OPINION ENTERED: February 8, 2013

CLAIM NO. 201200696

DENNIS HOWARD PETITIONER

VS. **APPEAL FROM HON. OTTO D. WOLFF, IV, ADMINISTRATIVE LAW JUDGE**

ENTERPRISE MINING CO., LLC
and HON. OTTO D. WOLFF, IV,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
VACATING AND REMANDING

* * * * * *

BEFORE: ALVEY, Chairman; STIVERS and SMITH, Members.

ALVEY, Chairman. Dennis Howard ("Howard") seeks review of the order rendered November 15, 2012 by Hon. Otto D. Wolff, IV, Administrative Law Judge ("ALJ") dismissing his claim against Enterprise Mining Co. LLC ("Enterprise"), and denying his petition for reconsideration.

On appeal, Howard argues the claim should have been placed in abeyance, or in the alternative, the parties should have been allowed to complete proof and set forth contested issues at the Benefit Review Conference ("BRC"). Howard argues the ALJ's decision to dismiss the claim prior to any proof taken, before a BRC and prior to a hearing, was arbitrary and capricious.

Howard filed a Form 103, Application for Resolution of Hearing Loss Claim on May 29, 2012 alleging on February 5, 2012 he became disabled due to occupational hearing loss arising out of and in the course of his employment with Enterprise. He alleges he became aware of his condition on March 14, 2012. Howard alleges at the time of injury he was a heavy equipment operator and had been exposed to loud noises for prolonged periods of time. In support of his Form 103, Howard attached a Hearing Evaluation Report dated March 14, 2012 which indicated "right ear has medical middle ear problem that should be DX by ENT physician."

Thereafter, a scheduling order was issued on June 19, 2012 assigning the claim to the ALJ, scheduling a BRC for October 4, 2012, and setting a proof schedule. In a letter dated June 22, 2012, the parties were notified Howard had been scheduled for a university evaluation pursuant to

KRS 342.315 on July 27, 2012 at the University of Kentucky Medical Center.

Howard filed a motion on July 16, 2012 requesting the claim be placed in abeyance, cancelling the university evaluation, and cancelling the BRC. Howard stated he was attempting to return to work and may suffer additional exposure, thereby making it premature to proceed with the hearing loss claim. In an Order dated August 13, 2012, the ALJ overruled Howard's motion and further stated any scheduled university evaluation and BRC would be held as scheduled.

To complicate matters, on August 17, 2012, Hon. J. Landon Overfield, Chief Administrative Law Judge ("CALJ") ordered the claim be held in abeyance and cancelled the university evaluation.

Howard filed a petition for reconsideration on August 20, 2012, requesting the ALJ reconsider the August 13, 2012 order overruling his motion to place the claim in abeyance, citing to Leeco v. Smith, 970 S.W.2d 337 (Ky. 1998). On August 22, 2012, Enterprise filed an "Objection to Motion to Place Claim in Abeyance/Motion to Dismiss" arguing placing the claim in abeyance would be improper since Howard was going to return to work. Rather, Enterprise argued Howard should withdraw his claim and re-

file at a later date. Enterprise requested the claim be dismissed since it appeared Howard did not wish to pursue the hearing loss claim.

On September 19, 2012, the CALJ issued an Order stating "the order rendered August 17, 2012 in DWC No. 2012-00696 placing that claim in abeyance is SET ASIDE." The CALJ further noted the August 17, 2012 order, was intended for a separate claim but was rendered and entered in this hearing loss claim, also ordered the cancellation of a scheduled university evaluation, which was not possible since it had been previously scheduled for July 27, 2012.

Thereafter, Enterprise filed a motion to re-schedule the university evaluation based upon the September 19, 2012 order by the CALJ and the fact Howard did not attend the original university evaluation set in July 2012.

On October 4, 2012, a BRC was held. In the BRC Order and Memorandum, the following handwritten note appears:

> Π instructed to refile Pet. for Recon. on issue of whether claim should be placed in abeyance or dismissed to be filed subsequently. Π's Petition to be filed w/in twenty (20) of this order + Δ given fourteen (14) thereafter. BRC cont. due to pending legal questions that could end case.

On October 11, 2012, Howard filed a renewed petition for reconsideration stating he last worked for Enterprise on February 5, 2012 and returned to work for Perry Co. Coal Company ("Perry") in June 2012. Howard alleged he was currently being exposed to loud noises and therefore it would be necessary to join Perry in the future as a potential defendant to determine apportionment between it and Enterprise. Howard further noted it was premature to litigate this claim given his ongoing exposure to loud noise, and again argued the proper remedy would be to hold the claim in abeyance pursuant to Leeco v. Smith, supra. Howard asserted Enterprise would not be prejudiced by this action, but his employment with Perry could be jeopardized if forced to file a claim against it. He also stated he "is not able to dismiss that claim" due to potential statute of limitations and notice problems.

Enterprise filed a "Response to Plaintiff's renewed Petition for Reconsideration/Renewed Motion to Dismiss" on October 29, 2012 arguing apportionment is inappropriate. Enterprise relied upon KRS 342.7305(4) which provides in part "the employer with whom the employee was last injuriously exposed to hazardous noise shall be exclusively liable for benefits." Enterprise argued it is not liable since Howard has returned to work for a different

coal company, and continues to be exposed to hazardous noise. Enterprise further argued Leeco v. Smith, supra, is inapplicable since it was a claim for coal workers' pneumoconiosis benefits rather than a hearing loss claim and the claimant continued to be employed by the same employer.

On November 15, 2012, the ALJ entered the following Order:

> This matter is before the ALJ on Defendant's Response to Plaintiff's Renewed Petition for Reconsideration/ Renewed Motion to Dismiss. Having reviewed the record and being otherwise sufficiently advised:
>
> IT IS HEREBY ORDERED as follows:
>
> 1. The Plaintiff's Petition for Reconsideration is DENIED.
>
> 2. This claim is DISMISSED with prejudice.

On appeal, Howard argues the ALJ exceeded his authority when he dismissed the claim arguing as follows:

> As set forth above, this claim was dismissed on a purely technical reason which was not fully developed. No proof was taken by either party as to whether the Plaintiff's subsequent employment would have constituted additional exposure or whether any subsequent exposure would have been significant.
>
> The ALJ's decision to dismiss the claim was an unusually harsh remedy.

> The ALJ should have held the claim in abeyance or at a minimum should have allowed the parties to complete proof and set forth the contested issues at a [BRC]. The ALJ's decision to terminate the litigation before any proof was taken before all the issues were identified including the jurisdictional issues and before a hearing was held was arbitrary and capricious.
>
> As set forth in Messer v. Drees, 382 S.W.2d 209 (Ky. 1964), rules of procedure are set forth to prevent chaos and not to otherwise dispose of a potentially valid claim. The Plaintiff recognizes that the ALJ has broad discretion to manage taking proof, however, the ALJ exceeded his authority in this case. *See* Cornett vs. Corbin Materials, 807 S.W.2d 56 (Ky. 1991).
>
> As set forth in the Plaintiff's petition for reconsideration, there is some authority that when a Plaintiff suffers additional exposure the proper remedy is to hold the claim in abeyance pending further development. Leeco v.Smith, 970 S.W.2d 337 (Ky. 1998).
>
> Based on the foregoing, the Board should remand this matter to the ALJ with directions to either allow the parties to take proof and schedule a [BRC] or hold the claim in abeyance.

In the case *sub judice*, the October 4, 2012 BRC Order and Memorandum essentially bifurcates the claim to address "whether claim should be placed in abeyance or dismissed." The order then set forth a schedule allowing Howard to "refile" his petition for reconsideration and

allowing Enterprise time to respond. Howard and Enterprise submitted their respective arguments. Thereafter, the ALJ summarily denied Howard's petition for reconsideration and dismissed the claim on November 15, 2012 without providing an explanation.

The law is well settled parties are entitled to findings sufficient to inform them of the basis for the ALJ's 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). We are cognizant of the fact an ALJ is not required to engage in a detailed discussion of the facts or set forth the minute details of his reasoning in reaching a particular result. The only requirement is the decision must adequately set forth the basic facts upon which the ultimate conclusions were 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). We also find the holding of the Kentucky Supreme Court in New Directions Housing Authority v. Walker, 149 S.W.3d 354 (Ky. 2004), to be instructive. There the Court remanded the claim to the ALJ "for further consideration, for an exercise of discretion, and for an

explanation that will permit a meaningful review." Id. at 358.

Having reviewed the evidence of record, we are left with assumptions and conjecture as to the basis and reasoning for the ALJ's dismissal of the claim. We do not believe the ALJ's November 15, 2012 order dismissing the claim provides an adequate explanation for dismissal of the claim. In fact, the order provided no findings of fact, nor any explanation or determination explaining his reasoning for dismissal. We therefore vacate and remand this claim to the ALJ to provide an explanation or analysis as to why he deemed dismissal to be proper and to conduct any additional proceedings he may deem necessary to assist with his determination. Dismissal may well be appropriate, but the ALJ must clearly provide the basis for his determination.

Accordingly, the order by Hon. Otto D. Wolff, IV, Administrative Law Judge, rendered November 15, 2012, is hereby **VACATED** and **REMANDED** for further proceedings consistent with the views expressed in this opinion.

ALL CONCUR.

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