

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: June 5, 2020

CLAIM NO. 201570429

LEGGETT & PLATT

PETITIONER

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

SIERRA RITCHIE AND
HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING IN PART,
VACATING IN PART & REMANDING

* * * * *

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

ALVEY, Chairman. Leggett & Platt appeals from the February 6, 2020 Opinion and Award rendered by Hon. Jonathan R. Weatherby, Administrative Law Judge (“ALJ”), awarding Sierra Ritchie (“Ritchie”) temporary total disability (“TTD”) benefits, permanent partial disability (“PPD”) benefits, and medical benefits for a work-related injury she sustained on September 2, 2015. The ALJ also ordered a

vocational rehabilitation evaluation. Leggett & Platt also appeals from the ALJ's February 27, 2020 order on its petition for reconsideration, and the February 27, 2020 Amended Opinion and Award.

On appeal, Leggett & Platt argues the ALJ erred by including the impairment rating assessed by Dr. John Gilbert for the thoracic spine in the award of PPD benefits. We note Leggett & Platt indicated it has commenced payment of the PPD benefits awarded based solely upon the assessment of Ritchie's lumbar spine, not the 5% impairment rating assessed for the thoracic spine. Leggett & Platt also argues the ALJ failed to make sufficient findings of fact regarding the duration of TTD benefits. Regarding the award of PPD benefits, including the impairment assessed for the thoracic spine, we affirm. However, we vacate in part and remand for the ALJ to provide a specific analysis regarding the award of TTD benefits.

Ritchie filed a Form 101 on June 27, 2019 alleging she sustained a low back injury on September 2, 2015 while pushing and pulling on a bed that she was assembling at work. She specifically indicated her injuries were to the low back area (lumbar and lumbar-sacral). The Form 104 work history indicates Ritchie has worked as an assembler in a factory, as a waitress, performing cleaning/janitorial work at a nursing home, and as a childcare attendant.

Ritchie testified by deposition on August 19, 2019, and at the final hearing held December 11, 2019. Ritchie was born on July 6, 1995, and she resides in Harrison County, Kentucky. She is a high school graduate, and has no specialized or vocational training. Ritchie testified she last worked in June 2017, following the March 8, 2017 surgery when she was released to light duty, and has not

worked since. Her previous work included cleaning, sweeping, mopping, and doing laundry at a nursing home. She provided childcare at a day care center. She also worked as a waitress at a pizza restaurant.

Ritchie testified Leggett & Platt makes bed frames. She began working there after she graduated from high school. She was involved in folding, bending, and stapling boxes and bed frames. Her work shift was from 5:00 p.m. to 3:30 a.m. Ritchie testified that on September 2, 2015, she was re-working a queen sized bed frame which had been returned for repair. As she was pushing the bed in place, she experienced low back pain. She reported the incident, and completed an incident report. She was advised Leggett & Platt would not pay for an emergency room visit.

After the incident, Ritchie went home, and saw Dr. Travis Hunt, an orthopedic surgeon, a few hours later. Dr. Hunt prescribed a muscle relaxer, and treated her multiple times over the next few years, including performing surgery on March 8, 2017. Ritchie testified the surgery eliminated problems in the left side of her low back and left leg, but she continues to have problems in her mid and lower back, right hip, and right leg. She has been treated with physical therapy, a back brace, injections, surgery, and medications. She testified she continues to experience daily back problems. Sometimes her right leg gives out, especially after standing for long periods or descending stairs. She testified she is unable to participate in many activities she engaged in prior to the accident, and she has trouble dressing and tying her shoes. She testified she is only able to engage in limited household chores. She testified she does not believe she is physically able to perform any of her past jobs.

In support of her claim, Ritchie filed treatment records from Dr. Hunt beginning May 12, 2016 through October 25, 2018. Those records document various treatments including physical therapy, medications, a back brace, surgery, and injections. Significantly, Dr. Hunt noted as follows:

June 6, 2016 – still working full time

July 21, 2016 – wearing a back brace but still working

September 15, 2016 – “She’s been working full duty.”

September 29, 2016 – “She’s been working full duty.”

February 20, 2017 – “She is working full-time but it is because she is doing a light duty job.”

Those records also indicate that on May 4, 2017, Ritchie was released to return to work lifting no more than ten pounds, and should not sit or stand for more than an hour at a time. On both June 1, 2017 and September 7, 2017, Dr. Hunt indicated those restrictions should remain in place. On November 30, 2017, Dr. Hunt indicated Ritchie could return to work with no lifting greater than thirty pounds, and no standing for greater than two hours at a time without a break, for no more than eight hours per day. On January 25, 2018, Dr. Hunt ordered a functional capacity evaluation (“FCE”). On March 8, 2018, Dr. Hunt noted the FCE report was consistent with his previously recommended restrictions. He found Ritchie had reached maximum medical improvement (“MMI”), and noted she could work within the restrictions reflected in the FCE report. On October 4, 2018, Ritchie advised Leggett & Platt was attempting to find a position accommodating her restrictions. Ritchie subsequently filed Dr. Hunt’s office note of April 12, 2016

noting her complaints of low back pain, and his diagnosis of an L5 pars defect and paresthesia secondary to her injury.

Ritchie additionally filed the October 21, 2015 MRI report from American Imaging Consultants, PLLC. Dr. Jon Kostelie, radiologist, noted Ritchie had mild diffuse bulging at L5-S1 with mild bilateral neuroforaminal narrowing. She also filed the March 8, 2017 operative note indicating she underwent an L5-S1 interbody fusion and decompression of the right L5 nerve root, with application of an interbody device, and posterior instrumentation at L5-S1.

Dr. Gilbert evaluated Ritchie at her attorney's request on July 18, 2019. Dr. Gilbert noted Ritchie sustained a low back injury while working on an assembly line at Leggett & Platt while pushing a bed on an assembly line. Ritchie complained primarily of low back and right leg pain, numbness, and weakness. She also complained of some mid back pain, numbness, and weakness as well. He stated she last worked in June 2018. Dr. Gilbert diagnosed Ritchie as status-post fusion at L5-S1 with persistent back pain, right lumbar radiculopathy with chronic low back pain, some mid back pain with muscle spasm, and some low back spasms. He opined all of her problems are work-related. Dr. Gilbert assessed a 27% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"). Of this rating, he attributed 23% to her *cervical* spine, and 5% to her thoracic spine. He also stated Ritchie is unable to return to the type of work performed at the time of the injury, and can only perform sedentary work activities. (Emphasis added).

Ritchie later filed a December 10, 2019 note from Dr. Gilbert. Dr. Gilbert stated the impairment rating he stated was due to the cervical spine was actually a mistake, and should have stated it was for the lumbar spine.

Ritchie also filed treatment records from Dr. James Oliver for eight treatment dates between January 10, 2018 and April 9, 2019. Dr. Oliver noted Ritchie's complaints of low back pain into the right buttock and thigh. He administered injections. Dr. Oliver diagnosed Ritchie with post-laminectomy syndrome of the lumbar spine, lumbar spondylosis, lumbar facet disorder, restless leg syndrome secondary to her injury, and lumbar degenerative disc disease. He additionally noted Ritchie had complained of pain since her work-related injury.

Dr. Stacie Grossfeld evaluated Ritchie at Leggett & Platt's request on October 14, 2019. Dr. Grossfeld noted she had reviewed a June 29, 2013 record from the Hardin Memorial Hospital. Actually, the record was from the Harrison Memorial Hospital. Ritchie had received some treatment for her neck and low back subsequent to being involved in a motor vehicle accident. At that time, it was noted she had a pars defect at L5 with spondylosis. Dr. Grossfeld noted Dr. Gilbert had assessed a 23% impairment rating for Ritchie's cervical spine, but was unsure why. At the time of her evaluation, Ritchie was taking Lexapro for depression and Adipex for weight loss. She diagnosed Ritchie with a prior active congenital spondylosis at L5 which necessitated the lumbar fusion performed by Dr. Hunt. She determined Ritchie had reached MMI as of March 8, 2018. She assessed a 22% impairment rating for Ritchie's lumbar spine condition pursuant to the AMA Guides which was non-work-related condition. She stated Ritchie has no impairment for any low back

strain she sustained while working for Leggett & Platt. Dr. Grossfeld stated Ritchie is unable to return to the type of work performed at the time of the injury.

Leggett & Platt filed records from the Harrison Memorial Hospital. An abdominal CT-scan of the abdomen and pelvis performed on May 4, 2012 revealed bilateral pars defects at L5 with some retrolisthesis. August 29, 2013 x-rays revealed bilateral pars defects and spondylosis at L5 with no listhesis.

A Benefit Review Conference (“BRC”) was held on December 11, 2019. At that time, the parties agreed the issues preserved included benefits per KRS 342.730, work-relatedness/causation, average weekly wage, unpaid/contested medical benefits, vocational rehabilitation benefits, permanent total disability/multipliers, and capacity to return to the type of work performed at the time of the injury. At the Hearing, it was noted there might have been an overpayment of TTD benefits and the BRC order was amended to reflect the preservation of that issue.

In the Opinion and Award rendered February 6, 2020, the ALJ noted Leggett & Platt had paid \$45,052.21 in TTD benefits (page 2 of the decision). The ALJ awarded PPD benefits based upon Dr. Gilbert’s assessment of a 27% impairment rating enhanced by the three-multiplier contained in KRS 342.730(1)(c)1. The ALJ performed no analysis regarding the period to which Ritchie may be entitled to TTD benefits, merely finding she was entitled to those benefits previously paid. In the Order portion of the decision, the ALJ specifically found as follows:

1. The Plaintiff, Sierra Ritchie, shall recover from the Defendant, Leggett & Platt, and/or its insurance carrier temporary total disability benefits already paid and the sum of \$365.85 per week for 425 weeks for

permanent partial disability commencing on September 2, 2015, 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, but to be interrupted by any corresponding applicable periods of temporary total disability. All income benefits shall terminate pursuant to KRS 342.730(4) on the Plaintiff's 70th birthday.

Leggett & Platt filed a petition for reconsideration requesting the ALJ to provide a determination regarding the appropriate period and rate of TTD benefits payable to Ritchie. It also requested a finding that it is entitled to credit for any overpayment of benefits. Leggett & Platt also argued the ALJ erred by including the 5% impairment rating assessed by Dr. Gilbert for Ritchie's thoracic spine.

On February 27, 2020, the ALJ issued an order merely attaching an Amended Opinion and Award without specifically addressing the petition. On page 8 of the amended decision, the ALJ stated, "Consequently, there has been a possible overpayment of temporary total disability benefits as to rate for which the Defendant shall be entitled to credit for any overpayment of the total amount owed." The ALJ did not provide any analysis regarding the actual period to which Ritchie may be entitled to an award of TTD benefits. In the Order portion of his amended decision, the ALJ found as follows:

1. The Plaintiff, Sierra Ritchie, shall recover from the Defendant, Leggett & Platt, and/or its insurance carrier temporary total disability benefits in the weekly amount of \$369.55 from June 4, 2016, through July 18, 2019, and the sum of \$365.85 per week for 425 weeks for permanent partial disability commencing on September 2, 2015, 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, but to be interrupted by any corresponding applicable periods of temporary total disability. The Defendant Employer shall take a dollar for dollar credit for temporary total disability benefits already paid. All income benefits shall terminate pursuant to KRS 342.730(4) on the Plaintiff's 70th birthday.

We initially note that, as the claimant in a workers' compensation proceeding, Ritchie had the burden of proving each of the essential elements of her claim. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Ritchie was successful in her burden, we must determine whether substantial evidence of record supports his 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 function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings made 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). 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 other conclusions or reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

We find no merit in Leggett & Platt's argument that the ALJ erred by including the 5% impairment rating assessed by Dr. Gilbert for Ritchie's thoracic spine in his award of PPD benefits. In her Form 101, Ritchie indicated her injury was to her low back area. She testified her complaints were in her mid-back, low back, right hip, and right thigh. Dr. Gilbert acknowledged her complaints in his report, which was provided to Leggett & Platt early in the litigation of the claim. Dr. Gilbert was not deposed, and no evidence to the contrary was introduced. The ALJ did not err in including the 5% impairment rating for the thoracic spine in calculating the award of PPD benefits. It is reasonable to conclude the "low back area" may include some elements of the thoracic spine, and there is no evidence of record requiring reversal of that determination.

That said, we must vacate the ALJ's determination of entitlement to TTD benefits, and remand for a specific determination based upon the evidence.

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

In determining Ritchie'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).

Here, the ALJ provided no analysis regarding Ritchie's entitlement to TTD benefits. His findings fail to reasonably apprise the parties, and this Board, of his rationale for such award. The ALJ was required to review the evidence, and determine the period or periods to which Ritchie may be entitled to an award of TTD benefits supported by the evidence. Such analysis is required to determine whether Ritchie received the correct amount of TTD benefits, whether there has been an overpayment entitling Leggett & Platt to a credit for overpayment of benefits, or whether there has been an underpayment of such benefits. If the ALJ determines there was an overpayment of TTD benefits, he must determine if Leggett & Platt is entitled to a credit pursuant to Triangle Insulation and Sheet Metal Co. v. Stratemeyer, 782 S.W.2d 628 (Ky. 1990). On remand, the ALJ must set forth a complete and thorough analysis of Ritchie's entitlement to TTD benefits based upon the evidence. We note that Dr. Hunt's records reflect Ritchie continued to work full time for Leggett & Platt during part of the period that TTD benefits were awarded. We direct no particular result and the ALJ may make any decision supported by the evidence.

Accordingly, the Opinion and Award rendered February 6, 2020, the February 27, 2020 order, and Amended Opinion and Award rendered by Hon. Jonathan R. Weatherby, Administrative Law Judge, are **AFFIRMED IN PART** and **VACATED IN PART**. This claim is **REMANDED** to the ALJ for a determination in accordance with the directions set forth above.

STIVERS, MEMBER, CONCURS.

BORDERS, MEMBER, NOT SITTING.

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