

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: May 22, 2015

CLAIM NO. 200587220

LYON COUNTY BOARD OF EDUCATION

PETITIONER

VS.

APPEAL FROM HON. JANE RICE WILLIAMS,
ADMINISTRATIVE LAW JUDGE

BOBBIE DAVENPORT
and HON. JANE RICE WILLIAMS,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
VACATING AND REMANDING

* * * * *

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

STIVERS, Member. Lyon County Board of Education ("Lyon County") appeals from the December 22, 2014, Opinion, Award and Order and the January 23, 2015, Order On Petition for Reconsideration of Hon. Jane Rice Williams, Administrative Law Judge ("ALJ"). The ALJ awarded Bobbie Davenport ("Davenport") temporary total disability ("TTD") benefits, permanent total disability ("PTD") benefits, and medical

benefits. On appeal, Lyon County argues Davenport's bipolar disorder is not a direct result of the June 16, 2004, injury.

The Form 101, filed December 15, 2010, alleges Davenport sustained the following injuries while in the employ of Lyon County as a custodian on June 16, 2004: "Lower back, right knee, right foot, psychological condition." She alleged her injuries occurred when she "stepped on a landscape rock and fell in a twisting motion striking her right knee on the pavement and landscape timber." She also alleged "[O]n November 12, 2010, her right knee gave way causing her to fall, which reinjured her back."

Medical treatment included "right knee arthroscopy and injections, pain management and medication."

On March 16, 2011, Davenport filed a Motion to Amend 101 to include a psychological injury. Her motion was sustained by order dated March 29, 2011.

The Benefit Review Conference ("BRC") Order and Memorandum, dated May 10, 2011, lists the following contested issues: benefits per KRS 342.730; work-relatedness/causation; average weekly wage; injury as defined by the ACT; exclusion for pre-existing

disability/impairment; TTD [handwritten: "possibly overpayment"]. Under "other matters" is the following:

This claim is bifurcated for an initial determination as to the compensability of the requested total knee replacement (R knee). []'s verbal motion for a university evaluation on this issue is GRANTED. An order concerning the UE will follow.

The parties stipulated Davenport sustained a work-related injury on June 16, 2004. The parties also stipulated Lyon County voluntarily paid TTD benefits totaling \$63,702.59 and medical expenses totaling \$69,544.80. They also stipulated TTD benefits were last paid on January 22, 2010.¹

Davenport introduced Dr. J. Thomas Muehleman's March 9, 2011, report in which he diagnosed:

Axis I: Bipolar Disorder Type I 296.63
Anxiety Disorder, NOS

Axis II: Deferred

Axis III: Chronic Pain

Axis IV: Occupational Problems,
unemployed

Axis V: 50

¹ In a December 1, 2004, filing entitled "Stipulation as to Underpaid Temporary Total Disability," the parties stipulated TTD benefits were voluntarily paid through January 4, 2014.

Concerning Davenport's impairment rating, Dr.

Muehleman opined as follows:

Impairment rating: Class 4 Marked Impairment, 70% impairment as defined in chapter 12, 2nd Edition of AMA Guidelines.

Prior to her injury, there is no evidence of any impairment since recovery from her initial episode at age 15. She appears to have been quite functional and self-sufficient. I opine that all of her current impairment was brought into 'disabling reality' by the worker [sic] related injury. 100% of the 70% impairment is a direct result of the work related injury. While she was predisposed to the development of active symptoms, she had functioned well during her adult years; she had been stable, without need for treatment, highly productive and 'enjoyed life.'

Restrictions would include activities requiring thoughtful planning, patience, concentration, social interaction, reliable attendance, and sustained effort.

Lyon County introduced the May 16, 2011, report of Dr. Robert Granacher. After performing a psychiatric examination, Dr. Granacher diagnosed:

Axis I: A. Chronic bipolar illness, type I, currently in a mixed phase, with grossly inadequate psychiatric treatment.

B. There is no evidence that her mental state is in any way related to a work injury in 2004 or work injury in 2010.

She has recurrent genetic bipolar illness rather than caused by an accident.

Axis II: None.

Axis III: Morbid obesity, dysfunctional right knee, and complaints of chronic pain.

Axis IV: She does show evidence that she has worked at numerous occupations throughout her life.

Axis V: Current GAF = 31-40.

Dr. Granacher opined Davenport has a 0% whole body psychiatric impairment due to the June 16, 2004, injury "based on Guides to the Evaluation of Permanent Impairment, American Medical Association, Page 220, Table 1, 1984; Page 363, Table 14-1, 2000."² However, Dr. Granacher assigned a 25% to 30% permanent impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment, ("AMA Guides") for Davenport's bipolar condition. He concluded the impairment rating is not due to the alleged work injury. He answered "no" to the following

² Even though not directly stated, it is clear this impairment rating is based upon both the 2nd Edition and the 5th Edition of the American Medical Association Guides to the Evaluation of Permanent Impairment.

question: "In your opinion, and based upon the medical records provided, is there a direct causal relationship between the June 16, 2004, right knee and back injury and the psychological symptoms Ms. Davenport is claiming?" Dr. Granacher opined Davenport requires psychiatric restrictions and lacks the mental capacity to engage in the type of work she is trained, educated, or experienced to perform. He specifically noted "[s]he is not fit for duty at any occupation at this time."

Dr. Granacher's report of May 23, 2011, was also introduced in which he expressed disagreement with the impairment rating assessed by Dr. Muehleman. Dr. Granacher opined, in part, as follows:

There is no evidence in the medical records of Ms. Davenport, or in her face-to-face examination conducted by me, that is consistent with the severe levels of dysfunction required for a 70% impairment as defined on page 220 of the AMA Guides.

Davenport's March 2, 2010, deposition was introduced. She testified that within three months of her 2004 knee injury, she went into a "deep, dark depression." She later returned to her job full-time at Lyon County in August 2004 and continued working until her surgery in

March 2005. During that time, she was "in agony." She explained as follows:

A: I was in agony.

Q: All right.

A: I would be up there mopping [sic] and crying --

Q: Okay.

A: -- crying and mopping. [sic] I mean, it was -- I was in excruciating agony. I couldn't hardly go, but I had to work.

After surgery, she was never able to return to work.

Davenport testified that on November 12, 2010, she was in her bathroom when her right leg collapsed, "which it does quite often." She fell back hitting the lower part of her back on the porcelain of her toilet. She elaborated as follows: "And it messed me up for a while. I was paralyzed for about- partially paralyzed for about a week. I couldn't do a straight leg lift. I couldn't wiggle my toes."

Davenport joined the lower back injury claim with her knee injury claim because the initial knee injury caused her right knee to collapse.

At the October 23, 2014, hearing, relative to her psychological problems, Davenport testified:

Q: So tell us what kinds of problems that you're having with what we'd call psychological.

A: Oh, okay. Well bipolar, which is up and down, thing goes from depression to heightened- Mostly depression, lately. When you have chronic pain, that goes with it. And then my life changed, it turned upside down from working and being so active to zero.

In an April 15, 2012, Opinion, Award, and Order Hon. Caroline Pitt Clark, Administrative Law Judge ("ALJ Clark") determined Davenport's right knee condition is causally related to the June 16, 2004, work injury.³ ALJ Clark also determined right knee replacement surgery recommended by Dr. Andrew Shinar was reasonable and necessary for the cure and/or relief of Davenport's June 16, 2004, work injury and compensable. The claim was placed in abeyance pending Davenport attaining maximum medical improvement ("MMI") following the surgery. TTD benefits were awarded from the date of surgery until attainment of MMI.

³ Prior to ALJ Clark leaving her position, by Order dated July 13, 2012, she reassigned the claim to the ALJ.

The October 7, 2014, BRC Order lists the following contested issues: "benefits per KRS 342.730" and "TTD."

The record contains a filing styled "Motion to Leave to File Affidavit of Angie Wright as Part of Defendant's Proof" which states, in part, as follows:

One of the issues that has arisen in this action has been the amount of TTD payments made to the Plaintiff, Bobbie Davenport. It was contemplated at both the Benefit Review Conference and the hearing of this matter that Defendant would supplement the record with an Affidavit from the adjuster setting forth amounts of TTD benefits paid.

Attached to this motion is the Affidavit of Angie Gabbard-Wright in which she detailed the periods and amount of TTD payments. The parties filed a "Stipulation as to Underpaid Temporary Total Disability" dated December 1, 2014, which indicates a total of \$84,601.45 was paid in TTD benefits and TTD benefits of \$125,047.62 should have been paid. The parties stipulated to a total underpayment of TTD benefits of \$40,446.17.

In the December 22, 2014, Opinion, Award, and Order, the ALJ found Davenport's psychological injury work-related and she is permanently totally disabled concluding:

A. Benefits per KRS 342.730.

1. Principle of law.

To qualify for an award of permanent partial benefits under KRS 342.730, the claimant is required to prove not only the existence of a harmful change as a result of the work-related traumatic event, he is also required to prove the harmful change resulted in a permanent disability as measured by an AMA impairment. KRS 342.0011(11), (35), and (36). Furthermore, if, due to an injury, an employee does not retain the physical capacity to return to the type of work that the employee performed at the time of the injury, the benefit for permanent partial disability shall be multiplied by three (3) times the amount otherwise determined. KRS 342.730 (1)(c)(1).

The determination of a total disability award remains within the broad authority of the ALJ. *Ira A. Watson Department Store v. Hamilton*, 34 S.W.3d 48 (Ky. 2000). To determine the likelihood that a worker can resume some type of work under normal employment conditions, the ALJ should consider the worker's age, education level, vocational skills, medical restrictions, emotional state and how those factors interact. *Id.* "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 (citing *Hush v. Abrams*, 584 S.W.2d 48 (Ky. 1979)).

2. Findings of fact and conclusions of law.

Davenport's disability as a result of her work injury is permanent and total.

3. Evidentiary basis and analysis.

In so finding, the ALJ relies on Davenport's testimony and on the impairments as provided by the various evaluating physicians. Dr. Granacher, although finding her condition is not work related, found her to be permanently and totally disabled due to her mental condition. Dr. Muehleman, on the other hand, stated that prior to the injury, Davenport suffered no impairment since recovery from her initial psychological episode at age 15. She appeared to have been quite functional and self-sufficient. His opinion that the psychological impairment is due to the work injury is relied upon herein.

Davenport presented as credible and her testimony was compelling. She has no specialized or vocational skills that are in high demand. She does possess general skills but now has not been employed for 10 years and has significant medical restrictions. Given Davenport's age, limited vocational experience and significant medical restrictions, both physical and psychological, as well as her current emotional state, it is not likely that she will be able to find and continue performing sustained employment.

i. Age

Davenport is fifty-three years old. While fifty is not retirement age, the harsh reality is that workers fifty and over face added challenges when trying to find new employment. On the balance, the age factor weighs in Davenport's favor.

ii. Education and Vocational Skills

Davenport received a high school diploma. She has experience in a wide variety of jobs but does not possess transferable vocational skills as much as simply a willingness to take on and work hard in many different jobs. On the balance, this factor weighs in Davenport's favor as not having significant work force skills.

iii. Restrictions

Davenport's restrictions are significant, both physical and psychological, with the psychological restrictions of Dr. Granacher finding her totally disabled. As noted above, Dr. Granacher does not believe her bipolar condition was caused by the work injury but it is quite clear the impairment as a result thereof began with the work injury. Dr. Muehlman found her psychological condition has been brought on by the work injury as she showed no limitations prior to the injury. He restricted her from activities requiring thorough planning, patience, concentration, social interaction, reliable attendance and sustained effort. The physical restrictions would be enough to limit Davenport's ability to take on many of the prior job duties since she has been limited to lifting no more than 15 pounds and is restricted from various movements related to her knee. The psychological restrictions alone would prevent her from returning to any of her prior jobs or any employment requiring reliable attendance.

This factor weighs heavily in Davenport's favor.

iv. Emotional state

The evidence is convincing that Davenport loved working and would much prefer to work. However, Davenport's emotional state is fragile and the reason for the restrictions from activities requiring thorough planning, patience, concentration, social interaction, reliable attendance and sustained effort. This factor weighs strongly in favor of a total award.

Calculation

The parties stipulated that Davenport's AWW was \$255.92 from Lyon County Board of Education and \$120.00 from other employment for a total of \$375.92.

$$\text{\$375.92} \times .66667 = \text{\$250.61}$$

B. Reasonableness and Necessity of the Aqua Therapy.

1. Principle of law.

In a post-award medical fee dispute, the employer bears both the burden of going forward and the burden of proving the contested treatment or expenses are unreasonable or unnecessary. *National Pizza Company vs. Curry*, 802 S.W.2d 949 (Ky. App. 1991); *Snawder v. Stice*, 576 S.W.2d 276 (Ky. App. 1979); *Addington Resources, Inc. v. Perkins*, 947 S.W.2d 421 (Ky. App. 1997); *Mitee Enterprises vs. Yates*, 865 S.W.2d 654 (Ky. 1993); *Square D Company v. Tipton*, 862 S.W.2d 308 (Ky. 1993). The claimant, however, bears the burden of proving work-relatedness. See *Addington Resources, Inc. v. Perkins*, 947 S.W.2d 421 (Ky. App. 1997).

The ALJ, as the fact-finder, has the discretion to determine the

quality, character, and substance of the evidence in the record. *Burton v. Foster Wheeler Corp.*, 72 S.W.3d 925, 929 (Ky. 2002); *Miller v. East Ky. Beverage/Pepsico, Inc.*, 951 S.W.2d 329, 331 (Ky. 1997). The ALJ can choose "to believe part of the evidence and disbelieve other parts of the evidence whether it came from the same witness or the same adversary party's total proof." *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15, 16 (Ky. 1977). When one of two reasonable inferences may be drawn from the evidence, the finder of fact may choose. *Jackson v. Gen'rl Refractories Co.*, 581 S.W.2d 10, 11 (Ky. 1979). An ALJ must state the evidentiary basis for each legal conclusion with sufficient specificity to permit a meaningful administrative and judicial review. *Big Sandy Comm. Action Program v. Chaffins*, 502 S.W.2d 526, 531 (Ky. 1973).

2. Findings of fact.

Davenport is entitled to aqua therapy as reasonable and necessary for the cure and/or relief of the effects of the work injury.

3. Evidentiary basis and analysis.

Davenport presented as motivated on the issue of working to improve her physical condition. Dr. Patel stated he believed the aqua therapy may be beneficial. Even though Dr. Goldman did not believe aqua therapy was warranted, he pointed out the problem with the impact of hiking. Davenport believes the low impact of aqua therapy will make it possible to lose the weight (70 pounds) she has gained since her injury. Plaintiff has not presented a plan for a structured program. An

assessment and plan should precede the commencement of the therapy.

The program should be under the supervision of a trained therapist.

Lyon County filed a petition for reconsideration which was denied by order dated January 23, 2015.

On appeal, Lyon County argues Davenport's bipolar disorder is not a direct result of her June 16, 2014, physical injury; therefore, any impairment attributable to her psychological condition is not compensable.

In workers' compensation claims, the claimant bears the burden of proof and risk of non-persuasion before the ALJ with regard to every element of the claim. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). As Davenport was the party with the burden of proof and was successful before the ALJ, the sole issue in this appeal is whether substantial evidence supported the ALJ's conclusion. Special Fund v. Francis, Ky., 708 S.W.2d 641 (Ky. 1986). Substantial evidence has been defined as some evidence of substance and relevant consequence, 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).

We vacate the determination Davenport is totally occupationally disabled and the award of TTD benefits, PTD benefits, and medical benefits, including aqua therapy.

The December 22, 2014, Opinion, Award and Order and the January 23, 2015, Order on Petition for Reconsideration contain numerous errors. The ALJ failed to address the impairment rating attributable to the knee injury and whether the remaining alleged physical injuries are work-related. The Form 101 and record indicate Davenport alleged physical injuries to her lower back, right knee, and right foot on June 16, 2004. Davenport has also alleged reinjuring her back on November 12, 2010, because her right knee gave way causing her to fall. On remand, since ALJ Clark has determined the knee injury is work-related, the ALJ must determine the impairment rating attributable to the knee injury. The ALJ must also determine whether the other alleged physical injuries are work-related. This includes a determination of whether the injuries are permanent or temporary and what, if any, permanent impairment rating is attributable to each alleged physical injury.

Only if the ALJ determines there is a work-related physical injury can Davenport's alleged psychological injury be deemed an "injury" as defined by the Act and compensable. KRS 342.0011(1) clearly indicates "injury" as used in the Kentucky Workers' Compensation Act does not "include a psychological, psychiatric, or stress-related change in the human organism, **unless it is a direct result of a physical injury.**" (emphasis added). The issue Lyon County raises on appeal has been rendered moot by our decision. However, once the ALJ determines Davenport sustained one or more work-related physical injuries, Dr. Muehleman's March 9, 2011, report constitutes substantial evidence in support of a finding Davenport's psychological injury is a direct result of her physical injury or injuries. Should the ALJ determine Davenport sustained a psychological injury, she must determine the impairment rating attributable to the injury.

In the December 22, 2014, Opinion, Award and Order, the ALJ found Davenport permanently totally disabled based upon her psychological injury without finding Davenport sustained a permanent impairment rating for the injury. The finding of permanent total disability without a finding of a permanent impairment rating was erroneous. KRS 342.0011(11)(c) mandates a permanent disability rating must

be present before a finding of permanent total disability can be made. On remand, the ALJ must determine the impairment rating attributable to Davenport's psychological injury.

After the ALJ determines Davenport's work-related physical injuries, the impairment rating attributable to each physical injury, and the impairment rating attributable to the psychological injury, she must then revisit the issue of permanent total disability utilizing the factors set forth in Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

Additionally, in the amended award and order, the ALJ must precisely define the specific work-related physical and psychological injuries for which medical benefits, including aqua therapy, are awarded.

Finally, the December 22, 2014, Opinion, Award and Order awards "TTD as agreed by the parties and as reflected on the affidavit of Angie Gabbard-Wright in the total of \$84,601.45." However, the award of TTD benefits fails to address the stipulated underpayment of TTD benefits of \$40,446.17. On remand, the ALJ's award of TTD benefits must address the underpayment of TTD benefits and enter the appropriate award of additional TTD benefits. Should the ALJ determine Davenport is permanently totally

disabled or permanently partially disabled, the amended award and order must specify that any award of income benefits is to be interrupted during any period TTD benefits are paid.

Accordingly, the finding Davenport is totally occupationally disabled and the award of TTD benefits, PTD benefits, and medical benefits, including aqua therapy, set forth in the December 22, 2014, Opinion, Award and Order and the January 23, 2015, Order On Petition for Reconsideration are **VACATED**. This claim is **REMANDED** for additional findings and an amended order and award consistent with the views expressed herein.

ALL CONCUR.

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