

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: May 21, 2021

CLAIM NO. 201886946

AGGREGATE PROCESSING INCORPORATED

PETITIONER

VS.

APPEAL FROM HON. PAUL L. WHALEN,
ADMINISTRATIVE LAW JUDGE

DANIEL PEYTON and
HON. PAUL L. WHALEN,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
VACATING AND REMANDING

* * * * *

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

ALVEY, Chairman. Aggregate Processing Incorporated (“Aggregate”) appeals from the January 15, 2021 Opinion, Award, and Order rendered by Hon. Paul L. Whalen, Administrative Law Judge (“ALJ”). The ALJ awarded Daniel Peyton (“Peyton”) permanent partial disability (“PPD”) benefits based upon a 21% impairment rating assessed by Dr. James Owen enhanced by the 3 multiplier contained in KRS 342.730(1)(c)1 for a work-related left hand injury he sustained on

March 28, 2018. The ALJ also awarded medical benefits pursuant to KRS 342.020. The parties stipulated Aggregate paid temporary total disability (“TTD”) benefits from March 29, 2018 through August 24, 2018, at the rate of \$566.69 per week, although the ALJ did not specifically award those benefits in his decision. Aggregate also appeals from the February 16, 2021 Order denying its Petition for Reconsideration.

On appeal, Aggregate argues the ALJ failed to address whether the 21% impairment rating assessed by Dr. Owen, upon which he relied to award PPD benefits, was in accordance with the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment (“AMA Guides”). It also argues the ALJ erred in discrediting Dr. Margaret Napolitano’s opinion based upon her failure to address scar tissue. Finally, Aggregate argues the ALJ erred by citing to and relying upon medical literature that was not filed in evidence. We determine the ALJ, although requested, failed to make a determination regarding whether the impairment rating assessed by Dr. Owen was in accordance with the AMA Guides. We also note the ALJ impermissibly based his determination, in part, upon his internet research, and upon medical literature that was not filed in evidence. We therefore vacate the ALJ’s decision in its entirety, and remand for a determination of all issues based upon the evidence of record.

Peyton filed a Form 101 on September 25, 2018, alleging he sustained a left hand injury on March 28, 2018 when it became trapped in a steel beam he was installing while working for Aggregate. Peyton has a GED. His employment experience includes working as a welder, equipment operator, and supervisor. He

currently works for a company hanging steel, and installing machinery and conveyor systems.

Peyton testified by deposition on November 20, 2018, and at the hearing held November 18, 2020. He was born on November 23, 1981, and he resides in Stanford, Kentucky. After the accident, he returned to work for Meade Machinery, which is where he worked prior to his employment with Aggregate. He earns less for Meade Machinery than he did while working for Aggregate. He testified his job at Aggregate involved welding, rigging chains and cables, operating a crane, and climbing. His work with Meade Machinery is not quite as heavy, and is primarily performed inside factories/facilities. He still welds in his job at Meade Machinery. He was assisting with building a platform at a rock quarry at the time of the accident.

Peyton was working with a crew installing a cross-brace for a platform support at the time of the accident. He had secured his end of the beam. However, the workers below him had not yet secured their end, and Peyton's left hand became trapped when the beam shifted. His supervisor used a pry bar to release his left hand, and he was immediately taken to the emergency room at the Putnam County Hospital in Greencastle, Indiana. He subsequently treated with Dr. Napolitano, a hand surgeon with the Kleinert Kutz facility in Lexington, Kentucky.

Dr. Napolitano performed surgery. Peyton testified he continues to have difficulty with moving his fingers. He also complains of tingling, numbness in the fingers, coldness, swelling, cramping, and drawing of his left hand. Peyton does not believe he is able to perform the job duties required at Aggregate because he has

no left hand grip strength. He is also unable to form a fist due to the left hand injury, and has difficulty climbing.

Peyton filed records from Dr. Napolitano for treatment he received from June 4, 2018 to July 16, 2018. Dr. Napolitano performed left ring and small finger extensor digitorum communis tenolysis procedures on July 5, 2016. She noted Peyton held his hand in an “unnatural position and resists attempts to passively flex digits.” She noted his hand was cool and mottled on July 2, 2018. On July 16, 2018, she noted Peyton’s complaints of stiffness, swelling, numbness, and tingling. She noted his peripheral nerves were intact. She also stated that under sedation his fingers were in a normal relaxed position, but returned to the unnatural position when he awakened. She found Peyton reached maximum medical improvement (“MMI”) by July 16, 2018, and released him to return to work without restrictions. In a November 19, 2018 response to a questionnaire submitted by Aggregate, Dr. Napolitano noted Peyton sustained a work injury when his left hand was crushed between two metal pieces. She stated Peyton had no clinical findings consistent with CRPS. She again noted he had reached MMI, and she assessed a 0% impairment rating pursuant to the AMA Guides.

Peyton also filed records from Danville Physical Therapy for treatment administered from July 9, 2018 to August 17, 2018. He also filed the May 21, 2018 MRI report from Ephraim McDowell Health indicating he had mild edema, but his flexor tendons were intact. An EMG/NCV report from Ephraim McDowell Health on August 24, 2018, performed by Dr. Maria Pavez, was unremarkable with no evidence of radiculopathy.

Dr. Owen evaluated Peyton on January 21, 2020. In his Form 107-I, Dr. Owen noted Peyton had reached MMI. He noted the history of the left hand crush injury. He assessed a 21% impairment rating, which he stated was based upon the AMA Guides, all due to the work injury. He stated Peyton is unable to return to the type of work performed on the date of injury. He restricted Peyton from lifting, handling, and carrying objects weighing more than 14 kg.

Dr. Ronald Burgess evaluated Peyton on August 1, 2018, at Aggregate's request. He found Peyton had reached MMI. He noted Dr. Napolitano's findings of normal range of motion under sedation. He did not believe Peyton had adhesions from the crush injury. Dr. Burgess stated he was unable to determine whether Peyton was malingering or has a factitious finger condition. He stated he is unable to assess an impairment rating due to Peyton not allowing motion of his digits. He stated that based upon Dr. Napolitano's report, Peyton has a normal range of motion of the digits, and therefore would not qualify for an impairment rating. He stated Peyton's diagnosis is malingering, and no additional treatment is required. "If his lack of flexion is factitious, he would be a candidate of non-work-related psychiatric care." In an addendum dated February 24, 2020, Dr. Burgess disagreed with Dr. Owen's findings. He stated the impairment rating Dr. Owen assessed was not in accordance with the AMA Guides, and explained why he made this assertion.

A Benefit Review Conference Order was held on February 11, 2020. The parties stipulated Peyton sustained a work injury on March 28, 2018, TTD was paid, and the amount of TTD and medical benefits paid was listed. The parties

stipulated Peyton's average weekly wage is \$850.00. Issues preserved for determination included extent and duration with multipliers, work-relatedness/causation, whether an impairment rating is assessed in accordance with the AMA Guides, entitlement to future medical benefits, and unpaid or contested medical benefits. Whether Peyton retains the capacity to return to the type of work performed on the date of injury remained at issue.

In the Opinion, Award, and Order, the ALJ noted he had reviewed medical information obtained from the NIH-National Library of Medicine at nih.gov. Based upon his internet research, the ALJ determined Drs. Napolitano and Burgess lacked credibility because they did not report they had performed certain testing discussed in the medical article he reviewed. He found Dr. Owen's opinions more reliable. The ALJ determined Peyton sustained a work-related left hand injury for which he is entitled to PPD benefits based upon the 21% impairment rating Dr. Owen assessed. He found the 3 multiplier contained in KRS 342.730(1)(c)1 applicable because he determined Peyton does not retain the capacity to return to the type of work he performed on the date of the injury. The ALJ did not address entitlement to TTD benefits, nor did he address Aggregate's concerns regarding Dr. Owen's impairment rating. We note the ALJ at one point noted the date of injury is March 18, 2018 rather than March 28, 2018. We find this mistake is harmless and does not impact the ALJ's decision.

Aggregate filed a Petition for Reconsideration noting the ALJ determined Drs. Napolitano and Burgess were not credible because they failed to discuss scar tissue. Aggregate noted the ALJ did not cite to evidence in the record

suggesting scar tissue caused any impairment. It pointed to Dr. Napolitano's note specifically addressed scar tissue. Aggregate also requested additional findings supporting the ALJ's determination. Aggregate additionally argued the ALJ misinterpreted Dr. Napolitano's findings, and requested he issue a determination based upon a proper review of the evidence. Aggregate also argued the ALJ erred by relying on a medical article that is not part of the record. Finally, Aggregate argued the ALJ failed to address whether the impairment rating Dr. Owen assessed is in accordance with the AMA Guides.

In his Order denying the Petition for Reconsideration, issued February 16, 2021, the ALJ stated as follows *verbatim*:

The Defendant/Employer has filed a Petition for Reconsideration of the ALJ's Opinion and Order in this matter. Plaintiff filed a Response to Defendant's Motion for Reconsideration.

As a basis for its Motion for Reconsideration, Defendant/Employer requests the ALJ to reconsider or to correct patent errors appearing in the January 15, 2021, Opinion, Order and Award of the Administrative Law Judge pursuant to KRS 342.281.

Defendant/Employer has taken issue with the fact the ALJ wanted to know more about the medical procedure, "extensor tenolysis" that was about to be performed on the Plaintiff. In order understand what procedure that Plaintiff was undergoing when the Plaintiff's hand when under anesthesia, the ALJ went to the NIH-National Library of Medicine and looked up "Extensor tenolysis." The ALJ found that the extensor tenolysis is a surgical procedure to free the tendon from a post-traumatic scar tissue.

The ALJ having reviewed the pleadings herein, denies the Defendant/Employer's Petition for Reconsideration.

We initially note that as the claimant in a workers' compensation proceeding, Peyton bore the burden of proving each of the essential elements of his claim. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Peyton was successful in his burden before the ALJ, we must determine whether substantial evidence supports the ALJ's decision. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Substantial evidence" is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971).

In rendering a decision, KRS 342.285 grants an ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). An ALJ may draw reasonable inferences from the evidence, reject any testimony, and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). Although a party may note evidence supporting a different outcome than reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). Rather, it must be shown there was no evidence of substantial probative value to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings made are so unreasonable under the evidence they must be reversed as a matter of law. Ira A. Watson Department Store

v. Hamilton, 34 S.W.3d 48 (Ky. 2000). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to weight and credibility or by noting other conclusions or reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

That said, the ALJ was required to make his determination based upon the evidence in the record. He is not permitted to go outside the record to obtain additional information not introduced into evidence to support his determination. We find the ALJ's internet research and review of medical literature not contained in the record is impermissible, and therefore his decision must be vacated in its entirety. This claim is remanded to the ALJ for entry of a determination based upon the record, not what is obtainable from external sources. Therefore, we find the ALJ's decision is not supported by substantial evidence of record.

We additionally note an ALJ is required to provide a sufficient basis to support his determination. Cornett v. Corbin Materials, Inc., 807 S.W.2d 56 (Ky. 1991). Parties are entitled to findings sufficient to inform them of the basis for the ALJ's decision to allow for meaningful review. Kentland Elkhorn Coal Corp. v. Yates, 743 S.W.2d 47 (Ky. App. 1988); Shields v. Pittsburgh and Midway Coal Mining, Co., 634 S.W.2d 440 (Ky. App. 1982). This Board is cognizant of the fact that an ALJ is not required to engage in a detailed discussion of the facts or set forth the minute details of his or her reasoning in reaching a particular result. The only requirement is the decision must adequately set forth the basic facts upon which the ultimate conclusion was drawn so the parties are reasonably apprised of the basis of

the decision. Big Sandy Community Action Program v. Chaffins, 502 S.W.2d 526 (Ky. 1973). We note the ALJ did not provide additional findings supporting his determination, although requested to do so by Aggregate.

Finally, Aggregate preserved the issue of whether the impairment rating Dr. Owen assessed is in accordance with the AMA Guides. The ALJ failed to address this issue in either his Opinion or in the Order denying the Petition for Reconsideration. On remand, the ALJ is directed to provide a determination on this issue.

Based upon the foregoing, we vacate the ALJ's decision and his Order denying the Petition for Reconsideration in their entirety. On remand, the ALJ shall make a determination on all issues based solely upon the evidence of record. This includes entitlement to TTD benefits, PPD benefits, the application of multipliers, medical benefits, and any other issues preserved by the parties. We do not direct any particular result, and the ALJ may make any determination based upon the evidence of record.

Accordingly, the Opinion and Award rendered January 15, 2021, and the February 16, 2021 Order denying Aggregate's Petition for Reconsideration rendered by Hon. Paul L. Whelan, Administrative Law Judge, are **VACATED** and this claim is **REMANDED** for determinations based upon the evidence in the record.

STIVERS, MEMBER, CONCURS.

BORDERS, MEMBER, NOT SITTING.

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