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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000538-WC

JOHN PENNY — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-06-91458

SOUTHEAST TIRE SERVICE INC.; HON. JAMES L. KERR, ADMINISTRATIVE LAW JUDGE; AND THE WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON AND VANMETER, JUDGES; GUIDUGLI,[1] SENIOR JUDGE.

VANMETER, JUDGE: John Penny petitions for the review of a Workers' Compensation Board (Board) opinion affirming the opinion and order of an Administrative Law Judge (ALJ) awarding Penny permanent partial disability

[1] Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

benefits. Penny argues that the ALJ erred by failing to find that he was permanently, totally disabled, and that the Board erred by affirming the ALJ's opinion in that regard. For the following reasons, we affirm.

Penny was born in 1962 and has a 7th grade education. His employment history includes work as a chipper operator at a sawmill, a laborer in coal mines, and a security guard. He began working as a tire mechanic for Southeast Tire Service Inc. in 2004.

While attempting to throw a thirty-pound tire onto a stack of tires in March 2006, Penny felt his back pop. He immediately experienced pain and then went to the emergency room for treatment. Penny subsequently underwent physical therapy and eventually a lumbar discectomy. He has not returned to any employment.

After Penny filed for workers' compensation benefits and the parties submitted evidence, the ALJ concluded that Penny was not permanently totally disabled, explaining as follows:

> [T]he plaintiff has a minimal education and a history mostly of heavy manual labor. While plaintiff complains of chronic, intractable back and leg pain, his treating surgeon, Dr. Bean, would allow the plaintiff to work on light duty lifting 10 pounds repetitively and 20 pounds at a maximum with no repetitive bending, stooping, twisting, pulling, kneeling, or crawling. The plaintiff has previously worked as a security guard which he stated involved a great deal of sitting, mostly while driving. While the plaintiff stated he can drive only 10 minutes at

> most, the restrictions imposed by Dr. Bean would certainly allow plaintiff to return to work as a security guard. Wherefore, the Administrative Law Judge believes that the plaintiff is not totally occupationally disabled.

The ALJ awarded Penny permanent partial disability benefits based upon a 12% impairment rating. The ALJ further denied Penny's petition for reconsideration insofar as Penny argued that he was permanently totally disabled. The Board affirmed, and this petition for review followed.

Penny argues that the ALJ erred by failing to find that he was permanently, totally disabled, and that the Board erred by affirming the ALJ's opinion in that regard. We disagree.

A workers' compensation claimant bears the burden of proving his claim. *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735, 736 (Ky.App. 1984). Since Penny was unsuccessful in proving that he was permanently totally disabled, the question on appeal is "whether the evidence was so overwhelming, upon consideration of the entire record, as to have compelled a finding in his favor." *Id.* Compelling evidence is that which is so overwhelming that no reasonable person could reach the same conclusion as the ALJ. *Neace v. Adena Processing*, 7 S.W.3d 382, 385 (Ky.App. 1999).

Pursuant to KRS 342.0011(11)(c), one is permanently totally disabled when he, "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 at KRS 342.0011(34) as "providing services to another in return

for remuneration on a regular and sustained basis in a competitive economy[.]" The Kentucky Supreme Court has explained that an ALJ must make an "individualized determination" regarding what a worker is capable of doing after recovering from his work injury. *Ira A. Watson Dept. Store v. Hamilton*, 34 S.W.3d 48, 51 (Ky. 2000). Factors the ALJ may consider in making that determination include 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.

Id. The ALJ may also consider the worker's testimony, and the medical and vocational experts' opinions; however, the ALJ need not rely upon the experts' opinions. *Id.* at 52.

Here, the ALJ expressly considered Penny's educational level, work history, and medical condition. He also considered the work restrictions Dr. Bean placed upon Penny, as well as Penny's testimony that he could drive no more than 10 minutes at a time. Indeed, Penny testified that he did not believe he could perform any job including his old security job, which required him to drive around strip-mining property to ensure that nothing was being stolen. In short, these are several of the factors that *Ira A. Watson Dept. Store* instructs an ALJ to consider when determining whether a claimant is permanently totally disabled.

Ultimately, while Penny's functional capacity evaluation indicated that he had limited tolerance to prolonged positions in sitting and standing and his family doctor restricted him from sitting or standing for more than thirty minutes without a break and from working for more than four hours at a time. Dr. Bean did not place any restrictions upon Penny with regard to sitting, standing, or driving. Since an ALJ has the sole authority to determine the quality, character and substance of the evidence, *Square D Co. v. Tipton*, 862 S.W.2d 308, 309 (Ky. 1993), we cannot say that the ALJ erred by relying upon the restrictions Dr. Bean placed upon Penny and concluding that within those parameters he could perform his old security job, i.e., "any type of work." Thus, the ALJ did not err by concluding that Penny was not permanently totally disabled, and the Board did not err by affirming the ALJ's opinion.

A different result is not compelled by the fact that the ALJ did not expressly discuss Penny's functional capacity evaluation in his findings of fact and conclusions of law. The ALJ set forth the findings of that evaluation in his summary of the evidence, thereby indicating that he considered the evidence in determining Penny's award. And, of course, the ALJ was not required to adopt the functional capacity evaluation's findings.

Nor is a different result compelled by Dr. Bean's opinion that Penny could perform "light duty" work. No finding was made as to whether Penny's old security job was a "light duty" job. Regardless of whether that job qualified as a "light duty" job, the ALJ could adopt the specific work restrictions Dr. Bean

placed upon Penny without adopting his opinion that Penny could perform "light duty" jobs. *FEI Installation, Inc. v. Williams*, 214 S.W.3d 313, 316 (Ky. 2007) ("ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness"). As set forth above, the ALJ did not err by determining that Penny could perform his old security job within the specific work restrictions Dr. Bean placed upon him.

The Board's opinion is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE
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