

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: October 3, 2014

CLAIM NO. 201392740

PIKE COUNTY BOARD OF EDUCATION

PETITIONER

VS.

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

DONALD G. ROBINSON  
and HON. WILLIAM J. RUDLOFF,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION  
AFFIRMING  
\* \* \* \* \*

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

**STIVERS, Member.** Pike County Board of Education ("Pike County") seeks review of the May 19, 2014, Opinion and Order of Hon. William J. Rudloff, Administrative Law Judge ("ALJ") finding Donald G. Robinson ("Robinson") totally occupationally disabled as a result of a November 2, 2011, right shoulder and neck injury. The ALJ awarded permanent total disability ("PTD") benefits and medical benefits.

Pike County also appeals from the June 13, 2014, Opinion and Order on Reconsideration.

On appeal, Pike County challenges the ALJ's decision on four grounds. First, it asserts the ALJ erred in finding Robinson sustained a cervical spine injury. Second, Pike County asserts Robinson does not have a permanent impairment of his right shoulder. Alternatively, it argues in the event Robinson has a permanent impairment of the right shoulder, he is only entitled to permanent partial disability ("PPD") benefits. Third, it asserts substantial evidence does not support an award of medical benefits for either the cervical spine or the right shoulder injury. Finally, it argues Robinson is not totally occupationally disabled.

Robinson sustained three previous work-related injuries for which he received an award of workers' compensation benefits. In a December 23, 1997, Opinion, Order & Award, Hon. W. Bruce Cowden, Administrative Law Judge ("ALJ Cowden") determined Robinson had a 4% occupational disability as a result of an April 3, 1995, right knee injury, a 5% occupational disability as a result of an October 20, 1995, left knee injury, and a 15% occupational disability as a result of a September 12, 1996, low back injury. ALJ Cowden awarded PPD benefits and

medical benefits for each injury. Additionally, in a February 24, 1999, Opinion and Award, Hon. Ron May, Administrative Law Judge ("ALJ May") determined Robinson suffered from coal workers' pneumoconiosis and awarded benefits not to exceed 208 weeks.

Robinson's February 10, 2014, deposition testimony reveals he was born on March 8, 1956, and is right handed. He acknowledged working in the coal mines, primarily underground, for approximately twenty years. Robinson testified he sustained two work-related knee injuries and a back injury for which he filed workers' compensation claims. He last worked in the coal mines in 1996 and was off work until approximately 2004 when he was employed by Pike County. While employed by Pike County he worked the dayshift at Shelby Valley High School as a custodian from 6:30 a.m. to 3:00 p.m. Robinson provided the following testimony regarding his job duties:

Q: Okay. With your custodian duties, if you would, tell me a little bit about that job and what you would do on a typical day or a typical week?

A: I took care of a lot of the outside work. I weed eaten, I picked up the garbage, I ran the mowers. Just anything they needed done outside, you know, that's mostly what I done during the summer. And the wintertime work was, you know, mostly inside. But, you know, I took care of the gym. We took

care of the floors, you know, like sweep them and mop them and stuff. And I done [sic] some welding and stuff for them also. I took care of their chairs and stuff at the school.

Q: Like if the chairs broke or something?

A: Yes, I would weld it up. I took care of that.

Q: Okay. Did you have more outdoor responsibilities than some of the other custodians?

A: Well, yes. I took care of the outside mostly. I mean, I had somebody to help me, but I was mostly outside. Yes, sir.

. . .

Q: Okay. In terms of physically doing your job there, what would have been the toughest things or thing that would be the heaviest to do or most difficult thing to do? Was there a certain activity?

A: Well, weed eating is tough, you know. And a lot of times we would move classrooms, you know, the chairs, the desks, whatever we had to move them. And during the summer, I mean, the early part of the summer, we would move all of the classrooms. We would move all of the chairs, desks and all out, and strip and wax the floors.

Q: In terms of moving furniture or equipment and things like that, would you have help from the other custodians?

A: Yes, sir.

He testified that at some point during his employment as a custodian with Pike County he moved from a 205-day period of employment to a 240-day period of employment which required him to work the full year. Robinson was injured on November 2, 2011, when the ten foot ladder he had climbed in order to hang pictures in the gymnasium gave way and he fell to the gymnasium floor. Robinson did not know how far he fell but believed he still had to descend several steps when the ladder collapsed. He explained he landed on his "right side primarily on his arm and butt." The other custodians working with him were present when he fell. Although he was able to get up and walk, he did not perform his normal job duties the rest of the day. An accident report was filled out at the main office.

Robinson testified he worked regularly after the accident with the help of the other custodians who assisted with lifting. In August 2012, he finally sought medical attention from Dr. Ronald Mann. At that time he complained of neck and right shoulder symptoms. Dr. Mann sent him to physical therapy for both conditions. He was then seen by Dr. Anbu Nadar, an orthopedic surgeon who performed surgery on his shoulder in February 2013. After the shoulder surgery, he underwent another course of physical therapy

which he indicated was helpful. Dr. Nadar later released him from his care. No other physician has seen him for his neck and shoulder problems.

Prior to treatment by Dr. Mann, Robinson had been treated by Dr. Brendon Coughtry for low back problems for approximately four years. Dr. Coughtry had administered injections and regularly prescribed Hydrocodone, Celebrex, and Neurontin. Dr. Coughtry did not treat his shoulder and neck condition.

Robinson described his current problems due to the shoulder injury as follows:

Q: Okay. Right now why don't you tell me what type of problems you have out of your shoulder?

A: Well, like I said, I can't lift, you know. If it's down low I can hold it, but I can't lift it up with my arm. And my neck hurts a lot, and sometimes I've got numbness in my fingers. I can't sleep on my arm, my right arm. I can't sleep with it. I have to hold it over a pillow, and that's the way I sleep.

Q: Do you feel like the surgery helped your shoulder at all?

A: Yes. The constant pain is not there anymore like it was.

Q: Okay. But in terms of like what you can do or can't do, do you feel like that the surgery helped with that in terms of your ability to do things?

A: Well, before I couldn't do it and I still can't lift, like I said, with it and stuff.

. . .

Q: Do you feel like you're getting any improvement?

A: Well, like I said, still can't sleep with it, you know. It's hard. I can't reach behind my back. Like my belt loops and stuff, it's hard to get my belt. I have a time, you know. It takes me a while to try to get my hand back there to get the belt and stuff.

Robinson testified he currently has more neck problems than shoulder problems. However, he still cannot reach and retrieve items. He has not returned to work.

Robinson has very little problems with his knees but still has back problems. He explained he did not return to work in the underground mines because it involved constant crawling, bending, and stooping which he could not do even on an occasional basis.

At the April 23, 2014, hearing, Robinson testified all of his previous jobs in the coal and construction industry involved bending, pushing, pulling, and using his right arm and shoulder. When he was not operating machinery underground he was engaged in lifting. Concerning his ability to perform his previous jobs, Robinson explained as follows:

Q: From your shoulder, alone, and I know your neck is bothering you, too, I'm going to ask you from your shoulder alone, could you do any of these previous jobs listed on this work history on a consistent full-time basis?

A: No, sir I couldn't do a good job.

Q: Why not?

A: Because of the pain. I can't use it like I did before. Like, I run a roof bolter and I always had to bend bolts with my right arm and stuff, and there's no way that I can do that.

Q: And, in a custodian job there's all kinds of things you had to do using your right arm.

A: Oh, yeah I changed, you know, bulbs and stuff, and I lifted desks and stuff all the time.

Q: Are you right handed?

A: Yes, I am.

Q: At the present time, the pain you're having in your shoulder, is it constant pain or does it come and go?

A: Well, it's constant but sometimes it's worse, you know, than others.

Q: What type of things make it worse? Do you have to even exert yourself sometimes for it to get worse or does it just get worse?

A: Well, as an example, yesterday I - I don't know what I done, but it was hurting all day yesterday. It and my neck, you know, I don't know. Maybe, I laid wrong or something. I don't know, but it hurt all day yesterday.

Robinson testified his shoulder and neck pain limit his ability to sit. The loss of the strength in his right shoulder limit his ability to carry items. He has lost some range of motion in his shoulder and cannot move his shoulder above a certain level. His pain prevents him from holding down a job. Although he did not return to the coal mines after his low back injury, he worked on a full-time basis from 2004 until November 2011.

Pike County introduced the February 19, 2014, report of Dr. Gary Bray and the July 24, 2013, report of Dr. Richard Sheridan. It also introduced the records of Pikeville Medical Center and Dr. Coughtry. Robinson introduced Dr. Nadar's record and a Form 107 he completed on February 26, 2014, and the October 31, 2013, report of Dr. David Muffly.

The April 10 2014, Benefit Review Conference Order and Memorandum ("BRC Order") reflects the parties stipulated Robinson sustained a work-related injury on November 2, 2011, and Pike County received due and timely notice. It listed the contested issues as follows: "benefits per KRS 342.730; 'injury' as defined by the Act; and medical benefits." Under "Other" the BRC Order listed "permanent total disability; whether Whole Man Doctrine and Teledyne Doctrine apply."

After providing a brief summary of Robinson's testimony and an extensive summary of the medical evidence, the ALJ provided the following findings of fact and conclusions of law regarding Robinson's occupational disability:

**A. Injury as defined by the Act.**

KRS 342.0011(1) defines "injury" to mean any work-related traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings. KRS 342.0011(33) defines "objective medical findings" to mean information gained through direct observation and testing of the patient applying objective or standardized methods.

I saw and heard the plaintiff Mr. Robinson testify at the Final Hearing and make the factual determination that he was a credible and convincing lay witness. Based upon the plaintiff's sworn testimony, which is summarized above, and the persuasive and compelling medical report from his treating orthopedic surgeon, Dr. Nadar, which is summarized above, as well as the persuasive and compelling medical report from Dr. Muffly, which is summarized above, I make the factual determination that the plaintiff Mr. Robinson sustained significant permanent physical injuries to his right shoulder and neck as a result of his work-related fall while employed by the defendant on November 2, 2011.

In concluding Robinson was permanently totally disabled, the ALJ provided, in relevant part, the following findings of fact and conclusions of law:

**B. Benefits per KRS 342.730; permanent total disability; whether whole man doctrine and Teledyne doctrine apply?**

In rendering a decision, KRS 342.285 grants the Administrative Law Judge as fact-finder the sole discretion to determine the quality, character, and substance of evidence. *AK Steel Corp. v. Adkins*, 253 S.W.3d 59 (Ky. 2008).

As indicated above, I saw and heard Mr. Robinson testify at the Final Hearing. I carefully observed his facial expressions during his testimony. I carefully listened to his voice tones during his testimony. I carefully observed his body language during his testimony. I again make the factual determination that he was a credible and convincing lay witness.

This case calls to mind the Opinion of the Kentucky Court of Appeals in Jeffries v. Clark & Ward, 2007 WL 2343805 (Ky.App.2007), in which the Court of Appeals quoted from Chief Judge Overfield's Opinion in the case, where he made the following statement . . . "It is often difficult to explain to litigants and counsel why one witness is considered credible and another is not considered credible. No doubt many of the factors related to the credibility by a trier of fact are subconscious and many are related to life experiences" (emphasis supplied). The Court of Appeals stated that it was within the Judge's sole discretion to

determine the quality, character, and substance of the evidence, and the Court of Appeals did not disturb Judge Overfield's determination that one witness was not credible, despite the fact that Judge Overfield used his "life experiences" in making that determination.

Both Dr. Nadar, the treating orthopedic surgeon, and Dr. Muffly, the examining orthopedic surgeon, stated that as a result of Mr. Robinson's work-related fall on November 2, 2011 he will sustain a 5% permanent impairment to the body as a whole under the AMA Guides, Fifth Edition, due to his right shoulder injuries and an additional 5% permanent impairment to the body as a whole due to his neck injuries, producing a combined permanent impairment of 10% to the body as a whole, all of which is related to the plaintiff's work injuries on November 2, 2011. Dr. Muffly stated that Mr. Robinson has permanent restrictions, including avoidance of reaching above shoulder level, maximum lifting above shoulder level being 15 pounds, lifting of 30 pounds from waist to chest and further that plaintiff cannot return to his custodian job. Dr. Nadar stated that the plaintiff does not retain the physical capacity to return to the type of work which he performed at the time of his injuries and has restrictions as follows: Avoid lifting, pushing, pulling, climbing and crawling.

Mr. Robinson testified that he has a history of manual labor, including lifting, and that he cannot physically return to work at his former jobs. That is credible and convincing evidence under the holding of the

Kentucky Supreme Court in *Hush v. Abrams*, 584 S.W.2d 48 (Ky.1979).

As indicated above, the evidence was that the plaintiff worked on a regular full-time basis as a custodian for the defendant from 2004 to 2013. One of the most important decisions in modern Kentucky workers' compensation law is that of the Kentucky Supreme Court in *Roberts Brothers Coal Company v. Robinson*, 113 S.W.3d 181 (Ky.2003), where the high court held that if an individual is working without restrictions at the time a work-related injury is sustained, the finding of pre-existing impairment does not compel a finding of pre-existing disability with regard to an award made under KRS 342.730(1)(a).

"'Permanent total disability' means 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 . . . ." Kentucky Revised Statutes (KRS) 342.0011. To determine if an injured employee is permanently totally disabled, an ALJ must consider what impact the employee's post-injury physical, emotional, and intellectual state has on the employee's ability "to find work consistently under normal employment conditions . . . [and] to work dependably[.]" *Ira A. Watson Dept. Store v. Hamilton*, 34 S.W.3d 48, 51 (Ky. 2000). In making that determination, "the ALJ must necessarily consider the worker's medical condition . . . [however,] the ALJ is not required to rely upon the vocational opinions of either the medical experts or the vocational experts. A worker's testimony is competent evidence of his physical

condition and of his ability to perform various activities both before and after being injured."

Id. at 52. (Internal citations omitted.) See also, *Hush v. Abrams*, 584 S.W.2d 48 (Ky. 1979).

Based upon the credible and convincing lay testimony of the plaintiff, as summarized above, and the persuasive and compelling medical evidence from the treating orthopedic surgeon, Dr. Nadar, as covered above, as well as the persuasive and compelling medical evidence from Mr. Muffly, the examining orthopedic surgeon, as summarized above, I make the factual determination that as a result of his work-related fall on November 2, 2011, Mr. Robinson will sustain a 10% permanent impairment to the body as a whole due to his right shoulder and neck injuries, which are causing him pain and weakness in his right shoulder, limitation of motion in his right shoulder, pain in his neck and intermittent tingling down into his right arm. Mr. Robinson is presently 58 years of age and he is, therefore, an older worker in the highly competitive job market. He has absolutely no specialized or vocational training. His work history has been at manual labor jobs requiring lifting. Based upon his sworn testimony and the medical evidence from both Dr. Nadar and Dr. Muffly, specifically regarding his permanent physical restrictions, I make the factual determination that Mr. Robinson is not physically capable of returning to any of his former jobs. If he should go out into the job market to attempt to find another job, it is reasonable to state that he would have a very difficult time finding a regular

full-time job and I make that factual determination.

In this case, I considered the severity of the plaintiff's work injuries, which are covered in detail above, his work history, which is covered in detail above, his education, which is covered in detail above, his sworn testimony, which is covered in detail above, the medical evidence from Dr. Nadar, the treating orthopedic surgeon, which is covered in detail above, and the medical evidence from Dr. Muffly, the examining orthopedic surgeon, which is covered in detail above. Based on all of those factors, I make the factual determination that the plaintiff Mr. Robinson cannot find work consistently under regular work circumstances and work dependably. I, therefore, make the factual determination that he is permanently and totally disabled.

The ALJ awarded medical benefits for the right shoulder and neck injury.

Pike County filed a petition for reconsideration alleging the determination Robinson was totally disabled is a patent error appearing on the face of the award. The remainder of its petition was a re-argument of whether Robinson sustained work-related shoulder and neck injuries. Significantly, Pike County did not ask for additional findings of fact nor did it assert the ALJ's analysis regarding whether Robinson was permanently totally disabled was deficient.

In the June 13, 2014, Opinion and Order on Reconsideration, the ALJ noted the petition for reconsideration was an attempt to reargue the case. However, out of an abundance of caution, he provided, in relevant part, the following findings:

The plaintiff Mr. Robinson testified that on November 2, 2011 he fell off a stepladder while working for the defendant and struck his right arm and buttocks on the surface below. He testified that as a result of his fall he sustained injuries to his neck and right shoulder. He testified that his work history was at manual labor, which included lifting. He stated that he was taking prescription pain medications. He testified that he cannot return to his former jobs. He stated that he has been awarded Social Security total disability benefits.

At the Hearing on April 23, 2014 I sat a few feet from Mr. Robinson during his testimony. I carefully observed his facial expressions during his testimony, carefully listened to his voice tones during his testimony and carefully observed his body language during his testimony. I am the only decision maker who has actually seen and heard the plaintiff testify. He was a very stoic gentleman. I make the factual determination that he was a credible and convincing lay witness and that his testimony rang true.

. . .

The plaintiff filed the medical report of Dr. Anbu Nadar dated February 26, 2014. Dr. Nadar recounted the plaintiff's history of his work

injuries arising out of his work-related fall. Dr. Nadar noted that Mr. Robinson had an MRI and shoulder surgery. Dr. Nadar produced his findings on physical examination. His diagnoses were a cervical strain and a right shoulder strain and impingement and cuff tear. Dr. Nadar stated that within reasonable medical probability the plaintiff's injuries were the cause of his complaints. Dr. Nadar stated that using the AMA Guides, Fifth Edition, the plaintiff's permanent whole person impairment will be 10%, consisting of 5% permanent impairment for his cervical spine injury and 5% permanent impairment for his right shoulder injury. Dr. Nadar stated that Mr. Robinson did not have an active impairment prior to his injuries. Dr. Nadar stated that the plaintiff reached maximum medical improvement in October, 2013. Dr. Nadar stated that the plaintiff does not retain the physical capacity to return to the type of work performed at the time of his injuries, and that restrictions should be placed upon the plaintiff's work activities as a result of his injuries: Avoidance of lifting, pushing, pulling, climbing and crawling.

The plaintiff also filed the medical report of Dr. David Muffly dated October 31, 2013. Dr. Muffly took a history from Mr. Robinson regarding his fall injuries on November 2, 2011 and his subsequent medical treatment, including arthroscopic surgery by Dr. Nadar on February 14, 2013. The plaintiff also recounted his recurrent painful symptoms. Dr. Muffly conducted a comprehensive physical examination of the plaintiff. Dr. Muffly also reviewed diagnostic test results and medical records dealing with Mr. Robinson. Dr. Muffly's diagnosis was that the

plaintiff sustained a right rotator cuff tear and a cervical strain relating to his November 2, 2011 work injury. Dr. Muffly stated that the plaintiff's chronic pre-existing low back pain was not made worse by his November 2, 2011 work injury. Dr. Muffly stated that using the AMA Guides, Fifth Edition, Mr. Robinson will sustain a 5% permanent impairment due to his right shoulder injury and a 5% permanent impairment due to his cervical spine injury, with the combined permanent impairment being 10%, all of which is related to the work injury on November 2, 2011. Dr. Muffly placed upon the plaintiff permanent restrictions as follows: Avoid reaching above shoulder level, maximum lifting above shoulder level of 15 pounds, a lifting limitation of 30 pounds from waist to chest, and that the plaintiff cannot return to his custodian job.

The evidence was that the plaintiff worked on a regular full-time basis as a custodian for the defendant from 2004 to 2013. One of the most important decisions in modern Kentucky workers' compensation law is that of the Kentucky Supreme Court in Roberts Brothers Coal Company v. Robinson, 113 S.W.3d 181 (Ky.2003), where the high court held that if an individual is working without restrictions at the time a work-related injury is sustained, the finding of pre-existing impairment does not compel a finding of pre-existing disability with regard to an award made under KRS 342.730(1)(a).

"'Permanent total disability' means 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 . . . ." Kentucky Revised Statutes (KRS) 342.0011. To determine if an injured employee is permanently totally disabled, an ALJ must consider what impact the employee's post-injury physical, emotional, and intellectual state has on the employee's ability "to find work consistently under normal employment conditions . . . . [and] to work dependably[.]" Ira A. Watson Dept. Store v. Hamilton, 34 S.W.3d 48, 51 (Ky. 2000). In making that determination,

"the ALJ must necessarily consider the worker's medical condition . . . [however,] the ALJ is not required to rely upon the vocational opinions of either the medical experts or the vocational experts. A worker's testimony is competent evidence of his physical condition and of his ability to perform various activities both before and after being injured."

Id. at 52. (Internal citations omitted.) See also, Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979).

I made and again make the factual determination that the testimony of the plaintiff Mr. Robinson, as summarized above, and the persuasive and compelling medical evidence from the treating orthopedic surgeon, Dr. Nadar, as summarized above, as well as the persuasive and compelling medical evidence from Mr. Muffly, the examining orthopedic surgeon, as summarized above, led me to the decision that as a result of Mr. Robinson's work-related fall on November 2, 2011, he will

sustain a 10% permanent impairment to the body as a whole due to his right shoulder and neck injuries, all of which is causing him pain and weakness in his right shoulder, limitation of motion in his right shoulder, pain in his neck and intermittent tingling down his right arm. The parties stipulated that Mr. Robinson last worked back on February 14, 2013. He is now 58 years of age and is, therefore, an older worker in the highly competitive job market. He has absolutely no specialized or vocational training or education. His work history has been at manual labor jobs requiring lifting. Based on the plaintiff's sworn testimony, as covered above, and the medical evidence from both Dr. Nadar and Dr. Muffly, as covered in detail above, and specifically regarding the plaintiff's permanent physical restrictions, I make the factual determination that Mr. Robinson is not physically capable of returning to any of his former jobs. I further make the factual determination that if he goes out into the job market to attempt to find another job, it is reasonable to believe that he will have a very difficult time finding a regular full-time job. In this case, I considered the severity of the plaintiff's work injuries, which are covered in detail above, his work history, which is covered in detail above, his education, which is covered in detail above, his credible and convincing sworn lay testimony, which is covered in detail above, the medical evidence from Dr. Nadar, the treating orthopedic surgeon, which is covered in detail above, and the medical evidence from Dr. Muffly, the examining orthopedic surgeon, which is covered in detail above. Based on all of those factors, I made and again make the factual determination that the

plaintiff Mr. Robinson cannot find work consistently under regular work circumstances and work dependably. I, therefore, make the factual determination that he is permanently and totally disabled.

In support of its first argument, Pike County relies upon the opinions of Drs. Bray and Sheridan and asserts Dr. Muffly found no objective findings to support his conclusion Robinson had an impairment of the cervical spine. As to Dr. Nadar's findings, it argues he provided no analysis to support his findings and impairment rating. Pike County asserts the mechanism of the injury does not support a finding of a neck injury and the persuasive medical evidence indicates Robinson did not sustain a cervical injury.

In its second argument, Pike County concedes Robinson may have sustained a shoulder injury, but argues he has no permanent impairment. It relies solely upon the findings and opinions of Dr. Sheridan. Alternatively, it asserts that should the Board disagree and affirm the ALJ's conclusion Robinson has a permanent impairment of the right shoulder, the medical records only support an award of permanent partial disability benefits enhanced by the three multiplier. It contends there is no evidence he is totally disabled. In support of this argument, it cites to

opinions of Dr. Bray, Dr. Muffly, and Dr. Nadar and the restrictions each imposed.

Next, Pike County contends that since there is not sufficient evidence to support a finding of a cervical or shoulder injury and Robinson does not require any further treatment of the shoulder or cervical spine, he is not entitled to an award of future medical benefits.

Finally, it contends there is no medical evidence establishing Robinson cannot return to gainful employment. It emphasizes a vocational evaluation is not in evidence establishing he cannot return to gainful employment. It asserts even though Robinson testified he did not believe he was capable of returning to gainful employment, "his protestations did not ring true given the cold hard facts of this case." It complains the ALJ relied upon Robinson's self-serving testimony regarding his history of performing manual labor including lifting. Although Pike County acknowledges the medical evidence demonstrates Robinson has right shoulder limitations, his condition "is not prohibitive." It posits that even though Robinson is currently fifty-eight years old, he has a work history which reveals the ability to keep a job and follow directions for an extended period of time which are key requirements for employers such as Wal-Mart, Lowes, and

McDonalds. Pike County contends there is an absence of reliable evidence which supports the ALJ's factual determination Robinson would have a difficult time finding a regular full-time job.

It also notes Dr. Coughtry treated Robinson's low back for the last four years, and after his injury Robinson did not inform Dr. Coughtry of a right shoulder problem. Thus, Robinson's lack of complaints cast doubt on the severity of the shoulder problem. Pike County seeks reversal of the ALJ's decision asserting at most Robinson is entitled to an award of PPD benefits based on a 5% impairment for his shoulder condition with enhancement by the three multiplier.

Robinson, as the claimant in a workers' compensation proceeding, had the burden of proving each of the essential elements of his cause of action, including causation. See KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Robinson was successful in that burden, the question on appeal is whether there was substantial evidence of record to support 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 rendering a decision, KRS 342.285 grants an ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). An ALJ may draw reasonable inferences from the evidence, 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. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). An 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). In that regard, an ALJ is vested with broad authority to decide questions involving causation. Dravo Lime Co. v. Eakins, 156 S.W. 3d 283 (Ky. 2003). Although a party may note evidence that would have supported a different outcome than that reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). Rather, 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).

The function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings made are so unreasonable under the evidence that they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to weight and credibility or by noting other conclusions or reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

We find no merit in Pike County's assertion the medical evidence demonstrates Robinson did not sustain a cervical spine injury. Dr. Muffly's report reveals Robinson had stiffness in the cervical spine. He provided the range of motion for flexion, extension, left rotation, right rotation, left lateral bend, and right lateral bend. He noted the MRI of October 30, 2012, showed moderate disc bulging at C5-6 with mild neuroforaminal encroachment and mild bulging of C4-5. He reviewed the records of Drs. Nadar and Mann as well as the treatment record of Dr. Coughtry covering the period from June 3, 2010, to January

29, 2011. Dr. Muffly concluded Robinson's cervical condition is due to the injury and fell within DRE Category II. Accordingly, he assessed a 5% impairment pursuant to the 5<sup>th</sup> Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides").

The Form 107 completed by Dr. Nadar reveals tenderness and limited range of motion of the cervical spine. He diagnosed cervical strain, finding as Dr. Muffly did, that Robinson fell within DRE Category II. He too assessed a 5% impairment.

The opinions of Drs. Muffly and Nadar constitute substantial evidence which support the ALJ's determination Robinson sustained a work-related cervical spine injury meriting a 5% impairment rating. Dr. Muffly's report sets out objective medical findings which support his conclusion and opinions. Similarly, Dr. Nadar's Form 107 provides objective medical findings which support his opinion Robinson sustained a cervical spine injury. Consequently, the ALJ's determination Robinson sustained a cervical spine injury must be affirmed.

Similarly, we find no merit in Pike County's argument Robinson does not have a permanent impairment as a result of the right shoulder injury. Notably, Pike County's argument relies solely upon the opinions of Dr.

Sheridan. Pike County does not reference Dr. Bray's report. In his report, Dr. Bray concluded Robinson had a right rotator cuff tear for which he received satisfactory surgical treatment. He expressed the opinion the rotator tear was related to the November 2011 fall. Pursuant to the AMA Guides, Dr. Bray assessed a 5% impairment rating. In doing so, Dr. Bray stated he agreed with Dr. Muffly, who also assessed a 5% impairment rating for the right rotator cuff tear. Their opinions are reinforced by Dr. Nadar who assessed a 5% impairment rating due to a rotator cuff tear. Since the record amply supports the ALJ's finding of a work-related right shoulder injury meriting a 5% impairment rating, it must also be affirmed.

Pike County's argument that substantial evidence does not support a finding Robinson is entitled to future medical treatment for the cervical spine or right shoulder condition can be dispensed with in short order. Drs. Nadar and Muffly diagnosed a cervical strain for which they assessed a 5% permanent impairment rating. They also assessed a 5% impairment rating for the rotator cuff tear in the right shoulder. Their opinions are supported by objective medical findings and constitute substantial evidence supporting the ALJ's determination Robinson sustained a permanent cervical spine and right shoulder

injuries. Thus, as a matter of law Robinson is entitled to future medical benefits.

In FEI Installation, Inc. v. Williams, 214 S.W.3d 313 (Ky. 2007), the Supreme Court instructed that KRS 342.020(1) does not require proof of an impairment rating to obtain future medical benefits, and the absence of a functional impairment rating does not necessarily preclude such an award. Here, however, it is undisputed Robinson has a permanent functional impairment rating as a result of his injury. The Board has consistently held that a worker who has established a work-related permanent impairment rating has also established a disability for purposes of KRS 342.020 and is entitled to future medical benefits. We interpret the Court's holding in FEI Installation, Inc. v. Williams, supra, to mean that where there is evidence of a permanent impairment rating in accordance with the AMA Guides, as a matter of law, it is error for an ALJ to rule broad-spectrum and prospectively that future medical care is unreasonable and unnecessary, notwithstanding nonspecific expert medical testimony to the contrary. In such circumstances, pursuant to KRS 342.020(1), a general award of future medical benefits is mandated.

Since the ALJ found Robinson sustained physical injuries to the cervical spine and right shoulder meriting

an impairment rating for each, Robinson, by statute, is entitled to medical benefits for each work-related condition.

We find no merit in Pike County's assertion the ALJ erred in determining Robinson is permanently totally disabled. Significantly, in its petition for reconsideration, Pike County did not challenge the accuracy of the ALJ's findings or argue his analysis, as required by applicable case law, was deficient or inadequate. On appeal, it makes no such challenge.

In Ira A. Watson Department Store v. Hamilton, supra, the Supreme Court provided the factors to be considered by an ALJ in resolving the issue of whether a worker is totally occupationally disabled as follows:

An analysis of the factors set forth in KRS 342.0011(11)(b), (11)(c), and (34) clearly requires an individualized determination of what the worker is and is not able to do after recovering from the work injury. Consistent with *Osborne v. Johnson*, *supra*, it necessarily includes a consideration of factors such as the 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. The definition of "work" clearly contemplates that a worker is not required to be homebound in order to be found to be totally occupationally disabled. See, *Osborne v. Johnson*, *supra*, at 803.

Although the Act underwent extensive revision in 1996, the ALJ remains in the role of the fact-finder. KRS 342.285(1). It is among the functions of the ALJ to translate the lay and medical evidence into a finding of occupational disability. Although the ALJ must necessarily consider the worker's medical condition when determining the extent of his occupational disability at a particular point in time, the ALJ is not required to rely upon the vocational opinions of either the medical experts or the vocational experts. See, [citations omitted]. A worker's testimony is competent evidence of his physical condition and of his ability to perform various activities both before and after being injured. [citation omitted].

KRS 342.285(2) provides that the Board shall not reweigh the evidence and substitute its judgment for that of the ALJ with regard to a question of fact. The standard of review with regard to a judicial appeal of an administrative decision is limited to determining whether the decision was erroneous as a matter of law. [citation omitted]. 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. [citation omitted].

Id. at 51-52.

Shortly thereafter, the Supreme Court in McNutt Construction/First General Services v. Scott, 40 S.W.3d 854 (Ky. 2001) further explained:

For that reason, we conclude that some of the principles set forth in *Osborne v. Johnson, supra*, remain viable when determining whether a worker's occupational disability is partial or total. See also, Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000), in which we reached the same conclusion.

An analysis of the factors set forth in KRS 342.0011(11)(b), (11)(c), and (34) clearly requires an individualized determination of what the worker is and is not able to do after recovering from the work injury. Consistent with *Osborne v. Johnson, supra*, it necessarily includes a consideration of factors such as the 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 dependable and whether his physiological restrictions prohibit him from using the skills which are within his individual vocational capabilities. The definition of "work" clearly contemplates that a worker is not required to be homebound in order to be found to be totally occupationally disabled. See, *Osborne v. Johnson, supra*, at 803.

Id. at 860.

In the May 19, 2014, Opinion and Order and in the June 13, 2014, Opinion and Order on Reconsideration, the ALJ set forth the permanent physical restrictions imposed by Drs. Nadar and Muffly. He noted Robinson had a history of performing only manual labor which included lifting, and he testified he could not return to his former jobs. He found this testimony credible. The ALJ also noted Robinson had worked on a regular full-time basis as a custodian for seven years. After taking into consideration the restrictions imposed, Robinson's testimony, his age of fifty-eight, the fact he had no specialized or vocational training, and had only performed manual labor jobs which entailed lifting, the ALJ concluded Robinson was not physically capable of returning to any former job and was therefore totally occupationally disabled. Considering the severity of the work injury, the work history, Robinson's education, his testimony as to his physical capabilities, and the medical evidence from Drs. Nadar and Muffly regarding his restrictions, the ALJ concluded Robinson is permanently totally disabled as defined by the statute and case law.

Although not raised by Pike County, we find the ALJ conducted the appropriate analysis as required by

McNutt Construction/First General Services v. Scott, supra, and Ira A. Watson Dept. Store v. Hamilton, supra. Further, the ALJ's finding of total occupational disability is supported by substantial evidence specifically the opinions of Drs. Nadar and Muffly and Robinson's testimony as to his physical capabilities. The fact there was no vocational evaluation is of no import as the ALJ is not required to rely upon vocational opinions of either a medical expert or a vocational expert. Rather, a worker's testimony is competent evidence of his physical condition and ability to perform various activities pre-injury and post-injury.

Further, we cannot attribute any significance to the fact Robinson did not discuss with Dr. Coughtry his right shoulder problem as that is the ALJ's function, not ours. We note Robinson explained Dr. Coughtry was not treating his shoulder and neck, only his back.

Finally, although not specifically addressed by either party, we believe the ALJ adequately addressed the issue raised in the BRC Order pertaining to the "Whole Man Theory." In Garrett Mining Co. v. Nye, 122 S.W.3d 513, 520 (Ky. 2003), the Supreme Court explained that the "Whole Man Theory" applies: "[w]here [an employee] has had a compensable disability, received his compensation and returned to work and then receives a subsequent independent

injury which incapacitates him, the prior injury should not be deducted." (quoting Cabe v. Skeens, 422 S.W.2d 884, 885 (Ky.1967)). The Supreme Court noted that "[t]he rule is applied when the disability caused by the second injury is unrelated to and unaffected by the disability caused by the previous injury." Garrett Mining Co. v. Nye at 520. More recently, in Hill v. Sextet Mining Corp., supra, the Supreme Court explained:

[A] worker who has sustained both compensable and noncompensable disability is entitled to receive income benefits for the full extent to which compensable, work-related harmful change causes a complete inability to work. See International Harvester Co. v. Poff, [331 S.W.2d 712 (Ky. 1959)]. Therefore, a worker with an AMA impairment from a nonwork-related condition who sustains a work-related injury may receive income benefits for total disability if there is substantial evidence that the work-related harmful change, by itself, is sufficient to cause an AMA impairment and to cause the worker to be unable to perform any work.

Id. at 508-509.

Here, we believe the ALJ could reasonably conclude the neck and shoulder injuries Robinson sustained approximately fifteen years after his last work injury on September 12, 1996, were sufficient to cause total occupational disability. Robinson was able to work full-time from 2004 to 2011 without any restrictions performing

heavy manual labor. In his deposition, Robinson described his job duties with Pike County. In addition, the job description filed by Pike County establishes Robinson was required to do strenuous manual labor. He was required to engage in sweeping, scrubbing, mopping, and waxing in various locations of the school. He was also required to wash windows and walls, pick up trash around the grounds, and in the building sweep and clean walkways, entrances, dispose of trash, unpack and pack, load and receive books and materials, and operate cleaning equipment. The job description states Robinson had to have the physical ability to perform heavy physical labor. There was no testimony Robinson was unable to perform all these tasks prior to the November 2, 2011, work injury. Further, the ALJ could reasonably conclude the restrictions of Drs. Nadar, Muffly, and Bray would prohibit all the above activities.

In addition, in the ALJ's Opinion and Order and the Opinion and Order on Reconsideration ruling on the petition for reconsideration, the ALJ implicitly, if not expressly, concluded the effects of the subject injury prevented Robinson from returning to the underground coal mines. Thus, we believe consistent with the "Whole Man Theory," the injury of November 2, 2011, standing alone was

severe enough and sufficient to cause Robinson to be totally occupationally disabled.

Although not raised by Pike County, we also note the ALJ addressed the issue of whether Robinson's previous occupational disabilities constitute an impairment as defined in Roberts Bros. Coal Co. v. Robinson, 113 S.W.3d 181 (Ky. 2003). There, the Supreme Court pointed out as follows:

In other words, KRS 342.730(1)(a) requires the ALJ to determine the worker's disability, while KRS 342.730(1)(b) requires the ALJ to determine the worker's impairment. Impairment and disability are not synonymous. We conclude, therefore, that an exclusion from a total disability award must be based upon pre-existing disability, while an exclusion from a partial disability award must be based upon pre-existing impairment. For that reason, if an individual is working without restrictions at the time a work-related injury is sustained, a finding of pre-existing impairment does not compel a finding of pre-existing disability with regard to an award that is made under KRS 342.730(1)(a).

KRS 342.730(1)(a) specifies that nonwork-related impairment "shall not be considered" when determining whether an individual is totally disabled. Here, the ALJ determined that the claimant was totally disabled as a result of his injury. Based upon a finding that 25% of his impairment was due to the natural aging process, the ALJ concluded that the award must be

reduced by 25%. Contrary to what the employer would have us believe, the exclusion was based solely upon impairment. Nowhere did the ALJ specifically find that 25% of the claimant's ultimate disability was due to the natural aging process. Furthermore, the finding that the claimant had no pre-existing active disability precluded such an inference. It is apparent, therefore, that the ALJ found work-related impairment, by itself, to be totally disabling. For that reason, an award under KRS 342.730(1)(a) was appropriate without regard to the fact that 25% of the claimant's impairment was attributable to the natural aging process. Furthermore, since none of the claimant's disability was active at the time of his injury, no exclusion for prior, active disability was required.

Id. at 183.

Here, the ALJ concluded although Robinson had pre-existing impairments as determined by ALJ Cowden in the December 23, 1997, Opinion and Award, he did not have a pre-existing disability with regard to an award pursuant to KRS 342.730(1)(a).

Because the ALJ's decision is supported by substantial evidence and he performed the requisite analysis pursuant to Ira A. Watson Department Store v. Hamilton, supra, and McNutt Construction/First General Services v. Scott, supra, we are without authority to

disturb his decision on appeal. Special Fund v. Francis,  
supra.

Accordingly, the Opinion and Order rendered May  
19, 2014, and the Opinion and Order on Reconsideration  
rendered June 13, 2014, are **AFFIRMED.**

ALL CONCUR.

**COUNSEL FOR PETITIONER:**

HON TODD KENNEDY  
P O BOX 1079  
PIKEVILLE KY 41502

**COUNSEL FOR RESPONDENT:**

HON RANDY G CLARK  
P O BOX 1529  
PIKEVILLE KY 41502

**ADMINISTRATIVE LAW JUDGE:**

HON WILLIAM J RUDLOFF  
400 E MAIN ST STE 300  
BOWLING GREEN KY 42101