

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: May 22, 2020

CLAIM NO. 201900620

JENNMAR SERVICES

PETITIONER

VS. APPEAL FROM HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE

BOBBY PHELPS
and HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

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

STIVERS, Member. Jennmar Services (“Jennmar”) seeks review of the December 17, 2019, Opinion and Award of Hon. Jonathan R. Weatherby, Administrative Law Judge (“ALJ”) finding Bobby Phelps (“Phelps”) sustained work-related injuries manifesting on April 5, 2019, while in the employ of Jennmar and which rendered him totally occupationally disabled. The ALJ awarded permanent total disability (“PTD”) benefits terminating four years from the date of injury pursuant to KRS 342.730(4) and

medical benefits. Jennmar also appeals from the January 10, 2020, Order ruling on its petition for reconsideration.

On appeal, Jennmar asserts the ALJ committed reversible error by finding Phelps is permanently totally disabled.

BACKGROUND

The Form 101 alleges Phelps sustained cumulative trauma injuries to multiple body parts due to an April 5, 2019, work injury while in the employ of Jennmar.

Phelps' August 20, 2019, deposition reveals he was born November 20, 1952 and has worked in coal mines since 1976 as a heavy equipment operator, almost exclusively operating a dozer. Phelps denied sustaining any prior work injuries. Phelps retired in 2015 when his employer, Armstrong Coal Company ("Armstrong") in Madisonville, Kentucky, shut down the coal mine resulting in a layoff. Following the layoff, Phelps was retired for approximately three years.

Phelps returned to work for Jennmar, a temporary employment service, on approximately December 11, 2018 and worked through April 5, 2019. Jennmar assigned Phelps to Murray Coal Company which had purchased Armstrong. As he had done in the past, Phelps ran a dozer at a coal mine site working approximately ten hours daily during the week and eight hours on Saturday.

Phelps testified he experienced cumulative trauma injuries to his right shoulder, lower back, and cervical region over the course of operating a dozer for forty years. He began experiencing right shoulder problems in the last year he was employed by Armstrong. Susan Matthews ("Matthews"), the Physician's Assistant who Phelps

had seen for seven or eight years, prescribed a gel for him to apply to his shoulder for what she thought was arthritis. He used the gel sporadically.

Although Phelps was unable to pinpoint the date he first experienced low back problems, he acknowledged the low back problems started before he was employed by Jennmar. His lower back problems extend into his left leg. He denied having any right leg symptoms. As a result, he has problems standing on hard surfaces for more than thirty minutes. He has not undergone treatment for his lower back and leg problems.

Phelps also experienced neck problems which began before he worked for Jennmar. He believed his headaches are an extension of his neck problems. He takes Tylenol and applies BioFreeze. Phelps listed April 5, 2019, as the date of injury on the Form 101 because that was the last day he worked for Jennmar. Phelps explained why he believes his work at Jennmar and in the coal industry resulted in his work injuries:

Q: How [sic] you think your job with Jennmar injured you.

A: Well, it was through the coal mines. I mean through all the years, you know. Like I say, 40 years on a bulldozer there, just repetition work. I mean even today, if I grip something, that finger right there locks up.

...

Q: ... So with your right shoulder, which part of your job do you think injured your right shoulder?

A: The blade lever on that dozer, you know, all those years. And also, mainly, that ripper. Because like I say, I've always run a ripper dozer They call them ripper tractors, but my main job was doing all that ripping of that rock. And like I say, you've got the up and down. You've got four ways to do that thing. You're sitting back

here like this. The blade lever's more up here, it's a little more comfortable. But that ripper's back here.

...

Q: Okay. Is that what you think contributed to like your headaches and neck pain is looking back, or do you think looking down –

A: I think it had a whole lot to do with it because a day's ripping and looking in back of you, your neck is pretty stiff. Sometimes you have to kind of stop and kind of work it a little bit.

Q: What about your low back? Which part of your job as a heavy equipment operator do you think affected your low back?

A: Just sitting in that dozer seat 58 hours a week.

Phelps believed his symptoms in those three areas worsened during his employment with Jennmar. After April 5, 2019, Phelps first saw Dr. James Rushing, a chiropractor, on April 23, 2019. Although other doctors have seen him for evaluation, Phelps has not seen a physician for treatment of his shoulder, low back, and cervical region. Since leaving Jennmar, Phelps has performed odd jobs which he described as follows:

A: Well, like bush hogging. My son and I have got some, little bit of old equipment. Maybe digging a ditch for somebody or something like that, you know. An electric ditch or a water ditch, something like that.

Q: How often do you think you do those odd jobs?

A: Just whenever they come up, not very often.

Q: Okay. Since leaving in April, how many have you done?

A: I don't know, three, I guess.

Q: Okay. And was that digging a ditch, or what were you doing?

A: Yes. It's mostly for the family, to be truthful. Like I say, the kids and grandkids.

Q: So are you getting paid for those odd jobs, or are they kind of just favors?

A: Some of them's [sic] charity, and some of them I get paid for. Mostly charity. If they offered, I'd take it.

Phelps considered himself retired. Other than social security benefits and money received for performing odd jobs, Phelps has no other source of income. He described the symptoms and problems he was experiencing in his right shoulder, head, neck, and low back at the time of the deposition. He takes no medication for these problems except Tylenol on a sporadic basis. Phelps recounted his physical activities since April 5, 2019:

A: You know, you talk about what we do, my son and I, mostly his, we've got a few cattle. I've got to help with that, go up there and water and feed them and things.

Q: From a physical standpoint, do you think you could go back to operating a dozer?

A: I ain't said I can't do nothing because I can, but I suffer for it, you know.

Q: Right.

A: It's just according to how much I do is how much I suffer. That's just the way it is. But, yeah, I can do a little bit.

Q: So you feel like you would maybe have problems like doing it for ten hours a day?

A: Oh, yes, yes, yes, yes.

At the October 23, 2019, hearing, Phelps reiterated much of his deposition testimony concerning his employment in the coal industry and the problems he experienced in operating a dozer. He recounted the symptoms he

currently experiences in his low back, neck, and right shoulder. Phelps explained, “the only pain reliever I can take is Tylenol because I just have one kidney and it functions about 50 percent.” Consequently, Tylenol and BioFreeze are the only medications he takes for his work-related problems. He uses Tylenol as a pain reliever and rubs BioFreeze behind his right ear for headaches. Concerning his ability to return to his previous employment at Jennmar, Phelps testified:

Q: Could you go back and do your job there today?

A: Not that long. Not for ten hours a day I couldn't, no.

Q: That's all I have.

A: Let me say this, too. I ain't saying I can't do something because I can, but I pay for it it hurts so bad afterwards, you know. I mean I have to recuperate from it. And I told several. I think I told Michelle, all of them last time, you know, that when I was working at JENNMAR there – which I'd been off three years and I went back to working there. And my shoulder hurt so bad when I sat on the couch I'd have to prop it up on a pillow and lay the same way in the bed at night unless my wife was close enough to lay it on her. But anyway, I have to lay it on the pillow.

Q: But you couldn't work, you don't think, now?

A: Like I said, I could work so many hours but I could not work, you know, like surface mine works. No, I couldn't.

Phelps provided the following comparison between the problems he experienced while retired and during the time he worked for Jennmar:

A: Well, it got worse, Michelle. I mean, during those three years, yeah, I had trouble with my back. I ain't saying I didn't have trouble with my back, you know, but it wasn't as bad as it is now, you know, as far as I could – I could work longer and I could stand longer, you know. But it's just got aggressively worse, quite a bit worse really. I guess maybe when I went back to surface mine,

you know, and had been off that while it really I guess just gets flared up. I don't know, but anyway.

Phelps described the tasks he has performed since April 5, 2019:

Q: You haven't worked anywhere since I took your deposition in August, have you?

A: Just temporary things around home. There's farmers there and I do a little work for them and I do a little bush-hogging stuff, just do whatever I do to get by, you know. And I told McKinnley here, you know, I don't draw hardly enough Social Security I ain't got no choice but to work some, you know.

Q: What sorts of temporary jobs do you do when you're on a farm?

A: Well, like I said, you know, the bush-hogging part there, you know. Driving a tractor, bush hogging. And even that, I can tell it, you know, but it's different, you know. Not working a public job you can stop, you can get off or rest and if you hurt you can go home. It's different.

Phelps introduced the records of Dr. Rushing which included a one-page questionnaire the doctor completed on April 23, 2019. Phelps also filed the medical reports of Drs. John Gilbert and Joseph Zehner. Jenmar introduced the report of Dr. Robert Jacob.

The October 8, 2019, Benefit Review Conference ("BRC") Order and Memorandum reveals the parties stipulated Phelps sustained a work injury on April 5, 2019, and Jenmar received due and timely notice of the injury. The contested issues were "benefits per KRS 342.730, work-relatedness/causation, unpaid or contested medical expenses, injury as defined by the Act, and TTD:" Under the heading of "Other" is "multipliers; PTD."

In his December 17, 2019, decision, the ALJ found Phelps provided "exceptionally credible testimony" and "his coal career is laudable." Consequently,

his testimony was given “significant weight herein due to [Phelps’] credibility.” The ALJ concluded Phelps’ description of his physically demanding duties and the progression of his symptoms while employed in the coal industry lent credence to the medical opinions of Drs. Rushing, Gilbert, and Zehner. Therefore, based on Phelps’ testimony and those physicians the ALJ found Phelps sustained work injuries. In finding Phelps to be totally permanently disabled, the ALJ provided the following findings of fact and conclusions of law:

17. Dr. Zehner, the credibility of whom has been previously cited and established, found that the Plaintiff did not retain the physical capacity to return to his prior employment but could work light duty with limited hours.

18. Dr. Gilbert likewise determined that the Plaintiff did not retain the physical capacity to return to the same type of work and that he could perform sedentary to light work but would have trouble going up and down ladders and with sitting or standing for extended periods of time.

19. The ALJ finds that considering the Plaintiff’s advanced age, his significant physical restrictions that essentially confine him to part time sedentary work, and his 40-year history of work in the coal mining industry, the Plaintiff is unable to provide services to another in return for remuneration on a regular and sustained basis in a competitive economy. The ALJ consequently finds that the Plaintiff is permanently and totally disabled.

Jennmar filed a petition for reconsideration. Relevant to this appeal, Jennmar asserted the ALJ failed to conduct the analysis required by City of Ashland v. Stumbo, 461 S.W.3d 392, 396 (Ky. 2015) in addressing the issue of permanent total disability. It pointed out the ALJ failed to find the impairment rating attributable to Phelps’ injuries. Thus, further findings of fact and conclusions of law were needed. Lastly, Jennmar asserted substantial evidence does not support a finding of permanent

total disability for the following reasons: 1) Phelps “testified or implied he could return to work as a heavy equipment operator in some capacity;” 2) he “testified or implied that he believes he is capable of other types of work;” 3) Phelps “continues to perform physically demanding work (watering/feeding cattle, bush hogging and digging ditches) and occasionally earns wages for same;” 4) Phelps “exhibited his ability to continue working despite ongoing symptoms in his neck, right shoulder and low back prior to his voluntary retirement in 2016 and again in 2018 when he returned to work with the defendant/employer;” and 5) “none of the evaluating physicians concluded [Phelps] was completely precluded from returning to some type of employment on a sustained basis.”

In the January 10, 2020, Order, the ALJ clarified the contested issues to be decided and supplemented his findings of fact with the following:

2. The ALJ finds that the Plaintiff was credible in his testimony that he had become unable to stand for longer than thirty minutes without a break and that his low back, neck, and right shoulder symptoms had progressed over the years to the point where the Plaintiff could no longer perform the type of work that he had performed for over 40 years.

3. The ALJ further finds that the impairment rating of 28% issued by Dr. Gilbert was persuasive and that the restrictions issued by Drs. Gilbert and Zehner were equally credible. As such, the ALJ finds that the Plaintiff would have trouble sitting or standing for long periods of time and that he would be unable to lift more than 20 pounds.

4. The ALJ is particularly persuaded by the opinion of Dr. Zehner that the Plaintiff would be limited to light duty and to limited hours. When considering the Plaintiff's work history, age, education level, and restrictions, the ALJ is convinced that the Plaintiff would be unlikely to be able to provide services to another in exchange for

remuneration on a regular basis in a competitive economy.

In arguing substantial evidence does not support the ALJ's finding of total disability, Jennmar notes Phelps confirmed the presence of symptoms at all three injury sites prior to his voluntary retirement. Jennmar asserts Phelps' testimony establishes he continued to operate a dozer without problems until his retirement. Thus, Jennmar posits Phelps did not retire after being laid off by Armstrong due to his symptoms but rather due to the layoff and to provide younger workers an opportunity to continue working. Jennmar emphasizes that following his retirement, Phelps continued to have symptoms in the low back, right shoulder, and neck prior to resuming work for Jennmar. In spite of these symptoms, Phelps voluntarily returned to work in 2018 for Jennmar and operated a dozer with ongoing symptoms for approximately five months. When asked if he could return to work, Jennmar observes Phelps testified, "I ain't [sic] said I can't do nothing because I can ..." Jennmar references Phelps' testimony that he has continued to work following his departure from Jennmar and performs odd jobs such as feeding cattle, bush hogging, and digging ditches for which he occasionally receives compensation. Jennmar insists these jobs are not only physically demanding but also exhibit Phelps' ability to operate other types of heavy equipment/machinery. In its view, since Phelps has worked receiving some remuneration, he does not have a complete and permanent inability to return to work.

Jennmar observes that even though Phelps testified he could not stand for longer than thirty minutes, he did not identify any problems with remaining in a seated position, as he was required to do when operating heavy equipment. Jennmar

posits Phelps' long tenure in the coal mining industry demonstrates he is dependable. Jenmar emphasizes Phelps has never sought medical treatment for any of the affected body parts except for topical cream which he used prior to his employment with Jenmar. Since his symptoms are not severe enough to require medical treatment, Jenmar argues Phelps cannot be permanently totally disabled. Jenmar also relies upon the fact that Phelps was not assessed permanent restrictions by anyone "other than a one-time paid evaluator."

Jenmar requests the Board determine Phelps is not permanently disabled since he not only retains the physical capacity to return to work as a bulldozer operator but can also perform a number of other jobs on a sustained basis for compensation.

ANALYSIS

Phelps, as the claimant in a workers' compensation proceeding, had the burden of proving each of the essential elements of his cause of action, including his entitlement to PTD benefits. *See* KRS 342.0011(1); Snowder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Phelps was successful in that burden, the question on appeal is whether there was substantial evidence of record to support 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 to be afforded the evidence 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).

As an initial matter, we note Jenmar does not contend the ALJ's analysis as to whether Phelps is permanently totally disabled is deficient. Jenmar raised the ALJ's failure to conduct the analysis required by City of Ashland v. Stumbo,

supra, in its petition for reconsideration. However, on appeal, it does not contend the ALJ's decision in combination with the January 10, 2020, Order failed to provide the analysis required by City of Ashland v. Stumbo, supra. Similarly, Jennmar does not charge the ALJ's analysis is not in compliance with the criteria set forth in McNutt Construction/First General Services v. Scott, 40 S.W.3d 854 (Ky. 2001). Nor does Jennmar take issue with the ALJ's finding of lumbar, right shoulder, and cervical work injuries and the impairment rating attributable to the injuries.

In his June 27, 2019, report, Dr. Gilbert diagnosed the following:

Cervical and lumbar degenerative joint disease with right cervical radiculopathy in a dermatomal and myotomal type distribution and lumbar left lower extremity radiculopathy in a dermatomal and myotomal distribution and right shoulder pain and weakness as is reproducible and right shoulder degenerative joint disease due to cumulative trauma.

Dr. Gilbert attributed the entirety of the above-cited diagnoses to the work-related injury. He assessed a 28% impairment rating broken down as follows: lumbar 13%, right shoulder 10%, and cervical 8%. He concluded Phelps did not have an active impairment prior to this injury. Significantly, Jennmar does not contend Phelps had a pre-existing active impairment or disability necessitating a carve-out from the award. Dr. Gilbert opined Phelps did not possess the physical capacity to perform the type of work he performed at the time of the injury because his cervical and lumbar radiculopathies and right shoulder weakness preclude performing such work. Dr. Gilbert restricted Phelps to sedentary to light duty work. However, he believed Phelps would have trouble going up and down ladders and engaging in any repetitive

operation of controls. Phelps would also have difficulty sitting or standing for any extended period of time.

Similarly, pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment (“AMA Guides”), Dr. Zehner assessed a 17% impairment rating breaking the impairment rating down as follows: cervical spine region 7%, lumbar spine region 7%, and the right shoulder 4%. He found Phelps had no pre-existing impairment of any of the three body parts. Dr. Zehner concluded Phelps was unable to stand for more than thirty minutes, lift more than twenty pounds, and sit for longer than one hour without increased pain. Phelps did not possess the ability to return to his previous employment and could perform light work “with limited hours (part time).”

Phelps testified if he engaged in certain activities, he would “suffer for it,” and he could not return to the work of dozer operation he had performed for forty years.

As Jennmar emphasizes, Phelps acknowledged he was capable of performing certain tasks. However, we do not believe this is fatal to the ALJ’s finding of total occupational disability. Both Drs. Gilbert and Zehner opined Phelps cannot return to the only work he has performed in forty years and also restricted him to light duty. Dr. Gilbert noted even in performing light duty, Phelps would have difficulty sitting for long periods of time. In Dr. Zehner’s opinion, which the ALJ found particularly persuasive, Phelps was only capable of light duty work on a limited or part-time basis. The opinions of Drs. Gilbert and Zehner comprise substantial evidence

establishing Phelps cannot perform work as a dozer operator or any work on a full-time basis.

The ALJ also found extremely persuasive Phelps' assessment of his physical capacity and the pain he currently experiences or will experience upon attempting to perform sporadic tasks. Well established is the premise that a claimant's testimony concerning his physical condition and his physical ability to perform activities and the physical effects of those activities afterwards is competent evidence upon which the ALJ may rely. Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979). Consequently, Phelps' testimony also comprises substantial evidence supporting a finding he can no longer be employed as a dozer operator nor on a full-time basis.

While consideration of a total disability award depends on many of the same factors enunciated in Osborne v. Johnson, 432 S.W.2d 800 (Ky. 1968), the ALJ is granted broad authority to translate an impairment rating into either partial or total disability. Ira A. Watson Department Store v. Hamilton, *supra*. The factors which the ALJ may consider in making the determination include the worker's post-injury physical, emotional, intellectual, and vocational status and how those factors interact. McNutt Construction/First General Services v. Scott, *supra*. The ALJ apparently concluded that regardless of the fact Phelps occasionally performed various odd jobs and was paid for some of those tasks, Phelps is permanently totally disabled as defined in KRS 342.0011(11)(c). In McNutt Construction/First General Services v. Scott, *supra*, the Kentucky Supreme Court concluded:

For that reason, we conclude that some of the principles set forth in Osborne v. Johnson, *supra*, remain viable when determining whether a worker's occupational disability is partial or total. *See also*,

Hamilton, Ky., 34 S.W.3d 48 (2000), in which we reached the same conclusion.

An analysis of the factors set forth in KRS 342.0011(11)(b), (11)(c), and (34) clearly requires an individualized determination of what the worker is and is not able to do after recovering from the work injury. Consistent with *Osborne v. Johnson, supra*, it necessarily includes a consideration of factors such as the worker's post-injury physical, emotional, intellectual, and vocational status and how those factors interact. It also includes a consideration of the likelihood that the particular worker would be able to find work **consistently** under normal employment conditions. A worker's ability to do so is affected by factors such as whether the individual will be **dependable** and whether his physiological restrictions prohibit him from using the skills which are within his individual vocational capabilities. The definition of "work" clearly contemplates that a worker is not required to be homebound in order to be found to be totally occupationally disabled. *See, Osborne v. Johnson, supra*, at 803. (emphasis added).

Id. at 860.

Even though Phelps was capable of sporadically performing some odd jobs, the ALJ found he would not be able to find work consistently under normal employment conditions. Phelps' testimony in concert with the doctors' supports the ALJ's determination Phelps' work-related conditions prohibit him from using skills within his individual vocational capabilities in order to obtain employment on a consistent and dependable basis. As pointed out by the Supreme Court in McNutt, the definition of work does not contemplate Phelps must be homebound before being found totally occupationally disabled. The fact Phelps occasionally drives a tractor, operates a bush hog, and feeds and waters cattle does not prohibit a finding of total occupational disability.

The ALJ acted within his authority and translated Phelps' significant impairment rating into an award of permanent total disability. We do not believe the evidence is so overwhelming as to compel a finding in Jennmar's favor. As reviewed above, because this Board has no fact-finding function, and the ALJ made sufficient findings to support his decision, which is supported by substantial evidence in the record we are without authority to direct a different result. Special Fund v. Francis, supra and KRS 342.185.

Accordingly, the December 17, 2019, Opinion and Award and the January 10, 2020, Order ruling on the petition for reconsideration of the Administrative Law Judge are **AFFIRMED**.

ALVEY, CHAIRMAN, CONCURS.

BORDERS, MEMBER, NOT SITTING.

COUNSEL FOR PETITIONER:

HON MICHELLE ENOCH
11901 BRINLEY AVE
LOUISVILLE KY 40243

LMS

COUNSEL FOR REPENDENT:

HON MCKINNLEY MORGAN
921 S MAIN ST
LONDON KY 40741

LMS

ADMINISTRATIVE LAW JUDGE:

HON JONATHAN R WEATHERBY
MAYO-UNDERWOOD BUILDING
500 MERO ST 3RD FLOOR
FRANKFORT KY 40601

LMS