OPINION ENTERED: March 15, 2013

CLAIM NO. 201098749

LIFELINE HOME CARE, INC. PETITIONER

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

CHERYL PAYTON
DR. DANIEL REYNOLDS
and HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING IN PART,
VACATING IN PART, AND REMANDING
* * * * * *

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

STIVERS, Member. Lifeline Home Care, Inc. ("Lifeline") appeals from the November 5, 2012, opinion and order rendered by Hon. William J. Rudloff, Administrative Law Judge ("ALJ") in which the ALJ awarded permanent total disability ("PTD") benefits, medical benefits, and vocational rehabilitation. Lifeline also appeals from the

November 29, 2012, order overruling its petition for reconsideration.

The Form 101 alleges Cheryl Payton ("Payton"), while working as a home health aide, injured her right shoulder on January 11, 2010, “while attempting to keep patient from falling." The Form 101 indicates the physical requirements of her job with Lifeline are "lifting, pulling, pushing, reaching, bending, stooping, squatting, etc." The highest grade Payton completed was the 8th grade.

A report dated March 24, 2010, by Dr. John J. Guarnaschelli, attached to the Form 101, states, in part, as follows:

> [Payton] has worked as a home health nurse and aid, for about three years. On January 11th 2010, while helping a patient, preventing [sic] her from falling, and as a result of that has had some atypical right shoulder pain. Initially, it was primarily in the right shoulder, but now has involved [sic], in terms of right cervical pain, as well as some pain leading to the right arm, with numbness and tingling to the first three digits of the right hand. It is really the numbness and tingling that is bothering her more than anything at this point. She denies other trauma, injury, or fall. An MRI scan would [sic] be [sic] completed on March 17 2010, and the patient was referred to our offices. The report by radiology shows evidence of moderate neuro foraminal disc damage at C5-6, effacement of the right nerve root on the right cannot be excluded. I concur

> with this report, and certainly, the clinical symptoms would suggest a nerve root, and a painful cervical radiculopathy as a result of this disc abnormality; however, on today's exam, she also has significant pain with any degree of movement of the right shoulder, including internal and external rotation, so that I think that she has perhaps a double crunch-type injury, both involved the right shoulder as well as that of the right C6 nerve root. I have taken the liberty of ordering an [sic] additional x-rays, as well as an MRI scan of the right shoulder, and again, asked [sic] after we review this we will certainly make every attempt possible to try to treat both entities in a conservative manner, and try to avoid any considerations of surgery; however, before making this decision, we will go ahead and review the newer ordered MRI scan and x-rays of the right shoulder.

Lifeline's Form 111- Notice of Claim Denial, filed November 2, 2010, indicates Payton's claim was denied for the following reasons: "extent and duration; causation/work-relatedness; pre-existing active; and whether Plaintiff sustained an injury as defined by statute."

On April 26, 2011, Payton filed a "Motion to Add Compensable Injury" to include a cervical spine injury.

The June 17, 2011, benefit review conference ("BRC") order by Hon. Howard E. Frasier, ALJ, ("ALJ Frasier") lists the following contested issues:

"Reasonableness and necessity and work-relatedness of surgery proposed on the right shoulder by Dr. Rogers; MMI; TTD." Under "other matters" is the following:

> Plaintiff's Motion to Bifurcate is GRANTED; Plaintiff's motion to amend to add cervical spine claim is PASSED pending resolution of the bifurcated matter; final extent and duration is reserved for later determination; proof for the bifurcated claim for all parties is EXTENDED to July 7, 2011.

The June 17, 2011, BRC order also lists "8th grade" under stipulations for Payton's educational level.

By Interlocutory Opinion and Award dated August 18, 2011, ALJ Frasier awarded temporary total disability ("TTD") benefits and determined the right shoulder surgery proposed by Dr. Rogers to be compensable. ALJ Frasier placed the claim in abeyance until Payton reached maximum medical improvement ("MMI").

By order dated December 20, 2011, the claim was reassigned to the ALJ. By order dated May 31, 2012, the claim was taken out of abeyance.

The September 14, 2012, BRC order lists the following contested issues: benefits per KRS 342.730, work-relatedness/causation, unpaid or contested medical expenses, injury as defined by the ACT, and vocational rehabilitation. The BRC order indicates TTD benefits were

paid from May 5, 2010, through March 12, 2012, for a total of $15,479.64, and medical expenses totaling $22,686.26 were paid. Payton last worked on May 6, 2010. Under "plaintiff's educational level" is written: "8th grade? - AT ISSUE."

Lifeline's first argument on appeal is the ALJ erred as a matter of law in finding Payton permanently totally disabled. Lifeline asserts, in part, as follows:

> The ALJ's findings is [sic] unreasonable under the evidence, because uncontradicted medical evidence, which the ALJ improperly disregarded, shows there are no medical restrictions/limitations that prevent or hinder Payton's physical ability to work. To the contrary, the objective medical evidence shows her conditions don't require any restrictions/ limitations. As such, the lack of any objective physician assigned physical restrictions/limitations is completely contradictory to the finding Payton is permanently totally disabled and has the complete inability to perform any work. Thus, there is no substantial evidence to support that, from a physical standpoint, Payton is permanently totally disabled.

In concluding Payton is permanently totally disabled, the ALJ made the following findings of fact:

> In rendering a decision, KRS 342.285 grants the Administrative Law Judge as fact-finder the sole discretion to determine the quality, character, and substance of evidence. *AK Steel Corp. v. Adkins*, 253 S.W.3d 59 (Ky. 2008).

Based upon the persuasive medical reports from Dr. Rogers and Dr. Barefoot, I find that the plaintiff will sustain a 23% whole person permanent impairment under the AMA Guides, Fifth Edition.

"'Permanent total disability' means 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 . . . ." Kentucky Revised Statutes (KRS) 342.0011. To determine if an injured employee is permanently totally disabled, an ALJ must consider what impact the employee's post-injury physical, emotional, and intellectual state has on the employee's ability "to find work consistently under normal employment conditions . . . . [and] to work dependably[.]" *Ira A. Watson Dept. Store v. Hamilton*, 34 S.W.3d 48, 51 (Ky. 2000). In making that determination,

> "the ALJ must necessarily consider the worker's medical condition . . . [however,] the ALJ is not required to rely upon the vocational opinions of either the medical experts or the vocational experts. A worker's testimony is competent evidence of his physical condition and of his ability to perform various activities both before and after being injured."

Id. at 52. (Internal citations omitted.) See also, *Hush v. Abrams*, 584 S.W.2d 48 (Ky. 1979).

> In the present case, I considered the severity of the plaintiff's work injuries, her education, her age, her work history, her testimony and the specific medical opinions of both Dr. Rogers and Dr. Barefoot regarding her permanent injuries and occupational disability. Based on all of those factors, I make the factual determination that the plaintiff cannot find work consistently under regular work circumstances and work dependably. I, therefore, make the factual determination that she is permanently and totally disabled.

Lifeline filed a petition for reconsideration, and in the order overruling the ALJ stated:

> 1. Defendant has filed a Petition for Reconsideration and plaintiff has responded thereto.
>
> 2. There is a clerical error on Page 1 of the Opinion and Order dated November 5, 2012, and said Opinion and Order is corrected and amended to state that defendant filed a Form 111 on November 2, 2010.
>
> 3. In Ford Furniture Company v. Claywell, 473 S.W.2d 821 (Ky.1971), Kentucky's highest court held that KRS 342.281 limits the reviewing court to the correction of errors patently appearing on the face of the award, order or decision. The rest and remainder of defendant's Petition for Reconsideration is an improper re-argument of the case.
>
> 4. In rendering a decision, KRS 342.285 grants the ALJ as fact-finder the sole discretion to determine the quality, character, and substance of

> evidence. AK Steel Corp. v. Adkins, 253 S.W.3d 59 (Ky.2008). An ALJ may draw reasonable inferences from the evidence, 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. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky.1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15, 16 (Ky.1977). Although a party may note evidence supporting a different outcome than reached by the ALJ, such evidence is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky.1974). The board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to weight and credibility or by noting reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky.1999). It is well established, whether on reopening or at the time of an original proceeding, an ALJ is vested with wide ranging discretion. Colwell v. Dresser Instrument Div., 217 S.W.3d 213 (Ky.2006); Seventh Street Road Tobacco Warehouse v. Stillwell, 550 S.W.2d 469 (Ky.1976).
>
> 5. The Opinion and Order dated November 5, 2012 comprehensively discussed the contested issues raised by the parties and subject to the above clerical correction, said Opinion and Order is reaffirmed.

As fact-finder, the ALJ determines the quality, character, and substance of all the evidence and is the sole judge of the weight and inferences to be drawn from

the evidence. Square D Company v. Tipton, 862 S.W.2d 308 (Ky. 1993); Miller v. East Ky. Beverage/Pepsico, Inc., 951 S.W. 2d 329 (Ky. 1997). He may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it was presented by the same witness or the same party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). Additionally, if "the physicians in a case genuinely express medically sound, but differing, opinions as to the severity of a claimant's injury, the ALJ has the discretion to choose which physician's opinion to believe." Jones v. Brasch-Barry General Contractors, 189 S.W.3d 149, 153 (Ky. App. 2006).

In workers' compensation cases, the claimant bears the burden of proof and risk of nonpersuasion with regard to every element of the claim. Durham v. Peabody Coal Co., 272 S.W.3d 192 (Ky. 2008). As Payton was the party with the burden of proof and was successful before the ALJ, the sole issue in this appeal is whether substantial evidence supports the ALJ's conclusion. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986). Substantial evidence has been defined as evidence of substance and relevant consequence and having the fitness to induce conviction in the minds of reasonable people. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971).

Although a party may note evidence that would have supported a conclusion that is contrary to the ALJ's decision, such evidence is not an adequate basis for reversal on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974).

In finding Payton permanently totally disabled, the ALJ relied upon the medical opinions of Drs. Rogers and Barefoot, Payton's testimony, and her education, age, and work history.

Dr. Barefoot's February 28, 2011, independent medical examination ("IME") report contains the following diagnoses:

> 1. Cervical degenerative disc disease.
> 2. Right shoulder AC joint arthropathy with ongoing severe right shoulder pain and limited mobility in the right shoulder.

Dr. Barefoot assessed a 15% impairment rating which he attributed to the work injury of January 11, 2010. Regarding Payton's continuing ability to work as a home health aide and restrictions, Dr. Barefoot opined as follows:

> Ms. Payton will continue to have significant problems with chronic pain and limited mobility in her right shoulder. She will requiring [sic] ongoing medical therapy for this condition.

> Dr. Rogers has recommended surgical treatment for her painful right shoulder condition. I am in agreement with Dr. Rogers' assessment that surgery is indeed indicated for Ms. Payton's ongoing painful right shoulder condition.
>
> It is apparent that Ms. Payton will not be able to return to her prior position as an aide. She will have ongoing significant problems with chronic pain and limited mobility in her right shoulder that will severely impair her ability to lift and carry. She would have marked difficulty using her right arm at or above 45 degrees on a repetitive basis.

In a second IME report dated July 11, 2012, Dr. Barefoot provided the following diagnoses: "1. Cervical degenerative disc disease. 2. Status post right distal clavicle resection." Dr. Barefoot assessed a 23% impairment rating due to the work injury of January 11, 2010. Regarding Payton's continuing ability to work as a home health aide and restrictions, Dr. Barefoot opined as follows:

> Ms. Payton will need ongoing treatment for these [sic] painful condition.
>
> Ms. Payton will not be able to return to her prior position as a [sic] eldercare aide. She would have marked difficulty with lifting, grasping and carrying. She would have marked difficulty operating machinery. She would have difficulty climbing and descending stairs on a repetitive basis. She would have marked difficulty

> using her arms at or above shoulder level.

In his October 30, 2012, report, Dr. Ted Rogers opined as follows:

> Please be advised that I have reviewed the independent medical examination by Dr. Barefoot dated July 11th, 2012 stating that Ms. Payton had diagnostic impression of cervical degenerative disc disease as well as a history of right distal clavicle resection performed by myself on September 21st, 2011. I agree with [sic] that due to the distal clavicle excision, she would have some limitation in lifting with that arm. I did also state at the time of surgery that there were some possibilities that she could have some difficulty with overhead lifting in the future as well as mild pain at the surgery site. I also agree with the fact that there are some signs she does have cervical disc degeneration. [sic] The degenerative disc disease I will refer her to her current physician for that. I am not an independent medical examiner who does impairment ratings; however, I am in agreement with the IME performed by Dr. Jules Barefoot.

Payton was deposed on January 27, 2011, and September 10, 2012, and also testified at the hearing. At the hearing, Payton testified she is forty-nine years old and has completed the seventh grade. Regarding her ability to work as a home health aide and her ability to work in general, Payton testified as follows:

Q: You have not been back to work since the doctor took you off. As you sit here today- and I know you have had a couple of surgeries- do you think you could go back to doing that job?

A: I- I know I couldn't but it breaks my heart to think that I couldn't.

Q: Why is that on both?

A: Because I know that the daily pain that I live with just trying to relieve the pain that I go through and I know it would even make it worse to try, and it wouldn't be a benefit for my clients to even try to help them at this point in the state that I am in.

Q: Do you think the state that you are in would put those individuals in danger if you were trying to lift them?

A: Of course it would.

Q: Why so?

A: Because I can't even take care of myself, let alone try to handle these elderly people.

Q: Do you want to try to go back to work?

A: I would- I would like to.

Q: And I was going to ask you about that. Dr. Crystal- I know you haven't seen his report- had indicated that you could go back to doing some clerking jobs or things of that nature. Do you think you could go back to doing those I guess first from a physical standpoint, either standing around or pushing papers or things of that nature?

A: Honestly, no, I don't think I could for the very reason that the trip from my house to over here today was very uncomfortable and painful for me.

Q: You mean riding in a car?

A: Yes.

Q: So you have problems riding?

A: I do.

Q: What about standing or sitting or moving and things of that nature?

A: Yes.

Q: [sic] Yes, it hurts to turn my neck.

A: [sic] Is that on a daily basis?

A: It's all the time.

Q: Okay. Do you believe that from the standpoint of learning something new with your education that you could-that you could possibly learn some other type of trade and/or job?

A: You know, I have [sic] sent over through my mind with that wondering what I could do, that I could, you know, with my limitations that I have and I haven't came [sic] up with nothing [sic] yet.

Q: What about any of the previous jobs you have done, do you think you could do any of those?

A: No, I don't think I could.

Q: Why so?

A: Because with the limitation I have with my neck, the pain that I have.

> When I am at home during the day I have to spend a lot of my time in bed.

Payton testified that on a regular day, her pain level is seven on a scale of one to ten. Concerning the effects of her medication, she testified as follows:

> Q: Do you find that taking any of the medications affect you congnitively [sic] or anything of that- or any of the medications that you have taken?
>
> A: It does.
>
> Q: How so?
>
> A: I can't drive. It kind of affects your thinking.
>
> Q: Now which medication is that specifically?
>
> A: It's the pain medication.
>
> Q: Do you know the name of that?
>
> A: Hydrocodone.

The above-cited evidence comprises substantial evidence in support of the ALJ's determination Payton is permanently totally disabled. In making a determination as to whether a claimant is permanently totally disabled, an ALJ is vested with broad discretion. *See* Seventh Street Road Tobacco Warehouse v. Stillwell, 550 S.W.2d 469 (Ky. 1976). Payton's testimony regarding her ability to work and her level of pain is substantial evidence in support of

this determination, as an injured worker’s credible testimony is probative of her ability to labor post-injury. *See* Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979); *See also* Carte v. Loretto Motherhouse Infirmary, 19 S.W.3d 122 (Ky. App. 2000). In addition, Payton's testimony in conjunction with the limitations and impairment rating contained in Dr. Barefoot's July 11, 2012, report constitute substantial evidence. It is evident the ALJ considered Payton's age and education as well as other factors in combination with her post-injury physical capacity in concluding Payton is permanently totally disabled. *See* Ira A. Watson Dept. Store v. Hamilton, supra. Thus, the ALJ's determination Payton is permanently totally disabled is supported by substantial evidence and cannot be disturbed.

Lifeline's second argument on appeal is that the ALJ failed to make a finding as to whether the third cervical epidural steroid injection, recommended by Dr. Daniel Reynolds, was a reasonable and necessary form of medical treatment for the effects of Payton's January 11, 2010 work injury and subsequent September 21, 2011 shoulder surgery. Lifeline notes it submitted the request for a third injection to utilization review and the request was denied. Lifeline then filed a motion asserting a medical fee dispute and to join Dr. Reynolds as a party and a Form

112. The ALJ sustained Lifeline's motion by order dated August 14, 2012. Lifeline identified "unpaid or contested medical expenses" as an issue at the September 14, 2012, BRC.

A review of the record reveals Lifeline's recitation of the procedural history pertaining to this issue is correct. A review of the November 5, 2012, opinion and order reveals a section devoted exclusively to "unpaid or contested medical expenses." While the ALJ's findings of fact on this issue are scant at best, and he did not explicitly state he was resolving Lifeline's Form 112 medical fee dispute, he directly addressed the need for cervical injections by stating as follows:

> Based upon the totality of the evidence in the record, I make the factual determination that the plaintiff’s work injuries required medical treatment and will probably require future medical treatment, specifically including the cervical injections recommended for her.

The ALJ was not obligated to rely upon the utilization review denial in making his decision. Significantly, while Lifeline requested the ALJ to find the third steroid unreasonable in its November 15, 2012, petition for reconsideration, it did not ask for additional findings. Therefore, as the issue regarding the cervical

injections was resolved in the November 5, 2012, opinion and order, albeit in a minimalist fashion, and Lifeline failed to ask for additional findings in its petition for reconsideration, we will not remand the claim to the ALJ for additional findings of fact.

The second factual finding the ALJ allegedly failed to make is the extent of Payton's education. Lifeline asserts as follows:

> Even though the ALJ found Payton was permanently totally disabled, a ruling on the extent of her education is necessary, because he also awarded vocational rehabilitation benefits. If Payton receives vocational rehabilitation benefits and subsequently returns to work prior to when the 425 week permanent partial disability benefits period would have expired, then the extent of her education is very material, because it will determine whether she is entitled [sic] benefits based on a 3.2 or 3.4 multiplier.

Lifeline then argues as follows:

> Lifeline Home Care respectfully asserts the issue of Payton's education has actually been decided and even stipulated. Payton originally testified at a January 27, 2011 deposition and, on page 7, indicated she had completed the eighth grade. The parties then attended a Benefit Review Conference on June 17, 2011, and Payton stipulated she had an eighth grade education. Approximately three weeks later, at the July 8, 2011 Formal Hearing, Payton testified she had an eighth grade

education. The parties briefed the issues that were pending at that time and the very first sentence of Payton's August 5, 2011 Brief states, 'Ms. Payton is a married mother of three (3) who has an 8th grade education.' Because Payton previously stipulated she had an eighth grade education and indicated so in her Formal Hearing testimony and Brief, former ALJ Howard E. Frasier, Jr. found she had an eighth grade education.

Payton, prior to the Formal Hearing, never filed a motion requesting the ALJ to vacate the stipulation pursuant to 803 KAR 25:010 § 16. Subsection 2 of the aforementioned administrative regulation specifically states, '[u]pon cause shown, a party may be relieved of a stipulation if the motion for relief is filed at least ten (10) days prior to the date of the hearing, or as soon as practical after discovery that the stipulation was erroneous.' Moreover, Payton did not file a petition for reconsideration from the ALJ's August 18, 2011 Opinion and Order. Payton then gave a deposition on September 10, 2012 and changed her testimony. Payton testified she did not have an eighth grade education, and last completed the seventh grade. Over Lifeline Home Care's objection, the ALJ listed the extent of Payton's education as an issue on the September 14, 2012 Telephonic Benefit Review Conference Order and Memorandum. Despite listing education as an issue, the ALJ did not render a decision on it in his November 5, 2012 Opinion and Order. On page 2, the ALJ specifically indicated, '[p]laintiff's educational level: 8th grade? at issue.' Lifeline Home Care respectfully asserts that, although former ALJ Frasier's August 18, 2011 Opinion and Order was interlocutory,

> pursuant to Bowerman v. Black Equip. Co., 297 S.W.3d 858 (Ky. App. 2009), absent of [sic] showing [sic] new evidence, fraud or mistake, an ALJ cannot reverse previously litigated and adjudicated factual questions. Payton did not submit any new evidence on this issue, in the form of educational records or transcripts, and merely changed her testimony after previously testifying, on two prior occasions, that she had an eighth grade education. After testifying she last completed the eighth grade for more than a year and a half, and even stipulating to it, she then changed her mind and testified she only had a seventh grade education. Lifeline Home Care respectfully asserts this does not constitute 'new evidence' or a 'mistake' under the Bowerman case, *supra*. Lifeline Home Care respectfully requests the Board to remand this matter to the ALJ to make additional findings.

During her January 27, 2011, deposition, Payton testified she completed the eighth grade at Butler County District Elementary. The June 17, 2011, BRC order lists "8th grade" as Payton's educational level under stipulations. However, in Payton's September 10, 2012, deposition, she testified she did not complete the eighth grade but completed the seventh grade. Additionally, the September 14, 2012, BRC order states "8th grade? - AT ISSUE" under "plaintiff's educational level." However, Payton failed to file a motion pursuant to 803 KAR 25:010 § 16(2) requesting the ALJ to relieve her of the stipulation

contained in the June 17, 2011, BRC order. We also note that while the ALJ erroneously indicated Payton's educational level was "at issue" in the November 5, 2012, opinion and order, he failed to directly resolve this issue in either the opinion and order or the November 29, 2012, order overruling Lifeline's petition for reconsideration. Therefore, we vacate the language in the November 5, 2012, opinion and order indicating Payton's educational level is "at issue" and remand the claim for a finding Payton has an eighth grade educational level.

Finally, in her brief, Payton requests the Board to assess sanctions against Lifeline arguing as follows:

> In addition, it is clear that Lifeline is not contesting that Payton is due permanent benefits based upon a 23% impairment rating and that Payton does not retain the physical capacity to return to her prior job. Therefore, Lifeline's failure to pay said uncontested disability benefits is sanctionable conduct and Payton would request sanctions by this Board accordingly.

KRS 342.310(1) permits the Board to assess the costs of a proceedings only when it determines the appeal has been brought without reasonable grounds. Payton has made no such allegation. Rather, Payton argues sanctions are appropriate because Lifeline failed to pay uncontested disability benefits. Contrary to Payton’s assertion, on

appeal Lifeline contested the ALJ’s finding she was totally occupationally disabled. Thus, Lifeline did not fail to pay uncontested disability benefits. Further, we note Lifeline did not avail itself of the provisions of 803 KAR 25:010 Section 21(14) which provide for the filing of a motion requesting the Board to order the payment of benefits pending appeal in conformity with the award. Therefore, since Lifeline contested Payton’s entitlement to PTD benefits, Payton did not seek to have those benefits paid pending appeal, and Payton does not contend the appeal has been brought without reasonable grounds, we conclude Payton’s request for sanctions is without merit.

Accordingly, the November 5, 2012, opinion and order and the November 29, 2012, order overruling the petition for reconsideration are **AFFIRMED** regarding the ALJ's determination Payton is permanently totally disabled and the cervical injections are compensable. Those portions of the November 5, 2012, opinion and order and the November 29, 2012, order overruling the petition for reconsideration pertaining to Payton's educational level are **VACATED** and this claim is **REMANDED** for entry of an amended opinion finding Payton has an eighth grade educational level.

ALVEY, CHAIRMAN, CONCURS.

SMITH, MEMBER, NOT SITTING.

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