Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: November 13, 2013

CLAIM NO. 201283372

CEDAR LAKE PARK PLACE PETITIONER

VS. **APPEAL FROM HON. WILLIAM J. RUDLOFF, ADMINISTRATIVE LAW JUDGE**

PENNY BERRY
and HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING IN PART, REVERSING IN PART,
AND REMANDING
* * * * * *

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

STIVERS, Member. Cedar Lake Park Place ("Cedar Lake") appeals from the June 27, 2013, opinion, order, and award and the July 23, 2013, order ruling on the petition for reconsideration rendered by Hon. William J. Rudloff, Administrative Law Judge ("ALJ"). In the June 27, 2013, opinion, order, and award, the ALJ awarded Penny Berry

("Berry") temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits enhanced by the three multiplier, and medical benefits. On appeal, Cedar Lake argues the ALJ erred by awarding PPD benefits enhanced by the three multiplier and TTD benefits.

The Form 101 alleges on April 29, 2012, Berry sustained pulmonary problems and sick building syndrome in the manner described as follows:

> I went to work for the Defendant/employer on or about September 7, 2010. During the first week or so I started to develop lung and/or allergic problems. I sought treatment with my primary care physician (Dr. Pitcock), at an Urgent Care facility and saw Dr. White, an allergist and eventually ended up under the care of Dr. Karmon, a pulmonologist.
>
> I continued to work throughout 2010 and 2011 with my problems and was first taken off work on May 1, 2012 and returned to work on September 28, 2012 and was last exposed/last worked on October 26, 2012. I have used 4/29/12 as my date of 'injury' since that is the date used by the insurance carrier.

The Form 101 indicates Berry was working as a Registered Nurse (“RN”) at the time of her injuries, and no longer works for Cedar Lake.

Concerning the applicability of the three multiplier, the ALJ determined as follows:

I have just read the Opinion of the Workers' Compensation Board in Claim No. 2011-01390, Tamara Daniel, Petitioner, vs. Ford Motor Company and Hon. Grant S. Roark, Administrative Law Judge, Respondents, which Opinion is dated June 6, 2013. The Opinion was written by Chairman Alvey. The Opinion notes that the *Fawbush* analysis requires that first the Judge must determine, based on substantial evidence, that the plaintiff cannot return to the type of work performed at the time of the injury in accordance with KRS 342.730(1)(c)1; second, that the plaintiff has returned to work at an average weekly wage equal to or greater than his pre-injury average weekly wage in accordance with KRS 342.730(1)(c)2; and third, whether the plaintiff can continue to earn that level of wages into the indefinite future. In the Daniel case, Judge Roark in his original Opinion made a very succinct *Fawbush* analysis, which consisted of three sentences. Judge Roark concluded that the plaintiff was not entitled to any enhanced permanent partial disability award. His *Fawbush* analysis and Opinion was affirmed by the Board.

Based upon the plaintiff's sworn testimony in the case at bar, which I found to be very persuasive and convincing, and the persuasive medical report from Dr. Cavallazzi, the university evaluator, which I found to be credible and convincing and which is entitled to presumptive weight, all of which is summarized in detail above, I make the factual determination that the plaintiff can return to the type of work which she performed at the time of her occupational disease and injury in accordance with KRS 342.730 (1)(c)1. In addition, I make the factual

determination that the plaintiff has not returned to work as a nurse earning the same or greater average weekly wage than she earned at the time of occupational disease and injury per KRS 342.730(1)(c)2. I also have to make the determination whether the plaintiff is likely or unlikely to be able to continue earning the wage that equals or exceeds the wage at the time of her occupational disease or injury for the indefinite future. Based upon the plaintiff's sworn testimony and the persuasive medical report from Dr. Cavallazzi, I make the further factual determination that under the decision of the Court of Appeals of Kentucky in *Adkins v. Pike County Board of Education*, 141 S.W.3d 387 (Ky.App.2004), the *Fawbush* analysis includes a broad range of factors, only one of which is the plaintiff's ability to perform her current job. Under the *Adkins* case the standard for the decision is whether the plaintiff's occupational disease or injuries have permanently altered her ability to earn an income and whether the application of KRS 342.730(1)(c)1 is appropriate. I make the factual determination under the plaintiff's testimony and the medical report from Dr. Cavallazzi that it is unlikely that the plaintiff will be able to continue for the indefinite future to do work from which to earn such a wage. Based upon all of the above-cited evidence, I make the factual determination that the third prong of the *Fawbush* analysis applies here and that the plaintiff's injuries and occupational disease have permanently altered her ability to earn an income and that she is unlikely to be able to continue for the indefinite future to do work from which to earn such a wage. I, therefore, make the factual determination that the third

> prong of the *Fawbush* analysis applies here and that under that application the plaintiff is entitled to the 3 multiplier.

In its petition for reconsideration, Cedar Lake argued the ALJ could not enhance Berry's PPD benefits by the three multiplier based on his findings in the opinion, order, and award. However, the ALJ reaffirmed his decision regarding the applicability of the three multiplier in his order overruling Cedar Lake's petition for reconsideration.

Without question an analysis pursuant to Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003) is only necessary in cases in which the two and three multipliers are both potentially applicable. *See* Adkins v. Pike County Bd. of Educ., 141 S.W.3d 387 (Ky. App. 2004). Here, the ALJ specifically found Berry "can return to the type of work which she performed at the time of her occupational disease and injury in accordance with KRS 342.730(1)(c)1." Thus, the three multiplier is not applicable. Additionally, the ALJ determined Berry "has not returned to work as a nurse earning the same or greater average weekly wage than she earned at the time of [sic] occupational disease and injury per KRS 342.730(1)(c)2." Thus, the two multiplier is not applicable. For the ALJ to continue with the Fawbush analysis and resolve the third prong in favor of the three

multiplier defies the applicable law. As the ALJ initially found both multipliers were not applicable, the enhancement of Berry's PPD benefits by the three multiplier must be reversed. In the case *sub judice*, the award of PPD benefits cannot be enhanced by a multiplier.

Cedar Lakes' second argument on appeal is that the ALJ's award of TTD benefits contains an error. Cedar Lakes argues, in relevant part, as follows:

> The Administrative Law Judge in assessing his award of TTD benefits ignored the maximum medical improvement date provided by Dr. Broudy and simply awarded a date of maximum medical improvement on the date that the University evaluator provided an impairment rating. The Administrative Law Judge gave no explanation for this decision and gave no indication of why he did not award the undisputed, uncontradicted date of maximum medical improvement of June 29, 2012.

Concerning the issue of entitlement to TTD benefits, the ALJ determined as follows in the June 27, 2013, opinion, order, and award:

> KRS 342.0011(11)(a) defines "temporary total disability" to mean the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement that would permit a return to employment.
>
> Based upon the plaintiff's sworn testimony and the persuasive medical

> report from Dr. Cavallazzi, I make the factual determination that the plaintiff was temporarily totally disabled and is entitled to recover temporary total disability benefits beginning on June 1, 2012 to September 27, 2012, and again beginning on October 29, 2012 and running to and including March 27, 2013.

Cedar Lake filed the May 15, 2013, supplemental report of Dr. Bruce Broudy which was based on his examination of March 1, 2013. In this report, Dr. Broudy opines Berry reached maximum medical improvement ("MMI") on June 29, 2012.

Also in the record is the medical report of Dr. Rodrigo Cavallazzi, a university evaluator with the University of Louisville. Dr. Cavallazzi examined Berry on March 27, 2013, and diagnosed work-related asthma and assessed a Class 2 (10-25%) impairment rating.

In her February 18, 2013, deposition, Berry testified as follows:

> Q: And when was your- the last day that you worked at Cedar Lake, the best you recall?
>
> A: October 26th.
>
> Q: And looking at this form 104, it looks like you also- you didn't work there from the end of April of 2012 through September 21st of 2012; is that correct?

A: Correct.

Q: Okay. And then you went back the 28th of September; is that correct?

A: Correct.

Q: And then worked through the 26th of October?

A: Correct.

The ALJ's award of TTD benefits from June 1, 2012, to September 27, 2012, and October 29, 2012, to March 27, 2013, is supported by substantial evidence. The ALJ relied upon Berry's deposition testimony regarding when she first stopped working for Cedar Lake following her injury and then returned to work. Additionally, and what Cedar Lake has objected to, the ALJ relied upon Dr. Cavallazi's medical report in which he assessed an impairment rating on the date of his examination, March 27, 2013. While Dr. Cavallazi did not discuss an MMI date in his report, the ALJ is free to reject Dr. Broudy’s uncontradicted MMI date should he provide a sufficient explanation. Here, the ALJ clearly explained that he relied upon Dr. Cavallazi’s opinions and Berry’s testimony in determining an MMI date of March 27, 2013.

Temporary total disability means the condition of an employee who has not reached MMI from an injury and has not reached a level of improvement that would permit a

return to employment. KRS 342.0011. The existence of temporary total disability involves a factual finding in which the ALJ is called upon to analyze the evidence presented and determine the date the injured employee either 1) reaches MMI, or 2) attains a level of improvement such that he is capable of returning to gainful employment. KRS 342.0011(11); W.L. Harper Construction Co. v. Baker, 658 S.W.2d 202 (Ky. App. 1993); Central Kentucky Steel v. Wise, 19 S.W.3d 657 (Ky. 2000). Generally the duration of an award of TTD may be ordered only through the earlier of those two dates.

Here, it is evident the ALJ relied upon Berry's testimony in concluding that from June 1, 2012, through September 27, 2012, and again from October 29, 2012, through March 27, 2013, Berry had not attained a level of improvement such that she was capable of returning to gainful employment. In concluding Berry had reached MMI on March 27, 2013, the ALJ obviously determined that on the date Dr. Cavallazi examined her, Berry attained MMI, as the award of TTD benefits terminated as of the date of Dr. Cavallazi's examination. As noted above, within his discretion, the ALJ is permitted to conclude Dr. Cavallazi believed on the date he saw her, Berry attained MMI.

Significantly, we note in its petition for reconsideration, Cedar Lake suggested the ALJ take a similar approach regarding Berry's entitlement to TTD benefits by asserting as follows:

> While the Administrative Law Judge is entitled to ignore the impairment rating of Dr. Broudy, the fact that an impairment rating was provided on March 1, 2013, indicates that the Plaintiff had reached maximum medical improvement at that time such that an impairment rating could be assigned. As such, the maximum TTD the Plaintiff should have received was through March 1, 2013.

As acknowledged by Cedar Lake in its petition for reconsideration, the ALJ could have relied upon the date Dr. Broudy saw Berry on March 1, 2013, in arriving at an MMI date. However, the ALJ was also permitted to determine Berry attained MMI some twenty-six days later on the date Dr. Cavallazi examined Berry on March 27, 2013.

It is not improper for the ALJ to infer that Dr. Cavallazi believed Berry was at MMI on the date of his examination and, consequently, he assessed an impairment rating. It is well within the ALJ's discretion to infer MMI from this medical report, and such inferences are fundamental to the ALJ's role as fact-finder. Dravo Lime Co. v. Eakins, 156 S.W. 3d 283 (Ky. 2003); Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979); Jackson v. General Refractories

Co., 581 S.W.2d 10 (Ky. 1979). The ALJ's award of TTD benefits from June 1, 2012, to September 27, 2012, and from October 29, 2012, to March 27, 2013, is supported by substantial evidence and will not be disturbed.

Accordingly, the award of PPD benefits enhanced by the three multiplier contained in the June 27, 2013, opinion, order, and award and the July 23, 2013, order on petition for reconsideration is **REVERSED**. The ALJ's award of TTD benefits is **AFFIRMED**. This claim is **REMANDED** for entry of an amended opinion and award awarding PPD benefits without enhancement.

ALL CONCUR.

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