Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: April 17, 2015

CLAIM NO. 201194858

HAZARD INDEPENDENT SCHOOL DISTRICT — PETITIONER/CROSS-RESPONDENT

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

TURUNAU ADAMS — RESPONDENT/CROSS-PETITIONER

HON. STEVEN G. BOLTON, ADMINISTRATIVE LAW JUDGE — RESPONDENT

OPINION
AFFIRMING IN PART,
VACATING IN PART
AND REMANDING

* * * * * *

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

RECHTER, Member. Hazard Independent School District ("Hazard") appeals from the June 27, 2014 Opinion, Award and Order and the August 29, 2014 order ruling on the parties' petitions for reconsideration rendered by Hon. Steven G.

Bolton, Administrative Law Judge ("ALJ") awarding Turunau Adams ("Adams") permanent partial disability benefits based upon an 11% impairment rating. Hazard also appeals from a separate August 29, 2014 Order dismissing its medical dispute.

Hazard argues the ALJ erred in failing to deduct Adams' pre-existing active impairment from the award and in overruling the medical dispute and motion to join a treatment provider. Adams cross-appeals arguing the ALJ's finding that she is not entitled to the three multiplier is not supported by substantial evidence; the ALJ failed to address income and medical benefits for her cervical spine injuries; the ALJ failed to address her right leg, right knee, left knee, right hip, right arm, left arm, right hand and left hand conditions; the ALJ erred in failing to award income or medical benefits for her psychological claim; and the ALJ erred in failing to find her permanently totally disabled. For the reasons set forth herein, the decision is vacated in part and the claim remanded to the ALJ for further fact-finding.

Adams testified by deposition on November 12, 2012 and at the hearing held April 22, 2014. She was briefly employed as a bagger for K-Mart in 1979, as a cashier for

McDonalds in 1996, and as a CNA at Hazard Nursing Home in 1999. She worked as a nurse from 2001 through 2008.

Adams began working for Hazard in 2008 as an assistant manager. Her duties included cooking, baking, washing dishes, performing paperwork, ordering supplies, performing temperature checks and milk counts. She had to lift crates of milk weighing up to fifty pounds, and was required to be on her feet most of the day.

On February 25, 2011, Adams was walking near a stove when her shoelace got caught on a pipe in the floor and she fell on her knees and hands. She felt her head move down then up in a whiplash movement and immediately felt pain in her neck, and in her low back on both the left and right sides. She also struck her left hip, causing a bruise.

Adams testified her back pain progressively worsened following the work injury. She now has burning pain in her right leg and numbness into her toes. Her neck pain has not changed significantly since non-work-related fusion surgery prior to the work injury. Adams indicated her ability to perform tasks at home has been affected. She is unable to wash dishes without taking a break and can only sit for a half hour to one hour and stand for only fifteen or twenty minutes. Since the work injury, she suffers from

anxiety and depression. Adams acknowledged she has been on all of her medications for years and her dosage of Hydrocodone is currently lower than at the time of the work-related injury. She did not return to work following the injury and does not believe she can return to any work.

Dr. Angela Rice treated Adams from October, 2006 to August, 2012 for back pain. Additionally, she treated Adams for neck pain in 2006, numbness and burning in the left hand in 2006, cervical degenerative disc disease in 2007, anxiety and depression from 2007 through 2012, leg pain from 2008 through 2012, osteoarthritis in 2010, and right hip pain/sacroiliitis in 2009. On February 17, 2011, prior to the work accident, Adams was treated for low back pain radiating into the right leg and foot. She reported an onset of pain with no history of trauma or acute injury at work. Dr. Rice's plan included obtaining a lumbar MRI. At a later visit, Adams reported a fall at work on February 25, 2011. She was diagnosed with neck pain, degenerative disc disease of the cervical and lumbar spine, left shoulder, left hip, and depression.

Dr. James S. Powell treated Adams on referral from Dr. Rice. Dr. Powell performed a bilateral L5-S1 laminoforaminotomy on December 16, 2011. He opined Adams currently suffers from failed back syndrome.

Dr. James R. Bean evaluated Adams and prepared a report on November 15, 2012. Dr. Bean diagnosed a lumbar disc herniation at L5-S1 and placed Adams in DRE category III with a 10% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"). He found Adams had no prior active impairment rating, though she only provided a history of her pain beginning with the February 25, 2011 work incident. He opined Adams did not retain the physical capacity to return to the type of work she performed at the time of the injury. He restricted Adams to lifting fifteen to twenty pounds occasionally and ten pounds repeatedly with only occasional bending, twisting and stooping.

Dr. Ira B. Potter, who evaluated Adams at the request of her attorney, indicated she reached maximum medical improvement on August 6, 2012 and placed her in DRE category III, assigning a 12% impairment rating pursuant to the AMA Guides. He opined Adams would have been placed in DRE category II with a 7% pre-existing active impairment prior to the work injury. He restricted Adams to no lifting over forty pounds, no lifting over twenty pounds below waist level, no prolonged or repetitive overhead work, no continuous sitting, standing or walking, no prolonged or repetitive stooping or crouching, no heavy pushing, pulling

or carrying and no activities involving sustained posturing of the lumbosacral spine at extremes of motion or repetitive movements into extremes of lumbosacral motion.

Dr. Anbu K. Nadar evaluated Adams on October 16, 2012. He diagnosed cervical strain, lumbosacral strain with radiculopathy, and status post-lumbar foraminotomy at L5-S1. Referencing the AMA Guides, he placed her in DRE lumbar category III and assigned a 13% impairment rating with an additional 3% for pain in the back and leg. Adams provided a history of the work injury and "some back strain in the past which subsequently resolved." He assigned a 28% impairment for Adams' cervical condition with 25% attributable to a previous cervical fusion. His report was silent regarding the question of pre-existing lumbar impairment. He opined Adams does not retain the physical capacity to return to the type of employment performed at the time of the injury. She has limitation in work activities requiring heavy lifting, bending, twisting, prolonged standing or walking and climbing.

Dr. Timothy C. Kriss assigned an 11% impairment rating pursuant to the AMA Guides for the lumbar condition, but did not believe the work injury produced any impairment rating. Dr. Kriss stated "the operative treatment for radiculopathy automatically places Ms. Adams in DRE category

3, regardless of long-term outcome." Dr. Kriss opined Adams would have been placed in DRE category II with a 5% impairment rating prior to the fall at work on February 25, 2011. He noted Adams had chronic back and right radicular leg pain/numbness for five years with a spike in her symptoms on February 17, 2011, eight days prior to the work incident. He felt the small disc herniation at L5-S1 occurred at some time immediately prior to February 17, 2011 and not on February 25, 2011. He indicated the work incident was actually a therapeutic event because it relieved Adams' right lower extremity symptoms for more than a year after the work event. Dr. Kriss stated the lumbar spinal impairment, need for surgery, ongoing symptoms and treatment, and any need for potential restrictions are all consequences of Adams' pre-existing active history of lumbar degenerative disc disease, lumbar osteoarthritis, and lumbar spondylosis. There is no objective medical evidence of a permanent harmful change associated with the work event, which he characterized as a temporary musculoskeletal strain/contusion resulting in no permanent impairment, permanent restrictions or need for ongoing treatment.

Dr. Eric Johnson, Ph.D. performed a psychological evaluation on June 6, 2012. Dr. Johnson diagnosed chronic generalized anxiety disorder, chronic dysthymic disorder

(rule out conversion disorder), and dependent personality traits. He opined her psychological complaints were the direct result of her physical work-related injury. He noted she had depression and anxiety for years prior to the work injury, but the injury aggravated her pre-existing pain and increased her anxiety and depression. Dr. Johnson assigned a current impairment rating of 15% pursuant to the AMA Guides, indicating Adams had a 9% prior active impairment for anxiety and depression leaving 6% resulting from the work injury.

Dr. Douglas D. Ruth evaluated Adams on December 12, 2012. He diagnosed depressive disorder, claustrophobia, and personality disorder. Dr. Ruth assigned a 4% impairment pursuant to the AMA Guides for Adams' psychological condition, but felt the entirety of the impairment is due to pre-existing conditions. He believed Adams was markedly exaggerating her current complaints and minimizing her pre-existing issues.

In his analysis, the ALJ noted that while Dr. Kriss felt the back surgery was medically unnecessary, Adams relied on her treating physician's medical opinion in deciding to have the surgery, which had been recommended in response to her complaints resulting from the fall at work. The ALJ also noted Dr. Kriss assigned no restrictions,

believed her complaints were psychosomatic in nature, and believed she suffered no permanent physical injury. The ALJ found Adams was temporarily totally disabled from February 25, 2011 through August 6, 2012 as the result of "an exacerbation of a previously existing, active back condition" and then as a result of the surgery performed on December 15, 2011. The ALJ's finding regarding impairment is as follows:

> As the direct and proximate result of her work injury resulting in lumbar spine surgery performed by her treating surgeon on December 15, 2011, she suffered a whole person impairment of 11% according to the 5th edition of the AMA *Guides to the Evaluation of Permanent Impairment*. In making this finding I rely on the medical opinion of Dr. Timothy C. Kriss, which I find to be persuasive with regard to this issue.

The ALJ noted Dr. Ruth found Adams had a 4% prior active impairment rating, but did not make a specific finding regarding the psychological condition. However, after providing for permanent partial disability, temporary total disability and medical benefits, the ALJ stated "All remaining issues are moot, and therefore dismissed."

Both parties petitioned for reconsideration. In its petition for reconsideration, Hazard argued the ALJ erred in failing to address the contested issue of exclusion of pre-existing active condition/disability. Hazard

asserted the ALJ's summary of Dr. Kriss' opinion in the analysis was incomplete in that the ALJ failed to account for the fact Dr. Kriss had opined Adams had a pre-existing active impairment of 5%. It urged the 5% must be subtracted from the 11% rating leaving 6% as compensable.

Adams filed a petition for reconsideration including the same arguments she makes on appeal. On reconsideration, the ALJ indicated he found Dr. Potter's assessment of the date Adams reached maximum medical improvement most persuasive. The ALJ noted the majority of Adams' petition was directed to the weight of the evidence and he found no patent error concerning those arguments.

The ALJ's finding relevant to Hazard's appeal is as follows:

> As to the Defendant's third allegation of error, my summarization of Dr. Kriss' opinion is not incomplete. On page 9 of his IME of 12/4/2012, Dr. Kriss opined that the Plaintiff suffered 11% WPI directly as a result of the surgery she underwent for the cure and relief of her claimed work injury. That rating was exclusive of the effects of the actual injury, which Dr. Kriss believed had resulted in 0% WPI, although he acknowledged a 5% WPI pre-existing the date of injury from an active, pre-existing condition. Thus, the 5% was not a part of my calculation because, according to Dr. Kriss, upon whose opinion I relied, the 5% had no relation to the 11% caused by the surgery. Therefore, with regard to this issue, I

> see no error patently appearing on the face of the Opinion, Award and Order dated 6/27/2014.

On June 13, 2014, while the case was under submission but before an opinion was issued, Hazard filed a notice of contest of medical services and motion to add Dr. Angela Rice as a party, a Form 112 Medical Dispute, and a motion to remove the claim from submission. Hazard contested the reasonableness and necessity of a referral for pain management and epidural steroid injections. Without issuing any findings, the ALJ overruled Hazard's Form 112 and motion to add Dr. Rice as a party by order dated August 29, 2014.

On appeal, Hazard argues the ALJ erred in failing to subtract pre-existing active impairment from the low back impairment rating assessed by Dr. Kriss. Hazard notes the ALJ found a pre-existing active low back condition at the time of the work injury, and that finding has not been challenged. It argues the ALJ's interpretation, as expressed on reconsideration, of Dr. Kriss' opinions is unreasonable and an abuse of discretion. According to Hazard, there is no dispute that Dr. Kriss opined Adams had a 5% pre-existing active impairment for the lumbar condition. Hazard notes Dr. Kriss did not opine the 11%

impairment rating was exclusive of, or in addition to, the 5% pre-existing active impairment rating.

To be characterized as active, an underlying pre-existing condition must be symptomatic and impairment ratable pursuant to the AMA Guides immediately prior to the occurrence of the work-related injury. Finley v. DBM Technologies, 217 S.W.3d 261 (Ky. App. 2007). In a post-1996 permanent partial disability case, the permanent impairment rating caused by the work injury in instances involving a pre-existing active impairment is calculated by subtracting the active impairment rating from the combined rating. *See* Roberts Brothers Coal Co. v. Robinson, 113 S.W.3d 181 (Ky. 2003).

Here, the ALJ determined Adams sustained a temporary injury in the form of an exacerbation of a prior active condition. However, the ALJ failed to specifically find what percentage of impairment Adams had prior to the work injury. The ALJ believed that because the surgery would produce an 11% impairment rating, it was unnecessary to carve out any pre-existing impairment. The greater impairment rating produced by surgery did not negate or extinguish the prior active condition and prior impairment rating, if one existed. The ALJ was required to specifically find whether the prior active condition

produced an impairment rating prior to the work injury and subtract that percentage, if any, from the present impairment rating. The remaining impairment is the only impairment proximately caused by the work injury. Dr. Kriss, upon whom the ALJ relied in determining Adams' current rating, unequivocally assigned a 5% rating for pre-existing active impairment placing Adams in DRE category II prior to the work injury. Nothing in Dr. Kriss' report indicates he felt the 11% rating was in addition to the 5% pre-existing impairment he found. Thus, his 11% rating can only be viewed as an assessment of Adams' current impairment rating. Dr. Potter, Adams' expert, also placed Adams in DRE category II with a 7% impairment rating prior to the work injury. Dr. Bean found no pre-existing active impairment. However, Adams only provided a history of back pain beginning with the work injury. Dr. Nadar's report addressed pre-existing impairment for the cervical condition but was silent regarding the question of pre-existing lumbar impairment. It is readily apparent all of the physicians offered opinions regarding the *current lumbar condition* based upon placement of Adams in DRE category III due to the surgery. On remand, the ALJ is directed to determine whether the pre-existing active low back condition he found produced a permanent impairment

rating immediately prior to the work injury and, if he finds a pre-existing impairment rating, subtract that percentage from the current 11% rating for the lumbar condition and award permanent partial disability benefits based upon the remainder of the impairment rating.

Hazard next argues the ALJ erred in overruling the medical dispute and motion to join the treatment provider. Hazard concedes the dispute was filed after the claim was taken under submission, but it notes it was required to submit the Form 112 under deadlines contained in the Act and administrative regulations, or risk waiving its ability to contest the requested treatment.

The ALJ did not abuse his discretion in declining to remove the claim from submission[1]. The medical dispute arose following the hearing while the parties were awaiting the ALJ's decision in the claim. However, the ALJ still retained jurisdiction over the claim and should have made a determination of whether the Form 112 set forth a *prima facie* showing for the requested relief and, if so, set a briefing schedule. The ALJ erred in summarily overruling the medical dispute.

[1] The ALJ's order did not specifically rule on the motion to remove from submission, but in overruling the Form 112 and motion to join the provider the ALJ implicitly denied the motion to remove from submission.

For her cross-appeal, Adams first argues the ALJ erred in not awarding benefits enhanced by the three multiplier. Adams contends that, if the injury is found compensable without any carve out for the pre-existing condition, then Dr. Kriss' opinion that any restrictions are for the pre-existing condition is without merit. Adams notes she had no restrictions prior to the work injury. She further notes Drs. Bean, Potter and Nadar indicated she lacked the physical capacity to return to the work she performed at the time of the injury. Adams further contends the ALJ erroneously failed to consider the requirements of Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003).

Next, Adams argues the ALJ failed to address income and medical benefits for the cervical spine and failed to address the right leg, knee and hip, left knee, left and right arm, and left and right hand conditions. Adams asserts the assessment of 3% impairment for the cervical condition by Dr. Nadar is unrebutted. Adams contends the medical records and her testimony establish she sustained permanent injuries to her neck, right leg, knees, right hip, arms and hands, entitling her to past, present and future medical benefits.

Adams argues the ALJ erred in failing to award income and medical benefits for her psychological

condition. Adams acknowledges she had a psychological condition prior to the work injury. However, she contends Dr. Johnson's opinion is the only credible opinion regarding that condition. He opined the condition was worsened by the work injury.

Finally, Adams argues the ALJ erred in failing to find her permanently totally disabled. Adams again notes Drs. Bean, Powell, Potter and Nadar opined she was not capable of performing the type of work she performed at the time of the injury. She contends those opinions combined with her testimony establish she is totally occupationally disabled.

We believe the matter must be remanded to the ALJ for additional findings. The ALJ failed to make a specific finding as to whether Adams sustained a cervical or psychological injury. It is incumbent upon a fact-finder to provide sufficient findings of fact upon which a reviewing body as well as the parties can reasonably conclude the basis of upon which he reached his decision. Shields v. Pittsburg & Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982). Although the ALJ referenced in his analysis Dr. Ruth's opinion regarding a pre-existing psychological condition, the ALJ made no specific finding regarding the issue. Dr. Nadar found Adams sustained an additional 3%

rating for the cervical condition related to the work injury. The ALJ failed to specifically address the issue of whether the work injury produced any impairment for this condition.

Likewise, the ALJ's findings are insufficient regarding the right knee, right leg, right hip, left knee, arms and hands. Although no impairment ratings were issued for those conditions, the ALJ was required to address the alleged conditions. It is possible for an injured worker to establish a temporary injury for which temporary benefits may be paid, but fail to prove a permanent harmful change to the human organism for which permanent benefits are authorized. Robertson v. United Parcel Service, 64 S.W.3d 284 (Ky. 2001). Similarly, an injury may not produce an impairment rating but require ongoing medical treatment. In Combs v. Kentucky River District Health Dept., 194 S.W.3d 823 (Ky. App. 2006) the Court of Appeals held an injured worker is entitled to an award of medical benefits "at the time of injury and thereafter during disability" in the absence of a permanent injury or disability. Thus, the ALJ must determine whether Adams sustained work-related injuries to lower extremities, hip, arms and hands. The Board directs no particular result concerning these conditions.

Because additional fact-finding may affect the issues of whether the three multiplier should have been awarded or whether Adams sustained a permanent total disability, it would be premature for this Board to address these issues. As a final matter, on remand, the ALJ is not required to address the Fawbush factors. Because Adams never returned to work following the injury, that case is inapplicable.

Accordingly the June 27, 2014 Opinion, Award and Order and the August 29, 2014 order ruling on the parties' petitions for reconsideration are hereby **VACATED IN PART** and the claim **REMANDED** for additional findings and an amended award in conformity with the views expressed herein. The August 29, 2014 order ruling on the medical dispute and motion to join treatment provider is **VACATED** and this matter is **REMANDED** for determination of whether Hazard made a *prima facie* showing and further proceedings if warranted.

ALL CONCUR.

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