Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: February 12, 2016

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 August 21, 2015, Amended Opinion and Order on Remand and the September 30, 2015, Opinion and Order on Reconsideration overruling its petition for reconsideration of Hon. William J. Rudloff, Administrative Law Judge ("ALJ"). On remand, the ALJ again

determined William Genter ("Genter") is totally occupationally disabled.

Because we and the parties are fully familiar with this claim, we will not discuss the facts of the case.

We incorporate the appellate procedural history of this claim as set out in our July 10, 2015, Opinion as follows:

> 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. [footnote omitted] 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:
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>> Upon remand, the ALJ shall reconsider the evidence and make a specific 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.
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> 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. [footnote omitted] 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 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.
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> Id. Slip Op. at 6 & 7.

In his February 4, 2015, Opinion on Remand, the ALJ reiterated the same summary of Genter's testimony contained in his previous decision as well as his summaries of the July 25, 2012, report of Dr. Michael Grefer and the May 9, 2012, report of Dr. Thomas Bender. The ALJ did not discuss the testimony of three nurses who worked with Genter regarding his low back, left shoulder, and neck problems prior to his September 9, 2011, injury nor did he discuss Genter's extensive testimony regarding his pre-existing problems in the left shoulder, knee, and all regions of his spine. In the February 4, 2015, Opinion on Remand, the ALJ determined Genter was totally disabled.

We vacated the ALJ's February 4, 2015, decision and the March 9, 2015, Opinion and Order on Reconsideration and remanded the claim stating as follows:

> 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. [footnote omitted] 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 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. [footnote omitted] 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 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.*
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> 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.

In the August 21, 2015, Amended Opinion and Order on Remand, the ALJ inserted almost verbatim the same summary of Genter's testimony. He merely altered two sentences which did not change the contents of his summary. The ALJ provided the same summaries of the July 25, 2012, medical report of Dr. Grefer and the May 9, 2012, medical report of Dr. Bender. The ALJ included a short summary of the deposition testimony of Tandy Mamutse ("Mamutse"), Stephanie Mardis ("Mardis"), and Rosemary Martin ("Martin"), all of whom are nurses who worked alongside Genter. The ALJ included the language contained in his previous opinion in determining Genter sustained a work-related injury, had provided notice, and his entitlement to temporary total disability ("TTD") benefits.

Under the heading "extent and duration and permanent total disability," the ALJ inserted the following which is different from his previous opinions:

> I make the determination pursuant to the persuasive, compelling and reliable medical evidence from Dr. Grefer that Mr. Genter cannot return to work for the defendant and is essentially unable

to work since nothing is available for him, and further that Mr. Genter is totally disabled from his job as a result of his work-related injuries sustained on September 9, 2011 and the aggravation of pre-existing dormant conditions by that accident.

. . .

I make the determination that work as a nurse is strenuous physical labor employment. Mr. Genter's solid work history shows that he had a very good work ethic. At the time of the Final Hearing on August 29, 2012, he was 59 years of age and is, therefore, an older worker with severe limitations for reemployment in the highly competitive job market. I make the determination that Mr. Genter will not be able to return to any regular gainful employment in the highly competitive job market. He last worked back on September 23, 2011 and has had no earnings since then, and the parties so stipulated. At [sic] the concurring opinion in the Stumbo case stated, "A claimant can certainly know as a fact if he is in pain, as well as he can know when it hurts to perform certain physical activities. He is entitled to tell and our court will give credence and weight to such testimony." Based upon the plaintiff's physical limitations, his age, which is advanced, and his work history as a nurse, I make the determination that if he went out into the highly competitive job market it would be obviously impossible for him to find any regular gainful employment.

(5) All of the above factors led to the legal conclusion that Mr. Genter is totally disabled due to his 9-9-11 injuries.

As part of my analysis of this case, I compared and contrasted the evidence from the defendant's three employees, Ms. Martin, Ms. Mardis and Ms. Mamutse. I make the determination that since they are all employees of the defendant their testimony is clearly biased in favor of the defendant hospital and against the nurse, Mr. Genter. I also compared and contrasted the testimony of the defendant's three employees with that of Dr. Grefer, Mr. Genter's long-term treating orthopedic surgeon. I make the determination that the weight of the credibility on the issue of whether the plaintiff's pre-existing back, neck and left shoulder condition was active or dormant at the time of Mr. Genter's injuries on September 9, 2011, rests with Dr. Grefer, the plaintiff's long-term treating orthopedic surgeon. I specifically make the determination that said pre-existing conditions were dormant and were aroused or brought into disabling reality as a result of his work event on September 9, 2011. I also make the determination that the plaintiff did not have knee-related active occupational disability before his work-related injuries on September 9, 2011, and that the defendant has not met the burden of proving that the plaintiff had knee-related active occupational disability before his work injuries on September 9, 2011. In reaching that determination, I rely upon the holding of the Kentucky Court of Appeals in *Finley v. DBM Technologies*, 217 S.W.3d 261 (Ky. App. 2007).

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).
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> 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.

The ALJ inserted the same language from his previous opinion in which he discussed the definition of permanent total disability, the holdings in Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979) and McNutt Construction/First General Services v. Scott, 40 S.W.3d 854 (Ky. 2001) with the exception of adding the following the language in his discussion of McNutt:

> I also rely upon the holding of the Supreme Court that 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).

The ALJ also inserted his previous discussion of Roberts Bros. Coal v. Robinson, 113 S.W.3d 181 (Ky. 2003) and Wilder v. Enterprise Mining, 2014 WL 7239812 (Ky. 2014).

St. Elizabeth filed a thirteen page petition for reconsideration citing to twenty-two of the Board's findings and directives. It also requested the ALJ to review and consider evidence which it contended had not been recited, addressed, or analyzed consisting of Genter's May 3, 2012, deposition testimony, his August 29, 2012, hearing testimony, the report of Dr. Jose Rivera, the testimony of the three nurses, the testimony of Mary Neuhaus ("Neuhaus"), its workers' compensation case manager, the June 29, 2012, Work Rehabilitation Center report, and various portions of the reports of Drs. Grefer and Bender. St. Elizabeth provided a brief summary of each of the above-cited evidence. It asserted the ALJ erred by relying upon the opinions of Dr. Grefer in resolving the issue of permanent total disability. It contended the

unrebutted medical testimony established Genter has a 25% impairment for the work injury, is able to return to work, and had a 5% pre-existing active impairment. St. Elizabeth contended the ALJ provided no foundation for disregarding the testimony of Genter's co-workers as biased. Further, the unrebutted medical and lay evidence demonstrated only Genter's non-work-related condition in his knees and low back kept him from working.

The ALJ's September 30, 2015, Opinion and Order on Reconsideration overruling the petition for reconsideration utilized the same language contained in his August 21, 2015, decision. The order did not specifically address any of the requests by St. Elizabeth.

On appeal, St. Elizabeth asserts the ALJ's latest opinion comes across as a defiant assertion he is free to ignore the mandates of the Court of Appeals, the Supreme Court, and the most recent ruling of this Board. It argues the ALJ cuts and pastes his prior recap of Dr. Grefer's evidence and merely underlines portions of it in an apparent disregard of the Board's ruling that the report cannot constitute substantial evidence on the issue of permanent total disability.

St. Elizabeth asserts the ALJ committed clear error in his analysis of the pre-existing active condition.

It provides a summary of Genter's May 3, 2012, deposition and August 29, 2012, hearing testimony. St. Elizabeth also provides a summary of the reports of Drs. Rivera, Grefer, and Bender as well as a summary of the testimony of Mamutse, Mardis, and Martin.

St. Elizabeth charges the ALJ chose to ignore many portions of the testimony deemed important by the Board and the appellate courts. It notes the ALJ's summary of Genter's testimony, the report of Dr. Grefer, and the report of Dr. Bender are exactly as contained in his previous decisions. Further, the ALJ failed to cite to any of Genter's contradictory evidence or the evidence of pre-existing active problems.

St. Elizabeth contends the ALJ's opinion falls short of the mandate of the Board and the Supreme Court concerning the existence of a pre-existing condition. It also contends the ALJ ignored Genter's own admissions regarding his persistent pre-existing problems. St. Elizabeth contends the ALJ abused his discretion in discounting the testimony of Genter's three co-workers. It contends the ALJ's analysis of the pre-existing knee condition misses the point as it is undisputed he had a prior non-work-related surgery in both knees and a non-work-related pre-existing low back condition. St.

Elizabeth maintains the evidence is undisputed these non-work-related conditions were symptomatic and kept Genter from completing work rehabilitation and returning to work.

St. Elizabeth argues substantial evidence does not support an award of permanent total disability and the ALJ's opinion is clearly erroneous. It argues Genter's testimony does not support what is stated by Dr. Grefer since Genter provided no evidence he could not return to the job on a regular and sustained basis. Further, the ALJ's reliance upon Dr. Grefer is clear error as this Board has already stated such in its prior opinion vacating. St. Elizabeth notes the Board previously noted Dr. Grefer had relied upon the June 29, 2012, work rehabilitation report which indicated Genter was restricted only by the problems he experienced from non-work-related conditions in both knees and the low back. It also notes Genter never reported he continued to have decreased range of motion, pain, stiffness, tightness, and muscle weakness of the cervical thoracic spine and his left shoulder as stated by the ALJ. Rather, this statement is contained entirely within the report of Dr. Grefer.

St. Elizabeth argues the ALJ's analysis as required by McNutt is insufficient. Even though it has been established Genter had a work-related injury to the

neck, left shoulder, and back, it requests that any impairment of the back should be disregarded since Genter stated he did not have a low back claim and it was pre-existing and active by his own admission. Further, any impairment to the left shoulder should be disregarded because Genter said repeatedly he was not claiming a left shoulder injury and did not report it to Dr. Bender.

St. Elizabeth argues Dr. Grefer's opinion of a 30% impairment rating should be disregarded because he did not apportion the total impairment among the neck, left shoulder, and unrelated low back. It contends the only credible evidence is Dr. Bender's 25% impairment rating attributed to the neck surgery reduced by 5% for a pre-existing active condition.

Finally, St. Elizabeth asserts the award of permanent total disability should be vacated and the matter remanded with instructions to enter an award of permanent partial disability ("PPD") benefits with no multipliers.

Because the ALJ's analysis does not comply with the directives set out in our July 10, 2015, Opinion, we vacate the determination Genter is permanently totally disabled and has no pre-existing active conditions. We emphasize our directives contained within our July 10,

2015, Opinion also encompasses the directives of the Court of Appeals and the Supreme Court.

We begin by stating the Court of Appeals and the Supreme Court affirmed the determination Genter sustained work-related injuries to his back, neck, and shoulder. Their decisions are the law of the case. Therefore, we have no authority to direct otherwise in remanding.

In his August 2015 decision, the ALJ's determination Genter did not have a pre-existing neck, back, and shoulder condition misses the point since the fact that Genter sustained those injuries has already been established. The ALJ was required to determine whether the pre-existing low back and knee injuries prevented him from returning to work. The ALJ made the determination Genter did not have "knee-related active occupational disability before the September 9, 2011, work-related injury." However, in making that statement the ALJ did not cite to the evidence upon which he relied in making that finding. He could not have relied upon Dr. Grefer's opinions because he did not offer an opinion as to whether the pre-existing low back and knee injuries were active or dormant. The ALJ cannot rely upon Genter's testimony in support of such a finding. As noted in our previous opinion, Genter's testimony establishes he underwent substantial treatment of

the low back and both knees.[1] In addition, Genter testified he has undergone treatment in all parts of his spine since 2003. More importantly, the ALJ completely failed to address whether Genter's low back condition was active at the time of injury.

The ALJ's finding the pre-existing condition in both knees was not active is insufficient as we are unable to discern the evidence upon which the ALJ relied in making that finding. Dr. Grefer offered no opinion as to whether the condition of both knees and the low back were active or dormant at the time of the injury. Further, as previously noted, Dr. Grefer did not identify the dormant non-disabling condition which was aroused. The ALJ did not provide any evidentiary basis for his findings other than to state "the medical evidence from Dr. Grefer, as covered in detail above, is very persuasive and compelling," and Genter's testimony "as covered above was very credible and convincing." These statements are insufficient to support the ALJ's decision as he failed to cite to the specific opinions of Dr. Grefer and the testimony of Genter upon which he relied. We again note Genter's testimony establishes ongoing problems in the left shoulder, lumbar

[1] Genter testified he underwent meniscal repairs of both knees.

region, thoracic region, and left knee pre-dating September 9, 2011. However, the ALJ failed to discuss any of this in analyzing the extent of Genter's pre-injury and post-injury occupational capabilities. This claim must be remanded as directed by the Supreme Court for a determination of whether Genter's pre-existing knee and low back injuries were active or dormant and whether they prevented him from returning to work.

Similarly, the ALJ's reliance upon Dr. Grefer's opinions in determining Genter cannot return to work and is totally occupationally disabled is also insufficient as the ALJ does not cite to any portions of his testimony which support this finding. In addition, the ALJ failed to address the problems with Dr. Grefer's opinion that Genter is totally occupationally disabled which is based, in large part, on the contents of the June 29, 2012, letter from St. Elizabeth Work Rehabilitation Center. Without question, that letter establishes low back pain spasms and knee pain due to performing the work activities during rehabilitation were prohibiting Genter from completing the program. As noted in the June 29, 2012, rehabilitation note, Genter's problems with working more than three hours per day were solely due to problems arising from his non-work-related low back and bilateral knee condition. Thus, Dr. Grefer's

opinions are based upon the effects of problems caused by Genter's non-work-related knee and low back condition. Further, Dr. Grefer did not identify the specific pre-existing dormant condition which was aggravated by the September 9, 2011, injury. The ALJ did not discuss any of these facts as he was directed in our July 10, 2015, opinion vacating his decision.

Finally, the ALJ's analysis pursuant to McNutt is wholly insufficient as he merely stated Genter had a very good work ethic, was 59 years old, and an older worker with severe limitations of re-employment in the highly competitive job market. The ALJ again determined Genter would not be able to return to any regular gainful employment in a highly competitive job market. The ALJ concluded based upon Genter's physical limitations, his age, and work history as a nurse it was obviously impossible for him to find regular gainful employment. Again, those statements fall far short of the analysis required by McNutt, as they are mere conclusions unsupported by a citation to the specific evidence upon which the ALJ relied in reaching the conclusions. The ALJ again failed to address Genter's physical, emotional, intellectual, and vocational status and how those factors interact. Further, the ALJ did not address whether

Genter's pre-existing knee and low back problems prevented him to some extent from being gainfully employed. We previously emphasized the ALJ cannot rely upon Dr. Grefer's opinions as they were based on a misinterpretation of the report from St. Elizabeth Work Rehabilitation Center. Unfortunately, the ALJ chose not to address this report in his summary of the evidence or in his findings of facts and conclusions of law.

Lest there be no misunderstanding, on remand, the ALJ must discuss the nature and severity of Genter's pre-existing injuries to the low back and both knees in accordance with the Supreme Court's directive. Since Dr. Grefer opined the September 9, 2011, injury aggravated previous dormant conditions but did not identify those conditions, his opinion relative to this issue is without substance. Thus, the ALJ cannot rely upon Dr. Grefer's opinions since he did not identify the conditions which he considered to be pre-existing and dormant. Certainly, Dr. Grefer did not offer an opinion as to the severity of Genter's low back and knee conditions and whether they were active when the work-related injury occurred. Genter's testimony establishes those conditions were symptomatic prior to his September 9, 2011, injury. If the ALJ determines the pre-existing conditions in the knees and low

back were active at the time of the September 9, 2011, injury he must then determine the effect of those conditions on Genter's ability to return to work. In determining whether the pre-existing conditions in the low back and knee were active or dormant, the ALJ shall specifically address all relevant evidence. Finally, the ALJ must also engage in an analysis required by McNutt in determining whether Genter is totally occupationally disabled.

Accordingly, the August 21, 2015, Amended Opinion and Order on Remand and the September 30, 2015, Opinion and Order on Reconsideration are **VACATED**. This claim is **REMANDED** to an Administrative Law Judge as designated by the Chief Administrative Law Judge 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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