Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: December 30, 2014

CLAIM NO. 201200223

DAVID REGAN PETITIONER

VS. **APPEAL FROM HON. JONATHAN R. WEATHERBY, ADMINISTRATIVE LAW JUDGE**

CLARK MANAGEMENT
and HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

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

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

STIVERS, Member. David Regan ("Regan"), *pro se*, seeks review of the September 3, 2014, Order on Remand of Hon. Jonathan R. Weatherby, Administrative Law Judge ("ALJ") finding he is not entitled to additional temporary total

disability ("TTD") benefits. No petition for reconsideration was filed.[1]

In a January 13, 2014, Opinion and Award, the ALJ determined Regan sustained a work-related right knee injury on October 6, 2011, when he fell in the course of his employment with Clark Management ("Clark"). The ALJ awarded benefits based upon a 3% impairment assessed by Dr. Frank Bonnarens. Based upon the opinion of Dr. Bonnarens the ALJ determined Regan was entitled to TTD benefits from December 7, 2012, the date he underwent surgery on his right knee until March 7, 2013. He also concluded Regan retained the ability to return to the same type of work he performed at the time of the injury. The ALJ entered an award of TTD benefits spanning a period from December 7, 2012, through March 7, 2013, with permanent partial disability ("PPD") benefits to begin on March 8, 2013, and continuing for 425 weeks.

Regan filed a petition for reconsideration asserting he was seen by Dr. Joseph Dobner who recommended surgery for the work-related meniscus tear and took him off work until the surgery. Regan noted another doctor who examined him agreed with Dr. Dobner that he should remain

[1] Upon entry of the Order on Remand, Regan's attorney withdrew as counsel of record.

off work until surgery. He also noted Dr. Phillip Corbett believed Regan needed surgery but could probably perform most of his jobs. Regan argued since a physician did not place him at maximum medical improvement ("MMI") until after the December 7, 2012, surgery and no physician released him to return to his usual occupation, he was entitled to TTD benefits beginning December 30, 2011, the day following his termination, and continuing until he attained MMI on March 7, 2013. The ALJ overruled Regan's petition for reconsideration. Regan appealed on the issue of his entitlement to additional TTD benefits.

In a June 27, 2014, Opinion Vacating and Remanding, this Board vacated the award of TTD benefits reasoning as follows:

> Here, the ALJ failed to set forth adequate findings of fact and provide an explanation which would allow meaningful review regarding his determination of entitlement to TTD benefits during the time period in question. The ALJ's one sentence explanation is inadequate particularly in light of the fact the issue was specifically reserved in the BRC order and the ALJ summarily overruled Regan's request for additional TTD benefits in his petition for reconsideration. Because the ALJ failed to provide a proper analysis regarding the entitlement of TTD benefits during the period of time Regan was not working prior to his surgery, the award of TTD benefits is vacated. On remand, the ALJ must determine whether Regan is

> entitled to additional TTD benefits from December 30, 2011 to December 7, 2012 utilizing the two-pronged analysis referenced above. As fact-finder, it is the prerogative of the ALJ to determine whether or not Regan is entitled to TTD during the time period in question, if it is supported by the evidence. The ALJ shall provide the basis for his determination.

Accordingly, the claim was remanded to the ALJ for entry of an amended opinion and award in conformity with the Board's opinion.

On remand, after noting the date of MMI and the date of termination of TTD benefits were not in dispute, the ALJ entered the following additional findings of facts and conclusions of law:

> 1. Temporary total disability means 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…KRS 342.0011(11)(a)
>
> 2. It is undisputed that the Plaintiff missed no work due to his injury. The Plaintiff testified that he was demoted from the position of Maintenance Supervisor several weeks after the injury and that as a result of the demotion, he became able to pick and choose jobs, allowing him to continue until he was ultimately fired on December 29, 2011. It is less than credible that a demotion gave the Plaintiff more authority to pick and choose jobs. The ALJ finds, due to his stated continuance of work without

> interruption, that the Plaintiff retained the ability to perform the same job despite his injury.
>
> 3. The ALJ finds that the Plaintiff has submitted no evidence of any change in condition that would have suddenly rendered him unable to perform his job as of the day that he was terminated. The ALJ therefore finds that the Plaintiff has not established any entitlement to temporary total disability benefits until the date of surgery.

On appeal, Regan asserts the ALJ based his decision upon one statement made by him which the ALJ felt was untrue. He argues if the ALJ had gone further into his statement the ALJ would have known that every Monday morning when thirty or more work orders were passed out for the week, he would pick and choose the ones that would keep him off his knees and off ladders. At the end of each week, Regan turned in the jobs he performed as well as the ones he did not perform. Regan states he turned in this information each week and would also explain the tenant did not show up on time or parts were needed. He states these work orders "would go in the order parts or recycle for the next week." Regan asserts he did not lie. He concludes by stating as follows: "so when [sic] decision got vacated by appeals, and to come back with a statement that should have

been follow [sic] through with an explation [sic] or call insted [sic] of calling me a lier [sic]."

It is obvious from Regan's *pro se* brief he feels he has been dealt with unfairly. Because Regan is representing himself, we shall attempt to explain the fundamental legal principles that control how this Board must decide his appeal.

Under Kentucky's workers' compensation system, the ALJ functions as both judge and jury. When performing the duties of a jury, the ALJ is commonly referred to as the "fact-finder." As fact-finder the ALJ reviews the evidence submitted by the parties and decides which testimony from the various witnesses is more credible and best represents the truth of the matter or matters in dispute. The ALJ, as judge, then applies the law to the facts as he determines them to be true. As a matter of law, the facts as decided by the ALJ cannot be disturbed on appeal by this Board so long as there is some substantial evidence of record to support the ALJ's decision. *See* KRS 342.285(1); Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

Furthermore, in the absence of a petition for reconsideration, on questions of fact, the Board is limited to a determination of whether there is substantial evidence

contained in the record to support the ALJ's conclusion. Stated otherwise, inadequate, and incomplete, or even inaccurate fact finding on the part of an ALJ will not justify reversal or remand if there is identifiable evidence in the record that supports the ultimate conclusion. Eaton Axle Corp. v. Nally, 688 S.W.2d 334 (Ky. 1985); Halls Hardwood Floor Co. v. Stapleton, 16 S.W.3d 327 (Ky. App. 2000).

Although we understand Regan is frustrated at the outcome of his workers' compensation claim, we also recognize the ALJ's job as fact-finder is a difficult responsibility. As a rule, in every worker's compensation claim, both sides resolutely contend they have presented evidence of "the truth" concerning those matters at issue. It is for this very reason that in cases where the evidence is conflicting regarding an issue, the facts concerning that issue as determined by the ALJ, are afforded vast deference as a matter of law on appellate review.

Authority establishes that Regan, as the claimant in a workers' compensation case, bore the burden of proving each of the essential elements of his cause of action before the ALJ. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Among those elements was the extent to which Regan was entitled to TTD benefits. Burton v. Foster Wheeler

Corp., 72 S.W.3d 925, 928 (Ky. 2002); Stovall v. Collett, 671 S.W.2d 256 (Ky. App. 1984). Since Regan was unsuccessful in establishing entitlement to additional TTD benefits, the question on appeal is whether the evidence is so overwhelming, upon consideration of the record as a whole, as to compel a finding in his favor. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984).

"Compelling evidence" is defined as evidence which is so overwhelming no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985). 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 sole authority to judge 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 (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); Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). Mere evidence contrary to the ALJ's decision is not adequate to require

reversal on appeal. Id. In order to reverse the decision of the ALJ, it must be shown there was no substantial evidence of probative value to support his decision. Special Fund v. Francis, supra.

KRS 342.0011(11)(a) defines temporary total disability as:

> The condition of an employee who has not reached maximum medical improvement from an injury and who had not reached a level of improvement which would not permit a return to employment.

Concerning entitlement to TTD benefits, the Kentucky Court of Appeals in Magellan Behavioral Health v. Helms, 140 S.W.2d 579, 581 (Ky. App. 2004) instructed as follows:

> While the Board was correct in recognizing that that definition encompasses two analyses, it erred when it rephrased them in disjunctive terms of "or" when the statute is clearly written using the conjunctive "and." In order to be entitled to temporary total benefits, the claimant must not have reached maximum medical improvement **and** not have improved enough to return to work.
>
> In this case, once the ALJ determined that Helms had reached maximum medical improvement, she ended her eligibility for TTD benefits. Whether she remained under restrictions which prohibited her from returning to work even after reaching maximum medical improvement is relevant to the issue of the extent and duration of impairment.

> The second prong of KRS 342.0011(11)(a) operates to deny eligibility to TTD to individuals who, though not at maximum medical improvement, have improved enough following an injury that they can return to work despite not yet being fully recovered.

Therefore, in order to qualify for an award of TTD benefits, the claimant must not have reached MMI and he must not have reached a level of improvement that would permit him to return to the type of work he was performing when injured or to other customary work. When both elements are not present the claimant is not entitled to TTD benefits.

Here, the ALJ determined there was no dispute Regan did not miss work due to the injury. Further, he noted Regan testified that several weeks after the injury he was demoted from his position as maintenance supervisor. However, due to the demotion Regan was able to then pick and choose the jobs he was to perform until he was ultimately fired on December 29, 2011. The ALJ concluded that Regan's statement the demotion gave him more authority to pick and choose his jobs was less than credible. Relying upon Regan's acknowledgement that he continued working without interruption, the ALJ found he retained the ability to perform the same job despite his injury.

Regan does not dispute the accuracy of the ALJ's summary of this specific testimony. More importantly, Regan did not ask for clarification or additional findings in a petition for reconsideration. Thus, as previously noted, inaccurate, incomplete, or inadequate fact-finding by the ALJ will not justify reversal or remand as long as there is substantial evidence in the record supporting his decision. In other words, the failure to file a petition for reconsideration results in the ALJ's Opinion and Award being conclusive and binding as to all questions of fact. Our sole task is to determine whether substantial evidence supports the ALJ's decision.

Based on Regan's testimony he continued to work after being injured until he was terminated, the ALJ could reasonably conclude Regan was capable of performing the type of work he performed when injured and/or other customary work. The fact Regan continued working after the injury and only ceased working for Clark because he was fired, constitutes substantial evidence which supports the ALJ's decision Regan is not entitled to additional TTD benefits from December 29, 2011, until the date of his surgery. The ALJ specifically noted MMI was not at issue since the parties agreed MMI was attained, per Dr. Bonnarens' opinion, on March 7, 2013. Thus, on remand, the

ALJ determined whether Regan's condition was such that it would allow him to continue performing the work he performed when injured or other customary work. The ALJ's finding Regan was still capable of performing the type of work he was performing when injured is supported by substantial evidence. Therefore, the evidence does not compel a finding in Regan's favor.

Even though the ALJ relied solely upon Regan's testimony that he continued working after the injury, Dr. Corbett's opinions contained in his June 19, 2012, report also constitutes substantial evidence in support of the ALJ's decision. In that report, Dr. Corbett stated as follows:

> In my opinion, there is no need for permanent restrictions based on the patient's injury of 10/6/11, but there is indication for medical treatment, and that is for an appropriate surgical resection of the meniscus to prevent its becoming a feature in the acceleration of the meniscal deterioration. It would appear, however, on the basis of today's performance that the patient can perform most of the work that I believe is associated with his trade. The patient's issues regarding squatting, kneeling, and crawling may become problematic if required on a frequent basis.

Although not specifically relied upon by the ALJ, since no petition for reconsideration was filed, such

evidence in the record may constitute substantial evidence in support of the ALJ's decision. Here, in addition to Regan's testimony, Dr. Corbett's opinions recited verbatim above also constitute substantial evidence in support of the ALJ's decision to deny additional TTD benefits beyond those previously awarded in the January 13, 2014, Opinion and Award.

That said, because the ALJ's award in the January 13, 2014, Opinion and Award which was unaltered by the September 13, 2014, Order on Remand is not in conformity with the statute and applicable case law, we vacate the award of PPD benefits. This Board is permitted to *sua sponte* reach issues even if unpreserved. KRS 342.285(2)(c); KRS 342.285(3); George Humfleet Mobile Homes v. Christman, 125 S.W.3d 288 (Ky. 2004).

In the initial award, the ALJ awarded TTD benefits from December 7, 2012, through March 7, 2013. We have affirmed that award. However, the ALJ erroneously awarded PPD benefits commencing the day after the award of TTD benefits and continuing for a period not to exceed 425 weeks. *See* Sweasy v. Wal-Mart Stores, Inc., 295 S.W. 3d 835 (Ky. 2009). Therefore, this claim is remanded to the ALJ for entry of an award of PPD benefits commencing on October 6, 2011, the date of injury and continuing for a

period not to exceed 425 weeks together with interest at the rate of 12% per annum on all past due and unpaid installments of such compensation and interrupted during any period TTD benefits are paid.

Accordingly, the September 3, 2014, Order on Remand of the ALJ is **AFFIRMED**. However, the award of PPD benefits in the January 13, 2014, Opinion and Award reaffirmed and unaltered by the September 3, 2014, Order on Remand is **VACATED**. This claim is **REMANDED** to the ALJ for entry of an award of PPD benefits in conformity with the views expressed herein.

ALL CONCUR.

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