

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: August 30, 2019

CLAIM NO. 201592945

HOPKINS COUNTY FISCAL COURT/COUNTY JAIL

PETITIONER

VS.

APPEAL FROM HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE

BARRY WYATT and
HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING IN PART,
VACATING IN PART & REMANDING

* * * * *

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

ALVEY, Chairman. Hopkins County Fiscal Court/County Jail (“Hopkins County”) appeals from the Opinion, Award and Order rendered April 23, 2019 by Hon. Chris Davis, Administrative Law Judge (“ALJ”). The ALJ awarded Barry Wyatt (“Wyatt”) permanent total disability (“PTD”) and medical benefits for a left knee injury he sustained on October 21, 2014 while working for Hopkins County.

Hopkins County also appeals from the May 21, 2019 order denying its petition for reconsideration.

On appeal, Hopkins County argues the record does not support the award of PTD benefits. Hopkins County also argues the ALJ neglected to address the viability of vocational rehabilitation. It additionally argues the ALJ's gratuitous comments regarding Wyatt being an "older worker", and "would-be employers" are deterred from hiring him are not supported by the record. Finally, Hopkins County argues it is entitled to a credit for a previous award of 12% permanent partial disability ("PPD") due to a previous unrelated injury. We find the ALJ performed the appropriate analysis in awarding Wyatt PTD benefits. We likewise determine the ALJ was not compelled to carve out a portion of the award for a pre-existing active disability. However, we vacate the ALJ's decision, in part, regarding the gratuitous comments which do not appear to be supported by evidence in the record. We remand for a determination based solely on the evidence of record, and whether Wyatt should be referred for a vocational rehabilitation evaluation.

Wyatt filed a Form 101 on November 23, 2015, alleging he injured his left knee and ankle when his foot caught on a step as he was descending causing him to fall into a brick wall on October 21, 2014 while working for Hopkins County. Wyatt was born on November 20, 1966 and is a resident of Madisonville, Kentucky. Wyatt is a high school graduate. Wyatt was working as a deputy jailer at the time of the accident. In the Form 104, Wyatt noted he had previously worked as a deputy jailer, animal control officer (cruelty investigator), nursing home orderly, security guard, prison guard, and construction laborer.

Wyatt testified by deposition on January 18, 2016, and at hearings held July 21, 2016, and February 27, 2019. Wyatt testified that on October 21, 2014, he was involved with replacing inmates at a car wash point. This required him to escort inmates to the locations, and to escort others back to the detention facility. The accident occurred at approximately 6:20 a.m. After the fall, Wyatt went to the emergency room where the initial concern was his left ankle swelling. After the emergency room treatment, he saw Russell Payton, APRN (“Nurse Payton”), in Dr. James Donley’s office. He later saw Dr. Joseph Mesa.

Wyatt continued to work light duty for Hopkins County until Dr. Donley performed arthroscopic surgery on his left knee on February 19, 2015. Hopkins County paid temporary total disability (“TTD”) benefits until July 20, 2015. Afterward, Wyatt received unemployment benefits until March 31, 2016.

Wyatt previously sustained a work-related low back injury in the 1990’s while working for the Kentucky Department of Corrections. He underwent multiple surgeries for that injury, and eventually settled that claim. He testified he had never previously experienced left knee or ankle problems before the fall while working for Hopkins County. Wyatt testified he had a small stroke, or Transient Ischemic Attack (“TIA”) in 2014, and a stroke in 2015, which effected his vision, and caused memory loss and right-sided weakness. He testified he is unable to perform any of his previous work due to pain and stiffness in his left knee, and pain in his left ankle.

When Wyatt testified by deposition, he indicated he was planning to take classes in keyboarding. He testified he had applied for Social Security disability

benefits. He also testified that cold weather increased his pain, and he took Advil on a daily basis. He additionally testified that he used a walker, and could not stand for long periods of time. He also testified that he was unable to return to work due to the physical requirements of walking, stair climbing, and inmate restraint.

At the hearing held July 27, 2016, the issues preserved for decision included benefits per KRS 342.730, unpaid or uncontested medical expenses (including knee replacement surgery which Wyatt had previously testified he did not wish to have), exclusion for pre-existing disability/impairment, TTD benefits, vocational rehabilitation benefits, and whether Wyatt had reached maximum medical improvement (“MMI”). He testified his knee had worsened since the arthroscopic surgery. He testified that the pain was worse, and his knee dislocated occasionally causing him to fall. He also testified he could not wear boots or high topped shoes due to ankle swelling. At the time of the hearing, he was taking Mobic, an anti-inflammatory, which he testified provided no relief. He had been unable to find work since his surgery.

At the February 27, 2019 hearing, Wyatt testified that he had not worked since his surgery. He sees his family physician monthly. He has been unable to work, and cannot perform his previous jobs. He testified that due to the work injury, he has pain, discomfort, stiffness, swelling, weakness, soreness, inability to sleep, and has experienced cracking and popping his left knee. He testified his left knee buckles after standing twenty to thirty minutes. He wears a left knee brace but still has swelling. He continues to experience intermittent dull aching and left ankle pain. He no longer drives due to the difficulty of getting in and out of vehicles. In

addition to the problems with his left knee and ankle, he takes insulin for diabetes, and medication for high blood pressure.

Joyce Wyatt, Wyatt's wife, testified at the July 27, 2016 hearing. She testified that he sits a lot, and she has observed him fall on several occasions since the accident. She also testified regarding his memory loss, as well as swelling to his left knee and ankle.

In support of his claim, Wyatt filed records from Dr. Donley's office, for treatment he received from October 29, 2014 through July 20, 2015. Wyatt initially reported left ankle and knee pain. On December 20, 2014, Nurse Payton noted Wyatt was released to light duty, and he had not yet reached MMI. Physical therapy was ordered, and eventually Wyatt had arthroscopic left knee surgery. On July 20, 2015, Dr. Donley diagnosed Wyatt with left knee pain, a left lateral meniscus tear, a left medial meniscus tear, and a left anterior cruciate ligament strain. Dr. Donley recommended a total left knee replacement.

Wyatt also filed the February 6, 2016 report from Ben Waide, P.T. ("Mr. Waide"). Mr. Waide stated that as of the date of his evaluation, Wyatt was unable to perform any significant work due to his left knee injury. Mr. Waide found no indication of symptom magnification.

Wyatt additionally filed the May 25, 2015 note from Dr. Mesa. Dr. Mesa noted the October 22, 2104 injury. He diagnosed Wyatt as status post arthroscopic medial meniscectomy and debridement of the tibia with evidence of chondromalacia of the tibia and patellofemoral joint. He also stated x-rays revealed moderate osteoarthritic changes. Wyatt also filed Dr. Mesa's July 26, 2017 report.

Dr. Mesa noted Wyatt has osteoarthritis of the left knee and weak quadriceps, along with a left ankle sprain, and a left knee collateral ligament sprain.

On October 15, 2017, Dr. Mesa noted Wyatt's complaints of right knee pain. Wyatt believed this was due to placing too much weight on the right leg due to his left knee problems. Dr. Mesa diagnosed chronic right knee pain and osteoarthritis. Dr. Mesa noted that Jason Myers, P.T. ("Mr. Myers"), with Liberty Rehabilitation had performed an examination at his request on March 8, 2017. Mr. Myers had recommended Wyatt avoid crawling, stair climbing, ladder climbing, and kneeling. Mr. Myers also recommended restrictions on Wyatt's standing and sitting. Mr. Myers determined a 7% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides") is appropriate for Wyatt's injury. Dr. Mesa agreed with Mr. Myers' findings, and adopted them as his own assessment.

Dr. Gregory Snider evaluated Wyatt on September 21, 2015 at Hopkins County's request. Wyatt filed the report as evidence. Dr. Snider noted Wyatt's complaints of left knee pain with associated stiffness, weakness, and occasional give away. Wyatt also reported persistent left ankle pain. Dr. Snider noted Wyatt took over-the-counter anti-inflammatory medication, used a cane, and was not working. He found Wyatt had reached MMI. He diagnosed Wyatt with obesity, diabetes, left knee arthritis, left knee contusion/sprain, status post partial meniscectomy, and chronic ACL deficiency. He did not recommend any additional treatment, but stated Wyatt should lose weight. Dr. Snider opined Wyatt does not

retain the capacity to work as a deputy jailer. Dr. Snider assessed a 5% impairment rating pursuant to the AMA Guides for Wyatt's work injury.

Mr. James Adams ("Mr. Adams") performed a vocational evaluation on March 3, 2016. Mr. Adams opined Wyatt is unable to return to any of his pre-injury work. He specifically stated, "I see nothing in any reports I have read to believe that Mr. Wyatt is capable of performing any work that is available in the economy in significant numbers". Mr. Adams determined Wyatt is unemployable.

Hopkins County filed the settlement agreement from claim number 1998-83972 when Wyatt settled an unrelated low back injury claim for a 12% permanent partial disability. Wyatt underwent laminectomies at L3-L4, and L4-L5 for that injury. He has not alleged a low back injury stemming from his left knee injury sustained while working for Hopkins County.

Dr. Ronald Fadel, an orthopedic surgeon, evaluated Wyatt at Hopkins County's request on March 1, 2016. Dr. Fadel stated it is premature to consider a total knee replacement for Wyatt. He found Wyatt's meniscal tear is work-related. Dr. Fadel assessed a 1% impairment rating pursuant to the AMA Guides. Dr. Fadel found Wyatt had not reached MMI. He limited Wyatt to six hours sit down duty daily. He also stated Wyatt was temporarily unable to return to work as a deputy jailer as of the date of the evaluation.

Hopkins County also filed the July 12, 2015 through July 15, 2015 treatment records from Deaconess Hospital in Evansville, Indiana for treatment Wyatt received for a stroke. Wyatt was diagnosed with having a stroke, diabetes mellitus, essential hypertension, and a TIA.

Dr. Michael Best evaluated Wyatt at Hopkins County's request on July 26, 2017. Dr. Best noted Wyatt may need a total knee replacement, or even a hemi-arthroplasty, but this was not caused by a work injury. He stated this recommendation is due to pre-existing end-stage degenerative arthritis of the knee, not due to an October 2014 work injury. He found only the medial meniscal tear is work-related. Dr. Best assessed a 1% impairment rating based upon the AMA Guides for the torn meniscus. Dr. Best opined Wyatt needs no restrictions due to the meniscal tear and repair. He additionally stated Wyatt reached MMI eight to ten weeks after the meniscal surgery. Dr. Best found Wyatt does not have the physical capacity to return to work as a deputy jailer.

Two Benefit Review Conferences ("BRC") were held. At the first BRC held on July 12, 2016, the issues preserved included Wyatt's capacity to return to the job performed on the date of injury, benefits per KRS 342.730, unpaid or contested medical expenses (knee replacement), exclusion for pre-existing disability/impairment, TTD, and vocational rehabilitation. At the second BRC held March 12, 2019, the issues listed included capacity to return to the work performed on the date of the injury, benefits per KRS 342.730, credit for unemployment benefits, exclusion for pre-existing active disability/impairment, and TTD.

Hon. Jeanie Owen Miller, Administrative Law Judge ("ALJ Miller"), rendered an interlocutory decision on July 30, 2016. ALJ Miller determined Wyatt had not reached MMI, and found he needed additional treatment. ALJ Miller ordered the claim placed in abeyance, and awarded TTD and medical benefits.

On April 23, 2019, the ALJ found Wyatt is permanently totally disabled and awarded PTD benefits for the left knee injury. The ALJ found the 7% impairment assessed by Dr. Mesa is reasonable. The ALJ stated that if Wyatt had not been determined permanently totally disabled, he would have been entitled to the three multiplier contained in KRS 342.730(1)(c)1. The ALJ allowed Hopkins County credit for any benefits paid, and for any unemployment benefits received by Wyatt. Although the ALJ did not specifically address vocational rehabilitation, he made the following statements in determining whether Wyatt is permanently totally disabled:

The Plaintiff can no longer stand through an 8-hour workday. He has limitations on his walking, standing, kneeling, squatting and crawling. He cannot work as a jailer, construction laborer, working investigator, orderly or prison guard.

Given his educational background, 12th grade education, and restriction, Wyatt would require a great deal of job retraining to be able to work in any light or sedentary demand job. He currently had no experience with any such job.

Once he completed that job retraining he would be considered an older worker, older than 55. He would still retain a wide variety of restrictions from his work injury and have zero work experience in the jobs he was seeking. Facts that would surely deter would-be employers.

Based on these factors the Plaintiff is permanently and totally disabled as result of his work injury.

Hopkins County filed a petition for reconsideration arguing the evidence of record does not support the award of PTD benefits. It also argued the ALJ failed to address the previous award for the 1998 low back injury. It

additionally argued the ALJ did not address vocational rehabilitation benefits. Finally, it argued the ALJ's decision was contrary to the weight of the evidence.

The ALJ issued an order on reconsideration on May 21, 2019, finding as follows:

This matter comes before the undersigned on Defendant's Petition for Reconsideration and the Plaintiff's Response thereto. The Defendant points to evidence of record that supports a contrary conclusion but does not point to any evidence of record that compels a contrary conclusion. The Opinion is supported by substantial evidence. The Defendant confuses prior active impairment ratings and prior active disability. I need not, nor should I, carve out prior impairment ratings in a total disability award. The petition is OVERRULED.

We initially acknowledge that as the claimant in a workers' compensation proceeding, Wyatt had the burden of proving each of the essential elements of his cause of action. *See* KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Wyatt was successful in his burden, we must determine whether the ALJ used the appropriate standard for reaching his determination, and whether substantial evidence of record supports his 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 function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings made are so unreasonable under the evidence that they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to weight and credibility or by noting other conclusions or reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

In determining Wyatt is permanently totally disabled, the ALJ was required to perform an analysis pursuant to the City of Ashland v. Taylor Stumbo, 461 S.W.3d 392 (Ky. 2015). Although he did not specifically cite to that case, the ALJ took into consideration those requirements in determining whether Wyatt was permanently totally disabled. He took into account Wyatt's age, education, and past work experience, along with his post-injury physical status. The ALJ performed the

appropriate analysis in accordance with the direction of the Kentucky Supreme Court in City of Ashland v. Stumbo, *supra*. The ALJ's determination regarding the award of PTD benefits is supported by Wyatt's testimony, along with the medical evidence, and that portion of his decision will remain undisturbed.

We additionally find the ALJ did not err by refusing to carve out a percentage of the award of PTD benefits due to the settlement of his previous unrelated low back injury. It is undisputed that Wyatt previously sustained an unrelated low back injury, for which he received a settlement based upon a 12% disability. However, the record is completely devoid of any evidence establishing his ability to work was in any way restricted or he was disabled prior to the date of the injury due to that condition. The evidence establishes that Wyatt worked continuously for various employers after the settlement of that previous claim. As noted by the ALJ, "impairment and disability are not synonymous". Despite the previous injury and settlement, there is no indication Wyatt suffered from any ongoing difficulty due to his low back, and likewise, there is no evidence his left knee or ankle were involved in his previous claim.

In Roberts Brothers Coal Co. v. Robinson, 113 S.W.3d 181 (Ky. 2003), the Kentucky Supreme Court distinguished between pre-existing impairment and pre-existing disability. The Court held a finding a claimant had a pre-existing impairment was not synonymous with a finding of a pre-existing disability. *Id.* at 183. The Court explained there should not be a carve out from a total disability award for pre-existing impairment if there was no pre-existing disability. *Id.* Although Hopkins County submitted the information regarding Wyatt's previous award for his low back injury, it failed to produce any evidence the prior condition produced a pre-existing disability prior to the work

injury. Therefore, the ALJ's determination in finding Wyatt is permanently totally disabled due to the October 21, 2014 injury, and he had no pre-existing disability, is supported by the record. The record does not compel a finding of pre-existing disability, and the ALJ's determination on this issue will not be disturbed.

Hopkins County also argues the ALJ erred by failing to consider awarding vocational rehabilitation benefits. 803 KAR 25:010 § 13(14) provides only those issues preserved at the BRC for determination by the ALJ "shall be the subject of further proceedings." Although not listed in the BRC order issued March 12, 2019, vocational rehabilitation was an issue listed in the BRC order issued July 12, 2016. The transcript from the July 27, 2016 hearing also reflects that vocational rehabilitation was preserved as an issue. We additionally note the ALJ made apparently gratuitous comments in the April 23, 2019 decision regarding the amount of retraining which may be required enabling Wyatt's ability to perform any light or sedentary work, and "[f]acts that would deter would-be employers".

We note the ALJ did not specifically address vocational rehabilitation in either the April 23, 2019 decision or the May 21, 2019 order on reconsideration, although preserved as an issue in the July 12, 2016 BRC order and at the July 27, 2016 hearing, and despite Hopkins County's arguments in its brief and in its petition for reconsideration. We therefore must vacate the ALJ's determination, in part, and remand for a determination of whether Wyatt should be referred for a vocational evaluation, and for the ALJ to cite to the evidence in the record supporting his statements on page 12 of his decision regarding the amount of retraining which would be required, and the deterrence to potential

employers. We do not direct any specific determination, and the ALJ may make any determination based upon the record.

Accordingly, the April 23, 2019 Opinion, Award, and Order, and the May 21, 2019 order on petitions for reconsideration issued by Hon. Chris Davis, Administrative Law Judge, are hereby **AFFIRMED IN PART**, and **VACATED IN PART**. This claim is **REMANDED** for an amended award as set forth above.

STIVERS, MEMBER, CONCURS.

RECHTER, MEMBER, CONCURS IN PART, DISSENTS IN PART, AND FURNISHES A SEPARATE OPINION.

RECHTER, Member. I dissent only from that portion of the majority opinion concerning vocational rehabilitation for two reasons. First, I do not believe the issue of vocational rehabilitation was preserved as a contested issue. I believe it was incumbent upon Hopkins County to include vocational rehabilitation in the 2019 BRC Order, particularly after a three year hiatus in the litigation of the claim.

More importantly, even if preserved as a contested issue, I believe Hopkins County waived any challenge to the ALJ's findings regarding vocational rehabilitation. In its brief before the ALJ, Hopkins County specifically stated, "Plaintiff is entitled to vocational rehabilitation pursuant to KRS 342.710, *should he so elect.*" (Emphasis added). Hopkins County may not now argue the ALJ was *required* to order vocational rehabilitation.

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