

**Commonwealth of Kentucky
Workers' Compensation Board**

OPINION ENTERED: August 6, 2020

CLAIM NO. 201900338

AMEC FOSTER WHEELER ENVIRONMENT

PETITIONER/
CROSS-RESPONDENT

VS.

**APPEAL FROM HON. W. GREG HARVEY
ADMINISTRATIVE LAW JUDGE**

SETH MARSHALL
AND
HON. W GREG HARVEY,
ADMINISTRATIVE LAW JUDGE

RESPONDENT/
CROSS-PETITIONER

RESPONDENT

AND

SETH MARSHALL AND
DAVID MARSHALL, HIS ATTORNEY

PETITIONERS

VS.

AMEC FOSTER WHEELER ENVIROMENT AND
HON. W. GREG HARVEY,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

**OPINION
AFFIRMING**

* * * * *

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

BORDERS, Member. AMEC Foster Wheeler Environment (“AMEC”) appeals and Seth Marshall (“Marshall”) cross-appeals from the Opinion, Award, and Order dated February 14, 2020, the Order on Reconsideration dated March 5, 2020, and the Order dated March 11, 2020 rendered by the Hon. Greg Harvey, Administrative Law Judge (“ALJ”). The ALJ determined Marshall contracted Rocky Mountain Spotted Fever (“RMSF”) when he was bitten by a tick while working as an archeologist on a project for AMEC in Oxford, Mississippi. The ALJ determined Marshall’s RMSF resulted from a work-related incident and awarded twenty three weeks of temporary total disability (“TTD”) benefits and medical benefits. Marshall did not seek permanent partial disability (“PPD”) benefits. AMEC filed a Petition for Reconsideration regarding the ALJ’s determination of Marshall’s TTD benefits and the appropriate average weekly wage (“AWW”). Marshall filed a Motion for attorney fees and costs for having to prosecute a claim that was denied unreasonably. Both the Petition for Reconsideration and Motion for approval of attorney fees and costs were denied. This appeal followed. For reason to be set forth herein we affirm.

Marshall testified by deposition and at the final hearing. Marshall is an archeologist and a veteran of the Marine Corps, who served two deployments in Iraq, where he was wounded, and received Purple Heart and Good Conduct Medals. He later received a bachelor’s degree in history and anthropology from Eastern Kentucky University. In 2016, Marshall was employed by several companies as an anthropologist earning around \$27,000.00 in wages with additional per diem. He began working for AMEC in April 2017. He worked on a job in Oxford, Mississippi

for a TVA infrastructure development project. His job required him to walk a thirty-three mile corridor, performing anthropological surveys every 30 meters to determine the presence of culturally significant artifacts. His pay was \$20.20 per hour for a 40-hour week.

While working in Mississippi, Marshall was bitten on his left thigh by a tick which became embedded. He advised his supervisor of the incident and within 48 hours began to develop symptoms in the area of the bite, including tenderness and raised red bumps. Marshall presented to an urgent treatment center in Oxford on April 18, 2017 and was prescribed a 10 day prescription for Doxycycline. He finished the job in Oxford while on the medication and returned to Kentucky. Marshall completed the 10 days prescription of Doxycycline, but continued to struggle with fatigue, difficulty completing his job tasks, soreness, infection, and swelling in the leg. In May 2017, Marshall suffered from blurred vision, light sensitivity, heart palpitations, and slept 16 to 18 hours a day.

On May 25, 2017, Marshall presented to the emergency room at the Veterans Administration Hospital ("VA") in Lexington, Kentucky complaining of flu-like symptoms. He went to the VA because he was unable to get a response from AMEC regarding payment for his treatment, and he had no other health insurance. Blood testing indicated the presence of RMSF. The VA was unsure how to treat his condition and so no treatment was rendered in either May or June 2017. Marshall missed all but one week of work the entire month of July 2017 due to his symptoms. He attempted to return to work on a TVA project in August 2017 but struggled due to his continued symptoms. His employment was intermittent through the rest of

2017. His symptoms had not improved by November 21, 2017, so he returned to the VA and was prescribed a 21-day dosage of Doxycycline.

Marshall did not work in any capacity from December 2017 through February 2018. In March 2018, he was seen by Dr. Charles Kennedy, an infectious disease specialist. Dr. Kennedy performed additional testing and determined Marshall still suffered from active RMSF. Marshall continued off work through the end of March 2018. By April 2018, Marshall was finally feeling better and returned to work for AMEC on April 23, 2018. Marshall conceded he was never formally restricted from work by any of the physicians he has seen.

Michael Henry Lockman (“Lockman”) testified on behalf of Marshall. Lockman was Marshall’s co-worker and worked with him on the TVA project in Oxford. Lockman was told about the tick bite Marshall received and observed him as being lethargic, appearing ill, having trouble physically, and otherwise not acting like himself.

The records from TRC Solutions indicated Marshall’s pay rate from April 21 through June 1, 2018 was \$14.00 per hour for 57 hours of work; and from May 19 through June 7, 2018 was \$15.00 per hour for 40 hours of work

The records from New South Associates documented Marshall worked there from April 19 through April 21, 2017; and again from September 18 through November 3, 2017.

The records from the Urgent Care Clinic of Oxford indicate Marshall was treated on April 18, 2017 for a tick bite to his left thigh occurring on April 16, 2017. The records indicate he had a circular red rash with itching and mild erythema

with a puncture wound in the center. Marshall was prescribed a 10 day supply of Doxycycline.

The ALJ considered medical records from the VA Medical Center. These records reflect treatment for fatigue, light sensitivity, and forgetfulness in June 2017. Marshall was also seen by Dr. Nancy Mullen at the VA Medical Center on July 19, 2017. She received a history of the April 2017 tick bite and felt he had continued symptoms of RMSF. On November 30, 2017, she prescribed Doxycycline.

Dr. Takato Schaniger noted on June 9, 2017, he had reviewed serological testing suggesting Marshall may have had RMSF, but he felt it was inconclusive. He opined a 10 day trial of Doxycycline is generally sufficient to treat RMSF, and Lyme disease was not a likely diagnosis.

Dr. Kennedy, an infection disease specialist, initially saw Marshall on March 15, 2018. He received a history of Marshall suffering a tick bite in April 2017 while working in Mississippi for AMEC and developing RMSF with residual symptoms. Marshall complained of fatigue, sleeping 16 to 18 hours a day, headaches, muscle aches, and discomfort around the skull that radiated to his lower extremities. Dr. Kennedy noted the serologic and antibody testing showed that in the past he had a very high titer of antibodies indicating RMSF. He noted the serologic test revealed a severely elevated antibody level measuring 1:512, when a reading of 1:8 is positive. This made Marshall's testing nearly 10 times higher than the threshold amount. Dr. Kennedy concluded Marshall still had symptoms consistent with an active infection. As a result, Marshall underwent additional

serologic testing and was negative for Lyme disease. Dr. Kennedy opined Marshall had been exposed to RMSF. He conceded most patients are cleared of symptoms with a 10-day dose of Doxycycline, but some patients require additional treatment. Dr. Kennedy saw Marshall on March 29, 2018 and reported he was still having symptoms with some improvement. On June 21, 2018, Marshall indicated he was finally feeling normal.

Dr. Daniel Wolens, an occupational medicine specialist, performed a medical records review on behalf of AMEC. Dr. Wolens reviewed all medical records and testing and opined Marshall not contracted RMSF. Dr. Wolens opined that RMSF has no residuals and typically resolves without sequela after a 10-day dose of Doxycycline. Dr. Wolens opined any symptoms Marshall suffered after the initial 10 day period were not due to RMSF. Dr. Wolens felt Marshall reached maximum medical improvement (“MMI”) two weeks after the onset of symptoms or on April 28, 2017.

In the February 14, 2020 Opinion, Award, and Order, the ALJ made findings relative to this appeal *verbatim* as follows:

The threshold question for the ALJ to decide is whether or not Marshall suffered an occupational disease as a result of the tick bite. The medical evidence is in dispute. Dr. Wolens questions the diagnosis of RMSF and sets forth his rationale for doing so. Dr. Kennedy testified he believes Marshall did have RMSF and that he was still experiencing symptoms when he saw him in March, 2018.

Marshall is an extremely credible witness. The ALJ found his description of the onset of the tick bite and symptoms both detailed and completely believable. The ALJ also found Marshall’s description of continuing symptoms to be credible. Both Dr. Kennedy and Dr.

Wolens testified there is no such thing as chronic RMSF. The difference is that Dr. Kennedy acknowledged there can be residual symptoms that could require treatment.

Based on the totality of the evidence, the ALJ finds Marshall did initially contract RMSF. The serological testing seems definitive given the high levels of antibody detected in Marshall's blood. Although Dr. Wolens provided a detailed and thoughtful analysis of why he questioned whether Marshall had RMSF, the ALJ finds the serological testing and Dr. Kennedy's opinion to be more persuasive. The second question is whether that condition persisted beyond the initial 10 day doxycycline prescription. Dr. Wolens was adamant that it did not and that there is no medical literature or studies to suggest that Marshall could have continued to have RMSF. Dr. Kennedy opined that Marshall could still be symptomatic after the initial antibiotic.

The ALJ recognizes Dr. Wolens' opinion that the symptoms Marshall complained of could be synonymous with any number of maladies. He does not discredit Marshall's report of those symptoms but simply states that medically he has no diagnosis to offer that would explain why they persisted. The ALJ notes that the symptoms onset coincided with the tick bite. There is no evidence Marshall had any similar condition or malady before that date. In addition, Dr. Kennedy who is an infectious disease specialist, opined the symptoms could persist and require additional treatment. In this case, the ALJ has evidence from Dr. Mullen that a second doxycycline prescription was written on November 30, 2017. That 21 day dosing would have ended on December 22, 2017. That action constitutes affirmative treatment in the mind of the ALJ. It is clear from the record that Dr. Mullen intended that prescription to treat Marshall's ongoing and persistent complaints—complaints which can stem from RMSF.

Arguably Marshall continued that occurred after that date with Dr. Charles Kennedy. Those examinations resulted in some testing but no affirmative treatment. Some of that was due to Marshall's lack of financial resources to undertake an MRI of the brain or spinal tap. He was without any coverage. Fortunately for Marshall,

his symptoms finally improved in late April 2018 and he returned to regular work. Although having symptoms is important, the key facts for the ALJ in evaluating this case involve the treatment actually administered. For that reason, the ALJ finds that from the date of onset, April 15, 2017 through completion of the second doxycycline prescription, Marshall was suffering from the effects of RMSF.

Plaintiff claims TTD for 40 weeks. At the hearing, Marshall submitted a detailed exhibit that reflects when he worked. He contends that the weeks he did not work during that period he was unable to do so due to the symptoms he was having. Exhibit 4 to the hearing sets forth 23 weeks following the April 2017 tick bite that Marshall was off work before he completed the second round of doxycycline.

In order for TTD to be awarded, the Plaintiff must prove that he was not at MMI and had not reached a level of improvement that permitted a return to employment. The Defendant argues Marshall fails at both prongs of the test. First, it argues the only opinion offered as to MMI was that of Dr. Wolens who found Marshall reached MMI on April 28, 2017, ten days after finishing his initial doxycycline prescription. However, the undersigned has already determined Marshall's symptoms persisted beyond that date and that he still suffered from the effects of RMSF and required a second dose of doxycycline. Because the administration of additional antibiotics constituted treatment, the ALJ finds that Dr. Wolens' opinion that MMI was reached months prior to the second round of antibiotics is not persuasive or in comport with the facts as found herein. Using his logic and premise, however, the ALJ does find Marshall reached MMI when he completed the second round of antibiotics—December 22, 2017. Although his symptoms may have continued past that date, that was the last date he was administered any affirmative treatment.

The second issue with regard to TTD is the fact that Marshall did perform work on an intermittent basis. The Defendant argues that because Marshall did return to work, even on an intermittent basis, his condition improved to a degree that he could do so and he

therefore fails to meet the second prong to the test of whether he is entitled to TTD.

To his credit, Marshall worked intermittently to earn income as he had no other source. He testified when he did work it was everything he could do to complete the work. After the assignments ended he would have to rest up for long periods because of his fatigue and other symptoms. The ALJ finds Marshall's testimony credible on his difficulties and that he worked whenever he was able.

The ALJ finds that there are 23 weeks after the tick bite in which Marshall did not work and for which he was unable to do so. As Dr. Kennedy opined, the symptoms Marshall was having would have had an impact on his ability to work. Based on the foregoing, the ALJ finds Marshall is entitled to TTD for the 23 weeks between April 15, 2017 and December 22, 2017 when he did not work and was unable to do so.

There is a great deal of dispute regarding Marshall's average weekly wage. KRS 342.140 directs that in situations where an injured worker's wages are fixed by the hour, the ALJ must look to the wage most favorable to the employee based on the total wages earned in each quarter and divide them by 13 weeks to ascertain an AWW for each quarter. Where an employee has not been in the employ of the Defendant for a full 13 weeks immediately preceding the injury, KRS 342.140(1)(e) directs the ALJ to use the wages available from that employer and calculate an AWW based on what it would have been had a full thirteen weeks been worked. A review of Plaintiff's Exhibit 6 from the hearing indicates that during the 13 weeks preceding the injury, Marshall worked all but 5 days for New South, a different company. He began the employment with this Defendant on April 10, 2017 and suffered his tick bite on April 15, 2017. The records indicate he was earning \$20.20 an hour for AMEC and working 8 hours a day. In addition he received a daily per diem for meals of \$51.00 per day and lodging of \$91.00 per day. This results in a day rate of all compensation of \$808.00. The ALJ does not have wages of a similarly situated employee for AMEC during the 13 weeks prior to Marshall's injury. The Defendant argues Marshall's

employment was sporadic and it cannot be assumed that he would have earned \$808.00 in hourly wages and \$142.00 in per diem = \$1,518.00 a week in average compensation. The ALJ agrees that Marshall's work, by its' nature was sporadic. He earned wages when he could find a contractor that would hire him for his services. There was no guarantee that the work would transition seamlessly and that he would remain employed at all times. The premise of computing an average weekly wage is to as closely as possible project the earnings Marshall could have earned, on average, during the time before his injury. In this instance, the ALJ has the actual wages earned by Marshall, albeit from two employers—first New South and the second, the Defendant AMEC. Rather than fictionalize the wages, the ALJ is inclined to use the actual wages earned by Marshall from January 15, 2017 through April 15, 2017 to ascertain his average weekly wage. Plaintiff earned total hourly wages of \$6,871.54 that, if divided by 13 equals \$528.58 in hourly wages earned on average. He also earned per diems of \$255.00 per week in meals and \$455.00 a week in lodging. That equals an average weekly wage of \$1,238.58 and that will be the wage the ALJ uses in awarded TTD.

Plaintiff has filed the medical bill totaling \$495.00 for his consultation with Dr. Charles Kennedy for dates of service of March 15, 2018, March 29, 2018 and June 19, 2018. Marshall paid that bill and seeks reimbursement. KRS 342.020 affords a worker medical benefits for a work-related injury or exposure. In this instance, the ALJ finds that because Marshall was still having symptoms when he saw Dr. Kennedy and was looking for answers as to why those symptoms were continuing, he is entitled to reimbursement for those services.

AMEC filed a Petition for Reconsideration requesting the ALJ readdress the award of TTD benefits and the appropriate AWW. The ALJ overruled the Petition. Marshall filed a Motion for attorney fees and costs arguing that AMEC denied this claim without reasonable grounds, therefore entitling him to an award of

fees and costs. The ALJ overruled this Motion finding AMEC defended this claim reasonably. Both parties thereafter appealed.

On appeal, AMEC argues Marshall failed to sustain his burden of proving that he meets the two elements necessary for entitlement to TTD benefits. AMEC points out Marshall was never placed on work restrictions and two, the only physician to address MMI was Dr. Wolens. AMEC argues the record is devoid of any substantive proof indicating Marshall was entitled to TTD benefits and any such award was erroneous. AMEC also challenges the ALJ's determination of the appropriate AWW and the duration of TTD benefits.

On appeal, Marshall argues he should be awarded attorney fees and costs incurred since AMEC denied his claim based on an unreasonable medical opinion.

As the claimant in a workers' compensation proceeding, Marshall had the burden of proving each of the essential elements of his cause of action. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because he was successful in that burden, the question on appeal is 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 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 reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). If the ALJ's rulings are reasonable under the evidence, they may not be disturbed on appeal.

TTD is statutorily defined in KRS 342.0011(11)(a) as "the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement that would permit a return to employment[.]" In Magellan Behavioral Health v. Helms, 140 S.W.3d 579 (Ky. App. 2004), the Court of Appeals instructed that until MMI is achieved, an employee is entitled to TTD benefits as long as he remains disabled from his customary work or the work he was performing at the time of the injury.

In Livingood v. Transfreight, LLC, et, al., 467 S.W.3d 249 (Ky. 2015), the Supreme Court declined to hold a claimant is entitled to TTD benefits so long as

he or she is unable to perform the work performed at the time of the injury. The Court stated, "... we reiterate today, *Wise* does not 'stand for the principle that workers who are unable to perform their customary work after an injury are always entitled to TTD.'" *Id.* at 254. Most recently, in *Trane Commercial Systems v. Tipton*, 481 S.W3d 800 (Ky. 2016), the Supreme Court clarified when TTD benefits are appropriate in cases where the employee returns to modified duty. The Court stated:

We take this opportunity to further delineate our holding in *Livingood*, and to clarify what standards the ALJs should apply to determine if an employee "has not reached a level of improvement that would permit a return to employment." KRS 342.0011(11)(a). Initially, we reiterate that "[t]he purpose for awarding income benefits such as TTD is to compensate workers for income that is lost due to an injury, thereby enabling them to provide the necessities of life for themselves and their dependents." *Double L Const., Inc.*, 182 S.W.3d at 514. Next, we note that, once an injured employee reaches MMI that employee is no longer entitled to TTD benefits. Therefore, the following only applies to those employees who have not reached MMI but who have reached a level of improvement sufficient to permit a return to employment.

As we have previously held, "[i]t would not be reasonable to terminate the benefits of an employee when he is released to perform minimal work but not the type [of work] that is customary or that he was performing at the time of his injury." *Central Kentucky Steel v. Wise*, 19 S.W.3d at 659. However, it is also not reasonable, and it does not further the purpose for paying income benefits, to pay TTD benefits to an injured employee who has returned to employment simply because the work differs from what she performed at the time of injury. Therefore, absent extraordinary circumstances, an award of TTD benefits is inappropriate if an injured employee has been released to return to customary employment, i.e. work within her physical restrictions and for which she has the

experience, training, and education; and the employee has actually returned to employment. We do not attempt to foresee what extraordinary circumstances might justify an award of TTD benefits to an employee who has returned to employment under those circumstances; however, in making any such award, an ALJ must take into consideration the purpose for paying income benefits and set forth specific evidence-based reasons why an award of TTD benefits in addition to the employee's wages would forward that purpose.

Id. at 807

In determining Marshall's entitlement to TTD benefits, the ALJ was required to provide an adequate 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). An ALJ is required to 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. Chafins, 502 S.W.2d 526 (Ky. 1973).

AMEC argues the ALJ erred in awarding Marshall TTD benefits based on the fact no physician had ever formally restricted him from performing his customary work, and the only physician to formally address the issue opined Marshall had reached MMI on April 28, 2017. AMEC argues that even if Marshall contracted RMSF, it was only a temporary condition that resolved within 10 days and therefore TTD was not indicated. We disagree. In this specific instance, the ALJ thoroughly reviewed all the medical proof and was not persuaded by the

testimony of Dr. Wolens, but was persuaded by the testimony of Dr. Kennedy, which was clearly within his discretion. The ALJ determined Marshall had contracted RMSF as a result of the tick bite he received at work. The ALJ further found, from the reasonable inferences he drew from Dr. Kennedy's testimony that Marshall was not at MMI until his second dose of Doxycycline, which would have ended on December 22, 2017. The ALJ determined this was evidence of affirmative medical treatment and leads to the reasonable inference that MMI had yet to be achieved as treatment for RMSF was continuing. We conclude this is a reasonable inference. See Jackson v. General Refractories, supra; and Caudill v. Maloney's Discount Store, supra.

AMEC next argues the ALJ erred in determining Marshall was entitled to TTD benefits from April 15, 2017 to December 22, 2017. The ALJ based his determination on the opinion of Dr. Kennedy who opined the symptoms Marshall suffered from, during this time period, impacted his ability to work. We once again believe this could be reasonably inferred based on the medical opinions of Dr. Kennedy coupled with Marshall's testimony.

Lastly, AMEC argues the ALJ erred in determining the appropriate AWW. AMEC argues the AWW should be either \$187.15, or at most, \$900.88 and not \$1,238.58 as found by the ALJ. The ALJ, in his Opinion and Award, used the actual wages earned by Marshall while employed by AMEC and combined them with the per diem he received. By totaling the wages and per diem and dividing it by the number of weeks Marshall actually worked, the ALJ determined it would establish an AWW of \$1,238.58. We believe this determination accurately indicates

Marshall's true wages earned and consequently this finding will not be disturbed on appeal.

Marshall argues on cross-appeal that the ALJ erred in not finding AMEC's defense of this claim unreasonable because the basis of its denial relied on Dr. Wolens' opinion. Marshall argues Dr. Wolens is unqualified to make such an opinion regarding causation, therefore making it unreasonable and baseless. Marshall argues the opinions of Dr. Wolens reflect those of a "hired gun" used to purposely deny this otherwise compensable claim. As a result, he sought payment of attorney fees and costs per KRS 342.310. In the Order overruling this motion for fees and costs, the ALJ determined that while the opinion of Dr. Wolens supported the initial denial of this claim, though it was ultimately unsuccessful before the ALJ, the defense asserted by AMEC to this claim based on the same was not without reasonable grounds. This determination was well within the discretion of the ALJ to make, and a contrary result is not compelled.

Accordingly, the Opinion, Award, and Order of February 14, 2020 and the Orders of March 5, 2020 and March 11, 2020 rendered by the Hon. Greg Harvey, Administrative Law Judge are hereby **AFFIRMED**.

ALL CONCUR.

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