

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: September 7, 2018

CLAIM NO. 201402277

ANGELA SUMRALL

PETITIONER

VS.

APPEAL FROM HON. STEPHANIE KINNEY,
ADMINISTRATIVE LAW JUDGE

BLUEGRASS ORTHOPAEDICS & HAND CARE, PSC,
And HON. STEPHANIE KINNEY,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
VACATING AND REMANDING

* * * * *

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

RECHTER, Member. Angela Sumrall appeals from the May 9, 2017 Opinion and Order on Remand rendered by Hon. Stephanie L. Kinney, Administrative Law Judge ("ALJ"), as well as two Orders on Reconsideration dated February 21, 2018 and May 18, 2018. The ALJ awarded Sumrall permanent partial disability benefits

(“PPD”). Sumrall argues she is entitled to enhanced benefits pursuant to KRS 342.730(1)(c). For the reasons set forth herein, we vacate and remand.

Sumrall worked as an operating room nurse for Bluegrass Orthopaedics and Hand Care since 2010. She alleged a cumulative trauma injury to her neck, which ultimately required fusion surgery in November 2014. In an October 20, 2015 Opinion and Order, the ALJ determined Sumrall suffered a work-related neck injury which resulted in a 26% impairment rating. Pursuant to KRS 342.730(1)(c)1, the ALJ concluded Sumrall does not retain the physical capacity to return to her pre-injury work, and enhanced the award of PPD benefits by the three multiplier.

Bluegrass appealed to this Board, arguing insufficient evidence supported the ALJ’s conclusion Sumrall is entitled to enhanced benefits. We vacated the award of PPD benefits because the uncontroverted evidence established Sumrall returned to work at a wage greater than her pre-injury wages, thus qualifying her for conditional application of the two multiplier found at KRS 342.730(1)(c)2. Because the ALJ failed to recognize that both the two and three multipliers could apply to Sumrall’s situation, we remanded for an analysis pursuant to Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003).

On remand, the ALJ first discussed the analysis set forth in Fawbush, which is required when the claimant qualifies for both the two and three multipliers. The purpose of the Fawbush analysis is to determine which multiplier is most appropriate. As the ALJ noted, the relevant inquiry is whether Sumrall has experienced a permanent change in her ability to continue earning her same level of

wages. The ALJ is required to consider a “broad range of factors”, only one of which is the ability to perform the pre-injury job. Adkins v. Pike County Bd. of Educ., 141 S.W.3d 387 (Ky. App. 2004). Citing Trane Commercial Systems v. Tipton, 481 S.W.3d 800 (Ky. 2016), the ALJ then explained KRS 342.730(1)(c)1 requires a determination as to whether Sumrall returned to “the actual jobs that the individual performed.”

The ALJ next engaged in a detailed analysis of the tasks Sumrall performed prior to her fusion surgery, compared to those she performed at the time of the final hearing. While on light duty, Sumrall performed more paperwork and very little lifting and moving of patients. Though she was gradually returning to full duty, Sumrall testified she worked with pain, and required muscle relaxers and narcotic pain medication at night. The ALJ also noted Sumrall’s restrictions prevent her from lifting and moving patients in the operating room as she had before her injury. The ALJ then concluded this discussion with the following analysis:

This ALJ previously found Plaintiff retains the physical capacity to perform her pre-injury work, as noted in the Opinion, Award and Order of October 20, 2015. Also, there appears to be no permanent alteration in Plaintiff’s ability to earn money. She has continued to work for the Defendant and has received periodic raises that are based upon her job performance. This ALJ believes Plaintiff will be able to continue earning a same or greater wage given her experience and multiple raises based upon performance while working for the Defendant. The Defendant was certainly agreeable to accommodating light duty work restrictions, and there is nothing in the record to suggest the Defendant has indicated Plaintiff’s job is in jeopardy. To the contrary, the Defendant has given Plaintiff multiple raises based upon her job performance. Therefore, this ALJ finds benefits pursuant to KRS 342.730 (1) (c)2 is more

appropriate in this claim. Accordingly, Plaintiff is awarded permanent partial disability benefits at the rate of \$202.46/week for 425 weeks based upon a 26% permanent impairment rating with the single multiplier. However, if Plaintiff ceases to earn a same or greater wage, she will be entitled to benefits enhanced by the 2 multiplier pursuant to Livingood v. Transfreight, LLC, 467 S.W.3d 249 (Ky. 2015).

The basis of this appeal concerns the first sentence in the above-quoted portion of the ALJ's Opinion on Remand: "This ALJ previously found [Sumrall] retains the physical capacity to perform her pre-injury work, as noted in the Opinion, Award and Order of October 20, 2015." This statement is incorrect because, in fact, the ALJ concluded Sumrall does not retain the physical capacity to perform her pre-injury work in the original Opinion. Sumrall petitioned for reconsideration, emphasizing the apparent inconsistency of this statement. She argued this misstatement "tainted" the ALJ's entire analysis of enhanced benefits.

In her February 21, 2018 Order on Reconsideration, the first of two orders on reconsideration, the ALJ acknowledged the inaccuracy of her statement. She then provided the following explanation:

On remand this ALJ conducted an analysis pursuant to Fawbush. On page 7 on the opinion on remand this ALJ noted "This ALJ previously found Plaintiff retains the physical capacity to perform her pre-injury work". However, a thorough review of the ALJ's initial opinion does not support that statement. Nonetheless, based upon that statement this ALJ reversed her findings on remand. Based upon, the evidence in the record, this ALJ finds Plaintiff is entitled to permanent partial disability benefits enhanced by the 3 multiplier. After applying the factors elucidated in Fawbush, this ALJ finds Plaintiff does not have the capacity to continue to earn a same or greater wage into the indefinite future. This finding is based upon Plaintiff's testimony that she

feels uncertain she will be able to continue to perform her job duties. Likewise, Plaintiff was uneasy that she would be able to ease back into all of her pre-injury job duties. Plaintiff's testimony illustrated an individual that was clearly struggling to cope with a return to all her prior job duties.

Bluegrass petitioned for reconsideration. As Sumrall had in her petition for reconsideration, Bluegrass also focused on the ALJ's statement that she "previously found [Sumrall] retains the physical capacity to perform her pre-injury work, as noted in the Opinion, Award and Order of October 20, 2015." Bluegrass argued this statement was merely a typographical error. But for this typographical error contained in one sentence, the ALJ conducted a valid Fawbush analysis. She clearly considered whether Sumrall's injury permanently altered her ability to labor, as required by Adams, and reached the conclusion it had not. On this basis, Bluegrass argued the ALJ was without authority to revisit the conclusion she reached in the Order on Remand.

In a second Order on Reconsideration dated May 18, 2018, the ALJ reversed course. She now characterized the disputed sentence as a "typographical/clerical error." She then explained:

A review of the February 21, 2018 order indicates this ALJ found Plaintiff does not retain the capacity to perform her pre-injury work and does not have the ability to earn a same or greater wage. However, the finding that Plaintiff does not have the ability to earn a same or greater wage was a departure from this ALJ's previous finding set out above. Previously, this ALJ noted Plaintiff continued to earn same or greater wages and there was no alteration in Plaintiff's ability to earn money. This ALJ feels that reversing that finding was an error of law. While Plaintiff was correct that a typographical error existed, this ALJ does not think that

error allowed her discretion to disturb/reverse her prior finding that Plaintiff will be able to continue to earn a same or greater wage into the indefinite future.

As such, the ALJ awarded “permanent partial disability benefits based upon a 25% permanent impairment rating, with no multiplier enhancements.”

Sumrall has now appealed, arguing the ALJ impermissibly reversed the findings contained in the first Order on Reconsideration. She maintains the ALJ’s analysis in the Order on Remand was “tainted” by the mistaken belief she had previously determined Sumrall retains the physical capacity to return to her pre-injury job. Sumrall requests the claim be remanded to the ALJ for entry of an award of PPD benefits enhanced by the three multiplier. Bluegrass responds that the first Order on Reconsideration failed to identify the mere clerical error in the Order on Remand, and the second Order on Reconsideration simply corrected that mistake.

We find a number of concerns in this claim, which require it be remanded to the ALJ. First, the most recent order in this claim – the May 18, 2018 Order on Reconsideration – awards Sumrall PPD benefits “with no multiplier enhancements.” The uncontroverted evidence establishes Sumrall returned to work at a wage which was greater than her pre-injury average weekly wage. The ALJ acknowledged this fact in the Order on Remand. Even if Sumrall does not presently qualify to receive enhanced benefits because she continues to earn at least her pre-injury wage, it was improper for the ALJ to revise the order of PPD benefits to indicate the award contained “no multiplier enhancements.” See Climate Control of Ky. v. Muthler, 2010 WL 1427326 (Ky. App. 2010)(an award cannot be amended to conform to KRS 342.730(1)(c)2 in a petition for reopening unless the prior award

contains language determining the two multiplier applied). For this reason alone, that portion of the ALJ's order awarding PPD benefits "with no multiplier enhancements" must be vacated.

A second concern is the ALJ's Fawbush analysis contained in the Order on Remand, wherein the ALJ determined the two multiplier is most appropriate. The ALJ acknowledged the relevant inquiry is whether Sumrall can continue to earn the same wage indefinitely, taking into consideration more than just her ability to perform her current job. Adkins v. Pike County Bd. of Educ., 141 S.W.3d 387 (Ky. App. 2004). However, aside from a cursory mention of Sumrall's "experience", the ALJ identified only factors relating to her current job at Bluegrass, such as the employer's willingness to accommodate her restrictions and the fact she has received raises since her injury. Because employees change employers for myriad reasons, Adkins explains the ALJ must consider the claimant's ability to continue to earn the current wages at any job. The ALJ's analysis contained in the Order on Remand is faulty because it considers only Sumrall's ability to continue working as an operating room nurse at Bluegrass. It does not answer the relevant question of whether the injury permanently altered Sumrall's ability to earn her current wages should the employment at Bluegrass cease. See Adams v. NHC Healthcare, 199 S.W.3d 163 (Ky. 2006).

In another claim, a deficient Fawbush analysis might have been corrected in an order on reconsideration. Here, it appears the ALJ attempted to do so in the second Order on Reconsideration, though Sumrall disputes the ALJ's authority to enter that order. In fact, both parties have thoroughly discussed the

ALJ's general authority to revise an award on reconsideration, and the corresponding limitations. However, regardless of whether the ALJ exceeded her authority on reconsideration, we are generally unconvinced that meaningful review can be conducted. The analyses contained in the two Orders on Reconsideration differ so vastly in substance and result as to leave us unconvinced they are the product of a genuine exercise of discretion based solely on the evidence. *See New Directions Housing Authority v. Walker*, 149 S.W.3d 354 (Ky. 2004).

For these reasons, this claim must be remanded to the ALJ for further consideration. The ALJ has concluded Sumrall does not retain the capacity to return to her pre-injury job. She has further determined Sumrall returned to work at a higher wage than her pre-injury average weekly wage. These findings are supported by substantial evidence and have not been challenged by either party on appeal. As such, both the two and three multiplier are applicable to Sumrall's claim. On remand, the ALJ's sole task is to determine which multiplier is most appropriate, taking into consideration the factors and inquiries explained in Fawbush, Adams, and Adkins.

For the foregoing reasons, the award of permanent partial disability benefits contained in the May 9, 2017 Opinion and Order on Remand, the February 21, 2018 Order on Reconsideration and the May 18, 2018 Order on Reconsideration rendered by Hon. Stephanie L. Kinney, Administrative Law Judge, are hereby **VACATED**. This claim is remanded to the Administrative Law Judge for the narrow purpose explained herein.

STIVERS, MEMBER, CONCURS.

ALVEY, CHAIRMAN, NOT SITTING.

DISTRIBUTION

METHOD

COUNSEL FOR PETITIONER:
HON. NICHOLAS MURPHY
401 WEST MAIN ST
SUITE 1910
LOUISVILLE, KY 40202

LMS

COUNSEL FOR RESPONDENT:

LMS

HON. JAMES G FOGLE
610 S FOURTH ST
SUITE 701
LOUISVILLE, KY 40202

MEDICAL PROVIDER:

USPS

DR. LUIS VASCELLO
1760 NICHOLASVILLE RD
SUITE 302
LEXINGTON, KY 40503

ADMINISTRATIVE LAW JUDGE:

LMS

HON. STEPHANIE L. KINNEY
ADMINISTRATIVE LAW JUDGE
PREVENTION PARK
657 CHAMBERLIN AVENUE
FRANKFORT, KY 40601