

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: June 19, 2020

CLAIM NO. 201775825

KENTUCKY TRANSPORTATION CABINET

PETITIONER/
CROSS-RESPONDENT

VS.

APPEAL FROM HON. W. GREG HARVEY,
ADMINISTRATIVE LAW JUDGE

DEFOREST C. MILLER, III
AND
HON. W. GREG HARVEY,
ADMINISTRATIVE LAW JUDGE

RESPONDENT/
CROSS-PETITIONER

RESPONDENT

OPINION
AFFIRMING

* * * * *

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

ALVEY, Chairman. The Kentucky Transportation Cabinet (“KTC”) appeals and DeForest Miller (“Miller”) cross-appeals from the Opinion, Award, and Order rendered December 23, 2019 by Hon. W. Greg Harvey, Administrative Law Judge (“ALJ”). The ALJ determined Miller is permanently totally disabled due to injuries he sustained in a motor vehicle accident (“MVA”) which occurred in the course of

his employment with KTC on July 5, 2017. At the time of the accident, Miller was 70 years old. The parties also appeal from the January 22, 2020 order on reconsideration.

On appeal, KTC argues the award of permanent total disability (“PTD”) benefits is not supported by the record. It argues that taking into account Miller’s prior active problems, and the fact he is capable of performing another job, prevents such award. On cross-appeal, Miller argues the ALJ erred in retroactively limiting the duration of his award of PTD benefits pursuant to KRS 342.730(4) effective July 14, 2018. Miller also argues the retroactive application of KRS 342.730(4) is unconstitutional. We find the ALJ made the appropriate analysis in determining Miller is permanently totally disabled, and the record supports his decision. We also find the ALJ’s decision is in conformity with the holding by the Kentucky Supreme Court in Holcim v. Swinford, 581 S.W.3d 37 (Ky. 2019). We additionally note this Board lacks the authority to make determinations on constitutional issues. Therefore, we affirm on all issues.

Miller filed a Form 101 on November 5, 2018, alleging injuries to both knees and his right hip in the July 5, 2017 MVA occurring in the course of his employment with KTC. In the Form 104 filed in support of his claim, Miller indicated he worked for KTC from 2007 until 2018. His employment history includes working as an engineer assistant, owner/operator of a construction/renovation company, shift manager at a printing facility, plant manager, and owning a convenience store.

Miller testified by deposition on December 20, 2018, and at the hearing held October 25, 2019. Miller was born on March 19, 1947, and resides in Somerset, Kentucky. He is a high school graduate. He has taken some college courses in construction and real estate. He additionally has vocational training in carpentry and architectural drawing. Miller spent seven years in the Army Reserve as a supply sergeant. Miller's work history includes working in, and later managing an industrial printing facility. He later worked at a facility which printed patterns/designs on curtains. He worked for an engineering company for seven years where he dealt with plotting and designing water lines. He also obtained the necessary easements and drew the blueprints.

Miller's job with KTC primarily consisted of performing field inspections of work performed by contractors. He estimated he spent 75% of his time doing those inspections which required climbing up and down hills and around structures. The job required extensive walking and standing. He was based in the Somerset office, but his work was primarily performed in other counties. When he returned to work after the accident, his job consisted of digitizing paper records for storage. He eventually retired due to ongoing knee pain and the inability to sit for long periods.

Miller testified he never experienced right knee problems prior to his accident. He had previously undergone right shoulder and hip replacements unrelated to his work injury. He had also previously undergone cervical surgery. Miller testified he had experienced a left knee problem when he was around ten years old, but that had resolved, and he had no additional problems until the MVA. Miller

has several additional health issues that he treats with medication, including diabetes, which are unrelated to the MVA.

On July 5, 2017, Miller was returning to the office in Somerset after performing his work duties in Lincoln County. He testified it was raining at the time of the accident. As he was approaching a traffic light, the rear of the truck he was driving slid into the left lane, and an approaching vehicle struck him head-on. He testified that although he was wearing restraints, both knees hit the dashboard, and his head hit the window. He reported the incident to the Somerset office. He was suspended from work for five days afterward.

Miller had in-patient treatment in Corbin for four weeks. He subsequently treated with Dr. David Dome. Dr. Dome eventually referred him to Dr. Daniel Yanicko for treatment, including injections. Dr. Yanicko recommended a total left knee replacement. Miller also stated Dr. Yanicko advised he use a cane for balance, and limited use of a knee brace. Miller returned to work briefly in September 2017. He last worked on August 26, 2018. The parties stipulated he earned less after returning to work.

Miller testified he has constant left knee pain and swelling. He has difficulty getting up and down, as well as walking on uneven ground. He also stated it is difficult for him to climb stairs. Miller testified he is able to stand for fifteen to twenty minutes at a time. He noted left total knee replacement surgery has been recommended, but he has declined because he has to care for his invalid wife. He also noted that sometimes his right knee bothers him more than his left. He testified

he does not believe he is capable of returning to his job duties as an Engineering Tech II due to his physical limitations.

Miller filed Dr. Frank Burke's July 29, 2018 report in support of his claim. Dr. Burke noted Miller sustained injuries to both knees on July 5, 2017 when they struck the dashboard of the vehicle he was driving at the time of the MVA. Dr. Burke noted Miller's previous history of osteoarthritis of the right hip and shoulders requiring total joint arthroplasties. He also noted Miller's other unrelated problems consisting of coronary artery disease, myocardial infarction requiring two stents and eventual bypass surgery, elevated cholesterol, multiple colon resections, hernias, diabetes, and treatment with numerous medications for his various conditions. Dr. Burke diagnosed Miller with persistent right anterior knee pain and a left knee lateral tibial plateau fracture with chronic effusion.

Dr. Burke assessed a 14% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"). He determined Miller is unable to return to his previous work. He noted Miller must use a cane and cannot climb, crawl, use ladders, sit for prolonged periods, squat, or stoop. He also stated Miller should not lift weights greater than required for his activities of daily living. Dr. Burke stated all of Miller's complaints were caused by the injuries he sustained in the MVA. Dr. Burke also noted Miller had reached maximum medical improvement ("MMI") by the time of the evaluation.

In a supplemental response, or addendum, dated August 24, 2019, Dr. Burke revised the impairment rating to 16% after he had reviewed additional records.

He stated Miller had reached MMI by March 5, 2019. He recommended a left knee arthroplasty and intra-articular steroid treatment. He stated Miller is incapable of working eight hours per day, five days per week.

Miller filed Dr. Yanicko's treatment records of eight office visits between January 31, 2018 and March 5, 2019. Dr. Yanicko saw Miller upon referral from Dr. Dome. He treated Miller with bilateral knee injections. He found Miller has osteoarthritis, swelling, and crepitus of both knees. In his questionnaire dated March 14, 2019, Dr. Yanicko agreed with Dr. Burke's diagnoses, the assessment of a 16% impairment rating pursuant to the AMA Guides, the work-relatedness of Miller's condition, the restrictions recommend by Dr. Burke, the reasonableness and necessity of Miller's treatment, and the recommendation for a total knee replacement and strengthening exercises.

Dr. Rick Lyon evaluated Miller at KTC's request on April 11, 2019. He noted Miller's complaints of knee pain following the July 5, 2017 MVA. He noted Dr. Dome had released Miller to full duty work, with weight bearing as tolerated, on December 21, 2017. He diagnosed Miller with a left lateral tibial plateau fracture, bilateral knee pain, and left hip arthritis. Dr. Lyon stated Miller had not yet reached MMI for his left knee injury, and found he is a candidate for left knee arthroplasty. Because he determined Miller had not reached MMI, he stated he could not assess an impairment rating. He stated Miller could perform sedentary work only, but could return to the job performed prior to the injury date. He stated the left hip condition and left knee fracture were caused by the MVA. He stated the right knee condition was not caused by the MVA.

In a supplemental report dated July 17, 2019, Dr. Lyon stated Miller had reached MMI because he did not wish to have the surgery. Dr. Lyon assessed a 12% impairment rating pursuant to the AMA Guides for Miller's left knee injury. He stated Miller could return to sedentary work.

A Benefit Review Conference was held on October 1, 2019. The issues preserved for determination included work-relatedness/causation of Miller's right knee condition, injury as defined (right knee), permanent income benefits per KRS 342.730 (including multipliers), temporary total disability ("TTD") benefits, exclusion for pre-existing active impairment, constitutionality of the limitation of benefits found in KRS 342.730(4), unpaid or contested medical expenses, and entitlement to future medical benefits.

In the Opinion, Award, and Order rendered December 23, 2019, the ALJ found Miller sustained injuries to both knees in the July 5, 2017 MVA. The ALJ followed the steps required by Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000) and City of Ashland v. Taylor Stumbo, 461 S.W.3d 392 (Ky. 2015) in determining Miller is permanently totally disabled. The ALJ also determined the age limitations established by KRS 342.730(4) effective July 14, 2018 are applicable. The ALJ also awarded medical benefits for both knees pursuant to KRS 342.020. The ALJ also ordered Miller to undergo a vocational rehabilitation evaluation. The ALJ specifically found *verbatim* as follows:

There is no dispute Miller suffered an injury to his left knee as a result of the July 5, 2017 motor vehicle accident. The dispute as to the existence of an injury and the work-relatedness and causation of the condition pertains to the right knee. Dr. Lyon opined he did not believe Miller suffered an injury to the right knee and

based that opinion on his examination, x-ray studies and the lack of evidence of treatment and complaints pertaining to the right knee in the time period immediately after the accident.

Miller relies upon Dr. Burke and Dr. Yanicko in asserting a right knee injury claim. Dr. Burke and Dr. Yanico both opined Miller suffered dashboard trauma to the right knee in the accident and was left with anterior knee pain. As noted above, the right knee pain was felt to stem from traumatic patella femoral arthritis of the right knee that was aroused as a result of the motor vehicle accident. Dr. Burke noted the medical records reveal complaints of right knee pain to the physical therapist on November 22, 2017 and to Dr. Dome on December 21, 2017.

The ALJ finds Miller suffered injuries to both knees in the July 5, 2017 automobile accident. The finding of a right knee injury is based on the opinions of Dr. Burke and Dr. Yanicko. Although the ALJ is cognizant of Dr. Lyon's opinion on the occurrence of a right knee injury and the work-relatedness and causation of Miller's right knee complaints, the evidence is that he suffered a head on collision with dashboard trauma. He complained of pain in both knees initially. The left knee had a fracture that garnered the attention of his medical providers but he noted right knee discomfort as well. Based on the mechanism of injury, Miller's testimony and the opinions of Dr. Yanicko and Dr. Burke the undersigned finds Miller suffered an injury to the right knee as well.

B. Benefits per KRS 342.730/pre-existing active conditions/extent and duration/alleged PTD

The central issue in this case is whether or not Miller's accident has rendered him permanently and totally occupationally disabled. "Work" is defined as providing services to another in return for remuneration on a regular and sustained basis in a competitive economy. KRS 342.0011(34). The Kentucky Supreme Court set forth the following analysis in Ira A. Watson Dept. Store v. Hamilton, 34 S.W.3d 48, 52 (Ky. 2000) in determining whether a claimant is permanently and totally disabled:

[a]n 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 able to work dependably and whether the worker's physical restrictions will interfere with 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.

Accordingly, pursuant to Ira A. Watson Department Store v. Hamilton, supra, the ALJ is required to make specific findings regarding Miller's post-injury physical, emotional, intellectual, and vocational status and how those factors interact.

In City of Ashland v. Stumbo, 461 SW3d 392 (Ky. 2015), the Kentucky Supreme Court laid out a five-step analysis which the ALJ must utilize in determining entitlement to permanent total disability. Initially, the ALJ must determine if the claimant suffered a work related injury. Next, the ALJ must determine what, if any, impairment rating the claimant has. Third, the ALJ must determine what permanent disability rating the claimant has. Then the ALJ must make a determination that the claimant is unable to perform any type of work. (In making this determination, the ALJ must state with some specificity the factors, which were utilized in making the conclusion the claimant is permanently and totally disabled). The ALJ must consider several factors including the worker's age, education level, vocational skills, medical restrictions, and the likelihood that he can resume some type of "work" under normal employment conditions. See Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky., 2000). Finally, the ALJ

must determine the total disability is the result of the work injury.

Miller was working without restrictions prior to the motor vehicle accident. The Defendant appropriately points out the many other health problems Miller has. These include a neck fusion, colon resections, shoulder replacements, diabetes with peripheral neuropathy, etc. Up to the date of the accident, however, Miller worked without restrictions for the Defendant. He traveled to and from job sites and oversaw water line installation. The work required him to be on his feet and to walk. He would have to navigate uneven ground and surfaces.

The undersigned has already determined Miller suffered work-related injuries to both knees in the July 5, 2017 accident. There is only one impairment rating of record that assesses impairment for both knees—that is the 16% both Dr. Burke and Dr. Yanicko agree most accurately represents Miller's impairment. The ALJ relies on those opinions for the appropriate impairment rating herein. At issue is whether or not Miller can perform any work on a regular and sustained basis in a competitive economy.

Dr. Burke opined Miller would not be capable of performing work 8 hours a day, 5 days a week. Dr. Lyon opined Miller would be restricted to a sedentary type of work but that based on his discussion with Miller he could return to his prior work with the Defendant. For his part, Miller does not believe he could return to his prior work due to his difficulty ambulating, navigating uneven surfaces and the need to constantly alternate between standing and sitting. He did concede he might be able to do some computer work if he was allowed to constantly change positions.

The medical opinion evidence supports the finding that Miller can return to some sedentary work. That also is in agreement with Miller's own testimony, provided of course, he is afforded the ability to change positions. Miller's difficulty ambulating is a serious workplace limitation. He does have a wide variety of workplace experience and has some computer skills as evidenced by the fact that when he returned to work post-injury he performed data entry when he was no longer able to go

out into the field. Miller is currently 72 years old. He does have a high school education but not a college degree. Miller will be 73 in approximately three months and cannot reliably ambulate without the use of an assistive device.

Based on Miller's age, the severity of his restriction in ambulating and the opinion offered by Dr. Burke, the ALJ finds Miller has satisfied his burden of proving he is permanently and totally occupationally disabled. Although Miller might be able to perform some work on occasion, Dr. Burke did not feel he was capable of working an 8 hour day 5 days a week. Having observed Miller and being fully appreciative of his comment that he might be able to do some computer work, the ALJ simply does not feel he can sustain work on a regular basis in a competitive economy. Had he been able to work, the ALJ is convinced Miller would not have ceased doing so in the first place.

The Defendant argues Miller's other health conditions may not be considered in determining whether he is totally disabled. *See* KRS 342.730(1)(a). The ALJ specifically notes that the finding of total disability is premised on Miller's inability to ambulate reliably and his inability to sit or stand for any appreciable amount of time without changing positions. Those factors, coupled with Miller's age and lack of vocational training in sedentary employment are the reasons why this award is made.

Based on the stipulated AWW of \$806.30, his permanent total disability benefits shall be paid at the rate of \$537.53 from July 5, 2017. His income benefits are subject to the limitations set forth in KRS 342.730(4). Plaintiff has preserved the constitutionality of that 4 year limitation on benefits as an issue herein. However, the undersigned does not have the authority to rule upon constitutional questions.

C. Medical Benefits

By virtue of KRS 342.020, the Plaintiff is entitled to both past and future medical benefits for the bilateral knee injuries suffered in the July 5, 2017 work incident.

KTC filed a Petition for Reconsideration requesting “the ALJ to reconsider the evidence showing the prior non-work-related lower extremity problems that would have had a direct bearing on his ability to ambulate.” KTC essentially requested the ALJ to review the evidence and set aside his finding that Miller is permanently totally disabled due to the work-related MVA. Miller filed a Petition for Reconsideration arguing the ALJ erred in finding KTC is entitled to credit for TTD benefits and wages paid after the injury date. He argued KTC is not entitled to credit for *bona fide* wages paid pursuant to the holding in Millersburg Military Institute v. Puckett, 230 S.W.3d 339 (Ky. 2008). Miller also argued the ALJ erred in finding the revised version of KRS 342.730(4) is applicable to his claim, and that the statute is unconstitutional.

In his order dated January 22, 2020, the ALJ sustained Miller’s petition, in part, and found KTC is not entitled to credit for his post-injury wages. He denied the arguments regarding the applicability of the revised version of KRS 342.730(4) and constitutionality. The ALJ also denied KTC’s petition as an impermissible re-argument of the merits of the claim.

On appeal, KTC argues the record does not support an award of PTD benefits. As the claimant in a workers’ compensation proceeding, Miller had the burden of proving each of the essential elements of his claim. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Miller was successful in his burden, we must determine whether substantial evidence of record supports 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). Although a party may note evidence supporting a different outcome than reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). Rather, it must be shown there was no evidence of substantial probative value to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings made are so unreasonable under the evidence they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, supra. The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to weight and credibility or by noting other conclusions or reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

We note that permanent total disability is defined 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 because of an injury. KRS 342.0011(11)(c). “Work” is defined as providing services to another in return for remuneration on a regular and sustained basis in a competitive economy. KRS 342.0011(34). In determining whether Miller is permanently totally disabled, the ALJ was required to perform an analysis pursuant to the City of Ashland v. Taylor Stumbo, supra, and Ira A. Watson Department Store v. Hamilton, supra.

We find the ALJ clearly, and appropriately, performed an analysis pursuant to the required factors set forth in City of Ashland v. Stumbo, supra, and Ira A. Watson Department Store v. Hamilton, supra, in finding Miller is permanently totally disabled. The ALJ took into account Miller’s age, education, and past work experience, along with his post-injury physical status. The ALJ outlined the evidence he reviewed and provided the basis for his determination that Miller is permanently totally disabled due to his work-related injuries. Although KTC pointed to various previous conditions, as noted by the ALJ, Miller was working without restrictions or limitations prior the MVA. The ALJ properly analyzed the claim, and his decision falls squarely within his discretion. Therefore, his determination on this issue will remain undisturbed.

Miller argues the statutory changes to KRS 342.730(4) effective July 14, 2018 do not apply to his claim. The changes reflected in 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 age 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. There 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 therefore find Miller's award is governed by the limitations set forth in the amended statute.

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

Accordingly, the December 23, 2019 Opinion, Award, and Order and the January 22, 2020 Order on the petitions for reconsideration rendered by Hon. W. Greg Harvey, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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