

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: November 16, 2018

CLAIM NO. 201260107

GWENDOLYN PENDERGRAFT  
and HON. JOHNNIE L. TURNER

PETITIONER

VS.           **APPEAL FROM HON. JONATHAN WEATHERBY,  
ADMINISTRATIVE LAW JUDGE**

CORBIN CITY SCHOOLS  
and HON. JONATHAN WEATHERBY,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION  
VACATING & REMANDING  
\*\*\*\*\***

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

**STIVERS, Member.** Gwendolyn Pendergraft (“Pendergraft”) seeks review of the May 24, 2018, Opinion on Remand of Hon. Jonathan Weatherby, Administrative Law Judge (“ALJ”) awarding temporary total disability (“TTD”) benefits “from the exacerbation dated December 11, 2012,” through January 12, 2013, and medical benefits “from the effects of the work-related exacerbation.” In a June 21, 2018, Order, the ALJ amended the award to reflect TTD benefits were due from December 11,

2012, through January 7, 2013, and amended the interest rate applicable to unpaid TTD benefits.

On appeal, Pendergraft asserts the ALJ erred in relying upon Dr. Tharun Karthikeyan's opinion in determining she attained maximum medical improvement ("MMI") on January 7, 2013. Pendergraft asserts Dr. Karthikeyan never expressed an opinion as to MMI. Pendergraft argues the parties are entitled to fact-finding based on a correct understanding of the evidence submitted during adjudication, and when the fact-finder may have held an erroneous understanding of the relevant evidence in reaching a decision the Courts have authorized remand to the ALJ for further findings. Pendergraft requests the Board remand the claim to the ALJ with instructions to "correctly and appropriately do proper factual findings and correct the errors in his finding and order." We vacate the May 24, 2018, Opinion on Remand and the June 21, 2018, Order and remand the claim to the ALJ.

### **BACKGROUND**

Pendergraft's Form 101 alleges she was injured on December 11, 2012, when "Plaintiff was at school and a student kicked her in the knee that she had previously had a knee replacement. She began to fall, but some students caught her before she hit the floor."

In a May 15, 2017, Opinion and Order, relying upon the opinions of Drs. Steven Wunder, Daniel Primm, and Karthikeyan, the ALJ determined Pendergraft did not suffer a permanent injury and dismissed her claim. Pendergraft appealed to this Board, and in an opinion rendered December 21, 2017, this Board affirmed the ALJ's determination Pendergraft did not sustain a permanent injury.

However, regarding the dismissal of Pendergraft's claim for temporary injuries stemming from the 2012 work incident, this Board vacated the ALJ's decision specifically noting as follows:

Corbin additionally filed the December 19, 2014 records review report of Dr. Steven S. Wunder, a physical medicine and rehabilitation physician. Dr. Wunder noted the history of the April 2012 right knee replacement, and the December 11, 2012 incident when Pendergraft was kicked in the right knee by a student. After reviewing numerous medical records, Dr. Wunder noted he did not believe Pendergraft sustained a permanent right knee injury in the December 11, 2012 incident. However, he stated, "[S]he probably had a contusion to the right knee with the December 11, 2012 incident." He also noted Pendergraft did not sustain a "permanent" low back injury due to the December 11, 2012 incident. He additionally noted Pendergraft has no new or additional impairment due to the December 11, 2012 incident. He stated any restrictions would be due to her prior knee replacement, previous chronic low back pain, and from her MS.

In vacating, we explained as follows:

However, regarding the dismissal of Pendergraft's claim for a temporary injury stemming from the December 11, 2012 incident, a contrary result is compelled and we must reverse the ALJ's determination. Clearly, a traumatic event occurred at work on that date. Although the ALJ determined all of her complaints were due to a pre-existing active condition, we note his decision is not supported by the record. Dr. Primm noted while Pendergraft did not sustain a permanent injury due to the incident, she sustained lumbar and knee strains in the incident which had resolved by the time of his examination. Dr. Karthikeyan noted the history of the kicking incident, and while he did not believe there was a problem with her knee replacement, he noted she had slightly more effusion than normal and, "she may have strained something to cause the effusion, but I do not think there is any real damage done." He then prescribed anti-inflammatory medication, and kept her off work until January 7, 2013. Dr. Wunder noted she had no

permanent knee injury, but she had a knee contusion due to the December 11, 2012 incident.

Since the rendition of Robertson v. United Parcel Service, 64 S.W.3d 284 (Ky. 2001), this Board has consistently held 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 payable. In Robertson, the ALJ determined the claimant failed to prove more than a temporary exacerbation and sustained no permanent disability as a result of his injury. Therefore, the ALJ found the worker was entitled to only medical expenses the employer had paid for the treatment of the temporary flare-up of symptoms. The Kentucky Supreme Court noted the ALJ concluded Robertson suffered a work-related injury, but its effect was only transient and resulted in no permanent disability or change in the claimant's pre-existing spondylolisthesis. The Court stated:

Thus, the claimant was not entitled to income benefits for permanent partial disability or entitled to future medical expenses, but he was entitled to be compensated for the medical expenses that were incurred in treating the temporary flare-up of symptoms that resulted from the incident. Id. at 286.

Because the evidence the ALJ stated he relied upon in reaching his decision, as outlined above, compels a contrary result regarding whether **Pendergraft sustained a temporary injury to her right knee**, we must remand for further determinations. On remand, the ALJ must determine whether Pendergraft is entitled TTD benefits, and medical benefits, either temporary or permanent, for the temporary injury. The ALJ may make any determination he deems appropriate as long as it is supported by the evidence. We direct no particular result. Likewise, the ALJ must make a determination regarding the medical dispute subject of the Form 112 filed by Corbin, listed as an issue in the Benefit Review Conference Order and Memorandum. (emphasis added).

There was no appeal from our decision.

The ALJ's May 24, 2018, Opinion on Remand reads, in relevant part,

as follows:

This matter is before the ALJ upon Remand and Reversal from the Workers Compensation Board. The ALJ found that there was no temporary injury due to the prior active condition of the Plaintiff. The ALJ has been reversed on that issue and is directed to award temporary total disability benefits. Accordingly, the following additional findings and Award are issued:

1. The ALJ is directed to find that the Plaintiff reached maximum medical improvement on January 7, 2013, as determined by the opinion of Dr. Karthikeyan from the exacerbation dated December 11, 2012. The ALJ so finds.

#### **AWARD**

**IT IS HEREBY ORDERED AND ADJUDGED** as follows:

1. The Plaintiff, Gwendolyn Pendergraft, shall recover from the Defendant, Corbin City Schools., and/or its insurance carrier temporary total disability benefits from the December 11, 2012, through January 12, 2013, together with interest at the rate of 12% per annum on all past due and unpaid installments of such compensation. The Defendant shall take credit for any payment of such compensation heretofore made, including those payments of temporary total disability benefits already made.

2. Plaintiff shall recover of the Defendant-employer and/or its insurance carrier, such medical expenses including but not limited to provider's fees, hospital treatment, surgical care, nursing supplies, and appliances as may be reasonably required for the cure and relief from the effects of the workrelated [sic] exacerbation of the Plaintiff's injury occurring on December 11, 2012, only. The Defendant's obligation shall be commensurate with the limits set by the Kentucky Medical Fee Schedule.

...

Corbin City Schools (“Corbin”) filed a petition for reconsideration asserting the ALJ’s opinion contained a typographical error, as the ALJ found Pendergraft attained MMI on January 7, 2013, but the award of TTD benefits extends through January 12, 2013. Corbin also asserted, “the 12%/6% interest provisions apply, and the closed period of medicals should be clarified.” The ALJ entered the following amended award in the June 21, 2018, Order:

This matter is before the ALJ upon Petition for Reconsideration filed by the Defendant Employer of the Award issued on Remand seeking a correction of the end of temporary total disability benefits, a clarification of the interest to be applied to past due amounts, and a clarification of the medical benefits awarded. Accordingly, the following **AMENDED AWARD** is hereby issued:

**AMENDED AWARD**

**IT IS HEREBY ORDERED AND ADJUDGED** as follows:

1. The Plaintiff, Gwendolyn Pendergraft, shall recover from the Defendant, Corbin City Schools., and/or its insurance carrier temporary total disability benefits from the [sic] December 11, 2012, through January 7, 2013, together with interest at the applicable statutory rate on all past due and unpaid installments of such compensation such that 12% interest is to be paid on amounts due up to and including June 28, 2017, and 6% interest is to be paid for past due amounts thereafter. The Defendant shall take credit for any payment of such compensation heretofore made, including those payments of temporary total disability benefits already made.

2. The Plaintiff shall recover of the Defendant-Employer and/or its insurance carrier, such medical expenses including but not limited to provider’s fees, hospital treatment, surgical care, nursing supplies, and appliances as may be reasonably required for the cure and relief from the effects of the work-related injury found herein as well as the exacerbation of said injury. The Defendant’s

obligation shall be commensurate with the limits set by the Kentucky Medical Fee Schedule.

### **ANALYSIS**

KRS 342.0011(11)(a) defines temporary total disability as follows:

‘Temporary total disability’ means the condition of an employee who has not reached maximum medical improvement [MMI] from an injury and has not reached a level of improvement that would permit a return to employment.

The above definition has been determined by our courts of justice to be a codification of the principles originally espoused in W.L. Harper Construction Company v. Baker, 858 S.W.2d 202 (Ky. App. 1993), wherein the Kentucky Court of Appeals stated generally:

TTD is payable until the medical evidence establishes the recovery process, including any treatment reasonably rendered in an effort to improve the claimant's condition, is over, or the underlying condition has stabilized such that the claimant is capable of returning to his job, or some other employment, of which he is capable, which is available in the local labor market. Moreover, . . . the question presented is one of fact no matter how TTD is defined.

Id. at 205.

In Central Kentucky Steel v. Wise, 19 S.W.3d 657 (Ky. 2000), the Kentucky Supreme Court further explained that “[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 that is customary or that he was performing at the time of his injury.” Id. at 659. In other words, where a claimant has not reached MMI, TTD benefits are payable until such time as the claimant’s level of improvement permits a return to the type of work he was customarily performing at the time of the traumatic event.

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 a continuation of TTD benefits so long as he or she remains disabled from his or her customary work or the work he or she was performing at the time of the injury. The Court in Magellan, supra, stated:

In order to be entitled to temporary total disability benefits, the claimant must not have reached maximum medical improvement and not have improved enough to return to work.

. . .

The second prong of KRS 342.0011(11)(a) operates to deny eligibility to TTD to individuals who, though not at maximum medical improvement, have improved enough following an injury that they can return to work despite not yet being fully recovered. In Central Kentucky Steel v. Wise, [footnote omitted] the statutory phrase ‘return to employment’ was interpreted to mean a return to the type of work which is customary for the injured employee or that which the employee had been performing prior to being injured.

Id. at 580-581.

In Double L Const., Inc. v. Mitchell, 182 S.W.3d 509, 513-514 (Ky. 2005), with regard to the standard for awarding TTD benefits, the Supreme Court elaborated as follows:

As defined by KRS 342.0011(11)(a), there are two requirements for TTD: 1.) that the worker must not have reached MMI; and 2.) that the worker must not have reached a level of improvement that would permit a return to employment. *See* Magellan Behavioral Health v. Helms, 140 S.W.3d 579, 581 (Ky. App. 2004). In the present case, the employer has made an ‘all or nothing’ argument that is based entirely on the second requirement. Yet, implicit in the Central Kentucky Steel v. Wise, supra, decision is that, unlike the definition of

permanent total disability, the definition of TTD does not require a temporary inability to perform ‘any type of work.’ *See* KRS 342.0011(11)(c).

...

Central Kentucky Steel v. Wise, *supra*, stands for the principle that if a worker has not reached MMI, a release to perform minimal work rather than ‘the type that is customary or that he was performing at the time of his injury’ does not constitute ‘a level of improvement that would permit a return to employment’ for the purposes of KRS 342.0011(11)(a). 19 S.W.3d at 659.

More recently, 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.

Finally, in Trane Commercial Systems v. Tipton, 481 S.W.3d 800 (Ky. 2016), the Supreme Court clarified when TTD benefits are appropriate in cases where the employee returns to modified duty. The Supreme Court instructed as follows:

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 TDD 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 TDD 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 TDD 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 TDD benefits in addition to the employee's wages would forward that purpose.

Id. at 807.

In determining Pendergraft'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). While an ALJ is not required to engage in a detailed discussion of the facts or set forth the minute details of his reasoning in reaching a particular result, he 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).

Even though Pendergraft did not file a petition for reconsideration requesting additional findings, the ALJ's erroneous citation to Dr. Karthikeyan's opinion concerning the date of MMI and other deficiencies in the May 24, 2018, Opinion on Remand mandate that we vacate his decision and remand for further findings and an award in conformity with the statute. The ALJ's analysis is deficient and fails to provide any findings of fact and conclusions of law to reasonably apprise

the parties and this Board of his rationale for the award of TTD benefits. This Board cannot engage in fact-finding to support the ALJ's decision, and this Board is unable to determine how the ALJ arrived at his award of TTD benefits. While we acknowledge the ALJ determined Pendergraft reached MMI on January 7, 2013, there is no further analysis as required by the statute and relevant case law. Thus, the requisite fact-finding necessary for our review is absent.

Further complicating matters is the ALJ's erroneous reliance upon Dr. Karthikeyan's opinion in determining the date of MMI to be January 7, 2013.<sup>1</sup> In his initial record of December 13, 2012, Dr. Karthikeyan stated Pendergraft had a small effusion which she stated is slightly more than normal, and it is possible Pendergraft may have strained something to cause the effusion. However, he did not think there was any real damage. Dr. Karthikeyan further stated:

We are going to have her take the anti-inflammatory and we will keep her out of work for the next couple of weeks through the holidays so that she can rest and not have to be on her feet all the time.

We are going to see her back in about 6 week's time. If, at that time, she is continuing to have radicular symptoms, then we will likely pursue further lumbar spine imaging with an MRI.

On that same date, Dr. Karthikeyan completed a work status report in which he indicated Pendergraft was "unable to return until January 7, 2013." Under the heading "Plan of Care" Dr. Karthikeyan checked medication and physical therapy. Under the heading "MMI" he checked "No," and under "Projected MMI Date" he wrote "Unknown." By "Next Appointment" he wrote "6 weeks."

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<sup>1</sup> Dr. Karthikeyan's records are contained in Corbin's October 7, 2014, filing of the Lexington Clinic's medical records.

Dr. Karthikeyan saw Pendergraft again on January 29, 2013. At that time, he noted Pendergraft felt she was not getting better, and it may be prudent to begin a work-up for infection. He stated, "My suspicion for this is really quite low, but I think the only way to know for sure is to actually carry out the work-up." Dr. Karthikeyan recommended lab work and suggested he try to aspirate the knee. Pendergraft was nervous about this and preferred to wait on the systemic blood work. Dr. Karthikeyan indicated he would order the blood work that day and would call Pendergraft with the results. If the results were elevated, he would have her return to aspirate the knee. If everything looked negative, Dr. Karthikeyan was going to have her return to see him in about three months. At that point, she would be a year out from surgery, and this might give her some more time to recover from surgery. Significantly, in the Work Status document of that same date, Dr. Karthikeyan indicated Pendergraft could only be returned to modified duty with no prolonged standing and walking. He limited the period of prolonged standing and walking to thirty minutes. Concerning MMI, he again checked "No," and for the projected MMI date he again wrote "Unknown."

The records reflect Dr. Karthikeyan again saw Pendergraft on May 1, 2013. At that time, he stated he did not have an answer and Pendergraft was taking Ibuprofen. He offered her stronger anti-inflammatories such as Celebrex and Naproxen, but she declined. Dr. Karthikeyan stated he did not have any other thoughts or investigations about what could be causing her pain.

The records of Dr. Karthikeyan clearly reflect Pendergraft did not attain MMI at any time during his treatment of her. Although Dr. Karthikeyan indicated he

would return her to work on January 7, 2013, he stated she had not reached MMI, and the January 29, 2013, work status document indicates Pendergraft could return to work on modified duty with prolonged standing and walking limited to thirty minutes. Thus, Pendergraft's entitlement to TTD benefits must be analyzed as set out herein.

We have reviewed the August 29, 2014, report of Dr. Primm and the December 19, 2014, report of Dr. Wunder and neither doctor offered an opinion as to MMI. The only doctor who offered an opinion as to MMI was Dr. David Muffly who indicated MMI occurred on October 3, 2013. Certainly, Dr. Karthikeyan did not provide a date of MMI. Dr. Karthikeyan's January 29, 2013, work status report indicates Pendergraft was not to engage in prolonged standing or walking for more than thirty minutes. The record reflects Pendergraft worked as a teacher, and as such Dr. Karthikeyan's restrictions are a significant limitation on Pendergraft's ability to perform her profession. Thus, the second prong of the analysis as required by statute must be performed by determining at what point Pendergraft had improved enough to permit a "return to employment" as defined by pertinent case law.

We also note the ALJ's May 24, 2018, Opinion on Remand is not an award in conformity with the statute and not in accordance with this Board's directive. We specifically stated we directed no particular result. Thus, the ALJ's statements he was directed to award TTD benefits and to find Pendergraft reached MMI on January 7, 2013, based on the opinion of Dr. Karthikeyan are erroneous.

Moreover, the ALJ's award does not define the injury. We concluded the record established that Pendergraft sustained a temporary right knee injury. Thus, on remand, the ALJ should have made a finding Pendergraft sustained a temporary

right knee injury. The ALJ made no finding of a temporary injury to either knee. Further, although the July 26, 2016, Benefit Review Conference Order & Memorandum reflects the parties stipulated Pendergraft's average weekly wage to be \$1,076.92, the ALJ did not calculate the amount of TTD benefits to which Pendergraft was entitled. The amended award merely awards TTD benefits from December 11, 2012, through January 7, 2013, but does not state the weekly amount to which Pendergraft is entitled.

Finally, the May 24, 2018, award does not determine the period during which Pendergraft is entitled to medical benefits. This was pointed out by Corbin in its petition for reconsideration requesting the ALJ to determine "the closed period of benefits should be clarified." Similarly, our direction to the ALJ was to also resolve the medical fee dispute which had been filed by Corbin in which it contended Pendergraft's right knee and low back are prior active conditions unrelated to the December 11, 2012, incident. Corbin asserted it was not responsible for any medical benefits relating to the alleged December 11, 2012, work injury. Thus, the ALJ should have resolved the medical dispute by determining the period during which Pendergraft was entitled to medical benefits.

All parties to a workers' compensation dispute are entitled to findings of fact based upon a correct understanding of the evidence submitted during adjudication of the claim. Where it is demonstrated the fact-finder may have held an erroneous understanding of relevant evidence in reaching a decision, the courts have authorized remand to the ALJ for further findings. *See* Cook v. Paducah Recapping Service, 694 S.W.2d 684 (Ky. 1985); Whitaker v. Peabody Coal Company, 788

S.W.2d 269 (Ky. 1990). Since the ALJ's erroneous understanding of Dr. Karthikeyan's opinions clearly impacted the ALJ's finding regarding the extent to which Pendergraft was temporarily totally disabled, we must vacate the May 24, 2018, Opinion on Remand and the June 21, 2018, Order ruling on the petition for reconsideration. On remand, the ALJ must set forth a complete and thorough analysis of Pendergraft's entitlement to TTD benefits consistent with Trane, Livingood, *et al*, and also determine the period during which Pendergraft is entitled to medical benefits. We express no opinion as to the outcome on remand.

Accordingly, in the May 24, 2018, Opinion on Remand and the June 21, 2018, Order are **VACATED**. This claim is **REMANDED** for additional findings concerning Pendergraft's entitlement to TTD benefits and medical benefits in accordance with the views set forth herein.

ALL CONCUR.

**DISTRIBUTION:**

**METHOD**

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