

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: August 7, 2020

CLAIM NO. 201900528, 201900527, 201900526 & 201900525

BLUE DIAMOND MINING, LLC

PETITIONER

VS. **APPEAL FROM HON. MONICA RICE-SMITH,
ADMINISTRATIVE LAW JUDGE**

PAUL OSBORNE
and HON. MONICA RICE-SMITH,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
AFFIRMING**

* * * * *

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

STIVERS, Member. Blue Diamond Mining, LLC (“Blue Diamond”) seeks review of the February 14, 2020, Opinion, Order, and Award of Hon. Monica Rice-Smith, Administrative Law Judge (“ALJ”). The ALJ resolved Paul Osborne’s (“Osborne”) claims for a work-related left ring finger injury, cumulative trauma injuries to his low back and right knee, occupational hearing loss, and coal workers’ pneumoconiosis (“CWP”). The ALJ found Osborne sustained a work-related October 26, 2017, left

ring finger injury and awarded permanent partial disability (“PPD”) and medical benefits. The ALJ also found Osborne sustained work-related cumulative trauma low back and right knee injuries and occupational hearing loss. She awarded permanent total disability (“PTD”) benefits and medical benefits for the cumulative trauma injuries and medical benefits for the hearing loss. The ALJ dismissed Osborne’s CWP claim. Blue Diamond also appeals from the March 31, 2020, Order sustaining in part its petition for reconsideration and overruling the remainder.

On appeal, Blue Diamond challenges the ALJ’s award on two grounds. First, it argues the ALJ provided insufficient findings of fact concerning her reliance upon Dr. Bruce Guberman’s opinions on causation and the impairment ratings assessed for the cumulative trauma injuries. Next, Blue Diamond asserts the ALJ erred in concluding Osborne is permanently totally disabled, as she did not undertake the correct analysis. As a sub-part to this argument, Blue Diamond argues the ALJ failed to consider whether Osborne’s non-work-related breathing condition impacted his ability to work.

BACKGROUND

On May 2, 2019, Osborne filed four claims alleging an October 26, 2017, left ring finger injury, cumulative trauma injuries to the low back and right knee, occupational hearing loss, and occupational CWP. By Order dated June 5, 2019, the claims were consolidated.¹ As the ALJ’s determination regarding Osborne’s left ring

¹ During the pendency of the action, Osborne successfully amended his Form 101s to reflect his last date of employment with Blue Diamond was February 21, 2019.

finger injury, the hearing loss, and CWP claims are not at issue, the decision regarding those claims and the evidence relating thereto will not be discussed in this opinion.

Osborne testified at a July 8, 2019, deposition and the December 16, 2019, hearing. At the time of his deposition, Osborne was 63 years old. His date of birth is November 25, 1955. He attended high school through his junior year. Osborne testified he is 5'5" tall and weighed between 154 to 156 pounds. He has a Kentucky Foreman's card, Kentucky and federal electrical card, and a Mine Emergency Technician ("MET") card. He worked for Blue Diamond from 1996 to 2019. He was last employed on February 21, 2019, at Blue Diamond. The day after he quit work he underwent lumbar surgery performed by Dr. James Bean in Lexington, Kentucky.²

Other than the October 26, 2017, left ring finger injury, Osborne denied sustaining any other injuries while working for Blue Diamond. While working at Blue Diamond, Osborne worked as a maintenance supervisor, section repairman, and on the section and outby. Osborne provided the following regarding his work and why he stopped working at Blue Diamond:

Q: Were you paid by the hour or salary?

A: Hourly.

Q: And what was your last regular hourly rate?

A: \$26.00 an hour.

Q: How many hours a week were you working when you last worked for Blue Diamond?

² The record reveals that on February 22, 2019, Dr. Bean performed a left L4-5 laminectomy with discectomy. Dr. Bean's January 29, 2019, record establishes Osborne had left hip and leg pain for two years and a lumbar MRI scan revealed broad-based disc bulge at L4-5 on the left with some lateral recess stenosis. The lumbar myelogram revealed subtle but definite impression L5-S1 nerve root sleeve with lateral recess stenosis with disc bulge.

A: Between 60 and 70.

Q: How did your employment with the company end? Meaning, did you resign? Were you terminated? Did you get laid off? What happened there?

A: I had to go in and have a surgery on my back and he put a restriction on me, where I could only lift 20 pounds of weight. They didn't have nothing for me. I mean, you just couldn't work.

Q: Okay.

A: My belt weighed more than that.

Q: Okay. And that was a surgery with Dr. Bean?

A: Yes.

Q: And that involved your low back?

A: Uh-huh (affirmative response).

Q: Is that yes?

A: Yes.

At the time of his deposition, Dr. Bean had released Osborne from his care. Osborne described his section repairman duties:

Q: So Mr. Osborne, what did the job of section repairman require you to do from a physical standpoint?

A: We usually have to change tires on the shuttle car on the scoop. Fix broken bearing chains. Take lids on and off of a miner when a miner wouldn't run anymore to find out what the problem [sic] and repair it. You'd have to change motors. There was a lot of different things.

...

A: And we had to weld. We had to get a welder, and oxygen, and acetylene tanks, and set everything up so we could weld with it. And just routine maintenance of greasing and tightening chains. It was several things during each shift.

Q: How much do you think you would have been required to lift in that job?

A: Well on a daily basis, an oxygen tank will run about 80 pounds. I've had to change cutter head clutches on a motor. They'll run about 85 to 90 pounds. The lids on the miners, some of them will run up to 60, 65 pounds or more. There are rub rails that probably – the guards over the side of it, they call them a rub rail. Some of them will weigh up to 150 pounds. You've got to get two people to lift those, or use slate bars. If you're changing a scoop tire, it probably would run about 400 pounds. Shuttle car tire would probably be around 500 to 550, maybe 600.

...

Ms. Brashear: But you don't lift that by yourself.

Mr. Osborne: No. No. You've got to use – no. You don't lift that by yourself. You've got to use slate bars or get somebody to help you. Cheater bars, or slate bars, pry bars.

Before working for Blue Diamond, he worked two years for Altec as a repairman in the mines. Prior to that, he worked in the logging industry from 1987 to 1994. During that time, he operated a bulldozer, cut timber, and repaired equipment. From 1982 to 1987, he worked as a mechanic for Cumberland Resources. From 1976 to 1982, he worked for Greer & Young as a heavy equipment mechanic. He denied experiencing any injuries while working for any of these entities.³

Osborne worked in the mining industry approximately 28 or 29 years.

At the time of his deposition, he was taking no medications. Osborne testified Dr. John

³ Osborne acknowledged he had broken his left index finger while working for James River which was subsequently purchased by Blue Diamond. He filed no claim for this injury. The only surgeries he underwent were on his lower back performed by Dr. Bean and left finger performed by Dr. Mukut Sharma following the October 26, 2017, injury.

Page treated his right knee upon referral from Dr. George Chaney. He denied experiencing an acute right knee injury. He provided the following explanation:

Q: Okay. Did you have any kind of injury to your right knee, or was it just kind of ---

A: No. Huh-uh (negative response).

...

A: I had somehow or another got two tore ligaments in the back of it – torn ligaments. And cartilage, I guess you call it. It's in the middle there, it just wore out. And my right knee is trying to go to the right. This is part of what Dr. Page told me. It's trying to go out from under me. He said in years to come I would have to have a partial knee replacement for it.

Q: How long has your right knee been bothering you?

A: Probably six or seven years.

Q: Okay. And it just kind of came on spontaneously ---

A: Yeah, it just keeps getting worse.

Q: Do you have any problems with the left knee?

A: Some.

Q: Is the right knee worse?

A: the right knee's worse. The pain in my right – my left leg, and in my left knee, and down to near the ankle was coming from the disc in my back.

Dr. Page administered a right knee injection which provided no benefit.

Osborne no longer sees Dr. Page. Drs. Chaney and Page are the only physicians who treated his right knee. At the time of his deposition, Osborne took 800 mg of Ibuprofen prescribed by Dr. Chaney and Norco prescribed by Dr. Page for inflammation. Osborne testified a physician has never told him the knee problem was due to his employment.

Osborne estimated his low back symptoms manifested four to five years ago. He denied sustaining a low back injury prior to seeing Dr. Chaney for back pain. Dr. Chaney referred him to Dr. Bean. When Blue Diamond transferred Osborne to Virginia, he stopped seeing Dr. Bean. After returning to work in Kentucky, he was experiencing such severe back pain that he resumed treatment with Dr. Bean. Osborne offered the following regarding his right knee and low back symptoms:

A: It got so bad, the ibuprofen and stuff wouldn't kill the pain enough to where I could tolerate working.

...

Q: What are the symptoms you experience at this point, in your right knee on a daily basis?

A: When I get up, I just get a real sharp pain in it and it wants to fold out from under me. I got to get up, hesitate a minute to make sure it's going to work properly, and then I can move around. At night, it wakes me up. I probably sleep four or five hours, got to wake up, to get out of the bed, move around a little bit, and then I can go back and lay down, and go to sleep.

Q: Okay. What about the low back?

A: Well, it's about the same way.

Osborne testified Dr. Bean assigned restrictions following his surgery which he supplied to Diane Lewis with Blue Diamond. As a result, Blue Diamond terminated his employment. Osborne did not apply for work elsewhere because he believes he cannot pass the physical examination. Osborne believes he is incapable of gainful employment:

Q: Okay. Is it your low back and lifting restriction that Dr. Bean assigned for you that would prevent you from going back to work?

A: Yes, that and my knees.

At the time of his deposition, Osborne performed limited household chores and maintenance.

At the hearing, Osborne testified he worked in underground coal mines for 28 or 29 years. He reiterated his previous work history in logging and as a heavy equipment mechanic. He testified these jobs entailed the same physical demands as underground coal mining. He described the nature of his work in the coal mines:

Q: Did all of your coal mine jobs, whether or not you were classified as management, have the same physical demands and job duties?

A: Yes.

Q: Did your electrical and repair duties change based upon your job classification?

A: No.

Q: What were those duties?

A: It was to keep the equipment so it would run, change equipment components, change tires on scoops, on shuttle cars, help the other repairman, keep everything permissible in a way that state and federal would accept it.

Q: Okay. In what coal height did you work most often?

A: Approximately, forty-two inches.

Q: What positions did you have to put your body in to do your job?

A: You was always kneeling, bending my back, stretching forward and backwards and – and twisting motions with my back.

Q: What about getting around?

A: I had to bend over. We called it duck walk.

Q: And, regardless of the coal height, did you kneel frequently?

A: Yes.

Q: How often?

A: Probably, seventy-five percent of the time.

Q: And, why was that necessary?

A: Because you was in such a confined area and the equipment was built so low to the bottom or ground, ever how you want to put it.

His right knee symptoms are worse than his left knee.

Q: You testified in your deposition that your right knee problems were worse than the problems that were affecting your left knee. Why is that in your – in your estimation?

A: Well, if you've got to kneel down, if you're right-handed, normally, you'll put your right knee down and balance yourself with your left one.

Osborne described his electrical and maintenance duties:

Q: And, what repair electrical and maintenance duties did you most frequently do?

A: Well, you'd have to change – keep all of the tires changed on the shuttle cars and scoops, keep the chains in the equipment tied. If a chain broke, you'd have to repair it. You would have to take the lids on and off the miners and the equipment in order to get to the internal components of it and replacing several and various types of motors and hydraulic jacks.

Osborne recounted the activities associated with using welding equipment:

Q: Did you ever have occasion to work with welding equipment and – and oxygen and other types of tanks?

A: Yes, very, very often.

Q: Okay. And, what kind of tanks would you be working with?

A: The oxygen tank, it – the oxygen tank would probably run seventy-five to eighty pounds. Acetylene would probably be somewhere around sixty to sixty-five. The welder would probably weigh seventy – between seventy and eighty pounds.

Q: How often would you do the work that you just described to me two questions ago?

A: Constantly.

Q: Okay. And in what directions would you have to flex your back?

A: You'd either have to bend forward or back or backwards or twist from side to side.

Q: And, why is that necessary?

A: Because of the coal height and the equipment height.

Q: And, in what position was your back in most frequently?

A: Probably, bent forward.

Q: On average, how much of your shift would you spend bent at the waist throughout your coal mine career?

A: Probably, seventy-five to eighty-five percent.

Dr. Bean's lifting restriction prevent him from returning to the coal mining industry. He explained:

Q: You testified in your deposition that your mining belt weighed more than twenty pounds. How much did it weigh?

A: Guessing, thirty-five or forty pounds.

Q: And, why did your mining belt weigh that much?

A: Well, I had a self-rescuer on it. I had an F3 tracking radio. I had a methane spotter on it. I had to carry my light battery. I had to carry several tools. There was nothing I could get rid of because I needed this to do my job, plus for safety reasons.

...

Q: If you had a thirty pound lifting restriction, could you return to work at any of your previous repair jobs?

A: No.

Q: In your mine equipment repair, maintenance and mine electrical jobs, how much weight did you routinely lift without assistance?

A: Anywhere between sixty, eighty, eighty-five pounds.

Q: And, what objects weighed that amount?

A: Well, you had lids on the equipment that you had to take on and off to get inside of it, the various components of a miner, continuous haulage shuttle car, scoop. You'd have to change scoop tires, which you'd have to have help with them getting the lids on and off where you could get it to do the job.

Q: Okay. I think you mentioned something about a tank a few questions ago.

A: Well, if you –yeah, if you had to weld anything, you had to go get all of the oxygen and acetylene because there was a storage area. You had to go down there to get it and then get the welder and everything and hook it up so you could weld.

Q: Okay. What is the most weight that you were expected to lift without assistance?

A: They wanted you to lift around a hundred pounds.

Q: And, what objects weighed that amount?

A: Well, you had cutter head clutches, foot shafts on the miner, a bunch of lids on the miner. There was various things.

Osborne testified Drs. David Muffly and Ellen Ballard did not ask about his job duties. Similarly, neither doctor sought information concerning the effects of

his symptoms on his daily activities. He described his current right knee and low back symptoms:

Q: Around the time that you last worked in February of 2019, what symptoms did you have in your right knee?

A: Well, it was very stiff. It would swell. When I would kneel down for a while, I'd either have to get somebody to help me stand up or get a hold of a piece of equipment and pull myself up. I'd lose all of my feeling in it.

Q: How did those symptoms affect your work?

A: It slowed me down tremendously.

Q: Why – why did it slow you down tremendously?

A: Well, I couldn't move around as fast.

...

Q: Do you currently have any low back symptoms?

A: Yes.

Q: What are those?

A: A real sharp stabbing pain that goes across my back and down both of my legs. It's real stiff at times. It limits my amount I can bend over or go backwards or a twisting motion either one.

Q: Do you believe the low back surgery was beneficial?

A: Somewhat, yes. It relieved some of the pain.

Q: Do you have any back pain now?

A: Yes.

Q: Okay. So, it helped alleviate pain then?

A: Uh-huh (affirmative).

At the time of the hearing, Osborne was still taking Ibuprofen and Norco prescribed by Dr. Chaney. His daily activities are limited and he does not exercise except to walk.

In support of his cumulative trauma claims, Osborne offered the April 23, 2019, Form 107 prepared by Dr. Guberman and his October 22, 2019, supplement. Blue Diamond offered Dr. Muffly's July 9, 2019, report and Dr. Ballard's September 10, 2019, report.

In finding Osborne sustained work-related cumulative injuries to his right knee and low back, the ALJ provided the following *verbatim* findings of fact and conclusions of law:

The ALJ finds Osborne sustained work related cumulative trauma injuries to his right knee and low back manifesting on February 21, 2019. The ALJ finds the opinion of Dr. Guberman most credible and consistent with the treatment records and testimony of Osborne.

Osborne began experiencing low back pain and right knee pain while working at Blue Diamond. Osborne's work at Blue Diamond was physically demanding. He lifted heavy weight and worked with his back bent and in awkward positions daily. He also worked daily in squatted and kneeling positions. He had no specific injuries to either his right knee or low back. Both just began hurting and continued to worsen over time. He sought treatment with Dr. Chaney for his knee and low back while working at Blue Diamond. Dr. Chaney referred Osborne to specialists, Dr. Page for his knee and Dr. Bean for his back.

Dr. Page diagnosed right knee medial compartment primary osteoarthritis. Dr. Page noted the MRI revealed an extruded medial meniscus with a moderate size tear of the posterior horn and body. Dr. Page noted Grade 3 medial and patellofemoral degeneration. Dr. Bean diagnosed lateral recess stenosis L4/5 left, degenerative disc moderate at L2/3 and L3/4

and moderately severe at L4-5 and L5/S1. Dr. Bean noted the myelogram revealed a definite impression on the left L5 nerve root from lateral recess stenosis with disc bulge. He performed a laminectomy and discectomy at L4/5. On March 22, 2019, Dr. Bean released Osborne with restriction of no lifting over 20 pounds and no repetitive bending, lifting and twisting movements.

Dr. Guberman diagnosed degenerative joint disease of the right knee, degenerative joint and disc disease of the lumbar spine, and herniation of the lumbar spine. He opined all the diagnoses are due to cumulative trauma from Osborne's work activities. Dr. Guberman advised Osborne's abnormalities and symptoms are more than would be expected for a man his age due to cumulative trauma of work. Dr. Muffly and Dr. Ballard both agree Osborne has a cumulative trauma injury to his back, but disagree as to the degree.

In concluding Osborne is totally occupationally disabled, the ALJ reasoned as follows:

...

The ALJ finds Osborne has sustained a 16%% combined whole person impairment due to his cumulative trauma injuries manifesting on February 21, 2019. Again, the ALJ finds most credible Dr. Guberman.

Dr. Guberman assessed a combined impairment of 16% for the cumulative trauma injuries. He assessed 13% for the lumbar spine and 4% for the right knee. Dr. Guberman documented the objective findings used to calculate his impairments. Dr. Guberman's impairment is consistent with the AMA Guides.

The ALJ finds Osborne is entitled permanent total disability (PTD) benefits. KRS 342.0011 (11) defines permanent total disability as the condition of an employee who has a permanent disability rating and has a complete and permanent inability to perform any type of work. KRS 342.0011(34) defines work as providing services to another in return for remuneration on a regular and sustained basis, in a competitive economy. Pursuant to *Osborne v. Johnson*, 432 S.W.2d 800 (KY 1968), the ALJ must evaluate the post-injury physical, emotional,

intellectual, and vocational status when determining entitlement to PTD. When determining entitlement PTD or total occupational disability, restrictions due to non-work related conditions cannot be considered. *City of Ashland v. Stumbo*, 461.S.W.3d 392 (KY 2015).

The ALJ believes Osborne is totally occupationally disabled. Dr. Bean, the treating surgeon, imposed lifting restrictions of 20 pounds and no repetitive bending, twisting, and lifting movements.

Osborne is 63 years old, with only an 11th grade education. Although he has some certifications, they are mainly specific to his mining employment and levels of labor beyond Osborne's permanent restrictions. All of Osborne's work history has been in arduous manual labor. He continues to have pain in his low back and knee, which require him to take narcotic medication. The ALJ believes based on Osborne's advanced age, education, continuing treatment, and work restrictions it is highly unlikely that he would be able to find work consistently under normal employment conditions.

Based on the foregoing, the ALJ finds Osborne sustained a 16% impairment to the whole person as a result of the February 21, 2019 cumulative trauma injuries and is permanently and totally disabled. Osborne's benefits shall be \$955.32.

The ALJ awarded PPD benefits of \$12.21 per week for the October 26, 2017, left ring finger injury commencing on October 27, 2017, and continuing for 425 weeks. For the cumulative trauma injuries, PTD benefits were awarded at the rate of \$955.32 per week commencing on February 22, 2019. Pursuant to KRS 342.730(4), all income benefits terminate on Osborne's 70th birthday. The ALJ awarded medical benefits for the cumulative trauma injuries and the hearing loss.

Blue Diamond filed a petition for reconsideration pointing out a typographical error and asserting the same arguments it makes on appeal. Blue Diamond requested additional findings regarding the permanent total disability

determination. It also requested the ALJ order it is not required to pay PPD benefits and TTD benefits during the periods the awards overlap. The March 31, 2020, Order corrected the typographical error, and ordered the payment of PPD benefits suspended during any period PTD benefits were paid. The remainder of Blue Diamond's petition for reconsideration was overruled.

In contending the ALJ did not provide sufficient findings of fact in support of her reliance upon Dr. Guberman's opinions, Blue Diamond complains the ALJ did not provide any explanation for her conclusion that "Dr. Guberman's opinions are more credible and consistent with that testimony." In her analysis, Blue Diamond asserts the ALJ failed to explain why she found Dr. Guberman's opinions more credible than those of other physicians. It notes the ALJ overruled its petition for reconsideration requesting further explanation.

Blue Diamond also asserts the ALJ provided no analysis regarding the alleged right knee injury. Even though she noted Drs. Muffly and Ballard opined Osborne's low back symptoms were at least partially related to the cumulative trauma, it argues the ALJ did not provide any such discussion regarding the right knee. Blue Diamond complains because Drs. Muffly and Ballard opined the right knee symptoms were not due to cumulative trauma, the ALJ should have referred to those opinions or provide an analysis as to why she relied upon Dr. Guberman's causation opinion in finding a right knee cumulative trauma injury. It also complains Dr. Guberman did not personally review any diagnostic studies. On the other hand, Dr. Muffly obtained x-rays in order to personally determine the degree of degenerative changes in the low back and right knee. Again, it notes specific findings of fact were requested in the

petition for reconsideration regarding the ALJ's reliance upon Dr. Guberman's causation opinions which the ALJ declined to provide. Therefore, Blue Diamond requests the Board vacate the decision and remand for additional findings as required by Shields v. Pittsburgh and Midway Coal Min. Co., 634 S.W.2d 440 (Ky. App. 1982).

Blue Diamond makes the same argument regarding the ALJ's failure to explain her reliance upon Dr. Guberman's impairment ratings. Although the ALJ stated Dr. Guberman documented the objective findings used to calculate an impairment rating that, in Blue Diamond's view, does not separate his opinions from the opinions of its doctors. Blue Diamond also complains Dr. Guberman based the right knee impairment rating upon a range of motion deficit but Dr. Muffly documented a normal knee examination which is consistent with the records of Osborne's treating physician, Dr. Page.

Next, Blue Diamond submits the ALJ erred in determining Osborne is permanently totally disabled as she failed to conduct the five-step analysis set forth in City of Ashland v. Stumbo, 461 S.W.3d 392 (Ky. 2015). Blue Diamond argues the ALJ failed to make a finding as to Osborne's permanent impairment disability rating which it pointed out in its petition for reconsideration to no avail. Because the ALJ failed to provide sufficient findings regarding her conclusion Osborne lacks the physical capacity to perform any type of employment, remand is necessary to require the ALJ to set forth with some specificity the factors she considered and how those factors led to the conclusion Osborne is totally permanently disabled.

In a sub-argument, Blue Diamond contends the ALJ erred by failing to consider whether Osborne's non-work-related breathing condition impacts his ability

to work. Although the ALJ dismissed Osborne's claim for CWP, it argues Osborne has a non-work-related breathing condition requiring him to use a prescription inhaler which the ALJ failed to consider. Blue Diamond requests remand with directions to provide additional findings on this issue.

ANALYSIS

Osborne, 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 and the extent of his occupational disability. *See* KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Osborne 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). 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).

In finding Osborne sustained work-related cumulative trauma injuries manifesting on February 24, the ALJ concluded Dr. Guberman's opinions concerning causation and the applicable impairment rating were in concert with the treatment records and Osborne's testimony. The ALJ cited Osborne's testimony that he began experiencing both low back and right knee pain while in the employ of Blue Diamond. Significantly, Blue Diamond does not dispute this finding. She also accepted Osborne's testimony regarding the symptoms he developed as a result of performing strenuous manual labor while working in underground coal mines. The ALJ set forth the records of Drs. Bean and Page which she believed supported Dr. Guberman's opinions. The reliance upon Dr. Guberman's opinion, Osborne's testimony, and

Osborne's treating physician's record is solely within the ALJ's discretion and this Board will not invade that discretion.

The ALJ must provide a sufficient basis to support his or her determination. Cornett v. Corbin Materials, Inc., 807 S.W.2d 56 (Ky. 1991). Parties are entitled to findings sufficient to inform them of the basis for the ALJ's decision to allow for meaningful review. Kentland Elkhorn Coal Corp. v. Yates, 743 S.W.2d 47 (Ky. App. 1988); Shields v. Pittsburgh and Midway Coal Mining, Co., *supra*. This Board is cognizant of the fact an ALJ is not required to engage in a detailed discussion of the facts or set forth the minute details of his or her reasoning in reaching a particular result. The only requirement is the decision must adequately set forth the basic facts upon which the ultimate conclusion was drawn so the parties are reasonably apprised of the basis of the decision. Big Sandy Community Action Program v. Chaffins, 502 S.W.2d 526 (Ky. 1973).

The ALJ's summary of Osborne's testimony as well as her reference to records of Drs. Bean and Page supporting Dr. Guberman's findings adequately provided the basis of her decision. The ALJ's findings regarding the portion of Osborne's testimony she found credible, her reference to the records of Osborne's treating physicians, and her rationale for relying upon Dr. Guberman's opinions are sufficient to apprise the parties of the basis of her decision. While authority generally establishes an ALJ must effectively set forth adequate findings of fact from the evidence in order to apprise the parties of the basis for the decision, the ALJ is not required to recount the record with line-by-line specificity nor engage in a detailed explanation of the minutia of his reasoning in reaching a particular result. Shields v.

Pittsburgh and Midway Coal Mining, Co., supra; Big Sandy Community Action Program v. Chaffins, supra. Moreover, the fact-finder is not required to convince Blue Diamond that Osborne has sustained work-related cumulative trauma injuries. Simply put, the ALJ is not required to set forth detailed reasoning or her thought processes in weighing each piece of evidence.

In his Form 107, Dr. Guberman provided the history of Osborne's multiple injuries. He noted Osborne reported an onset of lower back pain approximately four of five years previously without specific injury or trauma. He was subsequently referred to Dr. Bean who saw him in January 2017. At that time, Dr. Bean diagnosed left L5 radiculopathy. Osborne's symptoms persisted, but when he was transferred temporarily to Virginia, he did not return to Dr. Bean until he returned to work in Kentucky. He was seen by Dr. Bean in 2018 and underwent physical therapy. Osborne underwent a CT scan with myelogram on January 25, 2019, which showed multilevel degenerative change, worse at L4-L5 and L5-S1 with impingement. On February 22, 2019, Dr. Bean performed lumbar surgery.

Dr. Guberman noted Osborne's right knee became painful without injury in 2016. After consulting with Dr. Chaney, Osborne underwent an MRI of the right knee. The MRI revealed "Osteopenia and mild osteoarthritis. Small suprapatellar joint effusion could be reactive. No acute fracture or dislocation noted." Dr. Chaney referred Osborne to Dr. Page who saw him in 2018. Dr. Guberman then set forth Osborne's complaints and the results of the physical examination of the lumbar region and right knee. Although he did not personally review the tests, he reviewed the reports relating to a 2015 lumbar spine MRI, a January 25, 2019, lumbar spine CT scan with

myelogram, and a May 8, 2017, right knee MRI, and provided a summary of the results. Relative to the cumulative trauma injuries, Dr. Guberman provided the following diagnosis and opinions:

2. Degenerative joint disease and degenerative disc disease and disc herniation of the lumbosacral spine due to cumulative trauma of work.

a. status post left L4-5 discectomy on 2/22/2019

3. Degenerative joint disease of the right knee due to cumulative trauma of work.

In summary, the claimant is an elderly man who suffered a crush injury to his left ring finger at work on October 26, 2017. He was found to have an open comminuted fracture requiring open reduction internal fixation. He also had physical therapy. He continues to have pain, tenderness, scarring, and range of motion abnormalities of the left ring finger.

The claimant also has a long history of progressively more severe low back pain related to the strenuous work he has performed as an electrician in the coal mines. He was diagnosed as having left L5 radiculopathy with L4-L5 disc herniation causing lateral stenosis. He underwent surgery followed by physical therapy. Symptoms have improved but not entirely resolved.

He also has been found to have degenerative joint disease of his right knee due to the cumulative trauma of his work. He has persistent range of motion abnormalities of the right knee.

In my opinion, to a reasonable degree of medical probability, the claimant has more significant symptoms, abnormalities on imaging studies, radicular symptoms, range of motion abnormalities, interference with activities of daily living, and functional limitations in regard to his lumbar spine than would be expected for a man of his age, and that is due to the cumulative trauma of his work. Furthermore, in my opinion, to a reasonable degree of medical probability, he has more significant symptoms, abnormalities on imaging studies, range of motion abnormalities, interference with activities of daily

living, and functional limitations in regard to his right knee than would be expected for a man of his age, and that is due to the cumulative trauma of his work.

Dr. Guberman opined the work events as described to him were the cause of the impairment and no portion of the impairments were due to a non-work-related event. He assessed a 13% impairment rating for the cumulative trauma lumbar spine injury and a 4% impairment rating for the cumulative trauma right knee injury. Combined the cumulative trauma injuries resulted in a 16% total impairment. Combined with a 3% impairment rating for the left ring finger injury of October 26, 2017, Osborne had a 19% total impairment rating. Dr. Guberman set forth the following restrictions which appear to relate to the cumulative trauma knee and back injuries:

1. The plaintiff/employee described the physical requirements of the type of work performed at the time of injury as follows:

The claimant's work required heavy physical labor as an electrician doing mechanical work in the coal mines. That involved frequent heavy lifting and often in awkward positions, kneeling, crawling, and squatting, and also prolonged standing and walking on the coal mine floor.

2. Does the plaintiff/employee retain the physical capacity to return to the type of work performed at the time of injury? No. If not, why?

In my opinion, he is unable to lift, carry, push or pull objects weighing more than 25 pounds occasionally or more than 5 to 10 pounds frequently. He should avoid kneeling, crawling, squatting, and climbing. In my opinion, he is not able to stand and/or walk for a total of more than 20 to 30 minutes at a time or more than 4 hours in an 8-hour day.

3. Which restrictions, if any, should be placed upon plaintiff/employee's work activities as the result of the injury?

In my opinion, he is unable to lift, carry, push or pull objects weighing more than 25 pounds occasionally or more than 5 to 10 pounds frequently. He should avoid kneeling, crawling, squatting, and climbing. In my opinion, he is not able to stand and/or walk for a total of more than 20 to 30 minutes at a time or more than 4 hours in an 8-hour day. In my opinion, he is not able to sit for more than 30 minutes at a time or more than 4 or 5 hours in an 8-hour day.

In an October 22, 2019, supplemental report, Dr. Guberman stated he had reviewed the reports of Drs. Muffly and Ballard and set forth the areas of each report, including the impairment ratings assessed by each doctor, with which he disagreed. He then explained how he arrived at his impairment rating for the right knee and lumbar spine cumulative trauma injuries. He provided, in relevant part, the following responses to questions propounded to him:

15. Mr. Osborne was age sixty-one when he underwent lumbar MRI studies on November 11, 2016. These studies showed "L2-L3: Broad-based 3 mm left posterior lateral aspect this bulge. There is no significant spinal canal, lateral recess, neural foramina compromise, or nerve impingement. L3-L4: Mild broad-based posterior annular bulge and mild bilateral facet hypertrophy resulting in mild bilateral neuroforaminal stenosis. There is no significant spinal canal, lateral recess compromise, or nerve impingement. L4-L5: 4 mm broad-based posterior disc bulge asymmetrically more prominent on the left. Mild bilateral facet hypertrophy. Moderate right and moderate to severe left neuroforaminal stenosis with impingement of the left elbow no abnormality is present at the left lateral aspect. Moderate left lateral recess stenosis and at least abutment of the left L5 nerve root. No significant spinal canal stenosis. L5-S1: Moderate decreased disc height with a 3 mm broad-based disc bulge. Mild bilateral facet hypertrophy. Mild bilateral neuroforaminal stenosis right greater than left with transient abutment of the right L5 nerve root. No significant spinal canal stenosis. IMPRESSION: 1. Multilevel lumbar spondylosis most pronounced at L4-L5 as described. 2. No acute osseous abnormality. 3. Mild

rightward curvature of the lumbar spine could be secondary to muscle spasm.” In your opinion, were the findings on Mr. Osborne’s lumbar MRI studies, eventually requiring surgery, of greater severity than would be expected of a sixty-one year old individual?

Yes.

16. In your opinion, did the repetitive demands of Mr. Osborne’s work activity described to you personally and in the Functional Requirements of Work Activity form he completed on March 28, 2019, speed up and increase the severity of the degenerative changes in his lumbar spine so the changes exceeded normal aging effects for a person his age in 2016?

Yes.

17. Whether or not the degenerative changes in Mr. Osborne’s lumbar spine were consistent with aging, did his work activity over time arouse these degenerative changes from a dormant and asymptomatic state into an active, symptomatic and impairment state?

Yes.

18. Is it a natural result of aging for a sixty-one-year-old person to have the same degree of abnormalities as Mr. Osborne has in his lumbar spine?

No.

...

24. How did you obtain the information on which you relied?

That was based on the history obtained directly from the claimant and the records and they were consistent with his physical findings and imaging studies.

25. Did you adhere strictly to the precepts of fifth edition *AMA Guides* in rendering your opinions in response to the foregoing questions?

Yes, I did.

The reports of Dr. Guberman qualify as substantial evidence sufficient to support the ALJ's finding of low back and right knee cumulative trauma injuries and the impairment ratings assessed for each. Dr. Guberman's reports contain a comprehensive explanation for his causation opinions and how he arrived at his impairment ratings for both cumulative trauma injuries. The contrary opinions of Drs. Muffly and Ballard pertaining to causation represented nothing more than conflicting evidence compelling no particular outcome. Copar, Inc. v. Rogers, 127 S.W.3d 554 (Ky. 2003).

We note Drs. Muffly and Ballard both concluded Osborne sustained a cumulative trauma lumbar injury but attributed a portion of the impairment rating assessed for the condition of Osborne's lumbar spine to non-work-related causes. Within her discretion, the ALJ was free to reject the opinions of those doctors and this Board is without authority to invade that discretion. As previously stated, where conflicting evidence exists regarding an issue preserved for determination, the ALJ, as fact-finder, is vested with the discretion to pick and choose whom and what to believe. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). Likewise, 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. Id. at 16; Pruitt v. Bugg Brothers, 547 S.W.2d 123 (Ky. 1977). This Board will not disturb the ALJ's finding that Dr. Guberman's opinions relating to causation and the applicable impairment ratings are the most credible and consistent with the treatment records and Osborne's testimony. Consequently, the determinations Osborne sustained work-related

cumulative trauma low back and right knee injuries as well as the impairment rating attributable to each will be affirmed.

Blue Diamond also contends the ALJ did not comply with the standard set forth in City of Ashland v. Stumbo, *supra*. The Stumbo court set down the requisite analysis to be undertaken by an ALJ in determining whether a claimant is totally disabled. First, the ALJ must determine if the claimant suffered work-related injury. Next, the ALJ must determine the claimant's impairment rating, if any. In the third step, the ALJ must determine the claimant's permanent disability rating. Next, the ALJ is required to determine whether the claimant is unable to perform any type of work and in doing so consider various factors. Finally, the ALJ must determine total disability is the result of the work injury.

Although the ALJ's analysis was limited, we conclude the ALJ complied with the directives of the Stumbo court. Consistent with step one, the ALJ found Osborne sustained work-related low back and right knee cumulative trauma injuries manifesting on February 21, 2019. This finding is based upon Dr. Guberman's opinions which she believed were consistent with the treatment records and Osborne's testimony. Next, the ALJ determined Osborne retains a 13% impairment rating for the cumulative trauma lumbar spine injury and a 4% impairment rating for the cumulative trauma right knee injury. Consequently, step two of the analysis was satisfied. The ALJ then found Osborne was entitled to PTD benefits, and in resolving this issue cited Stumbo, *supra*, for the proposition that restrictions due to non-work-related conditions cannot be considered. She later stated Osborne sustained a 16% impairment due to the cumulative trauma injuries. Thus, step three of the analysis was met. The ALJ then

explained why she believed Osborne was totally occupationally disabled, citing to Dr. Bean's restrictions of no lifting over 20 pounds and no repetitive bending, lifting, and twisting movements. She also noted Osborne was 63 years old, possessed an 11th grade education, and only had certifications relating to his mining employment. She believed his levels of labor are beyond his permanent restrictions. Also significant were Osborne's history of performing arduous manual labor and his continued low back and knee pain which required narcotic medication. Thus, based on his age, education, continuing treatment, and the work restrictions of the treating physician, Dr. Bean, the ALJ concluded it was highly unlikely Osborne would be able to find work consistently under normal employment conditions. This satisfied the fourth step of the analysis. Finally, the ALJ found Osborne sustained a 16% impairment rating as a result of the work-related cumulative trauma injuries resulting in permanent total disability which satisfied step five of the analysis.

Moreover, the ALJ complied with the directives of McNutt Construction/First General Services v. Scott, 40 S.W.3d 854, 860 (Ky. 2001) in which the Kentucky Supreme Court set forth the factors to be analyzed in making the individualized determination of the worker's capabilities after recovering from the injury which is:

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.

...

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, Eaton Axle Corp. v. Nally, Ky.*, 688 S.W.2d 334 (1985); *Seventh Street Road Tobacco Warehouse v. Stillwell, Ky.*, 550 S.W.2d 469 (1976). 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. *Hush v. Abrams, Ky.*, 584 S.W.2d 48 (1979).

Here, the ALJ considered Osborne's age, education, work history, post-injury physical capabilities, and vocational status in determining whether he was totally occupationally disabled. Based on the evidence relied upon, the ALJ concluded Osborne's work restrictions prohibited him from using the skills which were within his vocational capabilities. Her reasoning is supported by the evidence and will not be disturbed. While the analysis could have been more in depth, her analysis sufficiently complies with the mandates of Stumbo, supra, and McNutt, supra.

Blue Diamond's alternative argument the ALJ failed to consider whether Osborne's non-work-related breathing condition impacted his ability to work

is without merit. In the December 16, 2019, Benefit Review Conference (“BRC”), Blue Diamond did not raise the exclusion for a pre-existing disability or impairment as a contested issue. Further, it did not frame that argument in its brief to the ALJ after the claim had been submitted. Thus, Blue Diamond cannot raise this issue for the first time in a petition for reconsideration. Significantly, 803 KAR 25:010 § 13 (11) and (12) direct that at the BRC the parties shall identify all contested issues and only contested issues shall be subject to further proceedings. Blue Diamond’s failure to raise this issue at the BRC and in its brief prohibits it from raising this issue for the first time in a petition for reconsideration and again on appeal. Thus, Blue Diamond has waived its right to assert this argument on appeal. Further, the ALJ’s decision unequivocally demonstrates Osborne is totally occupationally disabled solely as a result of the cumulative trauma injuries.

Finally, we are compelled to point out the ALJ should have ordered Blue Diamond to pay the award of PPD benefits with Blue Diamond receiving a credit for the award of PPD benefits against its obligation to pay the award of PTD benefits. When the award of PPD benefits expired then Blue Diamond would pay the full award of the PTD benefits. Since the employer and the carrier are the same in both injuries, the net effect is the same and the error is harmless. Thus, remand is not necessary for a correction of the award.

Accordingly, the February 14, 2020, Opinion, Order, and Award and the March 31, 2020, Order ruling on the petition for reconsideration are **AFFIRMED**.

ALL CONCUR.

COUNSEL FOR PETITIONER:

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

LMS

COUNSEL FOR RESPONDENT:

HON SHERRY BRASHEAR
P O BOX 1626
HARLAN KY 40831

LMS

ADMINISTRATIVE LAW JUDGE:

HON MONICA RICE-SMITH
MAYO-UNDERWOOD BUILDING
500 MERO ST 3RD FLOOR
FRANKFORT KY 40601

LMS