

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: February 19, 2021

CLAIM NO. 201991161, 201900827, 201900853

BLACKJEWEL, LLC

PETITIONER

VS.

APPEAL FROM HON. GRANT S. ROARK  
ADMINISTRATIVE LAW JUDGE

WILLARD HICKEY AND  
HON GRANT S. ROARK,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION  
AFFIRMING

\* \* \* \* \*

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

**BORDERS, Member.** Blackjewel, LLC (“Blackjewel”) appeals from the October 5, 2020 Opinion on Remand and the November 9, 2020 Order on Petition for Reconsider rendered by Hon. Grant Roark, Administrative Law Judge (“ALJ”). On appeal, Blackjewel argues the ALJ erred in finding Willard Hickey (“Hickey”) permanently totally disabled and in failing to apportion any of the disability to pre-existing active impairment/disability. We disagree and affirm.

In a February 17, 2020 Opinion, Award, and Order, the ALJ determined Hickey suffered occupational hearing loss, Category 1 Coal Workers' Pneumoconiosis ("CWP"), and a cervical spine injury resulting from his employment as an underground shift foreman for Blackjewel. The ALJ determined Hickey was permanently and totally disabled solely as a result of his cervical spine injury and awarded medical benefits for the CWP and hearing loss claims.

Blackjewel filed a Petition for Reconsideration on March 2, 2020 requesting the ALJ make additional findings concerning pre-existing active impairment and permanent total disability. In his Order on Petition for Reconsideration, the ALJ determined Hickey retained a 5% impairment rating for his cervical spine but otherwise overruled the remainder of the Petition.

Blackjewel appealed to this Board. We rendered an Opinion on July 2, 2020, Vacating and Remanding this claim to the ALJ. This Board determined the ALJ performed the appropriate analysis pursuant to City of Ashland v. Stumbo, 461 S.W.3d 392 (Ky. 2015), with the exception of determining the functional impairment resulting solely from the effects of the May 17, 2018 injury. In the Opinion, Award, and Order, the ALJ failed to address the functional impairment to the cervical spine solely resulting from the May 17, 2018 accident. The ALJ attempted to correct the omission in the Order on Petition for Reconsideration. In that Order, the ALJ correctly determined Dr. Christopher Stephens assigned a 3% impairment rating as a result of the work incident, but incorrectly determined Dr. David Muffly assigned a 5% impairment rating as a result of the work incident. A review of Dr. Muffly's report clearly indicates he opined Hickey retained a 10% impairment rating as a

result of the work incident, and that the 5% impairment rating he assessed was for the pre-existing condition in Hickey's cervical spine prior to the occurrence of the May 17, 2018 accident.

This Board determined the ALJ's analysis was not supported by substantial evidence as the impairment rating relied upon was not solely attributable to the May 17, 2018 work injury. Since the ALJ erred in relying upon the 5% impairment rating assessed by Dr. Muffly in performing the analysis of whether Hickey was permanently and totally disabled, the February 17, 2020 Opinion, Award, and Order and the Order dated March 19, 2020 were vacated. This claim was remanded for the ALJ to perform the proper analysis mandated by City of Ashland v. Stumbo, *supra*, and Ira Watson Dept. Stores v. Hamilton, 34 S.W.3d 48, 51 (Ky. 2000). We did not express an opinion as to the outcome on remand, nor did we address the remaining arguments on appeal as they were not ripe for review.

In response to the Board's Opinion, the ALJ rendered the following October 5, 2020 Opinion on Remand, *verbatim*:

This matter comes before the Administrative Law Judge upon remand from the Kentucky Workers Compensation Board. In its July 2, 2020 decision, the Board vacated and remanded this matter with instructions for the ALJ to identify which cervical impairment rating of record, if any, supports the determination of permanent, total disability. The Board explained that in the ALJ's order on reconsideration, rendered on March 19, 2020, the ALJ indicated the award was based on Dr. Muffly's 5% cervical impairment rating but, in fact, the 5% impairment rating Dr. Muffly assigned was for plaintiff's preexisting condition and not solely for the effects of the May 17, 2018 work injury.

In accordance with the instructions on remand, the ALJ further finds that in the March 19, 2020 order on reconsideration, the ALJ simply erroneously indicated that Dr. Muffly had assigned a 5% cervical impairment rating for the work injury rather than the 10% he assigned. The ALJ intended to explain that plaintiff's award of permanent, total disability benefits was based in part on the 10% cervical impairment rating assigned by Dr. Muffly, and it is so determined at this time. All other findings and conclusions set forth in the February 17, 2020 Opinion, Order & Award and the March 19, 2020 order on reconsideration remain unchanged.

Blackjewel filed a Petition for Reconsideration of the October 5, 2020 Opinion on Remand requesting additional findings of fact regarding the issue of pre-existing active impairment and the ALJ's determination Hickey is permanently totally disabled. The ALJ denied the petition.

Hickey testified by deposition and at the final hearing. He is 63 years old and resides in Harlan, Kentucky. He is a high school graduate and has his mine foreman's papers. He last worked for Blackjewel on January 3, 2019, when he was taken off work by Dr. Shawn Fugate, his primary care physician ("PCP"), because of neck pain. Hickey began working at Blackjewel in October 2017 as a shift foreman and was required to go underground, make beltlines, travel with federal and state inspectors, and oversee the safety of the miners. He was exposed to coal dust and loud noises in the mine. He wore a disposable mask and occasionally hearing protection. He worked in the mining industry from 1975 to 2019, all underground, for a total of 42 years. Hickey admitted to having some arthritis in his neck and was taking Naproxen prior to May 17, 2018. On that day, he was walking on a beltline underground in low coal when he struck his head on an overhead beam, injuring his

neck and shoulders. He reported the incident but did not seek medical treatment for nearly a month. When his condition did not improve, he was seen by his PCP and was referred to Dr. Helms in Bristol, Tennessee. Surgery was recommended but has not been performed. He continued working through January 3, 2019, when he stopped due to neck pain. Hickey was also suffering from hearing loss and shortness of breath with exertion. Hickey testified that as a result of his neck injuries, he is not capable of continuing to work as an underground miner. In addition to his injury, he has hearing loss, which requires him to read lips, and he also suffers from shortness of breath due to CWP. He feels his condition is worsening.

The medical proof regarding Hickey's cervical spine condition comes from Barbourville ARH and consists of radiology reports. The MRI ordered by Dr. Fugate revealed multilevel degenerative changes, moderate spinal stenosis at C5-6 and C6-7, as well as moderate to severe multilevel neuroforaminal narrowing on the left at C4-5 and moderate to severe bilaterally at C6-7.

In a January 3, 2019 report, Dr. Fugate stated Hickey may not return to work until a neurosurgical evaluation is performed, to determine the extent of his problems.

Medical records from Dr. Helms with Bristol Regional Medical Center were considered. Dr. Helms reviewed a cervical MRI, performed physical examinations, and noted numbness and tingling in Hickey's arms and hands with activity. Dr. Helms recommended an ACDF at C5-6 and C6-7. Hickey elected to proceed with epidural spinal injections at C7-T1.

Dr. Muffly evaluated Hickey on August 8, 2019. He received a history of Hickey's work-related accident of May 17, 2018 and prior subsequent medical treatment. He opined Hickey suffers from bilateral cervical radiculopathy with chronic neck pain. He also found pre-existing minimally symptomatic neck pain, worsened by the work injury. Dr. Muffly assessed a 15% impairment rating pursuant to the 5<sup>th</sup> Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"), apportioning 10% to the work injury and 5% to his prior active condition. He did not feel Hickey could return to work as an underground miner.

Dr. Stephens evaluated Hickey on October 23, 2019. He received a history of the May 2018 work-related injury and the medical treatment Hickey received before and after the accident. Dr. Stephens reviewed all medical records prior and subsequent to the work accident, including diagnostic testing, and performed a detailed physical examination. Based on the foregoing, he diagnosed an exacerbation of pre-existing cervical spondylosis secondary to the work injury. Dr. Stephens opined causation is dual, as Hickey no doubt had pre-existing symptomatic spondylosis. However, he believed Hickey had a significant worsening due to the work incident. Dr. Stephens opined Hickey has an 8% impairment rating pursuant to the AMA Guides with 5% being prior active and 3% due to the work incident. Dr. Stephens opined Hickey could return to work without restrictions.

In his initial Opinion, the ALJ made the following findings concerning permanent total disability ("PTD") and carve out for prior active disability, *verbatim*:

As there is no dispute plaintiff suffered a compensable neck injury for which benefits are

awarded, the question is now whether plaintiff is partially or totally disabled as a result of this injury. Permanent total disability is defined in KRS 342.0011 (11) (c) as “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...” “Work” is defined in KRS 342.0011 (34) as “providing services to another in return for remuneration on a regular and sustained basis in a competitive economy.” To determine whether a claimant is permanently totally disabled, the ALJ is required to conduct a five-step analysis. The ALJ must initially determine whether a work-related injury has occurred, whether the claimant has a permanent impairment rating, and whether there is a disability rating. If these three threshold requirements are satisfied, the ALJ must then consider whether the claimant is unable to perform any type of work, and whether the finding of permanent total disability is work-related. *City of Ashland v. Stumbo*, 461 S.W.3d 392 (Ky. 2015). The ALJ’s analysis must be an individualized examination of a variety of factors, including the worker’s post-injury physical, emotional, intellectual, and vocational status. *Ira A. Watson Department Store v. Hamilton*, 34 S.W.3d 48, 51 (Ky. 2000).

Having reviewed the evidence of record, the Administrative Law Judge is ultimately persuaded plaintiff has carried his burden of proving he is permanently and totally disabled as a result of his cervical injury. In reaching this conclusion, the ALJ is aware that Dr. Helms released plaintiff without restrictions. However, plaintiff testified Dr. Helms only released him after plaintiff indicated he did not want to pursue a cervical surgery. Moreover, plaintiff’s current treating physician, Dr. Fugate, has kept plaintiff off work and has not released him. In any event, Dr. Muffly opined plaintiff cannot return to his previous occupation and assigned permanent restriction against overhead work, turning of the neck, and a maximum lift of 15 pounds. Plaintiff also testified credibly that his neck pain has gradually gotten worse since his injury and that he could not return to his previous job in the mines because of the bending of his neck that would be required while going into the underground mines. Based on Dr. Muffly

and plaintiff's credible testimony, it is determined plaintiff cannot return to work in the mining industry.

Given plaintiff's advanced age and the fact that he has worked the last 40+ years in the mining industry with no work experience in sedentary employment, the ALJ is further persuaded plaintiff is not likely to be able to find and perform other gainful employment on a regular and sustained basis. This is especially true given plaintiff's testimony that he often has to lay down in the middle of the day and that he cannot sit for prolonged periods of time before he has to get up and move around. Considering plaintiff's age, education, and work experience within the context of the restrictions assigned by Dr. Muffly, the ALJ is persuaded plaintiff is permanently and totally disabled as a result of his cervical injury.

Regarding a carve-out for prior active disability, on reconsideration the ALJ found as follows, *verbatim*:

Having therefore concluded plaintiff is permanently and totally disabled, any potential carveout for a pre-existing condition must be based on preexisting, active occupational disability rather than a pre-existing, active impairment rating. *Roberts Brothers Coal Co. v. Robinson*, Ky., 113 S.W.3d181 (2003). This goes to the defendant's petition with regard to a failure to carveout any portion of plaintiff's award for a pre-existing condition. The defendant argues the ALJ erred in not finding any pre-existing occupational disability because plaintiff was not missing work or working under restrictions prior to his cervical injury, as the defendant argues this is not required. However, the Court in *Robinson* determined otherwise.

The ALJ erred in his original Opinion in finding Hickey retained a 5% impairment rating for the cervical spine condition, attributable to the effects of the work-related injury. On remand, the ALJ corrected the error by finding Hickey retained a 10% impairment rating for the cervical condition and thereafter found he was permanently totally disabled. The ALJ determined Blackjewel did not meet its

burden of proving Hickey suffered from a prior active occupational disability and declined to carve out any of the benefits awarded. This appeal followed.

On appeal, Blackjewel argues the ALJ erred in finding Hickey permanently totally disabled and in failing to apportion any of the disability to pre-existing active impairment/disability. As the claimant in a workers' compensation proceeding, Hickey had the burden of proving each of the essential elements of his claim. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because Hickey was successful in his burden, the question on appeal is whether substantial evidence supports 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). The function of the Board in reviewing the ALJ's decision is limited to a determination of whether the findings made by the ALJ are so unreasonable under the evidence they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, *supra*.

As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the sole authority to judge all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). The 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); Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). Mere evidence contrary to the ALJ's decision is inadequate to require reversal on appeal. Id. In order to reverse the decision of the ALJ, it must be shown there was no substantial evidence of probative value to support his decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to the weight and credibility to be afforded the evidence or by noting reasonable inferences which otherwise could have been drawn from the record. Whittaker v. Rowland, supra. As long as the ALJ's ruling regarding an issue is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, supra.

Permanent total disability is defined as 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 because of an injury. KRS 342.0011(11)(c). "Work" is defined as providing services to another in return for remuneration on a regular and sustained basis in a competitive economy. KRS 342.0011(34). In determining Hickey is permanently totally disabled, the ALJ was required to perform an analysis pursuant to City of Ashland v. Stumbo, supra, and Ira A. Watson Department Store v. Hamilton, supra. We note additionally, an injured worker's testimony may be considered and relied upon when assessing total disability. Walker v. Product Finishers, 505 S.W.2d 178 (Ky. 1974), Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979)

This Board found, in the original Opinion, the ALJ performed an adequate analysis as required by the City of Ashland v. Stumbo, supra, with the exception of using the correct impairment rating. On remand, the ALJ corrected this error by determining a 10% impairment rating was appropriate. We find the ALJ has performed the correct analysis and applied the required factors set forth in City of Ashland v. Stumbo, supra, and Ira A. Watson Department Store v. Hamilton, supra, in finding Hickey is permanently totally disabled. The ALJ explained the five-step process required to support a determination of permanent total disability. The ALJ found Hickey sustained compensable work-related injuries warranting 10% impairment rating based upon Dr. Muffly's assessment. The ALJ could reasonably infer this as a basis for assessing whether Hickey is disabled. The ALJ next determined Hickey is unable to perform any of his past work. He specifically noted the limitations specified by Dr. Muffly and Hickey's assessment of his ability. The ALJ also noted Hickey's advanced age and the fact he has worked in the mining industry for the past 40 plus years with no work experience in sedentary employment. Based upon the evidence, the ALJ determined Hickey's inability to work is due to the residual limitations resulting from his work injuries.

We determine the ALJ appropriately outlined the steps necessary and the evidence he relied upon in reaching his determination Hickey is permanently totally disabled. The ALJ properly analyzed the claim, and his decision falls squarely within his discretion.

Lastly, Blackjewel argues the ALJ erred in determining Hickey did not suffer from a prior active disability. We disagree. In the case of Roberts Brothers

Coal v Robinson, 113 S.W.3d 181 (Ky. 2003), the Supreme Court determined in permanent partial disability cases, the existence of prior active impairment is sufficient evidence of a prior active condition for the employer to receive a carve out of their liability. In permanent total disability cases, the Court determined the employer must show the prior active condition caused a pre-existing active occupational disability rather than a pre-existing active impairment rating. In this specific instance, the ALJ determined there was no evidence of prior active occupational disability. We believe this determination, as well as the determination Hickey is permanently totally disabled, are clearly supported by substantial evidence and will not be disturbed on appeal.

Accordingly, the October 5, 2020 Opinion on Remand and the November 9, 2020 Order on Petition for Reconsideration rendered by Hon. Grant Roark, Administrative Law Judge, are **AFFIRMED**.

ALL CONCUR.

**DISTRIBUTION:**

**COUNSEL FOR PETITIONER:**

**LMS**

HON SHANE BRANHAM  
2452 SIR BARTON WAY, STE 101  
LEXINGTON, KY 40509

**COUNSEL FOR RESPONDENT:**

**LMS**

HON RONALD COX  
207 EAST CENTRAL ST.  
HARLAN KY, 40831

**ADMINISTRATIVE LAW JUDGE:**

**LMS**

HON GRANT S ROARK  
MAYO-UNDERWOOD BLDG  
500 MERO ST, 3<sup>rd</sup> FLOOR  
FRANKFORT, KY 40601