Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: December 5, 2014

CLAIM NO. 201300607 & 201300605

PINE BRANCH MINING, LLC PETITIONER

VS. **APPEAL FROM HON. GRANT S. ROARK, ADMINISTRATIVE LAW JUDGE**

STEPHEN MULLINS
and HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

STIVERS, Member. Pine Branch Mining, LLC, ("Pine Branch") appeals from the July 11, 2014, Opinion on Remand and the August 22, 2014, Order on Petition for Reconsideration of Hon. Grant S. Roark, Administrative Law Judge ("ALJ"). In the July 11, 2014, Opinion on Remand, in response to the March 14, 2014, Board opinion vacating and remanding, the ALJ determined that Stephen Mullins ("Mullins") did not

suffer from a compensable cervical injury and Mullins is permanently totally disabled.

On appeal, Pine Branch asserts Mullins does not qualify for an award of permanent total disability benefits.

The Form 101, Claim No. 2013-00605, alleges Mullins sustained work-related cumulative trauma injuries to his neck and back on November 30, 2012. The Form 101 indicates Mullins had only completed the ninth grade, and he has not obtained his GED. Further, the Form 101 indicates Mullins was working as a heavy equipment operator at the time of his injury. The Form 104 – work history indicates Mullins was employed at Pine Branch from March 20, 1980, through November 30, 2012.

The Form 103, Claim No. 2013-00607, alleges Mullins sustained work-related hearing loss on November 30, 2012, due to "[r]epetitive exposure to loud noise in the workplace."

By order dated July 17, 2013, the two claims were consolidated.

The September 10, 2013, Benefit Review Conference ("BRC") order lists, in part, the following stipulations:

> 3. Plaintiff sustained a work-related injury or injuries on 11-30-12.

> 11. Plaintiff's educational level: 9th.
>
> 12. Plaintiff's specialized or vocational training: surface mining.

The BRC Order also lists the following contested issues: benefits per KRS 342.730/multipliers; notice; unpaid or contested medical expenses; injury as defined by the ACT; exclusion for pre-existing disability/impairment; TTD. Under "other" is handwritten: "S.O.L."

In the December 2, 2013, Opinion, Order, and Award, the ALJ found Mullins to be permanently totally disabled and set forth the following findings:

> The next issue is the extent of plaintiff's impairment/disability. Plaintiff maintains he is totally disabled while the employer argues plaintiff has little, if any, functional impairment and can return to the kind of work he was performing at the time of his injury.
>
> In deciding this issue, the Administrative Law Judge is persuaded by the restrictions assigned by Dr. Owen. Although Dr. Owen indicated plaintiff could return to his former job if he could do so within the restrictions assigned, it is determined plaintiff could not return to his job as an equipment operator within those restrictions. Moreover, plaintiff worked in the mining industry most of his life and for this particular employer for approximately 30 years. Under these circumstances, the Administrative Law Judge is persuaded that working in the mining industry and/or as a heavy equipment operator

> constitutes the entirety of plaintiff's vocational training. Considering plaintiff's age and lack of education, by finding that plaintiff does not retain the ability to return to his former job, it is further determined plaintiff is permanently and totally disabled. In reaching this conclusion, the Administrative Law Judge was further persuaded by plaintiff's credible testimony and commendable work history that plaintiff would currently be working if he were physically able to do so.
>
> Moreover, although Dr. Owen carved out 2% of his overall impairment as being active at least two years before the claims file, the Administrative Law Judge is not persuaded plaintiff had any demonstrable occupational disability outside of his statute of limitations period to justify carving out any portion of his award of total disability. Plaintiff's award benefit is therefore calculated as follow:
>
> $1.170 x 2/3 = $780 → $736.19 (maximum PTD rate for 2012) per week.

In its March 14, 2014, opinion, this Board provided the following instructions on remand:

> On remand, the ALJ is directed to make specific findings of whether Mullins sustained cumulative trauma injuries to his cervical spine and point to the evidence in the record which support his conclusion. Only then can the ALJ make a determination as to causation/work-relatedness, i.e., whether Mullins [sic] neck and/or low back injuries are the result of his lengthy work history with Pine Branch, and whether those work-related injuries

> have rendered him permanently totally disabled. If the ALJ determines Mullins has not sustained work-related, cumulative trauma injuries to his cervical spine, he must then determine whether Mullins is permanently and totally disabled based solely on his lumbar spine injury.

In the July 11, 2014, Order on Remand, the ALJ made the following findings:

> This matter comes before the Administrative Law Judge upon remand from the Workers Compensation Board with instructions to clarify whether plaintiff had an identifiable cervical injury caused by cumulative trauma at work and, if so, to identify the evidence which supports that determination. The Board also directed that that the issue of extent and duration be re-visited after deciding the cervical issue such that whatever impairment/disability is determined is based only on compensable injuries.
>
> Having reviewed the record anew, and in keeping with the Board's instructions, it is determined plaintiff did not suffer a compensable cervical injury. As noted in the record, plaintiff had very limited examination findings with respect to the cervical spine. Even plaintiff's IME physician, Dr. Owen, did not assign any impairment rating for the neck. Neither did Dr. Lyon. Accordingly, it is determined plaintiff did not suffer any permanent neck injury due to cumulative trauma at work. As such, that portion of his claim must be dismissed.

> However, with respect to the extent and duration of plaintiff's impairment/disability, the Administrative Law Judge remains persuaded the effects of plaintiff's lumbar injury alone warrants the restrictions assigned by Dr. Owen, which also prevent plaintiff from being able to return to work in the mining industry for which he has training and experience. Again, given plaintiff's age, education and vocational history, it is determined the effects of plaintiff's lumbar injury alone render him permanently and totally disabled. He therefore remains entitled to the award of $736.19 per week beginning November 30, 2012 and continuing until he qualifies for normal, old age Social Security retirement, together with interest at 12% on all past due amounts.

In its petition for reconsideration, Pine Branch argued the record does not support a finding of permanent total disability.

In the August 22, 2014, Order on Petition for Reconsideration, the ALJ provided the following additional findings:

> This matter comes before the Administrative Law Judge pursuant to the defendant employer's Petition for Reconsideration of the Opinion on remand rendered in this matter on July 11, 2014. In its Petition the employer argues the award of permanent, total disability was not based on the evidence of record and must be set aside.

Having reviewed the evidence of record, the Administrative Law Judge is not persuaded the defendant points out any patent errors to justify the remedy it seeks. Although the employer argues plaintiff's lower back condition, if any, is not significant enough to warrant restrictions that would prevent him from returning to his job as an equipment operator, the Administrative Law Judge is not so persuaded. Again, Dr. Owen assigned restrictions against activities such as bending and heavy lifting. Although operating the heavy equipment with the defendant employer did not always call for these activities, plaintiff testified he also had to perform maintenance for approximately 1 ½ hours on 5 of the 6 days per week he worked. Plaintiff's testimony indicates he had to perform activities which may be in excess of Dr. Owen's restrictions.

Moreover, plaintiff testified that the operation of the equipment itself was problematic for his lower back. He testified that the kind of work he did caused almost constant jerking and whipping of his neck and lower back. He indicated his treating physician advised these activities were, and would be, detrimental to his lower back condition. Plaintiff testified his back pain alone would prevent him from returning to work as an equipment operator. As indicated previously, plaintiff was found quite credible in this regard. As such, the Administrative Law Judge remains persuaded plaintiff's lower back condition prevents him from returning to work as an equipment operator.

In addition, as previously pointed out, plaintiff has only a 9th grade education and his entire work history

> has been in the mining industry. Having concluded plaintiff was not able to return to work as an equipment operator in the mining industry, the Administrative Law Judge remains persuaded that plaintiff's injury, considered within the context of his age, education and his limited work experience/history, render him totally disabled.
>
> For these reasons, the defendant's Petition is denied.

On appeal, Pine Branch asserts a finding of permanent total disability contradicts the evidence in the record. It argues the ALJ's reliance on Dr. James Owen is unfounded, as Dr. Owen's report establishes Mullins can continue working.

As the claimant in a workers' compensation proceeding, Mullins had the burden of proving each of the essential elements of his cause of action, including the extent of his disability. *See* KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since he 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).

Authority has long acknowledged in making a determination granting or denying an award of PTD benefits, an ALJ has wide ranging discretion. Seventh Street Road Tobacco Warehouse v. Stillwell, 550 S.W.2d 469 (Ky. 1976); Colwell v. Dresser Instrument Div., 217 S.W.3d 213, 219 (Ky. 2006). KRS 342.285 designates the ALJ as the finder of fact. Therefore, the ALJ has the sole discretion to determine the quality, character, and substance of evidence. Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). The ALJ, as fact-finder, may choose whom and what to believe and, in doing so, 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 party's total proof. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15, 16 (Ky. 1977); Pruitt v. Bugg Brothers, 547 S.W.2d 123 (Ky. 1977).

It clear from both the July 11, 2014, Opinion on Remand and the August 22, 2014, Order on Petition for Reconsideration that the ALJ relied on both Dr. Owen's opinions and Mullins' testimony in finding he is permanently totally disabled.

In the June 16, 2013, Form 107, Dr. Owen prepared, he diagnosed the following:

> 1. Chronic low back pain with a two-level involvement per MRI with no evidence of radiculopathy on clinical exam.
>
> 2. Status post abdominal wall hernia that appears to be doing well with minimal pain postop.
>
> 3. History of neck and upper back pain with no significant range of motion or muscle spasm problems. Negative Phalen and Tinel and no evidence for carpal tunnel at the present time.

Concerning causation, Dr. Owen opined that within reasonable medical probability, plaintiff's injury is the cause of his complaints stating as follows:

> Within reasonable medical probability, the patient's injury was the cause of his complaint. This would, in my opinion, be a cumulative trauma problem for his low back. His abdomen problem is obviously associated, at least in his mind, to his activities of changing the air filters and the location and degree of strength and stretching necessary having caused the midline hernia. It should be noted I do not have the op report on that hernia.

Dr. Owen assigned a whole person impairment rating of 11% for Mullins' lumbar spine condition pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA

Guides"). He assigned a 0% whole person impairment for Mullins' abdominal wall hernia and a 0% whole person impairment for his cervical spine. Dr. Owen opined Mullins had an active impairment prior to his injury at Pine Branch. He imposed the following restrictions: "avoidance of activity that requires recurrent bending, squatting, or stooping and avoidance of lifting greater than approximately 30 pounds." He further opined that Mullins is able to return to the work he performed at the time of the injury "if the restrictions can be fully implemented."

In a June 9, 2013, supplemental report Dr. Owen stated Mullins had 2% pre-existing active whole person impairment.

Mullins testified at a July 15, 2013, deposition that when he first started working for Pine Branch in the 1980s, his position was a laborer which required him to "cut mining timbers and hauled them in, two hundred a day." After switching to heavy equipment operator, in addition to his loading duties, he also performed maintenance work for a few hours in the evenings for extra money. He testified as follows:

> A: I've done- yeah, I'd load coal ten or eleven hours a day, and then I'd do maintenance one or two hours of [sic] the day.

Q: Okay.

A: Of [sic] the evening, do air filters and stuff.

Q: What does that mean, do air filters?

A: Dry air filters. You've got them [sic] big trucks and you've got an air filter about this big around.

Q: And she's not going to be able to- or the judge or whoever, when we go back and read this is not going to be- how big? Can you just give in like feet how big?

A: Three feet long, two and a half foot wide, probably forty to fifty pounds.

Q: And what would you do with these air filters?

A: I'd climb the ladder and put them in the truck.

Q: Okay, so you'd put them actually in the-

A: In the equipment.

Q: You did the every, is that-

A: I'd do it five evenings a week.

Q: Okay.

A: I'd try to get out of there on Saturday and rest a little.

Q: Okay. And you were doing that up at the time you quit or however-

A: No, a couple months before because I told the boss he was just going to have to get somebody else to do it because that hernia was killing me.

Q: Okay.

> A: And my back, and I just couldn't climb them [sic] ladders and hold that filter up with one hand. I just couldn't do it no more.
>
> Q: Okay. And how long do you think did that job as maintenance?
>
> A: Ten years.

Mullins explained that during the last five years of his employment with Pine Branch, he operated a front loader:

> A: In the last five years I run [sic] a front-end loader and done [sic] maintenance of [sic] the evening.
>
> Q: Okay. Now this front-end loader, do you know when you started working on that? And just for my benefit, I'm not that familiar with a front-end loader, what is a front-end loader?
>
> A: Okay. A front-end loaders loads the trucks.
>
> Q: Okay.
>
> A: And you bust your coal up and clean your coal and get rock off of it where the rock loaders leave rock. You go in and dig it from solid and you back it out and you put it in the truck. And you go get you [sic] another bucket, and you move about a million buckets a day, I guess.
>
> Q: So is this, were you on a strip mine or surface mine?
>
> A: Yeah.
>
> Q: Did you ever work in an underground mine?

> A: No.
>
> Q: Now I know a little bit about it, but were you the one who was digging out the coal or are you digging out the-
>
> A: I dig out the coal.
>
> Q: Okay. So these huge machines come in and like get the surface off and you're coming-
>
> A: Yeah.
>
> Q: How big a front-end loader? Is it like a Mack truck, bigger than that?
>
> A: Oh, yeah. God, yeah, it's bigger than a Mack truck. You're looking down on a Mack truck.

Mullins would climb a ladder getting into the front loader, and run the front loader for eleven hours a day. He testified regarding the physical requirements of operating the front loader as follows:

> Q: Now when you were actually operating the loader, what would you do? Were you doing overhead work like pulling on things?
>
> A: You was [sic] pulling on the hydraulic levers.
>
> Q: Okay.
>
> A: And working the steering.
>
> Q: Anything else? How do you steer?
>
> A: The last one I run the last five years was a wobble stick. But before that you was doing this all the time,

> you know, and working your hydraulics too.
>
> Q: Okay. Other than operating the loader what would you, what sort of tasks would you do other than the greasing?
>
> A: Fuel it and grease it, blow my air filters and check it for cracks, leaks.
>
> Q: Was there any lifting involved?
>
> A: Just when I was doing maintenance.
>
> Q: Okay.
>
> A: Yeah, you'd have to lift your air filters back up in it. You take the air filters out, blow them out with an air hose and then lift them back up and put them back in it.
>
> Q: When you weren't a maintenance man, just strictly as the loader, what would you do when you're not in the loader, what job requirements?
>
> A: Grease it, fuel it, check it for leaks, blow air filters, and that's it.
>
> Q: Okay.
>
> A: And report anything that's wrong with it or anything like that.

Mullins testified that he quit on November 30, 2012, because he was to undergo hernia surgery in December 2012. He testified he is not currently working because of his back condition.

Mullins also testified at the hearing and provided the problems he is having with his neck and back as follows:

> Q: All right. Now, you said you was [sic] still having problems with your neck and your back. Let's individually talk about the back and the neck. First of all, what sort of problems are you experiencing in your neck, Stephen?
>
> A: Well, it gets still and I can't move it, and my shoulder, it's like something's under my shoulder blade. And my neck hurts right here.
>
> Q: Right there. You're pointing...
>
> A: Right in there.
>
> Q: ...right on...
>
> A: Yeah.
>
> Q: ...the back part...
>
> A: Right in here.
>
> Q: ...between the neck and the shoulder. Is that correct?
>
> A: Yeah. And it's like something's right in under my shoulder blade. This one was hurting this morning, my left one, and sometimes it goes to my right and I can't move just so far back this a way.
>
> Q: So you can't go back with the hand and arm, at times, to like reach behind you or do something back there?
>
> A: No, at times I can't.
>
> Q: Okay.
>
> A: At times I can.

...

Q: Can you reach up over your head and do things still?

A: Yeah.

Q: What about turn your head when you're driving looking back and things of that nature, when it's stiff? Does that bother you?

A: Yeah. If I try to turn around, but I always learned to use my mirrors.

Q: Okay.

A: I always use my mirrors.

Q: All right. Now, the pain that is there, is it sharp or dull when it's there?

A: Both.

Q: What seems to make it different? Do you notice anything you do around the house or....

A: Well, I can try to do stuff and seems like if I try to do any kind of manual labor, seems like it hurts more.

Q: Now, tell me some of the things you've tried to do that made it hurt and stuff.

A: well, I've got to go out and rake my ditch line out to keep the water off the house, you know how anybody will do when...

Q: Right.

A: ...it gets Spring, you know, they go out...

Q: Right.

A: ...and ditch the water a little bit. If I'm real slow at it and easy, I can do fine, but if I get any bit aggressive with it...

Q: Then the neck starts to hurt?

A: Yeah, then it hurts.

Q: Do you have...

A: My shoulder mostly.

Q: Okay. And that's the left shoulder you're pointing to?

A: Yeah, and sometimes it goes to my right, but my right, it hurts me different than my left.

Q: Right.

A: I can't explain it hardly. On my left, it's like something's right in under my shoulder blade.

Q: All right. Now, let's talk about your neck specifically. Do you have any headaches originating from the neck, or have you not had those?

A: I've had headaches, but I don't know if they originate from the neck or not.

Q: Okay. Fair answer. All right. Let's talk about the back. Are you having problems still in the lower back?

A: Yeah.

Q: Where is the problem located?

A: From right here down.

Q: Now, you're pointing to about four or five inches above the belt line, correct?

A: Ten.

> Q: About ten inches above the belt line?
>
> A: About ten inches.
>
> Q: And then you go down to the- you're pointing down to the bottom of the spine, is that...
>
> A: Yeah.
>
> Q: ...correct?
>
> A: Yeah.
>
> Q: And, is the pain localized in the mid back? Is that what you're saying?
>
> A: Yeah.
>
> Q: Does it go down either one of your legs?
>
> A: Left leg gives me a lot of trouble.

Mullins testified that he takes three different medications for his neck and back condition. He does not know if there are jobs he can perform.

Significantly, Pine Branch does not raise as error the sufficiency of the ALJ's analysis in determining Mullins is permanently totally disabled. Pine Branch's argument on appeal is that the evidence does not support a finding of permanent total disability. We disagree.

Both the July 11, 2014, Opinion on Remand and the August 22, 2014, Order on Petition for Reconsideration indicate the ALJ relied upon Dr. Owen's restrictions and

Mullins' testimony regarding his pre-injury work duties. The ALJ relied upon Mullins' testimony regarding his low back pain and how it prevents him from returning as an equipment operator. The ALJ also considered Mullins' education and the fact his entire work history has been in the mining industry. The above-cited testimony of Mullins and Dr. Owen's opinion comprise substantial evidence in support of the ALJ's determination Mullins is permanently totally disabled. In making a determination as to whether a claimant is permanently totally disabled, an ALJ is vested with broad discretion. *See* Seventh Street Road Tobacco Warehouse v. Stillwell, 550 S.W.2d 469 (Ky. 1976). Mullins' testimony regarding his post-injury ability to work and his level of pain is substantial evidence, as an injured worker's credible testimony is probative of his ability to labor post-injury. *See* Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979); *See also* Carte v. Loretto Motherhouse Infirmary, 19 S.W.3d 122 (Ky. App. 2000). Additionally, the ALJ may properly draw reasonable inferences from Dr. Owen's report that Mullins will be unable to successfully find employment which meets the restrictions he imposed. *See* 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). The ALJ's determination Mullins is permanently totally disabled shall remain undisturbed.

Accordingly, the ALJ's finding Mullins is permanently totally disabled as set forth in the July 11, 2014, Opinion on Remand and the August 22, 2014, Order on Petition for Reconsideration is **AFFIRMED**.

ALL CONCUR.

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