

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: December 21, 2018

CLAIM NO. 201593236

PSC INDUSTRIES, INC.

PETITIONER

VS.

APPEAL FROM HON. JEANIE OWEN MILLER,  
ADMINISTRATIVE LAW JUDGE

DERRICK BROWN  
And HON. JEANIE OWEN MILLER,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION  
AFFIRMING**

\* \* \* \* \*

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

**RECHTER, Member.** Hon. Jeanie Owen Miller, Administrative Law Judge (“ALJ”) entered an Opinion, Award and Order in the above-styled claim on December 1, 2016, determining Derrick Brown is permanently totally disabled as a result of work-related low back and neck injuries. A subsequent petition for

reconsideration was denied by Order dated January 5, 2017. PSC Industries, Inc. (“PSC”) appealed. This Board vacated the award, concluding the ALJ relied upon an impairment rating which was not assessed in conformity with the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5<sup>th</sup> Edition (“AMA Guides”). Brown petitioned the Court of Appeals for review. The Court of Appeals reversed the decision of this Board, and remanded the claim for consideration of the remainder of the issues raised by PSC in its original appeal. For the reasons set forth herein, we affirm the December 1, 2016 Opinion, Award and Order, and the January 5, 2017 Order of the ALJ.

Brown was employed as a machinist at PSC. On February 24, 2015, Brown injured his low back and neck when a large tool cabinet fell and pinned him against a worktable. The injury ultimately required cervical fusion surgery, performed by Brown’s treating neurosurgeon, Dr. Thomas Becherer. Following this procedure, Dr. Becherer referred Brown to Dr. Rodney Chou for treatment of his ongoing lumbar complaints.

Dr. Jules Barefoot conducted an independent medical evaluation on March 8, 2016. Although the record is unclear when Brown began treating with Dr. Chou, Dr. Barefoot’s report indicates treatment with Dr. Chou had commenced prior to the independent medical evaluation. Dr. Barefoot diagnosed status post anterior cervical discectomy and fusion, and lumbar spondylosis with moderately severe left and right facet arthropathy at L5-S1. Dr. Barefoot opined Brown was at maximum medical improvement (“MMI”) as of the date of the exam “if no further treatment is available.” Referencing the AMA Guides, he assigned a 28%

impairment rating for the cervical condition, and 13% for the lumbar condition, for a combined 37% whole person impairment rating. Dr. Barefoot recommended ongoing treatment of Brown's lumbar condition with Dr. Chou. He also concluded Brown is unable to return to his employment at PSC, and restricted him from working at heights, operating machinery with hand or foot controls, repetitive work above the shoulder, squatting, kneeling, crouching, and lifting more than ten pounds. Dr. Barefoot further explained Brown would have "ongoing significant restrictions in mobility in his cervical and lumbar spine."

The first treatment note in the record with Dr. Chou is dated June 9, 2016. Dr. Chou diagnosed cervical sprain, lumbar sprain and displacement of cervical intervertebral disc without myelopathy. He prescribed pharmaceutical cream and prescription pain medication. In a subsequent letter dated June 16, 2016, Dr. Chou assigned a 25% whole person impairment rating for the cervical condition. He recommended permanent restrictions against lifting more than fifty pounds.

The ALJ determined Brown suffered work-related cervical and lumbar spine injuries. She relied upon Dr. Barefoot's impairment rating of 37%. The ALJ then concluded Brown is permanently totally disabled, and explained:

In determining whether a worker is totally disabled, an Administrative Law Judge must consider several factors including the worker's age, educational level, vocational skills, medical restrictions, and the likelihood that he can resume some type of "work" under normal employment conditions. Ira A. Watson Department Store vs. Hamilton.

In applying the factors set out in Ira Watson, it is apparent that Plaintiff's vocational factors infer his total and permanent disability. Those factors I have

considered are: his age, 46, which is a middle-aged worker. His educational level – 12th grade with no specialized or vocational training. Mr. Brown’s work experience has been almost exclusively in labor-intensive jobs. While the plaintiff has applied for unemployment benefits, he has not been able to obtain employment. He has been willing to try to work at even minimum wage jobs. I found Mr. Brown very credible and I find that he desires to return to work, which I find admirable. The reality however is, that without additional training, it is unlikely he will be able to return to regular and sustained work. At the time of the injury he had the skills and ability to do labor type of jobs. It is clear by the medical restrictions placed on Mr. Brown, that he could not return to work at the present time to a job for which he has training and experience, on a regular and sustained basis.

PSC petitioned for reconsideration, arguing the evidence supported only an award of permanent partial disability benefits. The ALJ denied the petition, and offered the following additional analysis:

While it may be true that no medical doctor stated specifically that Mr. Brown is totally and permanently disabled, it must be noted that such a determination is not strictly a medical determination, but must include all of the vocational factors outlined in the case law interpreting the statute. I find no error in my inferences drawn from, not only the medical proof, but also from the plaintiff’s work history, his education and training, and his age.

The defendant argues statistics from the US Bureau of Labor Statistics are evidence of Mr. Brown's age not being a negative factor in his re-employment. It should be noted that the defendant's proffered evidence is improperly cited - as it does not appear in the record before the undersigned. More importantly, Mr. Brown's age was considered and was only one of the factors discussed by the undersigned in the Opinion Order and Award.

It must also be noted the emphasis the undersigned placed upon the plaintiff's vocational rehabilitation and retraining. Certainly the plaintiff must attempt to rehabilitate not only his physical condition, but he must be willing to rehabilitate and retrain for employment that his physical limitations allow. The undersigned finds no error in the application of the evidence in this case. Certainly, if the plaintiff improves, the defendant shall be able to reopen this claim.

PSC appealed to this Board, again arguing the evidence did not support an award of permanent total disability benefits. As part of its argument, PSC also challenged the sufficiency of the ALJ's analysis. In a split decision, the Board vacated the award, concluding Dr. Barefoot's impairment rating was not in conformity with the AMA Guides because he only placed Brown at MMI "if no further treatment" was rendered. Because Brown subsequently treated with Dr. Chou, the majority reasoned Dr. Barefoot's impairment rating could not be considered permanent. The Court of Appeals reversed the Board's decision, noting the need for additional treatment does not preclude a finding that a worker is at MMI. The Court of Appeals remanded the claim for consideration of the arguments PSC raised in its appeal to this Board.

We first note Brown, as the claimant, bore the burden of proving each of the essential elements of his cause of action. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because he was successful, the question on appeal is whether substantial evidence 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). To warrant reversal, 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).

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. Hill vs. Sextet Mining Corp., 65 S.W.3d 503 (Ky. 2001). "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. The statutory definition does not require that a worker be rendered homebound by his injury, but does mandate consideration of whether he will be able to work reliably and whether his physical restrictions will interfere with his vocational capabilities. Ira A. Watson Department Store vs. Hamilton, 34 S.W.2d 48 (Ky. 2000). In determining whether a worker is totally disabled, an ALJ must consider several factors including the worker's age, educational level, vocational skills, medical restrictions, and the likelihood that he can resume some type of "work" under normal employment conditions. Id.

The ALJ considered the factors enunciated in Hamilton. She considered his age and his high school education. However, she also emphasized the fact his entire work history has been in labor-intensive positions. The ALJ also noted the significant medical restrictions recommended by Dr. Barefoot. In the Order on Reconsideration, the ALJ rejected PSC's argument that no physician had restricted Brown from returning to work, though Dr. Barefoot opined he could not return to

his position at PSC. The ALJ correctly noted that the determination of permanent total disability is a legal conclusion, not a medical one, which takes into consideration the claimant's medical condition as well as vocational factors.

PSC argues the ALJ overlooked certain key factors. It emphasizes Brown's relatively young age, his high school education, his experience with automated machinery, and his stated desire to return to work. PSC again highlights the fact no physician stated Brown cannot return to gainful employment.

These arguments certainly support a finding Brown is not permanently totally disabled, but do not compel such a result. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). The ALJ conducted the analysis required by Hamilton. She articulated her reasoning, including those factors weighing against a finding of permanent total disability. However, she was more persuaded by the severity of Brown's physical restrictions and his work history which consists entirely of manual labor. Dr. Barefoot's opinion supports these conclusions. The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing our own appraisals as to the weight and credibility of the proof, or by noting other conclusions that could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

Accordingly, the December 1, 2016 Opinion, Award and Order, and the January 5, 2017 Order rendered by Hon. Jeanie Owen Miller, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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