

RENDERED: AUGUST 1, 2014; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2014-CA-000391-WC

PERRY COUNTY COAL CORPORATION

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-12-77181

CLIFFORD COBB;  
HON. OTTO DANIEL WOLFF, IV,  
ADMINISTRATIVE LAW JUDGE; AND  
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION  
AFFIRMING

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BEFORE: ACREE, CHIEF JUDGE; DIXON AND TAYLOR, JUDGES.

DIXON, JUDGE: Perry County Coal Corporation seeks review of a Workers' Compensation Board decision affirming an Administrative Law Judge's (ALJ) award of permanent total disability benefits for a back injury sustained by Clifford Cobb. We affirm.

Cobb was born March 13, 1961. He has a tenth grade education and a GED. Cobb began working for Perry County in February 2008. He sustained a work-related back injury later that year, and he was off work for three months. After completing physical therapy, he returned to light duty work for one month; thereafter, he was released to full-duty work. On July 17, 2012, Cobb was working in an underground mine changing out a water pump. When the weight of the pump shifted, Cobb attempted to balance the pump as his knees buckled, and he felt severe pain in his low back. Cobb sought treatment with Dr. Mitchell Wicker at the Hazard Clinic. Cobb described low back pain to his right hip, with radiating tingling and numbness through his right leg. Dr. Wicker diagnosed lumbar back pain and right hip pain. Cobb last worked for Perry County on July 19, 2012.

Cobb sought workers' compensation benefits for his low back injury and for occupational hearing loss. Cobb testified at the final hearing and introduced the medical report of Dr. Arthur Hughes, a neurologist. Dr. Hughes reviewed several diagnostic imaging studies and conducted a physical examination of Cobb. Dr. Hughes diagnosed lower back pain with right lumbar radiculopathy likely at S1, which he attributed to the July 2012 injury at work. Dr. Hughes assessed Cobb's impairment at 10% and asserted Cobb had no prior active impairment. Dr. Hughes concluded Cobb was unable to perform his prior work and assigned restrictions as to bending, walking, and lifting. To support his hearing loss claim, Cobb submitted an audiogram report by Robert Moore, an audiologist. Moore's report indicated Cobb suffered moderate to severe hearing

loss. The evidence also included a mandatory university hearing test conducted by Dr. Barbara Eisenmenger, an audiologist. She asserted that Cobb showed hearing loss attributable to long-term noise exposure and other factors that could not be separated. Dr. Eisenmenger assessed an impairment of 21% for Cobb's hearing loss.

Perry County contested a number of issues, including causation and preexisting disability. Perry County submitted the medical records of Dr. James Bean, a neurosurgeon. Dr. Bean reviewed Cobb's MRI and ordered a lumbar myelogram. The myelogram showed multilevel degenerative disc disease, without evidence of a herniated disc or nerve compression. Dr. Bean diagnosed lumbar strain with degenerative preexisting lumbar disc disease. In Dr. Bean's opinion, Cobb could not return to work and was limited to sedentary activity. Dr. Bean assessed a 7% impairment, which included 2% due to significant pain and functional limitation. Dr. Bean imposed restrictions as to bending, stooping, and lifting. Dr. Bean also acknowledged the 2008 lumbar injury and concluded that Cobb had recovered from that injury with conservative treatment. Perry County also submitted the report of Rick Pounds, a vocational rehabilitation counselor. Pounds indicated the test results were inconsistent, which he attributed to probable symptom magnification.

After considering all the evidence, the ALJ concluded that Cobb suffered a work-related back injury in July 2012, which rendered him permanently and totally disabled. In his opinion and award, the ALJ carefully summarized the lay and

medical testimony. The ALJ relied on the reports of Drs. Hughes and Bean to conclude Cobb suffered a lumbar strain in the 2012 work incident coupled with degenerative disc disease. The ALJ noted that both doctors reported that Cobb had recovered from his previous back injury in 2008; consequently, the ALJ concluded there was no evidence indicating that Cobb had a symptomatic and impairment-ratable preexisting condition immediately before his 2012 injury. The ALJ relied on Dr. Bean's assessment of 7% impairment for Cobb's back condition. As to total disability, the ALJ relied on Cobb's testimony, and the restrictions imposed by Drs. Bean and Hughes. The ALJ specifically noted that he was not persuaded by the conflicting opinion offered in the vocational report of Rick Pounds. The ALJ analyzed the evidence in light of the factors established in *Ira A. Watson Dept. Store v. Hamilton*, 34 S.W.3d 48, 51 (Ky. 2000), and the ALJ concluded Cobb was permanently totally disabled. As to the hearing loss claim, the ALJ found that the evidence of Dr. Eisenmenger's evaluation and Mr. Moore's report indicated Cobb suffered hearing loss due to extended exposure to hazardous noise in his employment. The ALJ assessed 21% impairment for hearing loss.

Perry County filed a petition for reconsideration requesting that the ALJ correct an error in the calculation of the hearing loss award. The ALJ granted the petition and issued an amended order to correct the error. Perry County then appealed the ALJ's decision to the Board. In its opinion affirming, the Board concluded substantial evidence supported the ALJ's finding that Cobb suffered a

work-related injury that resulted in permanent total disability and that substantial evidence supported the hearing loss claim. This petition for review followed.

The findings of an ALJ in favor of an injured worker will not be disturbed on appeal where the decision is supported by substantial evidence. *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735, 736 (Ky. App. 1984). “The [ALJ], as the finder of fact, and not the reviewing court, has the authority to determine the quality, character and substance of the evidence presented . . . .” *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418, 419 (Ky. 1985). Furthermore, the ALJ is free “to believe part of the evidence and disbelieve other parts of the evidence whether it came from the same witness or the same adversary party’s total proof.” *Caudill v. Maloney’s Discount Stores*, 560 S.W.2d 15, 16 (Ky. 1977). When this Court reviews a workers’ compensation decision, our function is to correct the Board only where we believe “the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice.” *Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992).

As it did before the Board, Perry County challenges the sufficiency of the evidence supporting the ALJ’s decision regarding causation and total disability.

Perry County points out pieces of evidence it believes the ALJ failed to consider:

- 1) Dr. Hughes did not review the lumbar myelogram, which discredits his opinion;
- 2) Cobb’s job description included some sedentary activities; and 3) Dr.

Eisenmenger’s finding of hearing loss was equivocal regarding causation.

Kentucky Revised Statutes (KRS) 342.0011(1) defines a compensable injury as being “any work-related traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings.”

Cobb testified that, since the July 2012 injury, he had lumbar pain that radiated to his right leg with tingling and numbness in his foot. Cobb stated he was not able to work, noting that he was taking medicine for pain control and that he was limited in his ability to sit or walk. Dr. Hughes’s report acknowledged that the MRI showed degenerative disc disease in the lumbar spine, and he diagnosed Cobb with lower back pain with right lumbar radiculopathy. Dr. Hughes found that there was no prior active impairment and that Cobb’s lumbar and leg pain were the result of the lifting injury. Dr. Bean diagnosed a lumbar strain with preexisting degenerative disc disease and assessed 7% impairment. Further, Dr. Eisenmenger’s evaluation concluded that, within reasonable medical probability, Cobb’s hearing loss was caused by repetitive exposure to hazardous noise in the workplace over an extended period of time.

Although Perry County is dissatisfied with the ALJ’s assessment of the evidence, we reiterate that the ALJ had “the authority to determine the quality, character and substance of the evidence[.]” *Burkhardt*, 695 S.W.2d at 419, and he was free “to believe part of the evidence and disbelieve other parts of the evidence . . . [.]” *Caudill*, 560 S.W.2d at 16. Despite Perry County’s argument to

the contrary, the ALJ did not fail to consider all of the evidence; rather, the ALJ weighed the conflicting evidence and found the medical opinions of Drs. Hughes and Bean, the report of Dr. Eisenmenger, and Cobb's lay testimony to be the most credible.

We now address the ALJ's finding of permanent total disability. KRS 342.0011(11)(c) defines "permanent total disability" 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[.]" The Kentucky Supreme Court, in *Hamilton, supra*, noted several factors relevant to an ALJ's determination of whether a claimant is partially or totally disabled. Those factors 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. 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.

*Hamilton*, 34 S.W.3d at 51.

In the case at bar, the ALJ considered Cobb's age, education, vocational skills, and post-injury medical restrictions. The ALJ concluded:

When all these factors are combined it is unlikely that [Cobb] will be able to resume some type of 'work' under

normal employment conditions. [Cobb] basically has a 10<sup>th</sup> grade education, few, if any, transferable vocational skills, and substantial post-injury restrictions and limitations, this combination makes it unlikely [Cobb] would be able to provide services to another on a regular and sustained basis in the competitive economy of eastern Kentucky. Based upon the review of [Cobb's] occupational status using the factors set forth in Watson, it is determined [Cobb] meets the definition of 'permanent total disability.' This is true despite the fact that [Cobb] has not undergone surgery for his low back symptom and complaints. [Cobb's] input, and the input of the involved medical experts, constitutes persuasive proof to determine [Cobb] is permanently totally disabled.

After careful review, we conclude the ALJ sufficiently articulated his reasoning and the evidence supporting his finding of total disability. Although Perry County cites "evidence which would have supported a conclusion contrary to the ALJ's decision, such evidence is not an adequate basis for reversal on appeal." *Id.* at 52. Further, it is well settled that "[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." *McNutt Construction/First General Services v. Scott*, 40 S.W.3d 854, 860 (Ky. 2001). Given the ALJ's broad discretion in weighing the evidence, we are not persuaded the ALJ erred by relying on the medical opinions of Drs. Hughes and Bean, and Cobb's credible lay testimony, to make a finding of total disability. After fully considering all of the issues raised by Perry County, we conclude the Board did not err in affirming the ALJ's award.

For the reasons stated herein, the decision of the Workers' Compensation Board is affirmed.



ALL CONCUR.

BRIEF FOR APPELLANT:  
Sarah K. McGuire  
Pikeville, Kentucky

BRIEF FOR APPELLEE:  
McKinnley Morgan  
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