

OPINION ENTERED: December 7, 2011

CLAIM NO. 200973799

MONUMENTAL LIFE INSURANCE COMPANY

PETITIONER

VS.

APPEAL FROM HON. EDWARD D. HAYS,
ADMINISTRATIVE LAW JUDGE

RALPH CAUDILL
and HON. EDWARD D. HAYS,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING AND ORDER INSTITUTING
THE PAYMENT OF INCOME BENEFITS

* * * * *

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

STIVERS, Member. Monumental Life Insurance Company ("Monumental") appeals the June 6, 2011, opinion, award, and order rendered by Hon. Edward D. Hays, Administrative Law Judge ("ALJ") awarding Ralph Caudill ("Caudill") permanent total disability ("PTD") benefits, medical benefits, and vocational rehabilitation benefits.

Monumental also appeals from the order dated July 28, 2011, denying its petition for reconsideration. In sum, on appeal, Monumental asserts the ALJ made insufficient findings and erred by finding Caudill to be permanently totally disabled. Monumental also asserts the ALJ erred by finding a work-related cervical spine injury.

The Form 101 indicates on November 3, 2009, Caudill was injured as follows:

The plaintiff went to a client's home to collect a premium, he had to go up steep steps to get access to the door, on the way out, he fell down the high steps which were 'eight (8) feet steep.' [sic] Client said he fell from the top step and landed on the bottom step.

Caudill alleges sustaining injuries to his back, neck, right leg, left leg, left foot, right hand, and a psychological component.

Monumental's Notice of Claim Denial indicates it denied Caudill's claim for benefits asserting the alleged injury did not arise out of and in the course of employment. Monumental further explained its denial as follows: "The defendant/employer disputes permanent injury resulting from the event in question, inclusive of an injury to the back, neck, right leg, left leg, left foot, right hand, and emotional component."

The February 16, 2011, Benefit Review Conference ("BRC") order lists the following contested issues: "Extent & duration; permanent injury as defined by the Act; and application of multipliers; total occ. dis.; MMI and TTD as to duration; medicals; vocat rehab."

Concerning the issue of permanent total disability, in the June 6, 2011, opinion, award, and order, the ALJ found as follows:

The ALJ is convinced that Ralph Caudill is totally occupationally disabled as a result of the physical injuries which he sustained on November 3, 2009 and the resulting psychological impairment which has resulted as a direct result of the work related physical injuries. Mr. Caudill has requested rehabilitation benefits pursuant to KRS 342.710, but in light of the extent of his disability, the ALJ is not convinced that any vocational rehabilitation could be rendered which would return Mr. Caudill to the active job market. The ALJ has considered all of the factors and criteria set forth in KRS 342.730; Osborne v. Johnson, 432 S.W.2d 800 (Ky. App. 1968); Ira A. Watson Dept. Store v. Hamilton, 34 S.W.3d 48 (2001); and McNutt Construction/First General Services v. Scott, 40 S.W.3d 854 (2001). The ALJ believes that the psychological impairment is the primary disabling factor. Dr. Eric Johnson has assessed a 24% impairment to the body as a whole. Dr. Douglas Ruth has assessed a 2% impairment. The ALJ believes the assessment of Dr. Johnson is more indicative of the severity of the plaintiff's psychological condition.

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....' KRS 342.0011(34) defines 'work' as providing services to another in return for remuneration on a regular and sustained basis in a competitive economy. The ALJ's finding of a permanent total disability is supported by the evidence submitted by Dr. Hall, Dr. Herr, Dr. Johnson, Dr. Mayer, and by Mr. Dwight L. McMillion.

In its petition for reconsideration, Monumental, in part, asked the ALJ to make "further findings specifying exactly why he does not believe, and upon what medical restrictions he basis [sic] his opinion, that the claimant cannot return to his work as an insurance agent." In the July 28, 2011, order ruling on Monumental's petition for reconsideration, the ALJ responded to Monumental's request for additional findings on this issue as follows:

The Defendant's Petition attempts to focus on the physical injuries sustained by Ralph Caudill and significantly ignores the psychological injuries which results directly from the traumatic fall down the stair steps. The ALJ has already found (on page 32) that the primary disabling factor is Mr. Caudill's psychological impairment. This finding was based partially on the assessment of Dr. Eric Johnson of a 24% impairment to the body as a whole. The ALJ also placed much credibility on the reports of Dr. Debra K. Hall. Dr. John Vaughan stated that

Mr. Caudill looked dysfunctional mainly from a psychological prospective, rather than from an orthopedic standpoint (see bottom of page 25 of Opinion).

The ALJ has also discussed the severe weight loss suffered by Mr. Caudill. The ALJ is convinced that Mr. Caudill is not malingering and is not exaggerating his symptoms. Dr. Hall's statements provide much of the basis for the ALJ's findings. Those findings and opinions of Dr. Hall are outlined thoroughly in the Opinion.

Pursuant to KRS 342.0011(11)(c), "permanent total disability" is defined in pertinent part 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 determination of permanent total disability, as articulated by the Supreme Court of Kentucky in Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48, 51 (Ky. 2000), 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." Ira A. Watson Department Store at 51. The Supreme Court articulated the factors an ALJ may consider in making this determination stating as follows:

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.

Id. at 51.

Pursuant to KRS 342.275 and KRS 342.285, the ALJ, as the fact-finder, determines the quality, character, and substance of all the evidence and is the sole judge of the weight and inferences to be drawn from the evidence. Square D Company v. Tipton, 862 S.W.2d 308 (Ky. 1993); Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997). In making a determination of whether a claimant is totally disabled, the ALJ may rely on the

medical testimony, a worker's own testimony regarding his or her physical condition and ability to labor, or a combination of both. Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979).

As Caudill was successful before the ALJ in proving permanent and total disability, the sole issue is whether substantial evidence supports the ALJ's decision. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986). Substantial evidence is defined as some evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable people. Smyzer v. B.F. Goodrich Chemical Co., 474 S.W.2d 367, 369 (Ky. 1971). This evidence has been likened to evidence that would survive a defendant's motion for a directed verdict. Id. Although a party may note evidence that would have supported a conclusion contrary to the ALJ's decision, such evidence is not an adequate basis for reversal on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46, 47 (Ky. 1974).

In the case *sub judice*, despite Monumental's assertions to the contrary, the ALJ made sufficient findings in support of his conclusion Caudill is permanently totally disabled, and this determination is supported by substantial evidence in the record. While the

ALJ's decision must adequately communicate the evidence upon which his ultimate conclusions are drawn so the parties may discern the basis of his decision, the ALJ is not required to engage in a detailed "discussion and analysis of either the evidence or the law." Big Sandy Community Action Program v. Chaffins, 502 S.W.2d 526, 531 (Ky. 1973).

In the June 6, 2011, opinion, award, and order and the July 28, 2011, order ruling on Monumental's petition for reconsideration, the ALJ specifically stated he relied on Dr. Eric Johnson's 24% psychological impairment rating to support a finding Caudill is permanently totally disabled. The ALJ's explanation does not end there, however. In the June 6, 2011, opinion, award, and order, the ALJ clearly indicated he relied upon "evidence submitted by Dr. Hall, Dr. Herr, Dr. Johnson, Dr. Mayer, and by Mr. Dwight L. McMillion." In the July 28, 2011, order ruling on the petition for reconsideration, the ALJ reiterated his reliance on Dr. Johnson's 24% impairment rating and the opinions of Drs. Hall and Vaughan.

A review of Dr. Hall's August 3, 2010, report reveals it is not only compelling but wholly supportive of the ALJ's determination Caudill is permanently totally disabled. Dr. Hall states, in part, as follows:

I have been seeing Mr. Caudill since his injury of 11/3/09. He has been seen at least on a monthly basis if not more frequently. Initially I felt he had only strains and contusions of his thoracic and lumbar spine.

I am aware of the opinions of the other physicians who have seen Mr. Caudill. I am aware that his diagnostic testing doesn't seem to support the degree of his injury. However, I feel I am more familiar with this gentleman because of the ongoing relationship that I have with him and am better able to judge his ability to work. Other physicians have spent 10 to 30 minutes with him on occasion and have dismissed him as having secondary motivation and possible malingering. I am in total disagreement with this.

Mr. Caudill never had a family doctor before his accident. He was on no medications. He had a very good work record without absenteeism. He initially wouldn't take any pain medication and actually had medication on hand, but would not take it.

I would have expected Mr. Caudill to be recovered from the accident he had by this time, but he has not. This man is severely injured. I believe the injury has triggered an abnormal pain response. In my medical opinion, he has developed complex regional pain syndrome as a direct result of his injury. ***This condition has caused his total disability.*** He is unable to perform any of his duties as a field agent. He is unable to perform any household duties and requires assistance for ADL's.

I base my opinion on my observations and evaluations of him at his regular

appointments. His condition, demeanor, mood does not vary or change from one appointment to the other. This man is very uncomfortable in the exam room. He is unable to sit squarely in a chair. He is unable to maintain any position for more than just a few minutes at a time. He has a stooped posture and antalgic gait. He fights back tears at each visit. His blood pressure is elevated, his heart rate is elevated, both measures of pain. He has sweat beads on his forehead at each visit, again an indication of pain. His dentist has said he is wearing his teeth by grinding them at night, again an indication of pain. He has had a dramatic weight loss from 190 pounds before his injury to a weight of 162 pounds at his most recent visit. He no longer drives because of the severity of pain. He has severe anxiety and depression as a result of his disability. It has also affected his marital intimacy. His feet are swollen since his injury and he in fact has to buy wide width shoes now as a result of this.

(emphasis added).

Dr. Hall was also deposed on March 4, 2011. Dr. Hall is a family practitioner and Chief of Staff at Highlands Regional Medical Center. Dr. Hall started treating Caudill on November 5, 2009, two days after his fall. Dr. Hall testified as follows concerning Caudill's current restrictions and level of disability:

Q: Doctor, as you sit here today, what restrictions would you place upon him at the current time?

A: No heavy lifting, no pushing, no pulling, no working above...with his arms above his head, no prolonged sitting, no prolonged standing, no prolonged walking. I wouldn't want him driving for any type of long distance. He- He's having difficulty concentrating. So, in my opinion, he's completely disabled right now from this.

We need not go any further in our review of the medical evidence than Dr. Hall's August 3, 2010, report and March 4, 2011, deposition. In the July 28, 2011, order ruling on the petition for reconsideration, the ALJ reiterated "Dr. Hall's statements provide much of the basis for the ALJ's findings." The opinions of Dr. Hall comprise substantial evidence in support of the determination Caudill is permanently totally disabled, and the ALJ stated his reliance on these opinions. While this Board acknowledges medical opinions in the record that run contrary to the ALJ's determination Caudill is permanently totally disabled, this is irrelevant in light of substantial evidence in the record supporting his determination. The ALJ may reject any testimony and believe or disbelieve various parts of the evidence. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). The ALJ's ruling will not be disturbed.

Monumental's second argument on appeal is the ALJ committed reversible error by finding a work-related cervical injury. Monumental asserts, in part, as follows:

The ALJ failed to address in the Opinion the issue of whether the Respondent's delayed onset of cervical problems arose out of the work injury of November 3, 2009. In the Order on Petition, the ALJ did address the issue, but he did so insufficiently and was misguided regarding the true nature of the medical report upon which he relied. A careful review of the November 30, 2010 note of Dr. Norman Mayer is vital to this appeal, and it is therefore attached hereto as Exhibit 4.

At the April 5, 2011, hearing, after identifying the contested issues identified at the February 16, 2011, BRC, the ALJ noted for the record the issue of "causation as to the neck and the psychological claims" was added as a contested issue "without objection." Consequently, the June 6, 2011, opinion, award, and order indicates the following as the first contested issue: "Causation, cervical and psychological." The June 6, 2011, opinion, award, and order further indicates as follows:

At the commencement of the Hearing on that date, without objection of either party, the issue of causation as to the neck and the psychological claims was added to the contested issues identified on the BRC Order and Memorandum dated February 16, 2011 (see page 4 of transcript of evidence).

Despite these notations, the June 6, 2011, opinion, award, and order is undeniably silent as to the work-relatedness of Caudill's alleged cervical spine injury. Monumental's June 14, 2011, petition for reconsideration requested the ALJ "to make further findings of fact in this regard and address this issue with specificity." In the July 28, 2011, order ruling on the petition for reconsideration, the ALJ made the following findings regarding Caudill's cervical spine injury:

Finally, the defendant-employer has requested the ALJ address whether the alleged neck injury is related to the work injury of November 3, 2009. The ALJ finds in the affirmative. Mr. Caudill had no significant prior history of any neck pains or problems. As early as November 16, 2009, Dr. Hall noted that an MRI of Mr. Caudill's cervical spine should be considered. On November 30, 2010, Dr. Norman Mayer, neurosurgeon, noted that Mr. Caudill continued to have severe back pain and had developed worsening neck pain. He noted that Mr. Caudill stated his neck pain actually started with the work accident, but was overshadowed by his back pain. This is not an unusual phenomenon. Injured persons will often focus on the more acute pain and not complain of a lesser pain until later. Dr. Mayer opined that claimant had pre-existing degenerative disc disease at C4-C5, but that it was aggravated by the trauma of falling down the stair steps. It should be remembered that Plaintiff turned at least two somersaults at the time of his fall. Dr. Alexander Poulos reviewed an MRI of

Mr. Caudill's cervical spine on November 18, 2010, and noted degenerative end-plate spurring protruding into the anterior aspect of the central spinal canal at the C4-C5 disc level. It is also significant that Mr. Caudill testified at the hearing on April 5, 2011 that he had severe and continuing pain in his neck, upper back, and lower back. This finding is noted on page 28 of the Opinion.

As Caudill was the party with the burden of proof on the issue of causation of the cervical spine injury and was successful before the ALJ, the sole issue on appeal is whether substantial evidence supports the ALJ's decision. Special Fund v. Francis, supra.

The record supports the ALJ's finding of causation regarding Caudill's cervical spine injury claim. It is apparent from the language in the July 28, 2011, order ruling on the petition for reconsideration the ALJ relied upon certain written statements of Dr. Norman Mayer in concluding Caudill's cervical spine injury is related to the November 3, 2009, fall. An examination of the record reveals the only medical record discussing Caudill's cervical spine condition from Dr. Mayer is dated November 30, 2010. In this record, Dr. Mayer states, in part, as follows:

History of Present Illness: The patient is here since his last office visit for followup [sic] of his back pain and

evaluation of neck pain. Since his last visit in June, 2010, he states he continues to have severe back pain and has developed worsening neck pain. He states that his neck pain actually did start with his work accident, but his back pain had overshadowed his neck pain, and recently, his neck pain has worsened.

[text omitted]

Imaging Studies: MRI, cervical spine, obtained at Pikeville Medical Center that reviewed, both the report and the imaging does reveal a disk osteophyte complex at C4-5, mild degree of contour and alteration of the anterior surface cervical cord with no significant central neural foraminal encroachment.

[text omitted]

Assessment and Plan: 1. Neck pain, worsened post trauma. I feel that the cervical C4-5 degenerative disease was pre-existing aggravated by trauma based on history but no evidence of radiculopathy nor does he have significant cervical stenosis. This should be managed nonsurgically.

In resolving the issue of causation, the ALJ, as fact-finder, has broad authority to utilize his discretion and pick and choose among the expert opinions in the record. See Dravo Lime Company v. Eakins, 156 S.W.3d 283 (Ky. 2005). Dr. Mayer opined Caudill's neck pain is "worsened post trauma" and his pre-existing C4-5 degenerative disease is "aggravated by trauma based on history." While we acknowledge Dr. Mayer did not

specifically identify what trauma he is referring to, the ALJ may properly *infer*, under the discretionary powers afforded him by law, the trauma Dr. Mayer refers to is Caudill's work-related fall down the steps on November 3, 2009. After all, Dr. Mayer refers exclusively to Caudill's November 3, 2009, fall in the section of his report entitled "history of present illness." Further, while we acknowledge there is no definitive statement from Dr. Mayer indicating his opinion as to whether Caudill's pre-existing cervical spine condition was dormant or active at the time of Caudill's November 3, 2009, fall, the ALJ may properly infer Caudill's cervical condition was dormant based on the following language: "[Caudill] states that his neck pain actually did start with his work accident, but his back pain had overshadowed his neck pain, and recently, his neck pain has worsened.".

We look, too, at the additional evidence cited by the ALJ in the July 28, 2011, order ruling on the petition for reconsideration as being supportive of causation. While medical causation usually requires proof from a medical expert, the ALJ may properly infer causation from the lay and expert testimony of record, including the claimant's own testimony. Mengel v. Hawaiian-Tropic Northwest &

Central Distributors, Inc., 618 S.W.2d 184 (Ky. App. 1981).

This evidence cited by the ALJ includes the following:

- Dr. Debra Hall indicated "consider MRI C spine" in a medical record dated November 16, 2009, 13 days after Caudill's fall down the steps.
- Dr. Alexander Poulos, Radiologist, set forth the following impression after reviewing an MRI scan taken of Caudill's cervical spine on November 18, 2010:

Degenerative end-plate spurring is protruding into the anterior aspect of the central spinal canal at the C4-C5 disk level with mild contour alteration to the anterior surface of the cervical cord.

The ALJ was also persuaded by Caudill's hearing testimony regarding "severe and continuing pain in his neck, upper back, and lower back." Our review of Caudill's hearing testimony reveals extensive testimony regarding Caudill's current level of neck pain. Caudill testified he experienced no neck or back pain before the November 3, 2009, fall stating:

Q: Okay. Now, before November 3, 2009, did you have any physical problems with your neck, your mid back, or your low back?

A: No. No. I've been in perfect health all my life. Never been on a pill, anything.

The evidence discussed herein comprises substantial evidence in support of the ALJ's determination regarding causation. "When one of two reasonable inferences may be

drawn from the evidence, the finders of fact may choose." Jackson v. General Refractories Co., 581 S.W.2d 10, 11 (Ky. 1979). Here, the ALJ has determined a causal connection exists between Caudill's November 3, 2009, fall down the steps and his cervical spine condition and pain. Since there is substantial evidence in the record which supports this determination, we lack the authority to direct a different result.

Finally, on November 4, 2011, Caudill filed a Motion for Continuation of Award Pending Appeal. Caudill's Motion for Continuation of Award Pending Appeal states as follows:

1. That the Respondent will be without sufficient monies to pay his bills, for his work-related injuries of November 3, 2009.
2. That KRS 342.300 provides for continuation of award pending appeal; 'upon...a sufficient showing of reason and necessity.
3. That Respondent is in need of continuation of award so that he does not have to suffer further due to financial burdens and possibly jeopardizing his credit rating.
4. That attached hereto and incorporated herein is an Affidavit by the Plaintiff in accordance with 803 KAR 25:010 Section 21(14).

Attached to Caudill's motion is a notarized affidavit dated November 1, 2011, setting forth Caudill's monthly bills, detailing to whom each bill is due, the due dates, and the amount of each bill. The total amount allegedly owed monthly is \$4,283.87. Caudill further states as follows in his affidavit:

At this time, my family's monthly income is \$2,321.00. My expenses per month exceed my income. I have been able to manage to pay my monthly expenses on time, however, once I lose my medical insurance, I will then have to pay at least \$842.93 in prescription expenses which will cause undue hardship on my finances. I expect that my medical coverage will expire in November 2011. Once this occurs I may have late payments on my expenses which will cause harm to my credit ratings and good standing among creditors.

In an order dated November 30, 2011, this Board ordered Caudill's motion passed and stated an order ruling on the motion would be entered at the time the opinion was rendered deciding the appeal.

KRS 342.300 permits the Board, "[u]pon motion of either party and a sufficient showing of reason and necessity therefor," to "continue in force the award, judgment, or order appealed from, pending its decision of such appeal." KRS 342.300. 803 KAR 25:010, Section 21 (14)(c) requires the motion to establish not only the

"probability of the existence in fact" of financial loss, privation, or detriment to the moving party's property or health, but also a reasonable likelihood the moving party will prevail on appeal. 803 KAR 25:010, Section 21 (14)(c)(1)(a)-(c) and (c)(2).

We have affirmed the ALJ's award of permanent total disability benefits and the ALJ's finding of causation with respect to Caudill's cervical spine injury. Thus, Caudill has prevailed on appeal and has satisfied the mandate of 803 KAR 25:010, Section 21 (14)(c)(2). Additionally, Caudill sufficiently demonstrated "financial loss" as well as "privation, suffering, or adversity resulting from insufficient income" in the above-cited affidavit attached to his Motion for Continuation of Award Pending Appeal, thus satisfying the requirement set forth in 803 KAR 25:010, Section 21 (14)(c)(1). Therefore, it is **ORDERED** Caudill's motion for continuation of benefits pending appeal is **GRANTED**, and Monumental shall pay all past due income benefits and the payment of income and medical benefits shall continue unless suspended by Monumental by the execution of a supersedeas bond. See KRS 342.300.

Accordingly, the June 6, 2011, opinion, award, and order and July 28, 2011, order ruling on the petition for reconsideration are **AFFIRMED**.

ALL CONCUR.

FRANKLIN A. STIVERS, MEMBER
WORKERS' COMPENSATION BOARD

COUNSEL FOR PETITIONER:

HON RONALD J POHL
271 WEST SHORT ST STE 100
LEXINGTON KY 40507

COUNSEL FOR PETITIONER:

HON CRYSTAL L MOORE
167 WEST MAIN ST STE 100
LEXINGTON KY 40507

COUNSEL FOR RESPONDENT:

HON JOHN EARL HUNT
P O BOX 308
STANVILLE KY 41659

ADMINISTRATIVE LAW JUDGE:

HON EDWARD D HAYS
657 CHAMBERLIN AVE
FRANKFORT KY 40601