

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: February 17, 2014

CLAIM NO. 201267487

PERRY COUNTY COAL CORPORATION

PETITIONER

VS.

APPEAL FROM HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE

ANTHONY BOWLING
and HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING IN PART,
VACATING IN PART, AND REMANDING

* * * * *

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

STIVERS, Member. Perry County Coal Corporation ("Perry County") appeals from the August 28, 2013, opinion, award, and order and the October 17, 2013, order ruling on its petition for reconsideration of Hon. Chris Davis, Administrative Law Judge ("ALJ"). In the August 28, 2013, Opinion, Award, and Order, the ALJ awarded Anthony Bowling ("Bowling") temporary total disability ("TTD") benefits,

permanent partial disability ("PPD") benefits, and medical benefits. On appeal, Perry County asserts the ALJ abused his discretion by relying on Dr. Arthur Hughes' impairment rating. Additionally, Perry County asserts the ALJ failed to provide an adequate analysis pursuant to Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003).

The Form 101 alleges on October 5, 2012, Bowling tore his right bicep in the following manner: "Moving a 4x8 sheet of metal with another co-worker, the co-worker's feet got stuck in mud and he fell and jerked the piece of metal."

The July 18, 2013, Benefit Review Conference order lists the following contested issues: benefits per KRS 342.730, work-relatedness/causation, exclusion for pre-existing disability/impairment, and TTD. Under "other" is the following: "causation is for right elbow only."

Bowling introduced the March 26, 2013, Form 107 prepared by Dr. Hughes. Dr. Hughes diagnosed the following:

1. Avulsed distal biceps tendon, status post surgical repair of same.
2. Pain and restricted ranged of motion right shoulder.
3. Pain and restricted range of motion right elbow.
4. Weakness of grip, right hand.

Dr. Hughes checked "yes" in response to the question: "Within reasonable medical probability, was plaintiff's

injury the cause of his/her complaints?" Dr. Hughes assessed a 17% whole person impairment rating.

Dr. Gregory D'Angelo's May 13, 2013, report details the history of Bowling's injury and also notes as follows:

On 10-30-12 he presented to Dr. Greg D'Angelo for an orthopaedic consult. He was diagnosed with distal biceps rupture, surgical intervention was recommended.

On 11-5-12 he underwent right elbow repair of avulsed distal biceps tendon, performed by Dr. D'Angelo.

Perry County's first argument is that the ALJ erred by relying on Dr. Hughes' 17% impairment rating instead of Dr. D'Angelo's 2% impairment rating.

Concerning his reliance on Dr. Hughes' impairment rating, in the opinion, award, and order, the ALJ explained as follows:

The undersigned has carefully considered all of the relevant evidence herein. This includes, but is not limited to the fact that Dr. D'Angelo is an orthopedic surgeon and Dr. Hughes is not. It includes that Dr. D'Angelo was the Plaintiff's treating surgeon and examined him on multiple occasions and Dr. Hughes only examined him once. It includes the fact that impairment ratings and restrictions are not technically linked and in the case of impairment ratings should be as objective as possible.

However, it also takes into account the fact that the Act is to be construed liberally in order to effectuate its beneficent purpose. These are not merely fancy words to justify those adjudicators who want to do whatever they want whenever they want. They have meaning. I simply cannot, and will not find, that even with multipliers, that a 2% impairment rating adequately compensates the Plaintiff for the loss of a \$1200.00 a week job.

This is not mere sympathy, the weight of the evidence, despite that addressed above, leads me to this conclusion. The Plaintiff, clearly, in the course and scope of his work sustained an injury requiring surgery. He has physical restrictions sufficient to prevent him from returning to work, which would at least imply a higher impairment rating. While attending a FCE, conducted by a neutral party, his arm began to swell in the middle of the evaluation. He is credible and makes credible and reasonable pain complaints. He, as far as I can tell, made diligent efforts to return to work and simply, factually, could not.

Forced to choose between the 2% and the 17% the undersigned finds the 17% more accurately reflects the Plaintiff's impairment rating. There is no dispute he cannot return to the type of work done on the date of injury.

Perry County's main objection to the ALJ's reliance upon Dr. Hughes is that "Judge Davis abused his discretion in choosing to rely on Dr. Hughes simply because

he did not think Dr. D'Angelo's 2% impairment...fully compensated respondent for the loss of his job." However, this exercise of discretion by the ALJ is precisely what the law permits. As fact-finder, the ALJ has the sole authority to determine the weight, credibility, and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the discretion to determine 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). Significantly, 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).

Here, the ALJ weighed the medical evidence carefully and determined Dr. Hughes' 17% impairment rating is a more accurate representation of Bowling's impairment. The function of the Board in reviewing an ALJ's decision is limited to determining whether the findings of fact are so unreasonable under the evidence they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton,

34 S.W.3d 48 (Ky. 2000). 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 other conclusions or reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (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, 708 S.W.2d 641, 643 (Ky. 1986). The ALJ's reliance upon Dr. Hughes' impairment rating is not unreasonable and is consistent with the discretion afforded him under the law; therefore, it will remain undisturbed.

Perry County also contends the ALJ erred because his decision to rely on Dr. Hughes' impairment rating over Dr. D'Angelo's was based upon "incorrect facts." Perry County asserts the ALJ did not understand the facts surrounding Bowling's return to work following his November 5, 2012, surgery because the ALJ referred to it as a "failed attempt to return to work." Significantly, the ALJ used this language in his discussion regarding the appropriate duration of TTD benefits. Thus, we find this assertion provides no support for Perry County's argument regarding the correct impairment rating. Nonetheless, we

will quickly dispense with Perry County's concerns regarding an alleged misunderstanding of the facts.

In the "summary of the evidence" in the August 28, 2013, opinion, award, and order, the ALJ stated as follows: "Following surgery, Bowling was released to return to light duty work. His duties included sweeping floors and answering phones. Bowling was laid off work and terminated on December 7, 2012." This summary is entirely consistent with Bowling's testimony at the July 18, 2013, hearing which is as follows:

Q: Okay. Then, after you had your surgery, I have- my notes show that you were released on some kind of light duty November 16, 2012. Is that...

A: Yeah, the day he took my stitches out, he released me to go back to work.

Q: And, did you go back to work?

A: Yes, I did.

Q: Okay. What did you do on light duty?

A: Swept floors and emptied garbage cans and answered the phones in the mining office.

Q: And, did you continue doing that until your layoff?

A: Yes, I did.

Without question, the language at issue- "failed attempt to return to work"- was contained in the section of

the ALJ's August 28, 2013, opinion, award, and order discussing the duration of TTD benefits to which Bowling is entitled. Consequently, this argument is without merit.

In a final attack on the ALJ's reliance on Dr. Hughes' 17% impairment rating, Perry County asserts the ALJ abused his discretion in relying on the impairment "because he did not indicate why he accepted the entire 17% impairment, without making findings to support each aspect of the impairment." This argument is unreasonable. The ALJ is not required to engage in a detailed discussion of the facts or set forth the minute details of his reasoning in reaching a particular result. The ALJ is only required to adequately set forth the basic facts upon which the ultimate conclusion was drawn so the parties are reasonably apprised of the basis of the decision. Big Sandy Community Action Program v. Chafins, 502 S.W.2d 526 (Ky. 1973). Additionally, while an ALJ may elect to consult the AMA Guides in assessing the weight and credibility to be afforded a physician's impairment rating, as finder of fact he or she is never required to do so. George Humfleet Mobile Homes v. Christman, 125 S.W.3d 288 (Ky. 2004). So long as sufficient information is contained within a medical expert's testimony from which an ALJ can reasonably infer the assessed impairment rating is based upon the AMA

Guides, the ALJ, as fact-finder, is free to adopt that physician's impairment rating.

Here, the ALJ set forth his rationale for relying upon Dr. Hughes' impairment rating over that of Dr. D'Angelo. The ALJ was not required to hyper-analyze and dissect Dr. Hughes' impairment rating. The ALJ's reliance upon Dr. Hughes' impairment rating will not be disturbed.

Perry County's second argument is that the ALJ did not perform a sufficient Fawbush analysis. Perry County asserts as follows:

Respondent testified he continued working after his injury as an electrician though he would self-limit himself until he was taken off work for surgery in November 2012. He was released to one handed duty after his surgery in mid-November 2012 and working in the office making the same pre-injury wages until a company layoff. As Dr. D'Angelo had not released respondent to full duty work at the time of the hearing in this claim, the evidence supports the application of the 3 multiplier via KRS 342.730(1)(c)1, but also as plaintiff returned to work making the same or greater wage after his injury, he could also be entitled to the 2 multiplier via KRS 342.730(1)(c)2.

The record reveals Bowling, after his injury, returned to work twice. He initially returned to work following his October 5, 2012, injury. Bowling testified as follows regarding his wages before and after the injury:

Q: And what was your last hourly rate at the time of your injury?

A: Twenty-seven dollars an hour, I believe, or twenty-six.

Q: And how many hours a week did you normally work?

A: That varied anywhere from forty to sixty, sixty-eight.

Q: Where was it usually?

A: For the last few months it was around forty-two, forty-three hours. Prior to that it was about sixty-eight hours a week.

Q: Because they just cut back everyone's hours?

A: Yes.

Q: So, after your injury were you paid the same rate?

A: Yes.

Q: Were you still working about forty-two, forty-three hours?

A: Yes, I was.

The second time Bowling returned to work was after the November 5, 2012, surgery. At the hearing, and as outlined above, Bowling returned to light-duty work. Bowling testified as follows regarding his wages at that time:

Q: Okay. During the time that you did work after your injury, were you still paid the same wages?

A: While I was on light duty at work, yes.

Bowling was ultimately terminated from his employment by virtue of a lay-off in December 2012.

Pursuant to Fawbush v. Gwinn, supra, an ALJ must determine which multiplier contained in KRS 342.730(1)(c) is "more appropriate on the facts" when awarding permanent partial disability benefits. Fawbush at 12. KRS 342.730(1)(c)1 states, in relevant part, as follows:

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 injury, the benefit for permanent partial disability shall be multiplied by three (3) times the amount otherwise determined under paragraph (b) of this subsection. . . ; or

KRS 342.730(1)(c)2 further provides:

If an employee returns to work at a weekly wage equal to or greater than the average weekly wage at the time of injury, the weekly benefit for permanent partial disability shall be determined under paragraph (b) of this subsection for each week during which that employment is sustained. During any period of cessation of that employment, temporary or permanent, for any reason, with or without cause, payment of weekly benefits for permanent partial disability during the period of cessation shall be two (2) times the amount otherwise payable under paragraph (b) of this subsection.

When a claimant satisfies the criteria of both (c)1 and (c)2, "the ALJ is authorized to determine which provision is more appropriate on the facts and to calculate the benefit under that provision." Kentucky River Enterprises, Inc. v. Elkins, 107 S.W.3d 206, 211 (Ky. 2003). As a part of this analysis, the ALJ must determine whether "a worker is unlikely to be able to continue earning a wage that equals or exceeds the wage at the time of injury for the indefinite future." Fawbush v. Gwinn, supra. In other words, is the injured worker faced with a "permanent alteration in the ...ability to earn money due to his injury." Id. "That determination is required by the Fawbush case." Adkins v. Pike County Bd. of Educ., 141 S.W.3d 387, 390 (Ky. App. 2004). If the ALJ determines the worker is unlikely to continue earning a wage that equals or exceeds his or her wage at the time of the injury, the three multiplier under KRS 342.730(1)(c)1 applies.

Fawbush, supra, articulated several factors an ALJ can consider when determining whether an injured employee is likely to be able to continue earning the same or greater wage for the indefinite future. These factors include the claimant's lack of physical capacity to return to the type of work that he or she performed, whether the post-injury work is done out of necessity, whether the

post-injury work is done outside of medical restrictions, and if the post-injury work is possible only when the injured worker takes more narcotic pain medication than prescribed. Id. at 12. As the Court in Adkins, supra, stated, it is not enough to determine whether an injured employee is able to continue in his or her current job.

The Court stated:

Thus, in determining whether a claimant can continue to earn an equal or greater wage, the ALJ must consider a broad range of factors, only one of which is the ability to perform the current job.

Id. at 30.

In the case *sub judice*, the ALJ enhanced the award by the three multiplier providing this one-sentence explanation: "There is no dispute he cannot return to the type of work done on the date of injury."

In its September 9, 2013, petition for reconsideration, Perry County requested the ALJ to:

- 1) Correct the stop date for TTD benefits;
- 2) Reconsider giving the opinions of Dr. Arthur Hughes more weight over treating surgeon, Dr. Gregory D'Angelo;
- 3) Reconsider whether an analysis pursuant to Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003) would be appropriate.

In the October 17, 2013, order on reconsideration, the ALJ determined as follows regarding the propriety of a Fawbush, supra, analysis:

The parties are, as always, entitled to a sufficient *Fawbush* analysis. However, herein, the undersigned having made factual findings that due to the work injury the Plaintiff cannot return to the type of work done on the date of injury and having made a factual finding that he is earning less than on the date of injury, due to the injury, the 3x multiplier under KRS 342.730(1)(c) is applicable.

The ALJ must apprise the parties of the basis for his decision to permit meaningful appellate review. Shields v. Pittsburgh and Midway Coal Min. Co., 634 S.W.2d 440, 444 (Ky. App. 1982). "The case law dealing with administrative bodies clearly indicates that it is required that basic facts be clearly set out to support the ultimate conclusions." Id. The Court of Appeals also stated as follows:

As the circuit court said, 'Concededly, it takes more time in writing an Opinion to tailor it to the specific facts in an individual case, however, this Court feels that the litigants are entitled to at least a modicum of attention and consideration to their individual case.'

Id.

Here, the two multiplier has been triggered and is potentially applicable, as the record indicates Bowling

returned to work at least twice following the injury earning wages equal to or greater than the wages he earned at the time of the injury. Additionally, the record reveals Bowling is no longer employed and earning those wages. Thus, as the two multiplier is potentially applicable and as the ALJ determined the three multiplier is applicable, the ALJ must provide a Fawbush analysis and determine whether Bowling "is unlikely to be able to continue earning a wage that equals or exceeds the wage at the time of injury for the indefinite future." Fawbush at 12. This Board is not a fact-finding tribunal. See KRS 342.285. Thus, the ALJ must review the evidence and set forth a Fawbush analysis that displays an adequate understanding of the facts and, importantly, the applicable law. Here, there was no such analysis. In fact, the ALJ, in the October 17, 2013, order on reconsideration, fails to acknowledge Bowling's return to work and the triggering of and potential applicability of the two multiplier pursuant to KRS 342.730(1)(c)(2). On remand, the ALJ must provide an adequate and thorough analysis.

Accordingly, concerning the ALJ's reliance upon Dr. Hughes' impairment rating, the August 28, 2013, opinion, award, and order and the October 17, 2013, order ruling on the petition for reconsideration are **AFFIRMED**.

That portion of the August 28, 2013, opinion, award, and order enhancing the PPD benefits by the three multiplier and the portion of the October 17, 2013, order ruling on the petition for reconsideration which reaffirmed the award are **VACATED**. This claim is **REMANDED** to the ALJ for entry of an amended opinion and award providing an analysis pursuant to Fawbush, supra consistent with the views expressed herein.

ALL CONCUR.

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