

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: April 13, 2020

CLAIM NO. 201701504 & 201701501

CHESAPEAKE OPERATING, LLC

PETITIONER/
CROSS-RESPONDENT

VS.

APPEAL FROM HON. JOHN B. COLEMAN,
ADMINISTRATIVE LAW JUDGE

CLAUDE ALLEN
AND
HON. JOHN B. COLEMAN,
ADMINISTRATIVE LAW JUDGE

RESPONDENT/
CROSS-PETITIONER

RESPONDENT

OPINION
AFFIRMING IN PART,
VACATING IN PART & REMANDING

* * * * *

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

BORDERS, Member. Chesapeake Operating, LLC (“Chesapeake”) appeals and Claude Allen (“Allen”) cross-appeals from the April 23, 2018 Opinion and Award rendered by Hon. John Coleman, Administrative Law Judge (“ALJ”). The ALJ determined Allen suffered cumulative trauma injuries to his left shoulder, right knee, cervical spine, thoracic spine, and lumbar spine, as well as noise induced hearing loss

with all conditions manifesting on September 2, 2015. The ALJ determined Chesapeake admitted to all allegations contained in the Form 101 by failing to timely submit a Form 111. The parties also appeal from the Order on the petitioners for reconsideration rendered by the ALJ on May 17, 2018.

The ALJ determined Allen suffered cumulative trauma injuries and noise induced hearing loss, and gave timely notice of the injuries. The ALJ found awarded 27.5% impairment rating is attributable to his cumulative trauma injuries and awarded 6.8% impairment rating resulted from the noise induced hearing loss. The ALJ determined Allen is not permanently totally disabled nor is he entitled to application of any statutory multipliers.

Both parties filed petitions for reconsideration which were denied, except to the extent the Opinion was amended to include application of the tier down provisions set forth in the 1994 amendment of KRS 342.730(4), by Order dated May 17, 2018.

On appeal, Chesapeake argues the ALJ erred in relying on the 8% impairment rating assessed by the university evaluator, Dr. Brittany Brose. It argues he did not consider her deposition testimony explaining the subjective nature of hearing loss testing. Chesapeake argues the ALJ should have relied on the 2% impairment rating assessed by Dr. Manning, and only awarded medical benefits for the hearing loss claim.

On cross-appeal, Allen argues the ALJ erred in applying the tier down provision to his award, in not finding he is permanently totally disabled, in not awarding temporary total disability (“TTD”) benefits, and in not applying the three

multiplier pursuant to KRS 342.730(1)(c)1. The ALJ's decision is affirmed in part, vacated in part, and remanded for additional determinations.

Allen alleged cumulative trauma injuries to his left shoulder, right knee, neck, thoracic, and lumbar spine. He also alleged noise induced hearing loss, with both conditions manifesting on September 29, 2015, Allen's last date of employment for Chesapeake. He was 61 years old, and had worked for Chesapeake, or its predecessor companies, as a pipeline and field laborer, and as a pipeline construction foreman. He testified the jobs were very physical in nature and performed in rugged terrain. The workers dug trenches for pipelines, and carried heavy loads needed to repair pipelines in rugged terrain. Allen also described working in a very noisy environment with exposure to noisy rigs and compressors, as well as from the process of removing fluid and oil from the wells. He wore a hearing aid in his right ear, prescribed years ago by Dr. Touma (first name unknown), but was not advised he suffered from hearing loss from exposure to noise at work until he saw Dr. Robert Manning. Allen worked for many years performing heavy manual labor and was having difficulty performing the work. He thereafter became a foreman, which was less physically demanding, but he still had to walk prolonged distances in the woods and was exposed to loud noises at the job site. Allen last worked for Chesapeake on September 29, 2015 when he was laid off.

Allen described constant dull aching pain and stiffness in his neck and difficulty turning his head without pain. He has occasional sharp left shoulder pain. He also has constant pain and stiffness in his entire spine. Allen was first advised by

Dr. Bruce Guberman the problems with his neck, left shoulder, mid back, low back, and right knee resulted from the cumulative trauma he received on the job.

Medical records, consisting of several diagnostic studies, and office notes of Dr. Jack Kendrick were considered by the ALJ. Dr. Kendrick's records reflect a diagnosis of osteoarthritis of the knee, neck, low back, and left shoulder on July 27, 2017. X-rays revealed degenerative joint disease of the left shoulder, cervical spine, and lumbar spine with a potential of diffuse idiopathic skeletal hyperostosis ("DISH").

Medical records from Dr. George Aitken were considered by the ALJ. Dr. Aitken saw Allen on July 13, 2016 and diagnosed pain in the left shoulder, right knee, unilateral primary osteoarthritis in the right knee, cervical disc disease, and obesity.

A medical report of Dr. Scott Harmann was considered by the ALJ. Dr. Harmann evaluated Allen on August 8, 2016. He received a history of right knee pain, arthritis, scoliosis, mobility loss, neck pain, left shoulder pain, left elbow pain, and right upper extremity pain with stiffness. Dr. Harmann performed a physical examination and assessed permanent restrictions.

Medical records of Dr. Nicholas Jurich were considered by the ALJ. The records indicate treatment from June 13, 2016 through February 14, 2017 for left shoulder complaints with a history of 35 years working as a pipeline laborer carrying heavy weights on the left shoulder. Allen also was seen for complaints of right knee pain.

Medical records from Dr. Chip Salyers were considered by the ALJ and reflected medical treatment from January 15, 2016 through September 14, 2016 for complaints of pain in the neck, thoracic spine, low back, right wrist, left shoulder, and right knee.

Medical records from Dr. Ryan Maynard were considered by the ALJ. The records reflect medical treatment for a cervical disc disorder, low back pain, left shoulder pain, right shoulder pain, hip pain, thoracic spine pain, sacral dysfunction, and right knee pain. Dr. Maynard directed Allen from heavy lifting and prolonged standing.

The August 9, 2017 Independent Medical Evaluation (“IME”) report of Dr. Guberman was considered by the ALJ. He received a history of Allen noting the onset of low back and bilateral knee pain ten to twelve years ago. Dr. Guberman received a detailed history of Allen’s job duties with Chesapeake including the physical requirements of the jobs. Dr. Guberman reviewed medical records, including diagnostic studies, and performed a detailed physical examination. Dr. Guberman diagnosed degenerative joint disease, degenerative disc disease in the neck, mid and lower back, degenerative joint disease of the right knee, and chronic strain and degenerative joint disease of the left shoulder, all of which he attributed to cumulative trauma incurred while working for Chesapeake. Dr. Guberman felt the diagnostic studies he reviewed indicated degenerative changes in the neck, mid and lower back with lack of motion in those areas. Dr. Guberman opined the studies indicated severe abnormalities, and that, combined with the loss of motion, symptoms, interference with activities of daily living, as well as functional limitations

in his neck, mid back, low back, left shoulder and both knees indicated Allen's conditions were greater than one would expect to find in a typical man of his age. Dr. Guberman opined the findings are due to the cumulative trauma Allen suffered while working for Chesapeake.

Dr. Guberman assessed a 24% impairment rating pursuant to the Fifth Edition of the American Medical Association, Guides to Permanent Impairment, ("AMA Guides") apportioned 8% to the cervical spine, 5% for the thoracic spine, 8% for the lumbar spine, 3% for the left shoulder, and 4% for the right knee. Dr. Guberman opined Allen did not retain the physical capacity to return to work.

Dr. Guberman also prepared an addendum report dated January 30, 2019. Dr. Guberman was supplied the IME report of Dr. David Jenkinson for review and comment. He opined Dr. Jenkinson failed to adequately measure Allen's range of motion in assessing an impairment for the entire spine. He also disagreed with Dr. Jenkinson's opinion that Allen's conditions were due to a condition called DISH.

The January 10, 2018 IME report of Dr. Jenkinson was considered by the ALJ. Dr. Jenkinson received a history of Allen's work history and the physical exertion required to perform the jobs. He reviewed medical records regarding Allen's medical treatment, including the IME report of Dr. Guberman and diagnostic studies, and performed a physical examination. Dr. Jenkinson diagnosed Allen as having multilevel degenerative changes in his spine, but felt the major abnormality was DISH, an idiopathic condition, not related to work. Dr. Jenkinson felt the degenerative changes seen in Allen's spine were normal for a man his age.

Dr. Jenkinson opined Allen showed no evidence of a work-related cumulative trauma injury as alleged. Dr. Jenkinson assessed a 0% impairment rating, attributable to his work, and felt Allen could return to work without restrictions. Dr. Jenkinson stated he did not agree with any of Dr. Guberman's opinions.

Medical records from Dr. Gregory Baker were considered by the ALJ. Allen was seen by Dr. Baker on May 19, 2016 with complaints of tinnitus and a history of ringing and buzzing in both ears for greater than ten years, right worse than left. Allen underwent an audiogram on May 16, 2016 indicating bilateral high frequency sensorineural hearing loss. Allen was diagnosed with bilateral tinnitus, bilateral hearing loss, and a hearing aid was recommended his right ear. No mention of the cause of the hearing loss is noted in the records.

The June 26, 2017 IME report of Dr. Robert Manning was considered by the ALJ. Dr. Manning received a history of Allen's occupational noise exposure, had him undergo an audiogram, and performed an otoscopic examination. Dr. Manning diagnosed bilateral systemic mild to profound nerve impairment hearing loss most commonly found and associated with loud noise exposure. Dr. Manning recommended hearing protection against additional exposure, and hearing aids. He assessed a 2% impairment pursuant to the AMA Guides.

The ALJ considered the November 2, 2017 University Evaluation report of Dr. Brose. Dr. Brose received a history from Allen of occupational noise exposure while employed at Chesapeake. She performed audiological testing, and performed a thorough physical examination. Based on the foregoing, Dr. Brose opined Allen had greater hearing loss than one would expect for his age. She noted

he had objective and behavioral measures consistent with a high-frequency loss and pattern, and high-frequency notch patterns consistent with noise exposure. Dr. Brose opined Allen's hearing loss was due to exposure to occupational noise while employed at Chesapeake. She assessed an 8% impairment pursuant to the AMA Guides, and recommended avoidance of exposure to loud noises and the use of bilateral hearing aids.

The deposition testimony of Dr. Brose was considered by the ALJ. Dr. Brose was questioned extensively about the discrepancy between her 8% impairment rating and Dr. Manning's 2% impairment rating. Dr. Brose admitted this was quite a discrepancy but believed her audiogram results were valid. She reiterated her opinion that Allen suffered from noise induced hearing loss due to his exposure to occupational noise at Chesapeake, and retained an 8% impairment rating as a result.

In the Opinion and Award rendered on April 23, 2018, the ALJ determined the issues of work relatedness/causation, whether due and timely notice was given, whether this claim is barred by the statute of limitations, and the allegations in the application for benefits, were deemed admitted as Chesapeake conceded the Form 111 was not timely filed. However, the ALJ determined the late filing of the Form 111 by Chesapeake, does not, in and of itself, entitle Allen to an award of benefits. The ALJ determined the failure to timely file the Form 111 was analogous to a default judgment in civil court with the burden remaining on Allen to prove the extent of the employer's liability. As a result, the ALJ determined Allen therefore sustained cumulative trauma injuries and an occupational hearing loss

manifesting on or about September 29, 2015. The ALJ also determined due and timely notice of both the cumulative trauma injuries to his left shoulder, right knee, cervical, thoracic, lumbar spine, and occupational hearing loss, was given. The ALJ thereafter awarded PPD benefits for the cumulative trauma injuries, without application of any statutory multipliers, and PPD benefits for the hearing loss, without application of any statutory multipliers, and medical benefits for both.

The ALJ entered the following findings which are set forth *verbatim*:

Benefits under KRS 342.730

The plaintiff has been found to have sustained injuries to his left shoulder and right knee as well as cervical spine, thoracic spine and lumbar spine as the result of cumulative trauma from his years of employment while working for the defendant. Under KRS 342.0011(1), “injury” is defined as any work related traumatic event or series of traumatic events, **including cumulative trauma** arising out of and in the course of employment which is the proximate cause producing a harmful change to the human organism evidenced by objective medical findings. . . . KRS 342.0011(1). In Haycraft v. Corhart Refractories, 544 S.W.2d 222 (Ky. 1976), the court held that a cumulative trauma injury could be proven by showing the nature and duration of the work probably aggravated a degenerative disc condition to the degree that it culminated in an active physical impairment sooner than would have been the case had the work been less strenuous. To that extent, the pre-existing condition is itself an injury.

In this instance, the ALJ must make a determination on the plaintiff's impairment rating attributable to the cumulative trauma injuries described by Dr. Guberman in the medical report attached to the application for benefits. Dr. Guberman has assessed a 24% impairment for the plaintiff's conditions after subtracting a portion of the right knee impairment as being prior and active in nature. Dr. Jenkinson felt the

only impairment the plaintiff had was in regards to the right knee and attributable to the prior surgery. However, Dr. Guberman described the plaintiff's degenerative changes throughout his spine was more advanced than typical and were attributable to the plaintiff's work conditions with the defendant for more than 35 years. Additionally, he recognized the prior knee surgery and reduced the impairment for the right knee for the condition. He assessed impairment for loss of motion in the left shoulder and described the degenerative changes present there. He also indicated in his supplemental report he recognized the possibility of DISH in the plaintiff's spine, but indicated the impairment he assessed was for the advanced degenerative condition related to the plaintiff's work activities. I find this opinion convincing and find the plaintiff has a 24% impairment rating after subtracting the prior active impairment for the plaintiff's right knee. Under KRS 342.730 (1) (b), the 24% impairment carries a grid factor of 1.15 resulting in a 27.6% permanent partial disability rating.

The plaintiff argues this impairment has rendered him permanently and totally disabled when one considers his age, education, past work experience, impairment and restrictions. However, the evidence also indicates that in the last several years prior to the plaintiff being laid off from his employment, he enjoyed working in a supervisory capacity. The evidence indicates the plaintiff not only worked until he was laid off from his employment wherein he earned in excess of \$90,000 per year, but also shows the plaintiff actively sought employment in a similar occupation after the layoff. Additionally, I am not persuaded by the assessment of restrictions given by Dr. Guberman. While Dr. Guberman did assess the plaintiff's impairment in a credible fashion, Dr. Jenkinson is more persuasive in regards to the plaintiff's restrictions, especially since the plaintiff was able to continue his employment until the layoff. Therefore, I am not convinced the plaintiff meets the criteria for permanent total disability.

However, I must determine whether the provisions of KRS 342.730 (1) (c) 1 or 2 apply to the

permanent partial disability award. Subparagraph 1 applies when the plaintiff lacks the physical capacity to return to the type of work being performed at the time of the injury and has not returned to earning same or greater wages. Essentially, it must be determined whether the injury has permanently altered the worker's ability to earn an income. Adams v. NHC Healthcare, 199 S.W.3d 163 (Ky. 2006). In Trane Commercial Systems v. Tipton, 467 S.W.3d 249 (Ky. 2016), the court cited to Ford Motor Company v. Forman, 142 S.W.3d 141 (Ky. 2004) reiterating that in determining whether an injured employee is capable of returning to the type of work performed at the time of the injury, the ALJ must consider whether the employee is capable of performing the actual jobs the individual performed.

In this instance, the plaintiff testified regarding his years of work as a field laborer while working on pipeline construction. The job required plaintiff to clear right-of-ways, which was very physically demanding. However, at the time the plaintiff ceased working for the defendant, he was working as a foreman in more of a supervisory role wherein he coordinated with pipeline contractors and was clearly able to perform his job duties in that capacity until the layoff. With that in mind, I find the opinion of Dr. Jenkinson to be the most persuasive and make the determination the plaintiff maintains the physical capacity to return to the particular job he was performing at the time of his injury. Additionally, since the plaintiff has not returned to work earning same or greater wages following his manifestation, he would not be entitled to the 2X multiplier. See AK Steel Corporation v. Childers, 167 S.W.3d 672 (Ky. App. 2005). The award of benefits will be based upon a straight 27.6% permanent partial bits disability.

Benefits under KRS 342.7305

The plaintiff's hearing loss allegation included some interesting testimony from the university evaluator. Dr. Brose evaluated the plaintiff for hearing loss under KRS 342.315 and opined that he had an 8% impairment under the AMA guides and a pattern of hearing loss that is compatible with long-term noise

exposure. Her opinion is entitled to presumptive weight, but may be rebutted by the opponent of the evidence. Magic Coal Company v. Fox, 19 S. W. 3d 88 (Ky. 2000). In this case, the defendant took the deposition of this evaluator and questioned her regarding the fact the plaintiff's impairment rating was assessed at 2% by his own evaluator and 8% by her only a few months later. She also explained the plaintiff's tinnitus could have played a role in the conflicting impairments. She conceded that it was unusual and that the impairment rating of Dr. Manning looked correct if the testing devices were properly calibrated. However, she also stood by her rating of 8% and opined that it would be difficult to determine if the plaintiff had a level of hearing loss sufficient to assess impairment from a remote traumatic hearing loss injury. In essence, she maintained the validity of the impairment assessed in conjunction with her evaluation under KRS 342.315.

Here, the plaintiff has testified regarding exposure to hazardous noise in the workplace and the audiograms and testing have revealed hearing loss compatible with that caused by hazardous noise exposure. As such, the plaintiff is entitled to an award of benefits based upon the 8% impairment assessed by a university evaluator.

Under KRS 342.730 (1) (b), the 8% impairment carries a grid factor of .85 resulting in a 6.8% permanent partial disability rating. The only restriction placed upon the plaintiff by the university evaluator is that he use hearing protection when exposed to noise at or away from the workplace. The plaintiff's job with the defendant was that of a foreman and involved coordination with contractors. I am convinced the plaintiff can return to this occupation while using hearing protection, when necessary. The plaintiff's award of benefits for occupational hearing loss will also be based upon the multiplier of 1X for his 6.8% permanent partial disability.

ORDER

1. For injury claim 2017-01504, the plaintiff, Claude Allen, shall beginning on September 29, 2015,

recover from the defendant-employer, Chesapeake Operating, LLC, and/or its insurance carrier, permanent partial disability benefits in the amount of \$160.14 per week for a period not to exceed 425 weeks for his 27.6% permanent partial disability.

2. For hearing loss claim 2017-01501, the plaintiff, Claude Allen, shall beginning on September 29, 2015, recover from the defendant-employer, Chesapeake Operating, LLC, and/or its insurance carrier, permanent partial disability benefits in the amount of \$39.45 per week for a period not to exceed 425 weeks for her 6.8% permanent partial disability.

3. All benefits are payable together with interest at the rate of 12% per annum on all due and unpaid installments of such compensation as of June 28, 2017 and 6% thereafter.

4. The employer shall pay all reasonable and necessary medical expenses for the cure and relief of the plaintiff's cumulative trauma injuries (left shoulder, right knee and spine) and occupational hearing loss pursuant to KRS 342.020.

Allen filed a petition for reconsideration arguing the ALJ failed to address entitlement to TTD benefits, erred in determining he was not entitled to application of any statutory multipliers and/or erred in not finding his is permanently and totally disabled. Chesapeake also file a petition for reconsideration arguing the ALJ erred in not applying the tier down provisions to the payment of benefits pursuant to the award, erred in finding that Allen retained a 24% impairment rating, and erred in not finding Allen retained a 2% impairment rating for his hearing loss instead of the 8% rating.

The ALJ entered the following order on reconsideration:

This matter is before the ALJ on petitions for reconsideration filed by the defendant and the plaintiff. The defendant's petition addresses three separate portions of the April 23, 2018, decision.

First, the defendant argues it was error for the ALJ not to apply the tier down to the 425-week award of benefits. The defendant pointed to recent WCB decisions applying the tier down. The plaintiff responded by pointing to the recent amendment to KRS 342.730 (4), which allows for full benefits up to age 70 or 425 weeks, whichever occurs first. The effective date of the amendment is not until July 14, 2018. However, it is to be applied to all claims pending at that time. Therefore, the defendant is correct that the tier down provisions are applicable unless this claim is not final by July 14, 2018. As such, the decision is amended to apply the tier down to the award of permanent partial disability benefits unless the claim is not final by July 14, 2018.

The next issue involves the ALJ's assessment of benefits based upon the impairment assessed by Dr. Guberman. The defendant misinterprets the ALJ's decision by indicating the ALJ felt he was required to accept Dr. Guberman's impairment. Instead, the ALJ set forth the reasons he found Dr. Guberman's impairment rating to be more persuasive. Therefore, this portion of the petition is denied.

Finally, the defendant requests the ALJ reconsider the award of benefits based upon the impairment assessed by the university evaluator in the hearing loss claim. The ALJ set forth the reasons for accepting the opinion of the university evaluator and the application of the university evaluator's opinion to KRS 342.7305. This request is also denied.

The plaintiff argues the ALJ erred by not awarding temporary total disability up through the time that Dr. Guberman declared the plaintiff to be at maximum medical improvement on August 9, 2017. However, this argument overlooks the lack of persuasive medical evidence that the plaintiff ceased work for reason of his cumulative trauma injury. Instead, the

plaintiff was laid off from his employment and continued looking for similar work. The ALJ found the cumulative trauma impairment did not result in the lack of physical capacity of the plaintiff to perform the job he was performing at the time of his injury. Therefore, the ALJ was simply not convinced the plaintiff met the two-part test for temporary total disability benefits at any time. This portion of the plaintiff's petition is denied.

Next, the plaintiff argues the ALJ erred by not awarding the 3X multiplier or permanent total disability benefits. The ALJ set forth the reasons that he was convinced the plaintiff maintained the physical capacity to perform his supervisory job. The ALJ simply found the plaintiff does not meet the requirements for the 3X multiplier or permanent total disability based upon the restrictions set forth in the opinion of Dr. Jenkinson. Therefore, these portions of the plaintiff's petition for reconsideration are also denied.

After considering the arguments of the parties, the Opinion and Award dated April 23, 2018, is amended to apply the tier down of benefits in the event this award becomes final prior to July 14, 2018. Otherwise, the award of benefits shall remain as written.

On appeal, Chesapeake argues the ALJ erred in determining Allen retains an 8% impairment rating for his occupational hearing loss and instead should have determined he only retains a 2% impairment rating. Allen cross-appealed arguing the ALJ erred in determining the tier down provisions apply, not awarding TTD benefits, and in not determining he was either permanently and totally disabled or was entitled to enhancement of his PPD award by the 3 multiplier.

As the claimant in a workers' compensation proceeding, Allen 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 he was successful in that 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). 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). Although a party may note evidence supporting a different outcome than 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 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 reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). If the ALJ's rulings are reasonable under the evidence, they may not be disturbed on appeal.

The evidence in this case does not compel a finding of permanent total disability, entitlement to TTD benefits, or enhancement by the three multiplier. In

this instance, the ALJ properly considered the lay and medical evidence, and specifically noted, when one considers Allen's age, education, past work experience, impairment, and restrictions, along with the fact he continued working without restrictions until he was laid off by Chesapeake, that he is not totally disabled. The ALJ found the restrictions imposed by Dr. Jenkinson more persuasive in light of the above, and found Allen is not permanently and totally disabled. In this regard, we affirm.

The evidence likewise does not compel a finding that Allen is entitled to an award of TTD benefits or enhancement of his PPD benefits by any multipliers. The ALJ, once again, thoroughly reviewed the medical and lay evidence, performed the appropriate analysis, and determined that while Allen had previously worked as a laborer in pipeline construction, a very physically demanding job, and at the time he stopped working for Chesapeake, he was a foreman. The ALJ determined this job was more of a supervisory position, consisting of coordination of pipeline contractors. He was clearly able to perform the job until he was laid off, and that, coupled with the opinion of Dr. Jenkinson, who felt Allen could return to work without restrictions, constitutes substantial evidence supporting the ALJ's determination that he was not entitled to either TTD benefits or enhancement of his PPD benefits by the three multiplier. In this regard, we likewise affirm.

Chesapeake appeals the ALJ's decision to rely on the 8% impairment rating assessed by Dr. Brose, the university evaluator. In making his determination, the ALJ noted the opinions of the university evaluator carry presumptive weight pursuant to KRS 342.315, but may be rebutted by the opponent. Magic Coal v Fox,

19 S.W.3d 88 (Ky. 2000). In making the determination to rely on the opinions of Dr. Brose, the ALJ considered both her written testimony as well as her deposition testimony, and did not find any evidence to rebut the presumption afforded her testimony. In so determining, the ALJ noted the discrepancies between the 2% rating from Dr. Manning and the 8% rating from Dr. Brose. The ALJ chose to believe the testimony of Dr. Brose was not only more persuasive than that of Dr. Manning, but that no sufficient evidence was submitted to rebut the presumptive weight to be afforded her testimony. We likewise affirm in this regard.

Allen also argues the ALJ's determination that the tier down provisions of the Act apply to the benefits awarded is erroneous. We agree with Allen that the ALJ erroneously applied the tier down provisions in this case. In this regard, we vacate and remand.

House Bill 2 became effective July 14, 2018. Section 13 of that bill amended KRS 342.730(4) to provide as follows:

All income benefits payable pursuant to this chapter shall terminate as of the date upon which the employee reaches the age of seventy (70), or four (4) years after the employee's injury or last exposure, whichever last occurs. In like manner all income benefits payable pursuant to this chapter to spouses and dependents shall terminate as of the date upon which the employee would have reached age seventy (70) or four (4) years after the employee's date of injury or date of last exposure, whichever last occurs.

In Holcim v. Swinford, 581 S.W.3d 37 (Ky. 2019), the Kentucky Supreme Court determined the amended version of KRS 342.730(4) regarding the termination of benefits at age seventy has retroactive applicability. Because the

Kentucky Supreme Court has determined the newly enacted amendment applies retroactively, we vacate that portion of the ALJ's Order on reconsideration, and remand this case to the ALJ for a determination consistent with this ruling.

Accordingly, the April 23, 2018 Opinion and Award, and the May 17, 2018 Order rendered by Hon. John Coleman, Administrative Law Judge, are hereby **AFFIRMED IN PART and VACATED IN PART**. This claim is **REMANDED** for entry of an amended opinion consistent with this Opinion.

ALL CONCUR.

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