Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: February 27, 2015

CLAIM NO. 201359455

CORRECTIONS CORPORATION OF AMERICA,
D/B/A LEE ADJUSTMENT CENTER PETITIONER

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

JAMES COMBS
HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
VACATING AND REMANDING

* * * * * *

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

ALVEY, Chairman. Corrections Corporation of America, D/B/A Lee Adjustment Center ("CCA") seeks review of the Opinion and Order rendered August 14, 2014 by Hon. William J. Rudloff, Administrative Law Judge ("ALJ") awarding James Combs ("Combs") permanent partial disability ("PPD") benefits, and medical benefits for back and neck injuries

stemming from scraping his low back on a shelf at work on June 28, 2013. CCA also appeals from the September 17, 2014 order denying its petition for reconsideration.

On appeal, CCA argues there is insufficient evidence to support a finding of a cervical injury. CCA next argues there is insufficient evidence to support a finding of a permanent impairment, or application of the three multiplier pursuant to KRS 342.730(1)(c)1. Finally, CCA argues the overwhelming evidence establishes a finding of a pre-existing active condition. Because the ALJ failed to address CCA's requests for additional findings supporting his decision, we vacate and remand.

Combs filed a Form 101 on March 3, 2014 alleging he injured his back, left shoulder and left arm on June 28, 2013 when he hit his low back on a shelf while packing a box of telephones for shipping. At the time of the accident, Combs was employed by CCA as an investigator, and he was concurrently employed as a part-time mail carrier for the United States Postal Service ("USPS"). His employment history indicates he began working for CCA in 1990, and last worked there on November 30, 2013. He has also worked as a mail carrier and was a member of the Army Reserve.

Combs testified by deposition on July 18, 2014, and at the hearing held July 25, 2014. Combs was born on

November 30, 1965 and is a resident of Beattyville, Kentucky. He is a high school graduate, and completed over fifty hours of college coursework at Eastern Kentucky University and Lee's College, but obtained no degree or certification. He also has some vocational training as a welder, although he did not complete the course of study. He subsequently operated a family welding business for nearly two years, primarily welding for oil companies in the field. He has also worked as a cashier at a gas station.

Combs began working for CCA on September 4, 1990. From 2005 to 2013, he worked as an internal affairs investigator, and also performed computer installations and provided technical support. He stated he primarily worked at a desk, but occasionally had to carry a printer which he estimated weighed seventy-five to eighty-five pounds. He also occasionally had to restrain inmates. Since August 2012, Combs has also worked as a mail carrier for the USPS on Saturdays, earning $19.00 per hour.

On June 28, 2013, Combs was boxing up old telephones for shipping. As he attempted to stand up, he struck the middle of his low back on the corner of a shelf. He stated he had a scrape on the left side approximately five to six inches in length. He did not strike his neck or left arm on the shelf. He reported the incident and self-

medicated for this condition. He had no problems with his neck or left arm on that date. He later developed pain in his upper shoulders going down his left arm. He also developed numbness from his neck to the fingers of his left hand. He did not seek medical treatment until over three months later on October 11, 2013, when he reported problems with his back, but did not mention his neck or left arm.

Combs had previously injured his low back in 2012 while assisting his father in carrying a deer while hunting. He had surgery for that condition on April 15, 2013. He returned to work after that surgery on June 18, 2013, but was still having stiffness in his back for which he was taking Lortab. He resigned from CCA on November 30, 2013 due to pain and stress, but still carries the mail.

With the Form 101, Combs filed records of Dr. Robert Owen, a neurosurgeon. On October 29, 2013, Dr. Owen noted Combs complained of low back pain and left leg pain. Dr. Owen had previously performed a right L4-L5 discectomy and foraminotomy on April 15, 2013. He noted Combs complained of an immediate onset of back and left leg pain after returning to work as a mail carrier. MRIs performed on November 27, 2013 revealed a left paracentral disc protrusion at C5-C6 resulting in severe stenosis, and left-sided protrusions at C3-C4, C4-C5, and C6-C7. The lumbar

MRI revealed a left partial laminectomy and discectomy at L4-L5 with no recurrent disc protrusion.

Combs filed the Form 107-I report completed by Dr. Jeffrey Uzzle on April 26, 2014. Dr. Uzzle noted the history of low back injury while moving a deer which resulted in the April 2013 surgery. He noted Combs returned to work in June 2013. He noted when Combs hit his back on a shelf on June 28, 2013, his back pain worsened, and he developed left leg radiculopathy. He also noted Combs subsequently developed cervical radiculopathy. As a result of the June 28, 2013 accident, Dr. Uzzle stated Combs had developed a C5-C6 disk herniation with non-verifiable radiculopathy, and a lumbar sprain or strain with an aggravation of left lower extremity radiculopathy. Dr. Uzzle assessed a 13% impairment rating for the lumbar spine pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"), of which he apportioned 10% to a pre-existing active condition. He assessed a 6% impairment rating for the cervical condition pursuant to the AMA Guides, which he stated was due to the work injury. Dr. Uzzle recommended restrictions of lifting no more than twenty to thirty pounds occasionally. He also stated Combs should not engage in more than occasional bending, twisting,

stooping, kneeling, crawling, squatting, standing, climbing, walking, sitting, or driving.

CCA filed Dr. Owen's records for treatment from January 15, 2013 through June 18, 2013. Combs initially complained of low back and right leg pain. Dr. Owen noted mild degeneration and spurring in the lumbar spine. He performed surgery on April 15, 2013 which consisted of a right L4-L5 lumbar discectomy and left lumbar foraminotomy. On May 21, 2013, Dr. Owen stated Combs did well after the surgery, but subsequently had flare ups. His record specifically states the following:

> A couple of weeks ago he had a flash flooded house and had to rescue his dogs. Since then, he's had more back and hip/iliac pain. The right side is worse than the left. He again aggravated pain just today when his son was unloading a generator from the truck. The generator almost fell and he had to help with it.

On June 4, 2013, Combs complained of severe radicular right leg pain. On June 18, 2013, Combs complained of some pain in the right posterior iliac region. He noted the surgery performed consisted of a bilateral decompression.

CCA also filed Dr. Salem Hanna's October 11, 2013 office note. Dr. Hanna stated Combs complained of

intermittent low back pain radiating to the left buttock and thigh. Combs complained his symptoms were aggravated with activity. He noted Combs had undergone lumbar surgery earlier in the year. He stated Combs returned to work in June and aggravated his low back condition with lifting in July.

CCA filed the April 29, 2014 report of Dr. Michael Best who evaluated Combs on its behalf. Dr. Best noted the history of Combs striking his back on the corner of a shelf, and the previous surgery of April 15, 2013. He noted subsequent to the June 28, 2013 incident, Combs did not seek treatment for over three and a half months. Combs first saw Dr. Hanna at the Immediate Care Center on October 29, 2013 for complaints of low back pain radiating into the left buttock and thigh. There were no complaints of left arm pain or symptoms. Dr. Best diagnosed Combs with an abrasion and contusion of the low back which has no causal relationship to his current complaints. Although Dr. Best checked the block in his report indicating Combs had no active impairment, he subsequently stated there would have been a 10 to 13% impairment rating pursuant to the AMA Guides for the injury and surgery due to the deer hunting incident. He stated Combs would have no additional impairment for his low back due to the June 28, 2013

incident. Dr. Best also stated Combs may have a 5% impairment rating, pursuant to the AMA Guides for his cervical condition which was not caused by the June 28, 2013 work incident. In a supplemental report, Dr. Best stated he had reviewed Dr. Uzzle's report and disagreed with his conclusions. He stated Dr. Uzzle's assessments of impairment are unsupported by the AMA Guides.

A benefit review conference ("BRC") was held on July 8, 2014. The BRC order and memorandum reflects the contested issues were whether Combs retained the capacity to perform the job he was doing on the date of injury, work-relatedness/causation, benefits per KRS 342.730, credit for unemployment/short term disability benefits, "injury" as defined by the Act, temporary total disability ("TTD"), pre-existing active disability, average weekly wage, entitlement to medical benefits, whether Combs is permanently totally disabled, and concurrent employment.

In his decision dated August 14, 2014, the ALJ found Combs sustained work-related injuries to the neck and low back on June 28, 2013. The ALJ found, based upon Dr. Best's report, Combs did not have a pre-existing active condition or impairment to his low back. Despite finding Combs had no pre-existing condition or impairment, the ALJ relied upon Dr. Uzzle's assessment of impairment which

clearly excluded 10% as due to a pre-existing active condition. The ALJ found Combs was not entitled to TTD benefits, and he awarded PPD benefits beginning June 28, 2013 based upon the 9% impairment rating assessed by Dr. Uzzle, which consisted of 3% for the lumbar spine, and 6% for the cervical spine.

Regarding the application of the three multiplier pursuant to KRS 342.730(1)(c)1, the ALJ stated as follows:

> *Fawbush v. Gwinn*, 103 S.W.3d 5 (Ky. 2003), and its progeny require the Administrative Law Judge to make three essential findings of fact. First, the Judge must determine whether a plaintiff can return to the type of work performed at the time of injury. Second, the Judge must also determine whether the plaintiff has returned to work at an average weekly wage equal to or greater than the pre-injury wage and later ceases that employment. Third, the Judge must determine whether the plaintiff can continue to earn that level of wages for the indefinite future.
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> In *Hush v. Abrams*, 584 S.W.2d 48 (Ky. 1979), the Kentucky Supreme Court stated that what it had in that case was lay testimony descriptive of and supportive of a permanent disability, together with medical testimony that was not in conflict with the lay testimony. The high court stated that where the medical evidence clearly and unequivocally shows the actual body condition, then the lay testimony is competent on the question of the extent of disability which has resulted from the bodily condition. The high court

further stated that where there is medical testimony from which the decision maker could have concluded that the plaintiff did suffer from a work-related trauma, then, having reached that conclusion, the decision maker could then use the lay testimony to determine the extent, if any, of the occupational disability.

Based upon the plaintiff's sworn testimony, which I found to be very credible and convincing, and the persuasive and compelling medical evidence from Dr. Uzzle, all of which is summarized in detail above, I make the factual determination that Mr. Combs cannot return to the type of work which he performed at the time of his work injuries in accordance with KRS 342.730(1)(c)1. I make the factual determination that Mr. Combs' job at the time of his June 28, 2013 work injuries was a demanding physical labor job. In addition, I make the factual determination that Mr. Combs returned to work for the defendant earning the same or greater average weekly wage that he earned at the time of his work injuries as per KRS 342.730(1)(c)2. I also have to have the determination whether Mr. Combs is unlikely or likely to be able to continue earning the wage that equals or exceeds his wage at the time of his injuries for the indefinite future. Mr. Combs complained of pain in his neck, arms, left shoulder, low back and hip area. He stated that he is not physically able to return to work for the defendant. Since leaving the defendant's employment, he has worked one day a week as a rural mail carrier. Based upon the plaintiff's credible and convincing lay testimony and the persuasive and compelling medical evidence from Dr. Uzzle, all of which is covered above, I make the

> further factual determination that under the decision of the Kentucky Court of Appeals 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 his current job. Under the *Adkins* case, the standard for the decision is whether the plaintiff's injuries have permanently altered his ability to earn an income and whether the application of KRS 342.730(1)(c)1 is appropriate. Based upon the plaintiff's credible and convincing sworn testimony, as covered above, and the persuasive and compelling medical evidence from Dr. Uzzle, which is covered in detail above, I make the factual determination that it is unlikely that Mr. Combs will be able to continue for the indefinite future to do work from which to earn such a wage. Based upon the above-cited evidence, I make the factual determination that the third prong of the *Fawbush* analysis applies here, and that the plaintiff's June 28, 2013 work injuries have permanently altered his ability to earn an income and that he is unlikely to be able to continue for the indefinite future to do work from which to earn such a wage, and that Mr. Combs is, therefore, entitled to the 3 multiplier under KRS 342.730(1)(c)1. In making that determination, I also rely upon the Opinion of the Kentucky Supreme Court in *Adams v. NHC Healthcare*, 199 S.W.3d 163 (Ky. 2006).

CCA filed a petition for reconsideration arguing the ALJ failed to offer any independent discussion relating Combs' neck condition to the June 28, 2013 work incident,

and requested additional findings supporting this determination. CCA also argued the ALJ erred in finding Combs had no pre-existing active condition or impairment in light of his recent lumbar surgery on April 15, 2013, for which Dr. Owen noted he was still having complaints as late as June 18, 2013, only ten days prior to the alleged work accident. CCA asked the ALJ to correct the patent error of the finding of no pre-existing active disability, or provide additional findings supporting his determination. CCA also asked the ALJ to support his conclusion Combs cannot return to his pre-injury employment. Finally, CCA asked the ALJ to make additional findings regarding Combs' entitlement to the enhancement of his award of PPD benefits by the three-multiplier pursuant to KRS 342.730(1)(c)1.

The ALJ entered an order denying the petition for reconsideration on September 17, 2014, essentially reiterating his findings from the original decision. The ALJ again made conclusory statements without making any specific findings of fact.

On appeal, CCA argues the record does not support a finding of a cervical injury, or the finding of a permanent impairment rating attributable to the June 28, 2013 work incident. CCA further argues the evidence compels the finding of a pre-existing active condition or

impairment. Finally, CCA argues the ALJ's application of the three multiplier pursuant to KRS 342.730(1)(c)1 is not supported by the evidence.

As the claimant in a workers' compensation proceeding, Combs had the burden of proving each of the essential elements of his cause of action. *See* KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the discretion to determine all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). The ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). Although a party may note evidence supporting a different outcome than that reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974).

The function of the Board in reviewing an ALJ's decision is limited to determining whether the findings made are so unreasonable under the evidence they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to weight and credibility or by noting other conclusions or reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). So long as the ALJ's ruling with regard to an issue is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

Here, the evidence may very well support an award of PPD benefits; however, the ALJ failed to make specific findings of fact, and failed to provide a sufficient analysis supporting the award. We note CCA's argument the evidence does not support the ALJ's finding Combs' cervical condition was caused by striking his low back on the corner of a shelf. We further note the accident report references only low back complaints, primarily consisting of a scrape. Combs received no medical treatment for the injuries he allegedly sustained on June 28, 2013 until October 11, 2013,

nearly three and a half months after the incident, and he did not mention neck or left upper extremity complaints. We also note Dr. Uzzle's report merely provides a conclusion the cervical condition was caused by the work incident, but provides no explanation or reasoning as to how this occurred, or any basis for his determination. On remand, the ALJ is directed to make specific findings supporting his determination the cervical condition is causally related to the June 28, 2013 incident.

Regarding his determination Combs had no pre-existing active condition or impairment, the ALJ failed to discuss all of the medical evidence, in particular the records of Dr. Owen who performed lumbar surgery on April 15, 2013. Dr. Owen's notes establish Combs had ongoing complaints of low back pain as late as June 18, 2013, for which he continued to take pain medication. Dr. Owen's records also reference additional intervening acute onsets of low back pain associated with Combs' activities, which the ALJ did not address. We further note the ALJ based his finding of no pre-existing active impairment on Dr. Best's report. We acknowledge Dr. Best checked a block in his report indicating Combs had no active impairment prior to the injury. However, in the next paragraph of the report, Dr. Best contradicts this indication by stating, "The

patient is a Lumbosacral Category III in that he underwent an L4-5 laminectomy and discectomy on April 15, 2013." We also note Dr. Uzzle assessed a 13% lumbar impairment rating of which he carved out 10% as pre-existing active.

The ALJ correctly cited to Finley v. DBM Technologies, 217 S.W.3d 261 261 (Ky. App. 2007), in which the Court held a condition must be both symptomatic and impairment ratable in order for it to be found pre-existing and active. As noted by Dr. Owen, Combs continued to experience symptoms, for which he was treating with pain medication when he was released to return to work on June 18, 2013. Likewise, the evidence from both Dr. Best and Dr. Uzzle support a finding the previous low back injury and surgery resulted in a ratable condition. CCA requested the ALJ to make additional findings supporting his assessment Combs had no pre-existing active impairment, however he failed to do so. Based upon the contradictions in Dr. Best's report, the carve out by Dr. Uzzle, and the totality of the evidence, the ALJ's determination does not appear to be supported by the evidence. On remand, the ALJ is directed to make a determination of whether Combs had a pre-existing active lumbar condition prior to June 28, 2013, based on the evidence, and provide specific findings supporting his determination.

In his determination assessing the three multiplier pursuant to KRS 342.730(1)(c)1, the ALJ performed an analysis pursuant to Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003). The ALJ stated, "I make the factual determination that Mr. Combs' job at the time of his June 28, 2013 work injuries was a demanding physical labor job." However, he did not provide an explanation of what was so physically demanding to preclude Combs' from continuing to perform his work. Combs returned to work on June 18, 2013, from his unrelated back surgery, and continued to work until he resigned on November 30, 2013. He testified his job primarily consisted of working at a desk, although he stated he occasionally had to move a piece of equipment or assist in taking down a prisoner. CCA requested the ALJ to make specific findings supporting the application of KRS 342.730(1)(c)1, which he failed to do in his order on reconsideration. On remand, the ALJ is directed to make specific findings supporting his conclusion Combs' had a "demanding physical labor job", and why the enhancement pursuant to KRS 342.730(1)(c)1 is appropriate in this instance.

We acknowledge KRS 342.285 designates the ALJ as the finder of fact, and as such is granted the sole discretion in determining the quality, character, and

substance of evidence. Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). Likewise, the ALJ, as fact-finder, may choose whom and what to believe and, in doing so, may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same party's total proof. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15, 16 (Ky. 1977); Pruitt v. Bugg Brothers, 547 S.W.2d 123 (Ky. 1977).

However, such discretion is not unfettered. In reaching his determination, the ALJ must also provide findings sufficient to inform the parties of the basis for his decision to allow for meaningful 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); Big Sandy Community Action Program v. Chafins, 502 S.W.2d 526 (Ky. 1973).

Here, the ALJ failed to discuss specific testimony supporting his decision and did not address all the evidence. The ALJ merely provided conclusions without providing a factual analysis which falls well short of what is necessary in reaching his decision.

On remand, the ALJ is directed to conduct an analysis in accordance with both the statutory and case law referenced above, and provide with specificity both his

findings and the evidence necessary to support his determination Combs' cervical condition is causally related to the June 28, 2013 work incident, and his determination of no pre-existing active impairment or condition, and the application of the three multiplier pursuant to KRS 342.730(1)(c)1.

As noted above, the ALJ listed evidence filed from Dr. Owen, in addition to evidence from Dr. Hanna and Dr. Sanoj Dubal. However, the ALJ failed to address their records or findings in his determination. While substantial evidence may very well exist supporting the ALJ's determination on all of the issues raised on appeal, he must provide an adequate explanation of the basis for his decision. This Board may not, and does not direct any particular result because we are not permitted to engage in fact-finding. *See* KRS 342.285(2); Paramount Foods, Inc. v. Burkhardt, supra.

Accordingly, the ALJ's decision rendered August 14, 2014 and the September 17, 2014 order overruling CCA's petition for reconsideration are **VACATED**. This claim is **REMANDED** for additional findings and entry of an amended opinion consistent with the views expressed herein.

ALL CONCUR.

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