

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: October 22, 2021

CLAIM NO. 201855483

GREG LAWREY

PETITIONER

VS.

**APPEAL FROM HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE**

KENWAY DISTRIBUTORS;
HON. DANIEL CAMERON,
ATTORNEY GENERAL OF KENTUCKY; and
HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

AND

KENWAY DISTRIBUTORS

PETITIONER

VS.

GREG LAWREY and
HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
AFFIRMING**

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

BORDERS, Member. Greg Lawrey (“Lawrey”) and Kenway Distributors (“Kenway”) appeal from the July 12, 2021 Opinion, Award and Order and the July 31, 2021 Order on Petition for Reconsideration rendered by Hon. Chris Davis, Administrative Law Judge (“ALJ”). Lawrey argues the amendments to KRS 342.730(4) should not retroactively apply or are unconstitutional as violating the contracts clause of the United States and Kentucky Constitutions, or as an exercise of arbitrary power in contravention of section 2 of the Kentucky Constitution. Kenway argues the ALJ erred in finding Lawrey sustained a permanent total disability (“PTD”). For reasons to be set forth, we affirm.

Lawrey testified by deposition on November 11, 2020 and at the hearing held May 19, 2021. Lawrey is 65 years old and is a high school graduate. He has training as a machinist and in auto mechanics. His work history includes driving tractor-trailers for Heritage Environmental and later as a supervisor. Lawrey worked for Acme Auto Electric from 1992 through 1999 as an auto mechanic. Lawrey began working for Kenway on June 30, 2009 as a truck driver/delivery person. He delivered and unloaded cleaning and janitorial supplies to businesses and schools. He worked with weights from one pound up to a ton. He had to move 55-gallon drums. He used a pallet jack to move pallets which weighed up to a ton. When he arrived at work, his truck was loaded and he made deliveries. When he was not making deliveries, he was at the warehouse unloading trucks that came in, loading trucks to go out, putting stock away, and pulling orders for delivery. On

September 12, 2018, he was unloading a truck with a pallet jack when he heard and felt a pop in his right arm/shoulder and experienced pain in his neck.

Lawrey continues to have right shoulder pain radiating into his arm and down to his fingers. He is unable to lift his right arm above shoulder level. He has no strength in his right arm and his hand goes numb and turns cold. He has not worked since January 3, 2020. Lawrey receives Social Security disability benefits. Lawrey acknowledged severe macular degeneration is one of the conditions contributing to the Social Security disability determination. He is unable to get a CDL because of his eye condition. Symptoms in the right eye began in August 2018. Lawrey stated he is unable to perform his job with Kenway because of the lifting requirements. Kenway does not use two-person crews for deliveries. Lawrey acknowledged that except for the eye condition, he could perform the driving aspect of his former work.

Dr. Stacie Grossfeld treated Lawrey on October 23, 2018. A November 1, 2018 MRI showed an acute/subacute supraspinatus insertional tendon tear. A portion of the bursal musculotendon was completely torn and retracted. Dr. Grossman performed surgery on December 13, 2018. Based on a May 15, 2019 MRI Arthrogram, Dr. Grossfeld diagnosed a recurrent partial rotator cuff tear and referred Lawrey to Dr. Mark Smith to discuss a reverse right shoulder replacement.

Dr. Smith saw Lawrey on June 10, 2019. Lawrey reported right shoulder pain and tingling radiating throughout the arm. Dr. Smith diagnosed a recurrent rotator cuff tear. Dr. Smith performed an arthroscopic repair on July 30, 2019. On July 27, 2020, Lawrey reported loss of motion, shoulder pain, and

inability to use the arm. On examination, Lawrey had limited right shoulder range of motion, decreased strength, and positive Phalen's test at the wrist. Right shoulder X-rays showed normal subacromial and glenohumeral joint spaces. Lawrey had spurring over the superior aspect of the AC joint. A repeat right shoulder MRI was recommended.

Dr. Michael Best evaluated Lawrey on April 1, 2020. Dr. Best diagnosed a right shoulder rotator cuff tear, status-post right rotator cuff repair and biceps tenotomy, closed manipulation of the right shoulder, and re-repair of the right rotator cuff. Dr. Best noted persistent unexplained pathology including right axillary nerve injury by EMG/NCV, possible C5, C6, and/or C7 radiculopathy by EMG/NCV, and possible right carpal tunnel syndrome by EMG/NCV. Dr. Best assigned restrictions of no use of the right hand, no driving, no work at unprotected heights, and no lifting greater than light to medium-duty (up to 35 pounds). Dr. Best opined Lawrey's carpal tunnel syndrome is unrelated to the work injury.

In a June 25, 2020 supplemental report, Dr. Best indicated he had reviewed an EMG and nerve conduction study performed on May 14, 2020. He opined the work injury did not cause Lawrey carpal tunnel syndrome, which he opined is more likely resulted from rheumatoid arthritis. He also stated Lawrey's brachial plexus/axillary nerve injury has healed. The most recent EMG/NCV revealed no evidence of a cervical radiculopathy. Dr. Best felt Lawrey could return to full and unrestricted duties following surgery for the non-work-related carpal tunnel syndrome. In a July 17, 2020 report, Dr. Best noted Lawrey had reached maximum medical improvement ("MMI") from his shoulder injury. Dr. Best

limited Lawrey to light to medium duty work. Dr. Best assigned a 10% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment, (“AMA Guides”) for the right shoulder injury.

Dr. Jeffrey Fadel evaluated Lawrey on December 17, 2020. Lawrey reported right shoulder pain, difficulty sleeping at night, upper extremity radiculopathy, and compression neuropathy at the wrist. He also stated Lawrey has right biceps, triceps, deltoid, and trapezial muscles atrophy; positive Hawkins-Kennedy test; positive grimace sign; decreased right shoulder range of motion; positive Spurling’s test; decreased sensation over the lateral forearm; decreased sensation over the right thumb, index, middle, and ring fingers; positive Tinel’s sign at the right wrist; and a positive compression sign at the right wrist. Dr. Fadel diagnosed a right rotator cuff tear, probable herniated cervical disc at C5-C6, and right carpal tunnel syndrome, all caused by the September 12, 2018 work injury.

Dr. Fadel assigned permanent restrictions of no use of the right upper extremity for activities at or above shoulder level, no repetitive use of the right upper extremity, no lifting over ten pounds occasionally, and no pushing or pulling more than twenty pounds occasionally. He also indicated Lawrey should not repetitively use his right hand for activities involving fine manipulation or use vibratory tools. Dr. Fadel opined the restrictions make it impossible for Lawrey to return to his previous employment as a truck driver. Dr. Fadel stated Lawrey reached MMI as of January 2020 if no further treatment is considered. Dr. Fadel assigned a 14% impairment rating for the shoulder pursuant to the AMA Guides. He felt the work

injury solely caused the rotator cuff tear. The injury also caused an arousal of what probably was a pre-existing dormant condition involving the right carpal tunnel.

Dr. Michael Nicoson evaluated Lawrey on January 19, 2021. Lawrey reported loss of right arm motion and weakness, right hand locking, achiness in the right arm radiating from the shoulder to the wrist, tingling and numbness intermittently in the fingers of the right hand, and loss of hand coordination. Dr. Nicoson diagnosed Lawrey with a right rotator cuff repair, right axillary neuropathy, right carpal tunnel syndrome, and rheumatoid arthritis. He opined the right rotator cuff repair and right axillary neuropathy are related to the September 21, 2018 injury. Dr. Nicoson felt Lawrey's carpal tunnel syndrome is not work-related. Dr. Nicoson noted the literature indicates rheumatoid arthritis correlates with the development of carpal tunnel syndrome.

Dr. Thomas Loeb evaluated Lawrey on March 9, 2021. Lawrey reported persistent pain and stiffness in the right shoulder with numbness in the median nerve distribution of the right hand. Dr. Loeb diagnosed a right shoulder rotator cuff tear on September 12, 2018, along with a resolved stress nerve neuropraxia of the axillary nerve. He also stated Lawrey has ongoing adhesive capsulitis of the right shoulder and has developed unrelated right carpal tunnel syndrome. Dr. Loeb stated the underlying acromioclavicular joint and glenohumeral joint arthrosis was longstanding, pre-existing, and an active condition. It could have been symptomatically dormant and was transiently aggravated by the work injury. He stated Lawrey's injury would not have caused carpal tunnel syndrome. Dr. Loeb stated Lawrey reached MMI for the right shoulder by July 27, 2020. Dr. Loeb

assigned a 13% impairment rating for loss of right shoulder range of motion. Dr. Loeb assigned restrictions of no lifting above shoulder level and no lifting of more than five pounds on a repetitive basis.

The ALJ dismissed the claims for the cervical spine condition, carpal tunnel syndrome, AC joint, and glenoid conditions as not work-related. The ALJ then determined the brachial plexus/axillary nerve condition resolved without permanent impairment or the need for further medical treatment or restrictions. The ALJ determined the right rotator cuff tear is work-related and is a permanent injury. He selected the 13% impairment rating assigned by Dr. Loeb. Regarding the extent of disability, the ALJ found as follows *verbatim*:

When making an award of permanent, total disability I must take into account all of the requirements as set forth in KRS 342.0011(11); KRS 342.0011(34); Osborne v. Johnson, 432 S.W.2d 800 (Ky. App. 1968); and Ira A. Watson Dep't Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

Lawrey's testimony regarding his job duties is uncontradicted. Included in those duties was that he frequently had to lift more than five pounds, sometimes up to a ton, albeit with a pallet jack, and that he moved 55-gallon drums. This is outside his restrictions from Dr. Loeb so Lawrey cannot return to the type of work done on the date of injury.

In fact, I find the restriction against lifting five pounds repetitively to be highly limiting. There are no jobs I am aware of or that the evidence demonstrates that Lawrey can do with a five-pound repetitive lifting restriction.

Regardless, Lawrey is 65 years old. Any job he could do with that restriction would require job retraining that would take months if not more. No one is going to hire a person in his or her late 60s, with no experience, and a severe lifting restriction.

While I do understand that, I am required to consider all relevant factors not every analysis is complex. Each factor is not considered in vacuum, they interplay. Lawrey is already 65, has no experience with a job limiting him to lifting 5 pounds repetitively and does have that severe restriction. He is totally disabled.

On appeal, Lawrey and Kenway filed Petitions for Reconsideration making the same arguments they raise on appeal. The ALJ ruled as follows on reconsideration:

This matter comes before the undersigned on both parties Petitions for Reconsideration and Responses. Both Petitions are OVERRULED. While I believe the entirety of the Opinion supports the Award I need only emphasize the Plaintiff's age of 65, work-related restriction of lifting no more than 5 pounds and his history of blue collar work to find him totally disabled. I have no authority over the constitutionality of the Act.

Lawrey again argues the amendments to KRS 342.730(4) should not be applied retroactively or are unconstitutional as a violation of the contracts clause of the United States and Kentucky Constitutions or as an exercise of arbitrary power in contravention of section 2 of the Kentucky Constitution.

KRS 342.730(4), as amended by House Bill 2 effective July 14, 2018, provides:

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), effective July 14, 2018, regarding the termination of benefits at age seventy has retroactive applicability. Because the Kentucky Supreme Court has determined the amendment applies retroactively, we affirm the ALJ's award of PTD benefits subject to the limitations in KRS 342.730(4), effective July 14, 2018. We further note the Kentucky Supreme Court recently specifically held in Dowell v. Matthews Contracting, 627 S.W.3d 890 (Ky. 2021) that the Act does not create a contract between the employee and the state or the employer. Because the Act does not form a contract, there are no contractual rights that the amendment to KRS 342.730(4) could infringe. Thus, there can be no violation of the contracts clause. We additionally note that this Board, as an administrative tribunal, has no jurisdiction to determine the constitutionality of a statute. Blue Diamond Coal Company v. Cornett, 300 Ky. 647, 189 S.W.2d 963 (1945). Consequently, we are without authority to render a decision upon Lawrey's argument regarding the constitutionality of the amended statute. Thus, we affirm in this regard.

On appeal, Kenway argues the ALJ erred in finding Lawrey permanently totally disabled. Kenway argues the work injury alone does not render him permanently totally disabled. Kenway notes Lawrey is articulate, has a high school education, has performed supervisory duties for an environmental material handling company, and has managed a car repair business. It maintains Lawrey, from an orthopedic standpoint, is capable of performing work as a truck driver. Kenway contends the non-work-related macular degeneration now precludes that

work. Kenway notes KRS 342.730(1)(a) prohibits consideration of non-work-related impairment in determining if a worker is entitled to PTD benefits. Additionally, Kenway notes the macular degeneration is a condition that arose after the work injury. Kenway contends it should not be saddled with the entirety of the occupational disability when a large part of the reason Lawrey is not working is the subsequent non-work-related condition. Kenway argues that, at a minimum, there should be an apportionment between the work-related and non-work-related contributing factors.

As the claimant in a workers' compensation proceeding, Lawrey had the burden of proving each of the essential elements of his cause of action. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because he was 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). 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).

Permanent total disability is defined as the condition of an employee who, due to an injury, has a permanent disability rating and has a complete and permanent inability to perform any type of work because of an injury. KRS 342.0011(11)(c). "Work" is defined as providing services to another in return for remuneration on a regular and sustained basis in a competitive economy. KRS 342.0011(34). In determining whether a worker is totally disabled, the ALJ must consider several factors including the workers' age, educational level, vocational skills, medical restrictions, and the likelihood he can resume some type of work

under normal employment conditions. Ira A. Watson Department Store v. Hamilton, *supra*. Additionally, a claimant's own testimony as to his condition has some probative value and is appropriate for consideration by the ALJ. Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979). The ALJ enjoys wide ranging discretion in granting or denying an award of permanent total disability benefits. Seventh Street Road Tobacco Warehouse v. Stillwell, 550 S.W.2d 469 (Ky. 1976); Colwell v. Dresser Instrument Div., 217 S.W.3d 213 (Ky. 2006).

We conclude substantial evidence supports the ALJ's award of PTD benefits. The ALJ accepted the five-pound lifting restriction assessed by Dr. Loeb and determined that restriction precludes Lawrey from performing his past employment consisting of jobs requiring physical labor. Additionally, Dr. Fadel opined Lawrey's restrictions would make it impossible for him to return to his previous employment as a truck driver. While Lawrey ran a garage and supervised at the environmental company, he was a working supervisor in those jobs. The ALJ also determined that Lawrey's advanced age of 65 and need for vocational training weighed heavily against his ability to secure employment in a competitive job market. It does not appear the ALJ considered the subsequent development of macular degeneration in determining the extent of Lawrey's disability. Rather, he reached the determination that the effects of the work injury alone rendered Lawrey permanently totally disabled. If the effects of the work injury alone sufficiently establish PTD, any conditions that subsequently arise are immaterial. Based upon the medical evidence and severe restrictions imposed, as well as Lawrey's testimony, the ALJ could reasonably conclude Lawrey is not capable of performing work on a

regular and sustained basis in a competitive economy. Lawrey's testimony, along with the medical opinion of Dr. Loeb, constitutes the requisite substantial evidence supporting the ALJ's decision. For that reason, we cannot say the decision of the ALJ finding Lawrey entitled to an award of PTD benefits is so unreasonable under the evidence that the decision must be reversed as a matter of law. The ALJ acted within his discretion in determining which evidence to rely upon, and it cannot be said the ALJ's conclusions are so unreasonable as to compel a different result. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974).

Accordingly, the July 12, 2021 Opinion, Award and Order and the July 31, 2021 Order on Petition for Reconsideration rendered by Hon. Chris Davis, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR

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