Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: December 23, 2015

CLAIM NO. 201400467

JAMES RIVER COAL COMPANY PETITIONER

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

RONALD WAYNE CHILDERS and
HON. WILLIAM. J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
VACATING & REMANDING

* * * * * *

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

ALVEY, Chairman. James River Coal Company ("James River") appeals from the decision on remand rendered September 11, 2015 by Hon. William J. Rudloff, Administrative Law Judge ("ALJ"). This Board previously entered opinions on February 20, 2015, and July 17, 2015 vacating and remanding the decision of the ALJ rendered August 14, 2014, the order

on reconsideration rendered September 23, 2014, and the decision rendered April 7, 2015. In these decisions, the ALJ awarded Ronald Wayne Childers ("Childers") temporary total disability ("TTD"), permanent total disability ("PTD") benefits and medical benefits for injuries to his neck and low back due to cumulative trauma sustained as a result of his work at James River.

This is the third time this claim has been appealed to this Board. James River argues the ALJ's findings of cumulative trauma cervical and lumbar injuries, and the award of PTD benefits are not supported by substantial evidence. Because the ALJ has failed to comply with the previous directions of this Board, and has failed to support his decision with a citation to the required substantial evidence, we vacate the award of PTD benefits, and remand for additional findings based upon the evidence of record as indicated below.

As noted in our most recent decision, the facts of this claim have been recited previously and we adopt our summary found in the February 20, 2015 Opinion Vacating and Remanding. In our decision entered February 20, 2015, we stated as follows:

> The ALJ did not provide sufficient findings of fact and an explanation which allow for meaningful review of

his determination Childers sustained work-related cumulative trauma injuries to his back and neck.

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We are unable to determine the specific portion or portions of the summarized testimony which supports the ALJ's determination Childers sustained work-related injuries to the back and neck. Even though the ALJ stated Childers testified he began experiencing low back pain, he did not discuss any testimony as to what Childers believed caused this low back pain. Significantly, Childers testified he had received extensive treatment for low back pain prior to working for James River. The ALJ's statement Childers testified he was not physically capable of returning to work for James River or any other job for which he has work experience does not establish Childers sustained a work injury. More importantly, Childers' testimony summarized by the ALJ contains no reference to neck symptoms and by extension a neck injury. Further, the ALJ's summary does not indicate whether Childers was referring, in part, to the effects of his severe hip condition when he stated he was unable to work for James River or perform any other job at which he had work experience. We note Childers provided extensive testimony, during his deposition and at the hearing, regarding his symptoms and the nature of his injury, none of which was summarized by the ALJ.

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Dr. Bakun's benign statement that in his opinion the "structural changes and mild spasms in the affected areas have

been worsened by Childers' occupation" does not establish Childers sustained work injuries during his employment at James River. Further, Dr. Bakun did not state the extent to which the conditions were aggravated and whether these were dormant non-disabling conditions aroused into disabling reality by Childers' work activities at James River. Dr. Bakun did not offer an opinion as to whether Childers sustained a work injury. More importantly, Dr. Bakun does not diagnose work-related injuries to the back and neck. Thus, the ALJ's reliance upon the portions of Dr. Bakun's report, which he summarized, without further explanation does not sufficiently provide the basis for his determination of causation.

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The ALJ also relied upon what he characterized as persuasive and compelling medical evidence from Dr. Uzzle.

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... Dr. Uzzle diagnosed "chronic neck sprain/strain from cumulative trauma according to his history" and "chronic lumbar sprain/strain with degenerative disc disease." He did not link either to Childers' work. Rather, under the heading "Causation," he stated "[c]umulative trauma sustained over the work history of Ronald Childers is the cause of his complaints." In his explanation of causal relationship, Dr. Uzzle states a series of mini traumas which have been experienced by Childers in the course of his work life was brought into disabling reality by his last work with James River. Dr. Uzzle characterized the traumas as excessive

forces placed on the musculoskeletal system and the joints, disc in the spinal column, ligament fibers, and other structures supporting the joints in the spine. Notably absent is a statement specifically stating which sections of the spine were subjected to the mini-traumas and how the mini-traumas affected specific segments of the spine. Dr. Uzzle then stated these conditions have been developing over the years of exposure and largely not symptomatic until Childers' last employment. Dr. Uzzle's statement that Childers' problems were largely not symptomatic until his last employment does not establish Childers sustained back and neck injuries solely attributable to his last employment. In fact, Dr. Uzzle's next statement that this was a dormant non-disabling condition aroused into disabling reality by cumulative trauma does not in any fashion attribute any or all of the cumulative trauma to Childers' work for James River. Rather, Dr. Uzzle indicates a dormant non-disabling condition, which he does not describe, was aroused by cumulative trauma. Dr. Uzzle's report does not provide separate and distinct discussions of the nature of the cumulative trauma injuries to both the back and neck.

Thus, without more, the ALJ's references to Childers' summarized testimony and to medical evidence from Drs. Uzzle and Bakun "covered in detail above" do not sufficiently apprise the parties or this Board of the basis for the ALJ's decision on the issue of whether Childers sustained a compensable back and or neck injury. The ALJ must provide a separate and distinct analysis regarding each alleged injury, and enter sufficient findings of fact which provide the

basis for his determination as to whether Childers sustained a work-related neck injury and a work-related back injury. This is especially true since in its petition for reconsideration, James River requested separate findings for each alleged injury and the ALJ failed to comply with the request.

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Since the basis for his determination of work-related back and neck injuries is not supported by sufficient findings of facts, the ALJ's determination Childers sustained back and neck work injuries must be vacated. Similarly, the award of PTD benefits must also be vacated.

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On remand, should the ALJ determine Childers sustained a work-related injury or injuries, he must identify the specific portions of Childers' testimony and medical evidence upon which he relied in support of his findings. This analysis would necessarily include specific findings as to the nature and extent of any work injury he determines Childers sustained, the basis for each determination, and the impairment rating attributable to the work injury.

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In summary, on remand, should the ALJ again determine Childers sustained a work-related injury or injuries he must state what percentage of Childers' impairment, if any, is directly attributable to his work at James River. In doing so, the ALJ must cite, in his amended opinion and order, the

> medical proof that establishes Childers' work at James River contributed in some degree to the effects of his overall cumulative trauma injury and then, with specificity, denote to what degree it contributed. Simply because Childers was last employed by James River does not place the entire liability for Childers' alleged disability on James River. The ALJ must cite to evidence of record establishing that Childers' work activities performed during his employment with James River contributed to his overall permanent condition, producing some degree of harmful change to the human organism.
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> Even though we are vacating the award of PTD benefits, we are compelled to address the ALJ's analysis concerning the issue of permanent total disability. Permanent total disability 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:
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>> 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.

Here, the ALJ only cited to Ira A. Watson Department Store v. Hamilton, supra, and did not engage in the appropriate analysis of the factors discussed above. The mere statement he relied upon Childers' testimony and the medical evidence from Drs. Bakun and Uzzle, which the ALJ indicated he had covered in detail previously, is insufficient to apprise the parties and this Board of the basis for his determination. The ALJ provided Childers' age and noted he had a good work ethic. He did not indicate how Childers' age and work ethic factored into his decision. Any analysis concerning the existence of permanent total disability requires the ALJ to set forth how the severity of Childers' injury or injuries as well as how his age, work history, and education

factored into his decision to award PTD benefits. As noted by the Supreme Court in Ira A. Watson Department Store v. Hamilton, supra, the ALJ must make specific findings regarding Childers' post-injury physical, emotional, intellectual, and vocational status and how those factors interact. The ALJ failed to discuss any of those factors.

The ALJ's analysis regarding Childers' entitlement to PTD benefits is insufficient as the ALJ did not provide the basis for his finding Childers would not be able to find work consistently under normal employment conditions. He merely stated that based upon "the above factors" he made the factual determination Childers could not find work consistently under regular work circumstances and work dependably. That statement without further explanation is insufficient. The ALJ must cite to the specific portions of the lay and medical evidence he relied upon for making such a finding.

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As we are vacating the ALJ's findings regarding a work-related injury and the award of permanent total disability, the award of TTD benefits must also be vacated. We note, the award of TTD benefits in a claim where PTD benefits have been awarded is unnecessary. That fact aside, we agree with James River the ALJ's analysis regarding TTD benefits is insufficient.

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In the case *sub judice*, it is clear the ALJ awarded TTD benefits based upon Dr. Uzzle's assessment of MMI. What is not clear, however, is why the ALJ

> initiated his award of TTD benefits on October 15, 2013, which, according to the evidence in the record, is the day Childers was laid off. Significantly, Childers testified that after being laid off on that date he applied for work anywhere and everywhere but mainly at coal companies. The ALJ merely cited to Magellan Behavioral Health v. Helms, supra, but did not outline the law pertaining to entitlement to TTD benefits in detail in both the August 14, 2014, Opinion and Order and the September 23, 2014, Opinion and Order on Reconsideration. The ALJ merely stated he relied upon Dr. Uzzle's opinion as to when Childers attained MMI, which is an insufficient analysis supporting an award of TTD benefits on this issue. Again, the ALJ must provide adequate findings of fact based on the evidence in order to advise the parties and this Board of the basis for his decision. Shields v. Pittsburgh and Midway Coal Min. Co., supra; Big Sandy Cmty. Action Program v. Chaffins, supra. It is not the role of this Board to speculate on the ALJ's rationale and to render an opinion based on that speculation.
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> On remand, should the ALJ determine Childers is only entitled to PPD benefits, the ALJ must engage in the two prong analysis outlined herein in determining any period during which Childers is entitled to TTD benefits. The ALJ must also determine the appropriate start date for the payment of PPD benefits.

In the Amended Opinion and Order on Remand rendered April 17, 2015, the ALJ awarded PTD, but not TTD benefits. In our decision entered July 17, 2015, we noted

in the ALJ's original decision, and order on reconsideration, along with his decision on remand, he acknowledged Childers treated with Patricia Boggs, APRN ("Nurse Boggs") who works with Dr. George Caudill, but failed to address her treatment records. Nurse Boggs was apparently Childers' family physician from whom he received treatment during twenty office visits from July 2012 through July 2014. Those records were submitted by motion from James River. On August 8, 2014, the ALJ entered an order allowing the records of Nurse Boggs into evidence.

Nurse Boggs noted she primarily treated Childers for right hip pain, but he also complained of neck, back and arm pain. On August 3, 2012, Nurse Boggs reported Childers stated he had experienced right hip pain for seven years. On October 21, 2013, Nurse Boggs noted Childers' complaints of neck and left arm pain. She stated he had chronic complaints of low back and neck pain. On November 21, 2013, Nurse Boggs noted Childers' low back pain was chronic. Childers reported he had experienced constant neck pain for fifteen years which began when he popped his neck.

In his September 11, 2015 decision, the ALJ stated as follows:

The most recent Opinion dated April 17, 2015 states on Page 4 that I have carefully reviewed and considered all of the evidence designated by that parties and the complete and entire record in the case file. I carefully compared and contrasted all of the evidence before rendering said Opinion and Order, including the evidence from Nurse Practitioner Patricia Boggs. Nurse Practitioner Boggs is not a medical doctor and was not Mr. Childers' family physician. In its very recent Opinion in Claim No. 2014-74748, Lana Lee v. Livingston County Hospital, et al, entered on September 4, 2015, the Board approved Judge Roark's Order striking the statement of Stephanie Mundy, a Nurse Practitioner, since she was not a physician as required by 803 KAR 25:010, §10.

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I specifically compared and contrasted the evidence from Nurse Practitioner Boggs with the medical evidence from the treating chiropractor, Dr. Bakun, and from the examining orthopedic surgeon, Dr. Uzzle. I again emphasize that Nurse Practitioner Boggs is not a medical doctor and was not Mr. Childers' treating physician. Relying upon the Opinion of the Workers' Compensation board in Claim No. 2014-74748, Lana Lee v. Livingston County Hospital, et al, entered September 4, 2015, and the provisions of 803 KAR 25:010 §10, which provides that only the evidence of a physician may be filed, I make the determination that the weight of credibility obviously rests with Dr. Bakun and Dr. Uzzle, as compared to what Nurse Practitioner Boggs said, and I make that determination.

The ALJ's most recent decision is primarily a reiteration of his previous opinions, including his emphasis of underlining various restatements. In addition to the above language pertaining to Nurse Boggs, the ALJ added a reference to the five step requirement set forth in Ashland v. Stumbo, 461 S.W.3d 392 (Ky. 2015).

We note the ALJ, as fact-finder, 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 inadequate for 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, 708 S.W.2d 641 (Ky. 1986).

The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to the weight and credibility to be afforded the evidence or by noting reasonable inferences that otherwise could have been drawn from the record. Whittaker v. Rowland, 998 S.W.2d 479, 481 (Ky. 1999). So long as the ALJ's ruling with regard to an issue is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, supra.

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).

That said, KRS 342.285 (2)(d) & (e) state as follows:

> (2) No new or additional evidence may be introduced before the board except as to the fraud or misconduct of some person engaged in the administration of this chapter and affecting the order,

> ruling, or award, but the board shall otherwise hear the appeal upon the record as certified by the administrative law judge and shall dispose of the appeal in summary manner. The board shall not substitute its judgment for that of the administrative law judge as to the weight of evidence on questions of fact, its review being limited to determining whether or not:
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> > (d) The order, decision, or award is clearly erroneous on the basis of the reliable, probative, and material evidence contained in the whole record;
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> > Or
> >
> > (e) The order, decision, or award is arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

The ALJ's determination on remand remains deficient. Not only has he yet again failed to perform the appropriate analysis as directed, he has refused to consider evidence which **HE** allowed into the record, specifically the records of Nurse Boggs. The ALJ based this refusal upon a holding in a decision by this Board unrelated to the claim *sub judice*. The facts in that decision are completely different than those set forth in this claim. In this case, Nurse Boggs is a nurse practitioner, not a nurse. While a nurse practitioner is not specifically listed in the definition of physician in

KRS 342.0011(32), his or her duties are consistent with the duties of a physician and other positions so listed. Thus, her notes, reports, and records should have been given due consideration. We also note the ALJ has once again failed to point to the specific evidence from either Dr. Bakun or Dr. Uzzle which reflect Childers' injuries occurred while he was working for James River.

We remain unable to determine the specific portion or portions of the brief summarization of the evidence which supports the ALJ's determination Childers sustained work-related injuries to his neck and low back. Although the evidence indicates Childers takes pain medication, and did so long before he ceased his employment at James River, it does not establish this is prescribed for neck or low back pain rather than for the residuals of the unrelated right hip injury he sustained in a motorcycle accident in 2005. In his decision on remand, the ALJ pointed to Childers' testimony he began having neck pain seven to eight years ago, which conflicts with the records from Nurse Boggs which reflect he has experienced neck pain for over fifteen years, beginning with a popping incident. We additionally note Dr. Uzzle's statement indicating Childers' conditions were largely not symptomatic prior to his last employment. This indicates his condition may have

indeed been symptomatic prior to his employment with James River. The ALJ must address this apparent conflicting statement from Dr. Uzzle on remand.

We have previously outlined deficiencies in the reports of Drs. Bakun and Uzzle, and directed the ALJ to, "provide a separate distinct analysis regarding each alleged injury, and enter sufficient findings of fact which provide the basis for his determination as to whether Childers sustained a work-related neck injury and a work-related back injury." We additionally note the ALJ was previously directed to provide and outline the specific portions of Childers' testimony, and the medical evidence supporting his findings. We stated, "This analysis would necessarily include specific findings as to the nature and extent of any work injury he determined Childers sustained." Likewise, the ALJ was directed to specifically provide the basis for each determination, and the impairment rating attributable to the work injury. Again, the ALJ failed to determine the specific basis for Dr. Uzzle's assessments of impairment.

The ALJ's summaries of the records and reports of Drs. Bakun and Uzzle remain deficient, and consist merely of recitations from his previous decisions. His analysis of opinions from those physicians remains deficient as they

relate to his ultimate conclusions. Simply put, the ALJ has yet again failed to comply with the direction of this Board.

We agree the ALJ was not required to discuss every shred of evidence which factored into his decision. However, after being directed to do so, and having been afforded the opportunity to provide some explanation for his reasoning, the ALJ has failed to adequately respond to the previous direction of this Board

The ALJ has again provided primarily conclusory pronouncements rather than findings. Merely making conclusory statements without citation to supporting substantial evidence amounts to an abuse of discretion. Abuse of discretion has been defined, in relation to the exercise of judicial power, as that which "implies arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision." Kentucky Nat. Park Commission, ex rel. Comm., v. Russell, 301 Ky. 187, 191 S.W.2d 214 (Ky. 1945). Bullock v. Goodwill Coal Co., 214 S.W.3d 890, 893 (Ky. 2007).

In the previous opinion entered by this Board, we noted the ALJ had failed to adequately address the factors set forth in Ira A. Watson Department Store v. Hamilton,

supra. We again note the ALJ's assessment regarding PTD benefits is insufficient. We note the ALJ took into consideration Childers' restrictions assessed by Dr. Uzzle in his analysis, but based upon the foregoing, that does not clearly establish entitlement to permanent total disability benefits, nor does his determination clearly set forth these restrictions were directly required by his work with James River.

The ALJ listed the fact Childers is now 44 years old, which he stated is "upper" middle-age, without making any determination regarding how this affects his ability to obtain employment. He also noted Childers takes pain medication for his neck and low back. Nurse Boggs' records indicate Childers was taking pain medication before he left his employment with James River for his unrelated right hip and leg pain. Other than statements by evaluating physicians, the ALJ failed to cite to evidence indicating Childers is indeed taking pain medication for his neck and low back, and how this impacts his ability to work. The ALJ must also take into consideration the fact Childers actually sought employment in the coal industry after he left his employment with James River.

The ALJ is once again directed to provide an analysis encompassing all requirements pursuant to Ira A.

Watson Department Store v. Hamilton, supra, in reaching his determination. If after reviewing all of the factors, based upon the evidence, the ALJ determines Childers is not entitled to PTD benefits, he must make a determination of whether an award of permanent partial disability benefits is appropriate. If so, the ALJ must also engage in an appropriate analysis regarding entitlement to TTD benefits. We previously outlined the required analysis pertaining to an award of TTD benefits, and the ALJ is directed to make an analysis pursuant to the direction, if appropriate.

In arriving at this decision, we are not engaging in fact-finding. The ALJ is permitted to make any appropriate award based upon the evidence. However, the ALJ must provide an analysis which will allow for meaningful review. The ALJ is not permitted to reopen proof time, or to allow for any additional submission of evidence. The ALJ must make all determinations based upon the evidence as it existed at the time of his original decision.

Therefore, for the foregoing reasons, the award of PTD benefits by Hon. William J. Rudloff, Administrative Law Judge, in the opinion on remand rendered September 11, 2015, is hereby **VACATED**. This claim is **REMANDED** to the ALJ

for entry of an amended decision in conformity with the views expressed herein.

STIVERS, MEMBER, CONCURS IN RESULT ONLY AND JOINS IN MEMBER RECHTER'S SEPARATE OPINION.

RECHTER, MEMBER, CONCURS IN RESULT ONLY AND FURNISHES A SEPARATE OPINION.

RECHTER, Member. I concur in result only because I do not believe a nurse practitioner falls within the definition of "physician" pursuant to KRS 342.0011(32).

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