Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: January 23, 2015

CLAIM NO. 201173755

ACTIVE DAY PETITIONER/CROSS-RESPONDENT

VS. **APPEAL FROM HON. R. ROLAND CASE, ADMINISTRATIVE LAW JUDGE**

CRYSTAL COOK RESPONDENT/CROSS-PETITIONER

HON. R. ROLAND CASE,
ADMINISTRATIVE LAW JUDGE RESPONDENT

OPINION
AFFIRMING

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

RECHTER, Member. Hon. R. Roland Case, Administrative Law Judge ("ALJ") entered an Opinion, Award, and Order on August 14, 2014 awarding Crystal Cook ("Cook") temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits, medical benefits, and vocational

rehabilitation benefits for a work-related knee injury. Both Cook and her employer, Active Day, petitioned for reconsideration. By separate orders, both dated September 24, 2014, the ALJ denied the petitions. Active Day now appeals, and Cook cross-appeals. Cook argues she is entitled to enhanced benefits pursuant to KRS 342.730(1)(c)1. Active Day challenges the award of vocational rehabilitation benefits and the extent of Cook's injury. We affirm.

At the time of the June 23, 2014 hearing, Cook was twenty-seven years old. She has a GED, and is a certified nursing assistant. Prior to her employment with Active Day, she worked at Bell Oaks Terrace, Welcome Home Healthcare, and Miller's Merry Manor as a personal care assistant. Cook also has some experience performing clerical work at US Bank both as a mortgage officer and compliance officer.

Cook was employed by Active Day as a personal care assistant. On September 22, 2011, she was lifting a patient with the assistance of an apparatus when she felt a sharp pain in her right knee. She immediately reported the injury and sought medical treatment the same day at Springs Urgent Care. She was diagnosed with a right knee sprain and was placed in a brace. Three days later, she returned to Springs Urgent Care due to continued pain, and was referred

to Dr. William Martin. She returned to work for three days, but Active Day was unable to accommodate her restrictions. She ceased working on September 26, 2011.

Cook visited Dr. Martin on October 19, 2011. He initially ordered physical therapy, which did not alleviate Cook's pain. Following an MRI, Dr. Martin recommended an arthroscopy and plica excision. This procedure was performed on January 30, 2012. Thereafter, Cook continued physical therapy and received steroid injections. Following a functional capacity evaluation conducted June 25, 2012, Dr. Martin recommended permanent lifting restrictions and no squatting. He assigned a 10% whole person impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides").

On October 23, 2012, Active Day rehired Cook as a program and activities assistant, which required no lifting. Cook performed this job, though her inability to squat required her to seek assistance with some tasks. Active Day again terminated Cook on August 6, 2013. Cook testified her employer believed it was unsafe to employ her due to her physical restrictions.

Following her termination, Cook was hired as a medical assistant in a physicians' office, earning $9.50 per

hour for 40 hours a week. The position required she obtain her medical assistant registration, so she enrolled at Ross Medical Education Center. The program costs $15,000. Cook applied for and received a Pell Grant in the amount of $5000. She took out a student loan in the amount of $9,000, and paid for the remainder out-of-pocket. She was scheduled to complete the seven-month program on November 5, 2014.

Dr. James C. Dodds conducted an independent medical evaluation on June 21, 2013. He diagnosed a right knee sprain and patellofemoral pain. He believed no further treatment was necessary and recommended Cook undergo a functional capacity evaluation. He placed her at maximum medical improvement as of the date of his exam, and assigned no functional impairment rating. Dr. Dodds re-evaluated Cook on May 8, 2014. His opinions did not change.

The ALJ awarded TTD benefits and PPD benefits. For the award of PPD benefits, he relied upon the 10% impairment rating assigned by Dr. Martin. The ALJ next determined Cook is unable to return to her position as a personal care assistant due to her physical restrictions. He further found she has returned to work at a higher wage, and will be capable of sustaining this wage into the indefinite future. Finally, the ALJ concluded Cook is entitled to vocational rehabilitation, and ordered Active

Day to reimburse her for the cost of her registered medical assistant program.

Both parties petitioned for reconsideration, raising the same issues brought on appeal. The ALJ denied both petitions. Active Day now appeals, and Cook cross-appeals.

Cook argues the ALJ erred in determining she is ineligible for enhanced benefits pursuant to KRS 342.730(1)(c). She also claims the ALJ failed to adequately articulate his reasoning regarding this determination. We disagree.

The ALJ determined Cook lacks the physical capacity to return to her position as a personal care assistant, due to the physical restrictions recommended by Dr. Martin. KRS 342.730(1)(c)1. He then concluded she is currently employed as a medical assistant earning a higher average weekly wage than earned at the time of the injury. KRS 342.730(1)(c)2. Cook does not challenge these factual findings on appeal.

Under such circumstances, when a claimant meets the criteria of both KRS 342.730(1)(c)1 and 2, "the ALJ is authorized to determine which provision is more appropriate on the facts and to calculate the benefit under that provision." Kentucky River Enterprises, Inc. v. Elkins, 107

S.W.3d 206, 211 (Ky. 2003). As a part of this analysis, the ALJ must determine whether "a worker is unlikely to be able to continue earning a wage that equals or exceeds the wage at the time of injury for the indefinite future." Fawbush v. Gwinn, 103 S.W.3d 5, 12 (Ky. 2003). This inquiry involves consideration of numerous factors, including the claimant's lack of physical capacity to return to the type of work that he or she performed, whether the post-injury work is done out of necessity, whether the post-injury work is done outside of medical restrictions, and if the post-injury work is possible only when the injured worker takes more narcotic pain medication than prescribed. Id. The correct inquiry is not simply whether the claimant can continue in his current employment, but whether the injured worker is faced with a "permanent alteration in the . . . ability to earn money due to his injury." Id. *See also* Adkins v. Pike County Bd. of Educ., 141 S.W.3d 387, 390 (Ky. App. 2004).

In analyzing this third prong of the required Fawbush analysis, the ALJ in his August 14, 2014 Opinion simply stated that Cook “will be able to continue [earning the same or greater wages] for the indefinite future.” Later in the opinion, the ALJ commented:

> As previously indicated, the Administrative Law Judge finds the testimony of the plaintiff to be very credible and finds the plaintiff's course of conduct in this case to be not only credible but admirable. She obviously wants to return to gainful employment and in an effort to do so she enrolled in an educational program. She cannot return to work as a certified nursing assistant because of the squatting restrictions and has sought a type of work that with education she can perform.

In his September 24, 2014 Order on Reconsideration, he further elaborated:

> The plaintiff has returned to work earning $9.50 an hour and working 40 hours per week. This is more than twice her average weekly wage for the defendant-employer. The Administrative Law Judge finds she will be able to do so for the indefinite future. The plaintiff is very credible and well-motivated. She has enrolled in vocational training and has a 4.0. She completes this program in November, 2014 and the Administrative Law Judge has no reason to believe she will not complete the program and has no reason to believe she will not continue to earn equal or greater wages.

When read together, the ALJ's Opinion and Order on Reconsideration provides sufficient basis to support the determination Cook will be able to continue earning her pre-injury average weekly wage into the indefinite future. Cornett v. Corbin Materials, Inc., 807 S.W.2d 56 (Ky. 1991). Furthermore, he sufficiently articulated his

consideration of the factors set forth in Fawbush and Adkins. As stated by the ALJ, Cook is not currently working outside her medical restrictions and earns nearly double her pre-injury average weekly wage. As noted by the ALJ in the summary of Cook's testimony, she was prescribed only over-the-counter medication following her surgery. As stated in the Order on Reconsideration, the ALJ was obviously persuaded by Cook's motivation in seeking a position within her restrictions and obtaining the required education to retain that position. We conclude the ALJ set forth the correct legal standards, and adequately articulated the basis for his conclusions. Kentucky Supreme Court in New Directions Housing Authority v. Walker, 149 S.W.3d 354, 358 (Ky. 2004).

Furthermore, substantial evidence supports the ALJ's conclusion Cook will be able to continue to earn her pre-injury average weekly wage into the indefinite future. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986). Again, Cook currently holds a position within her physical restrictions, and there is no testimony or evidence from which to conclude she over-medicates to maintain this employment. She also earned the requisite education to procure other employment as a medical assistant should her current position terminate. Though Cook does have permanent

physical restrictions due to her injury, the ALJ, as fact-finder, is entitled to assess the weight to be afforded that circumstance. The evidence does not compel a different result. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984).

Active Day challenges the award of vocational rehabilitation benefits. By the time of the final hearing, Cook had already enrolled in and nearly completed the medical assistant program. Finding Cook entitled to vocational rehabilitation benefits, the ALJ ordered Active Day to reimburse the cost of the medical assistant program. On appeal, Active Day argues this award was in error because the ALJ made no finding Cook is unable to "perform work for which she has previous training or experience." KRS 342.710(3). In fact, it asserts, Cook is physically able to return to her pre-injury employment performing clerical work. It also argues vocational training is non-compensable because the procedure set forth in KRS 342.710(3) was not followed.

We turn first to Active Day's assertion that the vocational training is non-compensable because the statutory procedure was not followed. Essentially, it argues Cook forfeited any right to vocational rehabilitation by enrolling prior to ALJ approval of the program, or

completing the evaluation and referral process set forth in the statute. This Board has previously considered a similar issue in Lancaster Colony v. Dunagan, WCB 200995230 (November 25, 2013), where the claimant sought reimbursement for a cosmetology program in which she enrolled and completed prior to receiving an award of vocational rehabilitation benefits. We stated:

> KRS 342.710(3) neither authorizes nor prohibits an ALJ from ordering reimbursement for vocational rehabilitation completed without prior award of the benefit. Lancaster Colony argues the ALJ is creating a new right, not authorized by statute, to allow a claimant to essentially bypass the evaluation and recommendation process. It emphasizes Dunagan was specifically told by Lancaster Colony's insurance carrier she would need to obtain an award before she would be reimbursed.
>
> Certainly the statute does not contemplate Dunagan's approach. But we do not agree the ALJ has created a new right. As unequivocally stated in the first sentence of KRS 342.710(3), the right to vocational rehabilitation exists "when as a result of the injury [the employee] is unable to perform work for which he has previous training or experience." The services awarded must be "reasonably necessary to restore him to suitable employment."
>
> By the clear wording of the statute, the right to vocational rehabilitation exists "when as a result of the injury he is unable to perform work for which he has previous training and experience." The right does not

> come to fruition because the evaluation and recommendation process was completed, nor is that process a test to determine who qualifies. Rather, it is simply a method to determine what services are reasonably necessary.
>
> Even for that purpose, we note the permissive language concerning the evaluation and recommendation process: the ALJ "may" refer the claimant to evaluation, and "may" order services upon receipt of the evaluation report. In fact, KRS 342.710(6) specifically authorizes the ALJ to order reimbursement for vocational rehabilitation services received from other state agencies prior to an award or evaluation. When considered in this context, we cannot interpret Dunagan's failure to first obtain an award of benefits as an effective waiver of her right to vocational rehabilitation benefits.
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> Furthermore, we discern no prejudice to Lancaster Colony resulting from the fact the award was granted retroactively, as the employer enjoyed a full opportunity to be heard on the issue.

Based on this reasoning, we reject Active Day's argument that Cook's vocational rehabilitation program is non-compensable solely by virtue of the fact the statutory procedure was not followed. *Cf.* Pinkston v. Teletronics, Inc., 4 S.W.3d 130,132 (Ky. 1999)("A worker who participates in a rehabilitation program of more than 52 weeks' duration, without prior approval, clearly does so without the assurance that the entire program will be

compensable. We observe, however, that nothing in KRS 342.710 provides that benefits are forfeited unless approval is obtained before enrollment in a vocational rehabilitation program of more than 52 weeks' duration.").

Alternatively, Active Day claims the ALJ erred in determining Cook is eligible for vocational rehabilitation benefits. A claimant is entitled to vocational rehabilitation benefits when "as a result of the injury he is unable to perform work for which he has previous training or experience." KRS 342.710(3). Kentucky courts have interpreted this provision to mean the injury must prevent the worker from finding "suitable employment", defined as,

> work which bears a reasonable relationship to an individual's experience and background, taking into consideration the type of work the person was doing at the time of injury, his age and education, his income level and earning capacity, his vocational aptitude, his mental and physical abilities and other relevant factors both at the time of the injury and after reaching his post-injury maximum level of medical improvement.

Wilson v. SKW Alloys, Inc., 893 S.W.3d 800, 802 (Ky. App. 1995).

Here, the ALJ determined Cook is unable to return to her work as a personal care assistant due to the

squatting restrictions. As to Cook's prior experience performing clerical work, the ALJ concluded this was not "suitable employment." He noted Cook had earned her certified nursing assistant license prior to the injury, and had worked in the medical field for "the majority of her life." Given Cook's relatively young age, her work history is not extensive. However, her Form 101 indicates she worked as a personal care assistant for four of the eight years she has been employed and, more importantly, the three years prior to her injury. The ALJ also noted Cook's employment performing clerical work was primarily through a temporary staffing agency, and that she earned a higher hourly wage in the medical field.

Thus, the ALJ properly considered the factors set forth in Wilson determining clerical work is not "suitable employment" for Cook. This conclusion is supported by substantial evidence and, therefore, will not be disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986). Thus, the award of vocational rehabilitation benefits was proper.

For the foregoing reasons, the August 14, 2014 Opinion, Award and Order and the September 24, 2014 Orders on Reconsideration rendered by Hon. R. Roland Case, Administrative Law Judge are hereby **AFFIRMED**.

ALL CONCUR.

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