

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: April 5, 2019

CLAIM NO. 201659209

MEIJER

PETITIONER

VS.

APPEAL FROM HON. CHRISTINA D. HAJJAR,
ADMINISTRATIVE LAW JUDGE

AMANDA BUSTER
And HON. CHRISTINA D. HAJJAR,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
VACATING IN PART AND REMANDING

* * * * *

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

RECHTER, Member. Meijer appeals from the November 20, 2018 Opinion, Award and Order and the December 19, 2018 Order on Reconsideration rendered by Hon. Christina D. Hajjar, Administrative Law Judge (“ALJ”). The ALJ determined Amanda Buster suffered a work-related left foot injury and awarded temporary total

disability (“TTD”) and permanent partial disability benefits. On appeal, Meijer argues Buster is not entitled to TTD benefits from September 18, 2017 through February 1, 2018. For the reasons set forth herein, we vacate the award of TTD benefits from September 18, 2017 through February 1, 2018 and remand this claim to the ALJ for further consideration.

The following facts as determined by the ALJ have not been appealed. On December 8, 2016, Buster injured her left foot while working at Meijer. Diagnostic tests revealed a fracture and she was placed in a boot. After a week off work, Buster returned to light duty work as a greeter. Eventually, she was released to her regular position as a stockist, a position that required a significant amount of walking. However, Buster’s foot did not continue to heal as anticipated after the boot was removed and she was placed in a brace. Due to this circumstance, her treating orthopedic surgeon, Dr. Bradford Fine, took her off work on May 26, 2017.

The claim was bifurcated and, in an Interlocutory Opinion dated October 25, 2017, the ALJ addressed Buster’s entitlement to TTD benefits. The ALJ noted Dr. Fine had taken Buster off work on May 26, 2017 and that she was not at maximum medical improvement (“MMI”) as of the date of the Interlocutory Opinion. The ALJ additionally noted that Buster had returned to work as a greeter ten days after the injury, and awarded TTD benefits for the period she was off work. Because the greeter position was a usual job at Meijer, and not made-up work to avoid paying TTD benefits, the ALJ declined to award TTD benefits for the period Buster worked in this light duty position. The ALJ then awarded TTD benefits from May 16, 2017 “until [she] reaches MMI or returns to work.” In a subsequent Order

on Reconsideration, the ALJ corrected the Opinion to commence TTD benefits on May 26, 2017, the date Dr. Fine removed Buster from work.

On September 24, 2018, a final hearing was conducted. Buster testified at the hearing, and discussed her ongoing treatment with Dr. Fine for residual neuropathy in her left foot. After Dr. Fine took her off work in May, 2017, Buster stated she initially returned to work as a greeter around August, 2017. She estimated she had returned to her regular position as a stockist in February, 2018.

In the November 20, 2018 Opinion, the ALJ revisited the issue of TTD benefits. She determined Buster is entitled to TTD benefits from May 26, 2017 through February 1, 2018, “when Buster testified she returned back to work for Meijer.” Meijer petitioned for reconsideration, arguing Dr. Fine had released Buster to work on October 9, 2017. Additionally, Buster testified she had returned to work as a greeter around August, 2017.

In the December 19, 2018 Order on Reconsideration, the ALJ denied the petition and provided the following analysis:

Defendant argues Dr. Fine released Plaintiff to work on October 9, 2017 and that she in fact, returned to work. However, this ALJ reviewed the evidence and found no such records from Dr. Fine indicating that she was released to return to work on October 9, 2017. Further, Plaintiff testified that she returned to her stocking position in February. She indicated that she may have been working as a greeter at the time of the first hearing. However, her testimony at the hearing was clear that she had not yet returned to work. While Plaintiff may have been returned to work, it is unclear whether she was working fulltime. She may also have been released to return to work before February 1, 2018, but no such evidence was submitted in the record for the ALJ's consideration. Defendant also requests a credit for any wages paid to Plaintiff during any period where the ALJ

awarded TTD benefits. However, this issue was not raised by the parties, and there is no clear evidence concerning what periods of time she worked, how often she worked, what wage she earned, or any other information upon which the ALJ may base a credit.

Meijer now appeals, and continues to assert Buster is not entitled to TTD benefits after October 9, 2017 because she was released to work by Dr. Fine on this date and testified she had in fact returned to work as a greeter prior to this date. Meijer acknowledges the ALJ's determination that it had failed to submit clear evidence regarding the date Buster returned to work. In response, it directs our attention to Buster's October 23, 2018 Brief before the ALJ, which was submitted shortly after the final hearing. In that brief, Buster stated she received TTD benefits from May 16, 2017 through September 17, 2017. She then acknowledged she has been "able to work light duty or regular duty at all other points since her injury and asserts that no TTD is owed." In light of this admission, Meijer asserts it is being penalized for failing to submit wage records for an issue that was never contested. Buster has not filed a responsive pleading.

We begin by stating the ALJ cited accurate law in analyzing Buster's entitlement to TTD benefits. TTD is the condition of an employee who has not reached MMI and has not reached a level of improvement which would permit a return to employment. KRS 342.0011(11)(a). TTD benefits will not be terminated simply because an employee has been released to perform minimal work. Rather, TTD benefits are payable until such time an employee is released to perform their usual and customary work. Central Kentucky Steel v. Wise, 19 S.W. 3d 657 (Ky. 2000). A "return to employment" means work within the employees' physical

restrictions and for which she has the experience, training and education.” Trane Commercial Systems v. Tipton, 481 S.W.3d 800 (Ky. 2016).

In the Order on Reconsideration, the ALJ noted Dr. Fine’s records had not been placed in evidence. This Board has also reviewed the record and finds no medical records from Dr. Fine stating Buster was released to work in September, 2017. However, Dr. Ellen Ballard’s medical opinion was submitted. In that report, Dr. Ballard stated she had reviewed Dr. Fine’s medical records, and noted Buster was taken off work on May 26, 2017 and was seen on September 8, 2017 for a follow-up, at which time she was working a “sit-down job.”

We respect the ALJ’s discretion to assess the proof, and her emphasis on the fact that no clear evidence was submitted to establish exactly when Buster returned to full-time work. However, we are likewise troubled by the fact Buster conceded she was not entitled to TTD benefits beyond September 17, 2017, which may have impacted Meijer’s consideration of what proof it submitted prior to the final hearing. In light of this admission, we are compelled to vacate the award of TTD benefits from September 17, 2017 through February 1, 2018. On remand, the ALJ is requested to reconsider Buster’s entitlement to TTD benefits for the contested period in light of the statements made in her brief.

Accordingly, the November 20, 2018 Opinion, Award and Order and the December 19, 2018 Order on Reconsideration rendered by Hon. Christina D. Hajjar are hereby **VACATED IN PART**. This claim is **REMANDED** to the Administrative Law Judge for the limited reconsideration of Buster’s entitlement to

temporary total disability benefits from September 17, 2017 through February 1, 2018.

ALVEY, CHAIRMAN, CONCURS.

STIVERS, MEMBER, CONCURS IN RESULT ONLY.

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