Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: January 9, 2015

CLAIM NO. 200982990

DR. LARRY W. LYNN PETITIONER

VS. **APPEAL FROM HON. STEVEN G. BOLTON, ADMINISTRATIVE LAW JUDGE**

DOTTIE RAMEY
and HON. STEVEN G. BOLTON,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
VACATING AND REMANDING
* * * * * *

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

STIVERS, Member. Dr. Larry W. Lynn ("Dr. Lynn") seeks review of the February 20, 2014, Order on Remand of Hon. Steven G. Bolton ("ALJ") awarding permanent partial disability ("PPD") benefits enhanced by the three multiplier pursuant to KRS 342.730(1)(c)1 to Dottie Ramey ("Ramey"). Dr. Lynn also appeals from the July 29, 2014, Order denying his petition for reconsideration.

During the proceedings before Hon. Joseph Justice, Administrative Law Judge ("ALJ Justice"), the parties stipulated Ramey sustained a work-related injury on January 13, 2009, Dr. Lynn received due and timely notice, Ramey's average weekly wage ("AWW") was $265.00, and she returned to work on January 4, 2009, at the same or greater wages.[1]

On February 11, 2011, ALJ Justice rendered an Opinion, Award, and Order finding Ramey sustained work-related low back, left shoulder, and psychological injuries. ALJ Justice concluded Ramey had a 5% impairment rating for the low back condition, one-half of which was attributable to the work injury, and she had a 9% impairment rating due to the left shoulder injury. ALJ Justice also determined Ramey has a 9% psychological impairment rating, 6% of which is work-related, which combined with the impairments for the physical injuries resulted in a work-related 16.5% impairment rating.[2]

Because Ramey alleged numerous other injuries, ALJ Justice found as follows:

> Plaintiff has not proven any permanent work-related impairment to any body parts other than the left shoulder and the lumbar spine. Plaintiff has proven a psychological impairment. Plaintiff's claim for benefits

[1] The ALJ was assigned this claim after ALJ Justice's term ended.

[2] In response to the petition for reconsideration claiming the ALJ did not specifically determine the impairment rating attributable to the left shoulder, ALJ Justice stated that based upon Dr. Gregory T. Snider's opinions, Ramey had a 9% permanent impairment due to her left shoulder injury.

> for these other conditions should be dismissed. Using the Combined Values Chart Plaintiff has a 16.50% WPI.

ALJ Justice found Ramey was not permanently totally disabled but did not retain the physical capacity to return to the job she was performing when injured. Relying upon Ramey's treating physician, Dr. T. Robert Love, the ALJ found she was capable of performing sedentary work.

Dr. Lynn appealed asserting the ALJ failed to provide an analysis pursuant to Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003). In an August 12, 2011, opinion, this Board vacated in part, stating:

> Based upon the foregoing, we conclude the ALJ did not carry out an appropriate analysis of the lay and medical evidence pursuant to Fawbush, supra, in determining whether the three (3) multiplier, as articulated in KRS 342.730(1)(c)1, or the two (2) multiplier pursuant to KRS 342.730(1)(c)2 more properly applies. For that reason, the Board vacates and remands that portion of the opinion, award and order to the ALJ to perform a proper analysis to determine, which, if any multiplier is appropriate for this claim. After performing this analysis, the ALJ may very well conclude the three (3) multiplier is applicable to this claim.
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> On the other hand, if the ALJ determines KRS 342.730(1)(c)1 does not apply, then an analysis must be made pursuant to Chrysalis House, Inc. v. Tackett, 283 S.W.3d 67 (Ky. 2009), since Ramey continued to work for Lynn for several months after the accident, and the ALJ must determine whether the cessation of that wage

> was as a result of Ramey's work-related injury.

Ramey appealed to the Court of Appeals. In a February 28, 2012, Opinion, the Court of Appeals affirmed the Board holding:

> The ALJ found that Ramey was not permanently disabled, but also found that Ramey did not retain the physical capacity to return to her former duties and awarded the three times multiplier. Ramey undisputedly returned to work at equal or greater wages for more than six months following the injury. The ALJ did not make the determination of whether Ramey was likely to continue earning a wage that equals or exceeds the wage at the time of his injuries for the indefinite future. This determination is required by *Fawbush. See Adkins v. Pike Co. Bd. Educ.,* 141 S.W.3d 387, 390 (Ky. App. 2004). We conclude that the Board properly applied the controlling law in remanding the case to the ALJ for further analysis under Fawbush.

On remand, after providing a synopsis of Ramey's testimony and the evidence from Dr. Kermit Gibson, Dr. Love, Dr. Anbu Nadar, and Dr. David Herr, the ALJ entered the following:

> 1. Pursuant to Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003), with regard to the application of KRS 342.730 (1) (c) 1 (the 3 multiplier) or KRS 342.730 (1) (c) 2 (the 2 multiplier), I am authorized (and directed by the Board) to determine which provision is more appropriate on the facts.
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> 2. Here, Ms. Ramey did return to work after the injury making the same wage. However, she did that out of a feeling of responsibility to her employer, by whom she had been employed for many years. Although she

retained the same wage during this time period, her duties were significantly reduced, with most being assigned to other people. By her own testimony, she was physically unable to [sic] the same job duties after her injury that she could prior thereto. She specifically mentioned filing and mandatory cleaning duties. It is also of significance that she worked between her injury and shoulder surgery, but not after the shoulder surgery.

3. So, her unrebutted testimony was that her post-injury work was done out of necessity, primarily because Dr. Lynn would not "let her quit" because of his mother's last illness and death…that she felt a sense of loyalty to continue as long as she could. Yet she could not continue when Dr. Love took her off-work to subsequently perform her shoulder surgery. Up to that point, she could only work because others performed the job duties that were outside her restrictions. A claimant's own testimony is competent and of some probative value. *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15 (Ky., 1977).

4. She has not worked since July 17, 2009. As stated herein above, her last work for Dr. Lynn was possible only because other people performed tasks she had previously performed, but could no longer, due to her restrictions.

5. By description, her restrictions would not allow her to file, carry out heavy bags of trash or perform the cleaning duties she described, such as sweeping, mopping and doing heavy cleaning for the entire office each Wednesday, as required.

6. She has psychological problems, both injury related and pre-existing that are set out in the record herein, that while they may not affect her physical capacity, would certainly affect her future employability.

> 7. Based upon the restrictions placed upon her by her treating and examining physicians as set out herein above, especially Dr. Nadar, Dr. Love, Dr. Snider, and Dr. Herr, whose opinions I find to be persuasive as to Plaintiff's physical capacity, I find that Ms. Ramey [sic] not have the physical capacity to return to the type of work that she performed at the time of the injury.
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> 8. Further, based upon her own testimony, her education, work background and especially her physical restrictions, I find that the work related injury suffered by the Plaintiff has permanently altered her ability to earn an income. Further, that although she returned to work for a relatively brief period of time at a wage equal to that which she had earned before the injury, it [sic] highly unlikely that she would be able to continue for the indefinite future to do work from which to earn such a wage. Adams v. NHC Healthcare, 199 S.W.3d 163 (Ky. 2006). In making that finding, I rely on the medical opinions of Dr. David Herr, which I find to be the most compelling and persuasive evidence in the record as to that issue.
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> 9. Consequently, I conclude that Ms. Ramey is entitled to the 3 multiplier pursuant to KRS 342.730 (1) (c) 1.

Dr. Lynn filed a petition for reconsideration asserting the order contained multiple patent errors. First, he asserted the ALJ erroneously relied upon Dr. Herr's opinions as ALJ Justice had rejected Dr. Herr's opinions. He noted Dr. Herr diagnosed work-related medical conditions, for which he assessed impairment ratings, which ALJ Justice found were not work-related. Further, he argued Dr. Herr did not express an opinion

as to Ramey's restrictions or abilities excluding the effects of the non-work-related medical conditions.

Next, Dr. Lynn contended the Fawbush analysis almost entirely concerned Ramey's capacity to perform the job she performed when injured. He asserted Ramey's inability to perform the job she was performing at the time of the injury, is relevant for purposes of determining whether a Fawbush analysis is needed. As that was not in issue, Dr. Lynn expressed concern the ALJ did not "fully comprehend" the Fawbush analysis.

Concerning the findings in paragraph eight of the order, Dr. Lynn asserted the ALJ needed to make additional findings providing the basic facts supporting his conclusory statements. He noted although Ramey may be excluded from performing heavy, medium, and light work, ALJ Justice found she was capable of performing sedentary work and that finding cannot be altered. Dr. Lynn also requested the ALJ identify the evidence which supports his conclusion the effects of the injury have permanently altered Ramey's ability to earn an income.

Finally, Dr. Lynn contended since ALJ Justice determined Ramey is not permanently totally disabled and she is not precluded from performing sedentary work, "there is no evidence, not already rejected by ALJ Justice, limiting Ramey to working less than on a regular and sustained basis." Dr. Lynn posited Ramey's AWW is $265.00 and if she earned a minimum wage

of $7.25 per hour and worked forty hours a week she would make $290.00. Alternatively, it noted should she work 36.6 hours a week at minimum wage of $7.25 she would earn $265.35. Therefore, Dr. Lynn argued all the evidence in the record establishes Ramey retains the ability to earn equal or greater wages for the indefinite future and substantial evidence does not support a conclusion to the contrary.

In the July 29, 2014, Order, the ALJ noted the petition for reconsideration was primarily a re-argument of the facts and requested "additional findings which were already made or referenced by citations to the evidence of record." Finding no patent error appearing on the face of the order, the ALJ denied the petition for reconsideration.

On appeal, Dr. Lynn alleges the ALJ erred by relying upon the opinions of Dr. Herr which were rejected by ALJ Justice. He again notes Dr. Herr diagnosed many medical conditions which the ALJ determined were not work-related conditions and not compensable. Dr. Lynn maintains Dr. Herr's opinion Ramey cannot return to work in any capacity was in part based on the effects of injuries to Ramey's knees, right shoulder, and left hip, all of which the ALJ found non-work-related. Therefore, since Dr. Herr did not express an opinion as to Ramey's work restrictions and abilities based solely on her work-related medical conditions, Dr. Lynn argues his

opinions are of no value. Further, Dr. Lynn argues the ALJ's reliance on Dr. Herr is misplaced because he expressed the opinion Ramey was unable to perform any type of work.

Dr. Lynn asserts the ALJ's Fawbush analysis pertains almost exclusively to Ramey's capacity to perform the job she was performing at the time of the injury, which is insignificant. Dr. Lynn contends the ALJ failed to provide sufficient findings of fact to support his conclusions of law. He notes the matter was remanded to the ALJ to resolve the third prong of the Fawbush analysis. Dr. Lynn maintains ALJ Justice determined Ramey is physically capable of performing sedentary work and there is no medical limitation regarding the number of hours she can perform this type of work. Dr. Lynn observes he requested the ALJ identify the evidence which supports a conclusion that the effects of the injuries have permanently altered her ability to earn an income, since "there is nothing in [Ramey's] age, education, or work history that would support such a conclusion."

Finally, Dr. Lynn argues since Ramey is capable of performing sedentary work and is not totally disabled, the evidence establishes Ramey retains the ability to earn equal or greater wages in the indefinite future. He again cites to Ramey's stipulated AWW and the number of hours she can work at

minimum wage each week which results in a weekly wage greater than her AWW.

In a companion argument, Dr. Lynn cites "the broad factors" the appellate courts have identified to be considered in resolving the third prong of the Fawbush analysis. Dr. Lynn argues that on remand the ALJ "did not discuss a single one of the 'broad range of factors' identified by the appellate courts as the crucial criteria to be considered." We vacate the ALJ's decision and remand.

This claim was remanded for the sole purpose of resolving the third prong of the Fawbush analysis. Therefore, determining whether Ramey possessed the capacity to perform the job she was performing at the time of the injury was unnecessary. The ALJ should have focused entirely upon whether the evidence indicates Ramey was likely to be able to continue earning a wage that equals or exceeds the wage at the time of the injury for the indefinite future. Fawbush at 12.

In Adkins v. Pike County Bd. of Educ., 141 S.W.3d 387, 390 (Ky. App. 2004) the Court of Appeals stated as follows:

> If every claimant's current job was certain to continue until retirement and to remain at the same or greater wage, then determining that a claimant could continue to perform that current job would be the same as determining that he could continue to earn a wage that equals or exceeds his pre-injury wages. However, jobs in Kentucky, an employment-at-will state, can and do

> discontinue at times for various reasons, and wages may or may not remain the same upon the acquisition of a new job. Thus, in determining whether a claimant can continue to earn an equal or greater wage, the ALJ must consider a broad range of factors, only one of which is the ability to perform the current job. Therefore, we remand this case to the ALJ for a finding of fact as to Adkins' ability to earn a wage that equals or exceeds his wage at the time of the injury for the indefinite future. If it is unlikely that Adkins is able to earn such a wage indefinitely, then application of Section c(1) is appropriate.

In Adams v. NHC Healthcare, 199 S.W.3d 163, 169 (Ky. 2006), the Supreme Court adopted the ruling of the Court of Appeals in Adkins, supra, stating:

> The court explained subsequently in *Adkins v. Pike County Board of Education*, 141 S.W.3d 387 (Ky. App. 2004), that the *Fawbush* analysis includes a broad range of factors, only one of which is the ability to perform the current job. The standard for the decision is whether the injury has permanently altered the worker's ability to earn an income. The application of KRS 342.730(1)(c)1 is appropriate if an individual returns to work at the same or a greater wage but is unlikely to be able to continue for the indefinite future to do work from which to earn such a wage.
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> Unlike the situations in *Fawbush*, *supra*, and *Adkins*, *supra*, the claimant continued to work as a nursing assistant for several months after his injury but quit before his claim was heard. He asserted that he could no longer work. Having found the claimant to be only partially disabled, the ALJ's task was to determine whether his injury permanently deprived him of the ability to do work in which he could earn a

> wage that equaled or exceeded his wage when he was injured. The claimant asserts that it did and that he was entitled to a triple benefit under KRS 342.730(1)(c)1.

Based upon Ramey's testimony, education, work background, and physical restrictions, the ALJ found her work injuries have permanently altered her ability to earn an income. The ALJ did not cite to the portion of Ramey's testimony upon which he relied in making that finding. Similarly, he did not discuss how her education and work background factored into his decision. Further, the ALJ did not discuss the physical restrictions which were germane to his decision. In determining whether it is likely Ramey is able to continue earning a wage that equals or exceeds her wage at the time of the injury, the ALJ relied solely upon the opinions of Dr. Herr. The ALJ provided no further findings or explanation. Further, he did not cite to the specific opinions of Dr. Herr which swayed his decision. As urged by Dr. Lynn, we decline to rely upon the Court of Appeals' holding in Enterprise Mining v. Wilder, 2013-CA-000820-WC, rendered February 7, 2014, Designated Not To Be Published, as the Supreme Court in an opinion rendered December 18, 2014, Designated Not To Be Published, reversed the Court of Appeals' decision.[3]

[3] 2014-SC-00085-WC.

However, given ALJ Justice's findings, Dr. Herr's opinions do not constitute substantial evidence supporting the ALJ's finding that it is "highly unlikely that [Ramey] would be able to continue for the indefinite future to do work from which to earn such a wage."

First, we note ALJ Justice rejected Dr. Herr's impairment ratings and many of his diagnoses of work-related injuries. Dr. Herr diagnosed the following work-related conditions:

1. Degenerative disc disease lumbar spine.

2. HNP, lumbar, L4-5 and/or L5-S1.

3. Left sciatica.

4. Shoulder impingement syndrome, bilateral shoulders.

5. Tear of rotator cuff, left shoulder.

6. Recurrent tear of rotator cuff, right shoulder.

7. Osteoarthritis of AC joint, bilateral shoulders.

8. Osteoarthritis, bilateral knees.

9. Tear of medial meniscus, left knee.

10. Tricompartmental osteoarthritis, bilateral knees.

11. Osteoarthritis left hip.

In his Form 107 and attached report pursuant to the 5th Edition of the American Medical Association, Guides to the

Evaluation of Permanent Impairment, Dr. Herr assessed a 21% impairment for the right shoulder, a 7% impairment for the left shoulder, a 20% impairment for the left knee, a 20% impairment for the right knee and a 5% impairment for her lumbar spine condition. He indicated Ramey had a minimum impairment rating of 55% and a maximum impairment of 63%. More importantly, in his report regarding Ramey's capacity to return to work, Dr. Herr stated as follows:

> Ms. Ramey cannot return to work in any capacity due to problems with bilateral knees, bilateral shoulders, and lower back. All four weight-bearing joints have been adversely affected as a result of the hard fall on January 23, 2009. Further, the condition of her lumbar spine will preclude prolonged sitting and repetitive and prolonged bending activities as a result of exacerbation of degenerative disc disease and degenerative joint disease of this 58-year-old lady's lumbar spine and probable herniated discs at L4-5 or/and L5-S1 causing persistent and progressive left sciatic pain.

Since Dr. Herr's opinion that Ramey cannot return to work in any capacity is, in large part, based on non-work-related conditions, his opinion cannot be relied upon in determining whether it was likely Ramey would be able to continue to earn a wage that equals or exceeds her wage at the time of the injury for the indefinite future. ALJ Justice specifically rejected the work-related injuries to both knees and the right shoulder. He also found one-half of the impairment rating assessed for the

lower back condition to be non-work-related. ALJ Justice also determined Ramey is not totally disabled and can perform sedentary work. These findings are now the law of the case and the ALJ is bound by the findings.

The ALJ must provide a sufficient basis to support his determination. Cornett v. Corbin Materials, Inc., 807 S.W.2d 56 (Ky. 1991). The 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). This Board is 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 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). Here, regarding the issue before the ALJ, Dr. Herr's opinion cannot constitute substantial evidence in support of the ALJ's decision. Further, the bare bones statement of the ALJ that he relied upon the opinions of Dr. Herr, is insufficient and certainly does not advise the parties of the basis for his decision. This is especially true since ALJ

Justice rejected most of Dr. Herr's diagnoses and all of his impairment ratings.

All parties are entitled to findings of fact based upon a corrected understanding of the evidence submitted during adjudication of the claim. Where it is demonstrated the fact-finder may have held an erroneous understanding of the relevant evidence in reaching a decision, the courts have authorized remand to the ALJ for further findings. *See* Cook v. Paducah Recapping Service, 694 S.W.2d 684 (Ky. 1985); Whitaker v. Peabody Coal Company, 788 S.W.2d 269 (Ky. 1990). Since the ALJ did not understand the opinions of Dr. Herr, the ALJ's decision must be vacated.

Finally, as we are without fact-finding authority, we decline to remand with directions to enter the award requested by Dr. Lynn. Ramey's deposition testimony of September 28, 2010, reveals she worked 76 hours every two weeks which equates to 38 hours a week. On remand, the ALJ may conclude that due to her physical problems, Ramey does not possess the capacity to work 38 hours or even 36.6 hours each week. The ALJ's task on remand is to determine whether Ramey can return to regular employment at the same or greater wages than she earned at the time of the injury. Therefore, on remand, the ALJ must determine the extent to which Ramey is capable of regularly working in a sedentary capacity each week. Nothing prohibits the

ALJ from finding Ramey is not able to work 36.6 or more hours each week. On the other hand, the ALJ may determine Ramey is able to work more than 36.6 hours each week. We express no opinion as to the outcome on remand.

Accordingly, the February 20, 2014, Order on Remand finding Ramey is entitled to PPD benefits enhanced by the three multiplier pursuant to KRS 342.730(1)(c)1 and the July 29, 2014, Order denying the petition for reconsideration are **VACATED**. This matter is **REMANDED** to the ALJ for entry of an amended opinion and award in conformity with the views expressed herein.

ALL CONCUR.

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