Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: August 29, 2014

CLAIM NO. 201296662

JAMES L. NEWTON PETITIONER

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

GALLMAR CONTRACTING;
DR. DANESH MAZLOOMDOOST;
DR. GERALD EICHHORN;
and HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING IN PART,
VACATING IN PART, AND REMANDING
AND ORDER DENYING ORAL ARGUMENT

* * * * * *

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

ALVEY, Chairman. James Newton ("Newton"), *pro se*[1], seeks review of the Opinion and Order rendered March 20, 2014 by

[1] The record reflects Newton was represented by three separate attorneys during the course of litigation of this claim. Newton then appealed to the Board *pro se*.

Hon. William J. Rudloff, Administrative Law Judge ("ALJ"), finding he sustained a cervical strain, a lumbar strain and multiple myalgias/arthralgias due to a work-related fall on January 27, 2012. The ALJ determined Newton's work-related injuries did not result in permanent impairment, and he awarded temporary total disability ("TTD") benefits from January 28, 2012 to March 27, 2012 and medical benefits. The ALJ also resolved two medical disputes in Gallmar Contracting's ("Gallmar") favor. No petition for reconsideration was filed by either party.

On appeal, Newton essentially argues the evidence compels a finding of permanent injury and requests physical therapy be paid by his employer. Because the ALJ's decision is supported by substantial evidence and a contrary result is not compelled, we affirm. Regarding the award of TTD benefits, we vacate, and remand for additional findings.

Newton filed a Form 101 alleging he slipped and fell on January 27, 2012 while working as a carpenter for Gallmar, injuring his "low back, hands, feet, neck, left hip, left arm, right arm, shoulders, [and] upper back (thoracic)." In support of the claim, Newton attached numerous records including a July 10, 2012 lumbar MRI report which denoted a "small right foraminal disc protrusion associated with annular tear L4-5. Mild right neural

foraminal stenosis”; an August 3, 2012 letter from his chiropractor, Dr. Gerald Baker, which outlined treatment beginning February 10, 2012, for complaints of upper back, neck, lower back, hip and leg pain due to the January 27, 2012 work injury; an August 13, 2012 off work slip signed by a physician at St. Joseph’s Hospital restricting him to “limited use of back until MRI follow up”; an August 13, 2012 office note by Dr. Timothy Wilson ordering a lumbar MRI; and physical therapy records from Cardinal Hill Rehabilitation Hospital dated August 16, 2012.

Gallmar filed two medical disputes during the litigation of this claim. The June 3, 2013 medical dispute, based upon Dr. Albert Olash’s May 9, 2013 utilization review report, contests the recommendation by Dr. Danesh Mazloomdoost for a behavioral health evaluation to rule out opioid dependence. Dr. Olash determined the recommendation was unrelated to the January 27, 2012 work injury. The June 19, 2013 medical dispute contests Dr. Gerald Eichhorn’s recommendation for additional physical therapy for shoulder pain based upon a June 6, 2013 utilization review by Dr. Olash. Dr. Olash opined all active pathology due to the work injury had resolved and additional physical therapy is neither necessary nor appropriate. Gallmar also filed six additional notices of contest throughout the litigation

before the ALJ. Gallmar contested requests for additional chiropractic treatment with Dr. Baker and treatment rendered August 13, 2012 by St. Joseph's Hospital. It also disputed medical bills from Kentucky Lab Services, Saint Joseph East, Saint Joseph Urology, Quest Diagnostics, and Dr. Ben Rambicure.

Newton testified by deposition on May 6, 3013 and at the final hearing held February 25, 2014. Newton was born on April 14, 1959 and resides in Lexington, Kentucky. He earned a bachelor's degree in construction technology from Eastern Kentucky University. Newton began working for Gallmar as a carpenter/framer in September 2011. He performed heavy, physical labor, and stated he was required to lift up to two hundred pounds. On January 27, 2012, Newton slipped off the porch while trying to step down onto a brick ledge, and fell eight feet to the ground landing on his left side. Specifically, his hip and lower back struck the porch or brick ledge, and his left side, shoulder and head hit the ground. He initially could not move but was eventually able to get up with the assistance of a co-worker. Newton notified his foreman of his fall, and he was assigned to sweeping duties for the remainder of his shift.

Newton testified he visited the emergency room at St. Joseph's Hospital on the night of the accident and again

a few days later. Newton was referred to Dr. Wilson, an orthopedist who restricted him from work, ordered physical therapy and prescribed medication. Dr. Wilson eventually released Newton to return to work without restrictions. Newton returned five or six weeks later complaining of pain throughout his entire spine. Dr. Wilson ordered a pelvic MRI, which was normal, and then a lumbar MRI.

Newton returned to the emergency room at St. Joseph's Hospital while treating with Dr. Wilson due to his pain. The emergency room physician restricted him to light duty and Dr. Wilson later agreed with the restrictions. Dr. Wilson referred Newton to Dr. James Bean, a neurosurgeon, who ordered thoracic and cervical spine MRIs, prescribed Tramadol and Neurontin, and recommended additional physical therapy. Dr. Bean also referred him to Dr. Eichhorn and Dr. Mazloomdoost. Newton also sought treatment from his primary care physician, Dr. Rambicure, and his chiropractor, Dr. Baker.

Newton described various symptoms attributable to the January 27, 2012 work injury. He experiences pain and tightness in his chest, neck, mid back, low back, shoulders, left hip, and left leg. He has experienced shortness of breath, testicular problems, and "electric type of feelings" under his arms and down his hands. Prior to the work

accident, Newton was not taking any medication, and had no previous back or chest problems. Newton returned to unrestricted work with Gallmar after a period of light duty. He was then restricted to light duty again. Newton stated Gallmar provided him light duty work for approximately two weeks. Newton was then discharged from employment after Gallmar could no longer accommodate the light duty restrictions. Newton stated he last worked on September 24, 2012, and then received unemployment benefits through December 2013.

Treatment records from Dr. Wilson, St. Joseph's Hospital, Dr. Bean, Dr. Mazloomdoost, Dr. Eichhorn, and Dr. Rambicure were introduced by the parties. Dr. Wilson treated Newton from February to December 2012. He initially diagnosed Newton with left ischial tuberosity contusion and thoracic strain, ordered physical therapy, and restricted him to seated duty. After noting improvement, Dr. Wilson released Newton to return to unrestricted work on March 28, 2012. However, Newton returned May 21, 2012 complaining of back, leg, heel and hand pain. A June 12, 2012 pelvic MRI returned unremarkable. A July 10, 2012 lumbar MRI demonstrated a small right foraminal disc protrusion associated with annular tear L4-5 and mild right neural foraminal stenosis. X-rays of Newton's wrists and left

ankle were negative. Dr. Wilson recommended physical therapy and prescribed anti-inflammatory medication. On August 13, 2012, Newton complained of pain in his upper and lower back, in addition to shortness of breath. He recommended Newton find a primary care physician and go to the emergency room to address his shortness of breath. Newton visited the St. Joseph Hospital emergency room the same day. Dr. Melissa Cheeseman diagnosed fatigue and back pain, prescribed medicine and restricted Newton to limited use of his back. Newton returned to the emergency room on August 23, 2012 complaining of low back pain and was instructed to follow up with Dr. Wilson. Newton continued to treat with Dr. Wilson who ordered a cervical MRI. In the last office visit of record dated December 6, 2012, Dr. Wilson diagnosed thoracic pain from the work-related injury in January 2012. He noted Newton needs a thoracic MRI as recommended by Dr. Bean. He indicated he has no further treatment recommendations for Newton. Regarding restrictions, Dr. Wilson noted: “As far as restrictions at work, apparently he has been on light duty . . . I agree with Dr. Bean’s note that the patient should be at maximum medical improvement in January.”

Newton treated with Dr. Bean on several occasions from August 2012 to November 13, 2013. Dr. Bean initially

diagnosed a lumbar strain with annular tear at L4-5 with no radiculopathy or instability; and cervical and cervicothoracic pain probably due to a sprain with no evidence of myelopathy or radiculopathy. He recommended additional physical therapy and ordered cervical and thoracic MRIs. He expected Newton to reach maximum medical improvement ("MMI") with the use of physical therapy by January 2013. In the most recent office note of record on November 13, 2013, Dr. Bean noted the cervical myelogram revealed degenerative disk at C5-6 with no radiculopathy or myelopathy. Thoracic studies revealed a disk bulge at T9-10 without radiculopathy or myelopathy. A lumbar myelogram was normal. Dr. Bean released Newton from his care, and declined to recommend additional treatment options. He noted he could not find any specific neurologic reason to restrict Newton from work. He referred Newton to be evaluated by a physiatrist and by Dr. George Boucher to assess his functional capabilities.

Newton treated with Dr. Mazloomdoost, a pain management physician on two occasions in February and April 2013. Dr. Mazloomdoost initially recommended epidural steroid injections, prescribed Tramadol and Mobic. On April 3, 2013, Dr. Mazloomdoost found Newton was not a candidate for opiate management after he admitted to purchasing

medication illicitly. He ordered psychological testing due to concerns of opiate dependence. Newton treated with Dr. Eichhorn on April 25, 2013. Dr. Eichhorn prescribed additional physical therapy for the shoulder and restricted him to light duty. Newton began treating with Dr. Rambicure in February 2013. Over the next several months, Dr. Rambicure noted complaints of pain throughout the entire spinal column, reflux, blood pressure and hypertension. On June 24, 2013, Dr. Rambicure recommended light duty and physical therapy for persistent cervical-thoracic pain due to the January 2012 work injury.

Newton filed the February 28, 2013 report of Dr. Frank Burke, who performed an evaluation at his request. Dr. Burke diagnosed acute cervical contusion and strain with non-verifiable radicular complaints involving the right upper extremity; local and specific contusion/injury to the thoracic spine at the T4 level with persistence of pain and dysfunction, which might very well be strain, but with a soft tissue component, resulting in a persistent pain pattern and; lumbosacral spine strain with an annular tear at L4-5 with non-verifiable radicular complaints in the L5 distribution. Dr. Burke assessed an 11% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides). He opined

water therapy and pain management are reasonable, while surgery and narcotic medication are not. He stated Newton can return to work within his tolerances, but to not crawl and to lift carefully. In a May 16, 2013 addendum, Dr. Burke noted Newton is restricted in activity precluding him from working full-time, regular duty as a carpenter.

Gallmar submitted the April 16, 2013 report of Dr. Daniel Primm and the June 12, 2013 report of Dr. Gregory Snider. Dr. Primm diagnosed soft-tissue strains, by history, and probable significant psychological overreaction versus conversion reaction. He observed Newton's symptoms and behavior seem very unusual and inconsistent with his history of reported injury. He also stated many of the symptoms, particularly his shortness of breath and chest pain, cannot be related to his fall at work. Dr. Primm recommended a psychiatric evaluation.

Dr. Snider diagnosed cervical strain, lumbar strain and multiple myalgias/arthralgias. Dr. Snider noted Newton suffered sprain/strain/contusion type injuries and various imaging studies failed to show any significant anatomic disruption. He agreed with Dr. Primm's statement there is significant overreaction and a psychological component. Dr. Snider opined Newton had reached MMI and found no need for any formal medical treatment. He

recommended over-the-counter anti-inflammatories and a home exercise program. Dr. Snider declined to assess an impairment rating for Newton's injuries due to the presence of overreaction, purely subjective complaints by Newton, and inability to identify any specific acute, anatomic disruption from the work injury.

A benefit review conference ("BRC") was held on August 9, 2013. The BRC order reflects the parties stipulated Gallmar paid TTD benefits from January 28, 2012 to March 27, 2012 and medical expenses totaling $14,215.79. It also reflects Newton last worked in September 2012. The contested issues preserved for review were benefits per KRS 342.730, work-relatedness/causation, unpaid or contested medical expenses, TTD, whether injury is permanent, and credit for unemployment benefits.

The ALJ rendered an Opinion and Order on March 20, 2014. Under the heading "Summary of Evidence," the ALJ listed the evidence submitted by each party and stated he reviewed it and the entire record on file. He then only summarized Newton's testimony, the reports of Drs. Burke, Snider and Primm, and the November 13, 2013 office note of Dr. Bean. In the opinion, the ALJ found Newton sustained a cervical strain, a lumbar strain and multiple myalgias/ arthralgias as a result of the January 27, 2012 workplace

fall based upon Newton's testimony and Dr. Snider's report. The ALJ determined Newton's work-related injuries did not result in permanent impairment pursuant to the AMA Guides, again relying upon Dr. Snider's report. The ALJ found Gallmar entitled to a credit or offset for the unemployment benefits paid during the period of TTD. The ALJ found Newton was entitled to recover for his medical bills and expenses related to the cervical and lumbar strain. The ALJ also resolved both medical disputes in Gallmar's favor, relying upon Dr. Olash's opinions. After citing the statutory definition of TTD pursuant to KRS 342.0011(11)(a), the ALJ provided the following analysis:

> Based upon the plaintiff's testimony regarding his work-related injuries on January 27, 2012 and his subsequent medical treatment and return to work for the defendant at light duty, I make the determination that the plaintiff was entitled to recover temporary total disability benefits in the amount of $260.30 per week from January 28, 2012 to March 27, 2012, for a total amount of $2,231.14, as paid by the defendant and its workers' compensation insurer. I make the factual determination that the defendant's decision to terminate the plaintiff's temporary total disability benefits on March 27, 2012 was soundly based upon the persuasive and compelling report of Dr. Wilson, his treating physician, releasing the plaintiff to return to full duty on March 26, 2012.

The ALJ stated as follows regarding future medical expenses:

> Based upon the persuasive and compelling medical evidence from Dr. Snider, as covered in detail above, I make the factual determination that Mr. Newton did sustain injuries to his cervical area and lumbar area and that he has reached maximum medical improvement with no permanent impairment rating. Maximum medical improvement refers to the point at which a condition causing disability has stabilized and will not be improved by additional medical treatment, although some treatment may still be necessary. Based upon the decision of the Kentucky Supreme Court in *United Parcel Service v. Montgomery*, 2006 WL 2708532 (Ky.2006), I make the determination that although the plaintiff is not disabled to the level that warrants permanent income benefits, he is entitled to some additional medical treatment, although this will not prevent the defendant from disputing the reasonableness and necessity of any proposed treatment for the effects of the plaintiff's injuries. I specifically make the determination that the plaintiff is not entitled to recover permanent partial disability benefits under KRS 342.730(1).

The ALJ awarded Newton TTD benefits from January 28, 2012 through March 27, 2012 and medical expenses. The ALJ sustained Gallmar's two medical disputes and allowed a credit for any workers' compensation benefits and unemployment benefits already paid to Newton.

No petition for reconsideration was filed. On appeal, Newton states he is enrolled in vocational school, has purchased a rehabilitation facility membership and takes various prescription medications for his alleged work injury. Newton asserts requests for physical therapy by six different physicians have been denied and this has precluded him from reaching MMI. Newton argues based on the "overwhelming preponderance of evidence, considering the entire record, and that the ALJ decision is not based on substantial medical authority and was erroneous" and requests reversal. He also argues "the ample power of all evidence further makes the ruling a clearly unwarranted exercise of discretion." Newton also filed a fourteen page reply brief. Newton provided a chronological summary of his medical treatment received since the January 27, 2012 work accident. Newton essentially argues Dr. Snider's opinions do not constitute substantial evidence, and the medical evidence compels "the validity of the injury and the necessity of therapy." He requests physical therapy be found compensable, and workers' compensation benefits including payment for medical treatment.

Because Newton is proceeding *pro se*, we will attempt to explain the fundamental legal principles controlling how this Board must decide an appeal. In the

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 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).

Although we understand Newton is frustrated regarding the ALJ's decision, we also recognize the ALJ's job as fact-finder is difficult. 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 in cases where the evidence is conflicting, the facts concerning an issue as determined by the ALJ are afforded vast deference as a matter of law on appellate review.

Authority establishes Newton, 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). Since Newton was unsuccessful in his burden of proving his case, 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 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 10 (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.

Here, the record contains substantial evidence supporting the ALJ's determination Newton sustained cervical and lumbar strains due to the January 27, 2012 accident, which did not result in a permanent impairment. In making this determination, the ALJ relied upon Newton's testimony and, in particular, the opinions of Dr. Snider. In his report, Dr. Snider provided a summary of treatment rendered to Newton following the January 27, 2012 accident, and listed records from twelve different medical providers which he reviewed. After performing an examination, Dr. Snider diagnosed cervical strain, lumbar strain and multiple myalgias/arthralgias. He declined to assess an impairment rating due to the presence of overreaction, purely subjective complaints by Newton, and the inability to identify any specific acute, anatomic disruption from the work injury. The above constitutes the requisite substantial evidence and no contrary result is compelled. Although Newton strongly advocates a different conclusion,

he merely points to contradicting evidence which is not adequate to require reversal on appeal.

We also determine the ALJ acted within his authority in awarding Newton additional medical benefits for the work-related cervical and lumbar strains absent an award of permanent partial or total disability award. It is well established an ALJ can award future medical benefits for a work-related injury, even though a claimant has reached MMI and did not have a permanent impairment rating from the injury. *See* FEI Installation, Inc. v. Williams, 214 S.W.3d 313 (Ky. 2007).

With that said this Board is permitted to *sua sponte* reach issues even if unpreserved but not raised on appeal. KRS 342.285(2)(c); KRS 342.285(3); George Humfleet Mobile Homes v. Christman, 125 S.W.3d 288 (Ky. 2004). In his opinion, the ALJ listed the evidence filed by each party, but only summarized the three independent medical evaluations, Newton's testimony and the November 13, 2013 office note of Dr. Bean. After citing the definition of TTD, the ALJ determined Gallmar's decision to terminate TTD benefits on March 27, 2012 was soundly based upon the report of Dr. Wilson, who released Newton to full duty on March 26, 2012.

As noted by the ALJ, TTD is the condition of an employee who has not reached MMI following a work-related injury *and* who has not reached a level of improvement that would permit a return to employment. KRS 342.0011(11)(a). Both conditions must be satisfied for an employee to qualify for TTD benefits. *See* W.L. Harper Construction Company v. Baker, 858 S.W.2d 202, 205 (Ky. App. 1993); Double L Const., Inc. v. Mitchell, 182 S.W.3d 509, 513-4 (Ky. 2005). Regarding the second prong, until MMI is achieved, an employee is entitled to a continuation of TTD benefits so long as he remains disabled from his customary work or the work he was performing at the time of the injury. Magellan Behavioral Health v. Helms, 140 S.W.3d 579, 580-581 (Ky. App. 2004); Double L Const., Inc. v. Mitchell, 182 S.W.3d 509, 513-514 (Ky. 2005).

A review of the record reveals Dr. Wilson allowed Newton to return to unrestricted work on March 28, 2012, as relied upon by the ALJ in awarding TTD benefits through March 27, 2012. However, Newton returned to Dr. Wilson a few months later complaining of continued symptoms. Newton continued to treat with Dr. Wilson, who ordered diagnostic studies, prescribed medication, and recommended additional physical therapy. It does not appear Dr. Wilson restricted Newton from work during this time. However, in the last

office visit of record dated December 6, 2012, Dr. Wilson noted Newton needs a thoracic MRI as recommended by Dr. Bean. Regarding restrictions, Dr. Wilson noted: "As far as restrictions at work, apparently he has been on light duty . . . I agree with Dr. Bean's note that the patient should be at maximum medical improvement in January." Dr. Bean opined Newton would attain MMI with the use of physical therapy by January 2013. On Newton's last visit with Dr. Bean on November 13, 2013, he declined to recommend additional medical treatment and did not restrict him from work. In addition, Newton's other treating physicians provided restrictions and/or ordered additional physical therapy during his course of treatment.

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. *See* 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); and New Directions Housing Authority v. Walker, 149 S.W.3d 354, 358 (Ky. 2004). The ALJ's one sentence explanation is inadequate in light of the record revealing Dr. Wilson returned Newton to unrestricted work on March 28, 2012 but agreed with Dr. Bean he would not attain MMI until

January 2013 with physical therapy, and the presence of other conflicting evidence regarding this issue. On remand, the ALJ must clarify and expand on his analysis regarding Newton's entitlement to TTD benefits utilizing the two-pronged analysis referenced above, and provide the basis for his determination. If the ALJ's determination remains unchanged, he is to clarify why he relied upon Dr. Wilson's opinion allowing Newton to return to unrestricted work in March 2012 and not his agreement with Dr. Bean that Newton would attain MMI in January 2013.

Finally, Newton requested oral arguments be held. After having reviewed the record, it is determined an oral argument is unnecessary in arriving at a decision, and therefore the request is **DENIED**.

Therefore, those portions of the March 20, 2014 Opinion and Order by Hon. William J. Rudloff, Administrative Law Judge, finding Newton sustained cervical strain, lumbar strain and multiple myalgias/arthralgias as a result of the work-related fall, but not warranting permanent impairment and the award of future medical expenses are hereby **AFFIRMED.** Those portions of the March 20, 2014 Opinion and Order relating to TTD benefits are hereby **VACATED.** This claim is **REMANDED** to the ALJ for entry of an amended opinion in conformity with the view expressed herein.

ALL CONCUR.

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MICHAEL W. ALVEY, CHAIRMAN
WORKERS' COMPENSATION BOARD

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