

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: November 19, 2019

CLAIM NO. 201787441

JOSEPH WEAKLEY

PETITIONER

VS.

APPEAL FROM HON. TANYA PULLIN,
ADMINISTRATIVE LAW JUDGE

ABF;
AND HON. TANYA PULLIN,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

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

RECHTER, Member. Joseph Weakley appeals from the May 14, 2019 Opinion, Award and Order, and the June 12, 2019 Order on Reconsideration rendered by Hon. Tanya Pullin, Administrative Law Judge ("ALJ"). The ALJ determined Weakley suffered work-related injuries to his neck and right shoulder. On appeal, Weakley argues that the evidence compels a finding he is permanently totally

disabled. He also asserts the ALJ erred in applying the age limitations set forth in KRS 342.730(4). For the reasons set forth herein, we affirm.

Weakley was born on July 17, 1938 and worked for ABF as a driver and laborer. The position required him to hold a commercial driver's license ("CDL"), and to lift and climb frequently. He began working for ABF in 1986. Prior to that time, Weakley served in the military for several years and attended barber school.

On March 28, 2017, Weakley was performing a delivery and was struck in the head and right shoulder by an overhead warehouse door. He lost consciousness and was taken to University of Louisville ("UL") trauma center. A CT scan was taken of his head and neck, skin grafts were performed on his left forearm, and he was placed in a neck brace.

Weakley was directed to follow up with UL Neurosurgeons. A July 7, 2017 office note indicates Weakley was treated for a C2 fracture following the work accident. After six weeks, the neck brace was removed and Weakley attended fifteen physical therapy visits. He was returned to light duty work.

Following the work accident, Weakley was also treated for bilateral shoulder pain. An April 6, 2017 MRI of the right shoulder revealed a complete tear of the supraspinatus and infraspinatus tendons. A tear of the biceps tendon was also suspected. Dr. Mark Smith treated Weakley's right shoulder and diagnosed a large rotator cuff tear and Popeye deformity. He also noted left shoulder pain. Dr. Smith ordered physical therapy, but Weakley reported little improvement. He recommended surgery, but Weakley declined due to the extended pain and recovery

period anticipated. Dr. Smith last treated Weakley on February 8, 2018. At an August 13, 2018 deposition, Dr. Smith stated Weakley had reached maximum medical improvement and assessed a 14% impairment rating for the right shoulder if no surgery was performed. Dr. Smith attributed the right shoulder condition to the work injury, but opined the tendon tears likely pre-existed the work accident.

Dr. James Farrage conducted an independent medical evaluation (“IME”) on January 31, 2018. Dr. Farrage found no post-concussive symptoms, and diagnosed right rotator cuff injury. He opined Weakley could perform light to medium work, but could not return to his pre-injury work. Dr. Farrage restricted Weakley from excessive standing, walking, stair climbing, ladder use, lifting over 15 pounds frequently, and overhead work. Referencing the American Medical Association Guides to the Evaluation of Permanent Impairment, 5th Edition (“AMA Guides”), he assigned a 21% impairment rating entirely attributable to the work accident.

Dr. Stacie Grossfeld conducted an IME on February 28, 2018. Dr. Grossfeld diagnosed a C2 dense fracture and right shoulder contusion. She opined the right rotator cuff tear pre-existed the work accident, but the condition had an “excellent” prognosis. Dr. Grossfeld believed Weakley’s cervical condition would prevent him from turning his neck without pain and would prevent him from returning to work as a commercial driver. She assessed a 15% impairment rating pursuant to the AMA Guides for the cervical spine injury, which was work-related. She also assessed a 2% impairment rating pursuant to the AMA Guides for the right shoulder injury, but did not relate this condition to the work accident.

At the final hearing, Weakley testified his restrictions prevent him from returning to work. He also stated the inability to turn his neck prohibited him from passing a Department of Transportation physical examination in order to maintain his CDL. Weakley stated his ongoing pain prevents him from sustaining any employment.

The ALJ concluded Weakley suffered work-related injuries to his neck and right shoulder. She relied on the 21% impairment rating assigned by Dr. Farrage for these injuries, and concluded Weakley lacks the physical capacity to return to his pre-injury work. The ALJ then turned to the question of whether Weakley is permanently totally disabled. After citing the applicable law, she explained:

Dr. Farrage said Plaintiff was capable of light to medium work under the Department of Labor Guidelines and was restricted to lifting 30 pounds occasionally and 15 pounds frequently. Dr. Farrage gave other restrictions. Dr. Grossfeld only noted Plaintiff's restrictions related to the limited range of motion of his cervical spine. Although Dr. Smith testified that "he would not be capable of work" (MS, p 12, 14), given the context and totality of Dr. Smith's testimony, it is unclear to the ALJ whether Dr. Smith intended to speak of "truck driving work" or any type of work. Dr. Smith did after all assign lifting restrictions. Therefore, because on this issue because his testimony is not clear, Dr. Smith is not persuasive to the ALJ. Instead, the ALJ relies upon the opinion of Dr. Farrage that Plaintiff is capable of light to medium work and notes that Plaintiff has an extensive dependable work history, variety of job experiences and training including military service and as a barber and his years on the job.

Specifically, as to findings of post injury physical, emotional, intellectual and vocational status interacting as required by the courts in Ira Watson Department Store v. Hamilton, *supra*, and City of Ashland v. Stumbo, *supra*, the ALJ acknowledges while Plaintiff's age may suggest that he is unable to work in any job,

having observed Plaintiff, the ALJ noted that he was physically and mentally capable to fully participate in the Formal Hearing in his claim. The light to medium category of work would include a number of jobs in a competitive economy.

The fifth factor in the City of Ashland v. Stumbo, *supra*, analysis is the determination that the total and permanent disability is the result of the work injury. Because the ALJ has found that Plaintiff is not permanently and totally disabled, the fifth factor is moot.

Weakley petitioned for reconsideration, raising the same arguments now raised on appeal. The ALJ provided the following additional analysis concerning permanent total disability:

Plaintiff's Petition for Reconsideration argues that the Administrative Law Judge did not properly analyze the facts of the case under Ira A. Watson Department Store v. Hamilton, 34 S.W. 3d 48 (Ky. 2000) and City of Ashland v. Stumbo, 461 S.W. 3d 392 (Ky. 2015). Plaintiff requested additional findings of fact and an award of permanent total disability benefits. The Administrative Law Judge reiterates that Dr. Farrage said Plaintiff was capable of light to medium work under the Department of Labor Guidelines. Dr. Grossfeld only noted Plaintiff's restrictions related to the limited range of motion of his cervical spine. Although Dr. Smith testified that "he would not be capable of work" (MS, pp. 12, 14), given the context and totality of Dr. Smith's testimony, it was unclear to the Administrative Law Judge whether Dr. Smith intended to speak of "truck driving work" or any type of work. Dr. Smith did after all assign lifting restrictions. Therefore, because on this issue his testimony is not clear, Dr. Smith was not persuasive to the Administrative Law Judge. Instead, the Administrative Law Judge relied upon the opinion of Dr. Farrage that Plaintiff is capable of light to medium work and noted that Plaintiff has an extensive and dependable work history. The Administrative Law Judge further notes that Dr. Farrage was Plaintiff's IME doctor.

On appeal, Weakley first argues he is entitled to an award of permanent total disability benefits. He asserts it is uncontroverted that his physical limitations prevent a return to his pre-injury work. Combined with his advanced age and limited work experience outside of truck driving, Weakley claims the evidence compels a finding he is permanently totally disabled.

Permanent total disability is defined in KRS 342.0011 (11) (c) as “the condition of an employee who, due to an injury, has a permanent disability rating and has a complete and permanent inability to perform any type of work as a result of an injury...” “Work” is defined in KRS 342.0011 (34) as “providing services to another in return for remuneration on a regular and sustained basis in a competitive economy.” To determine whether a claimant is permanently totally disabled, the ALJ is required to conduct a five-step analysis. The ALJ must initially determine whether a work-related injury has occurred, whether the claimant has a permanent impairment rating, and whether there is a disability rating. If these three threshold requirements are satisfied, the ALJ must then consider whether the claimant is unable to perform any type of work, and whether the finding of permanent total disability is work-related. City of Ashland v. Stumbo, 461 S.W.3d 392 (Ky. 2015). The ALJ’s analysis must be an individualized examination of a variety of factors, including the worker’s post-injury physical, emotional, intellectual, and vocational status. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48, 51 (Ky. 2000).

The ALJ conducted the required analysis. She acknowledged Weakley’s advanced age of 80 years old, but was more persuaded by other factors. The ALJ noted Dr. Smith was unclear, in his deposition, as to whether Weakley

could return to any type of work. Dr. Farrage opined Weakley is capable of light to medium work despite the physical limitations he imposed. She also noted Weakley had prior experience in the military and as a barber, and is still able to drive non-CDL trucks. Finally, the ALJ took into account her personal assessment of Weakley and his demeanor at the final hearing.

While Weakley has identified factors that might have been considered to support a finding of permanent total disability, the ALJ is vested with discretion and authority to weigh the evidence and draw conclusions supported by the proof. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). The ALJ articulated her consideration of Weakley's past employment history, age, physical limitations, and emotional status. Having determined the ALJ conducted the analysis required by applicable case law, it is not the function of this Board to reweigh the proof and reach an alternate conclusion. Whittaker v. Rowland, 998 S.W.2d 479, 481 (Ky. 1999).

Weakley next argues the ALJ erred by applying the recently amended version of KRS 342.730(4), which limits his award to four years of disability due to his age at the time of the injury. He asserts such an application of the law violates his constitutional rights, though he does not specifically identify which rights.

The Kentucky Supreme Court in Holcim v. Swinford, 581 S.W.3d 37 (Ky. 2019), concluded the 2018 amendment to KRS 342.730(4) applies retroactively. Therefore, the ALJ's application of the time limitations contained in that amendment is proper. To the extent Weakley is challenging the constitutionality of the amendment on other grounds, we are without authority to consider the

constitutionality of a statute. Goodwin v. City of Louisville, 215 S.W.2d 557 (Ky. 1948).

Accordingly, the May 14, 2019 Opinion, Award and Order, and the June 12, 2019 Order on Reconsideration rendered by Hon. Tanya Pullin, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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