Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: January 15, 2016

CLAIM NO. 201194858

TURUNAU ADAMS PETITIONER

VS. **APPEAL FROM HON. STEVEN G. BOLTON, ADMINISTRATIVE LAW JUDGE**

HAZARD INDEPENDENT SCHOOL DISTRICT and
HON. STEVEN G. BOLTON,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION & ORDER
DISMISSING AND REMANDING
* * * * * *

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

ALVEY, Chairman. Turunau Adams ("Adams") appeals from the from the June 27, 2014 Opinion, Award and Order, the August 29, 2014 order ruling on the parties' petitions for reconsideration, the June 11, 2015 Order on Remand, and the August 4, 2015 Order on Petitions for reconsideration rendered by Hon. Steven G. Bolton, Administrative Law Judge ("ALJ") awarding permanent partial disability ("PPD")

benefits in the claim filed against Hazard Independent School District ("Hazard"). This Board previously rendered an opinion on April 17, 2015 affirming in part, vacating in part and remanding for additional determinations.

On appeal, Adams argues the ALJ erred in failing to enhance his award by the multipliers contained in KRS 342.730(1)(c)1. Adams also argues the ALJ erred by not awarding income or medical benefits for his psychological claim. Adams additionally argues the ALJ erred by failing to find him permanently totally disabled.

We note the ALJ complied with the previous direction of this Board by resolving the issue of whether there was pre-existing active impairment for the low back condition, the compensability of the alleged psychological claim, compensability of an alleged cervical condition, and the alleged injuries to the low back, knees, arms, hands, right leg, and right hip. However, we note that although the ALJ issued a scheduling order in his remand decision to resolve the outstanding medical dispute as directed, he was prevented from resolving this issue due to Adams' appeal. Because the outstanding medical dispute has not been resolved, the ALJ's decision is not final and appealable, therefore this appeal must be dismissed. We additionally note the ALJ did not perform an analysis pursuant to F.E.I.

Installation, Inc. vs. Williams, 214 S.W.3d 313 (Ky. 2007) concerning entitlement to medical benefits for a temporary cervical injury or exacerbation, or for a temporary left hip hematoma which he determined Adams sustained. Therefore, we also remand for additional determinations as set forth below.

Adams filed a Form 101 on September 7, 2012 alleging she injured her neck, right leg, right knee, left knee, right hip, back, right arm, left arm, right hand, and developed a generalized anxiety disorder, and an emotional component on February 25, 2011 when her shoelace caught on a pipe protruding from the floor causing her to fall to her hands and knees. The ALJ rendered a decision on June 27, 2014 awarding PPD benefits based upon an 11% impairment rating assessed by Dr. Timothy Kriss.

Subsequent to the issuance of that opinion, both Adams and Hazard filed petitions for reconsideration. Adams pointed out the ALJ had used an incorrect claim number, which he corrected in the order on reconsideration. The ALJ denied the remainder of Adams' petition as merely a reargument of the claim. Hazard argued the ALJ used an incorrect rate when calculating the award of temporary total disability ("TTD") benefits. The ALJ corrected the TTD award in the order on reconsideration. The ALJ denied

Hazard's argument regarding the failure to exclude any pre-existing active impairment.

In our previous decision, we noted on June 13, 2014, while the case was under submission but prior to the issuance of the opinion, Hazard filed a notice of contest of medical services and motion to add Dr. Angela Rice as a party, a Form 112 Medical Dispute, and a motion to remove the claim from submission. Hazard contested the reasonableness and necessity of a referral for pain management and epidural steroid injections. Without issuing any findings, the ALJ overruled Hazard's motions by order dated August 29, 2014.

In its appeal from the June 27, 2014 opinion, Hazard argued the ALJ erred in failing to subtract pre-existing active impairment from the rating assessed by Dr. Kriss. Hazard noted the ALJ found a pre-existing active low back condition at the time of the work injury, and that finding was not challenged. It argued the ALJ's interpretation, as expressed on reconsideration, of Dr. Kriss' opinions was unreasonable and constituted an abuse of discretion. Hazard argued Dr. Kriss' opinion Adams had a 5% pre-existing active impairment for the lumbar condition was undisputed. Hazard noted Dr. Kriss did not opine the 11% impairment rating was exclusive of, or in

addition to, the 5% pre-existing active impairment rating. In our decision entered April 17, 2015, we stated as follows:

> To be characterized as active, an underlying pre-existing condition must be symptomatic and impairment ratable pursuant to the AMA Guides immediately prior to the occurrence of the work-related injury. Finley v. DBM Technologies, 217 S.W.3d 261 (Ky. App. 2007). In a post-1996 permanent partial disability case, the permanent impairment rating caused by the work injury in instances involving a pre-existing active impairment is calculated by subtracting the active impairment rating from the combined rating. *See* Roberts Brothers Coal Co. v. Robinson, 113 S.W.3d 181 (Ky. 2003).
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> Here, the ALJ determined Adams sustained a temporary injury in the form of an exacerbation of a prior active condition. However, the ALJ failed to specifically find what percentage of impairment Adams had prior to the work injury. The ALJ believed that because the surgery would produce an 11% impairment rating, it was unnecessary to carve out any pre-existing impairment. The greater impairment rating produced by surgery did not negate or extinguish the prior active condition and prior impairment rating, if one existed. The ALJ was required to specifically find whether the prior active condition produced an impairment rating prior to the work injury and subtract that percentage, if any, from the present impairment rating. The remaining impairment is the only impairment proximately caused by the work injury. Dr. Kriss, upon whom the ALJ relied in determining

Adams' current rating, unequivocally assigned a 5% rating for pre-existing active impairment placing Adams in DRE category II prior to the work injury. Nothing in Dr. Kriss' report indicates he felt the 11% rating was in addition to the 5% pre-existing impairment he found. Thus, his 11% rating can only be viewed as an assessment of Adams' current impairment rating. Dr. Potter, Adams' expert, also placed Adams in DRE category II with a 7% impairment rating prior to the work injury. Dr. Bean found no pre-existing active impairment. However, Adams only provided a history of back pain beginning with the work injury. Dr. Nadar's report addressed pre-existing impairment for the cervical condition but was silent regarding the question of pre-existing lumbar impairment. It is readily apparent all of the physicians offered opinions regarding the *current lumbar condition* based upon placement of Adams in DRE category III due to the surgery. On remand, the ALJ is directed to determine whether the pre-existing active low back condition he found produced a permanent impairment rating immediately prior to the work injury and, if he finds a pre-existing impairment rating, subtract that percentage from the current 11% rating for the lumbar condition and award permanent partial disability benefits based upon the remainder of the impairment rating.

Hazard next argues the ALJ erred in overruling the medical dispute and motion to join the treatment provider. Hazard concedes the dispute was filed after the claim was taken under submission, but it notes it was required to submit the Form 112 under deadlines contained in the Act and administrative regulations, or risk

waiving its ability to contest the requested treatment.

The ALJ did not abuse his discretion in declining to remove the claim from submission[1]. The medical dispute arose following the hearing while the parties were awaiting the ALJ's decision in the claim. However, the ALJ still retained jurisdiction over the claim and should have made a determination of whether the Form 112 set forth a *prima facie* showing for the requested relief and, if so, set a briefing schedule. The ALJ erred in summarily overruling the medical dispute.

For her cross-appeal, Adams first argues the ALJ erred in not awarding benefits enhanced by the three multiplier. Adams contends that, if the injury is found compensable without any carve out for the pre-existing condition, then Dr. Kriss' opinion that any restrictions are for the pre-existing condition is without merit. Adams notes she had no restrictions prior to the work injury. She further notes Drs. Bean, Potter and Nadar indicated she lacked the physical capacity to return to the work she performed at the time of the injury. Adams further contends the ALJ erroneously failed to consider the requirements of Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003).

Next, Adams argues the ALJ failed to address income and medical benefits for the cervical spine and failed to address the right leg, knee and hip, left knee, left and right arm, and left

[1] The ALJ's order did not specifically rule on the motion to remove from submission, but in overruling the Form 112 and motion to join the provider the ALJ implicitly denied the motion to remove from submission.

and right hand conditions. Adams asserts the assessment of 3% impairment for the cervical condition by Dr. Nadar is unrebutted. Adams contends the medical records and her testimony establish she sustained permanent injuries to her neck, right leg, knees, right hip, arms and hands, entitling her to past, present and future medical benefits.

Adams argues the ALJ erred in failing to award income and medical benefits for her psychological condition. Adams acknowledges she had a psychological condition prior to the work injury. However, she contends Dr. Johnson's opinion is the only credible opinion regarding that condition. He opined the condition was worsened by the work injury.

Finally, Adams argues the ALJ erred in failing to find her permanently totally disabled. Adams again notes Drs. Bean, Powell, Potter and Nadar opined she was not capable of performing the type of work she performed at the time of the injury. She contends those opinions combined with her testimony establish she is totally occupationally disabled.

We believe the matter must be remanded to the ALJ for additional findings. The ALJ failed to make a specific finding as to whether Adams sustained a cervical or psychological injury. It is incumbent upon a fact-finder to provide sufficient findings of fact upon which a reviewing body as well as the parties can reasonably conclude the basis of upon which he reached his decision. Shields v. Pittsburg & Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982). Although the ALJ referenced in his analysis Dr. Ruth's opinion regarding a pre-existing

psychological condition, the ALJ made no specific finding regarding the issue. Dr. Nadar found Adams sustained an additional 3% rating for the cervical condition related to the work injury. The ALJ failed to specifically address the issue of whether the work injury produced any impairment for this condition.

Likewise, the ALJ's findings are insufficient regarding the right knee, right leg, right hip, left knee, arms and hands. Although no impairment ratings were issued for those conditions, the ALJ was required to address the alleged conditions. It is possible for an injured worker to establish a temporary injury for which temporary benefits may be paid, but fail to prove a permanent harmful change to the human organism for which permanent benefits are authorized. Robertson v. United Parcel Service, 64 S.W.3d 284 (Ky. 2001). Similarly, an injury may not produce an impairment rating but require ongoing medical treatment. In Combs v. Kentucky River District Health Dept., 194 S.W.3d 823 (Ky. App. 2006) the Court of Appeals held an injured worker is entitled to an award of medical benefits "at the time of injury and thereafter during disability" in the absence of a permanent injury or disability. Thus, the ALJ must determine whether Adams sustained work-related injuries to lower extremities, hip, arms and hands. The Board directs no particular result concerning these conditions.

Because additional fact-finding may affect the issues of whether the three multiplier should have been awarded or whether Adams sustained a permanent total disability, it would be premature for this Board to address these issues.

> As a final matter, on remand, the ALJ is not required to address the Fawbush factors. Because Adams never returned to work following the injury, that case is inapplicable.
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> Accordingly the June 27, 2014 Opinion, Award and Order and the August 29, 2014 order ruling on the parties' petitions for reconsideration are hereby **VACATED IN PART** and the claim **REMANDED** for additional findings and an amended award in conformity with the views expressed herein. The August 29, 2014 order ruling on the medical dispute and motion to join treatment provider is **VACATED** and this matter is **REMANDED** for determination of whether Hazard made a *prima facie* showing and further proceedings if warranted.

In an opinion on remand issued on June 11, 2015, the ALJ found 5% of the impairment rating assessed by Dr. Kriss was due to a pre-existing active condition and not compensable. He also determined Adams had no work-related psychological condition. Likewise, the ALJ determined Adams did not sustain compensable injuries to her knees, right leg, right hip, arms or hands, except for a temporary hematoma of the left hip. The ALJ additionally found Adams is not permanently totally disabled. The ALJ also ordered the following:

> The Defendant/Employer's Form 112 Medical Dispute, having set forth a prima facie showing for the requested relief, the parties shall have thirty (30) days hereafter in which to submit proof and thirty (30) days thereafter

> to submit briefs. An evidentiary hearing may be requested on motion of a party.

Hazard filed a petition for reconsideration, arguing the ALJ erred in calculating the weekly PPD payment amount. It argued a proper application of the factors after subtracting the pre-existing active component would result in payments of $8.59 per week rather than the $10.10 per week awarded. Adams responded Hazard was correct, but did not waive any arguments in its petition for reconsideration. Adams filed a petition for reconsideration arguing the ALJ again used the wrong claim number. Adams additionally argued the ALJ erred in neither awarding an enhancement of benefits pursuant to KRS 342.730(1)(c)1, nor finding she was permanently totally disabled. Adams additionally argued the ALJ erred in excluding a portion of the low back impairment due to pre-existing active conditions, and in not finding the psychological condition compensable. In an order dated August 4, 2015, the ALJ modified the decision to correct the PPD benefit rate and the claim number. He denied the remainder of Adams' petition for reconsideration as an impermissible reargument of the case. However the medical dispute remains unresolved.

803 KAR 25:010 Sec. 21 (2)(a) provides as follows:

> [w]ithin thirty (30) days of the date a final award, order, or decision rendered by an administrative law judge pursuant to KRS 342.275(2) is filed, any party aggrieved by that award, order, or decision may file a notice of appeal to the Workers' Compensation Board.

803 KAR 25:010 Sec. 21 (2)(b) defines a final award, order or decision as follows: "[a]s used in this section, a final award, order or decision shall be determined in accordance with Civil Rule 54.02(1) and (2)."

Civil Rule 54.02(1) and (2) states as follows:

> (1) When more than one claim for relief is presented in an action . . . the court may grant a final judgment upon one or more but less than all of the claims or parties only upon a determination that there is no just reason for delay. The judgment shall recite such determination and shall recite that the judgment is final. In the absence of such recital, any order or other form of decision, however designated, which adjudicates less than all the claims or the rights and liabilities of less than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is interlocutory and subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

> (2) When the remaining claim or claims in a multiple claim action are disposed of by judgment, that judgment shall be deemed to readjudicate finally as of that date and in the same terms all prior interlocutory orders and judgments determining claims which are not specifically disposed of in such final judgment.

Hence, an order of an ALJ is appealable only if: 1) it terminates the action itself; 2) acts to decide all matters litigated by the parties; and, 3) operates to determine all the rights of the parties so as to divest the ALJ of authority. Tube Turns Division vs. Logsdon, 677 S.W.2d 897 (Ky. App. 1984); *cf.* Searcy v. Three Point Coal Co., 280 Ky. 683, 134 S.W.2d 228 (1939); *and* Transit Authority of River City vs. Sailing, 774 S.W.2d 468 (Ky. App. 1980); *see also* Ramada Inn vs. Thomas, 892 S.W.2d 593 (Ky. 1995).

Petitioner filed this appeal prior to the resolution of the outstanding medical dispute despite the fact a scheduling order had been issued. It is readily apparent the opinion on remand issued June 11, 2015, and the order on reconsideration issued August 4, 2015, do not operate to terminate the action or finally decide all outstanding issues. Likewise, these orders do not operate to determine all the rights of the parties so as to divest

the ALJ once and for all of the authority to decide the merits of the claim.

We additionally note this Board is permitted to *sua sponte* reach issues even if unpreserved but not raised on appeal. KRS 342.285(2)(c); KRS 342.285(3); George Humfleet Mobile Homes v. Christman, 125 S.W.3d 288 (Ky. 2004). Here, although the ALJ determined Adams sustained a temporary cervical injury or exacerbation, he failed to address her entitlement to medical benefits for that condition. Likewise, he failed to address medical benefits as they may relate to the left hip hematoma. Therefore, on remand, the ALJ is also directed to make a determination of entitlement to medical benefits for those conditions in accordance with the directions set forth in Roberts v. United Parcel Service, 64 S.W.3d 284 (Ky. 2001) and FEI Installation, Inc. v. Williams, supra. We do not direct any particular result and the ALJ may make any determination which is supported by the evidence.

That said, Adams' appeal is hereby dismissed, and the claim is remanded to the ALJ to conduct all proceedings necessary for final adjudication of the outstanding medical dispute. Once the ALJ decides any pending issues, including whether Adams is entitled to any medical benefits for the cervical and hip conditions as noted above, any

aggrieved party may file an appeal on any issues, including those resolved in the decision rendered June 11, 2015, and the orders entered August 4, 2015.

For the foregoing reasons, **IT IS HEREBY ORDERED AND ADJUDGED** the appeal is **DISMISSED** and the claim is **REMANDED** for additional determinations in conformity with the directions set forth herein.

STIVERS, MEMBER, CONCURS.

RECHTER, MEMBER, CONCURS IN RESULT ONLY.

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MICHAEL W. ALVEY, CHAIRMAN
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