geary also appeals from the June 28, 2012, order denying his petition for reconsideration.

On appeal, Geary argues the ALJ erred in determining he is not totally occupationally disabled.

Geary testified at a deposition on September 22, 2011, and at the February 28, 2012, hearing. Geary's deposition testimony is consistent with the Form 104 attached to his Form 101 which reflects the following work history:

<u>Employer</u>	<u>Type of Industry</u>	<u>Occupation</u>	<u>Time Period</u>
Highland Mine (Patriot Coal)	Underground mining	Roof bolter Car driver	8/9/03-9/1/10
Freedom Mine/ Peabody	Underground mining	3 rd shift support	8/02-8/03
Gibbs Diecasting	Auto part manufacturing	shipping/ receiving	1996-2002
Laborers Int. Union Local 1392	Labor	Laborer	1993-1996
Sunrise Coal Co.	Underground Mining	Roof bolter	3/2/91-8/11/93
Green River Coal Company	Underground mining	Roof bolter	2/17/86-1991

¹ By order dated July 13, 2012, this claim was reassigned to Hon. Steven G. Bolton, Administrative Law Judge ("ALJ Bolton").

<u>Employer</u>	<u>Type of Industry</u>	<u>Occupation</u>	<u>Time Period</u>
HR Woods Coal	Underground mining	Roof bolter/ Shot firer	1985-1986
Self-Employed	Labor	Yard work Farm work, etc.	1982-1985
Camp #2 Mine Peabody Coal	Underground mining	Shuttle car driver/pinner/ shot firer	6/80-8/82
Alston #4 Mine Peabody Coal	Underground mining	Shuttle car driver/pinner/ shot firer	2/74-4/80
Thomas Industries	Light fixture manufacturing	S&R, forklift operator, line inspector	8/71-8/71
General Electric	Appliance manufacturing	Assembly line	8/70-8/71
H&W Construction	Building construction	Laborer/ carpenter helper	8/69-8/70

Geary testified on November 3, 2009, that while cleaning the dust box of the roof bolter a rock weighing between 500 to 1,000 pounds fell from the ceiling and landed on his leg. He was carried out of the mine and taken to the hospital. X-rays were performed, Geary was given pain medication, and referred to Dr. Reid Wilson, an orthopedic surgeon in Henderson, Kentucky. Dr. Wilson placed Geary's foot in a boot and gave him crutches to use. When he returned to see Dr. Wilson in four weeks, Geary was

sent to physical therapy. Later, Patriot sent Geary to Dr. Michael Best who recommended an MRI be performed.

In February 2010, shortly before the MRI was performed, Geary was called to return to work on restricted duty. Geary returned to work on February 10, 2010, because he believed he did not have a choice. When he returned to work he drove a ram car transporting coal. Because he could not walk, the company transported Geary to and from the mine. Once he got to the mine he was transported to the ram car. At the end of each shift, Geary was transported out of the mine.

Geary testified that shortly after he returned to work he reinjured his ankle. Because he continued to have trouble, Geary was allowed to see Dr. Paul Daines of Evansville who he testified "specializes on ankles." Geary testified an "Arizona brace" was made for his foot and ankle which he wore to work. Patriot then sent Geary to Dr. Todd Hockenbury in Louisville in May or June of 2010. Later, Dr. Hockenbury performed surgery on Geary's ankle. He has not worked since the surgery and continues to be treated by Dr. Hockenbury.

Geary testified his ankle has not improved since the surgery. Geary explained he stopped working because Patriot asked him to "build brattices and shovel on the

belt, and shovel rock in the air course." He stated he could not do the work because he could not stand or walk for any length of time. Because his condition prevented him from working, he retired effective September 1, 2010.

Geary testified he cannot do anything requiring him to stand longer than five or ten minutes. He walks slowly with a limp and he cannot bend or "turn too quick." Geary testified he has worked in the mines a total of twenty-five or twenty-six years. He testified he cannot do any of the previous jobs he performed in the mines or his previous jobs unassociated with coal mining. Geary testified he cannot walk for more than ten to twenty minutes at a time and he avoids walking on uneven ground. He has never performed any jobs involving sitting. His activities around his house such as lawn mowing are limited.

The parties submitted the medical records of Drs. Daines, Wilson, Hockenbury, and Keith Myrick. Only Drs. Hockenbury and Myrick provided impairment ratings.

After summarizing the lay and medical testimony, the ALJ entered the following analysis, findings of fact, and conclusions of law:

Defendant has conceded that Plaintiff cannot return to underground coal mining. If the sole job of

Plaintiff was operating a tram as he did prior to his injury and for some time following his injury, Plaintiff may very well be able to do that. He may very well not be able to do all the physical activities that a tram operator would ordinarily have to do. Plaintiff has retired, allegedly because of his injury, and receives a union pension as well as Social Security. He is claiming that he is permanently totally disabled in this claim for benefits. There are two impairment assignments in this claim. Dr. Myrick, a foot and ankle podiatric surgeon, who did an IME of Plaintiff on June 27, 2011, for Defendant, assigned 7% WPI. He said after completing his PT, Plaintiff should be able to return to a standing occupation, but would be restricted to level ground work, and the restrictions would include no ladders, climbing, or uneven surfaces.

Dr. Hockenbury, Plaintiff's treating physician, assigned 3% WPI, using Table 17-11, page 37, which states that ankle dorsiflexion limited to 0 degrees yields a 3% WPI. He reached MMI on 7/18/11. He did not know the particular physical requirements of coal mining, but said Plaintiff should not stoop, crawl, climb, jump, lift or carry more than 20 pounds, walk on uneven ground, climb ladders or stand/walk for more than 30 minutes per hour.

Plaintiff was 58 years old when he was injured. He has a 12th grade education. He has a varied work experience, although he worked in underground mining for the last several years. He operated a tram motor in mining, and had other experiences that demonstrate that he is able to learn complex work requirements. None of the

doctors' restrictions would prevent him from gainful employment.

Based on a careful review of all of the evidence presented in this claim, the Administrative Law Judge is not persuaded that Plaintiff is permanently totally disabled as a result of the November 3, 2009, work accident. Although there is no question he sustained a significant injury, the undersigned believes that, based on his age, education, and work, Plaintiff would be able to resume work on a regular and sustained basis in a competitive economy. In fact Plaintiff was able to return and worked several months as a tram operator, which was mainly sitting.

The ALJ finds that Plaintiff did not retain the physical capacity to return to the type of work that he performed prior to his injury. He is entitled to the three multiplier.

The ALJ was persuaded by Dr. Myrick [sic] report assigning 7% WPI. This rating seemed more appropriate given the restrictions that both physicians assigning impairment reported. The restrictions are to demonstrate impairment of activities of daily living. The 3% impairment did not match the restrictions.

The only issues involved benefits per KRS 342.730.

The ALJ awarded PPD benefits based upon a 7% impairment enhanced by the three multiplier pursuant to KRS 342.730(1)(c)1. Significantly, even though the parties stipulated the amount of temporary total disability ("TTD")

benefits and the periods TTD benefits were paid, the ALJ did not award TTD benefits.

Geary filed a petition for reconsideration requesting more specific findings of fact regarding the ALJ's determination he was not totally disabled. Geary asserted the ALJ "fails to present full legal analysis of this issue and makes conflicting statements of fact." Geary asserted the ALJ made no findings regarding his "credibility or the weight of his testimony." Geary also asserted the ALJ did not consider how his pain would affect his "attention, persistence and pain." Geary requested the ALJ "reconsider the issues" and provide additional findings of fact "and issue a new order reflecting these reconsiderations." As previously noted, the ALJ denied Geary's petition for consideration.

On appeal, Geary asserts the ALJ erred in determining he is not totally and permanently disabled. Citing the factors contained in Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000), Geary argues the ALJ's determination should have been specific enough to make clear to any reviewer the weight "the ALJ gave to the relevant factors and reasons for that weight." Geary takes issue with the ALJ's statement he had varied work experience. Geary argues his jobs outside of coal mining

were "short-lived, non-skilled, factory labor jobs, primarily over thirty-five years ago." Geary asserts his work skills are not varied and none involved sedentary jobs. Consequently, the ALJ's finding he "had varied work is not supported by substantial evidence." Geary argues he has been working in coal mines essentially his entire adult life. He insists having "one relatively narrow occupation with few transferable skills creates a substantial barrier to obtaining other employment." Geary posits in order to engage in a new vocation he will need to learn new and updated skills for a different industry. Given he is sixty-one years old, Geary maintains he is facing "inevitable discrimination." Geary asserts his age "strongly suggests" when coupled with his limitations he is permanently totally disabled. He argues the ALJ "did not explain [his] age and employability issues."

Geary asserts the ALJ generally concluded he could return to work on a regular and sustained basis because he had worked as a tram operator for "a short while." However, Geary argues the ALJ ignored and failed to consider that while working as a tram operator he was reinjured. Further, the ALJ failed to consider all the requirements of tram operation. Geary asserts there is no light work in a mine and an unsuccessful job attempt does

not permit a reasonable inference he can perform full time sedentary employment. He asserts this is true since he does not have a history of performing sedentary work.

Geary also argues the ALJ did not state "whether he considered Geary credible or if he had any reason to disbelieve his testimony regarding post-injury pain, schedule, or limitations." Geary contends "his symptoms are uncontroverted," and the ALJ did not consider the effects his pain will have on his capacity to work. Geary maintains his testimony is competent evidence of his physical condition and of his ability to perform various activities before and after the injury. Geary asserts the ALJ had a duty to reject or accept his testimony and he did neither. Further, the ALJ did not explain the significance of his medical restrictions on his ability to perform "normal full time work." Geary argues the findings of fact are insufficient "to enable a meaningful review" and requests this Board reverse and remand for "proper analysis and determinations of facts" consistent with the statutes and case law.

A claimant in a workers' compensation claim bears the burden of proving each of the essential elements of the cause of action. Burton v. Foster Wheeler Corp., 72 S.W.3d 925 (Ky. 2002). Since the ALJ found Geary failed in his

burden of proving total occupational disability, the question on appeal is whether the evidence is so overwhelming, upon consideration of the whole record, as to compel a finding in his favor. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). Compelling evidence is defined as evidence that is so overwhelming no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985). As fact-finder, the ALJ has the sole authority to determine the quality, character, and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993); Paramount Foods Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). Similarly, the ALJ has the sole authority to judge the weight and inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Luttrell v. Cardinal Aluminum Co., 909 S.W.2d 334 (Ky. App. 1995). The ALJ, as fact-finder, 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 v. Fox, 19 S.W.3d 88 (Ky. 2000); Halls Hardwood Floor Co. v. Stapleton, 16 S.W.3d 327 (Ky. App. 2000). Mere evidence contrary to the ALJ's decision is not adequate to require reversal on appeal. Whittaker

v. Rowland, 998 S.W.2d 479 (Ky. 1999). In order to reverse the decision of the ALJ, it must be shown there was no evidence of substantial probative value to support his decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

Here, the ALJ reviewed all of the evidence and determined Geary was not totally occupationally disabled. While consideration of a total disability award depends on many of the same factors enunciated in Osborne v. Johnson, 432 S.W.2d 800 (Ky. 1968), it remains within the broad authority of the ALJ to translate an impairment rating into either partial or total disability. Ira A. Watson Department Store v. Hamilton, supra. The factors which the ALJ may consider in making the determination include the worker's post-injury physical, emotional, intellectual and vocational status and how those factors interact. McNutt Construction/First General Services v. Scott, 40 S.W.3d 854 (Ky. 2001).

Dr. Hockenbury's records reflect he first saw Geary on November 18, 2010. Dr. Hockenbury performed a left ankle arthroscopic lateral talar dome osteochondritis dissecans lesion debridement and drilling on February 2, 2011. In an August 3, 2011, letter, Dr. Hockenbury stated Geary's ankle injury is work-related. Further, he believed

the second injury merely exacerbated the first injury. Accordingly, Dr. Hockenbury assessed a 3% impairment rating based on the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"). Dr. Hockenbury indicated Geary merely told him he worked in the mines and therefore he did not know the particulars of Geary's work requirements. Dr. Hockenbury did not believe Geary retained the physical capacity to return to the type of work performed at the time of the injury if the work required stooping, crawling, climbing, and lifting heavy objects. Accordingly, Dr. Hockenbury directed Geary not stoop, crawl, climb, jump, run, lift, or carry more than twenty pounds, walk on uneven ground, climb ladders, or stand/walk for more than thirty minutes per hour.

The June 27, 2011, independent medical examination ("IME") report of Dr. Myrick was introduced by Patriot, which reflects diagnoses of: 1) left ankle internal derangement with osteochondritis dissecans left talar dome; 2) left acute fibula fracture; and 3) osteoarthritis left ankle. Dr. Myrick concluded all of Geary's symptoms relate to the work injury. Dr. Myrick noted after surgery, Geary had further symptoms and pathology and believed he should continue to be followed by

Dr. Hockenbury. Dr. Myrick recommended Geary continue physical therapy. Dr. Myrick did not believe Geary's loss of range of motion of his left ankle would improve much more. Pursuant to the AMA Guides, he assessed a 7% whole person impairment. Concerning Geary's restrictions, Dr. Myrick provided the following:

I think at this point he is currently doing sit down duty and the sit down duty restriction is temporary. I feel that after he completes his physical therapy he should be able to return to a standing occupation but would be restricted to level ground work. His restrictions would include no ladders, climbing, or uneven surfaces. This is secondary to his loss of ankle joint motion.

Dr. Daines' medical records, introduced by Geary, reflect he returned Geary to work without restrictions on August 4, 2010. Dr. Daines' most recent medical report of October 1, 2010, reflects Geary was wearing the Arizona brace and his ankle is much more stable. He noted Geary was not able to turn or roll the ankle and was still having pain and discomfort. Dr. Daines did not provide an impairment rating or work restrictions.

Dr. Wilson's records, introduced by Geary, reflect he returned Geary to work on February 11, 2010, primarily performing sit down work with no prolonged standing or walking. Dr. Wilson's last note of April 5,

2010, reflects Geary was to continue "his current work duties."

There is no question Geary sustained a significant injury to his left ankle. While this Board or another ALJ may have decided Geary's injury would prevent a return to employment, as required by the definition of total disability as reviewed above, that is not the issue on appeal. The fact Geary can point to evidence in the record which would support his position does not compel such an award. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). As stated by the Kentucky Supreme Court in Ira A. Watson Department Store v. Hamilton, supra, "[t]he crux of the inquiry on appeal is whether the finding which was made is so unreasonable under the evidence that it must be viewed as erroneous as a matter of law."

Clearly, the ALJ was impressed with Geary's intelligence, and work history which included significant extended work outside the mines. Contrary to Geary's assertion he performed other varied jobs some thirty-five years ago and has worked in the coal mines essentially his entire adult life, we believe the work history and Geary's testimony support the ALJ's finding Geary has varied work experience. A review of the work history establishes Geary worked for Gibbs Diecasting for six years from 1996 until

2002. Prior to that, Geary worked at the Laborer International Union Local 1392 for approximately three years. Between 1993 and 2002, Geary worked outside the coal mines. Thus, the ALJ's characterization of Geary's work history as varied is supported by substantial evidence.

The ALJ reviewed the medical testimony, and specifically discussed Geary's age, education, and work experience. The ALJ understood Geary's most recent work involved working in underground coal mines. After noting Geary operated a tram in the mines and had other experiences demonstrating he had the ability to learn complex work requirements, the ALJ stated the doctor's restrictions did not preclude Geary from gainful employment. After acknowledging Geary sustained a significant injury, the ALJ again stated based upon his age, education, and work, he believed Geary was capable of resuming work on a regular sustained basis in the competitive economy. Although the ALJ found Geary did not retain the physical capacity to return to the type of work performed at the time of the injury, he clearly believed Geary retained the physical and mental capability to return to gainful employment. In rejecting Dr. Hockenbury's 3% impairment rating the ALJ stated the impairment rating did

not match Geary's restrictions and specifically noted the restrictions are to "demonstrate the impairment of activities of daily living." The ALJ stated he relied upon Dr. Myrick's report assigning a 7% whole person impairment. As recited herein, Dr. Myrick stated Geary was currently restricted to sit down jobs but after completion of physical therapy he "should be able to return to a standing occupation" with restrictions of "no working on ladders, climbing, or uneven surface." Dr. Myrick's report constitutes substantial evidence supporting the ALJ's determination Geary is not totally occupationally disabled.

Further, we do not believe remand is necessary for additional findings of fact as the ALJ specifically stated the basis for his decision. The ALJ was not required to state whether he believed or disbelieved Geary but merely the evidence upon which he relied in determining Geary was not permanently and totally occupationally disabled.

That said, the January 12, 2011, BRC order reflects the parties stipulated TTD benefits were paid from November 4, 2009, to February 9, 2010, February 21, 2010, to February 25, 2010, and from February 11, 2011, to July 19, 2011. There is no dispute Geary was entitled to TTD benefits during these periods. In contravention of the

statute, the opinion, award, and order does not contain an award of TTD benefits. Therefore, pursuant to KRS 342.285, this claim shall be remanded to ALJ Bolton for entry of an amended opinion, award, and order awarding TTD benefits based on the stipulation contained in the BRC order.

Accordingly, regarding the issue raised on appeal, the April 26, 2012, opinion, award, and order and the June 28, 2012, order denying the petition for reconsideration are **AFFIRMED**. This matter is **REMANDED** to ALJ Bolton for entry of an amended opinion, award, and order awarding TTD benefits based on the stipulation of the parties as set forth in the January 12, 2011, BRC order.

ALL CONCUR.

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