

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: December 11, 2020

CLAIM NO. 202000065, 201901163 & 201758738

WEBSTER COUNTY COAL, LLC
(ALLIANCE COAL)

PETITIONER

VS.

**APPEAL FROM HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE**

ANTHONY STONE
and HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
AFFIRMING AND REMANDING**

* * * * *

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

STIVERS, Member. Webster County Coal, LLC (Alliance Coal) (“Alliance”) seeks review of the July 20, 2020, Opinion, Order, and Award of Hon. Grant S. Roark, Administrative Law Judge (“ALJ”) finding Anthony Stone (“Stone”) sustained an October 27, 2017, work-related cervical injury while in the employ of Alliance. The

ALJ awarded permanent total disability (“PTD”) benefits and medical benefits.¹ Alliance also appeals from the August 24, 2020, Order ruling on its Petition for Reconsideration.

On appeal, Alliance asserts substantial evidence does not support the finding Stone is permanently totally disabled.

BACKGROUND

On September 24, 2019, Stone filed a Form 101 alleging an October 27, 2017, injury as a result of “striking against or stepping on a stationary object.” Stone described the injury as follows: “The shuttle car [Stone] was operating traveled over a feeder line and hit a hole bouncing him up into the canopy and forward into the door causing injuries to his left shoulder and neck.”

On October 22, 2019, Stone moved to consolidate his hearing loss claim (Claim No. 2017-58738 with his injury claim (Claim No. 2019-01163). By Order dated November 8, 2019, the ALJ consolidated the claims under the injury claim number. On January 15, 2020, Stone filed a claim for coal workers’ pneumoconiosis (“CWP”) (Claim No. 2020-00065). Two days later, he filed a motion to consolidate the CWP claim with the previously consolidated claims. By Order dated January 24, 2020, the ALJ consolidated the claims under the CWP claim number.

Stone testified at a January 20, 2020, deposition and the May 20, 2020, hearing. Stone’s deposition reveals he was born May 20, 1960 and attained an 11th

¹The ALJ also dismissed Stone’s claim for CWP. As that portion of the ALJ’s decision is not in dispute, the CWP claim will not be discussed herein.

grade education. He has no vocational training and was employed by Alliance at the Webster County coal mine. He was last employed by Alliance on March 19, 2019. Stone testified he stopped working on that date because of neck pain. He has not applied for work since that date.

Stone worked for Alliance from 1985 until he quit in 2019. During the time he worked for Alliance he was primarily a shuttle car driver, and this was the task he was performing when he quit. Prior to working for Alliance, he worked for Pyro Mining. Other than the two alleged neck injuries, Stone had sustained no other neck injuries.²

Stone's regular medical provider is Regina Elders, a nurse practitioner, in Dixon, Kentucky. She prescribes Mobic for his back condition. He was taking over-the-counter Aleve and Advil for his neck and shoulders. Stone has no major health problems. He provided the following description of the 2017 injury:

Q: Let's move onto the first injury at work on October 27, 2017. Can you tell me in your own words what happened?

A: I dumped a load of coal on the feeder. I was driving the shuttle car. I left the feeder and I crossed number three entry is what we call it and I hit a hole and it threw me forward up into my canopy.

Q: Did you have a hard hat on?

A: Yes, ma'am.

Q: What happened right after that?

² We are unable to locate within the record any motion by Stone seeking to amend his claim to include a subsequent injury. However, the record reveals the parties litigated an alleged October 27, 2017, cervical injury as well as an October 25, 2018, cervical injury.

A: I stopped at the car and got out. The guy that drives the car on the same side as me, Randy, he come up over there and seen if I was okay.

Q: Okay. And were you taken out of the mine at that point?

A: No.

Q: Did you finish your shift?

A: Yes, I did.

Q: Did you miss any work for this 2017 injury?

A: No.

Approximately two weeks later, Stone saw Dr. Daniel Emerson, an orthopedic surgeon.³ Stone's symptoms were left arm, left shoulder, and neck pain. Dr. Emerson informed him he had a trapezial strain for which he underwent physical therapy. Stone missed no work while undergoing physical therapy.

Stone recounted the event of October 25, 2018:

Q: Let's move onto the 2018 injury. Tell me what happened in your own words.

A: I was driving the shuttle car underground and I made a right-hand turn going toward the miner. One side of my car, electrical part of it kicked out and it slung me around and up into my canopy.

Q: Okay. Was the impact of that one to your body worse in your opinion than the 2017?

A: It's probably about the same.

Q: Okay. Did you finish your shift after that 2018 injury?

A: No.

Q: Okay. Were you taken out from the mine?

³ Dr. Emerson's records reveal he first saw Stone on November 14, 2017.

A: Yes.

Q: What symptoms were you having? What was bothering you?

A: My neck.

Q: Any left shoulder issues after that 2018 injury?

A: No.

Q: Were you taken to the hospital?

A: Yes.

Q: Did you have symptoms down your arm?

A: No.

Q: Okay. Was just neck pain?

A: Yes.

Q: What hospital did you go to; do you know?

A: they took me to Owensboro Health in Madisonville. I think it's Owensboro Health Clinic there.

Q: Okay. And what treatment did you get?

A: They wouldn't see me.

Q: Because it was Work Comp?

A: They said I was already being treated by Dr. Emerson.

After this injury, Stone returned to work the following Monday. He missed some work between the October 2018 injury and when he quit work due to neck pain. Stone was referred to Dr. Robert Vraney, a partner of Dr. Emerson. Stone testified Dr. Vraney believed "C5-C6 needed to be fused." After physical therapy, Dr. Vraney referred him to Dr. Jose Arias.

Stone testified that prior to the 2018 work injury, his shoulder and left arm were “good” but he continued to experience neck pain. After the 2018 injury, his neck pain shifted to the right side and was more intense. Dr. Arias performed fusion surgery in June 2019. Stone testified the surgery relieved some pain. However, he continues to experience right-sided neck pain and recurrent pain at the top of the right shoulder. Stone had no future appointment with Dr. Arias.

Stone testified he does a lot of housework and “piddles” with an old car. He does not hunt or fish. He walks for exercise. Because of his continued pain, he intends to call Dr. Arias.

The February 11, 2020, Benefit Review Conference Order and Memorandum reflects the parties stipulated Stone sustained an October 27, 2017, work injury, but Alliance disputed the alleged October 25, 2018, work injury. The parties’ stipulated due and timely notice was given. The contested issues were “benefits per KRS 342.730/732, work-relatedness, unpaid or contested medical expenses, credit for STD/LTD, exclusion for pre-existing disability/impairment, and TTD.”

At the hearing, Stone reiterated much of his deposition testimony. Stone testified he worked forty-one years as a coal miner during which he only worked six months above ground. He worked for Alliance for thirty-four years as an underground shuttle car driver. Stone again provided a description of the October 27, 2017, cervical injury. The first injury generated neck and shoulder pain for which he saw Dr. Emerson. Between the injuries, he experienced neck pain which extended into his left shoulder. The pain did not force him to miss work or prevent him from

engaging in any of his job duties. He worked the same number of hours. Stone also provided a description of the October 25, 2018, second neck injury. After the second neck injury, he continued to have significant neck pain. Stone believed he is incapable of returning to his job at Alliance explaining as follows:

Q: What parts would you struggle with?

A: I would struggle with the – all the jarring I would have to take. And of course we are required to lift some stuff. I don't – I don't like to do that. I don't – I feel like some days I might could work eight hour shifts. Then there is days I couldn't work, probably couldn't even work at all. So I would just struggle with that, all that part of it.

Stone described his pre-surgery and post-surgery symptoms:

Q: Let's start with before, before the surgery:

A: Before the ---

Q: What were your symptoms right then?

A: Before the surgery, I was just having a lot of neck pain mostly in my right side of my neck. And it would run down – it would run down into my shoulder on my right side in my shoulder blade. And after surgery, it – it seems like I'm better but there's days where, you know, I still feel some pain in – out of my neck. I'm not as mobile with my neck as I was. It seems like I have to turn my body more than turn my neck so that's basically the difference.

Q: Now, you say sometimes you have pain and all of that. How many days in a week would you say you have issues with your neck?

A: Oh, it – it's different. I'd say four – three or four days a week –

Q: Okay.

A: -- I'll have pain, you know, on and off.

Q: Now, you talked about trouble with your range of motion. Do you have any other symptoms?

A: Just the pain. Just, you know, range of motion. I don't – if my arms, if I raise my arms up, I can't – I can't hold stuff up as well as I used to. (Witness demonstrates.) I don't – I don't walk, you know, I used to run a lot and I don't – I can't do that no more, but I still walk some but very little, but –

Q: What problems do you have running?

A: It's – I can't take the jarring. I can't – when I run, it seems like it jars my neck and then when I get back home, it will start – it will irritate it so I basically just walk now.

Q: When you do have pain, does it still go into your right shoulder or is it mostly in your neck area?

A: It's – it's mostly in my neck area. It runs up – it runs up the side of my – right side of my head into my ear, in my eye and it causes headaches. I have a lot of headaches.

Stone had stopped taking all medication except for Aleve. He had not looked for work since his deposition. After being released from Dr. Arias' care, Stone returned to him because of continuing pain.

After summarizing the lay and medical evidence, the ALJ provided the following findings of fact and conclusions of law concerning Stone's cervical injury:

Causation/Work Relatedness

As a threshold issue, the defendant contested whether plaintiff's cervical condition was causally related to either work injury alleged. However, the defendant's experts establish causation and the defendant does not dispute the work relatedness of plaintiff's current cervical condition in its brief. Based on the undisputed evidence of record and the fact that the issue has been abandoned, it is determined plaintiff's

cervical condition is causally related to the October 27, 2017 work injury.

...

Benefits per KRS 342.730/Prior Active Condition

The next issue is the extent of plaintiff's impairment/disability. Plaintiff maintains his cervical injury, resulting surgery and current symptoms and restrictions, imposed upon his age, work history and education, render her permanently and totally disabled. For its part, the defendant maintains plaintiff is capable of returning to the job he held at the time of his injury and, in any event, is not precluded from all gainful employment.

In determining this issue, it is noted that there is no dispute plaintiff has at least a 25% impairment rating for his cervical injury. However, as among the impairment ratings of record, the ALJ is ultimately most persuaded by Dr. Travis' 25% impairment rating. He not only evaluated plaintiff twice, but his impairment rating is in accordance with the requirements of the AMA Guides, Fifth Edition.

The real issue is whether plaintiff is partially or 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 workrelated 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).

Having considered the totality of evidence available, the ALJ is ultimately persuaded plaintiff has carried his burden of proving he is precluded from obtaining and retaining gainful employment on a regular and sustained basis in a competitive economy based on the effects of his cervical injury within the context of his age, education and work history. In reaching this conclusion, the ALJ is persuaded by the opinions of plaintiff's treating physician, Dr. Arias. He performed plaintiff's surgery and is more familiar with plaintiff's condition, symptoms, and restrictions than any physician of record. In his last treatment note, he concluded plaintiff was not capable of returning to work as an underground miner and he supported plaintiff's decision to retire. This is further corroborated by plaintiff's own credible testimony that he does not believe he could return to work in the mines given his current condition, even after the improvement in symptoms following his cervical fusion surgery. From this evidence, the ALJ is amply persuaded plaintiff cannot return to work in the mining industry.

Moreover, because plaintiff is now 60 years of age and he has spent the last 40+ years in the mining industry, the ALJ is amply persuaded plaintiff's work history is not conducive to a return to sedentary employment in another field. Similarly, plaintiff's advanced age and lack of any college education further persuade the ALJ that plaintiff is not likely to be able to obtain physically suitable employment in a competitive economy. It is therefore determined plaintiff is permanently and totally disabled as a result of his work related cervical injury. His award of benefits is calculated as follows:

$\$1081.80 \times 2/3 = \721.20 per week beginning March 20, 2019 and continuing until plaintiff reaches 70 years of age.

Although listed as a contested issue, the employer acknowledged in its brief that there is no evidence to indicate plaintiff had any active cervical

impairment prior to October, 2017 to justify a reduction in his weekly benefits and the ALJ so finds.

Alliance filed a Petition for Reconsideration seeking an offset against its liability for PTD benefits because of disability benefits paid to Stone pursuant to a disability plan provided by Alliance.

Regarding the ALJ's finding of total disability, Alliance asserted as follows: "Further, the undersigned maintains that the Plaintiff is not permanently, totally disabled. The ALJ failed to set forth the legal significance of his findings concerning the Plaintiff's inability to return to work. Arnold v. Toyota Motor Mfg., 375 S.W.3d 56 (Ky. 2012)." Alliance requested the ALJ reconsider his decision and award. Alliance did not contend the ALJ failed to engage in the appropriate analysis in determining Stone is permanently totally disabled. The ALJ sustained the portion of the Petition for Reconsideration seeking an offset for disability benefits paid and Alliance was granted a credit against its liability for payment of PTD benefits during the overlapping periods Stone received or will receive long-term disability benefits. The ALJ overruled the portion of the Petition for Reconsideration concerning the finding of permanent total disability as a re-argument of the merits.

In arguing the record does not contain substantial evidence supporting a finding of permanent total disability, Alliance emphasizes Stone did not miss work following his October 2017 cervical injury. Alliance notes Stone was not treated for two weeks following the injury at which time he was diagnosed with a strain. Alliance also emphasizes Stone performed his same job until he quit on March 19, 2019. Further, at the time Stone quit work it was not due to a directive from a physician.

Alliance observes Dr. Arias' notes indicate that one month after his surgery, Stone experienced marked improvement of his pre-operative symptoms. Thus, Stone was in less pain after the surgery. Alliance maintains this notation establishes Stone worked in more pain prior to the surgery than after, and is capable of returning to his job at Alliance. Alliance also finds significant Dr. Arias' failure to impose any physical restrictions and Dr. Joseph Zehner's opinion Stone is able to participate in marathon running and camping.⁴ Alliance posits an individual capable of running over 26 miles is capable of maintaining gainful employment. Alliance also contends Dr. Zehner stated Stone was able to perform medium duty work.

Alliance also argues that since the ALJ relied upon Dr. Russell Travis' impairment rating, he should have relied upon Dr. Travis' opinion that Stone is able to work. It notes Dr. Travis concluded Stone is able to perform many jobs and could return to shuttle car driving. It observes Dr. Chris Stephens also believed Stone was capable of full-time employment. Alliance argues the ALJ erroneously ignored the conclusions of Drs. Travis, Stephens, and Zehner in finding Stone could not engage in gainful employment. Alliance notes Dr. Arias did not provide an opinion that Stone could not maintain employment.

Finally, Alliance argues the ALJ erroneously concluded that because Stone is now 60 years of age and worked forty years in the coal mines he is now permanently totally disabled. According to Alliance, the ALJ's finding Stone could not engage in sedentary employment is not based upon substantial evidence as the

⁴ At Stone's request, Dr. Zehner performed an independent medical evaluation and submitted a report. At Stone's request, Dr. Zehner performed an independent medical evaluation and submitted a report.

opinions of Dr. Travis and records of Dr. Arias do not support such a finding. Thus, the ALJ's reliance upon Stone's testimony that he could not return to work in the coal mines is insufficient to support a finding of total disability. It requests the determination of permanent total disability be reversed.

ANALYSIS

Stone, as the claimant in a workers' compensation proceeding, had the burden of proving each of the essential elements of his cause of action, including the extent of his occupational disability. *See* KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Stone was successful in that burden, the question on appeal is whether there was substantial evidence of record to support 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 that would have supported a different outcome than that 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 that they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). 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).

As an initial matter, we note Alliance does not question the sufficiency of the ALJ's five-step analysis required by City of Ashland v. Stumbo, 461 S.W.3d 392 (Ky. 2015). Rather, it disagrees with the ALJ's ultimate conclusion after performing the requisite analysis that Stone is permanently totally disabled. Thus, the sole issue as framed by Alliance is whether substantial evidence supports the ALJ's determination Stone is totally occupationally disabled. We conclude it does.

In his July 9, 2019, progress note, Dr. Arias observed Stone had some difficulty turning his head from side to side which was to be expected given the nature of his surgery. In an August 6, 2019, progress note, Dr. Arias again noted Stone had "some residual mild ache affecting the lateral aspect of the neck on the right side, but nothing in the arms." Within his Assessment/Plan, Dr. Arias stated:

He brought a job description, and it sounds like he should not go back to that kind of occupation. He tells

me that the current mine where he works is 10 feet in height, and they are moving to a 5 feet high mine, which will require him to not work standing, but bending. Apart from that, all of the other requirements are probably too much for him.

In an October 22, 2019, follow-up note, Dr. Arias noted Stone had “been left with some right-sided lateral cervical pain that goes into the retroauricular region with intermittent right-sided headache radiating behind the eye.”

Significantly, within his Assessment/Plan is the following:

His job as a coal miner requires him to work in confined spaces, having to even crawl which is not something that he could do with the type of surgery that he had. It is not possible for him to return to his previous employment as an underground coal miner. He is therefore going to transition to long-term disability and apply for social security disability. I fully support that application as he is definitely not able to return to his previous occupation.

The records of Dr. Arias constitute substantial evidence supporting the ALJ’s finding that Stone is totally occupationally disabled. Dr. Arias was unequivocal in his opinion that Stone was not capable of returning to his previous employment as an underground coal miner. Dr. Arias fully supported Stone transitioning “to long-term disability and apply for social security disability,” as Stone is unable to work as an underground coal miner.

Alliance’s physician, Dr. Stephens, was also of that opinion stating in his January 27, 2020, report “Based on my limited knowledge of shuttle car operation, I believe it would be difficult for him to return to this job, given the necessity to be aware of your surroundings. He has limited cervical motion, which would make this difficult.” Thus, there is ample evidence that Stone is not capable of

returning to work in the coal mining industry. The opinions of Dr. Arias also support the ALJ's finding that because of Stone's age and the fact he has worked forty plus years in the mining industry he is not able to perform sedentary work in another field. Because Stone did not have a college education and apparently had worked solely in underground coal mines his entire work life, the ALJ determined Stone was not able to find work consistently utilizing the skills which were within his individual vocational capabilities. This determination is amply supported by the lay and medical evidence.

During the hearing, Stone identified the physical problems he currently experiences and believed he was incapable of returning to his job at Alliance. He went so far as to state there are some days he "probably couldn't even work at all." This testimony also constitutes substantial evidence supporting the ALJ's determination Stone is permanently totally disabled.

In determining whether a particular worker is partially or totally occupationally disabled as defined by KRS 342.0011, in Ira A. Watson Dept. Store v. Hamilton, 34 S.W.3d 48, 51 (Ky. 2000), the Kentucky Supreme Court explained the analysis "requires a weighing of the evidence concerning whether the worker will be able to earn an income by providing services on a **regular and sustained** basis in a competitive economy." (Emphasis ours). The Supreme Court explained further:

An 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. *See, Osborne v. Johnson, supra*, at 803.

...

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. *Hush v. Abrams, Ky.*, 584 S.W.2d 48 (1979).

Id. at 51-52.

The Supreme Court reaffirmed this holding the next year in McNutt Construction/First General Services v. Scott, 40 S.W.3d 854, 860 (Ky. 2001) . There, the Supreme Court stated:

An 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 **dependable** and whether his physiological restrictions prohibit him from using the skills which are **within his individual 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. *See, Osborne v. Johnson, supra*, at 803. (Emphasis ours).

...

It is among the functions of the ALJ to translate the lay and medical evidence into a finding of occupational disability. Although the ALJ must necessarily consider the worker's medical 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 the vocational experts. *See, Eaton Axle Corp. v. Nally, Ky.*, 688 S.W.2d 334 (1985); *Seventh Street Road Tobacco Warehouse v. Stillwell, Ky.*, 550 S.W.2d 469 (1976). 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. *Hush v. Abrams, Ky.*, 584 S.W.2d 48 (1979).

Here, the ALJ expressly stated he considered Stone's age, 60, and the fact that in the last forty plus years he had worked solely in the coal mining industry. Given Stone's work history, the ALJ did not believe he was capable of sedentary employment in another field. Consequently, in light of his advanced age and lack of college education, the ALJ concluded Stone was not able to obtain physically suitable employment in a competitive economy. Those findings by the ALJ are supported by Dr. Arias' records and Stone's testimony.

We note with interest that even Dr. Travis in his February 28, 2019, report stated as follows: "I am impressed that Mr. Stone is a genuine and sincere person with no symptom magnification and continues to work. He has continued to work without restrictions in spite of his significant discomfort." In light of this statement, we believe the ALJ was justified in relying upon Stone's testimony that he could not return to his previous work. Moreover, we note that at the time he quit

work on March 19, 2019, Stone, whose date of birth is May 20, 1960, was 59 years old. Stone testified he worked forty-one years in the underground coal mines, thirty-five of which were with Alliance. Thus, Stone was either 17 or 18 when he first began working in the coal mines. Since Stone had never performed any work other than the work he was performing at the time he was injured, the ALJ reasonably inferred Stone is now unemployable.

As noted by the Supreme Court, the facts of each claim involve an individualized determination of whether an injured worker will be able to earn income on a regular and sustained basis in a competitive economy. Here, the ALJ was presented with a worker who had engaged in the same work for over forty years. Drs. Arias and Stephens agreed Stone could not return to work in the underground coal mines. Further, Dr. Arias fully supported Stone's application for Social Security disability benefits. Relying upon Dr. Arias' opinions and Stone's testimony, the ALJ was persuaded Stone is no longer capable of being gainfully employed. The ALJ's findings are supported by the record.

Further, the ALJ's acceptance of Dr. Travis' 25% impairment rating did not prevent a rejection of his opinion Stone was capable of being gainfully employed. As pointed out previously, the ALJ may believe various parts of a witnesses' testimony while disregarding other parts of that same witnesses' testimony. While Alliance is correct, the contrary opinions espoused by Dr. Travis could have been relied upon by the ALJ to support a different outcome in its favor, in light of the remaining record, the views articulated by Dr. Travis represent nothing more than conflicting evidence compelling no particular result. Copar, Inc. v.

Rogers, 127 S.W. 3d 554 (Ky. 2003). When the evidence with regard to an issue preserved for determination is conflicting, the ALJ, as fact-finder, is vested with the discretion to pick and choose whom and what to believe. Caudill v. Maloney's Discount Stores, supra. Consequently, we find no error in the ALJ's rejection of Dr. Travis' opinion as to Stone's occupational capabilities. Because the outcome selected by the ALJ is supported by substantial evidence in the form of Dr. Arias' opinions and Stone's testimony, we are without authority to disturb his decision on appeal. Special Fund v. Francis, supra.

That said, we note that during the January 30, 2020, deposition, the following exchange took place between the attorneys:

Ms. Hassman: Greg, there's not a hearing loss. Is that correct?

Mr. Smith: That's correct.

However, the ALJ's decision does not wholly dispose of the hearing loss claim. We are unable to locate within the record an Order dismissing the hearing loss claim or allowing it be withdrawn during the pendency of the action. The hearing loss claim was filed first, and Stone's injury and CWP claims were ultimately consolidated with the hearing loss claim. Thus, the claim must be remanded to the ALJ for an Order dismissing Stone's hearing loss claim.

Accordingly, the July 20, 2020, Opinion, Order, and Award and the August 24, 2020, Order ruling on the Petition for Reconsideration are **AFFIRMED**. This claim is **REMANDED** to the ALJ for entry of an Order dismissing Stone's hearing loss claim.

ALL CONCUR.

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