IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

DENNIS MOSS,	)	
	)	
Respondent,	)	
	)	
v.	)	**WD81467**
	)	
	)	**OPINION FILED:**
TREASURER OF THE STATE OF MISSOURI - CUSTODIAN OF THE SECOND INJURY FUND,	)	**December 26, 2018**
	)	
	)	
	)	
Appellant.	)	

Appeal from the Labor and Industrial Relations Commission

Before Division Four: Karen King Mitchell, Chief Judge, and Victor C. Howard and Lisa White Hardwick, Judges

The Treasurer of the State of Missouri as Custodian of the Second Injury Fund appeals from the final award of the Labor and Industrial Relations Commission granting Dennis Moss permanent total disability benefits. In its sole point on appeal, the Fund argues that the Commission erred in awarding benefits to Moss because the statutory requirements of § 287.190.6(2) were not met.[1] Because Moss's medical expert demonstrated and certified that

[1] All statutory citations are to the Revised Statutes of Missouri, as updated through the 2011 Supplement.

Moss is permanently and totally disabled, as required by § 287.190.6(2), we affirm the Commission's award.

Background[2]

On April 11, 2012, Moss, a corrections officer, injured his right shoulder at work. Moss, who is right-hand dominant, was carrying a 150-pound footlocker up a flight of stairs with a coworker when the coworker dropped his end of the locker and it yanked Moss's right arm, causing immediate pain in his arm and neck. Six months later, Dr. C. Craig Satterlee performed arthroscopic surgery on Moss's right shoulder. Although his symptoms initially decreased, his shoulder pain eventually returned. When subsequent treatments proved ineffective, Dr. Satterlee performed a right-shoulder replacement, but Moss continued to experience ongoing pain and difficulty lifting even light objects. Dr. Satterlee released Moss at maximum medical improvement on September 4, 2014, with a 30% permanent partial impairment rating for Moss's right shoulder and a lifting restriction of ten pounds with his right upper extremity.

As early as 1992, Moss began experiencing trouble with his hands, which led to surgery on his right wrist. Thereafter, he had ongoing trouble with his grip strength, which affected his daily activities. He also suffered a work-related injury to his right elbow in 2000 that required surgery and affected his ability to lift heavy objects. In late 2010 or early 2011, he injured his low back at work, resulting in lumbar surgery, after which he had difficulty standing or sitting for more than thirty minutes at a time and had to shift or change positions frequently.

Moss retained Dr. William Hopkins, an orthopedic surgeon, to assess Moss's medical condition. Dr. Hopkins rated the primary injury to the shoulder (35% permanent partial disability),

[2] "In reviewing the Commission's decision, we view the evidence objectively and not in the light most favorable to the decision of the Commission." *Poarch v. Treasurer of State of Mo.-Custodian of Second Injury Fund*, 365 S.W.3d 638, 642 (Mo. App. W.D. 2012).

the pre-existing injuries to the elbow (16.5% permanent partial disability), and the low back/body as a whole (25% permanent partial disability). Dr. Hopkins opined that Moss's pre-existing low back and right elbow injuries combined with the April 2012 shoulder injury to create an overall greater disability, and he determined that an enhancement factor of 10% was appropriate to account for the combination of Moss's prior and primary injuries. Dr. Hopkins concluded,

> Mr. Moss has very limited work capabilities. His ability to work would be limited to a sedentary occupation that requires mostly sitting, with the ability to change positions as needed. He will not be capable of repetitive right upper extremity work. His weight capability should be no more than 10 pounds from waist to shoulder using both hands. He is not capable of above shoulder work with his right arm. He is not capable of repetitive bending from the waist more than on an occasional basis, from his previous lumbar spine injury.[3]

Dr. Hopkins's report stated, "I certify this report is pursuant to Missouri Law."

Moss was then evaluated by Kristine Skahan, a vocational consultant. She began by noting that Moss's "previous work was at the unskilled to skilled level consisting of work mainly at the light to very heavy level." Then, she considered the restrictions outlined by Dr. Hopkins and opined that Moss "would be unable to perform at the sedentary level" due to both his inability to use his right-dominant arm for repetitive work and his need to change positions frequently. She concluded that Moss "would be unable to perform the usual duties of any job for which he is qualified . . . , and would not be hired by [an] employer in the open competitive labor market in the normal course of business." "When considering all of the physical restrictions, as well as Mr. Moss'[s] worker profile," Skahan opined "that he has a total loss to the open competitive labor market," which she attributed to "a combination of the back injury in 2011 and the shoulder injury that occurred on 4/11/12 . . . as well as his previous injuries to his upper right[-]dominant extremity and low back."

[3] Dr. Hopkins's report did not state that Moss was "permanently and totally disabled," nor did Dr. Hopkins recommend that Moss undergo an evaluation by a vocational rehabilitation specialist.

At the request of his employer, Moss was evaluated by certified rehabilitation counselor Terry Cordray, who determined that Moss was "totally precluded from all jobs in the labor market" because he required sedentary work that would allow him to change positions frequently but not require him to perform repetitive motions with his right upper extremity (dominant hand). According to Cordray, "At sedentary work, Mr. Moss would be limited to approximately 4% of the jobs in the labor market[, and] sedentary jobs require one to use the upper extremities." Cordray concluded,

> At 61, with a high school education, a lack of sedentary skills, and a history of work[-]related injury, it is my opinion that Mr. Moss would not be "placeable" in the labor market, given the combination of his sedentary work restrictions, . . . , as well as his age, education, and lack of transferrable skill level. . . . [I]t is my opinion that Mr. Moss is totally vocationally disabled.

The Fund did not present any contrary expert medical or vocational evidence.

The Administrative Law Judge (ALJ) awarded Moss $370.19 per week in permanent total disability benefits to be paid by the Fund. The ALJ concluded that "the combination of [Moss's] April 11, 2012 injury and [his] preexisting permanent partial low back and right elbow disability that existed at the time he sustained his April 11, 2012 injury resulted in [his] permanent total disability." The ALJ noted that permanent total disability is not exclusively a medical question; rather, it is a question of "whether any employer in the usual course of business would be reasonably expected to hire the employee in [his] present physical condition, reasonably expecting the employee to perform the work for which he . . . is hired." The ALJ rejected the very argument the Fund raises on appeal—that Moss is not entitled to permanent total disability benefits because no physician certified his status pursuant to § 287.190.6(2)—citing *Treasurer of the State of Missouri v. Majors*, 506 S.W.3d 348 (Mo. App. W.D. 2016), where this court affirmed the

Commission's decision to grant permanent total disability benefits even though no physician had determined that the employee was permanently and totally disabled.

In its Final Award Allowing Compensation, the Commission affirmed the ALJ's award in a supplemental opinion. In responding to the very issue the Fund now raises, the Commission concluded that § 287.190.6(2) "does not imply or mandate any requirement that a medical expert . . . specifically address or attempt to resolve the question whether the test for permanent total disability under Chapter 287 has been satisfied." The Commission further explained that analysis of the extent of disability involves evaluating issues such as job requirements and availability, transferrable skills, and retraining prospects; it also noted, "[i]n many (and perhaps most) cases, physicians do not possess the training, experience, or access to information necessary to render competent opinions regarding an injured worker's prospects for returning to any employment." The Commission then did "as [they] have always done: consider the actual substance of the opinions from the testifying experts, weigh the persuasive value of those opinions, and then fulfill [its] fact-finding duty to determine the nature and extent of [the] employee's disability." After doing so, the Commission concluded that § 287.190.6(2)'s requirement to demonstrate and certify was satisfied. This appeal follows.

Standard of Review

On appeal, we review the Commission's decision to ensure it is "supported by competent and substantial evidence." *White v. ConAgra Packaged Foods, LLC*, 535 S.W.3d 336, 338 (Mo. banc 2017) (quoting Mo. Const. art. V, § 18).

> The Commission's decision will . . . be disturbed [only] if: (1) the Commission acted without or in excess of its powers; (2) the award was procured by fraud; (3) the facts found by the Commission do not support the award; or (4) there was not sufficient competent evidence in the record to warrant the making of the award.

Id. We "will affirm the Commission's decision if [we] determine[] that the Commission could have 'reasonably made its findings, and reached its result, upon consideration of all the evidence before it.'" *Treasurer of State of Mo. v. Majors*, 506 S.W.3d 348, 352 (Mo. App. W.D. 2016) (quoting *Hornbeck v. Spectra Painting, Inc.*, 370 S.W.3d 624, 629 (Mo. banc 2012)).

"Where a Commission's decision is based on its interpretation and application of the law, we review the Commission's conclusions of law and its decision de novo." *Id.*; *see also White*, 535 S.W.3d at 338 ("Decisions involving statutory interpretation . . . are reviewed *de novo.*") "However, we defer to the Commission's factual findings on issues such as the credibility of witnesses and the weight given to their testimony." *Majors*, 506 S.W.3d at 352. "This includes the Commission's evaluation of expert medical testimony." *Id.* (quoting *Pruett v. Fed. Mogul Corp.*, 365 S.W.3d 296, 304 (Mo. App. S.D. 2012)).

Analysis

In its sole point on appeal, the Fund argues that the Commission erred as a matter of law in awarding Moss permanent and total disability benefits because a physician did not demonstrate and certify permanent total disability as required by § 287.190.6(2).

"Permanent partial disability or permanent total disability shall be demonstrated and certified by a physician." § 287.190.6(2)*; see also Patterson v. Cent. Freight Lines*, 452 S.W.3d 759, 765 (Mo. App. E.D. 2015) ("As an evidentiary matter, PPD and PTD must be 'demonstrated and certified by a physician.'" (quoting § 287.190.6(2))). Here, the issue is permanent total disability. "Under Section 287.020 RSMo., the term 'total disability' is defined as the 'inability to return to any employment and not merely . . . inability to return to the employment in which the employee was engaged at the time of accident.'" *Majors*, 506 S.W.3d at 353 (quoting *Scott v. Treasurer of State-Custodian of Second Injury Fund*, 417 S.W.3d 381, 386 (Mo. App. W.D.

2014)). "The well-established test for determining permanent total disability is 'whether the worker is able to compete in the open labor market.'" *Id.* (quoting *Scott*, 417 S.W.3d at 387). "The ability to compete in the open labor market hinges on whether, in the ordinary course of business, any employer would be reasonably expected to hire the individual given his or her present physical condition." *Id.* at 353-54 (quoting *Scott*, 417 S.W.3d at 387). Thus, determining permanent total disability requires medical evidence of the employee's present physical condition and anticipated work restrictions, as well as evidence of the current labor market, which a physician may not be able to provide. "It has been well established that the 'degree of disability is not solely a medical question.'" *Id.* at 354 (quoting *ABB Power T&D Co. v. Kempker*, 236 S.W.3d 43, 51 (Mo. App. W.D. 2007)).

The terms "demonstrated" and "certified" as used in § 287.190.6(2) are not defined in Missouri's workers' compensation law. In the absence of statutory definitions, we look to the dictionary to determine the plain and ordinary meaning of terms. *Mantia v. Mo. Dep't of Transp.*, 529 S.W.3d 804, 809 (Mo. banc 2017). The term "certify" means "to attest as being true or as meeting certain criteria." *Certify*, Black's Law Dictionary (10th ed. 2014). And "demonstrate" means "to show clearly . . . to prove or make clear by reasoning or evidence . . . to illustrate and explain especially with many examples." Merriam-Webster Online Dictionary, available at https://www.merriam-webster.com/dictionary (last accessed November 1, 2018).

Consistent with the definition of "total disability," we interpret § 287.190.6(2)'s mandate that permanent total disability "be demonstrated and certified by a physician" to require that a physician show clearly and attest as being true the employee's medical condition and resulting work-related restrictions post injury. Once a physician does that, the requirement of § 287.190.6(2) is satisfied, and it is within the Commission's expertise to determine whether the

employee, with the medical conditions and physical limitations confirmed by the physician, is employable. *See Patterson*, 452 S.W.3d at 767 ("[U]ltimately, the employability of an individual is a technical matter within the Commission's expertise.").

We recently addressed the requirement of § 287.190.6(2) in *Majors*. There, we affirmed an award where the Commission relied on both medical evidence and non-physician vocational expert evidence in considering whether a permanent and total disability existed. *Majors*, 506 S.W.3d at 354-55. The testifying physician in *Majors* determined that "Majors [a street sweeper] was physically unable to perform many physical tasks required in manual labor such as, but not limited to, bending his knees, squatting below parallel, twisting his knees, and standing for long periods of time." *Id.* at 351. The physician did not state that Majors was "permanently and totally disabled," but Terry Cordray, the rehabilitation counselor retained by Moss's employer in the present case, concluded that, "due to Majors'[s] education level, physical work limitations, and limited work experience, . . . [he wa]s unable to compete for work in the open labor market as a result of the primary right knee injury combined with the pre-existing left knee conditions." *Id.*

The Fund appealed, arguing that the Commission should not have relied on Cordray's opinion in determining whether Majors was permanently and totally disabled. *Id.* In rejecting the Fund's argument, we held that "[t]he record need not contain a single expert opinion addressing the entirety of a claimant's conditions. Rather, the Commission may consider the opinions of multiple experts of differing specialties to arrive at its factual determination as to the parts and sum of a claimant's conditions." *Id.* at 354 (quoting *Patterson*, 452 S.W.3d at 767). "[I]n a workers' compensation case, even '[t]he testimony of the claimant or other lay witnesses as to facts within the realm of lay understanding can constitute substantial evidence of the nature, cause, and extent of the disability, especially when taken in connection with, or where supported by, some medical

evidence.'" *Id.* (quoting *ABB Power*, 236 S.W.3d at 51). "It has been well established that the 'degree of disability is not solely a medical question.'" *Id.* (quoting *ABB Power*, 236 S.W.3d at 51). Thus, we conclude, as we did in *Majors*, that, in determining if the claimant is permanently and totally disabled, the Commission may rely on both evidence provided by a physician demonstrating and certifying the claimant's medical condition and functional abilities and evidence provided by other non-medical experts assessing whether, in light of his medical condition and functional ability, the claimant is employable.[4] We reject the Fund's contention that a finding of permanent and total disability can be made in only cases where the employee presents an opinion from a physician specifically stating that the employee is unable to perform any work.

We also reject the Fund's contention that *Majors* is distinguishable because here, unlike in *Majors*, the physician opined that the claimant could do sedentary work. After providing permanent partial disability ratings for Moss's primary injury and his pre-existing injuries, and concluding that the combination of injuries created an overall greater disability, Dr. Hopkins addressed Moss's ability to work in the future. The doctor advised that Moss would require a sedentary job where he could change positions as needed and would not have to lift more than ten pounds, raise his right arm above his shoulder, or bend repetitively at the waist, ultimately concluding that Moss has "very limited work capabilities."[5] In other words, Dr. Hopkins identified a very narrow type of work that would be compatible with Moss's medical condition and physical

[4] The Fund attempts to distinguish this court's decision in *Majors* by noting that there the medical expert "specifically recommended that Majors obtain a vocational assessment to determine his employability in the open labor market." *Treasurer of the State of Mo. v. Majors*, 506 S.W.3d 348, 354 (Mo. App. W.D. 2016). Although our opinion in *Majors* mentioned that the medical expert requested a vocational assessment, our decision in no way hinged on that fact. Likewise, we do not view the fact that Dr. Hopkins did not specifically request a vocational assessment for Moss to be determinative of the outcome here.

[5] "The words a medical expert uses are often important, not so much in and of themselves, but as a reflection of what impression such witness wishes to impart." *Majors*, 506 S.W.3d at 353 (quoting *Malam v. Dep't of Corr.*, 492 S.W.3d 926, 929 (Mo. banc 2016)). The impression imparted by Dr. Hopkins's long list of Moss's physical limitations that would have to be accommodated in the workplace was that Moss's prospects for future employment were dim.

limitations—sedentary work with the ability to change positions often but no requirement to perform repetitive motions with his dominant hand. This does not suggest, however, that the doctor concluded that Moss was, in fact, employable and, therefore not permanently and totally disabled. Rather, this evidence simply reflects the type of work restrictions applicable to Moss after his injuries, if he were employable.

In exercising its expertise to determine the technical question of employability, the Commission credited not only the medical opinion of Dr. Hopkins but also the testimony of two vocational experts, both of whom concluded that Moss's inability to perform repetitive motions with his right (dominant) hand and his need to change positions frequently combined to preclude him from competing in the open labor market. Specifically, Cordray stated,

> At 61, with a high school education, a lack of sedentary skills, and a history of work[-]related injury, it is my opinion that Mr. Moss would not be "placeable" in the labor market, given the combination of his sedentary work restrictions, . . . , as well as his age, education, and lack of transferrable skill level. . . . [I]t is my opinion that Mr. Moss is totally vocationally disabled.

The record reflects that the Commission properly applied the test for determining permanent total disability and considered Moss's employability. Specifically, the Commission was convinced both by Dr. Hopkins's testimony that Moss's combined shoulder, elbow, and low back conditions were serious enough to constitute a hindrance or obstacle to employment for the purposes of § 287.190.6(2) and by the testimony of two vocational experts who found Moss to be permanently and totally disabled.

Point I is denied.

Conclusion

Because the requirement in § 287.190.6(2) that a physician demonstrate and certify permanent total disability was met and there was sufficient competent evidence in the record to

support the Commission's finding, the Commission did not err in awarding Moss permanent and total disability benefits. Therefore, we affirm the Commission's award.

Karen King Mitchell, Chief Judge

Victor C. Howard and Lisa White Hardwick, Judges, concur.