Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: July 10, 2015

CLAIM NO. 201170625

ST. ELIZABETH MEDICAL CENTER PETITIONER

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

WILLIAM GENTER
and HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
VACATING IN PART AND REMANDING
* * * * * *

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

STIVERS, Member. St. Elizabeth Medical Center ("St. Elizabeth") seeks review of the February 4, 2015, Amended Opinion and Order on Remand of Hon. William J. Rudloff, Administrative Law Judge ("ALJ") again determining William Genter ("Genter") is totally occupationally disabled. St. Elizabeth also appeals from the March 9, 2015, Opinion and

Order on Reconsideration overruling its petition for reconsideration.

In an October 9, 2012, Opinion and Order, the ALJ determined Genter sustained work-related injuries to his neck, back, and left shoulder while employed by St. Elizabeth on September 9, 2011. Significantly, the ALJ did not specifically state the region of the back which was injured. The ALJ determined Genter was totally disabled as a result of this injury. St. Elizabeth appealed and this Board affirmed. St. Elizabeth appealed to the Court of Appeals which vacated concluding the Board erroneously ruled St. Elizabeth had waived the issue of whether Genter had a pre-existing condition and the parties tried the issue by consent.[1] It also noted St. Elizabeth had requested the ALJ make a finding of fact regarding whether the pre-existing condition was active or dormant. Thus, the "ALJ was required to make specific findings of fact regarding whether Genter's back, neck, and shoulder condition constituted a pre-existing active and dormant condition." Id. Slip Op. at 7. The Court of Appeals instructed as follows:

> Upon remand, the ALJ shall reconsider the evidence and make a specific

[1] 2013-CA-000672-WC, rendered October 11, 2013, Designated Not To Be Published.

> finding of fact on the issue of whether Genter's preexisting back, neck, and shoulder condition was active or dormant at the time of the work-related injury on September 9, 2011.

Id.

St. Elizabeth appealed to the Kentucky Supreme Court and in an opinion rendered December 18, 2014, the Kentucky Supreme Court affirmed in part and reversed in part.[2] The Supreme Court affirmed the finding Genter suffered a work-related injury while lifting a patient on September 9, 2011. It also affirmed the finding Genter provided adequate notice of his work-related injuries. The Supreme Court reversed the Court of Appeals by vacating the finding Genter is permanently totally disabled. The Supreme Court noted St. Elizabeth contended the ALJ's finding of permanent total disability is not supported by the evidence, and he failed to consider evidence which supports its argument. That evidence included the fact Genter was unable to complete work rehabilitation because of knee and low back pain which was unrelated to his work injury. Genter was able to work at least part-time as a floor nurse and had stated he was not permanently totally disabled. Therefore, St. Elizabeth argued the ALJ did not

[2] 2014-SC-000019-WC, rendered December 18, 2014, Designated Not To Be Published.

perform a proper analysis pursuant to Ira A. Watson Dept. Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000), and should have provided a better summary of the evidence and analysis in rendering his decision. After citing to a portion of the ALJ's opinion, the Supreme Court stated as follows:

> Here the ALJ's opinion barely provides an adequate evidentiary basis for his finding that Genter is permanently and totally disabled. A better opinion would have indicated the ALJ considered the counter evidence provided by St. Elizabeth, including the allegation that it was actually Genter's pre-existing knee and low back injuries which prevent him from returning to work. However, that finding by the ALJ does not articulate the effect of Genter's pre-existing conditions, as he did not determine if they were active or dormant when the work-related injury occurred. The result of that analysis might change the ultimate conclusion on whether Genter is totally or partially disabled as a result of the injury suffered when lifting the patient. *See International Harvester v. Poff*, 331 S.W.2d 712 (Ky. 1959) (holding that a worker who sustains both a work-related injury and a nonwork-related impairment is entitled to receive income benefits to the extent that the compensable work-related injury affected his ability to work). The Court of Appeals ordered this determination but stopped short of telling the ALJ to factor this into a new determination as to whether any disability Genter has is a total or partial disability. Thus, we vacate the ALJ's findings regarding Genter being permanently and totally disabled, and remand this matter for him to reconsider his determination in light

> of his findings regarding his pre-existing conditions.

Id. Slip Op. at 6 & 7.

On remand, the ALJ provided the following summary of Genter's testimony:

> The plaintiff, **William Genter**, testified that while working as a nurse for the defendant on September 9, 2011, he was lifting a patient and felt pain in his left shoulder and upper back. He filed an incident report with the defendant alleging a back injury. Upon returning to work on September 20, 2011, Mr. Genter stated that he experienced neck pain at the end of his work shift. He sought medical treatment for his pain and was referred to an orthopedic surgeon. Mr. Genter reported to the defendant on October 24, 2011 that he had sustained a neck injury. Mr. Genter had a prior history of neck and back pain. He had shoulder surgery in 2009. Mr. Genter testified that he had neck surgery in November, 2011.

The ALJ summarized in detail the contents of the July 25, 2012, letter of Dr. Michael Grefer. He provided a short summary of Dr. Thomas Bender's May 9, 2012, report. The ALJ did not discuss the testimony of the three nurses who worked with Genter, regarding Genter's lower back, left shoulder, and neck problems prior to the September 9, 2011, injury.[3] The ALJ did not discuss Genter's extensive

[3] The three nurses are Stephanie Mills, Genter's nurse manager, Rosemary Martin, Assistant Nurse Manager, and Tandy Mamutse.

testimony concerning his persistent pre-existing problems in the left shoulder, knees, and all regions of his spine.

In concluding Genter is permanently totally disabled, the ALJ stated as follows:

> In this case, I make the determination that the lay testimony of Mr. Genter, as covered above, was very credible and convincing. In addition, I make the determination that the medical evidence from the plaintiff's treating orthopedic surgeon, Dr. Grefer, as covered in detail above, is very persuasive and compelling. I make the determination that Mr. Genter will as a result of the work-related injuries to his neck, back and left shoulder on September 9, 2011 sustain under the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, a 30% permanent impairment to the body as a whole. I also make the determination pursuant to the medical evidence from Dr. Grefer that the plaintiff cannot return to work for the defendant and is essentially unable to work since nothing is available for him, and further that Dr. Grefer stated the plaintiff is totally disabled from his job as a result of his work-related injuries sustained in September, 2011 and the aggravation of pre-existing dormant conditions by that accident.

After discussing the definition of permanent total disability and the Kentucky Supreme Court's holding in Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979), the ALJ provided the following:

> Based upon the credible and convincing lay testimony of Mr. Genter,

as covered above, and the persuasive and compelling medical evidence from his treating orthopedic surgeon, Dr. Grefer, as covered in detail above, I make the determination that Mr. Genter continues to have decreased range of motion, pain, stiffness, tightness and muscle weakness of his cervico-thoracic spine and his left shoulder. I further make the determination that Mr. Genter is at maximum medical improvement and that his prognosis is poor for full recovery. I further make the determination that Mr. Genter will have significant permanent residuals as a result of his September 9, 2011 work-related injuries. At the time of the Final Hearing on August 29, 2012, Mr. Genter was 59 years of age, and is, therefore, an older worker with significant limitations for reemployment in the highly competitive job market. I make the determination that Mr. Genter had a good work history showing a good work ethic before his employment injuries on September 9, 2011, but that he will not be able to return to any regular gainful employment in the highly competitive job market. Based upon all of the above-stated factors, I make the determination that Mr. Genter cannot find work consistently under regular work circumstances and work dependably. Based upon all of the above factors, I reached the ultimate conclusion that Mr. Genter is permanently and totally disabled.

One of the most important modern decisions in Kentucky Workers' Compensation law is the decision of the Kentucky Supreme Court in *McNutt Construction/First General Services v. Scott*, 40 S.W.3d 854 (Ky.2001), where the high court held that where work-related trauma causes a dormant

> degenerative condition to become disabling and to result in a functional impairment, the trauma is the proximate cause of the harmful change; hence, the harmful change comes within the definition of an injury. The *McNutt* case definitely applies to the factual situation in the case at bar. Dr. Grefer, Mr. Genter's long-term treating orthopedic surgeon, stated that Mr. Genter is totally disabled from his job as a result of the work-related injuries which he sustained in September, 2011 and the aggravation of pre-existing dormant conditions by that accident. I make the determination that Mr. Genter's pre-existing conditions were dormant and not active when his work-related injuries occurred.
>
> I also rely on the highly important decision of the Kentucky Supreme Court in *Roberts Brothers Coal Company v. Robinson*, 113 S.W.3d 181 (Ky.2003), where the high court concluded that an exclusion from a total disability award must be based upon pre-existing occupational disability and that for that reason if an individual is working without restrictions at the time a work-related injury is sustained, a finding of pre-existing impairment does not compel a finding of pre-existing disability with regard to an award that is made under KRS 342.730(1)(a). That legal principle certainly applies in the case at bar. Mr. Genter testified that before his September 9, 2011 injuries he was working without restrictions.

St. Elizabeth filed a petition for reconsideration citing the instructions of the Court of Appeals and the Kentucky Supreme Court. It argued the ALJ

had not cited, addressed, or analyzed Genter's relevant testimony concerning the pre-existing conditions is his knees, left shoulder, and all regions of his spine. St. Elizabeth cited to multiple portions of Genter's testimony concerning his pre-existing conditions. St. Elizabeth briefly summarized the records from Dr. Jose Rivera, with the Interventional Pain Specialists, as well as the testimony of the three nurses relative to Genter's pre-existing problems. It also cited to portions of the Work Rehabilitation Center report of June 29, 2012, and portions of the reports of Dr. Grefer and Dr. Bender which it believed were significant regarding Genter's pre-existing problems. St. Elizabeth asserted the ALJ failed to engage in a proper analysis of all the evidence in order to allow for meaningful review. It also contended the ALJ failed to provide a legal basis for concluding Genter's claimed injuries were dormant and he had no pre-existing occupational impairment. Finally, it argued the ALJ failed to provide a proper legal analysis of what Genter is and is not able to do and failed to take into account the work hardening record establishing that only Genter's pre-existing knee and low back condition limited him to part-time work.

The March 9, 2015, Opinion and Order on Reconsideration overruling the petition for reconsideration mirrors much of the language in the February 4, 2015, decision.

On appeal, St. Elizabeth again cites to Genter's testimony regarding the problems in his left shoulder, knees, and throughout his spine which predated his work injury. It also provides the same summary of the medical and lay evidence set out in its petition for reconsideration. Consequently, St. Elizabeth contends the ALJ's opinion does not provide a proper legal basis for concluding Genter's claimed injuries were dormant and he had no pre-existing occupational impairment. St. Elizabeth complains the ALJ did not summarize any of the conflicting evidence nor did he cite to evidence demonstrating the problems in Genter's knees, left shoulder, and spine were active and disabling at the time of his work injury. It also contends the ALJ failed to address certain portions of Dr. Grefer and Dr. Bender's reports. St. Elizabeth contends "the record is rife with evidence including Genter's testimony that the ALJ failed to summarize, weigh, and determine its legal significance."

St. Elizabeth also takes issue with the ALJ's conclusion that any conditions and impairments were dormant

and inactive since the ALJ failed to take into account Genter's testimony, the medical records, and the testimony of his co-workers establishing his conditions were not dormant. St. Elizabeth asserts the amended opinion provides no analysis of the voluminous evidence, including Genter' testimony, which demonstrates his multiple physical conditions were symptomatic immediately prior to September 9, 2011.

Finally, St. Elizabeth complains the ALJ failed to provide a legal analysis of Genter's post-injury capabilities as required by applicable case law. It contends Genter offered no testimony relative to the issue of permanent total disability. As a subpart of its argument, St. Elizabeth argues the ALJ failed to take into account the work-hardening record reveals only Genter's unrelated knee and low back condition limit him to part-time work. It observes the ALJ's reasoning for finding permanent total disability is based on Dr. Grefer's conclusory report and not on testimony from Genter. St. Elizabeth argues there is no evidence Genter's age and work experience prevent him from performing sedentary or light work.

Because the ALJ's decision does not comply with the directive of the Supreme Court, we vacate and remand.

The fact Genter sustained a neck, back, and left shoulder injury is not in dispute as the Supreme Court has affirmed the ALJ's determination on this issue. Unfortunately, in his initial decision of October 9, 2012, the ALJ did not specify the region of Genter's spine which was injured. However, Genter's hearing testimony clearly establishes he did not sustain a low back work injury and he was not claiming a work-related knee injury. The Supreme Court specifically noted these pre-existing conditions were unrelated to the work injury. This is significant because Genter's testimony establishes he underwent substantial treatment of his low back and left knee. Genter testified he underwent meniscal repairs in both knees and had arthritis in both knees prior to the injury. Genter also testified he has undergone treatment in all regions of the spine since 2003.

The ALJ was required by the Supreme Court to address whether Genter's pre-existing knee and back injuries prevented him from returning to work. The Supreme Court also noted the ALJ did not articulate the effect of Genter's pre-existing conditions by not determining if each was active or dormant when the work injury occurred. Concluding this could affect the ALJ's determination regarding the extent of Genter's disability, the ALJ was to

reconsider his findings regarding the pre-existing conditions. In spite of this direction, the ALJ failed to identify Genter's pre-existing conditions as well as determine the nature and severity of those conditions. Instead, the ALJ relied in part upon Genter's testimony which he concluded was "credible and convincing," but primarily upon the "persuasive and compelling" opinions of Dr. Grefer "covered in detail above" in determining Genter was permanently totally disabled.

There are insurmountable problems with the ALJ's reliance upon Dr. Grefer's July 25, 2012, report in finding Genter is totally occupationally disabled. In his report, Dr. Grefer states as follows:

> [Genter] recovered very well from his shoulder and neck problems and did not return to our office from 4/7/10 until his office visit on 9/27/11 following the work related injury. He had been treated by Dr. Hansen but because of continued problems, he came to see me for evaluation and treatment.

Based on his examination and the x-rays, Dr. Grefer stated as follows:

> I do feel that Mr. Genter is basically at maximum medical improvement as of 7/24/12. His prognosis is poor for full recovery. I do think he will have significant permanent residuals as a result of the 9/9/11 work related injury.

Dr. Grefer noted future treatment consisted of observation, activity limitation, medications, and exercises. Surgery was not planned at this time but could possibly be required for the left shoulder if Genter's symptoms continued and worsened. He believed the work-related injury significantly affected and limited Genter's activity level to the point that he could only function in sedentary to light situations. Genter's "testing is suggestive that he limit his activities to part-time because of endurance situation." As noted by St. Elizabeth, Dr. Grefer then stated as follows:

> His testing is suggestive that he limit his activities to part-time because of his endurance situation. Dr. Haskel, at St. Elizabeth Employee Health, was involved with Mr. Genter's rehabilitation and thought that he could only work 3 hours a day. With Dr. Haskel's recommendations, there does not appear to be a position for Mr. Genter at St. Elizabeth Healthcare and, therefore, I feel that he cannot work at that facility and is essentially unable to work at this time since nothing is available for him. Therefore, I think he is totally disabled from his job as a result of the work related injury sustained in September 2011 and the aggravation of pre-existing dormant conditions by this accident.

Dr. Grefer's statement Genter is totally disabled is based upon the contents of the report from St. Elizabeth

Work Rehabilitation Center.[4] Within the section entitled "Progress Toward Goals" is the notation Genter was not able to increase his workday tolerance consistently to four hours a day due to pain complaints. Further, Genter reported increased low back pain spasms and knee pain due to performing work activities on a consecutive day-to-day basis. He was able to increase to four hours on his last day but indicated this was because he had a day off. The Assessment section of the report notes Genter had canceled one appointment due to increased symptoms and lack of sleep. He tolerated all the demands well with little or no pain behaviors. Since beginning the program two weeks prior, Genter had been recording increased pain with program demands. He had been treated with moist heat and ice for symptom relief. Genter had been wearing his back brace in the clinic "while completing his program for lumbar support, which he says helps." Notably, the second paragraph of the Assessment reads as follows:

> During the second week of the program he was progressed to 4 hour sessions, yet reported increased symptoms the following day. On 6/27/12, he stated his knee was really bothering him, describing it to be swollen, feeling of

[4] Although Dr. Grefer references Dr. Haskel's involvement in Genter's rehabilitation and his recommendations, we believe Dr. Grefer is referencing the June 29, 2012, letter to Dr. Grefer from Bridget Smith with St. Elizabeth Work Rehabilitation Center.

> crunching and grinding with several tasks and was only able to tolerate 2 hours of program demands that day. He changed his appointment from 6/28/12 to 6/29/12 due to conflicting appointment his wife had (she is unable to drive). He met the 50 pound floor to waist goal and has met all other physical job demands. He was not able to increase his workday endurance past 3-4 hours due to subjective complaints of chronic pain in knees stemming from old injury.

One of the Recommendations was "to discontinue the program due to increased pain and flare up in unrelated injury of right knee and inability to progress with workday tolerance."

Dr. Grefer's opinion Genter is totally disabled is based upon the June 29, 2012, letter "suggestive that [Genter] limit his activities to part-time because of his endurance situation." In reaching this conclusion, Dr. Grefer relied on Dr. Haskel's statement Genter could only work three hours a day.[5] What the ALJ failed to recognize, and what St. Elizabeth has emphasized throughout, is the limitation of working three hours per day was clearly due to problems arising from Genter's non-work-related knee condition. We add that the June 29, 2012, letter also states Genter's non-work-related back problems were

[5] It appears Dr. Haskel is the individual who either oversaw the rehabilitation or set up Genter's rehabilitation at St. Elizabeth Work Rehabilitation Center.

adversely affected by his rehabilitation. Thus, Dr. Grefer's opinion Genter is unable to work and is totally occupationally disabled is not predicated upon the effects of Genter's work injury but rather upon the effects of his non-work-related knee injury.

Dr. Grefer's opinion Genter is "totally disabled from his job as a result of the work-related injury sustained in September 2011 and the aggravation of pre-existing dormant conditions by this accident" is faulty for two reasons. First and foremost, Dr. Grefer's opinion Genter is totally disabled is based upon the effects of and problems caused by Genter's non-work-related knee and low back condition. Second, as noted by St. Elizabeth, Dr. Grefer does not identify the specific "pre-existing dormant conditions" which were aggravated by the September 9, 2011, injury. This is imperative as the Supreme Court specifically directed the ALJ to determine whether it was Genter's pre-existing knee and low back injuries which prevented him from returning to work. This determination necessarily required the ALJ to first determine whether each condition was active prior to September 9, 2011, and provide the evidence upon which he relied in making this determination. The ALJ failed to undertake this task. Rather, the ALJ cited only to Dr. Grefer's opinions without

undertaking the analysis directed by the Supreme Court. The ALJ's opinion is devoid of any discussion of Genter's pre-existing conditions. More importantly, the ALJ does not make any findings regarding the extent of Genter's pre-existing knee and low back injuries and the effect of these conditions on his occupational capabilities both before and after the September 9, 2011, work injury. Genter's testimony clearly establishes he had no pre-existing dormant non-disabling conditions in the left shoulder, lumbar region, thoracic region, and left knee prior to the September 9, 2011, injury. Rather, his testimony establishes ongoing problems in the left shoulder, lumbar region, thoracic region, and left knee pre-dating the September 9, 2011, work injuries. The ALJ did not discuss any of these in analyzing the extent of Genter's pre-injury and post-injury occupational capabilities.

The ALJ's reliance upon the opinions of Dr. Grefer, Genter's long-term treating orthopedic surgeon, in concluding Genter is totally occupationally disabled due to the work injury is misplaced. Dr. Grefer's statement there were no positions available for Genter at St. Elizabeth Health Center is based upon the problems identified in the June 29, 2012, report of St. Elizabeth Rehabilitation Center relating in large part to increased knee problems,

and to a lesser extent to his lower back problems. Without question, the problems inhibiting Genter's rehabilitation were not due to the effects of the work injury. Thus, Dr. Grefer's opinions based on the June 29, 2012, St. Elizabeth Work Rehabilitation Center report cannot constitute substantial evidence in support of the ALJ's determination Genter is totally disabled.

With respect to the ALJ's partial reliance upon the credible and convincing lay testimony of Genter which he summarized, we note the ALJ did not discuss his testimony regarding his pre-existing knee and low back condition and how they affected his ability to work as directed by the Supreme Court. The ALJ's short synopsis of Genter's testimony provides no insight as to the portions of his testimony upon which the ALJ relied in concluding he was totally occupationally disabled due solely to the effects of his work injury.

In McNutt Construction/First General Services v. Scott, 40 S.W.3d 854 (Ky. 2001), regarding the necessary analysis for determining the extent of a worker's occupational disability, the Supreme Court instructed as follows:

> An analysis of the factors set forth in KRS 342.0011(11)(b), (11)(c), and (34) clearly requires an

> individualized determination of what the worker is and is not able to do after recovering from the work injury. Consistent with *Osborne v. Johnson, supra*, it necessarily includes a consideration of factors such as the worker's post-injury physical, emotional, intellectual, and vocational status and how those factors interact. It also includes a consideration of the likelihood that the particular worker would be able to find work consistently under normal employment conditions. A worker's ability to do so is affected by factors such as whether the individual will be dependable and whether his physiological restrictions prohibit him from using the skills which are within his individual vocational capabilities. The definition of "work" clearly contemplates that a worker is not required to be homebound in order to be found to be totally occupationally disabled. *See, Osborne v. Johnson, supra, at 803.*

Id. at 860.

Here, the ALJ merely stated Genter was an older worker with significant limitations for reemployment in a highly competitive job market. Despite Genter's good work ethic, the ALJ concluded he would not be able to return to any regular gainful employment in a highly competitive job market. Those statements fall far short of the analysis required by McNutt, supra. The ALJ was specifically directed by the Supreme Court to determine whether Genter's pre-existing knee and low back injuries were active and, if so, whether they prevent him from returning to work. The

ALJ failed to make this determination. The ALJ did not address Genter's physical, emotional, intellectual, and vocational status and how those factors interacted. More importantly, the ALJ cannot rely upon Dr. Grefer's opinions as his opinions were based upon his misinterpretation of the report of St. Elizabeth Work Rehabilitation Center. Genter's inability to work more than three hours was based upon problems arising from non-work-related conditions. Therefore, the ALJ's decision must be vacated and this matter remanded to the ALJ, as directed by the Supreme Court, for a determination of the significance of Genter's pre-existing knee and low back injuries and whether these conditions, in any part, affected his occupational capabilities.

On remand, the ALJ must discuss the nature and severity of Genter's pre-existing knee and low back conditions in accordance with the Supreme Court's directive. Since Dr. Grefer opined the September 9, 2011, injury aggravated a pre-existing dormant condition, but he did not identify those conditions, his opinion relative to this issue is without substance.

Finally, Genter's testimony, the June 29, 2012, rehabilitation report, and the testimony of the three nurses establish Genter had ongoing symptomatic knee and

low back problems well before the September 9, 2011, injury. If the ALJ determines the pre-existing left knee and low back conditions were active at the time of the September 9, 2011, injury, he must then determine the effect of the pre-existing knee and low back conditions on Genter's ability to return to work. In determining whether the pre-existing knee and low back conditions were active or dormant, he must specifically address all the relevant evidence. The ALJ must also engage in the analysis required by McNutt, supra, in determining Genter's occupational disability.

Accordingly, the February 4, 2015, Amended Opinion and Order on Remand and the March 9, 2015, Opinion and Order on Reconsideration finding Genter to be totally occupationally disabled are **VACATED**. This claim is **REMANDED** to the ALJ for entry of an opinion in accordance with the views expressed herein and as directed by the Kentucky Supreme Court.

ALL CONCUR.

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