Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: March 4, 2022

CLAIM NO. 201990564

JOHN MOORE PETITIONER

VS. **APPEAL FROM HON. AMANDA M. PERKINS, ADMINISTRATIVE LAW JUDGE**

WESTERN KENTUCKY CORRECTIONAL COMPLEX and
HON. AMANDA M. PERKINS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING IN PART
VACATING IN PART & REMANDING

* * * * * *

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

MILLER, Member. John Moore ("Moore") appeals from the October 22, 2021 Opinion, Award, and Order and the November 12, 2021 Order denying his Petition for Reconsideration rendered by Hon. Amanda M. Perkins, Administrative Law Judge ("ALJ"). The ALJ awarded permanent partial disability ("PPD") benefits based on a 10% impairment rating pursuant to the 5th Edition of the American

Medical Association, <u>Guides to the Evaluation of Impairment Rating</u> ("AMA <u>Guides</u>") with no multipliers per KRS 342.730. However, she did not award temporary total disability ("TTD") benefits. Medical expenses related to the left wrist/forearm were to be paid per statute.

Moore worked for the Western Kentucky Correctional Complex ("Western") as a safety coordinator. On March 12, 2019, Moore was asked to train cadets as the normal training officers were out sick. Moore was assuming the role of a handcuffed inmate when his wrist was aggressively rotated and twisted by a trainee. Moore felt a sharp pain to his left wrist and heard a pop. It should be noted Moore is left-hand dominant. He went to the Emergency Room and was released to work with restrictions of no use of his left hand or forearm.

Moore continued to work for the next six weeks, and he testified he was able to do his job. On April 23, 2019, he was terminated for reasons Western deemed inappropriate actions involving inmates. Moore believes he was terminated for reasons related to his disability. A letter showing Western's reason for termination and appeal rights was filed as evidence.

The job duties of the safety coordinator were fully explored through the testimony of Moore and that of the Deputy Warden of Security, Jon Tangerose ("Tangerose"). Moore started his position as a safety coordinator in 2017. There was a disagreement as to the physical requirements of specific job duties, but it certainly included inspection of all fire extinguishers, classification of inmates on the farm equipment, conducting training for employees on safety issues, and serving as a liaison to outside emergency agencies. Moore testified he checked 700 plus fire

extinguishers every week to make sure they were fully charged. He had to shake them, making sure the inmates were not sticking contraband in them and that they were in the right place. He had to lift the fire extinguishers off the hangar. He stated, "we have ones in the vehicles I think are five pounders and the transport vans ten pounders and some of the bigger ones in the farm equipment you know twenty pounds and we had a couple fifty pounders."

The safety coordinator's office was outside the compound where the inmates reside. Tangerose testified the checking of fire extinguishers was more visual than physically demanding, but on days where it was done, the inspector spent more time around the inmates.

At the final hearing, in responding to a question regarding the job duties of the safety coordinator, Tangerose stated:

> So, the safety coordinator's primary responsibility is to ensure that all staff follow the applicable policies of safety throughout the institution. They're also required to investigate any type of accident that takes place, whether it be with an inmate or just an inmate, excuse me, or just a staff-involved accident, they submit a complete report of their findings, along with any issues that might have caused the accident to the warden. They're also required to do inspections on all fire systems, all fire extinguishers and they're also required to take outside contractors around throughout the institution to do full state inspections, which those are done quarterly, the fire extinguisher inspections are done monthly. Those are the primary duties. They also take contractors around and do pest control, set traps.

There was conflicting testimony whether Moore's positions of working on the firing range and as an armorer were strictly voluntary or mandated. Tangerose testified at the final hearing that as a safety coordinator, Moore did not have to work

on the firing range or as an armorer. These were strictly voluntary positions he chose to do.

Between the date of injury and the termination date, Moore testified he was able to perform his job. He testified:

> Q: That time that you worked from when this happened, this has been on March 12, 2019 to your last day working there at the prison in April of 2019, were you continuing to perform your regular duties as safety coordinator during that time
>
> A: And all my other duties, yes, sir.
>
> Q: Just all the things you've described here today
>
> A: Yes, sir.

Moore also testified that after the injury he was working more hours because spring is a busy time. Tangerose testified that Moore was always adamant he could continue doing what he always did.

Moore filed a Petition for Reconsideration requesting additional findings as to whether he was physically capable of performing the various functions related to his job, presumably due to the lack of an award of the three-multiplier. Moore also requested findings regarding his termination from employment and whether it was for good cause unrelated to his disability. Lastly, Moore requested the ALJ enter her findings for denying him the benefit of the two-multiplier.

In her Order denying the Petition for Reconsideration, the ALJ precisely detailed her reasoning regarding which medical opinion she found more credible and discussed the testimony of Moore and Tangerose. She explained why the two-multiplier of KRS 342.730(2) was not permitted since there was no cessation

of work and a return to work making equal or greater wages. She explicitly stated why she found the reason for termination unrelated to the disability.

Moore raises four issues on appeal: 1) The ALJ erred in finding the termination was not related to his injury; 2) The ALJ erred in finding TTD benefits were not due; 3) The ALJ erred in failing to enhance the PPD benefits via the three-multiplier; 4) and the ALJ erred in denying his motion for sanctions.

This claim was vigorously litigated by the participants. While there were several other contested issues listed in the Benefit Review Conference ("BRC") Order and Memorandum, this Opinion will only address the issues raised on appeal.

Regarding the issues of the reason for termination, enhancement of the PPD benefit by the three-multiplier, and whether to issue sanctions, there is substantial evidence of record cited by the ALJ to support her decision. The evidence does not compel a contrary result. Simply put, Moore is rearguing the merits of the claim and it is not the function of this Board to re-weigh the evidence.

The ALJ reviewed the medical opinions of Dr. Jeffrey Fadel and Dr. Thomas Gabriel. Dr. Gabriel assigned Moore a 9% impairment rating according to the AMA Guides and believed he could return to his job as a safety coordinator. Dr. Fadel examined Moore and assigned a 10% whole body impairment rating according to the AMA Guides but thought significant left arm/wrist restrictions were needed. The ALJ was persuaded by Dr. Gabriel's assessment. The ALJ referenced the treating physician Dr. David Tate who believed Moore could perform his job.

It is up to the ALJ to determined which medical opinion to believe when there are conflicting medical opinions as to the severity of a claimant's injury.

Jones v. Brasch–Barry General Contractors, 189 S.W. 3d 149,153 (Ky. App.2006). An ALJ may pick and choose among conflicting medical opinions and has the sole authority to determine whom to believe. Copar, Inc. v. Rogers, 127 S.W.3d 554 ,561 (Ky. 2003) Further, the ALJ reviewed the testimony of Moore and Tangerose concerning the job duties of a safety coordinator and his ability to perform the tasks associated with that job. Moore cites to Ford Motor Company v. Forman, 142 S.W.3d 141 (Ky. 2004), in arguing an award per KRS 342.730(1)(c)1 is appropriate. In addition to Moore's job duties as a safety instructor, he also performed duties as an armorer and firearms instructor. Moore testified these positions were part of his employment whereas Western's personnel testified they were not part of his duties as safety instructor and other personnel could have done these job duties. The ALJ believed the armorer and firearms instructor were volunteer positions. The ALJ found Dr. Gabriel's release without restrictions determinative along with Dr. Tate's opinion Moore could perform the safety coordinator job. Moore's own credible testimony during the six weeks he worked post injury showed he could do the work one-handed. Thus, the ALJ had sufficient evidence that Moore had the physical capacity to perform the job of safety coordinator.

As the claimant in a workers' compensation proceeding, Moore had the burden of proving each of the essential elements of his claim. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because Moore was unsuccessful in his burden, the question on appeal is whether the evidence compels a different result. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Compelling evidence" is defined as evidence that is so overwhelming, no reasonable person could reach the

same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985). The function of the Board in reviewing the ALJ's decision is limited to a determination of whether the findings made by the ALJ 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).

As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the sole authority to judge all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/ Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). The ALJ may 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. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000); Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). Mere evidence contrary to the ALJ's decision is inadequate to require reversal on appeal. Id

The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to the weight and credibility to be afforded the evidence or by noting reasonable inferences which otherwise could have been drawn from the record. Whittaker v. Rowland, supra. As long as the ALJ's ruling regarding an issue is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986). The Board affirms the ALJ's Opinion declining to enhance the PPD benefits by the three-multiplier.

Moore seeks review of the failure of the ALJ to assess sanctions against Western based on a delay of medical treatment. This issue was not raised in Moore's Petition for Reconsideration. When no petition for reconsideration is filed, the ALJ's award or order is conclusive and binding as to all questions of fact KRS 342.285(1). Brasch-Barry General Contractors v. Jones, 175 S.W.3d.81,83 (Ky. 2005). Even if the sanctions issue had been raised, the Board will not disturb the decision of the ALJ who adequately explained her reasoning based on the evidence of record. Whether to issue sanctions during the proceedings before the ALJ is entirely within her discretion. *See*, KRS 342.310 and 803 KAR 25: 010 Sec. 26. The use of the word **may** (emphasis added) in both the statute and regulation further leaves this decision to the tribunal resolving the claim on its merits. It was for the ALJ to weigh the evidence presented by Moore and Western as to the events leading to the delay in treatment and whether some form of punishment should be assessed. The ALJ reviewed a timeline of Western's correspondence with Moore's counsel and its attempts to provide treatment. The testimony of Moore placed the delay of treatment upon Western. The ALJ stated, "After reviewing the conflicting evidence, the ALJ finds that Western's defense of the claim was reasonable based on the circumstances." Moore must show the evidence compels a different result, and that is not the case.

Next, Moore believes it is Western's obligation to prove the reasons for the termination. Moore asserts his termination was because of his disability. Western produced the letter of termination, stating the reasons and the employee's appeal rights. The ALJ recited the contents of the letter in her Order on Petition for

Reconsideration. The ALJ concluded the termination was unrelated to Moore's disability.

Whether Western had valid reasons for termination can be raised in multiple forums to address that issue. For purposes of this review, it is but one other issue that had conflicting evidence. The fundamental question before this Board is whether Moore was physically capable of performing his customary work. Ford Motor Company v. Forman, supra. The termination is certainly one piece of evidence to be factored in by the ALJ along with the medical and lay testimony, and the ALJ determined that Moore could perform his job. Moore cites The Harper Company v. Joshua L. Zurborg, Claim No. 201176267 rendered October 10, 2014, a Board Opinion affirmed by the Court of Appeals, for the proposition a termination from employment does not affect whether the employee can receive TTD benefits. However, that case is distinguishable in that the employee never worked with the Employer after his injury and was found to be unable to perform his employment prior to reaching maximum medical improvement ("MMI").

Moore requests TTD benefits be paid. The BRC Order and Memorandum listed TTD benefits as a contested issue. Payment of TTD benefits was not specifically mentioned in Moore's Petition for Reconsideration but was raised as an issue in his Response to Defendant's Petition for Reconsideration. As stated previously, when no petition for reconsideration is filed, the ALJ's award or order is conclusive and binding as to all questions of fact. KRS 342.285(1). Yet even considering all findings of fact set forth by the ALJ as conclusive, the claim must be remanded for additional findings.

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 Central Kentucky Steel v. Wise, 19 S.W.3d 657, 659 (Ky. 2000), the Kentucky Supreme Court explained, "It 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." Thus, a release "to perform minimal work" does not constitute a "return to work" for purposes of KRS 342.0011(11)(a).

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, supra, 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

Pre-surgery, Moore had restrictions of no use of his left arm/hand but was able to perform his job until termination. There are no additional restrictions of record pre-surgery. Hence there is substantial evidence establishing why no TTD

benefits were awarded pre-surgery, that being Moore continues working at his job until he was terminated. The testimony of Moore provided sufficient evidence that he was able to perform his customary job. Western also provided evidence that Moore could perform his customary job.

The ALJ set forth the following in her Opinion, *verbatim*:

> Moore did not miss any work after the injury and returned immediately with the restriction of no use of his left hand/forearm. Moore and his supervisor testified that he returned to his job as a safety coordinator for six weeks and he did not have any issues performing his job. Thus, the ALJ finds that Moore is not entitled to any TTD benefits as he did return to his customary work, except for the volunteer roles of firearms instructor and armorer, and he was able to perform his job until he was terminated on April 23, 2019.
>
> The issue of when Moore reached MMI is moot, as the ALJ finds he is not entitled to TTD benefits. Regardless, the ALJ relies on Dr. Gabriel's to find Moore reached MMI on February 24, 2001. Dr. Gabriel's opinion regarding MMI is more consistent with the recovery time necessary after Moore's surgery.

However, there is no discussion regarding the subsequent treatment including ulnar shortening osteotomy surgery performed by Dr. Tate on August 24, 2020. Moore has requested TTD benefits be paid from the time of his termination until MMI or in the alternative post-surgery, from August 24, 2020 until MMI was reached, February 24, 2021. An ALJ must provide findings sufficient to inform the parties of the basis for her 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); Big Sandy Community Action Programs v. Chafins, 502 S.W.2d 526 (Ky. 1973).

Dr. Tate commenced treatment on June 23, 2020. X-rays were taken of the left wrist. Dr. Tate stated he needed to review earlier records. By this time, Moore had not worked for over a year. His next visit was on July 29, 2020. A repeat MRI was performed showing ulnocarpal abutment. Dr. Tate recommended surgery and placed restrictions of one-handed work only, unable to use left extremity. Dr. Tate performed an ulnar shortening osteotomy surgery on August 24, 2020. Dr. Tate stated in his office notes of September 1, 2020, "If such work is available one-handed desk work." Moore underwent physical therapy until October 16, 2020. Dr. Tate, in a form letter completed March 12, 2021, stated he thought Moore could perform the job of a safety coordinator as it was defined in the letter. "Safety Coordinator at Western Kentucky Correctional Complex involves desk work and walking around the facility to make visual inspections with occasional lifting of a fire extinguisher for inspection."

Dr. Fadel performed an examination on December 3, 2020. He opined Moore was at MMI at the time of discharge from physical therapy in October 2020 and assigned a 10% whole person impairment rating. He believed significant restrictions were needed; no repetitive use of left hand, no lifting more than 5 pounds occasionally with the left upper extremity, no use of vibratory tools, no pushing or pulling more than 15 pounds with his left upper extremity, and no repetitive fine manipulation task using his left hand. This, of course, would make it impossible for him to return to his previous employment as a corrections officer with its specific responsibilities.

In contrast, Dr. Gabriel performed and examination on May 25, 2021. Dr. Gabriel assessed a 9% whole person impairment rating but believed no permanent restrictions were needed. Dr. Gabriel believed MMI was attained on February 24, 2021, six-months post-surgery. Both Dr. Gabriel and Dr. Fadel recognized that Moore is left hand dominant.

The Opinion of the ALJ is affirmed as to all issues raised by Moore except for his entitlement to TTD benefits post-surgery. The Board is not directing any particular result as this is left to the ALJ to weigh the evidence of the various medical providers and lay testimony.

Accordingly, the October 22, 2021 Opinion, Award, and Order and the November 12, 2021 Order on Petition for Reconsideration rendered by Hon. Amanda M. Perkins, are **AFFIRMED IN PART** and **VACATED IN PART**. This claim is **REMANDED** to the ALJ for further analysis regarding Moore's entitlement to TTD benefits post-surgery.

ALL CONCUR.

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