

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: December 4, 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

* * * * *

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

ALVEY, Chairman. Leggett & Platt appeals from the August 4, 2020 Amended Opinion and Award on Remand rendered by Hon. Jonathan R. Weatherby, Administrative Law Judge (“ALJ”). On remand, the ALJ awarded Sierra Ritchie (“Ritchie”) temporary total disability (“TTD”) benefits at the rate of \$369.55 per week from June 4, 2016 to July 18, 2019. Although unnecessary, the ALJ provided an analysis regarding the award of permanent partial disability (“PPD”) benefits,

medical benefits, and vocational benefits for a work-related injury Ritchie sustained on September 2, 2015. We previously addressed and affirmed those determinations in our decision rendered June 5, 2020. The ALJ also provided an analysis regarding the award of TTD benefits as directed by this Board on June 5, 2020. Leggett & Platt also appeals from the ALJ's August 26, 2020 Order denying its Petition for Reconsideration.

On appeal, Leggett & Platt argues the ALJ erred in awarding TTD benefits through July 18, 2019. It again argues the ALJ erred by including the impairment rating assessed by Dr. John Gilbert for the thoracic spine in the award of PPD benefits. As noted above, this Board previously affirmed the award of PPD benefits, inclusive of the impairment rating Dr. Gilbert assessed for Ritchie's thoracic spine. Leggett & Platt did not appeal from the Board's previous determination, which is now the law-of-the-case, and is *res judicata*. On remand, the ALJ provided the requisite analysis in determining the period to which Ritchie was entitled to TTD benefits, and set forth the basis for his determination as this Board previously directed. Because we determine the ALJ performed the appropriate analysis, and his decision is supported by substantial evidence, we affirm.

We previously outlined the evidence filed in this claim, and will only address those items pertinent to this determination. Ritchie filed a Form 101 on June 27, 2019 alleging she sustained injuries on September 2, 2015 while pushing and pulling on a bed frame she was assembling at work.

Ritchie testified by deposition on August 19, 2019, and at the final hearing held December 11, 2019. After her work accident, Ritchie treated with Dr.

Travis Hunt, an orthopedic surgeon, multiple times over the next few years, including undergoing surgery on March 8, 2017. The surgery eliminated Ritchie's 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 testified she is unable to participate in many activities she engaged in prior to the accident, and is only able to engage in limited household chores. She does not believe she is physically capable of performing any of her past jobs.

On May 4, 2017, Dr. Hunt released Ritchie to return to work lifting no more than ten pounds, and advised she 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.

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. Ritchie complained of low

back with right leg pain, numbness, and weakness, as well as some mid back pain, numbness, and weakness. 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 stated Ritchie had reached MMI by July 18, 2019. 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 assessed 5% to her thoracic spine condition. 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.

Ritchie later filed Dr. Gilbert’s December 10, 2019 note. Dr. Gilbert stated he mistakenly indicated the impairment rating he provided was for the cervical spine, and it should have stated it was for her lumbar spine.

Dr. Stacie Grossfeld evaluated Ritchie at Leggett & Platt’s request on October 14, 2019. 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 she stated was a non-work-related condition. She also stated Ritchie has no impairment rating 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.

In the Opinion and Award rendered February 6, 2020, the ALJ stated Leggett & Platt had paid \$45,052.21 in TTD benefits. 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 his February 27, 2020 Order regarding Leggett & Platt's Petition for Reconsideration, the ALJ attached 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 provided no analysis regarding the actual period to which Ritchie may be entitled to an award of TTD benefits.

This Board affirmed the ALJ's decision and Order on Reconsideration in the Opinion entered on June 5, 2020, with the exception of determining the ALJ had failed to provide the appropriate analysis regarding the award of TTD benefits.

We specifically held as follows:

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.

Leggett & Platt did not appeal from the Opinion issued by the Board on June 5, 2020. Therefore, other than the remand for a more complete analysis regarding the award of TTD benefits, our determinations on all other issues is the law-of-the-case.

In the Amended Opinion and Award on Remand issued on August 4, 2020, the ALJ found *verbatim* as follows:

11. Temporary total disability means 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...KRS 342.0011(11)(a)

12. The Defendant Employer has provided an AWW1 indicating a pre-injury average weekly wage of \$554.33.

The ALJ finds that this evidence is credible and outweighs the testimony of the Plaintiff. The ALJ therefore finds that the Plaintiff's average weekly wage was \$554.33. The ALJ further finds that this average weekly wage corresponds to a temporary total disability rate of \$369.55. 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.

13. The ALJ has determined that the opinion of Dr. Gilbert is the most credible in this matter and finds in accordance with his opinion that the Plaintiff reached maximum medical improvement as of July 18, 2019. The Plaintiff has testified and the records 9 establishes that her last date of work following the injury was June 4, 2016. The ALJ finds, based upon the records and evidence submitted herein, that the Plaintiff is entitled to temporary total disability benefits in the weekly amount of \$369.55 from June 4, 2016, through July 18, 2019.

Leggett & Platt filed a Petition for Reconsideration arguing, as it does on appeal, the ALJ erred by including the 5% impairment assessed by Dr. Gilbert for Ritchie's thoracic spine in the award of PPD benefits. It also argued the ALJ erred by awarding TTD benefits until July 18, 2019, the date Dr. Gilbert determined Ritchie had reached MMI. The ALJ denied the Petition by Order entered August 26, 2020.

As previously noted, on appeal, Leggett & Platt argues the ALJ erred by including the 5% impairment Dr. Gilbert assessed for Ritchie's thoracic spine, and by awarding TTD benefits through July 18, 2019. As the claimant in a workers' compensation proceeding, Ritchie had the burden of proving 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 are required to determine whether substantial evidence

of record supports the ALJ's 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).

Drs. Hunt, Gilbert, and Grossfeld seemingly agree that Ritchie is unable to perform her past work. However, the ALJ was confronted with conflicting dates regarding when Ritchie reached MMI. Dr. Hunt indicated she reached MMI on March 8, 2018, although he continued to treat her afterward for increased complaints of low back pain. Dr. Grossfeld also stated Ritchie had reached MMI on March 8, 2018. Dr. Grossfeld determined Ritchie is unable to perform her previous work. Dr. Grossfeld assessed a 22% impairment rating, but opined this was due to a pre-existing active condition, not her work injury. Dr. Gilbert, as noted above, indicated Ritchie reached MMI on July 18, 2019. The ALJ was free to rely upon the MMI date provided by Dr. Gilbert. While there is evidence to the contrary, the ALJ properly exercised his discretion in relying upon Dr. Gilbert's determination regarding the MMI date. The ALJ also performed the appropriate analysis regarding Ritchie's entitlement to TTD benefits as requested by this Board in the June 5, 2020 Opinion, and his determination will not be disturbed.

We next turn to Leggett & Platt's argument regarding the inclusion of the 5% impairment rating for Ritchie's thoracic complaints. As noted above, Leggett & Platt previously raised this issue before the Board, which was addressed in the June 5, 2020 Opinion. Leggett & Platt did not appeal from that Opinion, and therefore the previous determination is the law-of-the-case.

In Inman v. Inman, 648 S.W.2d 847, 849 (Ky. 1982) the Supreme Court instructed as follows:

The law-of-the-case doctrine is a rule under which an appellate court, on a subsequent appeal, is bound by a prior decision on a former appeal in the same court and applies to the determination of questions of law and not questions of fact. “As the term ‘law of the case’ is most commonly used, and as used in the present discussion unless otherwise indicated, it designates the principle that if an appellate court has passed on a legal question and remanded the case to the court below for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case. Thus, if, on a retrial after remand, there was no change in the issues or evidence, on a new appeal the questions are limited to whether the trial court properly construed and applied the mandate. The term ‘law of the case’ is also sometimes used more broadly to indicate the principle that a decision of the appellate court, unless properly set aside, is controlling at all subsequent stages of the litigation, which includes the rule that on remand the trial court must strictly follow the mandate of the appellate court.” 5 Am. Jur. 2d, Appeal and Error, Sec. 744.

In McGuire v. Coal Ventures Holding Company, Inc., 2009-SC-000114-WC, rendered October 29, 2009, Designated Not To Be Published, the Kentucky Supreme Court described the law of the case doctrine as follows:

The law of the case doctrine concerns the preclusive effect of judicial determinations in the course of a single litigation before a final judgment. [footnote omitted] As applied to workers' compensation cases, a final decision of law by an appellate court [footnote omitted] or the Board [footnote omitted] establishes the law of the case and must be followed in all later proceedings in the same case.

Slip Op. at 6.

On remand, we only directed the ALJ to perform a more thorough analysis regarding the award of TTD benefits. This Board affirmed the ALJ's decision in all other respects. On remand, the ALJ performed the appropriate analysis as directed. All other issues are *res judicata*.

Accordingly, the Amended Opinion and Award on Remand rendered August 4, 2020, and August 26, 2020 Order on Reconsideration rendered by Hon. Jonathan R. Weatherby, Administrative Law Judge, are hereby **AFFIRMED**.

STIVERS, MEMBER, CONCURS.

BORDERS, MEMBER, NOT SITTING.

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