

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: August 23, 2019

CLAIM NO. 201263966

RYAN HOUSTON

PETITIONER

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

GREENUP COUNTY FISCAL COURT
and HON. JONATHAN WEATHERBY,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING IN PART
VACATING IN PART & REMANDING

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

STIVERS, Member. Ryan Houston (“Houston”) appeals from the April 30, 2019, Opinion on Remand and the April 30, 2019, Order striking from the record the Opinion of the Franklin Circuit Court of Hon. Jonathan Weatherby, Administrative Law Judge (“ALJ”). In the Opinion on Remand, the ALJ dismissed Houston’s claim for an alleged work-related psychological injury stemming from the incident occurring on October 31, 2012.

On appeal, Houston asserts the ALJ erred by striking from the record the Franklin Circuit Court Opinion which affirmed in part and reversed in part the Kentucky Retirement Systems Board's ("KRSB") decision denying Houston's claim for duty-related disability benefits. Houston also argues the evidence compels a finding of total disability.

BACKGROUND

The Form 110 Settlement Agreement entered into between Houston and Greenup County Fiscal Court ("Greenup County") was approved on November 25, 2014, by Hon. J. Landon Overfield, then Administrative Law Judge. It indicates Houston was injured on October 31, 2012, in the following manner: "After pulling a car over the driver of car hit claimant with car." The injuries were listed as: "right ankle sprain, left foot fx, left knee muscle tear."

Houston filed a Motion to Reopen on May 18, 2016, alleging he is "100% disabled as a law enforcement officer" due to a worsening of his physical and psychological injuries arising since the 2014 settlement. Houston asserted, in part, as follows:

2. That since the settlement of my claim, my condition has worsened considerably, I have undergone additional surgeries and have been declared totally disabled by my treating psychiatrist as a result of the injuries I sustained in the line of duty as the result of an attempted murder by a fleeing felon.

Attached to Houston's Motion to Reopen, among other medical records, is the March 22, 2016, letter by Dr. Mohamed Khodeir, a psychiatrist, which states as follows:

This document is to serve as confirmation that in my best clinical judgement Mr. Ryan Houston is unable to engage in any substantial gainful activity due to medically

determined mental impairment that is expected to last for a continuous period of at least 12 months stemming [sic] from physical and emotional trauma resulting in post-traumatic stress, anxiety, depression and related disorders.

In the August 7, 2017, Opinion and Order, the ALJ dismissed Houston's claim for a worsening of condition concluding Houston failed to give due and timely notice of the alleged "new issues" in his Motion to Reopen, including his alleged work-related psychological injury. The ALJ further concluded Houston failed to prove a worsening of impairment for the physical injuries listed in his original claim.

In his first appeal to this Board, Houston asserted he was neither required to give notice of every symptom stemming from the October 31, 2012, injury, nor to self-diagnose his injuries. He further asserted the ALJ's August 7, 2017, Opinion and Order provided no specifics regarding how notice was deficient.

In the Board's November 22, 2017, Opinion, we reversed in part, vacated in part, and remanded for additional findings, holding the ALJ's determination Houston failed to provide notice of his alleged work-related psychological injury was erroneous as a matter of law. We remanded for additional findings on the following issues: whether Houston had a known psychological condition at the time of settlement; the injuries he considered to be a part of the original claim; if there has been a worsening of impairment to a condition caused by the injuries since the date of the settlement; and if Houston is entitled to certain dental treatment and Viagra. We further stated as follows:

In addition, on remand the ALJ must determine whether Houston was unaware of any physical or psychological conditions at the time of settlement which are causally connected to the October 31, 2012, work injury. As

previously pointed out, Houston is not required to self-diagnose his physical and psychological conditions. Further, any condition which is directly attributable to the October 31, 2012, injury of which Houston was unaware at the time he was injured and which manifested after settlement may be compensable either in the form of temporary or permanent income and medical benefits.

In the February 7, 2018, Opinion on Remand, regarding Houston's alleged work-related psychological injury stemming from the October 31, 2012, injury, the ALJ dismissed Houston's claim as barred by the statute of limitations. The ALJ concluded that, based upon the medical report of Dr. Keith Haas, Houston was aware of his psychological condition at the time of the 2014 settlement.

In his second appeal to this Board, Houston asserted, in relevant part, the ALJ erred as a matter of law by dismissing Houston's psychological injury claim as being barred by the statute of limitations since he is not required to self-diagnose nor give notice of each category of symptoms as they arise.

In the Board's May 25, 2018, Opinion, we affirmed in part, vacated in part, and remanded for additional findings on the issue of Houston's alleged work-related psychological injury, holding the ALJ's analysis on this issue was deficient. We instructed, in part, as follows:

On remand, the ALJ is again directed to review the evidence and make a determination regarding whether Houston has a psychiatric or psychological condition, which had manifested at the time of the settlement of his claim in November 2014. If there is no such evidence, the ALJ must determine whether Houston has a compensable work-related psychiatric or psychological claim, the extent of the condition, and entitlement to income or medical benefits. We do not direct a particular result, but any determination must be based upon the evidence.

In the September 13, 2018, Opinion on Remand, the ALJ set forth the following additional findings regarding Houston's alleged work-related psychological injury claim:

1. The ALJ finds in accordance with the Plaintiff's deposition testimony that he began having nightmares immediately after the work injury and that he sought treatment for panic attacks that he attributed to the work injury and that he sought treatment for panic attacks that he attributed to the work injury prior to the 2014 settlement.

2. The Plaintiff, in his deposition dated September 21, 2016, was asked what treatment he next had that he related to the October 31, 2012, injury and he responded that he saw Dr. Oreta for panic attacks, insomnia, nightmares, and generally getting sick. The evidence indicates that he saw Dr. Oreta in December of 2013, and was prescribed Ambien, and a Z-pack, along with other medications which are illegible. The ALJ therefore finds that the Plaintiff sought treatment for his psychiatric condition that he specifically attributed to the work incident, prior to the 2014 settlement and that therefore his claim for a work-related psychological impairment is barred by the statute of limitations.

In Houston's third appeal to this Board, he asserted his psychological injury was not diagnosed until after he had additional surgeries on both knees and after settlement of his claim. Houston also asserted he is not required to self-diagnose his work-related psychological injury, and Dr. Dante Oreta, contrary to the ALJ's findings, had offered no opinions regarding a psychological condition or its work-relatedness.

In the Board's March 1, 2019, Opinion, we reversed the ALJ's determination Houston's psychological condition was known to him prior to the settlement agreement holding, in relevant part, as follows:

The evidence on which the ALJ relies – that Houston experienced “panic attacks, insomnia, nightmares, and generally getting sick” and was once prescribed a sleeping pill – is insufficient as a matter of law to establish he had a known, work-related psychological injury in 2014. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986). As such, Houston’s claim for psychological impairment is not barred by the statute of limitations found at KRS 342.185 nor the joinder requirements of KRS 342.270.

The Board remanded the claim to the ALJ for a consideration of Houston’s alleged psychological injury claim on its merits.

In the April 30, 2019, Opinion on Remand, in dismissing Houston’s claim for a work-related psychological injury, the ALJ set forth the following findings of fact and conclusions of law:

1. Injury is defined as “any work-related traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings.” KRS 342.0011(1).

2. An employee has the burden of proof and the risk of non-persuasion to convince the trier of fact of every element of his worker’s compensation claim. *Snawder v. Stice*, 576 SW2d 276 (Ky. App. 1979).

3. The ALJ finds that the Plaintiff has demonstrated a lack of credibility as a witness and that the surveillance video that was filed herein demonstrates that he fabricated the extent of his alleged psychological symptoms. Dr. Zerga, after reviewing the surveillance video in this matter, significantly changed his impairment rating based upon the Plaintiff’s demonstrated dishonesty regarding the extent of his symptoms. The ALJ finds that the same symptom magnification and dishonesty applies to his allegations of a psychological impairment as demonstrated by his apparent ability to interact with the public contrary to his prior testimony.

4. The ALJ finds that the evaluation provided by Dr. Tim Allen is the most probative in this matter as Dr. Allen

diagnosed malingering and found severe over-reporting of all symptom domains (psychiatric, somatic, and cognitive) that he described as being well beyond that typical in most cases. Dr. Allen opined that the Plaintiff attempted to present himself as extremely ill, emotionally disturbed, and unable to cope. Dr. Allen then stated that the results were therefore not valid due to the Plaintiff's approach to the evaluation. The ALJ finds, based upon the conclusions of Dr. Allen, that there is no reliable evidence of any psychological impairment that has been presented in this matter.

4. [sic] The ALJ further finds that the results that have been presented as determined by Dr. Allen, cannot and do not constitute the basis for any harmful change in the human organism as *evidenced by objective medical findings*. The ALJ therefore finds that the Plaintiff has not satisfied his burden to convince the trier of fact of every element of his worker's compensation claim per *Snawder v. Stice*, 576 SW2d 276 (Ky. App. 1979).

No petition for reconsideration was filed.

Houston first asserts the ALJ erred by striking from the record the Opinion and Order of the Franklin Circuit Court which affirmed in part and reversed in part the KRSB's decision denying his claim for duty-related disability benefits.¹

Houston asserts as follows:

The Franklin Circuit Opinion is an official document [sic] CR 9.04 and was done 'in Compliance with law.' It is also based on the same facts and legal standards. Franklin Circuit Court found that there was substantial evidence that the combination of the physical and psychiatric injuries compelled such a finding:

In sum, no reasonable person reviewing these facts and the record herein could conclude that but for the 2013 incident or any other incident in Petitioner's law enforcement career, Plaintiff would not suffer from the serious and debilitating psychiatric conditions that leave

¹ The proffered Franklin Circuit Court Opinion was struck from the record by separate Order dated April 30, 2019.

him disabled from engaging in any work'. Franklin Circuit Court Opinion, p. 14.

The Kentucky Supreme Court in Groce v. VanMeter Contracting, Inc., 539 S.W.3d 677 (Ky. 2018) addressed the legal significance of decisions from other administrative bodies. In Groce, the ALJ determined VanMeter had not violated KRS 342.165. This Board reversed based upon a settlement agreement VanMeter entered into with KOSHA, deeming it a judicial admission that VanMeter had knowingly violated applicable safety regulations. The Supreme Court agreed with the Court of Appeals which reversed this Board. In doing so, the Supreme Court stated:

The Court of Appeals rejected the Board's analysis and we agree. In construing the settlement agreement as a conclusive admission to a safety violation, the Board totally disregarded a crucial element of the settlement agreement: the explicit provision in which KOSHA and VanMeter disclaim its effect as an admission to the alleged violation. This provision precludes the use of the agreement as a conclusive judicial admission of a safety violation. Were we to conclude otherwise, the settlement of KOSHA and other regulatory processes would be greatly impeded as parties facing collateral litigation in a different forum would have every incentive to resist settlement.

Even without the express admission-disclaimer language, an agreement resolving the citations is not conclusive evidence in the workers' compensation action. “[A]n adjudicative determination by an administrative tribunal does not preclude relitigation in another tribunal of the same or a related claim based on the same transaction if the scheme of remedies permits assertion of the second claim notwithstanding the adjudication of the first claim.” *Berrier v. Bizer*, 57 S.W.3d 271, 280 (Ky. 2001) (quoting *Restatement (Second) of Judgments* § 83(3) (A.L.I. 1982)); accord *Board of Education of Covington v. Gray*, 806 S.W.2d 400 (Ky. App. 1991). “[*Restatement (Second) of Judgments* § 83(3) Comment a] explains that the principle applies whether the issue is claim preclusion (res judicata) or issue

preclusion (collateral estoppel).” Berrier, 57 S.W.3d at 280–81. The Board's reliance upon the settlement agreement as a substitute for evidence proving the violation was error.

Id. at 682-683. (emphasis added).

As fact-finder and gate-keeper of the evidence, 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). This 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, 998 S.W.2d 479, 481 (Ky. 1999). While the ALJ certainly had the discretion to enter into evidence the decision of the Franklin Circuit Court and find it compelling in resolving Houston's alleged work-related psychological injury claim, the ALJ, in equal parts, also had the discretion to strike it. Here, the ALJ chose to strike the Franklin Circuit Court opinion from the record which was well within the discretion afforded to him under the law. This Board will not curtail the ALJ's discretion. We affirm on this issue.

Next, Houston asserts the evidence compels a finding of permanent and total disability. We vacate the ALJ's dismissal of Houston's alleged work-related psychological injury claim and remand for additional findings.

In the April 30, 2019, Opinion on Remand, the ALJ relied upon Dr. Tim Allen stating “The ALJ finds, based upon the conclusions of Dr. Allen, that there is no reliable evidence of any psychological impairment that has been presented in this matter.” However, a review of Dr. Allen's October 25, 2016, Independent Psychiatric Examination report reveals that, after performing a psychiatric assessment of Houston,

Dr. Allen diagnosed Houston with malingering *and* post-traumatic stress disorder (“PTSD”) “following the work injury of October 31, 2012.” Dr. Allen further opined Houston is at maximum medical improvement with respect to his PTSD. Most importantly, he opined as follows regarding Houston’s impairment rating and causation:

Mr. Houston currently has a Class 1, impairment for Mental Disorders. The AMA Guides to the Evaluation of Permanent Impairment 5th Ed, Chapter 14, Table 14-1 p.363, does not provide percentages to apply to mental disorders. If we apply the AMA Guides 2nd edition Chapter 12, table 1, p.220 criteria then, **I believe he has a 5% whole body impairment due to psychiatric causes related to the injury on October 31, 2012.** (emphasis added).

While it is true Dr. Allen diagnosed Houston with malingering, Dr. Allen undeniably diagnosed Houston with PTSD and assessed a 5% impairment rating stemming from the October 31, 2012, injury. Consequently, the ALJ cannot rely upon Dr. Allen’s medical opinions in dismissing Houston’s claim for a work-related psychological injury. Dr. Allen’s opinions firmly support an award of permanent income benefits, either partial or total, and medical benefits for work-related PTSD.

All 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 courts have authorized remand to the ALJ for further findings. *See* Cook v. Paducah Recapping Service, 694 S.W.2d 684 (Ky. 1985); Whitaker v. Peabody Coal Company, 788 S.W.2d 269 (Ky. 1990).

Since the ALJ's erroneous understanding of Dr. Allen's opinions clearly influenced his decision to dismiss Houston's alleged work-related psychological injury claim, we vacate the April 30, 2019, Opinion on Remand and remand for additional findings. In the Board's March 1, 2018, Opinion, the claim was remanded to the ALJ "for consideration of the merits of Houston's psychological injury claim." On remand, the ALJ must consider the merits of Houston's psychological injury claim based upon a proper understanding of the medical evidence. Although Dr. Allen was critical of Houston, his medical opinions support a finding of a work-related psychological injury stemming from the October 31, 2012, injury.

Even though we acknowledge our rationale for vacating and remanding differs from the broad argument asserted on appeal by Houston (i.e. the evidence compels a finding of total disability), resolution of the merits of Houston's alleged work-related psychological injury claim must take place before the ALJ can resolve Houston's assertion on reopening that he is permanently and totally disabled due to a worsening of both his physical injuries and his alleged psychological injury. While the ALJ could conclude, on remand, Houston is not permanently and totally disabled due to his alleged work-related psychological injury, the ALJ could also determine Houston is entitled to permanent partial disability benefits for this injury. Therefore, Houston's declaration that the evidence compels a finding of total disability lacks merit.

As the ALJ failed to resolve Houston's alleged work-related psychological injury claim on its merits as instructed in our March 1, 2018, Opinion, no petition for reconsideration was necessary.

Respectfully, we disagree with the dissent's assertion of a *sua sponte* review. We also disagree with the assertion Houston did not challenge the dismissal of his psychological injury claim in the appeal to the Board. In his brief, Houston clearly asserts the evidence compels a finding of total disability. Obviously, this is an attack upon the ALJ's dismissal of his psychological injury claim, particularly in light of the fact that, the Franklin Circuit Court's opinion Houston asserts the ALJ erroneously struck, found Houston is disabled from engaging in any kind of work due to a combination of his physical and psychiatric conditions.

While acknowledging the ALJ has broad latitude to weigh the facts and credibility of the witnesses, Houston notes the ALJ's decision must be supported by substantial evidence. He argues the Board has the authority to reverse the decision where the facts compel a contrary finding especially in decisions where the error in assessing the evidence is so flagrant as to cause a manifest injustice. In response to Houston's argument and not in a *sua sponte* review, this Board reviewed the record to determine whether the evidence relied upon by the ALJ constituted substantial evidence supporting his decision dismissing the psychological injury claim. The ALJ found, based upon all of Dr. Allen's conclusions, that there is no reliable evidence of a psychological impairment. This finding ignores Dr. Allen's opinion Houston has a 5% impairment rating based on the AMA Guides due to psychological causes related to the injury of October 31, 2012. Thus, our decision was not generated by a *sua sponte* review but in response to Houston's argument. Consequently, we determined the stated grounds for the ALJ's complete dismissal of Houston's psychological injury claim do not constitute substantial evidence supporting the dismissal of his claim.

We have previously determined Houston's psychological injury was not known to him at the time he settled his claim in 2014. On remand, we instructed the ALJ to resolve Houston's psychological claim on its merits. In considering the merits of Houston's psychological injury claim, the ALJ must demonstrate an understanding of all of the relevant medical evidence post-dating the settlement, including the entirety of Dr. Allen's report.

Accordingly, we **VACATE** the April 30, 2019, Opinion on Remand and **REMAND** for additional findings consistent with the views expressed herein. The April 31, 2019, Order striking the Franklin Circuit Court opinion is **AFFIRMED**.

ALVEY, CHAIRMAN, CONCURS.

RECHTER, MEMBER, CONCURS IN PART, DISSENTS IN PART, AND FILES A SEPARATE OPINION.

RECHTER, Member. I concur with the majority that the ALJ did not err in striking the order of the Franklin Circuit Court. However, I do not believe this claim should be remanded to the ALJ for further consideration of Houston's psychological injury claim.

Houston did not file a petition for reconsideration, nor did he challenge the dismissal of his psychological injury claim in his appeal to this Board. I disagree with the majority that the dismissal of Houston's psychological injury claim is encompassed by the broader assertion that he is totally disabled. Houston is required to assert issues on appeal with specificity, particularly when he appealed that exact issue in a prior appeal to this Board, in which he challenged expressly and with

specificity the dismissal of his psychological injury claim. In my opinion, he has waived this argument on appeal and I do not believe it warrants *sua sponte* review.

We may review an unpreserved error *sua sponte* to ensure the award is in conformity with Chapter 342. Whittaker v. Reeder, 30 S.W.3d 138 (Ky. 2000). Conformity with the Workers' Compensation Act encompasses patent errors of law, such as in the computation of weekly income benefits, as was the case in Whittaker. See also Sidney Coal Co., Inc. v. Kirk, 364 S.W.3d 168 (Ky. 2012)(*sua sponte* review of miscalculation of weekly benefit). It does not encompass a review of the ALJ's consideration of the evidence in his role as fact-finder. This distinction was explained in Plumley v. Kroger, Inc., 557 S.W.3d 905 (Ky. 2018), in which the claimant argued the Supreme Court had the authority to consider his unpreserved error of a physician's misapplication of the AMA Guides:

In Geo. Humfleet Mobile Homes v. Christman, 125 S.W.3d 288 (Ky. 2004), the dispute involved a doctor relying on an outdated version of the Guides in forming his opinion, which was subsequently relied upon by the ALJ, an error the Christman court found to be a "patent" misapplication of the law warranting *sua sponte* review. Here ... the parties simply dispute the conformity of a doctor's opinion to the Guides, an issue that does not warrant *sua sponte* review because it does not implicate "whether an award conformed to Chapter 342 which is a question of law that a court should review, regardless of whether contested by a part..." In other words, such dispute does not involve a patent misapplication of the law to the facts warranting review *sua sponte*; rather, it is a dispute about interpretation of the Guides.
(internal citations omitted).

Here, the issue raised *sua sponte* by the majority is whether there is substantial evidence to support the ALJ's dismissal of Houston's psychological injury

claim. Such review does not encompass a patent error involving misapplication of Chapter 342.

Moreover, even if considered preserved for appellate review, Houston failed to file a petition for reconsideration. Thus, any inquiry is limited to whether substantial evidence on the record supports the ALJ's decision. Dr. Allen expressed his opinion that Houston had malingered, which impacted the results of his battery of psychological tests. I believe this is a sufficient basis upon which the ALJ could dismiss Houston's claim for psychological injury.

For these reasons, I concur in part and dissent in part.

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