

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: April 1, 2016

CLAIM NO. 201097308

CITY OF ASHLAND

PETITIONER

VS.

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

TAYLOR STUMBO
and HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
VACATING AND REMANDING

* * * * *

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

STIVERS, Member. The City of Ashland ("Ashland") appeals from the July 1, 2015, Amended Opinion and Order on Remand and the July 31, 2015, Opinion and Order on Reconsideration of Hon. William J. Rudloff, Administrative Law Judge ("ALJ"). In the July 1, 2015, decision, the ALJ awarded temporary total disability ("TTD") benefits, permanent total disability ("PTD") benefits, and medical benefits.

On appeal, Ashland asserts three arguments. First, Ashland asserts the ALJ's finding of permanent total disability is not supported by substantial evidence. Second, Ashland asserts the ALJ failed to determine the extent to which Taylor Stumbo's pre-existing antiphospholipid syndrome contributed to his permanent total disability. Third, Ashland asserts the ALJ erred by concluding it is liable for Stumbo's medication of Coumadin.

As a means of setting forth the lengthy procedural history preceding this appeal, we will recite the relevant portions of this Board's March 8, 2013, opinion:

The City of Ashland ("Ashland") appeals from the October 10, 2012, opinion and order and the November 2, 2012, opinion and order overruling Ashland's petition for reconsideration rendered by Hon. William J. Rudloff, Administrative Law Judge ("ALJ"). In the October 10, 2012, opinion and order, the ALJ awarded temporary total disability ("TTD") benefits, permanent total disability ("PTD") benefits, and medical benefits.

The Form 101 alleges on February 1, 2010, Taylor Stumbo ("Stumbo") was injured while working as a waste water operator when "[h]e stepped out of a dump truck and stepped on ice. He slipped causing injury to his left knee." Under "body part injured" is the following: "Left knee, deep vein

thrombosis. Plaintiff reserves the right to add an emotional component." The Form 104 attached to Stumbo's Form 101 indicates Stumbo worked at the following businesses before working for Ashland: Sears, Kay Jewelers, Colorama, Eagle Security, Ryans Steakhouse, Speedway, Taco Bell, Premier Physical Therapy, Breezeland Country Club, ECU, Foodland, Baskin Robbins, and Gattiland.

Ashland's Form 111 Notice of Claim Denial asserts as follows:

The Plaintiff did not sustain an 'injury' as defined by the Kentucky Workers' Compensation Act. At the time of the work accident, Plaintiff was suffering from pre-existing active impairment of this left knee. There is also a dispute regarding extent and duration and the amount of compensation owed to Plaintiff. Any disability suffered by Plaintiff is due to conditions unrelated to the work accident in question.

The June 12, 2012, benefit review conference ("BRC") order lists the following contested issues: TTD rate and duration, extent and duration, PTD, multipliers, unpaid/uncontested medicals, and vocational rehabilitation.

On June 11, 2012, Stumbo filed a "Motion to Amend 101 To Add Pulmonary Embolus" asserting as follows:

Plaintiff's file was reviewed by Dr. Quida Draine on 7/19/11. In his Peer Review Report, Dr. Draine stated that 'As a direct result of the knee injury and subsequent surgery, this patient developed a severe complication of DVT (deep vein thrombosis) and

subsequent PE (pulmonary embolus)' (see report attached).

Stumbo's motion was sustained by order dated June 19, 2012.

On August 6, 2012, Stumbo filed a "Motion to Amend 101 To Include Upper Gastrointestinal (UGI)" stating as follows:

Plaintiff's file was reviewed by Dr. Quida Draine on 7/19/11. In his Peer Review Report, Dr. Draine stated that 'As a direct result of the knee injury and subsequent surgery, this patient developed a severe complication of DVT (deep vein thrombosis) and subsequent PE (pulmonary embolus). For thes [sic] severe medical diagnosis, there is a need to have therapy for [sic] anti-coagulant medications like Aspirin and Coumadin....The use of anti-coagulant medications, like Coumadin, is associated with well recognized and real and potential complications.... Therefore, it is appropriate to conclude that the use of Coumadin has caused the current gastrointestinal symptoms' (see report attached).

Ashland's first argument on appeal is that the ALJ's finding of permanent total disability is clearly erroneous. Ashland argues as follows:

Here, the evidence in the record compels the conclusion that Stumbo has the ability to perform certain types of work despite his previously fractured tibia. He has work experience in outside sales, which he should still be able to perform. For example, he has had an outside sales job in acquiring land leases. He testified at the Final Hearing that this previous job required

him to 'travel upwards of about three to four hours a day, sitting in a car....And, between the times that [he] would have to take breaks for stops to allow [his] legs to stretch and stuff....[he believes] it would be pretty hard' to return to this type of work.

Ashland asserts Stumbo's hearing testimony conflicts with his deposition testimony in which he testified to recently taking a vacation to North Carolina. Ashland argues Stumbo has three years of college at Eastern Kentucky University and approximately 90 credit hours towards a degree in criminal justice. Additionally, Ashland alleges Stumbo testified a broken leg would not prevent him from working a desk job, although he has not sought employment since July 2011.

Concerning the issue of extent and duration, in the October 10, 2012, opinion and order, the ALJ determined as follows:

I saw and heard the plaintiff testify at the hearing. He was a credible and convincing witness. Based on the totality of the evidence in the record, including the plaintiff's testimony and the medical reports of Dr. Kulwicki, Dr. Herr and Dr. Nadar, which I found persuasive, I make the factual determination that Mr. Stumbo sustained a significant permanent whole person impairment as a result of his work injury on February 1, 2010.

In rendering a decision, KRS 342.285 grants the Administrative Law Judge as fact-finder the sole discretion to determine the quality, character, and substance of evidence.

AK Steel Corp. v. Adkins, 253 S.W.3d 59 (Ky. 2008).

"'Permanent total disability' means 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 . . ." Kentucky Revised Statutes (KRS) 342.0011. To determine if an injured employee is permanently totally disabled, an ALJ must consider what impact the employee's post-injury physical, emotional, and intellectual state has on the employee's ability "to find work consistently under normal employment conditions . . . [and] to work dependably[.]" *Ira A. Watson Dept. Store v. Hamilton*, 34 S.W.3d 48, 51 (Ky. 2000). In making that determination,

"the ALJ must necessarily consider the worker's medical condition . . . [however,] the ALJ is not required to rely upon the vocational opinions of either the medical experts or the vocational experts. 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."

Id. at 52. (Internal citations omitted.) See also, *Hush v. Abrams*, 584 S.W.2d 48 (Ky. 1979).

In the present case, I considered the severity of the plaintiff's work injury, his age, his work history and the specific medical evidence from Dr. Kulwicki, Dr. Herr and Dr. Nadar regarding his permanent impairment and occupational disability. Based on all of those factors, I make the factual determination that Mr. Stumbo cannot

find work consistently under regular circumstances and work dependably. I, therefore, make the factual determination that he is permanently and totally disabled.

In its October 23, 2012, petition for reconsideration, Ashland requested the ALJ reconsider the determination Stumbo is permanently totally disabled. In the alternative, Ashland requested additional findings of fact "clarifying how Plaintiff's restrictions preclude him from working in any capacity and render him permanently totally disabled." Ashland also sought additional findings clarifying to what extent Stumbo's "pulmonary embolism or deep vein thrombosis injuries contribute to his permanent disability and impairment."

In the November 2, 2012, opinion and order overruling Ashland's petition for reconsideration, the ALJ determined as follows:

. . .

4. The Opinion and Order dated October 10, 2012 comprehensively reviews the stipulations, the evidence and the issues raised in the case. In the Opinion and Order I noted that I saw and heard the plaintiff testify in person at the hearing and that he was a credible and convincing witness. Based on the plaintiff's testimony and the persuasive medical reports from Dr. Kulwicki, Dr. Herr and Dr. Nadar, I made the factual determination that Mr. Stumbo will sustain a significant permanent whole person impairment as a result of his work injuries on February 1, 2010 and is entitled to recover appropriate compensation benefits, including benefits for temporary total

disability, medical expenses, permanent total disability and vocational rehabilitation. All of the above-cited evidence supports the award of compensation benefits, as does the decision of the Kentucky Supreme Court in *Ira A. Watson Dept. Store v. Hamilton*, 34 S.W.3d 48 (Ky. 2000).

. . .

In the October 10, 2012, opinion and order and again in the November 2, 2012, opinion and order overruling Ashland's petition for reconsideration, the ALJ indicated he relied on Stumbo's testimony and the reports of Drs. Kulwicki, Herr, and Nadar in determining Stumbo is permanently totally disabled. Additionally, the ALJ stated he "considered the severity of the plaintiff's work injury, his age, [and] his work history."

A review of Dr. Kulwicki's June 3, 2011, report reveals he assessed a 13% impairment rating based upon the 6th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"). By letter dated June 4, 2012, Dr. Kulwicki was asked if his opinions regarding diagnosis, causation, and impairment rating would remain the same using the AMA Guides, 5th edition. On June 10, 2012, Dr. Kulwicki handwrote the following: "I do not own or use the 5th Edition. The [illegible] rating in the 6th Edition should correspond to the 5th Ed. rating. [illegible]." Again, by letter dated June 4, 2012, Dr. Kulwicki was asked if his opinions regarding diagnosis, causation, and impairment rating would remain the same using the AMA Guides, 5th edition. Dr. Kulwicki handwrote the following on

June 18, 2012: "I don't use the 5th edition. Kulwicki 6-18-12."

It is well established that while an ALJ has the discretion to pick and choose amongst the medical evidence, the ALJ cannot rely on a physician who assigns an impairment rating which contradicts the AMA Guides, 5th edition. In Jones v. Brasch-Barry General Contractors, 189 S.W.3d 149, 153 (Ky. App. 2006), the Court of Appeals of Kentucky determined as follows regarding an ALJ's reliance upon Dr. Reasor who assigned an impairment inconsistent with the AMA Guides, 5th edition:

We agree with Jones that the AMA Guides do not abrogate a physician's right to assess independently an individual's impairment rating. We also agree that if the physicians in a case genuinely express medically sound, but differing, opinions as to the severity of a claimant's injury, the ALJ has the discretion to choose which physician's opinion to believe. But an ALJ cannot choose to give credence to an opinion of a physician assigning an impairment rating that is not based upon the AMA Guides. In other words, a physician's latitude in the field of workers' compensation litigation extends only to the assessment of a disability rating percentage within that called for under the appropriate section of the AMA Guides. The fact-finder may not give credence to an impairment rating double that called for in the AMA Guides based upon the physician's disagreement with the disability percentages called for in the AMA Guides, which is precisely what Dr. Reasor did in the case at hand.

Under our law, the AMA Guides are an integral tool for assessing a claimant's disability rating and monetary award. So to be useful for the fact-finder, a physician's opinion must be grounded in the AMA Guides, meaning that a physician's personal antagonism toward the AMA Guides, such as that demonstrated by Dr. Reasor in this case, is legally irrelevant. And any assessment that disregards the express terms of the AMA Guides cannot constitute substantial evidence to support an award of workers' compensation benefits.

Therefore, Dr. Reasor's opinion that Jones is twenty-six percent disabled is not competent, substantial evidence because such a finding is greatly in excess of the express terms of the AMA Guides for the Category III injury Dr. Reasor found Jones to have. Since the Board found that the ALJ's decision was not supported by substantial evidence, it neither "overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice." Accordingly, the Board's decision to remand this case to the ALJ with instructions to select an impairment rating in accordance with Category III of the AMA Guides is affirmed.

Id. at 153-154.

We have previously held this same logic must apply to a physician who relies upon the wrong edition of the AMA Guides. Here, Dr. Kulwicki stubbornly adhered to the AMA Guides, 6th edition, despite two opportunities to couch his opinions in terms of the

5th edition. For this reason, Dr. Kulwicki's opinions and impairment rating do not constitute substantial evidence, and the ALJ cannot rely upon them. Consequently, we turn to the opinions of Dr. David Herr and Dr. Nadar in order to determine whether their opinions support the ALJ's determination Stumbo is permanently and totally disabled.

Attached to the Form 101 is a report by Dr. Herr dated August 11, 2011. Dr. Herr diagnosed Stumbo with a "1. Fracture, Medial Tibial Plateau, Left Knee. 2. Posttraumatic Arthritis, Left Knee." Dr. Herr assigned a 5% whole person impairment rating pursuant to the AMA Guides, 5th edition. Dr. Herr opined as follows regarding Stumbo's prognosis:

The prognosis is for progressive worsening of Mr. Stumbo's left knee as a result of depression of the medial tibial plateau and the resulting varus deformity which shifts weightbearing load into the medial compartment. Over time, this will result in progressive destruction of the medial compartment and can reasonably be expected to result in an indication for hemiarthroplasty of the medial compartment or total knee arthroplasty within 10 to 15 years.

Dr. Herr assessed the following restrictions:

Limitations necessary for Mr. Stumbo are prolonged standing and walking of greater than 1 hour continuous, squatting, crouching, kneeling, climbing stairs and ladders, working on scaffolding, working around dangerous machinery, and standing. The restrictions are considered permanent.

He will have particular difficulty standing and walking, with heavy lifting and carrying of over 25 pounds on an occasional basis, kneeling, squatting, and crouching, and climbing. He will also have difficulty operating equipment with left foot-operated controls such as trucks or other equipment that requires clutching or other foot-control operation with the left lower extremity.

A Form 107-I completed by Dr. Herr is also attached to the Form 101 and mirrors the contents of his August 11, 2011, report. In the Form 107-I, Dr. Herr opined Stumbo does not retain the physical capacity to return to the type of work he performed at the time of injury.

Also in the record is Dr. Herr's June 18, 2011, supplemental report in which he commented on medical records from Dr. David Jenkinson, Dr. James Wood, Dr. John Johnson, and Dr. Srinivas Ammisetty.

In an August 29, 2012, supplemental report Dr. Herr was asked to provide an opinion regarding "the long term vascular and pulmonary effects due to DVT and Pulmonary Embolus suffered by Mr. Stumbo following his left knee surgery." Dr. Herr opined as follows:

With respect to the impairment effects associated with the DVT and pulmonary embolus sustained by Mr. Stumbo complicating the surgery of his left knee, I agree with Dr. Westerfield that there are no permanent adverse effects upon Mr. Stumbo's pulmonary function or the venous function of his left lower extremity as a result of the DVT and associated pulmonary embolus.

These conditions have resolved without sequela that would result in an impairment of greater than 0%. The pulmonary impairment related to the work-related injury sustained by Mr. Stumbo is 0% and the DVT related impairment of his left lower extremity results in 0% impairment of the lower extremity and 0% impairment of the whole person as a result of the DVT that complicated Dr. Kulwicki's left knee surgery.

Attached to the Form 101 is a Form 107-I dated December 19, 2011, completed by Dr. Anbu K. Nadar in which he diagnosed the following: "Strain, left knee; status post-tibial plateau fracture; 2) status post-arthroscopy, removal of loose body and partial lateral menisectomy; 3) DVT with pulmonary embolus." Dr. Nadar assigned a 3% whole person impairment pursuant to the AMA Guides, 5th edition, Chapter 17, Table 17-33. Dr. Nadar assessed the following restrictions: "He has limitation in work activity that requires prolonged standing, walking and walking on uneven terrain, crawling, kneeling and activity of such nature." Also attached to the Form 101 is a report dated December 19, 2011, by Dr. Nadar which mirrors the Form 107-I.

Stumbo testified at an April 9, 2012, deposition that he is twenty-five years old and attended Eastern Kentucky University for three years where he worked towards a degree in criminal justice with a minor in occupational science. Stumbo testified he has a history of DVTs or blood clots. His first DVT was in 2003 after surgery on his left knee necessitated by a football injury. A typical day on his job with Ashland "could be anything from going and cleaning out a clogged

pipe, running the jet hose through it, or digging up old pipe and replacing it with new pipe on, on orders." He was "generally" on his feet all day and was required to lift forty to eighty pound bags of concrete, his tools, PVC pipe, ladders, and manhole covers.

Concerning his current condition, Stumbo stated as follows:

Q: Okay. Well, tell me about your condition right now. How does your knee feel?

A: It takes spells. It goes from, from aching pains to sharp pains. I don't have the full range of motion. It like snap/crackle/pops when like I do full extensions or flexions.

Q: Do you require the use of any sort of assistance in walking or standing?

A: The only type of medical assistance that I have is I have compression stockings for the blood clots, and that just keeps my leg from swelling, but I don't have any type of walkers or anything like that.

Q: So do you have to wear the compression stockings every day?

A: I use them as much as tolerable. I only have one pair of them. So anytime I try to do long trips driving, I try to wear them, or anytime I'm going to be on my leg a lot that day.

...

Q: Okay. Are you able to, you know, do you do household chores, things of that nature?

A: Yes. I'm able to do like laundry and dishes and stuff of that nature.

Q: Do you mow the yard?

A: [My father] actually mows the yard. We have inclines and stuff. I weed-eat on the level part of the house sometimes.

Q: Are you not able to mow the yard because of the inclines?

A: No. I can't do it with, with the embankment and the banks that we have.

Q: Okay. It sounds like in your history, you, you were pretty into sports. Do you still do any sports recreationally?

A: The only thing I do now is just mainly fish and hunt at the farm.

Q: What kind of hunting do you do?

A: I didn't go this past year; I went the year before last. It was [sic] deer hunt.

Q: Have you done any trips or vacations recently?

A: Actually this past week, I just got back from North Carolina.

...

Q: Okay. Kind of tell me how, how has your daily routine changed since you've had the injury as opposed to before. Tell me some-- are there things that you could do before that you can't do now?

A: Yes.

Q: Give me some examples.

A: As far as, I guess, it would be loss of strength and no ability to do, you know, physical tasks. I can't do like my range of motion for anything, you know, if I have to go pick, pick something up off the ground. Anytime like before, you know, I'd work out or go for jogs on the treadmill or something for long periods of time, I can't do that. I mean it's pretty much limited now to brisk walks at shorter distances and resting.

Q: So you don't work out anymore?

A: No, sir.

Q: But you're still able to take short-distance walks?

A: Yes, sir. Used [sic] to [sic] I'd do recreational activities like the [sic] hunting and fishing, I could go into deeper places, I guess, like more traverse [sic] terrain. Now it's pretty much limited to hunting on flat ground out of, you know, blinds on the ground to just fishing off the spillway where they already have benches so I can sit down.

...

Q: Okay. So, and I'm just trying to get some hypothetical examples. You know, if you had a job where you had to be on your feet and walking around but you weren't carrying anything, you know, do you think you could do something like that as long as you were able to take periodic breaks to sit down?

A: You know, walking around is maybe, I guess a hypothetical like in an office-type setting or anywhere like in an open landscape, I could probably, you know, walk around, you know, and not lift any weights maybe for about

two (2) hours before I would have to rest, I guess, roughly. I don't know.

Q: Okay. And, and how long would you have to rest?

A: I don't know. I mean it varies. Sometimes my leg hurts, you know, sometimes, I mean, it just feels like it's going to explode. It could take fifteen (15), twenty (20) minutes with it over my heart, you know, elevated or it could take longer. I mean I don't really know.

Q: Okay. Do you have any problem sitting down for a long period of time like if you're at a desk or something?

A: Sitting gives me more trouble than the actual walking around, like something about my knee being bent or restricted blood flow affects it worse.

Q: So give me, give me an example of, you know, you were kind of telling me that walking on it too long, you know, you can't do that for too long, but then you also can't sit still. So, you know, kind of tell me what you do during the day, how, you know, what's your routine like.

A: A typical day, I mean I probably get out of bed; shower; talk to Dad, see if there's anything else going on that day, if he needs me to do anything for him. I guess, you know, run those errands if they needed to be run; like if he needed something from the grocery store at Kroger's or something, go get that. Maybe I'll talk to some friends and see what they're doing, maybe visit with them for a little bit. Most of the time though once I get up, you know, and get out of the shower, if there's nothing on, I normally go in the living room and get in the recliner and put my feet up and

watch some TV until something is going on that day, until I get up with some friends.

Q: Okay. But you're able to drive okay?

A: Like on that trip to North Carolina that I just got back from, we, we stopped maybe about every hour and a half to two (2) hours at a rest area or gas station. I'd get out and walk around and stretch, and then I'm normally ready to go for another hour and a half or so.

At the August 30, 2012, hearing, Stumbo testified regarding his current level of pain as follows:

A: Yes. After- after [sic] surgery I still have pain and limitations. It's- from just my knee it- it goes, just from, like, almost like a dull to a sharp pain, just depending on what activity or what I may be doing at that time, like, stairs or bending over or just, you know, repetitive use of it, like, through walking and stuff of that nature.

Q: All right. Now, when you say pain, what type of pain are you- are you saying?

A: The type of pain I experience is anywhere from, just, like, a dull pain, to it gets, you know, to a sharp pain where, you know, it will stop me, you know, almost abruptly and- until I change what I- what I'm doing at that time.

Q: Now, what is the normal pain for you? Say, you're sitting at home not- haven't done any activity that day or you've got up out of the bed, haven't done any activity, do you have pain at that point in time?

A: For instance, if I- if I'm in my recliner, I guess, it will just be, like, almost a dull ache. I mean, maybe just like, on a scale of one to ten, that's what the doctors always used, was like, maybe, like, just a one or two, it doesn't- it's not, you know, very impairing, I can just feel it, like, at that point, I know it's there.

Q: Do you have that pain all the time, the one and two or does it come and go?

A: It comes and goes.

Q: Okay. Are there times that you're pain free?

A: Yeah. I would say there's- there's certain times, just for my knee exclusively, like, that it doesn't bother me.

Stumbo testified sitting does not cause the pain level in his knee to increase and standing still in one location causes the pain level to increase the most. He is able to walk short distances without a "great deal of pain."

Stumbo takes five milligrams daily of Coumadin which causes him to have chills, bruising, and nose bleeds.

Stumbo's work history includes working at Kay Jewelers, which he does not believe he could perform because it required him to be on his feet all day. Stumbo also has experience acquiring land leases, but he believed returning to that job would be "pretty hard" because it requires driving three to four hours a day.

Stumbo testified as follows regarding his work potential:

Q: If you had a job where you had to sit, stand and walk eight hours a day, five days a week in your current condition, do you think you could hold a job down like that?

A: It would depend on, I guess, how much sitting, standing and walking. If it was, you know, broken up and I was able to- to move around, I guess, in my discretion and elevate my leg, when it was- when it was time to hurt, yes.

In making a determination regarding permanent and total disability, an ALJ is vested with broad discretion. See Seventh Street Road Tobacco Warehouse v. Stillwell, 550 S.W.2d 469 (Ky. 1976). However, substantial evidence is "'more than a scintilla'" and "'means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" Kentucky Utilities Co. v. Hammons, 145 S.W.2d 67, 71 (Ky. App. 1940). "'Vague, uncertain, or irrelevant matter not carrying the quality of proof'" should not be deemed substantial evidence. Clear Branch Min. Co. v. Holbrook, 247 S.W.2d 48, 50 (Ky. 1953). That said, while this Board cannot engage in fact finding, we can determine whether the ALJ has adequately identified the substantial evidence which supports his determination Stumbo is permanently totally disabled and can request additional findings when the ALJ has fallen short. Here the ALJ has fallen short.

In both the October 10, 2012, opinion and order and the November 2, 2012, opinion and order overruling Ashland's petition for reconsideration, the ALJ indicated he relied upon Drs.

Herr and Nadar, as well as Stumbo's testimony. [footnote omitted] However, without additional explanation by the ALJ which Ashland requested in its petition for reconsideration and did not receive, this Board is unable to determine how the above-cited evidence supports the determination Stumbo is permanently totally disabled. Dr. Herr assigned a 5% impairment rating for Stumbo's left knee and 0% for the DVT complication following the left knee surgery. While Dr. Herr assigned certain restrictions, none pertained to Stumbo's ability to sit. Additionally, Dr. Nadar assigned a 3% impairment rating for the left knee, and his restrictions also did not encompass Stumbo's ability to sit.

Regarding Stumbo's testimony, the ALJ has simply stated he relied upon "the plaintiff's work injury, his age, [and] his work history." However, Stumbo's testimony establishes he was twenty-six years old at the time of the hearing and has 90 credit hours at Eastern Kentucky University towards a criminal justice major. He is able to fish, hunt, perform household chores, and spend his days with his friends. Stumbo is able to drive for two hours at a time before needing to take a break and has retail experience. There are times when Stumbo is pain-free. *Significantly, Stumbo testified he would be able to work an eight-hour-a-day job as long as he could, in his discretion, periodically elevate his leg.*

While an ALJ is not required to set forth the minute details of his reasoning in reaching a particular result, he must adequately set forth the basic facts upon which the ultimate conclusion was drawn so the parties are

reasonably apprised of the basis of the decision. Big Sandy Community Action Program v. Chafins, 502 S.W.2d 526 (Ky. 1973). The parties are entitled to findings sufficient to inform them of the basis for the ALJ's decision to allow for meaningful appellate review. Kentland Elkhorn Coal Corp. v. Yates, 743 S.W.2d 47 (Ky. App. 1988); Shields v. Pittsburgh and Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982). The ALJ must articulate sufficient findings to apprise both the parties and this Board of the reasons for his ultimate conclusions. Here, not only are there insufficient findings of fact, but Stumbo's testimony indicates that with accommodation, he is capable of gainful employment over an eight hour day.

Ashland's second argument on appeal regarding the ALJ's reliance upon Dr. Kulwicki has been addressed.

Accordingly, the ALJ's determination Stumbo is permanently totally disabled, and the award of income benefits is **VACATED**. This claim is **REMANDED** to the ALJ for additional findings of fact concerning whether Stumbo is permanently totally disabled.

The Court of Appeals affirmed the Board's decision. The Supreme Court of Kentucky, in City of Ashland vs. Taylor Stumbo, 461 S.W.3d 392, 396, 397 (Ky. 2015), affirmed the Court of Appeals and set forth the following five-step analysis an ALJ must undertake in determining whether a claimant is permanently totally disabled:

Thus, an ALJ is required to undertake a five-step analysis in order

to determine whether a claimant is totally disabled. Initially, the ALJ must determine if the claimant suffered a work-related injury. Here, the parties stipulated that Stumbo suffered a work-related injury; therefore, the ALJ was not required to make that finding. Next, the ALJ must determine what, if any, impairment rating the claimant has. Here, the ALJ listed the various impairment ratings assigned to Stumbo by the physicians. However, the ALJ never found which impairment rating Stumbo actually has. Having failed to determine what impairment rating Stumbo has, the ALJ could not then determine what permanent disability rating Stumbo has. Thus, the ALJ failed to satisfy the second and third steps of the analysis. Next, an ALJ is required to determine that the claimant is unable to perform any type of work. Here, the ALJ attempted to undertake this analysis, but, as noted by the Board and the Court of Appeals, he fell short. An ALJ cannot simply state that he or she has reviewed the evidence and concluded that a claimant lacks the capacity to perform any type of work. The ALJ must set forth, with some specificity, what factors he or she considered and how those factors led to the conclusion that the claimant is totally and permanently disabled. Such findings are particularly crucial in a case such as this where: part of Stumbo's condition and arguably some of his restrictions are related to his pre-existing antiphospholipid syndrome; Stumbo testified he could perform sedentary work with accommodations; no physician imposed any restrictions that would foreclose Stumbo from performing sedentary work; Stumbo has performed a wide-range of work activity; and Stumbo has obtained 90 hours of college credits. Finally, an ALJ must determine

that the total disability is the result of the work injury. Here, again, the ALJ fell short because he failed to delineate which, if any, of Stumbo's restrictions are related to the knee injury and which are related to the pre-existing antiphospholipid syndrome.

Portions of the July 1, 2015, Amended Opinion and Order on Remand will be cited, in relevant part, as needed.

Ashland filed a petition for reconsideration asserting the following:

[r]econsider his Amended Opinion and Order on Remand and award permanent partial disability ("PPD") benefits instead of PTD benefits; set forth additional findings of fact clarifying how Stumbo's restrictions prevent him from working in any capacity; set forth additional findings clarifying the extent to which Stumbo's pulmonary embolism or deep vein thrombosis injuries contributes to his permanent and total disability; and set forth additional findings regarding to what extent Ashland is required to pay Stumbo's medical expenses for treatment relating to his pulmonary embolism and deep vein thrombosis.

The July 31, 2015, Opinion and Order on Reconsideration denied Ashland's petition for reconsideration.

Ashland filed a Motion to Reopen on September 3, 2015, alleging newly discovered evidence. It asserts, in part, as follows:

The newly discovered evidence at issue here is the nature of Stumbo's claims in the lawsuit against Exterra Resources, that Stumbo suffers from a medical condition known as Chiari I, and the reason that Stumbo was terminated by Exterra. This evidence existed at the time of the initial proceeding. Stumbo filed suit against Exterra on January 22, 2010. The injury at issue in this proceeding occurred on February 1, 2010.

By order dated October 5, 2015, this Board placed Ashland's appeal in abeyance pending the resolution of the September 3, 2015, Motion to Reopen.

In an October 27, 2015, "Interlocutory Opinion and Order," the ALJ determined as follows:

This case has a long procedural history and was decided by the Kentucky Supreme Court in Taylor Stumbo v. City of Ashland, 461 S.W.3d 392 (Ky. 2015). Thereafter, I rendered an Amended Opinion and Order on Remand on July 1, 2015, which has subsequently been appealed to the Workers' Compensation Board by the defendant. The underlying case is not final, since it is pending before the Workers' Compensation Board pursuant to KRS 342.285.

While said appeal is pending, defendant has filed a Motion to Reopen pursuant to KRS 342.125, alleging fraud and newly discovered evidence. The plaintiff Stumbo has filed a Response to the Motion to Reopen, objecting to same.

The defendant is permitted under the law to proceed through the appellate

process and that right should not be disturbed. After the underlying claim is final, defendant has the option to file a Motion to Reopen, which can be litigated.

I make the determination that defendant's Motion to Reopen is premature and IT IS OVERRULED AND DENIED with the right of the defendant to refile its Motion to Reopen after the underlying claim becomes final.

This is an Interlocutory Opinion and Order and is not final or appealable.

By order dated November 10, 2015, this Board removed Ashland's appeal from abeyance.

Ashland's first argument on appeal is the ALJ's finding of permanent total disability is not supported by substantial evidence.

In our March 8, 2013, opinion vacating, we remanded the claim to the ALJ to "articulate sufficient findings to apprise both the parties and this Board of the reasons for his ultimate conclusions."

In the case *sub judice*, the Supreme Court of Kentucky set forth a five-prong analysis an ALJ must undertake in determining whether a claimant is permanently totally disabled. The first prong is for the ALJ to determine whether Stumbo suffered a work-related injury. As

noted by the Supreme Court, the parties stipulated to a work-related injury in the June 12, 2012, BRC Order.

In the second and third prong of the analysis, the ALJ must determine what, if any, impairment rating Stumbo has and if the impairment rating is permanent. In the July 1, 2015, Amended Opinion and Order on Remand as well as the July 31, 2015, Opinion and Order on Reconsideration, relying on the opinions of Drs. Herr and Nadar, the ALJ determined Stumbo sustained a 5% permanent impairment rating and has a permanent disability.

The fourth prong involves a determination of whether Stumbo is unable to perform any type of work accompanied by the specific factors the ALJ considered and how those factors led to the conclusion that Stumbo is permanently totally disabled. In his decision, the ALJ determined Stumbo is unable to perform any type of work and set forth factors supporting this determination which include the following:

- "Based upon the credible and convincing lay testimony of Mr. Stumbo and the persuasive, compelling and reliable medical evidence from both Dr. Herr and Dr. Nadar, I make the determination that the plaintiff continues to suffer serious left knee pain, which is aggravated by standing, walking and climbing stairs."

- "Dr. Nadar, a reputable orthopedic surgeon, stated that the plaintiff continues to complain of residual knee pain and stiffness, does not retain the physical capacity to return to the type of work which he performed at the time of his injury and has a definite limitation in work activity which requires prolonged standing, walking and walking on uneven terrain, crawling, kneeling, and activity of such a nature."

- "In this case, I carefully considered the severity of Mr. Stumbo's work injuries, as documented in his sworn testimony and the medical evidence from both Dr. Herr and Dr. Nadar, the orthopedic surgeon, all of which was credible, convincing, persuasive and compelling."

- "I took into consideration the uncontradicted fact that the plaintiff last worked back on February 1, 2010, the date of his employment accident, and that he has not had any earnings since that time."

- "I took into consideration the fact that the plaintiff has been awarded Social Security total disability benefits."

- "I took into consideration his educational background, which is above average. Unfortunately, Mr. Stumbo has not had any specialized or vocational training, which would assist him in obtaining regular gainful employment."

- "I also took into consideration the stringent permanent physical requirements placed upon Mr. Stumbo by both Dr. Nadar and Dr. Herr."

- "I make the determination that if Mr. Stumbo went out into the highly competitive job market, he will have an extremely difficult time finding any regular gainful employment for which he has had appropriate training and experience."

In the order ruling on the petition for reconsideration, the ALJ provided the following additional language in support of his determination Stumbo is permanently totally disabled:

I next make the determination that under the persuasive, compelling and reliable medical evidence from Dr. Herr, Mr. Stumbo is unable to perform any type of work, basing that determination on the above-stated persuasive, compelling and reliable medical evidence from Dr. Herr, as covered above. I also rely upon Mr. Stumbo's credible and convincing lay testimony that he suffers severe pain when he has to stand in one location for any significant period of time and that the maximum time he can stand is 15-20 minutes. I also rely upon Mr. Stumbo's testimony that he has fairly consistent pain when sitting, walking and standing. I also rely upon the testimony of Mr. Stumbo that after standing or walking for a short time he has to sit down and elevate his injured leg. I also rely upon Mr. Stumbo's testimony that he has to elevate his injured leg periodically for a total of approximately 3 hours per day. I also rely upon Mr. Stumbo's testimony that he has deep vein thrombosis, which causes pain in his injured leg and which constitutes a severe risk to his health and welfare when he has to

remain seated for more than a limited period of time. I also rely upon Mr. Stumbo's testimony that due to the taking of his medication for deep vein thrombosis, he suffers daily nose bleeds, in that these nose bleeds occur multiple times a day for at least a minimum of 5 minutes. I also rely upon Mr. Stumbo's testimony that he requires medical treatment to stop his bleeding. I also rely upon Mr. Stumbo's testimony that he cannot go back to an outside sales job because of the pain which he has when traveling in a car and his need to move around, switch between sitting and standing and the requirement that he has to elevate his injured leg frequently. Relying upon the above-cited medical evidence and lay evidence, I make the determination that Mr. Stumbo is unable to perform any type of work, basing that determination upon the credible and convincing lay testimony from the plaintiff, as covered above, and the persuasive, compelling and reliable medical evidence from Dr. Herr, as covered above. Based upon all of the above factors, I reach the legal conclusion that Mr. Stumbo is permanently totally disabled. I make the determination that if he could return to work, he would do so. I make the determination that if he went out into the highly competitive job market, he will have an extremely difficult and probably impossible time in finding any regular gainful employment. Relying upon the decision of the Kentucky Supreme Court in *Hush v. Abrams*, 584 S.W.2d 48 (Ky. 1979), I again reach the legal conclusion that the plaintiff is permanently totally disabled.

Finally, pursuant to the five-prong test, the ALJ was required to state Stumbo's permanent total disability is the result of the work injury. In both the July 1, 2015, Amended Opinion and Order on Remand and the July 31, 2015, Opinion and Order on Reconsideration, the ALJ made this statement.

Our review of the July 1, 2015, Amended Opinion and Order on Remand and the July 31, 2015, Opinion and Order on Reconsideration reveals the ALJ set forth additional findings in support of his determination Stumbo is permanently totally disabled. That said, we vacate the ALJ's determination of permanent total disability and the award of PTD benefits and remand for additional findings.

As Ashland argued in its September 25, 2015, appeal brief to this Board, the ALJ failed to "determine the extent to which Stumbo's pre-existing antiphospholipid syndrome contributed to his permanent disability and impairment." The Supreme Court of Kentucky emphasized more than once, in the case *sub judice*, the importance of the ALJ making this determination. At one point in its decision, the Supreme Court stated:

The ALJ must set forth, with some specificity, what factors he or she considered and how those factors led to the conclusion that the claimant is totally and permanently disabled. Such

findings are particularly crucial in a case such as this where: **part of Stumbo's condition and arguably some of his restrictions are related to his pre-existing antiphospholipid syndrome;** Stumbo testified he could perform sedentary work with accommodations; no physician imposed any restrictions that would foreclose Stumbo from performing sedentary work; Stumbo has performed a wide-range of work activity; and Stumbo has obtained 90 hours of college credits. Finally, an ALJ must determine that the total disability is the result of the work injury. Here, again, the **ALJ fell short because he failed to delineate which, if any, of Stumbo's restrictions are related to the knee injury and which are related to the pre-existing antiphospholipid syndrome.**

Id. at 396-397. (emphasis added).

As noted by Ashland, "nowhere in ALJ Rudloff's Amended Opinion and Order or in his Opinion and Order on Reconsideration did he even utter the words 'antiphospholipid syndrome.'" There is certainly medical testimony in the record regarding Stumbo's pre-existing genetic hypercoagulable state due to antiphospholipid syndrome; thus, it is relevant to the ALJ's analysis of permanent total disability.¹ On remand, the ALJ must discuss Stumbo's pre-existing antiphospholipid syndrome in his

¹ An example is Dr. Westerfield's August 13, 2012, report in which he opines as follows: "Because of Mr. Stumbo's prior medical history including prior deep vein thrombosis and antiphospholipid syndrome he was at risk for blood clotting from any immobilization activity."

analysis of whether Stumbo is permanently totally disabled due solely to the effects of the work-related injury and set forth, as articulated by the Supreme Court of Kentucky, "which, if any, of Stumbo's restrictions are related to the knee injury and which are related to the pre-existing antiphospholipid syndrome." Id. at 397.

Regarding Ashland's argument the ALJ "erred in failing to conclude that Ashland is not responsible for payment of Stumbo's lifetime anticoagulation treatment with Coumadin," we note that neither in the July 1, 2015, Amended Opinion and Order on Remand nor the July 31, 2015, Opinion and Order on Reconsideration did the ALJ specifically address Ashland's liability for Coumadin. Clearly, the ALJ relied, in part, upon Dr. Herr's opinions in reaching a decision on remand. However, in his August 29, 2012, Supplemental Medical Report, Dr. Herr stated as follows:

In my opinion, it can be stated within a reasonable degree of medical certainty that Mr. Stumbo would not have incurred the blood clot in his left leg had he not had the knee injury that resulted in the surgery from which the DVT flowed and the hospital care for pulmonary embolus and antitcoagulation for 6 to 12 months was required. ***Thereafter, following about 12 months after the DVT that complicated his knee surgery, I would agree with Dr. Westerfield that the***

need for anticoagulation on a lifetime basis is not causally related to the work injury while employed by the City of Ashland that resulted in the operation which was complicated by DVT and pulmonary embolus, and these circumstances would not have occurred simply because of his anticoaguable state which was not symptomatic prior to the knee injury. (emphasis added).

Thus, on remand, in light of the medical evidence in the record, the ALJ must directly address Ashland's liability for Stumbo's treatment with Coumadin.

Accordingly, the finding of permanent total disability and award of PTD benefits set forth in the July 1, 2015, Amended Opinion and Order on Remand and the July 31, 2015, Opinion and Order on Reconsideration are **VACATED**. This claim is **REMANDED** to an Administrative Law Judge as designated by the Chief Administrative Law Judge for entry of an amended opinion and award with the appropriate findings of fact in conformity with the views set forth herein. Additionally, on remand, the ALJ must resolve the extent of Ashland's liability, if any, for Stumbo's treatment with Coumadin.

ALL CONCUR.

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