Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: January 29, 2014

CLAIM NO. 201182959

SMX PETITIONER

VS. **APPEAL FROM HON. JONATHAN R. WEATHERBY, ADMINISTRATIVE LAW JUDGE**

ARLENE ALLEN,
and HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

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

RECHTER, Member. Petitioner, SMX, appeals from an August 16, 2013 Opinion and Award rendered by Hon. Jonathan R. Weatherby, Administrative Law Judge ("ALJ"). In that Opinion, the ALJ found Arlene Allen ("Allen") permanently totally disabled and awarded medical and income benefits. On appeal, SMX advances three arguments, all of which

pertain to the adequacy of the ALJ's findings and the sufficiency of the evidence. Finding no error, we affirm.

Allen is a high school graduate with no vocational training who began working for SMX in October, 2010 at a windshield factory. Her primary job duties included inspecting, lifting and packing windshields; breaking down boxes; and cutting vinyl. The windshields weighed between 25 and 40 pounds. Prior to her employment with SMX, Allen had worked as a babysitter, factory worker, waitress, and doing cleaning and laundry at a Laundromat. Just prior to her employment at SMX, from 2003 to 2010, Allen worked as an assistant manager at a campground. At the time of the final hearing, she was 51 years old.

Allen sustained two injuries while employed by SMX. On November 9, 2010, she pulled her back while banding tall boxes. She was treated at the emergency room and, thereafter, by her family physician, Dr. Patrick Kelleher. She missed a few days of work but was eventually able to return to regular duty.

On May 5, 2011, she was loading a roll of vinyl when she experienced a sharp pain in her back. Following this second incident, she was placed on light duty and was again treated by Dr. Kelleher. By May 21, 2011, he had taken her off work and recommended an MRI of the lumbar

spine. He also referred Allen to Dr. Phillip Tibbs, who first evaluated her on June 10, 2011.

Dr. Tibbs reviewed Allen's MRI and diagnosed a right disc herniation. He performed three surgeries. The first was a right lumbar microdiscectomy at L5-S1 on July 11, 2011. Dr. Tibbs performed a second microdiscectomy at the same level on September 27, 2011, which he referred to as a "redo". Allen experienced some relief from this second procedure for a time, but eventually intermittent pain returned. Because of this, Dr. Tibbs ordered a second MRI which revealed a recurrent right-side L5-S1 disc herniation. On February 20, 2012, Dr. Tibbs performed a posterior lumbar fusion. He continues to periodically evaluate Allen to ensure her hardware remains intact.

Allen testified she has experienced relief with her back pain since the third surgery, but continues to experience significant sciatic nerve pain. The pain is constant, but is particularly exacerbated when she sits, stands, stoops or lifts. The pain, especially when walking, makes it difficult for Allen to perform daily household tasks, and she does not believe she is able to work. She wears a brace to reduce the pain.

Dr. Tibbs opined Allen's continued pain is a result of nerve injury. He recommended a dorsal column

stimulator to alleviate the pain. Referencing the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"), Dr. Tibbs assigned a 26% whole person impairment rating. He further opined Allen's problems are the result of her November 9, 2010 work injury. He placed her at maximum medical improvement ("MMI") as of February 20, 2013, although he reiterated his belief Allen would benefit from the spinal cord stimulator.

Dr. John Vaughan performed an independent medical evaluation on July 31, 2012, after Allen's fusion surgery. Upon review of her medical records, Dr. Vaughn opined Allen had received appropriate and reasonable medical care, all of which were related to her work injury. He diagnosed a disc herniation at L5-S1 and estimated she would reach MMI nine months after her fusion surgery, on or about November 20, 2012. He also anticipated she would have an impairment rating of 23% according to the AMA Guides, and would be able to perform light to medium duty job activities.

Dr. Vaughn evaluated Allen a second time on December 4, 2012. He again opined Allen did not need further surgical treatment, and specifically stated he did not think a spinal cord stimulator would provide her relief. He recommended permanent restrictions of no lifting greater than 25 pounds, no repetitive bending or

twisting of the lumbar spine, and to alternate between sitting and standing as needed. He did not believe Allen could return to her work at SMX, but could perform light to medium duty work.

The ALJ found Allen's testimony "particularly credible and convincing". Lending weight to his position as the treating surgeon, the ALJ stated he found Dr. Tibbs' opinion credible. Based on this evidence, he concluded "she is permanently totally disabled." The ALJ awarded temporary total disability, permanent total disability, and medical benefits. Neither party petitioned for reconsideration.

On appeal, SMX argues the ALJ erred as a matter of law in finding Allen permanently totally disabled; the ALJ made inaccurate and inadequate findings of fact relating to permanent total disability; and the finding of permanent total disability is not supported by substantial evidence. In response, Allen asserts SMX's arguments are not preserved for review by this Board because it failed to file a petition for reconsideration. For this reason, Allen argues the appeal is frivolous and requests sanctions be imposed pursuant to KRS 342.310 and 803 KAR 25:010 §24.

We must first discuss what effect SMX's failure to file a petition for reconsideration has on our review.

When no petition for reconsideration is filed, the ALJ's award or order is conclusive and binding as to all questions of fact. KRS 342.285(1). Issues regarding questions of law, however, need not be preserved pursuant to a petition for reconsideration and may be appealed directly to this Board. Brasch-Barry Gen. Contractors v. Jones, 175 S.W.3d 81, 83 (Ky. 2005). KRS 342.285 permits this Board "to determine whether or not the ALJ's action was authorized; was the product of fraud; was in conformity with Chapter 342; was clearly erroneous under the reliable, probative and material evidence contained in the whole record; or was arbitrary and capricious, an abuse of discretion, or a clearly unwarranted exercise of discretion." Bullock v. Goodwill Coal Co., 214 S.W.3d 890, 893 (Ky. 2007).

Thus, to the extent an ALJ makes findings unsupported by evidence contained in the record, the error is one of law and no petition for reconsideration need be filed as a prerequisite to appellate review. KRS 342.281. However, an ALJ must be afforded the opportunity to make any corrections, via petition for reconsideration, concerning a misunderstanding of the evidence upon which the fact-finder relies. Accordingly, absent a petition for reconsideration, the issue is narrowed to whether the ALJ's

decision is supported by substantial evidence in the record. Halls Hardwood Floor Co. v. Stapleton, 16 S.W.3d 327 (Ky. App. 2000).

Turning to the arguments raised on appeal, SMX first claims the ALJ erred as a matter of law in finding Allen permanently totally disabled. The analysis required of the ALJ involves a consideration of Allen's post-injury physical, emotional, intellectual and vocational status and the likelihood she will be able to find work consistently under normal employment conditions. Ira A. Watson Dep't Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). SMX argues the ALJ failed to discuss these factors or otherwise provide the proper analysis required by law.

Upon review, we determine the ALJ made the required findings to support the conclusion Allen is permanently totally disabled. Certainly, the ALJ's findings are minimal. While authority generally establishes an ALJ must effectively set forth adequate findings of fact from the evidence in order to apprise the parties of the basis for his decision, he is not required to recount the record with line-by-line specificity nor engage in a detailed explanation of the minutia of his reasoning in reaching a particular result. 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).

Here, the ALJ identified the appropriate standards for determination of permanent total disability and had a correct and comprehensive understanding of the evidence before him, which we note was fairly limited. The ALJ indicated he had considered the principles enunciated in Ira Watson and their application to Allen's situation. The ALJ stated he found Dr. Tibbs' opinion persuasive and credible, particularly in light of his lengthy treatment of Allen which included three surgeries. Reading the opinion as a whole, it is apparent the ALJ accepted the entirety of Dr. Tibbs' report including impairment rating and restrictions. The ALJ also stated he found Allen's testimony credible regarding the extent and duration of the injury, and the extent to which the work injury affected her ability to function in every-day life. While the ALJ did not specifically address some of the factors, through his recitation of the definitions of permanent total disability and work, and his reference to the factors in Ira Watson, it is apparent he knew the correct standard. We conclude the ALJ's analysis satisfies the requirement of Chapter 342.

In a related argument, SMX contends the ALJ made inadequate findings of fact. KRS 342.0011(11)(c) requires a claimant have a permanent disability rating in order to qualify for permanent total disability benefits. SMX argues the ALJ failed to assess a permanent disability rating and, additionally, failed to make a finding any work-related injury occurred.

As noted by the ALJ, the parties stipulated Allen sustained a work-related injury on November 9, 2010. Upon review of the record in this claim, it is clear that SMX never contested the occurrence of a work-related injury. Further, as explained above, we believe it is apparent the ALJ accepted Dr. Tibbs' 26% whole person impairment rating.

SMX last argues the ALJ's award is not supported by substantial evidence. The ALJ was presented with two medical opinions which did not differ significantly. The two physicians agreed Allen's complaints are the result of her work-related injury, and agreed the three surgeries were necessary and reasonable. They differed only in the recommended permanent physical restrictions, and in the impairment rating. While Dr. Tibbs assessed a 26% impairment rating, Dr. Vaughn assessed a 23% rating. Acting within his discretion as fact-finder, the ALJ chose to rely upon Dr. Tibbs' medical opinion. Pruitt v. Bugg

Bros., 547 S.W.2d 123 (Ky. 1977). Further, the ALJ found credible Allen's testimony regarding the extent of her injury and its effects on her everyday functioning. Considered together, Dr. Tibbs' opinion and Allen's testimony constitute the requisite substantial evidence to support the award. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993).

As a final matter, we have considered Allen's request to impose sanctions. This request is based solely on SMX's failure to file a petition for reconsideration. By Allen's reasoning, this failure renders the entire appeal frivolous. We disagree. As explained above, the failure to petition for reconsideration limits appellate review, but does not completely extinguish this Board's authority to review the ALJ's opinion. We therefore cannot conclude the appeal has been brought without reasonable grounds.

Accordingly, the August 16, 2013 opinion and award rendered by Hon Jonathan R. Weatherby, Administrative Law Judge, is hereby **AFFIRMED**.

ALL CONCUR.

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