

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: February 28, 2020

CLAIM NO. 201769849

JEFFREY O'NEIL

PETITIONER

VS.

APPEAL FROM HON. TANYA PULLIN,
ADMINISTRATIVE LAW JUDGE

KENTUCKY STATE FAIR BOARD and
HON. TANYA PULLIN,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

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

ALVEY, Chairman. Jeffrey O'Neil ("O'Neil") appeals from the May 21, 2019 Opinion, Award, and Order, and the June 12, 2019 order rendered by Hon. Tanya Pullin, Administrative Law Judge ("ALJ") denying his petition for reconsideration. The ALJ awarded permanent partial disability ("PPD") benefits and medical benefits for a left shoulder injury O'Neil sustained while working for the Kentucky State Fair Board ("KSFB").

On appeal, O'Neil argues the ALJ erred in failing to award temporary total disability ("TTD") benefits. He also argues the ALJ erred in finding his award of PPD benefits terminate when he reaches age seventy in accordance with KRS 342.730(4) effective July 14, 2018. Finally, he argues the retroactive application of the amended version of KRS 342.730(4) effective July 14, 2018 is unconstitutional. We determine the ALJ performed the appropriate analysis, and substantial evidence supports the denial of TTD benefits. We find the ALJ's award of PPD benefits is in conformity with the holding by the Kentucky Supreme Court in Holcim v. Swinford, 581 S.W.3d 37 (Ky. 2019). We also note this Board lacks the authority to make determinations on constitutional issues. Therefore, we affirm on all issues.

O'Neil filed a Form 101 on March 2, 2018, alleging he injured his right thigh, left calf, left shoulder, and neck on August 20, 2017 when he fell while working for KSFb as he was attempting to prevent a child from falling down an escalator. In an affidavit filed in support of the Form 101, O'Neil stated he does not retain the physical capacity to return to the type of work he performed for KSFb on the date of the injury. In the Form 104 filed in support of his claim, O'Neil indicated he has been disabled since 2009, and he later testified he receives Social Security disability benefits. He also listed the brief employment period with KSFb.

O'Neil testified by deposition on June 12, 2018, and at the hearing held March 29, 2019. O'Neil was born on June 1, 1953. He is a college graduate with degrees in political science and sociology. He testified he was a realtor in New York for several years, and was a certified contractor. He had the contractor certification because he was involved in remodeling and "flipping" houses. He also

testified he worked in advertising while he was in New York. He testified he has been disabled due to atrial fibrillation and chronic obstructive pulmonary disease (“COPD”) since 2009. The only work he has performed since he received his Social Security disability determination was briefly working for KSFB in August 2017.

O’Neil testified he had problems with COPD, his heart, lumbar spine, neck, high blood pressure, and skin cancer prior to his accident at KSFB. He treated with the Leatherman Spine Clinic for his neck prior to the work accident. A previous MRI demonstrated problems at C3-4 and C5-6. He also testified he had multiple bicycle accidents prior to working for KSFB, which included low back and cervical spine injuries. He testified he was taking Oxycodone for low back pain prior to his work injuries.

O’Neil began working a temporary job with KSFB in August 2017. He stated his job involved customer relations, including providing information and preventing state fair attendees from accessing certain areas, including the stables. On August 20, 2017, O’Neil was working on the second floor of the main building. He stated four young children were playing, unsupervised, on the escalators. One of the children started to fall on the down escalator. When he grabbed the child, he lost his balance and fell face forward. He rode the escalator down. He was unable to call for assistance because he had no radio. He stated he injured the front of both shins, his face, his head, and left shoulder. He later developed deep vein thrombosis (“DVT”) in his right leg as he was going to church, and now has problems in the front of his right thigh and left calf. He stated his neck pain has improved, but he continues to have problems with his left shoulder, and he cannot lift above shoulder level. He

also complained of pain in the front of his right thigh. At the hearing, he testified he now has problems with his knees. O'Neil testified he believed he had reached maximum medical improvement ("MMI") because he does not desire surgery. He also testified he does not believe he would be able to return to his job at KSFB due to the pain in his left leg.

O'Neil filed records from U.S. Healthworks in support of his claim for visits between August 23, 2017 and October 11, 2017. The August 23, 2017 record reflects O'Neil strained his neck and left shoulder. He was allowed to return to work on that date with restrictions of no lifting greater than five pounds, no prolonged walking or standing, and to alternate sitting with standing. He was diagnosed with a neck muscle strain, a left shoulder strain, and multiple abrasions. Dayna Ray, N.P. ("Nurse Ray") indicated MMI was expected by September 6, 2017. She indicated that most likely O'Neil exacerbated his underlying medical conditions. Nurse Ray's restrictions were consistent with the restrictions assessed by Stephanie Martin, LNP ("Nurse Martin") on September 20, 2017, who also indicated O'Neil should avoid stooping, pushing/pulling, working at heights, and overhead repetitive work. Patricia Groves, NP, and Nurse Martin indicated the same restrictions were applicable on September 27, 2017 and October 11, 2017. The notes indicate O'Neil was referred to an orthopedic specialist.

Dr. Ellen Ballard evaluated O'Neil on October 25, 2017. She restricted O'Neil from climbing stairs and ladders, working at heights, operating hazardous machines, driving, prolonged walking or standing, overhead work, forceful pushing or pulling, and advised him to alternate sitting and standing. She

noted O'Neil had a history of lumbar spine issues, COPD, GERD, and high blood pressure. He was taking multiple medications including Gabapentin and Oxycodone. She diagnosed him with low back, mid back, and left shoulder pain. Dr. Ballard ordered a left shoulder MRI, which was performed on November 27, 2017. The MRI indicated O'Neil may have some tendinopathy and possible small rim and superior glenoid labrum tears. The MRI also indicated degenerative changes in the AC joint and glenohumeral joint. On November 29, 2017, Dr. Ballard noted O'Neil's left shoulder was painful with range of motion. She advised him to lift no more than twenty pounds, sit or stand as needed, and to avoid overhead work. She referred him to Dr. Frank Bonnarens for follow up of his left shoulder pain.

Dr. Jeffrey Fadel evaluated O'Neil on August 30, 2018. He noted the history of O'Neil's fall. He also noted Dr. Ballard had referred O'Neil to Dr. Bonnarens, but he developed right lower extremity pain before that referral, and was diagnosed with DVT. He noted O'Neil had undergone chronic pain management for a number of years prior to the accident for low back pain. He diagnosed O'Neil with a left shoulder rotator cuff tear caused by the fall at work. He also diagnosed meralgia paresthasias of the right lower extremity caused by the August 2017 accident. He assessed an 8% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment. Of this rating, he stated 6% was due to the left shoulder, and the remaining 2% was due to the right lower extremity. He recommended restrictions of no lifting greater than ten pounds, no pushing or pulling greater than thirty pounds, and no repetitive

use of the left upper extremity. He attributed the entirety of the impairment rating, and the need for restrictions to the fall at work.

Dr. Matthew Price evaluated O'Neil at KSFB's request on November 8, 2018. He diagnosed O'Neil with longstanding thoracic and lumbar stenosis with significant arthritis. He also diagnosed mild to moderate left shoulder arthritis, some right hip arthritis, and some pre-existing cervical stenosis. He stated O'Neil might have experienced some exacerbation of his pre-existing left shoulder and low back conditions. He stated O'Neil's ongoing treatment is unrelated to the fall based upon his previous conditions. He stated O'Neil could return to work. He stated O'Neil has returned to baseline function from his exacerbations. He stated he could not assess an impairment rating for the left shoulder due to O'Neil's symptom magnification.

A Benefit Review Conference was held on February 19, 2019. The issues identified included physical capacity to return to the type of work performed on the date of the injury, work-relatedness/causation, permanent income benefits per KRS 342.730, average weekly wage, exclusion for pre-existing disability/impairment, injury as defined by the Act, and entitlement to TTD benefits.

The ALJ rendered her decision on May 21, 2019. She found O'Neil sustained a work-related left shoulder injury when he fell while working for KSFB on August 20, 2017, but did not establish he sustained a work-related right lower extremity injury. She awarded PPD benefits based upon the 6% impairment rating Dr. Fadel assessed for the left shoulder injury. The ALJ also awarded medical benefits for the left shoulder injury. She declined to enhance the award by the

multipliers contained in KRS 342.730(1)(c)1 based upon Dr. Price's restrictions. She noted the only restrictions he imposed were for the pre-existing lumbar spine conditions for which O'Neil was actively treating prior to the accident. The ALJ limited the duration of the award of PPD benefits in accordance with the version of KRS 342.730(4) effective July 14, 2018.

Regarding TTD benefits, the ALJ found as follows:

Temporary Total Disability

Temporary Total Disability (hereinafter "TTD") is defined in statute in KRS 342.0011 (11) (a) as follows:

[T]he condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement that would permit a return to employment.

This is a two-prong test and in Magellan Behavioral Health v. Helms, 140 S.W.3d 579, 580, 581 (Ky. App. 2004), the Court of Appeals instructed that both prongs of KRS 342.0011(11) (a) must be met before a claimant is entitled to TTD:

KRS 342.0011(11) (a) states that temporary total disability "means the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement that would permit a return to employment."

Dr. Price placed Plaintiff at MMI in December 2017. Dr. Fadel placed Plaintiff at MMI in February 2018 if no further treatment was forthcoming. The ALJ relies upon the opinion of Dr. Price to find that Plaintiff reached MMI on December 1, 2017 because Dr. Price is clearer and opined with more certainty that Plaintiff had indeed reached MMI on that date than did Dr. Fadel.

Dayna Ray, NP, of US Healthworks said Plaintiff could return to work on August 23, 2017 despite Plaintiff's request to be kept off work. The restrictions given by NP Ray fit within the job description given by Plaintiff in his testimony. Therefore, the ALJ finds that Plaintiff was released to return to work on August 23, 2017. Plaintiff was scheduled to work until August 27, 2017. Although Plaintiff did not return to work, his treaters released him to do so as early as August 23, 2017. Therefore, the ALJ finds Plaintiff is not entitled to TTD.

Both O'Neil and KSFB filed petitions for reconsideration. O'Neil requested additional findings regarding the award of TTD benefits. O'Neil requested additional language regarding the application of KRS 342.730(4). He also argued he is entitled to TTD benefits from September 20, 2017 through February 2018. KSFB requested the ALJ include a reference to O'Neil's right thigh in her decision. The ALJ issued orders on the petitions on June 12, 2019. Regarding O'Neil's petition, the ALJ found as follows:

This matter comes before the undersigned Administrative Law Judge on Petition for Reconsideration filed by Plaintiff. In an Opinion, Award and Order rendered on May 21, 2019, the undersigned Administrative Law Judge awarded permanent partial disability benefits and medical benefits for the work-related injury to Plaintiff's left shoulder.

Pursuant to KRS 342.281, review by an Administrative Law Judge on a Petition for Reconsideration shall be limited to the correction of errors patently appearing on the face of the Opinion and Order.

The Petition for Reconsideration filed by Plaintiff seeks a clarification regarding the duration of benefits. This clarification could properly be deemed a correction of an error patently appearing on the face of the Opinion, Award and Order of May 21, 2019 in the above-

referenced claim. Specifically, Plaintiff requests an amendment to Paragraph 1 of the Order and Award on page 16. Plaintiff's Petition for Reconsideration is SUSTAINED insofar as Paragraph 1 of the Order and Award on page 16 is amended to include, "subject to the provisions of KRS 342.730 (4) in effect as of July 14, 2018, unless that statute as it existed/exists is ruled not to be retroactive as it relates to any date of injury prior to July 14, 2018 and/or unconstitutional as to any retroactive application of KRS 342.730 (4) per that July 14, 2018 amendment."

Plaintiff also seeks additional findings of fact relating to the period of temporary total disability ("TTD"). In his Petition for Reconsideration, Plaintiff argued that the Administrative Law Judge erred in not awarding a period of TTD and said, "Claimant may have been released to return to work on August 23, 2017 but the duration of his job does not enter into whether or not he is entitled to additional TTD benefits. Physicians who saw him after that date, specifically other doctors at US Healthworks (note of September 20, 2017, September 27, 2017, October 11, 2017) and Dr. Ellen Ballard, who saw him on October 25, 2017 and November 29, 2017 all kept him on restricted work." Plaintiff argues that he is entitled to TTD, at a minimum, from the date he returned to US Healthworks on September 20, 2017 through February 2018.

While at the September 20, 2017 visit to US Healthworks, Stephanie Martin, L.N.P., released Plaintiff to return to work on that date with additional restrictions, those restrictions would allow a return to work at the job as described by Plaintiff. The diagnosis by NP Ray on August 23, 2017 of strain of neck muscles, strain of left shoulder and abrasions, is nearly identical to the diagnosis of LNP Martin on September 20, 2017. LNP Martin diagnosed strain of muscle, abrasion multiple and contusion.

Then again on September 27, 2017, Patricia Groves, NP, released Plaintiff to return to work with restrictions that would permit Plaintiff to perform his job as described in his testimony. Then on October 11, 2017,

Stephanie Martin, NP, released Plaintiff to return to work with similar restrictions. Likewise, on October 25, 2017, Dr. Ballard gave work restrictions that would allow Plaintiff to return to his job as he described it in his testimony.

The Administrative Law Judge reiterates that Dayna Ray, NP, of US Healthworks said Plaintiff could return to work on August 23, 2017. The Administrative Law Judge noted Plaintiff's work schedule to August 27, 2017 to note that Plaintiff did not return to work on August 23, 2017 even though he was scheduled to work through August 27, 2017. Nonetheless, although Plaintiff did not return to work, NP Ray released him to return to work on August 23, 2017.

The Administrative Law Judge does not find that Plaintiff has met his burden of proving that he is entitled to TTD beyond the date NP Ray released him to return to work on August 23, 2017. In Magellan Behavioral Health v. Helms, 140 S.W.3d 579 (Ky. App. 2004), the Court of Appeals instructed that both prongs of KRS 342.0011(11) (a) must be met before a claimant is entitled to TTD.

The Administrative Law Judge being sufficiently advised and having reviewed her Opinion, Award and Order of May 21, 2019 in the above-referenced claim, IT IS HEREBY ORDERED:

The Opinion, Award and Order of May 21, 2019 is hereby amended in Paragraph 1 of the Order and Award on page 16 as given above.

Regarding KSFB's petition, the ALJ found as follows:

This matter comes before the undersigned Administrative Law Judge on Petition for Reconsideration filed by Defendant Employer. Pursuant to KRS 342.281, review by an Administrative Law Judge on a Petition for Reconsideration shall be limited to the correction of errors patently appearing on the face of the Opinion and Order.

The Petition for Reconsideration filed by Defendant Employer properly seeks a correction of a clerical error patently appearing on the face of the Opinion, Award and Order of May 21, 2019 in the above-referenced claim. Specifically, Plaintiff requests that the Administrative Law Judge include "right thigh" in the second paragraph on page 13. In his Form 101, Plaintiff claimed injury to his right thigh, left calf, left shoulder and neck. The Administrative Law Judge found that Plaintiff had borne his burden of proving a work-related injury to his left shoulder. Therefore, the second paragraph of page 13 is hereby amended to read as follows:

The ALJ finds that Plaintiff has not met his burden of proving a work-related injury to his right thigh, left calf, or neck because there is insufficient medical evidence to support these claims.

On appeal, O'Neil argues the ALJ erred in failing to award TTD benefits. He also argues the retroactive application of the version of KRS 342.730(4) effective July 14, 2018 is inappropriate in this case, and the statute is unconstitutional. We note O'Neil properly placed the Kentucky Attorney General on notice of the constitutional challenge in accordance with the provisions contained in KRS 418.075.

As the claimant in a workers' compensation proceeding, O'Neil 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 O'Neil was unsuccessful in convincing the ALJ he is entitled to TTD benefits, the question on appeal is whether the evidence compels a different result. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Compelling evidence" is defined as evidence that is so

overwhelming, no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985). The function of the Board in reviewing the ALJ's decision is limited to a determination of whether the findings made by the ALJ are so unreasonable under the evidence they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the sole authority to judge all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). The ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000); Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). Mere evidence contrary to the ALJ's decision is inadequate to require reversal on appeal. Id. In order to reverse the decision of the ALJ, it must be shown there was no substantial evidence of probative value to support his 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 the weight and credibility to be afforded the evidence or by noting reasonable inferences which otherwise could have been drawn from the record. Whittaker v. Rowland, supra. As long as the ALJ's

ruling with regard to an issue is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, *supra*.

O'Neil requests this Board to re-weigh the evidence and substitute its judgement for that of the ALJ regarding entitlement to TTD benefits. This we cannot do. The ALJ acted squarely within her discretion in finding O'Neil is not entitled to TTD benefits based upon this analysis, and we do not find the ALJ's determination is flawed. Therefore, we affirm.

TTD is statutorily defined in KRS 342.0011(11)(a) as “the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement that would permit a return to employment[.]” In Magellan Behavioral Health v. Helms, 140 S.W.3d 579 (Ky. App. 2004), the Court of Appeals instructed that until MMI is achieved, an employee is entitled to TTD benefits so long as he remains disabled from his customary work or the work he was performing at the time of the injury. In Central Kentucky Steel v. Wise, 19 S.W.3d 657, 659 (Ky. 2000), the Kentucky Supreme Court explained, “It 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.” Thus, a release “to perform minimal work” does not constitute a “return to work” for purposes of KRS 342.0011(11)(a).

In Livingood v. Transfreight, LLC, et, al., 467 S.W.3d 249 (Ky. 2015), the Supreme Court declined to hold a claimant is entitled to TTD benefits so long as he or she is unable to perform the work performed at the time of the injury. The

Court stated, “. . . we reiterate today, Wise does not ‘stand for the principle that workers who are unable to perform their customary work after an injury are always entitled to TTD.’” Id. at 254. Most recently in Trane Commercial Systems v. Tipton, 481 S.W.3d 800 (Ky. 2016), the Supreme Court clarified when TTD benefits are appropriate in cases where the employee returns to modified duty. The Court stated:

As we have previously held, “[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 [of work] that is customary or that he was performing at the time of his injury.” Central Kentucky Steel v. Wise, 19 S.W.3d at 659. However, 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. Therefore, absent extraordinary circumstances, an award of TTD benefits is inappropriate if an injured employee has been released to return to customary employment, i.e. work within her physical restrictions and for which she has the experience, training, and education; and the employee has actually returned to employment. We do not attempt to foresee what extraordinary circumstances might justify an award of TTD benefits to an employee who has returned to employment under those circumstances; however, in making any such award, an ALJ must take into consideration the purpose for paying income benefits and set forth specific evidence-based reasons why an award of TTD benefits in addition to the employee's wages would forward that purpose.
Id. at 807

Here the ALJ found O’Neil is not entitled to an award of TTD benefits. She provided a sufficient explanation supporting her determination. We determine her decision was appropriate, and is supported by the evidence of record.

O'Neil also contends the application of KRS 342.730(4) as amended in 2018, to his award is unconstitutional. We note 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 as seventy (70) or four (4) years after the employee's date of injury or date of last exposure, whichever last occurs.

In accordance with the holding by the Kentucky Supreme Court in Holcim v. Swinford, *supra*, we affirm the ALJ's application of KRS 342.730(4) as amended in 2018. In that case, the Kentucky Supreme Court determined the amended version of KRS 342.730(4) regarding the termination of benefits at age seventy has retroactive applicability. We find O'Neil's award is governed by the limitations set forth in the amended statute.

We additionally note 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 O'Neil's argument regarding the constitutionality of the amended statute. Thus, we affirm.

Accordingly, the May 21, 2019 Opinion, Award, and Order, and the June 12, 2019 order denying O'Neil's petition for reconsideration, rendered by Hon. Tanya Pullin, Administrative Law Judge, are hereby **AFFIRMED**.

STIVERS, MEMBER, CONCURS.

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