

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: January 22, 2020

CLAIM NO. 200596523

JONATHAN BUDDY SMALLWOOD

PETITIONER

VS.

APPEAL FROM HON. JOHN B. COLEMAN,
ADMINISTRATIVE LAW JUDGE

LONE MOUNTAIN PROCESSING, INC.
DR. DANESH MAZLOOMDOOST
and HON. JOHN B. COLEMAN,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

BEFORE: ALVEY, Chairman, STIVERS and RECHTER¹, Members.

STIVERS, Member. Jonathan Buddy Smallwood (“Smallwood”) appeals from the July 9, 2019, Opinion and Award of Hon. John B. Coleman, Administrative Law Judge (“ALJ”). The ALJ resolved Smallwood’s Motion to Reopen by increasing his

¹ Although Board Member Rechter’s term expired on January 4, 2020, she is permitted to serve until January 22, 2020, pursuant to KRS 342.213(7)(b), and participated in the above decision.

previous award of permanent partial disability (“PPD”) benefits from 425 weeks to 520 weeks. The ALJ found Smallwood’s impairment rating increased from 48% to 81.6%. The ALJ also determined the contested medical treatment recommendations made by Dr. Danesh Mazloomdoost, specifically SI injections and radiofrequency ablation, are reasonable and necessary. Smallwood also appeals from the July 29, 2019, Order on reconsideration.

On appeal, Smallwood asserts the ALJ should have found Smallwood was not gainfully employed between 2011 and 2017 at Camp Blanton “because it does not meet the criteria that has to be met in order to be considered substantial gainful employment.” Secondly, Smallwood asserts that, but for the ALJ’s finding, his activities as Camp Director at Camp Blanton comprised gainful employment, the medical evidence would have compelled a finding of permanent total disability.

BACKGROUND

The Form 101 asserts Smallwood sustained the following injuries on October 30, 2003, while in the employ of Lone Mountain Processing, Inc. (“Lone Mountain”):

Cervical neck injury with headaches and radiation into both arms; mid-back injury; low back injury with radiation of pain into right leg; psychological and emotion overlay; bladder disfunction [sic] and urinary frequency; concussion to head with resulting memory loss; erectile disfunction [sic]; stomach condition as a result of side affects [sic] from medication.

The Form 101 described the mode of injury as follows:

I was driving a scoop with no canopy. I was traveling up 9 Left Road Way with a load of supplies. I ran over some debris that had fallen of [sic] a tail piece that had been disassembled the night before on 3rd shift. I ran over some

header boards and a big rock. When I ran over the debris I was wedged against the roof of the mine and then the scoop dropped back down to the ground, 48 to 50 in.

As this is the second time this claim has been before this Board, we incorporate by reference the procedural and factual history of this litigation as set forth in our opinion entered June 5, 2009.

In the September 29, 2008, decision, Hon. Lawrence F. Smith, Administrative Law Judge (“ALJ Smith”) awarded Smallwood PPD benefits based upon a 27% whole person impairment rating and medical benefits for unspecified work-related injuries. ALJ Smith dismissed Smallwood’s claims for alleged work-related sexual dysfunction, fecal incontinence, and bladder dysfunction, as well as his psychological overlay claim.

Smallwood appealed, and in this Board’s June 5, 2009, Opinion, we affirmed in part, reversed in part, and remanded the claim to ALJ Smith. Our instructions to ALJ Smith on remand were to enter an amended award of medical benefits for Smallwood’s work-related bowel and bladder dysfunction as well as an amended award of income and medical benefits for his sexual dysfunction based upon a 5% impairment rating. Further, we requested ALJ Smith to consider the combined impairment rating Smallwood sustained as a result of the sexual dysfunction and his work-related back condition and enter the appropriate award.

Smallwood appealed to the Court of Appeals and the Supreme Court of Kentucky, and both courts affirmed this Board.

ALJ Smith set forth his Order on Remand on November 2, 2011, in which he amended his award in accordance with this Board’s instructions.

A voluminous number of medical fee disputes have been filed in this litigation. However, they do not need to be recounted here.

On September 28, 2012, Smallwood filed the Motion to Reopen that is the subject of this appeal. In his motion, Smallwood alleges his physical condition has greatly deteriorated. He further asserts as follows: “Since the original award, the Plaintiff is experiencing more urgency and more frequency with respect to his bladder dysfunction. The Plaintiff is also experiencing greater difficulty with bladder control.” Attached to his motion is an Affidavit of Dr. Charles Woolums and an affidavit and report of Dr. Mazloomdoost.

Smallwood filed an amended Motion to Reopen on August 19, 2013, in which he also attached the July 24, 2013, medical report of Dr. Robert Hoskins. By order dated December 11, 2012, Smallwood’s motion was sustained by Hon. Allison Emerson Jones, Administrative Law Judge.

Smallwood testified at the January 22, 2019, hearing, and addressed how his condition has worsened since the original award of benefits in 2008:

A: It just – you know – it’s just for the restriction of ability. You know, it lessens. Everything is – is more – it’s just more of a weight, more of a lack of mobility due to the pain, due to the issues of leakage, you know, control. A lot of it is just being confined in which pain predominantly dictates all of that, as far as what I can and can’t do.

Q: And, has the pain level increased since the...

A: Yes. Yes.

Q: ...original decision?

A: I mean, when I was on the Oxycontin, it – it was something that I could – you know, it took it – a lot of it

away, but, at the same time, you know, you didn't realize the effect of anything that you did and then, whenever you come off of that, the pain was so severe that it was unbelievable, you know, so, I mean, I've got it down now to where I just really am – I have to watch what I do on a day to day basis. Anything I do outside of level walking like this right here, uneven surfaces, anything contributes to the accelerated part of the pain.

Q: Now, you mentioned earlier that you had difficulty getting in and out of the bed. Is that problem something that's worsened since you've had your original decision in your case?

A: It's – it's a difficult process, yeah. I mean, you know, you're – it's just getting up of [sic] a morning. I mean, you know, it's...

Q: Is...

A: I don't know how to fully articulate. It's – it's just a pain that makes it harder to move. You know, everything is under a lot of – a big degree of stress and – and strain to try to move around and, you know, it just takes a while to get up and get moving and get your bearings, you know. It just...

Q: Is there an excruciating pain associated with about [sic] any type of movement?

A: Yes, it is. I mean, you know, everything is – movement dictates this pain. I mean, it's there constantly, but anything that's other than just a normal, you know, back and forth to the bathroom or something like that, it's really limited. It's really limited. I mean, I've gained over a hundred pounds of weight because of this pain.

Q: Has that occurred since you were awarded benefits initially?

A: Oh, yeah. Yea, when I first – when I first got hurt, I was as healthy as could be. I weighed about two hundred and fifteen pounds and I could outrun a deer. I mean, I was a healthy man. Then, whenever this happened right here, it's just – you know, it's just slowly declined to, I guess, what you see now.

He described how his bladder condition has worsened:

A: Just by lack of control. When this first started, you know, there was a little bit of – you could, more or less, hold yourself. It was bad, but you had to hurry and get to a bathroom. Now, whenever it comes on, you've got to be right there. Sitting and moving, even moving, dictates what happens, as far as leakage on either end, depending on, you know, the readiness of being able to use the bathroom. I actually wear – if I'm out like this, I- I wear protection just so that I don't – you know, mistakes are made.

Concerning his work at Camp Blanton, Smallwood testified:

A: It's a camp where kids come, as far as, you know, like boy scouts and things like that.

Q: And, how long were you employed through the camp?

A: I stayed almost six years?

Q: And, what six years are we talking about?

A: Let's see. From – well, prior to this two years here, - I've been out of the camp two years, so, prior to that, would be – let's see. I left in '16, I think.

Q: 2010 through 2016?

A: Yeah, somewhere in there. Somewhere in there.

...

Q: And, what is it that you do at Camp Blanton?

A: Just be there to oversee anything that might need to be done, as far as just, more or less, protecting the place or, kind of, being a watchman is basically it.

Q: And, how does Camp Blanton – did they have cabins?

A: They do.

Q: And, when kids come, they would stay for extended periods of time. Is that correct?

A: Generally, about a week long deal, yeah.

Q: And, were you considered the ranger?

A: Yes.

Q: And, you would've been the one who actually oversaw the activities there at camp then?

A: No.

Q: No?

A: No, I don't – I didn't – I did not do anything outside of just, when people come in, write down and book, you know, their visit there and their activities was [sic] something that they, I guess, done [sic] on their own. All they had to do was just, kind of, come in and follow the rules of what needed to be done, as far as their stay.

Q: But you were the only person that would have been at the camp that oversaw the camp area for that six year period, isn't that correct?

A: No. No, there was [sic] other people that come in when work had to be done.

Q: Okay. Okay. Were you the only person who would have been an on-site employee and you were stationed there at the camp and...

A: As far as living there, yes, that's correct.

Q:you lived there for a six year period?

A: Yes.

Q: And, you were the only one that would have been there on site continuously?

A: As far as living there, yes.

Q: I mean, you're saying some people would come in when there was work to be performed....

A: Yeah.

...

Q: And, where did you live on the camp?

A: There was a cabin down in the front that – as you come in that was for whoever was, you know, like, there, as far as a live-in, yes.

...

Q: And, you were designated as the camp director?

A: Camp – well, as camp ranger I was always told, but I don't know how, I mean,...

Q: Okay. I'm sorry. I thought I asked you if you were the – considered the ranger and you had indicated no, but your position was camp ranger?

A: I guess so. I mean, that's what the – that's what the title implies, as far as someone staying there.

Q: I mean, the whole purpose is to have someone on the property who would oversee the property and who would take care of things and make sure things were taken care of if they needed to be repaired by outside maintenance, correct?

A: That was done with a call – a phone-call to have someone come in. All I was was [sic] a person there that made the decisions of things that needed to be addressed.

Smallwood was paid \$500.00 a month and was also provided a cabin in which he lived and all of the expenses related to the cabin were paid. Smallwood left this position in May of 2016 because he bought a home.

On January 22, 2019, Smallwood filed a Motion to Reconvene Hearing in order to develop additional information and take additional testimony on the issue of whether Smallwood's work at Camp Blanton should be considered employment. By order dated March 6, 2019, the ALJ sustained Smallwood's motion.

A second hearing took place on May 21, 2019. Smallwood testified once again to what he did at Camp Blanton from March 2011 through April 2017. He testified as follows regarding what he was to do with the money he received every month:

Q: How much money did you receive each month?

A: Five hundred (\$500.00) a month is what I was paid through...

Q: Out of this five hundred (\$500.00), you paid for certain items that was [sic] used there at the park? Is that correct?

A: Yes, the biggest majority was paying someone to help maintain the facility.

Q: Okay.

A: What was left over was used for essentials, tissues, paper towels, gasoline and just general stuff for bathroom facilities...

Q: Okay.

A: ...and the lodging areas.

Q: Okay. Now, the amount that you spent on these items varied somewhat from month to month. Is that correct?

A: Yeah, they – I mean, that all depended on the nature of how many people came in and, certainly, the summer months, there's always, you know, an abundance of people there. You had a few off months in the winter time, you know, when it slowed down.

Q: Okay. But the expenses tended to be more during the summer and fall months?

A: Yes.

Q: Okay.

A: Yes.

Q: And, less during the winter months?

A: Generally, January and February was the biggest fall-off. Usually, right around March, middle of March or something like that all the way through until Christmas was the busiest time for the camp.

Q: Okay. In the months while you was [sic] there, to the best of your recollection, did you spend the entire amount on these expenses or was there some left over usually each month?

A: The biggest majority was spent on, you know, things that the camp needed for maintenance or, like I said, the things it needed for stocking the cabinets and things. There could've been, you know, a small margin left over. You know, it'd be hard to be accurate with that, but, you know, it could be fifty (\$50.00), a hundred dollars (\$100.00). I don't know. The biggest majority of it was used for, you know, maintaining the facility.

Smallwood received \$500.00 a month every month during the time period he was at Camp Blanton.

Harlan County Jail provided prisoners to engage in maintenance projects around the park for which there was no charge. Regarding the prisoners' work at the camp, he testified:

Q: What was the nature of some of the services that [sic] prisoners performed?

A: Just anything necessary. The only thing they weren't able to do is, like, building projects or something like that, but anything to do with picking up sticks, paper, manicuring the grounds, you know, moving debris or anything that was required, you know, labor. They were always real handy for that.

Q: Okay. And, did the jailer typically provide these prisoners for those type projects any time you requested?

A: If he didn't get to me within a day or so, I mean, - typically, we learned to try to be advance on doing this,

but it- you know, all we had to do was call and, if they were on a project, within a day or so, they were – they were there.

Smallwood described the type of work he performed on the property:

Basically, I – I just patrol the camp at times, you know, and would, you know, go around afterwards making sure that nobody had done anything. You know, if there's a piece of paper or something, certainly, you know, you're going to pick it up, but, you know, every once in a while, I'd have something like this to collect things that was – you know, you didn't want to be there, but, you know, if it – on a regular basis, after each group, like I said, they were really good about sending people down and the camp was at a point in time, that it was in duress. I mean, it was going down, so – but we had a good relationship with the jail and – and letting everybody know what we was [sic] trying to get done there and, if there was anything that was overwhelming or something that needed to be addressed, then we tried to do this in between each group to be sure this camp was clean and maintained. You know, we'd get people down to go back over the grounds good, check everything out and, you know, it just – it was a big benefit, you know, for their services, but, mainly, all I done [sic] was observed [sic] these things and, if it got to a point, you know, that we needed help with it, then, certainly, we had that provided for us.

The cabin Smallwood stayed in was a five-room cabin. “There was a kitchen, bedroom, living room and then a little storage room and then a little office room for a desk.”

In the July 9, 2019, Opinion and Award, the ALJ set forth the following analysis and conclusions:

After considering the entirety of the evidence submitted by both parties, I find the plaintiff has shown an increase in AMA impairment rating since the time of the Opinion and Award on Remand dated November 2, 2011. Based upon the medical opinion of Dr. Hoskins, I am convinced that the plaintiff's impairment rating has

increased from 35% to 48% under the AMA Guides. The increase in impairment rating is attributable to the bowel, urinary and sexual dysfunction for which the plaintiff was initially awarded only a 5% impairment. However, since the time of the original decision, the plaintiff has continued regular treatment, including the treatment at the University of Kentucky for increased bowel incontinence. While Dr. Snider has opined there is a lack of objective evidence that the conditions are neurogenic in nature, Dr. Patel was clearly convinced the condition was related to the subject injury. It can also be inferred that Dr. Mazloomdoost felt the etiology of the condition was the injury as well, since he referred the plaintiff for the treatment. Dr. Owen pointed to objective studies in his medical report, confirming that the plaintiff's conditions are neurogenic in nature. While I recognize the opinion of Dr. Snider and believe him to be a credible physician, the weight of the opinions and factual statements of the treating physicians regarding the need for treatment of the conditions leads me to be persuaded more by the opinions of Dr. Hoskins and Dr. Owen.

The plaintiff argues that he has been rendered permanently and totally disabled as the result of increased symptoms and impairment. The plaintiff made this request in his amended motion to reopen dated August 16, 2013 when he was working as the camp director of Camp Blanton. He was earning a salary of \$500.00 per month as well as receiving room and board for his work. The plaintiff argues that under Social Security disability guidelines, the amount of his earnings do not represent substantial gainful employment. However, under KRS 342.140 (6), the term "wages" includes the reasonable value of board, rent, housing, lodging, and fuel or similar advantage received from the employer. Therefore, the undersigned is convinced that the plaintiff was engaged in work throughout the relevant timeframe of 2011 through 2017. While the employment did not allow the plaintiff to enjoy the average weekly wage of \$763.60, which he earned for the defendant herein, it is substantial enough to reveal that the plaintiff did not meet the definition of permanent total disability as defined in KRS 342.0011 and required for a determination of total disability under the fourth step in the analysis set forth in City of Ashland v. Stumbo, 461 S.W. 3d 392 (Ky. 2015).

Based upon the plaintiff's increased impairment rating to 48% and the application of the multiplier of 1.70 set forth at KRS 342.730 (1) (b), an 81.6% permanent disability rating is calculated. Therefore, the plaintiff has exceeded the 50% threshold set forth in KRS 342.730 (1)(d), thereby entitling him to have his award of benefits, which was already paid at the maximum rate, extended to 520 weeks rather than the 425 weeks previously awarded.

The ALJ has reviewed the medical disputes filed herein and is firmly convinced that the medical treatment recommendations made by Dr. Dinesh Mazloomdoost are reasonable, necessary and related to the work injury. While I recognize the opinion of Dr. Rademaker, I am persuaded more by the opinion of the treating pain management specialist. Dr. Mazloomdoost clearly explained why the need for the SI injections were related to the effects of the work injury. He also explained why the radiofrequency ablation and the SI injections were recommended and reasonable for the work injury. While Dr. Rademaker did not believe the plaintiff received adequate relief from the first round of RFA's, it is easy to see how 30% relief is significant to the affected person. Therefore, the medical disputes are resolved in favor of the plaintiff.

Smallwood filed a petition for reconsideration asserting, among other alleged errors, the same arguments he now asserts on appeal. Regarding the issues on appeal, Smallwood's petition for reconsideration was denied.

ANALYSIS

Smallwood first argues the ALJ erred by concluding Smallwood's work as Camp Director for Camp Blanton was substantial gainful employment "because it does not meet the criteria that has to be met in order to be considered substantial gainful employment" under the Social Security Administration's disability guidelines. We affirm on this issue.

Smallwood had the burden of proving each of the essential elements of his claim, including whether he is now permanently totally disabled. Durham v. Peabody Coal Co., 272 S.W.3d 192, 195 (Ky. 2008); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because Smallwood was unsuccessful in his burden, 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). An ALJ is vested with broad authority to decide questions involving causation. Dravo Lime Co. v. Eakins, 156 S.W.3d 283 (Ky. 2003). 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 not adequate 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).

We also acknowledge that an ALJ has wide-ranging discretion in reaching his or her decision. Seventh Street Road Tobacco Warehouse v. Stillwell, 550 S.W.2d 469 (Ky. 1976); Colwell v. Dresser Instrument Div., 217 S.W.3d 213, 219 (Ky. 2006). KRS 342.285 designates the ALJ as the finder of fact, and he/she is granted the sole discretion in determining the quality, character, and substance of evidence. Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). Likewise, the ALJ, as fact-finder, may choose whom and what to believe and, in doing so, 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 party's total proof. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15, 16 (Ky. 1977); Pruitt v. Bugg Brothers, 547 S.W.2d 123 (Ky. 1977).

As an initial matter, it is critical to note Smallwood, in both his petition for reconsideration and his brief to this Board, failed to call into question the adequacy of the ALJ's analysis regarding permanent total disability or request additional findings concerning this issue. The sole focus of Smallwood's first argument is the fact the ALJ deemed Smallwood's work at Camp Blanton to be "substantial gainful employment." Pointing to the definition of "substantial gainful activity" as set forth in the Social Security Administration's disability guidelines, Smallwood asserts his work at Camp Blanton does not reach this threshold. Smallwood's argument on appeal with respect to this issue hinges on the incorrect notion that the standard for "substantial

gainful activity” in the Social Security context is applicable within the context of his workers’ compensation claim when it is not.

Regarding Smallwood’s work at Camp Blanton, the ALJ was ultimately persuaded by the fact that he was not only earning \$500.00 a month but was also being provided room and board. As the ALJ stated, pursuant to KRS 342.140(6), the definition of “wages” includes “the reasonable value of board, rent, housing, lodging, and fuel or similar advantage received from the employer.” For the Board to supplant the ALJ’s finding and find that Smallwood’s activity at Camp Blanton does not comprise “work” would be tantamount to requiring the Board to step outside of its statutorily-determined bounds. The Board, as an appellate tribunal, may not usurp an 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 could otherwise 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*.

That said, we believe the ALJ failed to set forth adequate findings on the issue of permanent total disability. Kentland Elkhorn Coal Corp. v. Yates, 743 S.W.2d 47 (Ky. App. 1988); Shields v. Pittsburgh and Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982). The analysis of this issue requires a weighing of several factors as set forth in Osborne v. Johnson, 432 S.W.2d 800 (Ky. 1968) and reiterated in Ira A. Watson Dept. Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000), including “a consideration of the likelihood that the particular worker would be able to find work consistently under normal employment conditions.” *Id.* at 51. We also note that, as

articulated by the Kentucky Supreme Court, “[t]he definition of ‘work’ clearly contemplates that a worker is not required to be homebound in order to be found to be totally occupationally disabled,” a notion not fully explored by this ALJ. *Id.* Nonetheless, the thoroughness of the ALJ’s analysis was not raised by Smallwood in his brief. Further, as stated, Smallwood failed to address the adequacy of the ALJ’s PTD analysis and/or request additional findings in his petition for reconsideration, thereby keeping this issue outside of our jurisdiction. *Wells v. Ford*, 714 S.W.2d 481 (Ky. 1986). As substantial evidence supports the ALJ’s determination Smallwood was engaged in work at Camp Blanton from 2011 through 2017, we must affirm on this issue.

Smallwood’s second argument on appeal is that, “but for the ALJ’s finding that the Petitioner’s responsibilities as Camp Director at Camp Blanton was substantial enough to require a finding that the Petitioner did not meet the definition of permanent total disability, the medical evidence would have compelled a finding of permanent totally disability.” We affirm on this issue, as the medical evidence filed in the record by Smallwood does not compel a finding of permanent total disability.

Attached to Smallwood’s original Motion to Reopen are the affidavits of Drs. Woolums and Mazloomdoost and the August 8, 2012, Form 107-I medical report of Dr. Mazloomdoost. While we acknowledge both of these physicians opined Smallwood’s occupational disability has increased, and Dr. Mazloomdoost imposed permanent restrictions and opined Smallwood is unable to return to the type of work

he performed at the time of his injury, neither physician opined Smallwood is unable to perform any type of work.²

Attached to Smallwood's Amended Motion to Reopen is the July 24, 2013, report of Dr. Hoskins. As with Drs. Woolums and Mazloomdoost, Dr. Hoskins also did not opine Smallwood is unable to perform any type of work.

Smallwood filed an updated report by Dr. Mazloomdoost dated June 14, 2018. Again, while Dr. Mazloomdoost reiterated Smallwood would be unable to return to the type of work he was performing at the time of the injury and he assessed permanent restrictions, he did not explicitly opine Smallwood is unable to perform any type of work.³

Smallwood also filed the July 18, 2017, report of Dr. James Owen. Dr. Owen also opined Smallwood would be unable to return to his pre-injury job and he also assessed permanent restrictions, but he did not opine Smallwood is unable to perform any type of work.⁴

Smallwood had the burden of proof upon reopening to prove he is now permanently totally disabled. The medical evidence Smallwood filed in the record does not, despite Smallwood's assertions on appeal, compel a finding of permanent total disability. While the ALJ certainly had the discretion to *infer* from the evidence in the record a finding of permanent total disability in lieu of increasing his award of

² Dr. Mazloomdoost assessed the following restrictions: "Limit lifting no more than 10 lbs. Walking < 15 minutes, Standing < 10 minutes, reaching & grasping are fine barring axial loading of < 10 lbs."

³ Dr. Mazloomdoost's restrictions in the report remained the same except for an easing of the walking restriction to "up to 1 hour."

⁴ Dr. Owen's restrictions are as follows: "The restrictions would be lifting, handling, and carrying objects less than 10 pounds; avoidance of activity that requires recurrent bending, squatting, and/or stooping."

PPD benefits, the ALJ, as is also within his discretion, chose not to do so. Therefore, on this issue we affirm.

Accordingly, on all issues raised on appeal, the July 9, 2019, Opinion and Award and the July 29, 2019, Order on reconsideration are **AFFIRMED**.

ALL CONCUR

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