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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000556-WC

TOYOTA MOTOR MANUFACTURING,
KENTUCKY, INC. APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-08-00674

BRENT ARNOLD;
HON. RICHARD M. JOINER,
ADMINISTRATIVE LAW JUDGE;
and WORKERS' COMPENSATION
BOARD APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, KELLER, AND MOORE, JUDGES.

MOORE, JUDGE: An Administrative Law Judge (ALJ) awarded Brent Arnold temporary total disability benefits (TTD) from May 10, 2007, to May 8, 2009, and

assigned Arnold a 6% permanent disability rating based on a finding of a cumulative work trauma injury Arnold sustained to his right shoulder during the course of his employment with appellee, Toyota Motor Manufacturing, Kentucky, Inc. Following the ALJ's award, Toyota petitioned the ALJ to reconsider the period of TTD specified in the award, arguing:

> [T]he evidence was clear, as acknowledged in the Opinion, that [Arnold] did not leave work on May 10, 2007 as a result of his shoulder condition, and the record is devoid of any medical proof which states he was unable to work due to his shoulder at that time. In order to qualify for temporary total disability benefits, not only must [Arnold's] condition be such that he is not at maximum medical improvement, it must prevent him from a return to employment. KRS [Kentucky Revised Statutes] 342.001(11)(a).
>
> There is simply no evidence to support the proposition that [Arnold's] shoulder condition was keeping him from work at the time temporary total disability benefits were initially awarded under the opinion. [Arnold] left Toyota on May 10, 2007, stating in his request for leave that he had to care for his pregnant wife, and then filed another request for leave due to extreme stress. He applied for and received short term disability as a result of these non-work related conditions. No physician took him off of work due to any shoulder abnormalities at that time. Awarding temporary total disability benefits to [Arnold] because he left work to care for his pregnant wife is a patent error on the face of the opinion.
>
> If temporary total disability benefits are awarded for the shoulder, the benefits should start from the date of surgery, as there is no other medical record which indicates the Plaintiff was unable to work because of his shoulder at any earlier period. That surgical date was November 12, 2008. The Opinion should be amended to reflect onset of temporary total disability from that date through May 8, 2009.

In essence, Toyota argued that Arnold had left work on May 10, 2007, when he applied for family medical leave to care for his wife and children, not due to his medical condition. The ALJ declined to amend the part of his order relating to Arnold's entitlement to TTD and denied Toyota's petition. Toyota offered the same argument on appeal before the Workers' Compensation Board. The Board affirmed, holding that substantial evidence of record—and particularly Arnold's own testimony—properly supported the ALJ's award of TTD. The particulars of the ALJ's order and the Board's opinion will be discussed in our analysis.

Toyota now appeals to this Court, arguing that the ALJ's findings relating to Arnold's award of TTD are inadequate as a matter of law, and that in affirming it, the Board engaged in unauthorized fact-finding. Because we agree with Toyota on both of these points, we reverse the ALJ's determination regarding Arnold's entitlement to TTD and remand this matter for the ALJ to reconsider and support his determination with adequate findings of fact.

As noted, among the several matters presented in this case, the ALJ was required to determine whether the condition of Arnold's shoulder temporarily and totally disabled Arnold and, if so, for how long. "Temporary total disability" is statutorily defined 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[.]" KRS 342.0011(11)(a). Thus, in order to be entitled to temporary total disability benefits, Arnold was

required to prove that for a definite period of time his shoulder 1) had not reached maximum medical improvement; *and* 2) had not improved enough to allow Arnold to return to work. *Magellan Behavioral Health v. Helms*, 140 S.W.3d 579, 581 (Ky. App. 2004). "The second prong of KRS 342.0011(11)(a) operates to deny eligibility to TTD to individuals who, though not at maximum medical improvement, have improved enough following an injury that they can return to work despite not yet being fully recovered." *Id*. And, this second prong is the focus of Toyota's appeal. Toyota contends that the ALJ made no adequate findings demonstrating that Arnold's shoulder injury prevented him from returning to work between the date he stopped working, May 10, 2007, and the date of his shoulder surgery, November 12, 2008.

Per KRS 342.275, an ALJ must support his "award, order, or decision . . . with a statement of the findings of fact, rulings of law, and any other matters pertinent to the question at issue." If an ALJ's order fails to make the statutorily mandated findings of fact, the ALJ's order contains a patent error. *Eaton Axle Corp. v. Nally*, 688 S.W.2d 334, 338 (Ky. 1985). Whether an appellate body reviews this type of patent error, however, depends entirely upon whether the complaining party has requested additional findings and clarification from the ALJ through a petition for reconsideration, per KRS 342.281. In the absence of a petition for reconsideration, inadequate, incomplete, or even inaccurate findings of fact on the part of the ALJ will not justify reversal on appeal. *Eaton Axle Corp.*, 688 S.W.2d at 338. Instead, appellate review of the ALJ's findings will be limited

to a determination of whether there is substantial evidence in the record that supports the ALJ's ultimate conclusion. *Snawder v. Stice*, 576 S.W.2d 276, 279 (Ky. App. 1979).

Conversely, if a party does file a petition for reconsideration asking the ALJ to remedy inadequate, incomplete, or inaccurate findings of fact regarding an essential issue and the ALJ summarily denies that petition, an appellate body will review whether the ALJ made adequate findings of fact. *See, e.g., Shields v. Pittsburgh and Midway Coal Mining Company*, 634 S.W.2d 440 (Ky. App. 1982). And, where the appellate body determines that the ALJ's findings on an essential issue are inadequate, the appellate body will reverse and remand for additional findings regardless of whether the record contained substantial evidence that could have otherwise supported the ALJ's ultimate conclusion. *Id.*; *see also Cook v. Paducah Recapping Serv.*, 694 S.W.2d 684 (Ky. 1985).

Entitlement to TTD is a question of fact. *Halls Hardwood Floor Co. v. Stapleton*, 16 S.W.3d 327, 329 (Ky. App. 2000) (citing *W.L. Harper Construction Company, Inc. v. Baker*, 858 S.W.2d 202, 205 (Ky. App. 1993)). Toyota properly raised the issue of whether the ALJ made adequate findings of fact regarding Arnold's entitlement to TTD by filing a petition for reconsideration. The ALJ summarily denied Toyota's petition. As such, the adequacy of the ALJ's factual findings regarding TTD is squarely presented for our review. If the ALJ's findings were inadequate, we need not address whether the record contained substantial evidence supporting the ALJ's ultimate decision.

That said, the question of whether a finding of fact is adequate or sufficient depends upon the case. *Passmore v. Lowes Home Center*, 2008 WL 5274855 (Ky. 2008)(2008-SC-000224-WC), at *2.[1] However, Kentucky precedent has consistently held that a finding of fact must be, at minimum, sufficient to apprise the parties of the basis for the ALJ's decision and to permit a meaningful appellate review. *See Big Sandy Community Action Program v. Chaffins*, 502 S.W.2d 526 (Ky. 1973); *Kentland Elkhorn Coal Corp. v. Yates*, 743 S.W.2d 47 (Ky. App. 1988); *Shields,* 634 S.W.2d 440 (Ky. App. 1982). Our courts will reverse an ALJ's finding on an issue involving "highly controverted evidence," where "the lower decisions were insufficiently clear for the reviewing body to determine what weight, if any, the fact-finder had given to particular evidence." *Carnes v. Parton Bros. Contracting, Inc.*, 171 S.W.3d 60, 67, n. 19 (Ky. App. 2005).

In *Shields*, for example, an ALJ found that a claimant suffered from pneumoconiosis. The ALJ's finding on that issue stated only

> [t]hat on or about March 30, 1979, the plaintiff became totally and permanently disabled as a result of the occupational disease of coal worker's pneumoconiosis and/or silicosis arising out of and in the course of his employment as a coal miner. The claimant is 62 years old, with a 7th grade educational level, and has been exposed to the hazards of the disease for about 39 years as a coal miner.

[1] We find *Passmore* to be persuasive authority in this case and proper to cite as it fulfills the criteria of Kentucky Rules of Civil Procedure (CR) 76.28(4).

This Court observed that Kentucky precedent requires "that an administrative agency must make findings of basic evidentiary facts, as opposed to a simple statement which reaches a conclusion and quotes the words of a statute[.]" *Id*. at 443. In remanding this issue for additional findings, this Court stated that

> [t]he question whether claimant was suffering from pneumoconiosis was sharply disputed by the physicians who testified in the case; and inasmuch as a finding of the existence of pneumoconiosis requires some expertise, all parties should have the benefit of knowing the factual basis for such a determination.

Id. at 444.

Here, the ALJ's order states only the following with regard to Arnold's entitlement to TTD:

> **What is the appropriate period of Temporary Total Disability?** Temporary total disability is defined in the Act 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." KRS 342.0011(11)(a). Here again, I accept the determination of Dr. [Timothy] Prince that maximum medical improvement of the shoulder condition was achieved by May 8, 2009. I conclude that during the time from the date he stopped work, May 10, 2007, until the date of May 8, 2009, Brent Arnold had not reached maximum medical improvement and had not reached a level of improvement that would permit a return to employment. Where an employee has not reached maximum medical improvement [MMI] and faces restrictions that preclude the employee from returning to his customary work or work that the employee was performing at the time of injury, it is permissible to find a temporary total disability for the duration of those conditions. *Central Kentucky Steel v. Wise*, Ky., 19 S.W.3d 657 (2000).

In sum, this portion of the ALJ's order concludes that Arnold reached MMI on May 8, 2009. The record contains Dr. Prince's determination to this effect; the ALJ cites to Dr. Prince's determination for factual support; and no party argues that it was improper for the ALJ to do so. The ALJ's order also concludes that Arnold's shoulder prevented him from working as of May 10, 2007. But, the ALJ's order is insufficiently clear for this Court to determine what weight, if any, the ALJ gave to any particular evidence as a factual basis for this determination. Dr. Prince offered no opinion that Arnold's shoulder caused Arnold to be temporarily and totally disabled as of May 10, 2007, and the ALJ merely supports this latter determination by quoting KRS 342.0011(11)(a). Most strikingly, this determination actually appears to conflict with the very order upon which it is written. On page 9 of that order, the ALJ summarized the evidence of record, stating:

> When Mr. Arnold first left his job[,] there was no indication from the medical records provided that he was not working because of neck or shoulder problems. The primary diagnosis was depression, stress, and anxiety.

In its own review, the Board decided that the ALJ's conclusion that Arnold's shoulder prevented him from returning to work as of May 10, 2007, was adequate. In its affirming opinion, the Board reasoned:

> With regard to the period of TTD, the ALJ clearly indicated his belief Arnold had not reached MMI and had not reached a level of improvement that would permit a return to employment from May 10, 2007, until he reached MMI on May 8, 2009, following recovery from surgery. The ALJ noted that, where an employee has not

reached MMI and faces restriction precluding the employee from returning to his customary work or work the employee was performing at the time of the injury, it is permissible to find temporary total disability for the duration of those conditions. The ALJ *apparently accepted Arnold's testimony* [that] the problem arose with the switch to the assembly job in April 2007 and progressively worsened until May, at which time, Arnold ceased working. The claimant's own testimony may constitute substantial evidence regarding his ability to labor and his retained physical capacity. Carte v. Loretto Motherhouse Infirmary, 19 S.W.3d 122 (Ky. App. 2000). The ALJ may give weight to a claimant's own testimony regarding his retained physical capacity and occupational disability. Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979). *Arnold's testimony further indicates* the stress and depression he was having at the time he went off work was a result of not being able to keep up with the pace on the assembly line as a result of his shoulder condition. The ALJ *could reasonably conclude* restrictions assessed by Dr. [Kaveh] Sajadi limiting Arnold to no lifting/pushing, and pulling more than two pounds with the right arm were reasonable restrictions from the time of injury until Arnold recovered from the surgery. Further, the ALJ *could reasonably conclude* Arnold was precluded from performing repetitive work with his right upper extremity for the duration of the period based on the restriction of avoiding repetitive work with the right upper extremity assessed by Dr. [Warren] Bilkey.

For the duration of the period in question, Arnold was receiving treatment for conditions related to the work injury. *There is no indication* Arnold's condition continued to worsen after he ceased working. The ALJ *could reasonably conclude* Arnold was a surgical candidate during the entirety of the period and, without undergoing the surgery, was unable to perform the repetitive activities of his job. Arnold testified his work on the assembly line involved 500 to 600 automobiles per shift. Again, we note Dr. [Ray] Wechman took Arnold off work on May 15, 2007, as a result of stress and depression, which Arnold testified was a result of his inability to keep pace with his work. Thus, even though Arnold may not have asserted a claim for permanent

> income benefits as a result of his stress and depression, the ALJ *could reasonably find* Arnold initially left work on May 15, 2007, as a result of a condition related to his work. *There being substantial evidence in the record to support the ALJ's award of the period of TTD, we are without authority to disturb the award*.

(Emphasis added.)

The issue presented in this matter, however, is the adequacy of the findings that the ALJ actually made regarding whether Arnold's shoulder rendered Arnold unable to return to work as of May 10, 2007. The issue is not whether substantial evidence of record, or any reasonable inferences that might have been drawn from it, could have supported the ALJ's ultimate conclusion on that issue. There is no indication that the ALJ chose to assign any weight, in the context of this issue, to Arnold's testimony or any evidence relating to Drs. Sajadi, Bilkey, or Wechman. In that light, the Board's myriad insights regarding what the ALJ might reasonably have concluded from that evidence are inconsistent with the Board's function; taken as a whole, they amount to additional, unauthorized fact-finding. This, in spite of the fact that the Board itself acknowledged in its own opinion, shortly before making these findings, that

> [t]he 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 *or noting reasonable inferences that otherwise could have been drawn from the evidence*. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

(Emphasis added.)

Moreover, the Board's opinion ignores that this evidence, along with other evidence of record, "would also have permitted other reasonable inferences" as to why Arnold stopped working on May 10, 2007. *Passmore*, 2008 WL 5274855, at *2. With regard to Arnold's testimony allowing for a "reasonable inference" that his shoulder caused him to be temporarily and totally disabled beginning on that date, even the ALJ's order notes, to the contrary, that when Arnold saw Dr. Wechman on May 23, 2007, Arnold stated:

> The last day I worked was 5/15, when I left after two hours.[2] I have not worked since. I have not seen an EAP. I spoke with CIGNA's representative yesterday finally. I feel better when I am sleeping, a bit better. If I am sitting on the back porch not thinking about anything, I feel a little better. I feel at times like I've lost control of everything. *I've never cared for this type of work that I am doing. I put up with it for ten years so I don't know why it is bothering me now*.

(Emphasis added.) Similarly, the record contains two applications for medical leave that Arnold filed with Toyota, where Arnold explained that he did not work on May 10, 2007, because he "[h]ad to care for [his] wife and children, due to [his] wife being sick from a migraine [h]eadache and not able to take medication due to pregnancy," and that he did not expect to return to work until May 16, 2007, due to his own symptoms of "[e]xtreme stress [and] depression per doctor diagnosis."

The Board also emphasizes that "Dr. Wechman took Arnold off work on May 15, 2007," but Dr. Wechman did so due to "stress and depression." When Dr. Wechman evaluated Arnold's physical condition at that time, his report noted

[2] Although Arnold worked for two hours on May 15, 2007, the parties agree that Arnold effectively stopped working on May 10, 2007.

no abnormalities with Arnold's head or neck, and, as it relates to Arnold's shoulder, noted only that Arnold had "good muscular coordination and strength bilaterally."

The Board's opinion also emphasizes that "The ALJ *could reasonably conclude* restrictions assessed by Dr. Sajadi limiting Arnold to no lifting/pushing, and pulling more than two pounds with the right arm were reasonable restrictions from the time of injury until Arnold recovered from the surgery." However, Dr. Sajadi did not actually evaluate Arnold until October 2, 2007, which is approximately five months after Arnold stopped working. And, while Dr. Sajadi did assign restrictions relating to Arnold's right shoulder, he assigned those restrictions for a condition of Arnold's shoulder which Dr. Sajadi believed was not work related. Dr. Sajadi stated as much in a February 29, 2008 report.

Finally, the Board's opinion states that "the ALJ *could reasonably conclude* Arnold was precluded from performing repetitive work with his right upper extremity for the duration of the period based on the restriction of avoiding repetitive work with the right upper extremity assessed by Dr. Bilkey." Dr. Bilkey did opine that "the onset of Mr. Arnold's pain problems is due to repetitive work activities that occur [sic] during the time period from 5/27/06 through 5/27/08." However, Dr. Bilkey did not evaluate Arnold until September 16, 2008, and he arrived at his restrictions by resorting to and incorporating the restrictions assigned by Dr. Sajadi. As noted, contrary to Dr. Bilkey's opinion, Dr. Sajadi assigned

those restrictions for what he believed was a non-work-related injury to Arnold's shoulder.

In short, the issue of whether Arnold's shoulder injury prevented Arnold from returning to work between May 10, 2007, and the date of his surgery, November 12, 2008, was sharply disputed. And, to paraphrase *Passmore*, 2008 WL 5274855, at *3, Toyota was entitled to be certain that the ALJ considered and understood all of the relevant evidence when the ALJ found that Arnold's shoulder injury prevented Arnold from returning to work as of May 10, 2007. The ALJ has failed to make clear when summarizing the evidence what, if anything, demonstrated that Arnold was unable to work beginning May 10, 2007, due to his shoulder, and even the ALJ's own order appears to contradict that notion. It is impossible under the circumstances to determine whether the ALJ's finding of TTD was the product of reasonable inferences based upon a consideration and accurate understanding of all of the evidence. As such, the decision of the Board is reversed, and this claim is remanded to the ALJ to reconsider and make additional findings regarding this issue.

CLAYTON, JUDGE, CONCURS.

KELLER, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

KELLER, JUDGE, DISSENTING: I respectfully dissent because I believe the majority's opinion alters the responsibility placed on the ALJ. As noted by the majority, an ALJ is required to "support his 'award, order, or decision . . . with a statement of the findings of fact, rulings of law, and any other matters

pertinent to the question at issue.'" KRS 342.275. However, as the Supreme Court of Kentucky held in *Big Sandy Community Action Program v. Chaffins*, 502 S.W.2d 526 (Ky. 1973), "KRS 342.275 requires nothing more than an award, findings of fact, and rulings of law. It is not incumbent upon the [ALJ] to provide for the record a discussion and analysis of either the evidence or the law." *Id.* at 531.

An ALJ must make two factual findings before awarding TTD benefits. First, an ALJ must find that the claimant "has not reached maximum medical improvement from an injury." Next, an ALJ must find that the claimant "has not reached a level of improvement that would permit a return to employment." KRS 342.0011(11)(a). The ALJ herein made those findings of fact. That is all he was required to do. While I agree with Toyota, the majority, and by inference, the Board, that it would have been better had the ALJ specifically pointed to the evidence that supported these findings of fact, he was not required to do so.

The majority cites to *Shields v. Pittsburgh and Midway Coal Mining Company*, 634 S.W. 2d 440 (Ky. App. 1982); *Cook v. Paducah Recapping Serv.*, 694 S.W. 2d 684 (Ky. 1985); *Carnes v. Parton Bros. Contracting, Inc.,* 171 S.W.3d 60 (Ky. App. 2005); and *Passmore v. Lowes Home Center*, 2008 WL 5274855 (Ky. 2008)(2008-SC-000224-WC), for the proposition that the ALJ's findings of fact were inadequate. However, I do not find these cases to be dispositive.

In *Shields*, the Board found that Shields gave due and timely notice of his claim and that he was totally and permanently disabled as a result of coal workers' pneumoconiosis. This Court's opinion does not state whether the Board undertook to summarize the evidence and noted that at least a portion of the evidence was faulty. Furthermore, this Court noted that a finding of the existence of coal workers' pneumoconiosis and whether Shields gave due and timely notice are conclusions of law.

Herein, the ALJ undertook a lengthy and detailed summary of the evidence before making findings of fact regarding Arnold's ability to perform work and the date he reached maximum medical improvement. The ALJ then reached the conclusion of law that Arnold was entitled to TTD benefits for the period of time specified. Pursuant to *Big Sandy,* that is all he was required to do.

In *Cook*, the question on appeal was whether the Board was required to find whether Cook had any occupational disability before it could make an award based on functional impairment. That issue no longer exists in cases involving permanent partial disability. Furthermore, as in *Shields*, the Supreme Court noted that the Board's factual summary of one medical witness was faulty. Toyota does not argue that the ALJ misstated or incorrectly summarized the facts, it argues that the ALJ reached the incorrect conclusion from the facts. Furthermore, the majority does not point to any factual misstatements or errors by the ALJ; therefore, I do not believe that *Cook* is dispositive.

In *Passmore*, the Supreme Court stated that

> [t]he ALJ failed to make clear when summarizing the evidence whether he was aware that the claimant had applied for social security disability benefits as of the hearing; whether he considered and understood all of Dr. El-Kalliny's testimony regarding the lifting restriction; and whether he considered and understood all of the claimant's testimony regarding his ability to perform work with a sit/stand option. It is impossible under the circumstances to determine whether the finding of partial disability was the product of reasonable inferences based upon a consideration and accurate understanding of all of the evidence.

Passmore, 2008 WL 5274855, at *3.

As in *Cook* and *Shields*, the issue was whether the ALJ's findings of fact were based on a correct understanding of the record, not whether they were adequate. Therefore, like *Cook* and *Shields,* I am not convinced that *Passmore* is dispositive.

I sympathize with Toyota's and the majority's frustration with the ALJ's opinion. I believe that, in the best of all possible worlds, the ALJs would specifically connect their summary of the evidence and their findings of fact. However, I do not believe that is the current status of the law, and the ALJ herein did all that was required of him.

Finally, I take issue with the majority's statement that the Board engaged in "unauthorized fact-finding." The Board did recite evidence in the record that supports the ALJ's award of TTD benefits. However, it did so to point out that the ALJ's award was supported by evidence of substance, which, as noted by the majority, is the Board's function. *See Snawder v. Stice*, 576 S.W.2d 276,

279 (Ky. App. 1979). Because there is evidence of substance to support the ALJ's award of TTD benefits, reversing and remanding will likely result in the ALJ issuing a new opinion that better makes the transition from his summary of facts to his findings of fact. Given that a different ultimate outcome is unlikely and in the interest of judicial economy, as well as for the foregoing reasons, I would affirm the Board.

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