

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: May 8, 2015

CLAIM NO. 201260802

STAR*TEL SYSTEMS, INC.

PETITIONER

VS.

APPEAL FROM HON. J. GREGORY ALLEN,
ADMINISTRATIVE LAW JUDGE

NEAL T. PUCKETT
HON. J. GREGORY ALLEN,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

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

RECHTER, Member. Star*Tel Systems ("Star*Tel") appeals from the October 2, 2014 Opinion, Order and Award and the November 3, 2014 Order on Defendant's Petition for Reconsideration rendered by Hon. J. Gregory Allen, Administrative Law Judge ("ALJ"). The ALJ determined Neal Puckett is permanently totally disabled following a work-

related motor vehicle accident. Star*Tel appeals this determination, arguing the ALJ applied an incorrect legal standard. For the reasons set forth herein, we affirm.

Puckett began his employment with Star*Tel in 1989 as a service manager. On December 4, 2012, he was involved in a motor vehicle accident while on a service call. He was knocked unconscious and taken to the emergency room by ambulance. He was diagnosed with acute chronic low back pain and neck pain. On December 11, 2012, Puckett visited the Family Care Center. He complained of back pain, neck pain, and severe bilateral shoulder pain. Puckett indicated the accident caused the neck and shoulder pain, and aggravated his chronic low back pain.

Eventually, Puckett treated with Dr. Jeffrey Been, who diagnosed left shoulder impingement, AC arthrosis and rotator cuff tear. On March 28, 2013, Dr. Been performed a left shoulder arthroscopic subacromial decompression, distal clavicle resection, and mini-open rotator cuff repair. At his last recorded visit with Dr. Been, he restricted Puckett from lifting more than 10 pounds with his left arm.

Just before the surgery, on March 11, 2013, Puckett also began complaining to Dr. Been of pain in his right forearm and elbow, particularly when gripping. He

was referred to Dr. David Tate, who diagnosed a tear of the lateral collateral ligament of the elbow with hematoma. Dr. Tate recommended surgery for the elbow ligament tear. In a June 7, 2013 office note, he reported Puckett had cubital tunnel syndrome, and restricted him from lifting more than two pounds with his right arm. He also recommended Puckett avoid ladders and the use of power tools. Dr. Tate opined Puckett's elbow condition is related to the motor vehicle accident.

Puckett also treated with Dr. Mitchell Campbell for low back pain from January 31, 2013 through March 7, 2013. Dr. Campbell noted Puckett had undergone a laminectomy thirty years prior, with increasing back pain, right leg pain and numbness radiating into his leg. Dr. Campbell recommended pain management, which was not approved by workers' compensation.

Dr. Robert Jacob evaluated Puckett on November 5, 2013 and recorded complaints of left shoulder pain, bilateral arm and hand pain, right elbow pain, low back pain, and bilateral leg pain. Dr. Jacob noted Puckett complained of low back, shoulder and neck pain in his medical visits immediately following the motor vehicle accident. He likewise noted Puckett's complaints of back pain prior to the accident, and the fact he first

complained of elbow pain several months later. For these reasons, Dr. Jacob concluded the low back and elbow injuries were not related to the accident and assigned no impairment. He assigned a 3% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides") for the left rotator cuff injury, and placed Puckett at maximum medical improvement.

Dr. Jules Barefoot examined Puckett and prepared a report dated October 17, 2013. Dr. Barefoot diagnosed Puckett with status post left rotator cuff repair, ligament tear in the right elbow, right ulnar neuropathy, and evidence of right L5 radiculopathy. He assessed a 13% whole person impairment pursuant to the AMA Guides for the left shoulder injury, 8% for the right elbow injury, and 30% for the lumbar spine injury. Dr. Barefoot noted Puckett's history of low back pain pre-dating the accident, and attributed 10% of the impairment rating for the lumbar spine to a pre-existing condition. Dr. Barefoot opined Puckett would have difficulty performing any overhead work with his left arm, repetitive grasping, or lifting and carrying with either hand. He also believed Puckett would have difficulty standing and walking for extended periods

of time. Dr. Barefoot recommended he avoid working on ladders and uneven ground.

William Ellis conducted a vocational evaluation on June 16, 2014 and noted Puckett's continued complaints of pain. He opined Puckett's concentration would be affected by this pain and by medication taken for relief. He concluded Puckett is 100% occupationally disabled due to decreased stamina and reliability.

Dr. Luca Conte conducted a vocational evaluation on June 17, 2014. Dr. Conte noted Puckett's history of low back pain and prior right shoulder injuries. He likewise noted Puckett was working under lifting restrictions similar to those recommended by Dr. Been. Therefore, Dr. Conte concluded he would continue to be able to perform his previous work. He also noted Puckett's transferable skills, gained through his experience performing supervisory and clerical tasks at Star*Tel. Thus, he opined Puckett would be able to perform work in the light and sedentary categories.

Puckett testified by deposition and at the final hearing. He acknowledged he suffered low back pain prior to the motor vehicle accident, and had previously taken narcotic pain medication for the condition. He also had undergone back surgeries in 1984 and 1985, and had a

permanent 10 pound lifting restriction as a result. Following a right shoulder surgery in 2010, he was permanently restricted from repetitive motion and lifting more than 10 pounds overhead. Puckett explained he suffers considerable pain in his low back, left shoulder, and neck. His right elbow and arm are weak. He did not believe he could return to his work at Star*Tel because it involved work on ladders and overhead work. In addition to general pain, he has difficulty gripping and grasping.

Puckett filed a Form 101 alleging injuries to his left shoulder, left arm and wrist/hand, right elbow and low back. The parties stipulated Puckett's left shoulder injury, and the ALJ determined he retains a 3% whole person impairment for that injury. The ALJ further determined Puckett sustained a work-related right elbow injury, resulting in an 8% whole person impairment. Finally, the ALJ concluded Puckett sustained a temporary exacerbation of his pre-existing low back condition, resulting in no permanent impairment.

Considering the issue of permanent total disability, the ALJ first correctly cited the applicable law. He then explained:

Puckett argues [he] is totally disabled pointing to the findings of Dr. Barefoot while defendant argues

[Puckett is] only 3% disabled and is certainly not totally disabled pointing to a plethora of other jobs and abilities the [Puckett] retains at the sedentary duty level.

...

Here, [Puckett's] date of birth is January 12, 1957, making him 55 years old on the date of injury. The parties stipulated he had a 12th grade education but also holds numerous certificates in the telecommunications field.

As for restrictions, the defendant refers to a 10 lb. lifting restriction placed on [Puckett] after his low back surgical procedure in the 80s. However, the ALJ was unable to locate any filing of the exact restrictions from that injury in the record. Moreover, that restriction was arguab[ly] for [Puckett's] low back condition and did not affect his left shoulder or right elbow. Clearly [Puckett] now has a 10 lb. lifting restriction on his left shoulder and two pound lifting restriction on the right upper extremity in addition to any lifting restriction for his lumbar spine.

The ALJ has also considered the vocational evaluations of Luca Conte and William Ellis. While defendant argues the Conte evaluation would permit [Puckett] to return to light to sedentary duties, Mr. Ellis finds [Puckett] to be unable to return to any type of work on a regular basis. The ALJ does not rely exclusively on either report [but] does take the contents and opinions under consideration.

After reviewing the entirety of the medical and lay evidence, the ALJ finds [Puckett] has carried his burden of demonstrating permanent total

disability. In reaching this determination, the ALJ notes the Kentucky legislature, in KRS 342.730(1)(c)3, professed a recognition of public policy by declaring that advancing age and limited education has an impact on employee's post-injury earning capacity. In certain situations, calculations are modified by additional factors when a claimant reaches 50 years of age or has less than 12 years of education at the time of the accident. While these criteria are used when considering permanent, partial disability, the ALJ believes consideration of the criteria as policy is equally applicable when analyzing a claim for permanent total disability. Here, [Puckett] was 55 years old on the date of injury and had a 12th grade education by virtue of a GED. While he has numerous certificates in the telecommunications field, those are offset to substantial degree by the severe restrictions of Dr. Been to the left shoulder and Dr. Tate for the right elbow. If [Puckett] was laboring under a 10 lb. lifting restriction for his lumbar spine before the accident herein, it is clear that additional restrictions of use of his upper extremities are devastating to his ability to perform work in a regular and sustained basis. Therefore, the ALJ finds [Puckett] is permanently totally disabled.

Star*Tel petitioned the ALJ for reconsideration, arguing the finding Puckett is permanently totally disabled is unsupported by the evidence. It asserted the ALJ had not considered Puckett's transferable skills in reaching his ultimate conclusion. It did not request additional

factual findings by the ALJ. The ALJ denied the petition as a request to reach a different conclusion.

Star*Tel now appeals. It first argues the finding of permanent total disability is not supported by the appropriate legal analysis. It claims the ALJ erroneously focused on Puckett's age and education, without considering his vocational status and his prior experience in sedentary positions. Star*Tel next asserts the ALJ did not state sufficient findings of fact to properly apprise the parties of the basis of his decision.

We conclude the ALJ conducted the appropriate analysis in determining Puckett is permanently totally disabled. KRS 342.0011(11)(c) defines permanent total disability as a "complete and permanent inability to perform any type of work as a result of an injury." The Kentucky Supreme Court, in Ira A. Watson Dep't Store v. Hamilton, 34. S.W.3d 48, 51 (Ky. 2000), explained the ALJ must conduct an individualized determination of what a worker is and is not capable of doing after a work injury. "[T]his necessarily includes a consideration of factors *such as* the worker's post-injury physical, emotional, intellectual, and vocational status and how those factors interact." Id. (emphasis added). Because the Court used the term "such as", we do not read this factors as a list

of required considerations. Rather, the emphasis is that the ALJ must conduct an individualized determination of permanent disability, and the Court has offered factors which might be taken into consideration by the ALJ.

In Puckett's case, the ALJ offered an extremely thorough recitation of the evidence, and detailed analysis of Puckett's condition. In considering whether Puckett is permanently disabled, the ALJ was persuaded by his current pain complaints, his age, and his relatively limited education. He acknowledged Dr. Conte's opinion Puckett could transfer skills to a sedentary job, but explained why he was persuaded by Dr. Ellis' opinion he could not work reliably due to pain. Thus, we conclude the ALJ properly conducted an individualized determination of Puckett's ability to perform work in a competitive economy, in accordance with Ira A. Watson. We disagree with Star*Tel that the ALJ improperly focused solely on Puckett's age and education. Rather, the ALJ was simply most persuaded by these factors, and therefore placed emphasis on them in his analysis.

Star*Tel has emphasized evidence in the record which would support a different conclusion than reached by the ALJ. This is insufficient to warrant reversal of an award. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky.

1974). There is proof of substantial probative value to support the decision, and therefore we will not disturb the award. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986). Because Star*Tel did not specifically request additional findings of fact in its petition for reconsideration, it may not now complain the ALJ's analysis is insufficient. Nonetheless, for the reasons already discussed herein, we conclude the ALJ has adequately articulated his reasoning and provided an analysis sufficient to apprise the parties of the basis of his reasoning. Cornett v. Corbin Materials, Inc., 807 S.W.2d 56 (Ky. 1991).

Accordingly, for the reasons set forth herein, the October 2, 2014 Opinion, Order and Award and the November 3, 2014 Order on Defendant's Petition for Reconsideration of Hon. J. Gregory Allen, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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