

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: November 8, 2019

CLAIM NO. 200880623

BILLY SEXTON

PETITIONER

VS. APPEAL FROM HON. STEPHANIE L. KINNEY,
ADMINISTRATIVE LAW JUDGE

WELDON DEWEESE TREE SERVICE;
AND HON. STEPHANIE L. KINNEY,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

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

RECHTER, Member. Billy Sexton appeals from the April 8, 2019 Opinion, Award and Order and the May 1, 2019 Order rendered by Hon. Stephanie L. Kinney, Administrative Law Judge (“ALJ”). The ALJ increased Sexton’s permanent partial disability benefits on reopening. On appeal, Sexton argues the ALJ erred in finding he is not permanently totally disabled. We affirm.

Sexton injured his back, neck and shoulder when he fell from a bucket truck on July 28, 2008. He settled his claim by agreement, approved September 24, 2009, based upon a 25% impairment rating for his cervical injury assessed pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition (“AMA Guides”), with application of the 3.2 multiplier, and medicals remaining open. Sexton filed a motion to reopen on October 21, 2011, alleging increased impairment/worsening of condition and change in occupational disability rendering him permanently totally disabled. Sexton’s reopening was placed in abeyance while he underwent an additional cervical surgery and three lumbar surgeries.

Sexton, born in 1962, has a ninth grade education with no vocational training. He is able to read, but does not comprehend what he is reading. He has only performed tree trimming and removal work as an adult. His work involved operating an aerial lift or a bucket truck while cutting down trees, roping, and preening. He had to lean out of the bucket to cut limbs with a chain saw and to throw ropes. Sexton climbed trees using spikes, picked up debris, and drove the bucket truck to the job sites.

Following his work accident, Sexton attempted to return to work as a box truck driver for one week, but quit because he could not tolerate lifting required by the job. Sexton stated his lumbar spine pain worsened following the settlement, necessitating three lumbar surgeries performed by Dr. David Rouben. Sexton was discharged from pain management in January 2018 due to a positive drug screen for methamphetamine. Sexton denied taking methamphetamine and believed Sudafed

or Vicks may have caused the positive result. He stated he did not like being on narcotic pain medication, and he acknowledged that he did not have narcotics in drug screens on several occasions, despite being prescribed them. He testified he only uses over the counter medication such as Tylenol or Advil.

Sexton stated he has pain on the right side of his neck, cannot turn his head to the right, and cannot look up very far without pain shooting down his right arm. He has numbness and tingling in his hands and in his right arm. He has headaches every day. He has stiffness and soreness in his back. His feet are numb, and he sometimes gets cramps and has to stand up for relief. He has pain in his right leg feet. He can stand or walk 20 minutes before he needs to take a break and can sit for a half hour then gets stiff.

Dr. Rouben performed a cervical fusion at C5-6 on December 8, 2008. He performed revision surgery for a failed fusion on September 25, 2012. Dr. Rouben placed Sexton at maximum medical improvement (“MMI”) on August 3, 2017 following lumbar fusion and noted Sexton “remains disabled.”

Dr. Gregory Nazar performed an independent medical evaluation (“IME”) on March 27, 2012. Dr. Nazar noted Sexton’s cervical pain progressively worsened since the 2008 surgery. He diagnosed chronic neck pain with non-specific left arm numbness and pain, possibly radicular. Dr. Nazar restricted Sexton from lifting greater than fifteen pounds and from neck extension and/or repetitive movements. He warned Sexton should not perform pushing or pulling activities above or at the shoulder level. Dr. Nazar assigned a 25% impairment rating for the cervical condition pursuant to the AMA Guides. In a July 26, 2012 addendum

letter, Dr. Nazar indicated Sexton has a non-union at C5-6 and recommended a posterior fusion at C5-6.

Dr. John J. Guarnaschelli performed an IME on August 12, 2013. He diagnosed status post three previous cervical operations, narcotic addiction superimposed on multilevel cervical spondylosis and degenerative changes, continuation of pain, and continuation of smoking. He agreed with the 25% whole-person impairment rating assessed by Dr. Rouben after the second surgery, and believed the third surgery, continued pain, and addiction to narcotics warranted an additional 5% to 8% whole-person impairment. Dr. Guarnaschelli opined Sexton could not return to work due to his dependence on Schedule II narcotics, and recommended weaning.

Dr. Brian Pienkos performed an IME on October 7, 2016. He diagnosed chronic low back pain, status post lumbar fusion from L4 to the ilium with persistent low back pain, and right lower extremity neurologic symptoms, primarily of numbness. Dr. Pienkos noted the cervical fusion had failed. He felt Sexton was not at MMI from the latest low back surgery. Thus, he declined to assess impairment or assign permanent restrictions. Dr. Pienkos stated continued tobacco use likely caused the failure of the cervical fusion.

Dr. Rafid Kakel performed an IME on July 20, 2017. He diagnosed status post multiple cervical surgeries and status post multiple lumbar surgeries. He noted the most recent CT scan showed probable loosening of the C5 vertebral body screws. Sexton is also status post lumbar spine fusion at L4-5 and L5-S1. The most recent CT scan showed loosening of the S1 pedicle screw. Dr. Kakel opined Sexton

is at MMI from the most recent fusion surgery at L5-S1. He indicated the cervical impairment rating of 25% is unchanged, and assigned a 17% impairment rating for the lumbar spine, resulting in a combined impairment rating of 38%. Thus, he felt Sexton had an increase of 13% in his impairment rating from the time of the settlement agreement. Dr. Kakel restricted Sexton to sedentary work with lifting, carrying, pushing, and pulling limited to ten pounds or less on an occasional basis. Sexton should stand or walk and climb stairs on an occasional basis and avoid ladder climbing. Dr. Kakel felt Sexton needs no additional formal medical treatment, and could return to sedentary work.

Robert G. Piper performed a vocational evaluation on November 22, 2013 and prepared a supplementary report on January 20, 2014. He initially found Sexton unemployable. In a supplemental report dated January 20, 2014, Piper concluded Sexton was employable in a range of light duty jobs, based on restrictions recommended by Dr. Rouben and Dr. Nazar. Testing revealed Sexton's ability as twelfth grade in word reading, ninth grade in sentence comprehension, eighth grade in spelling and third grade in math computation. Piper identified information clerk, automobile rental clerk, hotel clerk, survey worker, and general clerk as positions Sexton is capable of performing.

After noting the parties agreed Sexton now has a 38% impairment rating and does not retain the physical capacity to perform his pre-injury job, the ALJ made the following findings relevant to this appeal:

The ALJ is required to undertake a 5-step analysis in order determine whether a claimant is permanently and totally disabled. The ALJ must determine whether there has been a work-related injury, what Plaintiff's

impairment rating is, and address permanent disability. Finally, the ALJ must determine whether Plaintiff can perform any type of work and that total disability is due to the work injury. Ashland v. Stumbo, 461 SW 3d 392 (Ky. 2015).

After considering Plaintiff's age, educational level, vocational skills, medical restrictions, and the likelihood Plaintiff can resume some type of work under normal employment conditions, this ALJ finds Plaintiff is not permanently and totally disabled. This ALJ notes Plaintiff's cervical impairment has not changed since he settled his claim in 2009. Plaintiff's impairment rating increased by virtue of undergoing lumbar surgery. Plaintiff's current lumbar and cervical condition does not require ongoing medication or narcotics. From a treatment standpoint, it appears Plaintiff's condition improved when compared to his condition at the time of settlement in 2009. In 2009, Plaintiff continued to pursue pain management and was prescribed potent narcotics including Fentanyl. However, Plaintiff now manages his symptoms with over-the-counter medications. As such, this ALJ is not persuaded Plaintiff is permanently and totally disabled.

Sexton filed a petition for reconsideration requesting additional analysis regarding the extent of his disability. The ALJ provided the following additional analysis in her order on reconsideration:

This ALJ considered Plaintiff's age, educational level, vocational skills, medical restrictions, and the likelihood Plaintiff can resume some type of work under normal employment conditions. This ALJ notes Plaintiff is 56 years old and has a 9th grade education.

Plaintiff argued his age and education supports his claim for permanent total disability benefits. However, this ALJ does not agree. Plaintiff presented as a pleasant common-sense minded gentleman. Plaintiff has extensive employment experience in the tree removal/clean up industry. However, Plaintiff was able to obtain employment with a renovation company as a van/ truck driver. Plaintiff was able to perform many

aspects of this job but was unable to lift heavy lawn mowers and air compressors. Thus, based upon Plaintiff's age, educational background, employment history and vocational skills, this ALJ concludes Plaintiff has the capacity to perform less strenuous work and is not permanently and totally disabled.

Plaintiff has set forth many claimed limitations as a result of his neck and back injury. Consequently, many physicians have proffered opinions addressing Plaintiff's restrictions. This ALJ finds Dr. Kakel's recommended work restrictions are most probative. This ALJ notes Plaintiff's current neck and low back condition does not require ongoing pain management or narcotics. With that in mind, this ALJ feels Plaintiff is capable of performing sedentary work with limited lifting. As such, this ALJ is not convinced Plaintiff is permanently and totally disabled as a result of his work injury.

On appeal, Sexton argues the ALJ erred in concluding he is not permanently totally disabled. He notes Dr. Rouben placed him at MMI and stated he "remains disabled." Similarly, Dr. Guarnaschelli did not feel Sexton would be safe or capable of returning to any form of full-time employment driving or exposure to any mechanical equipment. Dr. Kakel limited Sexton to sedentary work. Sexton argues the medical evidence established that he is restricted to sedentary work, lifting ten pounds or less occasionally and standing and walking only occasionally. Further, he has a ninth grade education and limited experience outside of tree removal work. Considering the totality of his intellectual, vocational and physical limitations, Sexton contends he is permanently totally disabled.

As the claimant, Sexton bore the burden of proving each of the essential elements of his cause of action. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because he was unsuccessful in that burden, the question on appeal is whether the evidence compels a different result. 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) *superseded by statute on other grounds as stated in* Haddock v. Hopkinsville Coating Corp., 62 S.W.3d 387 (Ky. 2001).

Permanent total disability is 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 the injury. KRS 342.0011(11)(c). In determining whether a worker is totally disabled, the ALJ must consider several factors including the workers’ age, educational level, vocational skills, medical restrictions, and the likelihood he can resume some type of work under normal employment conditions. Ira A. Watson Dept. Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). In determining the level of occupational disability, no single factor is controlling. Further, it can rarely be said the evidence compels a finding of a greater or lesser degree of occupational disability. Millers Lane Concrete Co., Inc. v. Dennis, 599 S.W.2d 464, 465 (Ky. App. 1980). The ALJ enjoys wide ranging discretion in granting or denying an award of permanent total disability benefits. Seventh Street Road Tobacco Warehouse v. Stillwell, 550 S.W.2d 469 (Ky. 1976); Colwell v. Dresser Instrument Div., 217 S.W.3d 213 (Ky. 2006).

Sexton’s arguments are essentially a request for this Board to re-weigh the evidence and direct a finding in his favor, which we are not permitted to do. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). The ALJ identified the appropriate factors, weighed the evidence, and reached a determination supported by

substantial evidence. She specifically articulated how she considered Sexton's age, education level, and work history in conducting her analysis.

The ALJ was most persuaded by Dr. Kakel's restrictions, which would permit work on a sedentary level with limited lifting. She further noted that, from a treatment standpoint, Sexton's condition had improved when compared to the time of the settlement. The ALJ found it significant that Sexton had previously needed pain management treatment but presently does not require narcotics and manages his symptoms with over-the-counter medications. While Dr. Guarnaschelli had stated Sexton was not capable of employment, he based his opinion on Sexton's dependence on narcotics. At the time of the hearing, Sexton had not used narcotic medication for approximately one year. The evidence falls far short of compelling a finding that Sexton is permanently totally disabled.

While Sexton has identified evidence supporting a different conclusion, there was substantial evidence presented to the contrary. As such, the ALJ acted within her discretion to determine which evidence to rely upon, and we cannot say the ALJ's conclusions are so unreasonable as to compel a different result. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

Accordingly, the April 8, 2019 Opinion, Award and Order and the May 1, 2019 Order rendered by Hon. Stephanie L. Kinney, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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