Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: October 17, 2014

CLAIM NO. 201280638

DENTAL HEALTH ASSOCIATES, INC. PETITIONER

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

CAROLYN ANN GILVIN
HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
VACATING AND REMANDING

* * * * * *

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

ALVEY, Chairman. Dental Health Associates, Inc. ("DHA") seeks review of the Amended Opinion and Order on Remand rendered June 9, 2014 by Hon. William J. Rudloff, Administrative Law Judge ("ALJ") awarding Carolyn Ann Gilvin ("Gilvin") temporary total disability ("TTD") benefits, permanent total disability ("PTD") benefits, and medical

benefits. DHA also appeals from the July 31, 2014 order denying its petition for reconsideration. This claim was previously remanded to the ALJ by an opinion rendered by this Board on April 25, 2014, which vacated the ALJ's decision and remanded the claim to him for additional findings.

On appeal, DHA argues the ALJ erred as a matter of law in failing to consider the totality of the evidence and in failing to perform the requisite analysis to support his award of PTD benefits. Because we determine the ALJ failed to comply with the opinion rendered by this Board on April 25, 2014, and failed to make adequate findings to support the award of PTD benefits, we vacate and remand for additional findings.

In his original decision dated January 15, 2014, the ALJ awarded PTD benefits for Gilvin's bilateral carpal tunnel syndrome, and for her neck and left shoulder. The determination of left shoulder and neck injuries was not supported by the evidence, and Gilvin admitted they were not compensable injuries. This Board remanded the claim to the ALJ for a determination regarding the occupational disability resulting only from bilateral carpal tunnel syndrome, and to provide a more detailed analysis. In the

April 25, 2014 decision, this Board specifically directed as follows:

> In this instance, there is absolutely no evidence, much less substantial evidence, supporting the ALJ's award of benefits, in part, due to Gilvin's cervical complaints. The ALJ was clearly mistaken when he stated he relied upon Dr. Owen in finding the "neck" condition work-related. As noted above, Dr. Owen found Gilvin's cervical condition is not work-related. This is consistent with **ALL** of the other medical opinions finding the neck and shoulder conditions are not work-related. This is also consistent with Gilvin's admission in her position statement that her neck and shoulder complaints are not work-related. This issue was raised by DHA in its petition for reconsideration, but the ALJ failed to address it.
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> Because the ALJ's decision is based, in part, on a misinterpretation of the medical evidence, it must be vacated, and the claim remanded for a determination of her occupational disability based solely upon Gilvin's bilateral carpal tunnel syndrome. 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).
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> **On remand, the ALJ shall specifically address the impact of Gilvin's right and left carpal tunnel syndrome, whether those conditions resulted in any disability, and if so the extent. The**

ALJ shall discuss and cite to the specific medical testimony supporting his determination.

Regarding DHA's argument the ALJ erred in finding Gilvin permanently totally disabled, we note PTD is defined as 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. KRS 342.0011(11)(c). "Work" is defined as providing services to another in return for remuneration on a regular and sustained basis in a competitive economy. KRS 342.0011(34). The Kentucky Supreme Court set forth the following analysis in Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48, 51 (Ky. 2000) in determining whether a claimant is permanently and totally disabled:

> An analysis of the factors set forth in KRS 342.0011(11)(b), (11)(c), and (34) clearly requires an individualized determination of what the worker is and is not able to do after recovering from the work injury. Consistent with *Osborne v. Johnson, supra,* it necessarily includes a consideration of factors such as the worker's post-injury physical, emotional, intellectual, and vocational status and how those factors interact. It also includes a consideration of the likelihood that the particular worker would be able to find work consistently under normal employment conditions. A worker's ability to do so is affected by factors such as whether the individual will be able to work dependably and whether the worker's physical

> restrictions will interfere with vocational capabilities. The definition of "work" clearly contemplates that a worker is not required to be homebound in order to be found to be totally occupationally disabled.

We strongly emphasize, as we have on several occasions, a mere recitation of the factors set out in Ira A. Watson Department Store v. Hamilton, supra, without linking those factors to the specific facts at hand is not an appropriate analysis of a claimant's entitlement to PTD benefits. The ALJ must set forth exactly how the severity of Gilvin's injury, as well as how her age, work history, and education factored into his decision in determining whether she is permanently totally disabled.

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 his rationale supporting his determination. On remand, the ALJ is further directed to specifically address how Gilvin's education factors into his decision. Although there may be substantial evidence in the record supporting the ultimate determination Gilvin is permanently and totally disabled, the ALJ 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, 695 S.W.2d 418 (Ky. 1985).
(Emphasis added).

In his decision on remand, and the order on Petition for Reconsideration, the ALJ again failed to provide an adequate analysis specifically addressing the evidence, and failed to make sufficient findings to support his conclusions. Merely referencing his observations of Gilvin at the hearing, and stating a factual determination has been made does not make it so. The ALJ failed to discuss how the restrictions imposed specifically prevent Gilvin from performing her job duties. Likewise, the ALJ did not provide a detailed discussion of what her actual job duties were. Merely listing the fact Joanie Juett, office manager for DHA, testified without any reference to or analysis of her testimony falls short of that which is necessary to constitute a proper determination. This is especially true since the ALJ determined Gilvin is permanently totally disabled.

An analogous situation was recently addressed by the Kentucky Court of Appeals in Bluegrass Rehabilitation Center v. Edna Miles, 2013-CA-000973 (Ky. App. July 25, 2014), an unreported decision which is cited for guidance, not authority. There the Court stated as follows:

> The Kentucky Workers' Compensation Act ("Act") KRS 342.0011, *et. seq.*, distinguishes between PTD and PPD benefits as follows: PTD is defined as "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[.]" KRS 342.0011(11)(c). On the other hand, "[i]f, due to an injury, an employee does not retain the physical capacity to return to the type of work that the employee performed at the time of injury, the benefit for permanent partial disability shall be multiplied by three (3) times the amount otherwise determined[.]" KRS 342.730(1)(c)(1). In determining whether an employee has suffered a permanent total disability, the ALJ is required to consider factors "such as the worker's post-injury physical, emotional, intellectual, and vocational status and how those factors interact." *Hamilton*, 34 S.W.3d at 51.

In awarding PTD benefits to Miles, the ALJ stated, "I make the factual determination that the plaintiff cannot find work consistently under regular work circumstances and work dependably." However, this statement is merely a recitation of the ultimate fact necessary to sustain an award of PTD. While the ALJ stated that he considered Miles's injury, age, work history, and education, his opinion contains no analysis demonstrating how he weighed those factors to reach his ultimate conclusion, as required. Indeed, the Kentucky Supreme Court has held that an ALJ must consider these factors in relation to one another:

> KRS 342.275(2) and KRS 342.285 contemplate an [ALJ] opinion that summarizes the conflicting evidence concerning disputed facts; **weighs that evidence to make findings of fact; and determines the legal significance of those findings.** Only when an

> opinion summarizes the conflicting evidence accurately and states the evidentiary basis for the ALJ's finding does it enable the Board and reviewing courts to determine in the summary manner contemplated by KRS 342.285(2) whether the finding is supported by substantial evidence and reasonable.

Arnold v. Toyota Motor Mfg., 375 S.W.3d 56, 61-62 (Ky. 2012) (emphasis added) (internal citations omitted).

Here, the record shows no evidence that the ALJ balanced Miles's age, work history, and education against her physical restrictions, the availability of more sedentary jobs, and her ability to perform those jobs. Instead, the ALJ's opinion is simply conclusive, stating that he considered the evidence without any explanation of how he did so. As a result, the record does not contain the evidentiary basis for the ALJ's findings so as to allow for a meaningful review of this case. We believe the Board erred in affirming the ALJ's decision, since the ALJ did not make sufficient findings to support his award of PTD benefits.

In this claim, other than addressing his observation of Gilvin's demeanor at the hearing, the ALJ did not provide an adequate analysis of how he reached his determination she is permanently totally disabled. The ALJ stated he found Gilvin's hearing testimony and Dr. Owen's report persuasive and compelling without explaining why. The decision is bereft of any discussion regarding what he

specifically relied upon in reaching his determination. As in Bluegrass Rehabilitation Center v. Edna Miles, supra, here the ALJ failed to provide the specific analysis required for reaching his determination.

It is acknowledged an ALJ has wide range discretion in granting or denying an award of PTD benefits. Seventh Street Road Tobacco Warehouse v. Stillwell, 550 S.W.2d 469 (Ky. 1976); Colwell v. Dresser Instrument Div., 217 S.W.3d 213, 219 (Ky. 2006). It is further acknowledged KRS 342.285 designates the ALJ as the finder of fact, and 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 the specific testimony supporting his decision and did not address all evidence necessary to reach such a determination. A mere recitation of the evidence of record is insufficient, and does not constitute an analysis. Again, the ALJ merely provided a conclusion without providing a factual analysis which falls well short of what is necessary in reaching his decision.

On remand, the ALJ is once again directed to conduct an analysis in accordance with both the statutory and case law referenced above, and provide with specificity how the restrictions outlined impact Gilvin's specific job duties which would support his determination regarding her occupational disability. Likewise, the ALJ is directed to determine what Gilvin's job duties were, and the medical evidence supporting why she cannot specifically perform them. The ALJ is further directed to specifically address how Gilvin's education factors into his decision. Although there may be substantial evidence in the record supporting the ultimate determination Gilvin is permanently and totally disabled, the ALJ 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 determinations as set forth in the June 9, 2014 opinion and the July 31, 2014 order overruling DHA'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.

STIVERS, MEMBER, CONCURS.

RECHTER, MEMBER, DISSENTS AND WILL NOT FURNISH A SEPARATE OPINION.

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