

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: August 14, 2020

CLAIM NO. 201875579

ENOVAPREMIER OF KENTUCKY, LLC

PETITIONER

VS.

APPEAL FROM HON. BRENT E. DYE,
ADMINISTRATIVE LAW JUDGE

RODNEY ROE
and HON. BRENT E. DYE,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

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

STIVERS, Member. Enovapremier of Kentucky, LLC (“Enovapremier”) appeals from the April 3, 2020, Opinion, Award, and Order and the April 27, 2020, Order ruling on its petition for reconsideration of Hon. Brent E. Dye, Administrative Law Judge (“ALJ”). The ALJ awarded Rodney Roe (“Roe”) temporary total disability (“TTD”) benefits, permanent total disability (“PTD”) benefits, and medical benefits for his work-related left shoulder injury.

On appeal, Enovapremier asserts the ALJ erred by failing to apportion any degree of total disability to Roe's non-work-related cardiovascular condition and terminal cancer. Importantly, Enovapremier is not contesting the ALJ's finding of total disability nor is it challenging the sufficiency of the ALJ's analysis pursuant to Osborne v. Johnson, 432 S.W.2d 800 (Ky. 2000) or Ira A. Watson Depart. Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). Further, we note the parties, in the February 11, 2020, Benefit Review Conference ("BRC") Order stipulated a work-related injury occurred on June 4, 2018.

BACKGROUND

The Form 101 alleges Roe sustained work-related injuries to his "shoulder(s)" on June 4, 2018, in the following manner: "Plaintiff was unloading tires onto a conveyor belt when one became wedged. He pulled to get it loose, felt a pop in his left shoulder and severe pain."

Roe was deposed on December 2, 2019. Roe completed the twelfth grade and has vocational training in welding. Roe previously had a plumber's license, although he did not have that certification at the time of his deposition. Roe testified that his last day of work at Enovapremier was June 4, 2018, the day he injured his shoulder. Roe was formally discharged from his employment on February 7, 2019, because Enovapremier could not accommodate his restrictions. Roe testified as follows:

Q: If you happen to know, sir, if you can recall, what were your restrictions at that time?

A: I couldn't lift over 20 pounds I want to say it was. No prolonged standing, no reaching, no lifting anything

above my head or my heart, no repetitive motion with my shoulder.

Q: Okay. And do you happen to know which doctors or maybe I should say doctors, plural, had placed you under those restrictions?

A: Dr. Donegan.

Enovapremier is a satellite company for Toyota that mounts the tires onto the wheels, balances them, and then ships them to Toyota. Roe's job entailed working on approximately 2,000 tires/wheels per day. The heaviest item he had to maneuver weighed approximately 65-70 pounds. During a normal work day, Roe picked up items from floor level and lifted them over his head. Thirty to forty percent of the lifting he performed consisted of overhead lifting.

After his injury, Roe treated with Dr. Ryan Donegan. Roe had two heart attacks during this same time period. Both occurred on August 26, 2018, resulting in implantation of three stents at the University of Kentucky.

Roe testified he was not informed by Dr. Donegan why he was not a candidate for left shoulder surgery. Concerning his ongoing left shoulder problems, he testified:

A: I can't lift nothing hardly at all. I cannot lift my shoulder. That's it. That's as far as it goes. I have a hard time bathing myself. I couldn't do none of my yard work no more.

...

Q: And you were showing that you cannot lift your shoulder upwards or outwards, above shoulder level basically.

A: Yes.

Q: You can't raise it above your head?

A: No.

Q: And you said you can't lift much weight with it. How much do you think you can probably lift with it. How much do you think you can probably lift with your left hand and left arm before you say, "That's it, I can't take anymore?"

A: I would say anything over a gallon of milk. And I can't lift it – I mean, that's just reaching down from the ground and getting it and switching hands.

Q: Do you still continue to suffer from pain in the left shoulder?

A: Yes, sir.

Q: Is that constant?

A: Pretty much, yes. It even wakes me up during the night.

Q: How would you rate that pain on a scale of one to ten where one is virtually no pain at all and ten is the worst pain you can imagine? On average, what is your pain like?

A: About a five or six.

Q: Okay. And when you have a bad episode maybe you try to lift a little too much or you sit on it funny or whatever the case may be, how bad can it get?

A: Eight, nine.

Q: How often do you find yourself having those bad episodes in a course of a day or in a week? If you could, give my [sic] a ballpark estimate.

A: At least once a day.

Q: When you have one of those bad episodes, what do you typically do to get it back down to its baseline of pain?

A: I lay down.

Q: Do you feel like your overall condition in your left shoulder is getting better with time? Maybe it's getting worse with time or maybe you feel like I hit a wall, it's not changing one way or the other?

A: It seems to be getting worse but, I mean, it's not drastic changes. It's just slowly – just, you know, I can't lift something as high as I used to or I can't raise my arm. It's kind of handwashing with no hand.

Q: You mentioned you have some difficulties in terms of getting up in the morning using the shower or the bathtub, grooming yourself, getting dressed. When you have those kind of problems, what you [sic] do you do?

A: Holler for my wife.

Q: You require her assistance from time to time?

A: Yes, sir.

Q: Often do you find yourself requiring her assistance? Is it [sic] that something – something you need every day or just occasionally?

A: Three or four times a week.

Roe provided the following regarding a return to his job at Enovapremier:

Q: Let me ask you this: Do you think you could return to your former position at EnovaPremier?

A: No, sir.

Q: What do you think would be either difficult or outright impossible for you to do there?

A: Lifting the tires. Lifting period.

Q: You can't do that kind of work with your left shoulder anymore?

A: No. That's all I've done is lifting in construction all my life. Plumbing you got to lift pipe over your head.

Q: I was going to say, as we talked about your work history, it looks like most of your adult life has been plumbing, construction, working for Enovapremier. Did you ever have any kind of sit-down job as an adult?

A: No, sir.

Q: Ever have any kind of light-duty work as an adult that you had to do on a recurrent basis? By that, I mean did you ever have a position again as an adult where you didn't have to do a lot of lifting or physical activities?

A: No, sir.

Roe testified that due to his cardiovascular condition and cancer, he would “probably have to be retrained or be trained for something,” and that, “if possible,” he would be looking for a job. He further testified as follows:

Q: Maybe my last question for you here – last set of questions. Under the Workers' Compensation Act, vocational retraining rehabilitation is potentially available for someone like yourself. Now, given your specific – your situation, is that anything you think you would have any interest in at this time, some kind of vocational rehabilitation or retraining, additional education?

A: Well, to be honest, I'm not the sharpest tool in the shed. If it's not actually physically shown to me – as far as reading something, I'm not very good at...

Q: You do better by observing something other than reading about it?

A: Yes. I'm not a real-people person.

Q: I guess what I was getting at, if the Judge were to award you vocational rehabilitation and retraining, said, 'Look, pick a facility near your home, wherever it might be and go learn a new trade or a new occupation, is that something you have any interest in at this time?

A: If I was physically able, yes. At this time, I'm not.

Q: Obviously, your shoulder impedes you, your other medical conditions would also make it difficult for you to learn a new trade, do you think?

A: Yes. My short-term memory is – I'm 52 years old. It don't sound old. All I've done is hard physical labor all my life. That's all I know.

At the March 9, 2020, hearing, Roe offered the following as to whether left shoulder surgery had been recommended: "Yes and no. It was mentioned but with my age and where it was at, and I was, I was led to believe what I was told that it would be a 50/50 chance. And at my age and everything the way it was done, I've actually got a torn disc in my AC joint and that's, that's basically it." Regarding a return to the type of work he was performing at the time of the injury or returning to any type of work performed in the past, Roe testified as follows:

A: No, sir. I've done physical labor all my life. I've worked like a dog, and I just [sic] physical labor's all I know. I'm not as much a people's person. You know, I just, something needs done, I'll go do it. Instead of asking this one to do it or that one to do it, I would rather do it my own. That a way I know it's done right. I was promoted from Enovapremier at about six months from a team member to a team leader which ran the line. And I stepped down and went to get on first shift so I could spend more time with my family.

Roe was diagnosed with Stage 4 small cell lung cancer in or near August 2019.

Enovapremier filed the February 4, 2019, "Upper Extremity Impairment Rating Evaluation" of Dr. Donegan. After performing a medical records review, Dr. Donegan diagnosed symptomatic AC joint disease and assessed a 3% impairment rating.

Roe filed the October 21, 2019, Independent Medical Examination (“IME”) report of Dr. Frank Burke. After receiving a comprehensive history and performing a physical examination and medical records review, Dr. Burke diagnosed “an acute left AC joint injury and partial rotator cuff tear as a result of a work-related injury on 06/04/2018.” Dr. Burke opined that, because of Roe’s “deteriorating medical conditions, he is unable to proceed with surgery if recommended.” He assessed a 10% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment (“AMA Guides”). Dr. Burke believed Roe cannot return to the work he was performing at the time of his injury and should avoid reaching, crawling, pulling, or lifting with his left upper extremity. He declared that, “[a]t best, he would be sedentary with the use of his right upper extremity.”

The February 11, 2020, BRC Order lists the following contested issues: TTD benefits; KRS 342.730 benefits; PTD; AMA Guides’ proper use; unpaid or contested medical expenses; entitlement to medical benefits.

The April 3, 2020, decision contains the following *verbatim* analysis regarding permanent total disability:

I. TTD Benefits

KRS 342.0011(11)(a) establishes TTD means, “...the condition of an employee who has not reached [MMI] from an injury and has not reached a level of improvement that would permit a return to employment.” (emphasis added). The word “and” indicates KRS 342.0011(11)(a) contains a two-prong test, which claimants must both satisfy, to receive TTD benefits. Double L Const., Inc. v. Mitchell, 182 S.W.3d 509 (Ky. 2005); Magellan Behavioral Health v. Helms, 140 S.W.2d 579 (Ky. App. 2004).

A) MMI

A claimant's condition reaches MMI, when it stabilizes to the point that an impairment is reasonably permanent. Tokico (USA), Inc. v. Kelly, 281 S.W.3d 771 (Ky. 2009). The MMI date is a medical question, and reserved for medical expert witnesses. KY River Enters., Inc. v. Elkins, 107 S.W.3d 206 (Ky. 2003); Lanter v. Kentucky State Police, 171 S.W.3d 45, 52 (Ky. 2005).

Just because a claimant requires additional medical treatment does not mean he has not reached MMI. W.L. Harper Const. Co. v. Baker, 658 S.W.2d 202 (Ky. App. 1993). Determining when the claimant's condition stabilized, and, thus, reached MMI, is not an exact science. It depends, to a certain extent, on the date a physician actually examines the claimant.

Roe reached MMI on January 16, 2019. This is the date that Dr. Donegan examined Roe, and issued an MMI opinion. Dr. Donegan had treated Roe's left shoulder since July 9, 2018. He had closely monitored Roe's left shoulder condition.

Dr. Burke did not issue a specific MMI date. He simply indicated Roe was at MMI when the October 21, 2019 exam occurred. Dr. Burke did not address whether Roe had reached MMI at an earlier time point, and, if so, when and why. The ALJ finds Dr. Donegan's specific MMI opinion more credible and persuasive than Dr. Burke's general one.

B) Improvement level

KRS 342.0011(a)'s second prong denies TTD benefits to individuals that have not yet reached MMI or fully recovered, but have improved to the extent they can return to employment. Mitchell, *supra*. The Kentucky Supreme Court subsequently interpreted KRS 342.0011(11)(a)'s "return to employment" language and stated, "[i]t would not be reasonable to terminate the benefits of an employee when he is released to perform minimal work but not the type that is customary or that he was performing at the time of his injury." Central Kentucky Steel v. Wise, 19 S.W.3d 657 (Ky. 2000). Thus, if "minimal work" is not a claimant's customary work, or the work he/she performed when the injury occurred,

then it does not constitute the claimant's condition reaching an improvement level that would permit a "return to employment" under KRS 342.0011(11)(a).

The high Court then explained that Wise does not mean that workers that are unable to perform their customary work are always entitled to TTD benefits. Livingood v. Transfreight, 467 S.W.3d 249 (Ky. 2015). The Supreme Court further explained this principle in Trane Commercial Systems v. Tipton, 481 S.W.3d 800 (Ky. 2016). The Tipton Court stated, "...it is also not reasonable, and it does not further the purpose for paying income benefits, to pay TTD benefits to an injured employee who has returned to employment simply because the work differs from what she performed at the time of injury." Id.

The second TTD prong requires a two-step analysis. The first step is determining what the claimant's customary work – i.e. work within his/her physical restrictions and for which he/she had the experience, training, and education - was with the employer. The second step is determining whether the claimant's condition had reached an improvement level, allowing him/her to perform his/her customary work, before he/she reached MMI.

Roe's customary work included lifting and moving heavy tires. This required moving and lifting up to approximately 70 pounds. Roe explained that, during an eight-hour shift, he spent approximately four hours lifting and moving things. He also performed overhead work approximately 40% of the time.

The ALJ finds Roe's left shoulder condition did not reach an improvement level, allowing him to perform his customary work, before the January 16, 2019 MMI date. Dr. Donegan had Roe under physical restrictions/limitations that included no repetitive lift. Roe's credible testimony also establishes he could not perform his job's lifting requirements during this time period.

C) Weekly amount & duration

Enovapremier owes TTD benefits from June 5, 2018, the day after Roe stopped working, through January 15,

2019, the day before he reached MMI. Roe's \$676.80 Aww produces a \$451.20 weekly TTD rate. Enovapremier is entitled to a full, dollar-for-dollar, credit, for the voluntary TTD benefits it paid, against any past-due disability benefits owed. *See Triangle Insulation v. Stratemeyer*, 782 S.W.2d 628 (Ky. 1990).

II. Benefits per KRS 342.730, including PTD

The claimant "...bears the burden of proving each of the central elements of his cause of action." *Burton v. Foster Wheeler Corp.*, 72 S.W.3d 925 (Ky. 2002). The ALJ must determine whether Roe has a PTD or only permanent partial disability ("PPD"). This analysis includes determining whether he has a permanent impairment rating, and analyzing not just his physical capacity to perform the pre-injury work, but any work.

A) PTD benefits

An ALJ's has broad discretion, when making findings and determining, whether a claimant is PTD. *Seventh Street Road Tobacco Warehouse v. Stillwell*, 550 S.W.2d 469 (Ky. 1976); *Colwell v. Dresser Instrument Div.*, 217 S.W.3d 213, 219 (Ky. 2006). The ALJ may rely on a claimant's self-assessment, concerning his ability to provide income services, on a regular and sustained basis, in a competitive economy, when determining whether the claimant has a PTD. *Transp. Cabinet v. Poe*, 69 S.W.3d 60 (Ky. 2001); *Transp. Cabinet v. Guffey*, 42 S.W.3d 618 (Ky. 2001).

A claimant's self-assessment may constitute substantial evidence. *Id.* A claimant's testimony, however, does not compel any particular result. *Hush v. Abrams*, 584 S.W.2d 48 (Ky. 1979). Moreover, an interested witness's testimony, even if un-contradicted, does not bind the fact-finder. *Grider Hill Dock v. Sloan*, 448 S.W.2d 373 (Ky. 1969); *Bullock v. Gay*, 177 S.W.2d 883 (Ky. 1944).

KRS 342.0011(11)(c) indicates that an injured worker has a PTD if "...due to an injury, [he] has a permanent disability rating and has a complete and permanent inability to perform any type of work as a result of an injury...[.]" KRS 342.0011(34) indicates that work is "...providing services to another in return for

remuneration on a regular and sustained basis in a competitive economy.”

KRS Chapter 342 does not define the term regular. The Supreme Court, while analyzing its use in KRS 342.610(2)(b), has stated that “[r]egular’ generally means customary or normal, or happening at fixed intervals.” Daniels v. LG&E Co., 933 S.W.2d 281 (Ky. App. 1996). The Act also does not define the term sustained. When a statute does not define a specific term, courts use the term’s plain meaning unless doing so would result in an absurd result. *See* Bailey v. Reeves, 662 S.W.2d 832 (Ky. 1984); Commonwealth v. Montague, 23 S.W.3d 629 (Ky. 2000). Merriam-Webster dictionary defines sustained as, “maintained at length without interruption or weakening: [l]asting, [p]rolonged.” “sustained.” Merriam-Webster.com., Merriam-Webster, 2018. (Web. Apr. 2, 2020).

KRS Chapter 342 does not define the term competitive. Merriam-Webster dictionary defines competitive as, “relating to, characterized by, or based on competition.” It defines competition as, “the effort of two or more parties acting independently to secure the business of a third party by offering the most favorable terms.” “competitive” and “competition.” Merriam-Webster.com., Merriam-Webster, 2018. (Web. Apr. 2, 2020). Accordingly, “work” essentially means providing services to another in return for payment on a customary and prolonged basis in an economy where two or more parties are acting independently to secure business by offering the most favorable terms.

Roe has the burden and must prove: (1) he sustained an “injury;” (2) the injury produced a permanent disability rating {impairment rating x statutory factor}; (3) he has a complete and permanent inability to perform any type of work due to the injury; and (4) the work injury caused the PTD. City of Ashland v. Stumbo, 461 S.W.3d 392 (Ky. 2015).

i. Injury

The parties stipulated that Roe sustained a work-related left shoulder injury. The ALJ finds Roe can prove a PTD’s first necessary element.

ii. Permanent disability rating

Roe's work injury produced a permanent disability rating. The ALJ finds Roe has a 10% permanent left shoulder impairment rating. Dr. Burke calculated this rating after measuring Roe's left shoulder motion with a goniometer. He also made three measurements. The evidence shows Dr. Burke appropriately utilized the AMA Guides, Fifth Edition.

Dr. Burke assessed the 10% permanent impairment rating more than nine months after the shoulder measurements were made that Dr. Donegan used. The ALJ finds Dr. Burke's more recent measurements and findings are more credible and persuasive. Dr. Burke's measurements are approximately five months old, whereas Dr. Donegan's measurements are approximately a year and three months old.

Roe's credible testimony supports Dr. Burke's most recent and more restrictive measurements. Roe explained that he can barely use his left arm. He cannot lift it very high without experiencing severe pain. After weighing this issue's evidence, the ALJ finds Dr. Burke's 11% rating is more credible and persuasive.

A 10% permanent impairment rating produces an 8.50% disability rating ($.10 \times 0.85 \times 100$). Roe can satisfy the second element necessary to prove a PTD.

iii. Complete inability to perform work

The ALJ must weigh and balance the evidence concerning whether Roe has the ability to provide services, for income, on a regular and sustained basis, in a competitive economy. McNutt Const. Co. v. Scott, 40 S.W.3d 854 (Ky. 2001). When determining this, the ALJ must evaluate Roe's dependability and any physiological restrictions that would prohibit him from using his skills and vocational capabilities. Osborne v. Johnson, 432 S.W.2d 800 (Ky. 1968).

The ALJ must also consider several factors, including Roe's age, education level, intellect, vocational skills, and his post-injury emotional, physical, intellectual, and vocational, statuses, as well as how these factors all interact. Ira A. Watson Depart. Store v. Hamilton, 34

S.W.3d 48 (Ky. 2000). It also includes the likelihood that Roe can resume working under normal employment conditions. *Id.*

After weighing all these factors, the ALJ finds that Roe has met his burden, and proved that he has a complete inability to perform work. The ALJ finds Roe that Roe has a PTD. The evidence's totality supports this find.

Roe is currently 52 years old, and was almost 51 years old when his injury occurred. The legislature has stated and codified that advancing age adversely affects one's earning capacity. *See* KRS 342.730(1)(c)3. KRS 342.730(1)(c)3, in pertinent part, states that "...advancing age impact[s] an employee's post-injury earning capacity...[.]" This is the reason that the legislature added PPD enhancements if a worker, who does not retain the physical capacity to perform his pre-injury work, was over 50 years old when his injury occurred.

Although this statute pertains to PPD benefits (not PTD ones), the ALJ logically infers the legislature determined that advancing age adversely affects employee's post-injury earning capacity, because it make it more difficult for the employee to find "work" opportunities, and equally applies to PTD analysis. This is especially true when the 50-year-old worker has limited education, significant restriction/limitations, and non-transferable skills. The ALJ determines Roe's age, especially when considered with the other factors, favors a PTD finding.

Roe has limited education. He did not even complete high school. Roe explained that he dropped out, and joined the Marines. However, while serving his country, Roe obtained the required credits to complete high school. Although Roe testified that he has a high school diploma, it sounds like he actually has a GED. Roe, thus, completed the basic requirements for obtaining a high school diploma or GED. The ALJ reasonably infers that Roe only has abilities to perform basic academic abilities. As Roe stated, "...to be honest, I'm not the sharpest tool in the shed." The ALJ determines Roe's limited education, especially when considered with the other factors, favors a PTD finding.

Roe has limited vocational skills. He did not obtain any specialized military training. Roe explained that he was

an ammunition technician. This only required guarding the ammunition, and issuing it out. Several years ago, Roe obtained his plumber's license through on-the-job training. His certificate is no longer valid. Moreover, Roe has not performed plumbing work since approximately 2013. Roe further explained that his plumbing work required heavy lifting and other strenuous activities. Roe's limited education and vocational skills will adversely affect his ability to obtain a more sedentary job, which his condition requires.

His employment history primarily includes performing manual plumbing, construction, and factory work. He also served in the United States Marine Corps. Roe testified that these jobs have required hard physical labor, including lifting. Roe indicated these jobs have not provided him the skill set to perform lighter-duty work. Rose specifically stated, "I don't think I have the skill set. I'm not a people person so sitting behind a desk or something like that, I don't have any education, anything. Only thing I've ever done my life, in my life is hard, physical labor." The ALJ finds Roe highly credible. The ALJ determines Roe's limited vocational skills, especially when considered with the other factors, favors a PTD finding.

Roe's left shoulder requires significant restrictions/limitations. The ALJ finds Dr. Burke's recommended restriction/limitations more credible than the ones that Dr. Donegan recommended. Dr. Burke assessed Roe's physical abilities more than nine months after Dr. Donegan. Dr. Burke's assessment is approximately five months old, whereas Dr. Donegan's is approximately a year and three months old. Roe's credible testimony supports Dr. Burke's most recent and more restrictive physical limitations.

Roe explained that he can barely use his left arm and experiences constant pain. He cannot lift his left arm/shoulder very high without experiencing severe pain. Roe experiences an eight pain level, on a 0 to 10 pain-scale, when he lifts his left arm/shoulder near his heart. At rest, he experiences a three or four pain level.

The weight amount Roe can comfortably lift is equivalent to a gallon of milk. Roe's constant pain affects his sleeping ability. The pain wakes Roe up at least five times

a week. Roe can barely dress himself. He requires his wife's assistance several times a week just to perform basic activities, such as showering, grooming, and getting dressed. Roe occasionally has to lie down to rest.

Roe's credible testimony better supports Dr. Burke's suggested restrictions/limitations. Dr. Burke indicated that Roe even potentially requires surgery. Concerning Roe's physical abilities, Dr. Burke stated, "...I do not think he can return to work at which he was injured safely. He should avoid reaching, crawling, pulling, or lifting with the left upper extremity. At best, he would be sedentary with the use of his right upper extremity." Dr. Burke, thus, indicated Roe should not perform activities using his left upper extremity. The ALJ determines Roe's limited physical abilities, especially when considered with the other factors, favors a PTD finding.

The overwhelming evidence shows that Roe's left shoulder condition currently prevents him from providing services on a customary and prolonged basis in a competitive economy. Roe does not have the skill set to perform sedentary work. He can barely use his left arm. It produces significant symptoms, and requires Roe to sometimes take breaks and lay down. Roe is not a dependable worker. The ALJ concludes that Roe's left shoulder injury has left him permanently totally disabled.

iv. The 6/4/18 acute trauma caused the PTD

KRS 342.730(1)(a), in pertinent part, states that "[n]on-work-related impairment and conditions...shall not be considered in determining whether the employee is totally disabled for purposes of this subsection." A claimant is entitled to a PTD award despite prior or subsequent disability, if the work injury independently produces a total occupational disability. See Nally and Hamilton Enterprises v. Smith, No. 2004-SC-0568-WC (Ky. Feb. 17, 2005)(unpub.). The Smith Court stated that "[a]n injured worker is not penalized by the existence of a pre- or post-injury condition if there is substantial evidence that the compensable injury, by itself, would be totally disabling." *Id.*

Since sustaining his significant left shoulder injury, Roe, unfortunately, has had two heart attacks, as well as received a terminal cancer diagnosis. Nonetheless, the

ALJ finds that Roe's left shoulder injury would independently cause a PTD. The ALJ's previous findings and the case law support this decision.

An independent, non-compensable, disability will not affect a claimant's disability benefits, as long as he/she satisfies the appropriate standard. See Daugherty v. Watts, 419 S.W.2d 137, 138 (Ky. App. 1967). The Daugherty Court stated that "[w]e do not believe that our workmen's compensation law contemplates that any disability an employee sustains in the course of and arising out of his employment shall be cancelled out, for compensation purposes, by disability from another cause." Id.

The Daugherty Court further stated that "...it is our opinion that it is not within the intent of workmen's compensation statutes that an independent, non-compensable disability cause shall in any way reduce the force and effect of a compensable disabling cause." Id. Roe's heart condition and terminal lung cancer does not affect his limited left shoulder abilities. These conditions do not lessen the fact that Rose can barely move and use his left shoulder. They do not change the fact that Roe requires significant left shoulder restriction/limitations, as well as his wife's assistance performing basic activities.

The ALJ determines that Roe's left shoulder condition in-and-of-itself produces a permanent total disability. This is the case even if Roe had not had two heart attacks and received a terminal cancer diagnosis. The left shoulder injury, in-and-of-itself, caused the PTD. Although the facts are different, and the ALJ does not use it for *stare decisis* purpose, the Chapman case contains a fitting quote. R.C. Durr, Co., Inc. v. Chapman, 563 S.W.2d 743, 745 (Ky. App. 1978). The Chapman Court stated that:

Evidence of sufficient probative value tended to show that a 52 year old man who had worked all his life doing strenuous mechanical work could no longer lift heavy objects. We conclude that a sufficient evidentiary foundation existed to support but not compel the Board's finding Chapman incapable of performing any kind of work of regular employment and therefore, totally disabled.

The overwhelming evidence establishes Roe's significant left shoulder injury independently has caused a permanent total disability. He is entitled to such benefits.

Enovapremier's petition for reconsideration made the same arguments it makes on appeal. In the April 27, 2020, Order denying the petitions, the ALJ supplied, in relevant part, the following additional analysis:

...

The ALJ did not commit any patent or typographical errors. He properly performed his required duties. The ALJ respectively asserts that he accurately reviewed, summarized, and understood the evidence. He also cited the correct legal authority and standards. The ALJ made all the appropriate factual findings, and applied them to the correct legal standards.

...

The Defendant asserts that the ALJ committed a patent error, because the ALJ did not apportion the Plaintiff's disability between his work-related shoulder condition and his non-work-related ones, which includes heart issues and cancer. The Defendant "...contends that the judge's refusal to apportion any degree of disability to these undeniably debilitating, and unfortunately likely fatal, non-work-related health conditions constitutes patent error."

The ALJ respectfully disagrees. The Defendant's petition does not highlight any patent or typographical errors. It primarily reargues the claim's merits. The undersigned ALJ has already considered and weighed these same arguments.

On page 15, the ALJ acknowledged and stated that "[s]ince sustaining his significant left shoulder injury, Roe, unfortunately, has had two heart attacks, as well as received a terminal cancer diagnosis. Nonetheless, the ALJ finds that Roe's left shoulder injury would independently cause a PTD." The ALJ provided and explained his analysis.

The ALJ determined that the Plaintiff's left shoulder injury independently produced his permanent total disability. This is despite his unfortunate heart and cancer conditions. Over 70 years ago, Kentucky's highest court stated, "[w]here an employee has sustained a compensable injury, compensation will not be denied or the award reduced because of disease originating thereafter, even though such disease would totally incapacitate him." Dept. of Highways v. McCoy, 193 S.W.2d 410 (Ky. 1946).

Subsequent Courts have adopted this same principle. In 1967, Kentucky's highest Court stated that "[w]e do not believe that our workmen's compensation law contemplates that any disability an employee sustains in the course of and arising out of his employment shall be cancelled out, for compensation purposes, by disability from another cause." Daugherty v. Watts, 419 S.W.2d 137, 138 (Ky. App. 1967).

In 2005, the Kentucky Supreme Court stated that "[a]n injured worker is not penalized by the existence of a pre- or post-injury condition if there is substantial evidence that the compensable injury, by itself, would be totally disabling." Nally and Hamilton Enterprises v. Smith, No. 2004-SC-0568-WC (Ky. Feb. 17, 2005)(unpub.).

The Smith Court noted that "[a]lthough acknowledging that the subsequent stroke and heart attack were 'serious medical events' and that the claimant did not return to work after the stroke, the ALJ found the visual impairment, by itself, to be totally disabling." Id.

This is exactly what the undersigned ALJ determined in the present case. Although the Plaintiff's subsequent heart attacks and cancer conditions were serious medical events and the Plaintiff did not return to work after them (or before they occurred for that matter), the ALJ found the left shoulder injury, by itself, is totally disabling.

The fact Plaintiff's subsequent non-work-related conditions prevented a potential left shoulder surgery are not persuasive. First, there is not any reliable evidence that the Plaintiff's treating physician concretely recommended surgery. Secondly, even if the Plaintiff had the ability to undergo the surgery, the law does not

require that he undergo an invasive procedure that potentially poses a danger to life and health.

Third, there are not any guarantees that a potentially recommended surgery would completely resolve the Plaintiff's left shoulder issues. Not every surgery successfully fixes a problem. In fact, some surgeries place individuals in a worse position. The ALJ cannot speculate.

Finally, a claimant's pre-existing frailty, weakness, or sensitivity does not decrease the employer's liability, even if the claimant's pre-existing condition magnified the injury's results above their typical consequences. Inland Steel Co. v. Mullins, 367 S.W.2d 250, 253 (Ky. 1963). The Mullins Court stated that "[w]e have said that industry takes a man as it finds him [citation omitted], and this Court has held that the Workmen's Compensation Act is not limited in its application to employees in good health." Id.

The ALJ found and still finds that the Plaintiff's current left shoulder condition, in-and-of-itself, has produced a permanent total disability. The evidence's totality supports this finding. The decision contains the ALJ's analysis and outlines this finding's evidence.

ANALYSIS

On appeal, Enovapremier asserts the ALJ erred by failing to find Roe's total disability is due in part to his non-work-related cardiovascular condition and/or terminal cancer. We disagree and affirm.

Roe, as the claimant, bore the burden of proving every element of his claim, including entitlement to PTD benefits. Wolf Creek Collieries v. Crum, 673 S.W.2d 735, 736 (Ky. App. 1984). Because he was successful in that burden, the question on appeal is whether the ALJ's decision is supported by substantial evidence. Id. "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 is 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 are so unreasonable under the evidence they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, supra. 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).

After analyzing the evidence, the ALJ determined that, pursuant to Daugherty v. Watts, 419 S.W.3d 137 (Ky. App. 1967), Roe's left shoulder injury,

standing alone, rendered him permanently totally disabled. As noted by the ALJ, the Kentucky Supreme Court's predecessor, the Kentucky Court of Appeals, held in Daugherty that "it is not within the intent of the workmen's compensation statutes that an independent, non-compensable disabling cause shall in any way reduce the force and effect of a compensable disabling cause." Id. at 138. We further highlight the following dicta pertinent to the case *sub judice*: "There seems to be little authority on the question but it is that if a workman has suffered a compensable injury he will not be deprived of compensation merely because of the existence of an independent, concurrent cause of disability. See 58 Am. Jur., Workmen's Compensation, sec. 338, p. 810." Id.

The ALJ's comprehensive analysis pursuant to Osborne, supra, and Ira A. Watson Department Store, supra, offers insight into the rationale behind his conclusion Roe's left shoulder injury solely causes him to be permanently totally disabled. Significantly, Enovapremier has not challenged the sufficiency of the ALJ's analysis required by Osborne and Ira A. Watson Department Store. Among the many factors persuasive to the ALJ were the restrictions assigned by Dr. Burke and Roe's employment history. Dr. Burke opined Roe should avoid reaching, crawling, pulling, or lifting with his left upper extremity and should be sedentary while using only his right upper extremity, restrictions wholly incompatible with Roe's employment history. As Roe testified in his deposition, he has only performed jobs requiring physical labor such as work involved in plumbing, construction, and the tasks performed for Enovapremier. The ALJ believed Roe's left shoulder injury causes him significant pain. As the ALJ noted in the April 3, 2020, Opinion, Award, and Order,

Roe “can barely use his left arm and experiences constant pain. He cannot lift his left arm/shoulder very high without experiencing severe pain.” Roe has difficulty sleeping at night because of the pain. Roe’s left shoulder pain not only precludes him from carrying out normal daily activities such as dressing himself, an activity for which he is required to solicit his wife’s assistance, but, according to Dr. Burke, precludes him for performing any type of work requiring the use of his left arm.

Also persuasive to the ALJ is Roe’s advancing age of fifty-two years and the fact that his education extends only through the twelfth grade. These factors comprise substantial evidence not only supporting the ALJ’s conclusion Roe met his burden of proving a complete inability to perform work, a finding Enovapremier has not challenged on appeal, but also supporting the ALJ’s determination Roe’s left shoulder injury causes him to be permanently totally disabled.

Enovapremier points to Roe’s deposition testimony that, if it were not for his non-work-related cardiovascular condition and terminal cancer, he would “probably” have to be retrained and, “if possible,” look for work. Enovapremier argues that this testimony contradicts the finding Roe has a complete inability to perform any type of work. We also acknowledge Dr. Burke’s comment, in the October 21, 2019, IME report, that “[a]t best, [Roe] would be sedentary with the use of his right upper extremity.” However, the Form 104 reveals Roe worked in plumbing before working for Enovapremier. Roe confirmed his employment history entails performing only manual labor. During his deposition, Roe testified that he has never worked a sedentary job, is not a people person, is not good at learning through reading, and has poor short-term memory. Roe also testified he is not “the sharpest tool in the shed.”

At the hearing, Roe reiterated that he has exclusively performed physical labor. The ALJ was free to give significant weight to Roe's testimony regarding the extent of his occupational disability, which includes testimony indicating sedentary work would not be a good fit for Roe. Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979). The ALJ was also free to conclude that Roe does have the skill set to engage in sedentary work. This determination is supported by substantial evidence, and we affirm the ALJ's ultimate conclusion that Roe's left shoulder condition prevents him from providing services on a customary and prolonged basis in a competitive economy.

We take issue with Enovapremier's argument the ALJ failed to recognize the severity of Roe's non-work-related cardiovascular condition and terminal cancer and how these conditions impacted surgical repair of Roe's left shoulder. The ALJ addressed Roe's non-work-related cardiovascular condition and cancer in both the April 3, 2020, Opinion, Award, and Order and the April 27, 2020, Order demonstrating an appreciation for the severity of these conditions. He acknowledged Roe's non-work-related cancer diagnosis as "terminal" and described Roe's non-work-related cardiovascular condition and terminal cancer as "serious medical events." However, despite the severity of Roe's non-work-related cardiovascular condition and terminal cancer, the ALJ was not obligated to assign any responsibility to these two conditions as partial causes of Roe's totally disabling condition. As the Court stated in Daugherty, if the medical evidence indicates that a work-related condition causes a claimant to be totally disabled, "it is immaterial that he may suffer from other ailments which, too, would alone disable him." Id. at 138.

Here, the ALJ has determined that the medical and lay evidence indicate Roe's work-related shoulder condition causes him to be permanently totally disabled.

Further, despite Enovapremier's assertions to the contrary, in the April 27, 2020, Order, the ALJ adequately addressed the issue of Roe's alleged inability to undergo left shoulder surgery due to his non-work-related cardiovascular condition and terminal cancer. The ALJ correctly noted the law does not require a claimant to undergo invasive surgeries in order to mitigate potential awards of income benefits. Also, as noted by the ALJ, there is no medical opinion from either Drs. Burke or Donegan indicating surgery on Roe's left shoulder was recommended. Further, only Dr. Burke opined Roe is unable to proceed with surgery, *if recommended*, "[b]ecause of his deteriorating medical conditions. Dr. Donegan did not offer this same opinion in his records. Roe's deposition testimony reveals Dr. Donegan never informed him why surgery was not recommended. Notably, at the hearing, Roe testified he was informed his advancing age was the determinative factor. In other words, Roe did not testify he was informed shoulder repair surgery was contraindicated because of his non-work-related cardiovascular condition or terminal cancer.

Based upon the evidence, the ALJ was not required to apportion any of Roe's inability to be gainfully employed to his cardiovascular condition or cancer. This was a purely discretionary determination. The ALJ thoroughly analyzed the record and conducted a cogent analysis pursuant to Osborne and Ira A. Watson Department Store, and demonstrated a firm understanding of the Court's holding in Daugherty, supra. He concluded that, based upon the medical and lay testimony, Roe's non-work-related "heart condition and terminal lung cancer does not affect his limited left

shoulder abilities,” and Roe’s left shoulder injury alone renders him permanently totally disabled. This determination is supported by substantial evidence; consequently, it will not be disturbed on appeal.

Accordingly, on all issues raised on appeal, the April 3, 2020, Opinion, Award, and Order and the April 27, 2020, Order overruling the petitions for reconsideration are **AFFIRMED**.

ALVEY, CHAIRMAN, CONCURS.

BORDERS, MEMBER, NOT SITTING.

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