

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: February 14, 2020

CLAIM NO. 201890163

MICHAEL SKIDMORE

PETITIONER

VS.

APPEAL FROM HON. RICHARD E. NEAL,
ADMINISTRATIVE LAW JUDGE

TKC HOLDINGS/KEEFE GROUP and
HON. RICHARD E. NEAL,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

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

ALVEY, Chairman. Michael Skidmore (“Skidmore”) appeals from the July 11, 2019 Opinion, Order, and Award, and the August 12, 2019 order rendered by Hon. Richard E. Neal, Administrative Law Judge (“ALJ”). The ALJ awarded temporary total disability (“TTD”) benefits, permanent partial disability (“PPD”) benefits, and medical benefits for injuries Skidmore sustained while working for TKC Holdings/Keefe Group (“Keefe Group”).

On appeal, Skidmore argues the ALJ erred in finding he is not permanently totally disabled, and a contrary result is compelled. Skidmore also argues the ALJ's retroactive application of the amended version of KRS 342.730(4) effective July 14, 2018 is unconstitutional. We determine the ALJ performed the appropriate analysis, and his award of TTD and PPD benefits is supported by substantial evidence. We 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 also note this Board lacks the authority to make determinations on constitutional issues. Therefore, we affirm on all issues.

Skidmore filed a Form 101 on December 5, 2018, alleging he sustained injuries to his neck, back, right arm, and knees when he tripped and fell while working for Keefe Group on March 8, 2018. Skidmore was 65 years old on the date of injury. In the Form 104 filed in support of his claim, Skidmore indicated he had previously worked as a retail store manager, and as a team leader for a large grocery.

Skidmore testified by deposition on January 30, 2019, and at the hearing held May 14, 2019. Skidmore was born on April 12, 1952. He currently resides in Sharpes Chapel, Tennessee. At the time of his work accident, he resided in Lancaster, Kentucky. Skidmore is a high school graduate, and attended Kalamazoo Valley Community College for a year and a half, where he studied auto technology. He did not complete the program. He subsequently graduated from a police academy, and worked as a police officer for ten years.

In addition to serving as a police officer, Skidmore has worked in sales and management positions. He also worked as a small engine mechanic at a lawn

and garden store. He later worked as an assistant manager for a feed supply business. He worked for several years at Meijer both in Michigan, and in Lexington, Kentucky. He also managed a Dollar General store. He began working for Keefe Group in 2012. Keefe Group terminated Skidmore from that position on October 1, 2018, noting it could not accommodate his permanent restrictions.

Skidmore was a commissary worker for Keefe Group at the Northpoint Training Center located in Danville, Kentucky. His job involved stocking shelves, and filling personal comfort and food items for inmates. He stated his job occasionally required lifting up to fifty pounds, but generally orders did not weigh in excess of thirty pounds. The job required some bending, crouching, and kneeling.

The accident occurred on March 8, 2018. He was walking to get an item for an inmate's order, when he stepped on a piece of cardboard on the floor, and it slipped out from under him. He tried to break the fall by grabbing a shelf, and his right arm became entangled. He fell onto his left hand and knees, with the right arm caught in the shelf. He experienced gradual tightening in his shoulder, arm, neck, and back. He immediately reported the accident to his supervisor, who sent him for a drug test. He continued to work for Keefe Group, with light duty restrictions, until Dr. Travis Hunt took him off work on May 1, 2018. He has not worked since.

On March 9, 2018, Skidmore went to Concentra Medical Center ("Concentra") in Nicholasville, Kentucky for treatment. He reported neck pain, back pain into his left leg, and pain in his right arm. A muscle relaxer was

prescribed, and he was placed on light duty. Physical therapy was also prescribed. He made little progress with physical therapy, and was eventually referred to Dr. Hunt. Dr. Hunt identified a fracture at L3, and took him off work to recover. He last saw Dr. Hunt on August 27, 2018. He currently treats at Lincoln Memorial University in Tazewell, Tennessee. After Skidmore was terminated in October 2018, he received unemployment benefits at the rate of \$260.00 per week until they ran out in March 2019. He does not believe he can perform any of his previous jobs, nor does he believe he is able to work a full regular shift.

Skidmore described multiple other injuries he had previously sustained, and noted some were work-related. He described work-related injuries while working for Keefe Group in 2015 and 2017 when he slipped and fell in a cooler. He recovered from the temporary injuries he sustained in both accidents with only minimal treatment. He sustained a slight whiplash injury in a motor vehicle accident (“MVA”) in 2016, which also resolved without permanent residuals. He also underwent a right knee surgery in 1984 due to an injury he sustained in an MVA. He denied any problems after he healed from that surgery. He also underwent left knee surgery in the 1990s due to a torn meniscus, from which he also recovered.

Skidmore stated that he continues to experience intermittent neck pain and stiffness, occasional right hand numbness, and arthritis in his knees. He also complains of low back pain into his left leg, and a burning sensation on the inside of his right foot into his leg. Skidmore also testified his gait has been altered since the accident. He stated his left foot sticks out, making it difficult for him to walk. He

stated that Dr. Hunt recommended epidural steroid injections, but he declined to have them. He stated he is only able to ride in a car for approximately one hour before he has to get out and walk. He can stand for only ten minutes before developing low back and left leg pain. He also has trouble lifting, and difficulty sleeping. He stated he is no longer able to engage in hobbies he participated in prior to his injuries. He testified he is unable to treat with steroids due to adverse cardiac affects. He continues to take muscle relaxers and Advil or Aleve.

In support of his claim, Skidmore filed records from Concentra. He treated there on eight occasions between March 9, 2018, and April 16, 2018. He primarily saw Ms. Kimberly Jones, PA-C. Dr. Norman Ellingsen treated Skidmore on his last visit at Concentra. Skidmore reported low back and neck pain subsequent to falling at work, when he slipped on a piece of cardboard and fell forward to the floor, landing on his knees and left hand. He was initially diagnosed with an acute neck strain, lumbosacral strain, and left-sided sciatica associated with lumbosacral spine disorder. He was prescribed Methocarbamol, Naproxen, and physical therapy. X-rays were also ordered. Lifting and positional restrictions were advised. Skidmore's complaints continued through his course of treatment with Concentra. The records reflect he had only minimal improvement with physical therapy. On April 16, 2018, Dr. Ellingsen noted MRIs showed cervical spondylosis, and moderate to severe left L5-S1 neural foraminal narrowing, with effacement of the L5 nerve root. He referred Skidmore to Dr. Hunt.

Dr. Hunt first saw Skidmore on April 30, 2018. He noted that Skidmore had sustained a work-related injury, and had little improvement after six

weeks of physical therapy. He also noted Skidmore had taken anti-inflammatory medication, and muscle relaxers, but continued to complain of low back pain with prolonged standing or walking. He stated the lumbar MRI demonstrated marrow edema in the L3 inferior endplate. He also noted diffuse degenerative changes, multi-level disc bulges, and a fracture in the L3 disc body. On May 31, 2018, Dr. Hunt noted Skidmore was neurovascularly intact, but continued to complain of low back pain into his left buttock. On July 30, 2018, Dr. Hunt recommended additional physical therapy. On August 27, 2018, Dr. Hunt stated Skidmore had reached maximum medical improvement (“MMI”). He suggested pain management treatment, but Skidmore declined steroid treatment. He also suggested a spinal cord stimulator. Dr. Hunt recommended that Skidmore should retire, and avoid bending, lifting, twisting, pushing, pulling, and no involvement with inmates.

Dr. James Owen evaluated Skidmore on November 14, 2018. Dr. Owen diagnosed Skidmore with persistent lumbar pain associated with a markedly positive multi-level MRI showing a fracture at L3, and significant moderate to severe foraminal narrowing. He also noted effacement of the L5 nerve root at L5-S1 with multiple other levels involved. He stated the injuries were caused by a combination of the work event, and arousal of degenerative changes into disabling reality.

Dr. Owen stated Skidmore had reached MMI. He assessed a 16% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment (“AMA Guides”). He noted Skidmore’s neck was not included in the impairment rating, because his neck is no longer a significant pain generator. He stated Skidmore does not retain the capacity

to return to the type of work performed at the time of the injury. He assessed restrictions of lifting less than twenty pounds, walking no more than fifteen minutes, and to avoid recurrent bending, squatting, or stooping. He also stated Skidmore should avoid standing or walking more than fifteen minutes, or sitting for more than an hour at a time.

Keefe Group filed Dr. Hunt's October 8, 2018 note. He assessed an 8% impairment rating pursuant to the AMA Guides. Keefe Group also filed the January 8, 2016 emergency room records from the University of Tennessee Medical Center for treatment Skidmore received after a MVA. Skidmore complained of moderate low back pain. X-rays showed mild to moderate multilevel degenerative disc disease, disc space narrowing, endplate osteophyte narrowing, and discogenic sclerosis.

A Benefit Review Conference was held on April 10, 2019. The issues identified included work-relatedness/causation, permanent income benefits per KRS 342.730, exclusion for pre-existing impairment, credit for unemployment benefits, vocational rehabilitation, proper use of the AMA Guides, the rate and end date of benefits, and whether Skidmore retains the capacity to return to the type of work performed at the time of his injury.

The ALJ rendered his decision on July 11, 2019. He determined Skidmore sustained work-related injuries on March 8, 2018. He determined that despite evidence of previous injuries, Skidmore was not treating nor did he have any treatment in the period directly prior to the accident. He therefore determined Skidmore did not have an active impairment rating prior to his injury. The ALJ also

determined Skidmore is entitled to reasonable past and future medical treatment for his low back injury.

The ALJ acknowledged Skidmore was paid TTD benefits from April 30, 2018 through August 27, 2018 at the rate of \$375.91 per week. The ALJ found Skidmore retains the capacity to perform work on a regular basis, and is not totally disabled from all work. In making this finding, he noted Skidmore's education, work experience, and the restrictions recommended by Dr. Owen. The ALJ awarded PPD benefits based upon the 16% impairment rating assessed by Dr. Owen. He also found the multipliers contained in KRS 342.730(1)(c)1 are applicable. He enhanced the award of PPD benefits by the 3.6 multiplier. The ALJ also determined that Skidmore's PPD benefits will terminate when he reaches age 70 pursuant to the version of KRS 342.70(4) effective July 14, 2018.

Skidmore filed a petition for reconsideration arguing the ALJ's analysis of whether he is permanently totally disabled, or permanently partially disabled is deficient. He argued the ALJ failed to discuss the impact of his age in the analysis. Skidmore also argued the version of KRS 342.730(4) effective July 14, 2018 cannot be applied retroactively to his claim. The petition was denied by order issued August 12, 2019. The ALJ noted Skidmore's age, and noted this could be deemed as a positive for some employers. He noted that Skidmore, "has the intellect and transferable skills that will allow his[sic] to perform a variety of jobs within the restrictions recommended by Dr. Owen." The ALJ noted he did not err in applying the version of KRS 342.740(4) effective July 14, 2018 to the award of PPD benefits. He also declined to render a decision regarding the constitutionality of the statute.

On appeal, Skidmore argues the ALJ erred in failing to find him permanently totally disabled. He also argues the retroactive application of the version of KRS 342.730(4) effective July 14, 2018 is unconstitutional.

As the claimant in a workers' compensation proceeding, Skidmore had the burden of proving each of the essential elements of his claim. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because Skidmore was unsuccessful in convincing the ALJ he is permanently totally disabled, the question on appeal is whether the evidence compels a different result. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Compelling evidence" is defined as evidence that is so overwhelming, no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985). The function of the Board in reviewing the ALJ's decision is limited to a determination of whether the findings made by the ALJ are so unreasonable under the evidence they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the sole authority to judge all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). The ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky.

2000); Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). Mere evidence contrary to the ALJ's decision is inadequate to require reversal on appeal. Id. In order to reverse the decision of the ALJ, it must be shown there was no substantial evidence of probative value to support his decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to the weight and credibility to be afforded the evidence or by noting reasonable inferences which otherwise could have been drawn from the record. Whittaker v. Rowland, supra. As long as the ALJ's ruling with regard to an issue is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, supra.

Skidmore requests this Board to re-weigh the evidence and substitute its judgement for that of the ALJ. This we cannot do. The ALJ acted squarely within his discretion in finding Skidmore is not permanently totally disabled. He appropriately considered the factors set forth in Ira A. Watson Department Store v. Hamilton, supra, and City of Ashland v. Stumbo, 461 S.W.3d 392 (Ky. 2015). The ALJ outlined his analysis of whether Skidmore is permanently totally disabled, specifically noting his age, education, work experience, and restrictions. Based upon this analysis, we do not find the ALJ's determination that Skidmore is permanently partially disabled is flawed, and therefore we affirm.

Skidmore also contends the application of KRS 342.730(4) as amended in 2018, to his award is unconstitutional. We note House Bill 2 became

effective July 14, 2018. Section 13 of that bill amended KRS 342.730(4) to provide as follows:

All income benefits payable pursuant to this chapter shall terminate as of the date upon which the employee reaches the age of seventy (70), or four (4) years after the employee's injury or last exposure, whichever last occurs. In like manner all income benefits payable pursuant to this chapter to spouses and dependents shall terminate as of the date upon which the employee would have reached as seventy (70) or four (4) years after the employee's date of injury or date of last exposure, whichever last occurs.

In accordance with the holding by the Kentucky Supreme Court in Holcim v. Swinford, supra, we affirm the ALJ's application of KRS 342.730(4) as amended in 2018. In that case, the Kentucky Supreme Court determined the amended version of KRS 342.730(4) regarding the termination of benefits at age seventy has retroactive applicability. We find Skidmore'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 Skidmore's argument regarding the constitutionality of the amended statute. Thus, we affirm.

Accordingly, the July 11, 2019, Opinion, Order, and Award, and the August 12, 2019 order denying Skidmore's petition for reconsideration, rendered by Hon. Richard E. Neal, Administrative Law Judge, are hereby **AFFIRMED**.

STIVERS, MEMBER, CONCURS.

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