

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: December 18, 2015

CLAIM NO. 201383801

LAKE CUMBERLAND REGIONAL HOSPITAL

PETITIONER

VS.

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

LOUIS FOSTER  
and HON. WILLIAM J. RUDLOFF,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION  
VACATING AND REMANDING

\* \* \* \* \*

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

**RECHTER, Member.** Lake Cumberland Regional Hospital ("LCRH") appeals from the July 8, 2015 Opinion and Order and from the August 10, 2015 Order on Petition for Reconsideration rendered by Hon. William J. Rudloff, Administrative Law Judge ("ALJ"). The ALJ found Louis Foster ("Foster") entitled to permanent total disability benefits ("PTD"). LCRH argues the ALJ failed to make

sufficient findings to support the award of PTD benefits. LCRH further argues the ALJ failed to identify the level of impairment Foster sustained, and failed to make sufficient findings of fact to support the award of additional temporary total disability ("TTD") benefits on reconsideration. For the reasons set out herein, we vacate and remand for additional findings of fact and analysis.

Foster testified by deposition on December 1, 2014 and at the hearing held June 23, 2015. Foster began his employment with LCRH in 1990 and has worked in the catheterization lab since 1998. His work required that he wear a lead apron weighing twenty to thirty pounds for up to seven and a half hours during an eight hour shift. He was also required to position x-ray equipment and move patients. He alleged injuries to his thoracic and cervical spine and a psychological impairment as a result of injuries on February 10, 2012, May 4, 2013 and cumulative trauma manifesting on March 19, 2014.

On February 10, 2012, he was x-raying a new apron to assure there were no holes in the lead. When he lifted the apron from the table, he felt a shift in his back and pain in his upper back. He went to the emergency room at LCRH and was eventually referred to Dr. Magdy El-Kalliny for treatment. Dr. El-Kalliny took Foster off work in the

fall of 2012 and released him for light duty in November 2012. He was released to full duty in February 2013. Foster continued to have some pain but returned to his regular duties.

On May 4, 2013, Foster was reaching over a patient when he again felt a shift and pain in his back, and his legs "went out." He went to the emergency room at LCRH and again followed up with Dr. El-Kalliny who placed him off work, then restricted him to light duty. On March 19, 2014, Dr. El-Kalliny informed Foster that he had a cumulative trauma injury to the cervical spine from wearing the lead apron at work.

Foster testified his post-injury light-duty work included work in radiology at the Imaging Center where he assisted with outpatient x-rays. He did not have to move patients in this job. He also worked as a phlebotomist for approximately two weeks at reduced pay. He had some difficulty with his back pain because of the bending involved in this job. Finally, he worked for two weeks to a month as a monitor technician, watching heart rhythms, answering call bells, and performing secretarial type work. Foster indicated this job was not technically within his restrictions, but the employer "worked around" the lifting required in the position. His pay for the phlebotomist and

monitor technician jobs was less than half of what he earned in the catheterization lab. Foster stopped working on September 2, 2014 because of financial difficulties. He quit so he could cash out his retirement in order to keep his house and cars.

Foster testified he can sit for one half to two hours, and stand for one half to one hour. He has pain radiating down to his shoulders and numbness in his fingers in both hands. He has mid-back pain around both sides to his sternum, made worse by any physical activity including sitting for long periods or stooping. Foster indicated he has become moody and has trouble sleeping. His depression and anxiety affect his ability to concentrate. He takes Celexa, but it does not help. Foster was able to complete online courses and obtain a degree in Human Services from the University of the Cumberland. He was able to complete the course-work at his leisure. Foster does not feel he is presently capable of performing a desk job.

Dr. El-Kalliny treated Foster for the three alleged injuries. A March 20, 2012 MRI revealed a T6-7 disc herniation to the right. Dr. David Weber administered an epidural injection in June 2012. On August 2, 2012, Dr. El-Kalliny indicated Foster wanted to try to return to full-time duty. Foster was allowed to work half of the day

wearing the lead apron and was restricted to lifting fifteen pounds. However, his mid-back pain persisted. On February 26, 2013, Dr. El-Kalliny noted Foster was working without restrictions but continued to have pain. Dr. El-Kalliny placed Foster at maximum medical improvement ("MMI") for the 2012 injury on this date.

Dr. El-Kalliny again treated Foster following the May 4, 2013 injury. An MRI on May 24, 2013 revealed a new herniation at T7-8. On February 19, 2014, Dr. El-Kalliny restricted Foster to lifting twenty pounds, no standing for more than thirty minutes, and no wearing of the lead apron. On March 19, 2014, Dr. El-Kalliny advised Foster he had sustained a cumulative trauma injury to the neck from wearing the lead apron. A cervical MRI revealed disc prolapse at C3-4 and C4-5. Dr. El-Kalliny assigned permanent restrictions of no lifting greater than twenty pounds, alternating sitting and standing, and no wearing lead aprons. He assigned an 8% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5<sup>th</sup> Edition ("AMA Guides") due to the thoracic spine injuries and 5% for the cervical spine cumulative trauma injury.

LCRH submitted the report of Dr. Russell Travis who performed an independent medical evaluation ("IME") on

May 5, 2014. Dr. Travis felt the T6-7 disc extrusion had completely resolved with no residual. He assigned a 5% impairment rating for the thoracic spine related to the May 4, 2013 injury that involved a thoracic disc herniation at T7-8 which subsequently resolved.

Dr. Warren Bilkey performed an IME on April 4, 2014. He assigned an 8% impairment rating for the thoracic spine attributable to the February 10, 2012 and May 4, 2013 work injuries, and a 5% impairment rating for the cervical spine attributable to the March 19, 2014 cumulative trauma injury, for a combined 13% impairment rating pursuant to the AMA Guides. Dr. Bilkey opined Dr. El-Kalliny's restrictions were reasonable and medically necessary.

Dr. Timothy Kriss performed an IME on April 8, 2015 and diagnosed chronic mid-thoracic axial back pain, osteoarthritis of the neck, hyperflexia, and carpal tunnel. Dr. Kriss opined the thoracic disc herniations had completely resolved. He felt Foster's continued mid-back complaints were attributable to a musculoskeletal component rather than the resolved herniations. Dr. Kriss assigned a 5% impairment rating attributable to the 2012 and 2013 injuries and a 0% impairment rating for the cervical condition. He concluded Foster reached MMI from the 2012 injury of August 2, 2012 and reached MMI from the 2013

injury on July 11, 2013. Dr. Kriss opined Foster reached MMI for the March 19, 2014 injury on July 22, 2014. Dr. Kriss did not believe restrictions were necessary for the cervical condition and Foster could return to work as a catheterization lab technician.

Dr. Dennis Sprague, a licensed clinical psychologist, performed an IME on March 3, 2015. He diagnosed depressive disorder, generalized anxiety disorder, and pain disorder caused by Foster's work injury. He opined Foster lacked the psychological ability to return to work. Dr. Sprague stated Foster had a Class 2 impairment with a 12% rating pursuant to the AMA Guides, and recommended psychiatric/psychological intervention and treatment.

Dr. Timothy Allen performed an independent psychiatric evaluation on May 6, 2015. He opined Foster has an adjustment disorder with depressed mood, but has no resulting impairment rating and retains the psychological ability to return to work.

The ALJ's findings relevant to this appeal are as follows:

Mr. Foster is now 53 years of age. He has a very good work history, having been employed by the defendant for 24 years. This is strong evidence that he has a solid work ethic. Mr. Foster

last worked back in August, 2014. He is an older worker in the highly competitive job market. Based upon the plaintiff's limitations and his age, I make the determination that if he went out into the highly competitive job market he would have a very difficult, and probably impossible, time in finding any regular employment. Mr. Foster's testimony regarding his medical limitations in his neck, back and psyche are strongly supported by the expert evidence from Dr. El-Kalliny, Dr. Bilkey and Dr. Sprague. I make the determination that the medical evidence from Dr. El-Kalliny, the treating neurosurgeon, Dr. Bilkey, the examining physician, and Dr. Sprague, the psychologist, is persuasive, compelling and reliable.

. . . .

In this case, I considered the serious nature of Mr. Foster's work-related injuries, as thoroughly documented by Dr. El-Kalliny, Dr. Bilkey and Dr. Sprague, his educational level, which is above average, and his credible and convincing lay testimony, all of which is covered hereinabove. Based upon all of the above stated factors, I reach the legal conclusion that Mr. Foster is permanently totally disabled based upon Dr. Bilkey's medical report dated April 14, 2014, which stated that the plaintiff has reached maximum medical improvement.

LCRH filed a petition for reconsideration seeking further analysis of the issue of permanent total disability, specific findings regarding the extent of disability attributable to the alleged injuries, the

specific body parts which caused the total disability, and whether the post-injury jobs were menial and/or customary types of employment.

In the August 10, 2015 Order on Petition for Reconsideration, the ALJ amended the award to reflect that Foster was unable to perform his customary work following the February 10, 2012 injury and is entitled to TTD benefits from February 10, 2012 through September 2, 2014 with the exclusion of a period from February 26, 2013 through May 4, 2013. The ALJ noted Foster was either working under restrictions or performing modified activity and was unable to perform his usual customary duties.

On appeal, LCRH argues the ALJ failed to make sufficient findings to support the award of PTD benefits. It asserts the ALJ did not adequately address Foster's post-injury abilities and the factors of his post-injury physical, emotional, intellectual and vocational status and how those factor interact as required by Ira A. Watson Department Stores v. Hamilton, 34 S.W.3d 48 (Ky. 2000). LCRH contends the ALJ considered the "serious nature" of Foster's work-related injuries, his educational level and his testimony, but provided no explanation of how these factors were weighed.

We believe the ALJ failed to provide more than conclusory statements in determining Foster is permanently totally disabled. An ALJ must set forth adequate findings of fact from the evidence to apprise the parties of the basis for his decision. Shields v. Pittsburgh and Midway Coal Min. Co., 634 S.W.2d 440 (Ky. App. 1982); Big Sandy Cmty. Action Program v. Chaffins, 502 S.W.2d 526 (Ky. 1973). The ALJ must also demonstrate that all evidence was considered, and articulate his or her decision-making process.

Here, the ALJ merely identified the "serious nature" of the injuries, Foster's educational level, which is above average, and his credible and convincing lay testimony in finding a permanent total disability. The ALJ failed to specifically characterize the nature of Foster's injuries and which dates of injury produced a state of permanent total disability. The ALJ did not specifically identify what permanent restrictions are warranted, nor did he address how the physical restrictions would affect Foster's ability to perform other jobs for which he has training or experience. Although the ALJ described Dr. Sprague's opinion as compelling and reliable, Dr. Sprague did not believe Foster was at MMI for the psychological condition. We conclude the ALJ's findings were

insufficient to apprise the parties of the basis for the finding of a permanent total disability, and we must therefore vacate and remand for additional analysis.

LCRH also argues the ALJ failed to determine the level of impairment Foster sustained. The ALJ made no specific finding as to whether Foster sustained a permanent disability rating. LCRH argues, due to the multiple injury dates, the ALJ was required to make specific findings as to the amount each injury contributed to Foster's impairment and disability.

The ALJ's analysis notes the impairment assessments by Dr. El-Kalliny and Dr. Bilkey of 8% for the thoracic spine and 5% for the cervical spine. The ALJ also noted Ira A. Watson requires a finding of a permanent disability rating to award PTD benefits. While it is true the ALJ does not directly state what percentage of permanent impairment Foster has pursuant to the AMA Guides, he does state he found the evidence from Dr. El-Kalliny and Dr. Bilkey persuasive, compelling and reliable. He specifically cites the April 14, 2014 report of Dr. Bilkey as the basis for his finding of permanent total disability. Dr. Bilkey provided his assessment of impairment in that report. The ALJ made no determination as to the level of disability attributable to each of the three alleged

injuries. On remand, the ALJ must specifically determine any applicable impairment ratings pursuant to the AMA Guides and to which injuries any impairment rating is attributable.

Finally, LCRH argues the ALJ failed to make sufficient findings in the order on reconsideration to support the award of additional TTD benefits. LCRH notes Foster worked in his usual job as a cardiac catheterization technician from April 17, 2012 through May 16, 2012, from December 12, 2012 through May 4, 2013, and again from November 26, 2013 through February 5, 2014. LCRH contends the ALJ failed to explain what is deemed to be Foster's usual and customary work. Consistent with the principles enunciated in Livingood v. Transfreight, LLC, 467 S.W.3d 249 (Ky. App. 2014), LCRH contends the ALJ must make specific findings as to what constitutes Foster's customary work and whether his post-injury positions were menial, "make work" projects, and explain his analysis of the issue.

Foster bore the burden of proving entitlement to TTD benefits. Thus, the standard of review on appeal is whether substantial evidence supports the ALJ's finding. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). However, the ALJ must provide findings sufficient

to apprise the parties of the basis for the decision. Cornett v. Corbin Materials, Inc., 807 S.W.2d 56 (Ky. 1991). On reconsideration, the ALJ concluded Foster was unable to perform his customary work following the injury, and was either working under restrictions or was performing modified activity following the injury. He did not discuss whether Foster had training or experience in performing the activities involved in those positions. In Livingood, the Court noted Central Kentucky Steel v. Wise, 19 S.W.3d 657 (Ky. 2000) does not stand for the principle that workers who are unable to perform their customary work after an injury are always entitled to TTD. Under the circumstances of this case, it was incumbent upon the ALJ to analyze whether Foster had returned to his usual, customary work. Therefore, it is necessary to vacate and remand for additional findings concerning the Foster's post-injury employment.

Accordingly, the July 8, 2015 Opinion and Order and the August 10, 2015 Order on Petition for Reconsideration rendered by Hon. William J. Rudloff, Administrative Law Judge, are hereby **VACATED** and this matter is **REMANDED** for additional findings consistent with the views expressed herein.

ALL CONCUR.

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