

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: August 2, 2019

CLAIM NO. 201594425

KENNETH TURNER

PETITIONER

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

COMMONWEALTH OF KENTUCKY
DEPARTMENT OF CORRECTIONS
and HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
VACATING & REMANDING

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

STIVERS, Member. Kenneth Turner (“Turner”) appeals from the March 8, 2019, Opinion on Remand and the April 22, 2019, Order on Petition for Reconsideration of Hon. Jonathan R. Weatherby, Administrative Law Judge (“ALJ”). In the March 8, 2019, Opinion on Remand, the ALJ added one sentence to his original findings of fact and conclusions of law and corrected some of typographical errors.

On appeal, Turner sets forth three arguments. First, Turner asserts Dr. Thomas O'Brien's opinions are based on an inaccurate and incomplete history and cannot constitute substantial evidence. Next, Turner asserts the ALJ's decision on remand does not contain sufficient findings of fact. Finally, Turner argues the ALJ did not adequately address the conflicting evidence.

As this Board has previously reviewed this case, we will set forth, verbatim, our summary of the factual and procedural history of the litigation, as well as the substance of Turner's first appeal to this Board and our instructions to the ALJ on remand, as delineated in our January 11, 2019, Opinion, which is as follows:

Turner testified he was leaving work at Commonwealth of Kentucky Department of Corrections after his shift on February 16, 2015, when he slipped and fell on ice. He alleged injuries to his hips, ribs, right shoulder and neck. Turner denied having any neck problems prior to the work accident, but acknowledged he was taking pain medication for his knees and low back. Turner stated he went to a pain clinic every three months for these conditions prior to the work accident.

The following week, on February 23, 2015, Turner visited Holly McCormick, APRN with complaints of headaches, right shoulder pain, and right-sided chest pain. He reported the work accident to Nurse McCormick, who ordered x-rays and a CT scan. The x-rays revealed a shoulder abnormality of the clavicle and in the AC joint, and broken ribs. Turner was referred to an orthopedic surgeon for his shoulder condition. When he returned to Nurse McCormick on March 4, 2015, Turner continued to complain of pain in his right shoulder and ribs.

Turner was referred to Trigg County Hospital Rehabilitation Department for physical therapy. On March 24, 2015, he complained of right upper extremity radicular pain since the work accident. Office notes indicate Turner had a positive Spurling's test for cervical radiculitis, with limitation of cervical range of motion. At

a March 31, 2015 visit, Turner continued to complain of neck pain with headaches, and the office note indicates cervical pathology was suspected. Turner returned on April 13, 2015, and again had positive testing for right upper extremity radiculopathy. Turner again reported the right upper extremity pain began a few days after the injury on February 16, 2015.

Turner returned to Nurse McCormick on April 6, 2015, and reported he had experienced gradually worsening neck pain since the work accident. At a May 7, 2015 follow-up, he again reported ongoing neck pain and indicated he was awaiting a referral to an orthopedic specialist for the condition. On July 16, 2015, Nurse McCormick noted an MRI of Turner's neck was abnormal. The MRI had been obtained by Dr. Timothy Chang, whom Turner had visited for his right shoulder condition. Nurse McCormick noted Dr. Chang recommended Turner visit a cervical specialist for the pathology found on the MRI. She indicated, "This all stems from a worker's comp claim when he fell and hit his neck, head, and shoulder area."

Turner was referred to Dr. Miles M. Johnson of Bingham Nerve & Muscle for neck pain. On July 3, 2015, Dr. Johnson found normal results for both upper extremities with no median nerve or ulnar neuropathy. However, the study suggested a right cervical radiculopathy.

Turner was then referred to Dr. Gregory Lanford on September 17, 2015. He noted Turner had failed conservative treatment and recommended a cervical fusion at C4-6. Dr. Lanford diagnosed right C6 radiculopathy, weakness in the right biceps, and absent right biceps jerk consistent with foraminal stenosis at C5-6 on the right.

Dr. Lanford's surgical recommendation was analyzed by Dr. Paul Phillips, Jr. through utilization review on September 29, 2015. Dr. Phillips found the requested anterior cervical fusion at C4-6 was not medically necessary and appropriate. He noted the records did not include significant findings of recent electrodiagnostic studies confirming negative cervical radiculopathy. Though the records indicated Turner's

condition was not relieved by physical therapy or medication, nerve root blocks to define the pain generator prior to surgery had not yet been performed.

The workers' compensation carrier also requested Dr. Richard Berkman evaluate Turner. On December 8, 2015, Dr. Berkman diagnosed cervicalgia and primary right shoulder injury, cervical sprain, and possible exacerbation of pre-existing cervical spondylosis with a right C5 radiculopathy. He concluded Turner's pain was related to disuse and recommended a work hardening program.

Dr. Gregory Gleis performed an independent medical evaluation on August 12, 2015. Dr. Gleis indicated a May 12, 2015 cervical spine x-ray and a June 25, 2015 cervical MRI revealed pre-existing degenerative changes. He felt the left shoulder condition was consistent with pain from the cervical spine, and the initial right shoulder symptoms were consistent with an AC joint separation, but symptoms were now suggestive of referred cervical pain. Dr. Gleis found sufficient correlation between the neck and right arm symptoms, and concluded that the head contusion from the February 16, 2015 incident could have caused a neck injury. He concluded Turner was not yet at maximum medical improvement for the cervical spine.

There was a lapse in treatment for a period of time after the workers' compensation insurance carrier denied the proposed cervical fusion, and Turner obtained private insurance coverage. By July 6, 2016, however, Turner began treating with Dr. John Yezerski for his shoulder and neck. Dr. Yezerski diagnosed a right rotator cuff tear and treated the condition conservatively with injections. These measures failed and, on August 1, 2016, a total shoulder replacement was performed.

After the shoulder surgery, Turner again sought treatment for his neck pain. Because his insurance would not permit a return to Dr. Lanford, Turner visited Dr. Thomas Gruber on November 8, 2016, for neck pain and numbness. Turner returned on January 10, 2017, and Dr. Gruber's records indicate physical therapy and traction for Turner's neck and medication provided minimal improvement. An MRI of the cervical spine revealed right

foraminal stenosis at C4-5 and C5-6 and an EMG and nerve conduction study showed no peripheral neuropathy. Dr. Gruber performed a two-level fusion on February 6, 2017. Turner's cervical condition improved following the fusion and Dr. Gruber recommended trigger point injections to improve stiffness in his neck. Following a July 11, 2017 visit, Dr. Gruber concluded Turner was at maximum medical improvement for his neck condition.

In an August 15, 2017 report, Dr. Gruber noted a history of neck and upper extremity pain since a slip and fall at work. In the causation section of his report, Dr. Gruber noted Turner had "exacerbation of a likely chronic existing problem." He assigned a 25% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition. Dr. Gruber explained Turner's condition is due in part to the arousal of pre-existing, dormant, non-disabling condition or congenital abnormality. He concluded Turner had no active impairment rating prior to the injury.

Dr. Thomas O'Brien conducted an independent medical evaluation on April 3, 2018. He diagnosed minor bruises/contusions to the shoulder, ribs, and hip as a result of the work incident on February 16, 2015. Dr. O'Brien concluded Turner did not sustain a permanent injury in the fall. Rather, his rib and hip contusions resolved a few days after the incident and his shoulder pain improved.

Turning to the neck condition, Dr. O'Brien emphasized Turner did not complain of neck pain until almost two months after the work accident. According to Dr. O'Brien's review of the medical records, the first time Turner reported neck pain was to Dr. Chang at a May 12, 2015 office visit. According to Dr. O'Brien, "the two month hiatus where there are no symptoms of neck pain or cervical radiculopathy effectively rules out a causal association with Turner's neck symptoms and the ultimate surgical procedure that was carried out by Dr. Gruber." Dr. O'Brien further noted the MRI scan of the cervical spine on June 23, 2015 depicts longstanding mild degenerative disc changes with no acute objective findings that can be in any way associated with an acute

injury resulting from the work incident. Based on these circumstances, Dr. O'Brien concluded that Turner had non-work-related, multi-level, cervical degenerative disc disease, and the work injury of February 16, 2015, did not cause any temporary or permanent aggravation, acceleration or precipitation of the degenerative cervical condition beyond its expected natural progression. He assessed a 0% impairment for the neck and opined Turner could return to unrestricted work by May 12, 2015.

The ALJ made the following findings relevant to this appeal:

18. The ALJ finds that the report of Dr. O'Brien in this matter is the most comprehensive, thorough, and persuasive. Dr. O'Brien was also most familiar with the Plaintiff's medical history as demonstrated in his report. Dr. O'Brien diagnosed minor bruises and contusions to the shoulder, ribs, and hip as a result of his work incident but concluded that the Plaintiff did not sustain a permanent injury in the fall.

19. Dr. O'Brien opined that the Plaintiff's rib and hip contusions resolved a few days after the incident and that his shoulder pain improved. He also pointed out that the Plaintiff didn't complain of neck pain until almost two months after the incident and concluded that the Plaintiff had non-work-related, multi-level, cervical degenerative disc disease and that the work injury of February 16, 2015, did not cause an injury to the cervical spine.

20. Dr. Gruber convincingly stated that the Plaintiff's neck surgery was not related to the work injury and pointed out that the cervical MRI dated June 23, 2015, revealed longstanding, mild, degenerative disc changes at C4-5 and C5-6 with no objective findings showing work-relatedness.

21. Dr. Gruber also convincingly opined that the surgery performed by Dr. Yezerski on September 1, 2016, had no causal relationship to the healed minor right shoulder bruise that the Plaintiff sustained on February 16, 2015. He convincingly stated that had the work injury had [sic] caused the tear, he would have had an immediate onset of severe pain. Dr. O'Brien added that when the Plaintiff was seen in the emergency room, he did not have clinical findings of an acute and chronic rotator cuff tear and that

Dr. Chang's findings after the work injury supported a minor shoulder contusion and not a traumatic rotator cuff tear or aggravation of a pre-existing rotator cuff, degenerative tear or impingement. Dr. O'Brien concluded therefore that the Plaintiff's shoulder surgery by Dr. Yezerski and cervical surgery by Dr. Gruber were not related to the work injury of February 16, 2015.

22. Finally, Dr. O'Brien assessed a 0% impairment for the neck and shoulder and found that the Plaintiff could return to work unrestricted after the work incident by May 12, 2015. He also said that the Plaintiff needed no further medical treatment and was at [maximum medical opinion] as of May 12, 2015. While Dr. O'Brien found that the Plaintiff needed no restrictions due to the work injury. The opinions of Dr. O'Brien have convinced the ALJ and the ALJ thus finds that the Plaintiff sustained only temporary injuries that resolved as of May 12, 2015.

Turner filed a petition for reconsideration making essentially the same arguments he raises on appeal. The ALJ overruled Turner's petition for reconsideration, stating the petition failed to point out any patent error appearing on the face of the opinion.

On appeal, Turner argues Dr. O'Brien's opinion regarding causation of the cervical condition is based upon an inaccurate and incomplete history. Therefore, it cannot constitute substantial evidence. Dr. O'Brien based his medical opinion on the cervical MRI, which he interpreted to reveal degenerative disc changes at C4-5 and C5-6. He also based his opinion on the fact Turner did not report neck symptoms until May 12, 2015, to Dr. Chang.

Turner emphasizes the medical records from Trigg County Hospital Rehabilitation Department and Nurse McCormick. On March 24, 2015, Turner complained of neck pain during a physical therapy visit and had a positive Spurling's test. Turner also complained of gradually worsening neck pain to Nurse McCormick on April 6, 2015. Dr. O'Brien's medical records review does not reference these office notes.

In a related argument, Turner claims the ALJ also mischaracterized the onset of his cervical condition. He emphasizes that the ALJ did not acknowledge the

physical therapy record from March 24, 2015, which objectively documented the cervical problem. The decision also incorrectly states Dr. Gruber opined the neck surgery was not related to the work injury. Turner notes the ALJ failed to address these inconsistencies once raised in the petition for reconsideration.

The 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 claim must be remanded to the ALJ for further findings. Cook v. Paducah Recapping Service, 694 S.W.2d 684 (Ky. 1985); Whitaker v. Peabody Coal Company, 788 S.W.2d 269 (Ky. 1990). Because the ALJ may not have had an accurate understanding of the onset of Turner's cervical complaints, this claim must be remanded for additional findings.

A correct understanding of the history of Turner's cervical complaints may impact the ALJ's view of the persuasiveness of Dr. O'Brien's opinion. Dr. O'Brien noted Turner did not relate a history of cervical complaints until May 12, 2015, citing Dr. Chang's records. However, the Trigg County Hospital Rehabilitation Department records document cervical complaints and upper extremity radiculopathy on March 24, 2015. Dr. O'Brien did not summarize this record, and the ALJ's opinion states only that "[Turner] was seen on April 13, 2015, for a work injury and fall on February 16, 2015." While the ALJ acknowledged Turner's complaints of neck pain to Nurse McCormick on April 6, 2015, it is unclear whether the ALJ or Dr. O'Brien were aware of the March 24, 2015 physical therapy records.

We note the parties preserved exclusion for pre-existing disability/impairment as a contested issue. To be characterized as active, a pre-existing condition must be both symptomatic and impairment ratable. Finley v. DBM Technologies, 217 S.W.3d 261 (Ky. App. 2007). Here, the Department of Corrections presented no evidence that Turner's cervical condition was symptomatic and impairment ratable immediately prior to the work injury. Thus, the cervical condition does not constitute a pre-existing active condition.

A correct understanding of the onset of Turner's cervical complaints is especially important because, even in situations involving pre-existing conditions, surgery is compensable if a work injury hastens the need for the surgery. Derr Construction Co. v. Bennett, 873 S.W.3d 824, 827 (Ky. 1994). If an exacerbation caused Turner to undergo the cervical fusion, the resulting impairment is compensable. There is no indication Turner was a candidate for cervical fusion surgery prior to the work-related injury. No physician stated Turner would have required cervical surgery without the contribution of the work injury. Based upon the record, as a matter of law, the cervical condition as it existed immediately prior to the injury cannot be the cause of the need for surgery. There is no evidence of a subsequent injury. Thus, based upon the evidence in the claim, the surgery must be either the result of the work injury or the natural progression of the pre-existing condition occurring after the work injury.

On remand, we direct no specific result, as the inaccurate history may or may not render the entirety of Dr. O'Brien's opinions lacking in probative value. Because the Board has no fact-finding authority, the ALJ must determine the appropriate weight to be given Dr. O'Brien's opinions based upon a correct understanding of the evidence. We note Dr. O'Brien's opinion on causation was not based solely on his mistaken belief that there were no cervical complaints for two months following the injury. He also formed his opinion based upon MRI studies that he stated revealed longstanding mild degenerative disc changes with no acute objective findings that can be associated with an acute injury resulting from the work incident. Dr. O'Brien stated the work injury did not cause any temporary or permanent aggravation, acceleration or precipitation of the degenerative cervical condition above the natural progression of this condition. However, his opinion regarding the lack of any effect of the work injury would also appear to be based in part upon his mistaken belief that no cervical complaints were reported until two months after the work injury.

The ALJ's opinion in numbered paragraph 20 inaccurately indicates Dr. Gruber stated the neck surgery is not related to the work injury, and in paragraph 21 that Dr. Gruber felt the shoulder surgery was not related to the

work injury. Our review of Dr. O'Brien's report leads us to believe the statements attributed by the ALJ to Dr. Gruber were actually Dr. O'Brien's opinions. However, because the ALJ failed to address this error on reconsideration, we cannot be certain it is simply a typographical error or if the ALJ incorrectly believed Dr. Gruber felt the surgeries were not work-related. Again, we note Dr. Gruber actually stated Turner had "exacerbation of a likely chronic existing problem." Dr. Gruber further indicated Turner's condition is due in part to arousal of a pre-existing dormant non-disabling condition or congenital abnormality, and that Turner did not have an active impairment rating prior to the injury.

Accordingly, the July 23, 2018 Opinion, Award and Order and the September 4, 2018 Order rendered by Hon. Jonathan R. Weatherby, Administrative Law Judge, are hereby **VACATED** and this claim is **REMANDED** for additional findings consistent with the views set forth herein.

In the March 8, 2019, Opinion on Remand, regarding Turner's alleged work-related shoulder injury, the ALJ corrected paragraph twenty and the first sentence of paragraph twenty-one to read "Dr. O'Brien" instead of "Dr. Gruber." Concerning the alleged work-related cervical spine injury, the ALJ formulated one additional sentence at the end of paragraph nineteen which reads as follows: "While there was some reference to neck symptoms was [sic] made [sic] at a physical therapy visit on March 24, 2015, as well as a complaint to a nurse on April 6, 2015, the point made by Dr. O'Brien regarding the late onset of symptoms is still persuasive."

In a March 21, 2019, Petition for Reconsideration, Turner asserted the ALJ failed to set forth sufficient findings of fact and the order on remand also contains inaccurate findings of fact. Turner presented a list of eighteen questions he requested the ALJ answer. Turner also requested the ALJ to reconcile the conflicting evidence

between Dr. Gregory Gleis, Dr. R. Podoll, and Dr. O'Brien. Turner concluded with the following:

To be clear, the undersigned is asking for the Administrative Law Judge to state something more than a conclusory statement that he finds Dr. O'Brien's statements to be the most credible. When 5 doctors indicate that the cervical spine complaints are work related and only one doctor (who did not have all the records) says those complaints are not work related, the injured worker and the reviewing court is entitled to know how the ALJ reached that result. Likewise, when 5 medical professionals say the shoulder injury is work related and only one doctor disagrees, the injured worker and the reviewing court is entitled to know how the ALJ reached that result.

In the April 22, 2019, Order, the ALJ denied Turner's petition without setting forth any additional findings.

Turner first asserts Dr. O'Brien's opinions are based upon an inaccurate and incomplete history and, therefore, cannot constitute substantial evidence. We vacate the final sentence of paragraph nineteen in the March 8, 2019, Opinion on Remand, the dismissal of the cervical injury claim and the award, and remand for additional findings.

In this Board's January 11, 2019, Opinion, we remanded the claim to the ALJ, in relevant part, for him to set forth additional findings evidencing an accurate understanding of the medical evidence pertaining to the onset of Turner's cervical spine complaints. Specifically, we requested the ALJ to consider the physical therapy records from Trigg County Hospital Rehabilitation Department, including but not limited to records dating from March 24, 2015, in which Turner complained of neck pain. The ALJ was also requested to determine the appropriate weight to be

afforded to Dr. O'Brien's opinions regarding causation of the alleged work-related cervical spine injury in light of those records and in light of the fact that Dr. O'Brien did not review the records before providing his opinions. The ALJ failed to fully carry out our instructions.

As delineated in our first opinion, Turner was referred to the Trigg County Hospital Rehabilitation Department for physical therapy. The office notes from his appointments indicate Turner complained of "9/10 central cervical spine pain" on April 13, 2015, a date that precedes by one full month the May 12, 2015, appointment with Dr. Timothy Chang which Dr. O'Brien erroneously believed was the first time Turner complained of neck pain.¹ Additionally, a rehabilitation record dated March 24, 2015, indicates a positive Spurling test for cervical radicular symptoms, and a record dated March 31, 2015, indicates the physical therapist suspected "neck/cervical pathology." Turner also complained of neck pain to Holly McCormick, APRN ("Nurse McCormick"), on April 6 and May 7, 2015, representing an additional two occasions during which Turner complained of neck pain before the May 12, 2015, appointment with Dr. Chang.

Without question, Dr. O'Brien did not review the physical therapy records or the April 6 and May 7, 2015, records from Nurse McCormick at the time of his independent medical examination ("IME") report, as these records are not listed or summarized in the "record review" section of his report. Further, in light of the physical therapy records and the April 6 and May 7, 2015, records of Nurse

¹ In Dr. O'Brien's April 3, 2018, IME report, he states, in relevant part, as follows: "It is not until May 12, 2015 that Mr. Turner begins to relate neck symptoms. This is almost two months after the minor slip and fall incident before Mr. Turner described any neck pain or neuritic symptoms. In fact, Dr. Chang describes these as 'new symptoms' relating to the neck and right upper extremity."

McCormick, Dr. O'Brien's opinion Turner did not begin to relate neck pain until almost two months after the work incident at a May 12, 2015, appointment with Dr. Chang is not accurate. Consequently, the sentence at the conclusion of paragraph nineteen in the order on remand is also inaccurate, as "the point made by Dr. O'Brien regarding the late onset of symptoms" cannot be relied upon by the ALJ.

On remand, the ALJ should provide a summary of the Trigg County Hospital Rehabilitation Department physical therapy records filed in the record by Turner on April 18, 2018. Even though the ALJ, in the original July 23, 2018, Opinion, Award, and Order, noted the "records were reviewed and considered into evidence," the ALJ only stated the following regarding the April 13, 2015, record: "The records indicate that the Plaintiff was seen on April 13, 2015 for a work injury and fall on February 16, 2015." This summation fails to include the fact that Turner was experiencing cervical spine pain at that appointment, and does not include any reference to the physical therapy records from March 24, and 31, 2015. On remand, the ALJ should address all three records as they pertain to Turner's cervical spine condition.

The ALJ should also acknowledge that Dr. O'Brien did not review the physical therapy records or the April 6 and May 7, 2015, records from Nurse McCormick in formulating his report and set forth a comprehensive analysis addressing how this incomplete medical history bears upon Dr. O'Brien's ultimate conclusion regarding causation of the alleged work-related cervical spine injury. The ALJ must also address whether Dr. O'Brien's opinions can be considered credible and constitute substantial evidence in light of the incomplete history. Should the ALJ once

again choose to rely upon Dr. O'Brien in resolving the question of the work-relatedness of Turner's alleged cervical spine injury, he must set forth the specific portions of Dr. O'Brien's causation analysis which constitute substantial evidence in support of his ultimate conclusion that Turner's cervical spine condition is not causally related to the work injury.

Finally, we note that Respondent's expert, Dr. Gleis, who had the benefit of reviewing at least the March 24, 2015, physical therapy record indicating a positive Spurling test with radicular symptoms, found a causal connection between the February 16, 2015, fall and a cervical spine injury.

The Board has fully addressed arguments two and three on appeal in our resolution of Turner's first argument, and a separate analysis has been rendered moot.

Accordingly, the final sentence of paragraph nineteen in the March 8, 2019, Opinion on Remand, the dismissal of the cervical injury claim, and the award are **VACATED**. This claim is **REMANDED** to the ALJ for additional findings and a decision consistent with the instructions set forth herein.

ALVEY, CHAIRMAN, CONCURS.

RECHTER, MEMBER, CONCURS IN RESULT ONLY.

DISTRIBUTION:

COUNSEL FOR PETITIONER:

HON JEFFREY R ROBERTS
509 MAIN ST
MURRAY KY 42071

LMS

COUNSEL FOR RESPONDENT:

HON LEE JONES
HON SARA MAY
P O BOX 1167
PIKEVILLE KY 41502

LMS

LMS

ADMINISTRATIVE LAW JUDGE:

HON JONATHAN R WEATHERBY
657 CHAMBERLIN AVE
FRANKFORT KY 40601

LMS