

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: January 17, 2020

CLAIM NO. 201569813

TIME WARNER CABLE, INC.

PETITIONER

VS.

APPEAL FROM HON. JANE RICE WILLIAMS,
ADMINISTRATIVE LAW JUDGE

RICKY SMITH;
AND HON. JANE RICE WILLIAMS,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

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

RECHTER, Member. Time Warner Cable Inc. (“Time Warner”) appeals from the October 29, 2018 Opinion, Award and Order and the November 28, 2018 Order rendered by Hon. Jane Rice Williams, Administrative Law Judge (“ALJ”), awarding

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 will participate in decisions rendered by this Board through that date.

Ricky Smith permanent total disability benefits for neck, back, shoulder, and psychological injuries.² On appeal, Time Warner argues the ALJ erred in finding Smith permanently totally disabled, in relying on the opinions of Dr. Ben Kibler and Dr. Stephen T. Autry to find work-related neck and shoulder injuries, and in finding Smith reached maximum medical improvement (“MMI”) on January 29, 2018. We affirm.

Smith worked for Time Warner as a maintenance technician. His position involved fixing outages and required climbing utility poles, lifting, pulling, pushing, stretching, crawling, carrying and bending. He often carried forty to sixty pounds when he climbed utility poles. He has a high school education and on the job training as a maintenance technician, and has worked in this capacity for cable companies since 1989. Prior to his employment with Time Warner, Smith worked at a feed store, loading feed and fertilizer.

On August 24, 2015, he felt a pop in his back while carrying an extension ladder from his truck to a pole. He fell to the ground with severe back pain, and the ladder landed on his shoulder and neck. Smith was taken by ambulance to the emergency room in Manchester where he was released the same day. His injuries were initially treated by Mountain View Family Practice, before he was referred to Dr. William Brooks for his low back injury and UK Sports Medicine for his right shoulder injury. Subsequently, Smith was referred to Dr. Magdy El-Kalliny for his low back and neck injuries, and Dr. Ben Kibler for his right shoulder.

² This appeal was placed in abeyance pending the Kentucky Supreme Court’s opinion in Lafarge Holcim v. Swinford, 581 S.W.3d 37 (Ky. 2019), concerning the retroactive application of KRS 342.730(4). In supplemental briefs filed after the claim was removed from abeyance, the parties agreed KRS 342.730(4) has retroactive effect pursuant to the holding in Swinford, and no longer seek appellate relief from this Board on that issue.

Smith first visited Dr. El-Kalliny on March 29, 2016. Dr. El-Kalliny reviewed lumbar and cervical MRIs and diagnosed low back pain, disc degeneration of the lumbosacral region, intervertebral disc disorder with radiculopathy, and cervicalgia. He recommended epidural injections. On a Form 107-I report dated August 3, 2016, he diagnosed lumbar radiculopathy, low back pain, lumbar degenerative disc disease, cervicalgia and cervical radiculopathy, all of which are related to the work injury. He determined Smith had reached MMI as of day he completed the Form 107. Dr. El-Kalliny assessed a 13% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition (“AMA Guides”). He further opined Smith does not retain the physical capacity to return to the type of work performed at the time of injury based on his inability to lift, push or pull more than 10 pounds.

Dr. Kibler first treated Smith’s right shoulder on March 24, 2016. An MRI showed an intact rotator cuff, but Dr. Kibler opined Smith was a candidate for AC joint debridement and repair. On June 29, 2017, Dr. Kibler’s examination revealed significant stiffness and tightness in all ranges of motion for his back, his neck and for his shoulder. He diagnosed AC joint arthrosis of the shoulder caused by a direct blow trauma. Based on range of motion criteria and AC joint soreness, Dr. Kibler assessed a 14% impairment rating due to the work injury pursuant to the AMA Guides. He concluded the work injury aroused a pre-existing dormant degenerative condition. Dr. Kibler opined Smith reached MMI on August 1, 2017. He further concluded Smith would not be able to return to the work he performed at

the time of injury, and is restricted from overhead lifting and repetitive pushing or pulling.

Dr. Timir Banerjee performed an independent medical evaluation (“IME”) on March 9, 2016. Dr. Banerjee diagnosed a lumbar disc herniation at L4-5 related to injury, and spinal stenosis and disc degeneration. Dr. Banerjee concluded Smith reached MMI on March 9, 2016. He recommended a 25-50 pound lifting restriction. Dr. Banerjee assigned a 12–13% impairment rating pursuant to the AMA Guides. He did not believe Smith could return to his pre-injury job, an opinion reiterated in a November 4, 2016 addendum.

Dr. Gary T. Bray conducted an IME on May 18, 2017. He suspected marked functional overlay, anxiety, and probable symptom magnification, noting Smith functioned better when he did not believe he was being watched. Dr. Bray opined Smith would have reached MMI six months after the work injury. Upon examination and medical records review, Dr. Bray concluded Smith suffered a 0% impairment rating for any neck, low back and right shoulder injuries. He found some pathology in Smith’s neck and low back, but opined these conditions are degenerative in nature and not work-related. Nonetheless, he opined Smith is not able to return to previous work. Dr. Bray recommended future treatment with the Pain Clinic psychologist at UK, and with Dr. Banerjee in order to focus on the musculoskeletal problems and his psychosocial issues.

Dr. Bray was deposed on August 18, 2017. He explained that, while some injuries may have occurred as a result of Smith’s fall at work, they were not permanent. He stated psychological problems need to be addressed prior to dealing

with the physical problems. Dr. Bray agreed with Dr. Banerjee that the lumbar rating would be 12–13%, although he disagreed regarding work-relatedness.

Dr. Autry performed an IME on July 11, 2017. Dr. Autry determined Smith was at MMI as of that date. Upon review of Smith's cervical and lumbar MRIs, Dr. Autry diagnosed aggravation of cervical spondylosis with disc herniation, aggravation of lumbar spondylosis with radiculopathy and disc herniation, aggravation of AC joint arthropathy of the right shoulder, and aggravation of right rotator cuff tendinosis and impingement. Dr. Autry stated Smith had a specific injury that brought previously existent injuries into symptomatology due to impact loading, both torsionally and by direct fall to the right shoulder, neck and lower back areas. The harmful change to his neck occurred due to recurrent stress loading to the disc, ligament, and facet anatomy sustained during the course of his work. Dr. Autry assigned impairments of 8% for the neck, 12% for the right shoulder, and 13% for the low back resulting in a combined 30% impairment rating pursuant to the AMA Guides, all of which are attributable to the work injury. Dr. Autry opined Smith would not be able to return to the work he performed at time of injury. He recommended Smith avoid repetitive bending, twisting, stooping, crouching, kneeling, climbing and above shoulder level use of arms, with no lifting more than twenty pounds.

Dr. Kevin Chapman performed an independent psychological evaluation on January 23, 2018. Dr. Chapman opined Smith had not reached MMI as of the date of the evaluation. He diagnosed generalized anxiety disorder and major depressive disorder, and assigned a 60% impairment. He noted Smith is

unable to return to the line of work he performed at the time of injury due to physical injury. Dr. Chapman did not assess any permanent restrictions for the psychological condition, but found a “clear connection” between Smith’s negative affectivity, anxiety and worry, and his accident. Dr. Chapman recommended further testing and weekly psychotherapy to address the results of the injury.

Dr. Timothy S. Allen conducted an IME on January 29, 2018. He assessed a 5% impairment rating due to psychiatric causes related to the work injury. Dr. Allen diagnosed somatic symptom disorder as a result of the work injury, for which he should maintain psychiatric medication. Dr. Allen assigned no restrictions for this psychiatric injury.

Ralph Crystal, PhD., conducted a vocational assessment at the request of Time Warner on June 5, 2017. Intelligence testing revealed functioning in the average to borderline range. Smith’s reading ability is at a 3.9 grade equivalent, sentence comprehension at a 3.5 grade equivalent, and spelling/writing and arithmetic are at a 3.0 grade equivalent. Given his ability to lift up to ten pounds, combined with this academic ability, Dr. Crystal opined he could perform duties as a clerk, cashier, dispatcher, customer service representative, or salesman.

Smith testified regarding his ability to work and his mental status. He takes narcotic pain medication and anti-depressant/anti-anxiety medication. His medication affects his ability to think and maintain concentration. The medication and chronic pain affect his ability to focus and stay on task. Narcotic medication limits his ability to use and operate heavy machinery and automobiles. Smith stated he cannot lift a gallon of milk and cannot help around the house. He has attended

psychiatric counseling but the workers' compensation carrier would not continue to pay for it. Smith stated he avoids the public and has difficulty coping. He is emotional and depressed.

Smith testified his right shoulder causes him increased pain at night. When he tries to raise it, it is painful and weak. He is right hand dominant. Smith acknowledged Dr. Kibler recommends surgery. Smith has tried physical therapy and injections, but they do not help. He is also afraid to have back surgery because of the risk it will not succeed and he will be worse. The medication for chronic pain helps, but he has side effects. He is not able to drive for long periods, cannot focus on paperwork, and he cries easily. He does not believe he could return to his former job because it requires lifting in excess of his ability. Smith opined he cannot perform a desk job because of pain and the inability to sit for prolonged periods. His emotional and physical problems make him feel worthless and "beat down."

The ALJ made the following findings relevant to this appeal:

The determination of a total disability award remains within the broad authority of the ALJ. *Ira A. Watson Department Store v. Hamilton*, 34 S.W.3d 48 (Ky. 2000). To determine the likelihood that a worker can resume some type of work under normal employment conditions, the ALJ should consider the worker's age, education level, vocational skills, medical restrictions, emotional state and how those factors interact. *Id.* "A worker's testimony is competent evidence of his physical condition and of his ability to perform various activities both before and after being injured." *Id.* at 52 (citing *Hush v. Abrams*, 584 S.W.2d 48 (Ky. 1979)).

This claim has been practiced with a great deal of skill on both sides. Each attorney has carefully articulated and argued to proof. All the evidence has been considered as outlined above. After careful consideration, it is found that Smith's impairment is

13% for his low back, relying on Dr. El-Kalliny, Dr. Banerjee and Dr. Autry, and he reached MMI for his low back on August 3, 2016. His shoulder impairment relying on Dr. Kibler is work related and is 14%. He reached MMI on August 1, 2017. Relying on Dr. Autry, his neck impairment is 8% with MMI on July 11, 2017. His psychological impairment is 5% as assessed by Dr. Allen. There is no MMI date provided for the psychological injury as Dr. Chapman found he had not reached MMI when he evaluated him on January 23, 2018. Dr. Allen assessed impairment without restrictions on January 29, 2018 and for purposes of TTD, it could be inferred he reached MMI on that date.

Smith's disability as a result of the work injury is permanent and total. In so finding, it is important to note that Smith presented as credible and his testimony was compelling. While from a strictly physical perspective, his injuries do not appear to be nearly severe enough to warrant a total disability, this injury has set his frame of mind on what appears to be an irreversible course. Whether or not he is exaggerating his symptoms, he is convincingly unemployable as a result of his injury. It has left him with pain that is not dealt with adequately and a psychological condition that seems, as stated above, irreversible. Given Smith's age, limited vocational experience and significant medical restrictions, both physical and psychological, as well as his current emotional state, it is not likely that he will be able to find and continue performing sustained employment. Smith is 55 years old, 52 on the date of injury. While fifty is not retirement age, the harsh reality is that workers fifty and over face added challenges when trying to find new employment, particularly in a more rural environment. He has no education or job experience to qualify him for other jobs. He worked for Defendant only for the past 28 years and worked the outage repair job most of that time. Dr. El-Kalliny agreed that he is restricted from lifting, pushing or pulling more than 10 lbs. and has to alternate sitting and standing every hour. Nearly every medical opinion states that he cannot return to his job due to restrictions.

The evidence is convincing that Smith's emotional state is fragile and is much of the reason for his current state of not moving forward. It also should be noted that all

the evidence is compelling and could easily be followed. Still, where a man works hard in one job for nearly 30 years, from all aspects appears as a responsible citizen and then his work life comes to a screeching halt with one incident, as in this case, all possibilities and explanations must be considered. Whether he will ever have the mental and emotional capacity to be able to move in a productive and positive direction is unknown but his current emotional state prevents him, by itself, from returning to any type of employment.

Time Warner filed a petition for reconsideration, making the same arguments it raises on appeal. The ALJ denied Time Warner's petition for reconsideration, providing as follows:

Plaintiff has provided a thorough and sound response to the Petition and the ALJ agrees with each point. Regarding the issue that Dr. Allen did not provide psychological restriction, it is the opinion of the ALJ, based on testimony of Plaintiff and observation of his behavior on several occasions over the many months of litigation, that the 5% psychological impairment works in conjunction with the other factors set out in *Ira A. Watson Department Store v. Hamilton*, 34 S.W.3d 48 (Ky. 2000).

As stated by Plaintiff in the Response:

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" contemplates that a worker is not required to be homebound in order to be found to be totally occupationally disabled. *Ira A. Watson Department Store v. Hamilton*, 34 S.W.3d 48 (Ky. 2000). The Supreme Court also pointed out in *Ira A. Watson Department Store v. Hamilton* it is the role of the

ALJ to be fact finder. It is among the ALJ's functions to translate the lay and medical evidence into a finding of occupational disability. The ALJ must consider the worker's condition when determining the extent of his occupational disability at a particular point in time, the ALJ is not required to rely upon the vocational opinions of either the medical experts or vocational experts. A worker's testimony is competent evidence of his physical condition and of his ability to perform various activities both before and after being injured. Counsel would argue that the opinion extends to the testimony of the worker with regard to his mental condition as well.

Based on the factors set out in *Watson*, the worker's age, education level, vocational skills, medical restrictions, emotional state and how those factors interact, it is not conceivable that Plaintiff would be able to find and maintain a job consistently under normal employment conditions. (Emphasis original).

On appeal, Time Warner argues the ALJ erred in finding Smith is permanently totally disabled. It contends the award was based solely on Smith's psychological condition, as the ALJ specifically found Smith's physical injuries are not severe enough to warrant total disability. Time Warner asserts the evidence regarding the psychological condition alone is insufficient to support an award of permanent total disability. Dr. Allen assessed a 5% psychological impairment for somatic symptom disorder, despite Smith's poor effort on testing and malingering, but noted he has no psychiatric work restrictions. Further, Dr. Chapman was clear that Smith's psychological condition did not cause any specific restrictions that inhibited his return to work. Time Warner notes Smith never asserted in his testimony that he was permanently and totally disabled solely as a result of his psychological condition.

As the claimant in a workers' compensation proceeding, Smith 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 in that burden, 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).

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).

Time Warner argues the ALJ based the finding of permanent total disability on Smith's psychological injury alone. We disagree with this interpretation of the ALJ's analysis. While the ALJ stated the physical injuries alone would not

produce a permanent total disability, she did not conclude the physical condition had no impact on Smith's ability to perform work. The ALJ expressed a belief that the psychological condition in isolation would be sufficient to produce a permanent total disability. Regardless of the lack of any specific restrictions related to the psychological condition, the ALJ could reasonably conclude the condition would adversely affect Smith's ability to find and maintain employment in a competitive economy. The ALJ based the finding of permanent total disability on the combined effects of the physical and psychological conditions and how they interact, specifically citing his "medical restrictions, both psychological and physical". The ALJ's order on reconsideration likewise points to Smith's "age, education level, vocational skills, medical restrictions, emotional state and how those factors interact." Given the wide discretion afforded a fact-finder in translating a functional impairment into occupational disability within the confines of a claim for total disability, we are unable to identify any reversible error. Seventh Street Road Tobacco Warehouse v. Stillwell, 550 S.W.2d 469 (Ky.1976); Colwell v. Dresser Instrument Div., 217 S.W.3d 213 (Ky. 2006). Furthermore, this Board may not substitute its judgment for that of the ALJ on questions of fact. KRS 342.285(2).

The ALJ determined Smith sustained work-related injuries to his low back, shoulder and neck, as well as a psychological impairment. The ALJ determined the injuries left Smith with pain that is not adequately managed. She considered Smith's age, limited vocational experience and significant medical restrictions, both physical and psychological, as well as his current emotional state in determining he is not likely to find and continue performing employment on a

sustained basis. The ALJ specifically cited the ten-pound restriction assessed by Dr. El-Kalliny and the nearly unanimous opinion that Smith cannot return to the only work he performed for the past twenty-eight years. The record contains substantial evidence that Smith lacks the ability to perform work on a regular and sustained basis in a competitive economy.

Next, Time Warner argues the ALJ erred in relying on the medical opinions of Dr. Kibler and Dr. Autry to find work-related neck and shoulder conditions. It asserts the medical opinions of Dr. Kibler and Dr. Autry are not substantial evidence because they are based solely on subjective complaints. At most, it claims, his symptoms were transient in nature, and he suffered no permanent injury to the shoulder or neck as a result of the August 24, 2015 work accident. Time Warner notes Dr. El-Kalliny diagnosed cervicgia based solely on subjective complaints. Dr. Autry based his rating for the cervical spine on an aggravation of cervical spondylosis with disc herniation, yet disc herniation was not noted by Dr. El-Kalliny based on the cervical MRI. Time Warner believes Dr. Bray's opinion regarding temporary injuries and lack of permanent impairment is the only substantial evidence based upon objective medical findings.

The record contained conflicting medical opinions regarding the shoulder and cervical condition. Dr. Autry conducted a physical examination and reviewed medical records, including x-rays and MRIs of the cervical spine and right shoulder. He explained how Smith's work injury brought previously dormant conditions into disabling reality. Dr. Kibler likewise treated Smith's right shoulder injury, and documented loss of range of motion and stiffness. He recommended an

AC joint debridement and repair, and stated the work injury had brought Smith's previously dormant conditions into disabling reality. The opinions of Dr. Kibler and Dr. Autry constitute substantial evidence supporting the ALJ's decision. She acknowledged the conflicting evidence and properly weighed it to reach her determination. Time Warner merely points to conflicting evidence supporting a more favorable outcome, which is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp. 514 S.W.2d 46 (Ky. 1974).

Finally, Time Warner argues the ALJ erred in finding Smith reached MMI on January 29, 2018. It contends neither Smith's condition nor his treatment changed since the original evaluation by Dr. Banerjee, who placed Smith at MMI during his evaluation on March 9, 2016. Dr. Bray opined Smith reached MMI within six months of the work incident, which would be the end of 2015. While Smith continued with psychiatric counseling following Dr. Banerjee's evaluation and assessment of MMI on March 9, 2016, Smith repeatedly reported that the counseling was not helpful. When, as here, a claimant is found totally disabled from the date of the injury, what would have been temporary total disability merges with permanent total disability. Because we affirm the ALJ's finding of a permanent total disability, Time Warner's argument regarding the date Smith reached MMI is moot.

Accordingly, the October 29, 2019 Opinion, Award and Order and the November 28, 2019 Order rendered by Hon. Jane Rice Williams, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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