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TO BE PUBLISHED

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2013-CA-000973-WC

BLUEGRASS REHABILITATION CENTER

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-12-94841

EDNA MILES; HONORABLE  
WILLIAM J. RUDLOFF,  
ADMINISTRATIVE LAW JUDGE;  
AND WORKERS' COMPENSATION  
BOARD

APPELLEES

OPINION  
REVERSING AND REMANDING

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BEFORE: ACREE, CHIEF JUDGE; JONES AND VANMETER, JUDGES.

VANMETER, JUDGE: Bluegrass Rehabilitation Center ("Bluegrass") petitions for review of the Workers' Compensation Board ("Board") opinion which affirmed

the opinion and order of the Administrative Law Judge (“ALJ”) awarding Edna Miles temporary total disability (“TTD”) benefits, permanent total disability (“PTD”) benefits, and medical benefits for the work-related injury she sustained while employed with Bluegrass. For the following reasons, we reverse and remand this case to the Board with instructions to remand this matter to the ALJ to vacate his award of PTD benefits and, if appropriate, award benefits based on adequate evidentiary grounds.

In 2012, Miles filed a Form 101 alleging injuries to her back, hips, and lower abdomen from lifting a patient in the course of her job as a Certified Nursing Assistant (“CNA”). She was assisting another CNA in repositioning a patient in bed when she experienced a pop in her back and her right leg went numb, causing her to fall to the floor.

Miles testified by deposition and at a hearing before the ALJ. Miles was born in 1974 and is a resident of Lexington, Kentucky. She is a high school graduate and completed one year of college in order to obtain a higher level CNA certification. Her previous work history primarily consists of various CNA positions and working on an assembly line for General Motors in Michigan. She began working for Bluegrass as a CNA in September 2010. Her job duties included bathing, dressing, transferring and feeding residents. Some residents weighed in excess of five hundred pounds and two people were needed to lift some, but not all, patients.

Miles testified that she has not previously experienced back pain, except briefly during one of her pregnancies, which resolved shortly after she gave birth. She was not treating for any back pain prior to her injury at issue. She has continued to experience back pain since her injury, and the degree of pain varies daily. Her back pain is worse after engaging in certain activities such as bending, squatting and walking long distances.

After her injury, Miles sought treatment with Baptistworx and attempted to return to light duty work which consisted of passing ice. She had a course of physical therapy which provided some relief, and eventually treated with Dr. Thomas Menke, an orthopedic surgeon in Lexington. Dr. Menke took her off work and she was subsequently terminated from her job. She has not worked since and does not believe she can return to work. Dr. Menke advised surgery would not help and an injection provided only brief relief. Miles currently takes Soma and Flexeril. Dr. Menke released her to return to work and advised her to lift no more than twenty-five pounds occasionally, or over fifteen pounds frequently. She continues to experience back spasms and periodic leg numbness, and falls occasionally. Since Dr. Menke released her, she occasionally seeks hospital treatment in order to renew her prescriptions.

In support of the Form 101, Miles filed the February 6, 2012 note from Baptistworx. The note reflects she was assisting a coworker with lifting a resident in bed when she experienced a pop in her back and her right leg went numb, causing her to fall. Miles also filed the September 12, 2012 Form 107-I report

completed by Dr. James Owen, who noted the history of injury and initial treatment at Baptistworx. Dr. Owen diagnosed persistent low back pain with slightly positive supine straight leg raising on the right, and definite dysmetria and muscle spasm in the low back with non-verifiable radicular symptomology, all of which was caused by her work accident. He assessed an 8% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition (“AMA Guides”). Dr. Owen opined Miles does not retain the physical capacity to return to the type of work performed at the time of the injury. He recommended restrictions of lifting, handling, and carrying objects weighing less than twenty pounds, and avoidance of activity requiring recurrent bending, squatting or stooping, and avoidance of prolonged standing greater than half an hour, or walking more than an hour.

In addition, Miles submitted the Form 107-I medical report prepared by Dr. Jared Madden, D.O., dated November 9, 2012. Dr. Madden outlined the history of onset of back pain, leg numbness, and the fall. He diagnosed low back pain, lumbar degenerative disk disease, lumbar radiculopathy, and chronic pain syndrome due to trauma. He assessed a 12% impairment rating pursuant to the AMA Guides and opined Miles had reached maximum medical improvement (“MMI”) by August 6, 2012. He further opined Miles does not retain the physical capacity to return to the type of work performed at the time of the injury and is limited to light duty consisting of minimal bending, twisting, and stooping, with no prolonged sitting or standing. He also advised against repetitive motion with the

lower extremity and any lifting over ten pounds, and recommended routine position changes.

Bluegrass filed office records from Dr. Menke for treatment provided from April 16, 2012 through July 13, 2012, as well as a December 11, 2012 letter. Dr. Menke treated Miles for low back pain and numbness in her right leg and opined that she had reached MMI by July 2, 2012. He also noted a steroid injection provided temporary relief which wore off after only a few days. Dr. Menke stated Miles is not a surgical candidate, is status post a work-related injury, and has disk dessication at L4-5 identified on MRI. He assessed a 5% impairment rating based upon the AMA Guides and recommended restrictions of no lifting over thirty pounds on a maximum occasional basis, or over fifteen pounds more frequently. Bluegrass also filed the Functional Capacity Report prepared by Mr. Rick Pounds on November 15, 2012. Mr. Pounds recommended an “aggressive functional restoration program” and stated Miles demonstrated the ability to lift and carry boxes weighing ten, twenty and twenty-five pounds.

A benefit review conference (“BRC”) was held on December 4, 2012. In the BRC order and memorandum, the parties agreed the contested issues included benefits per KRS<sup>1</sup> 342.730. In an opinion rendered December 17, 2012, the ALJ found, in relevant part, as follows:

I saw and heard the plaintiff testify at the hearing and she was a credible and convincing witness. Based upon the totality of the evidence, including the plaintiff’s sworn testimony and the very persuasive medical reports from

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<sup>1</sup> Kentucky Revised Statutes.

Dr. Owen and Dr. Madden, I make the factual determination that Ms. Miles will sustain a 12% permanent whole person impairment under the AMA Guides, Fifth Edition, as per the very persuasive medical report from Dr. Madden.

In rendering a decision, KRS 342.285 grants the Administrative Law Judge as fact-finder the sole discretion to determine the quality, character, and substance of evidence. *AK Steel Corp. v. Adkins*, 253 S.W.3d 59 (Ky. 2008). In this case I find most persuasive the opinion of Dr. Madden and find that the plaintiff will sustain a 12% whole person permanent impairment.

“‘Permanent total disability’ means the condition of an employee who, due to an injury, has a permanent disability rating and has a complete and permanent inability to perform any type of work as a result of an injury . . . .” KRS 342.0011. To determine if an injured employee is permanently totally disabled, an ALJ must consider what impact the employee’s post-injury physical, emotional, and intellectual state has on the employee’s ability “to find work consistently under normal employment conditions . . . . [and] to work dependably[.]” *Ira A. Watson Dept. Store v. Hamilton*, 34 S.W.3d 48, 51 (Ky. 2000). In making that determination, “the ALJ must necessarily consider the worker’s medical condition . . . [however,] the ALJ is not required to rely upon the vocational opinions of either the medical experts or the vocational experts. A worker’s testimony is competent evidence of his physical condition and of his ability to perform various activities both before and after being injured.” *Id.* at 51 (internal citations omitted). *See also, Hush v. Abrams*, 584 S.W.2d 48 (Ky. 1979).

In the present case, I considered the severity of the plaintiff’s work injury, her age, her work history, her education, the testimony of the plaintiff and Dr. Madden’s specific opinions regarding her occupational disability. Based on all of those factors, I make the factual determination that the plaintiff cannot find work

consistently under regular work circumstances and work dependably. I, therefore, make the factual determination that she is permanently and totally disabled.

Bluegrass filed a petition for reconsideration, asserting that the award of PTD benefits was not supported by substantial evidence and Miles did not request such an award.<sup>2</sup> Thereafter, the ALJ entered an order denying the petition for reconsideration. Bluegrass appealed to the Board, arguing the ALJ's award of PTD benefits was not supported by substantial evidence. The Board affirmed the ALJ's decision. Bluegrass now petitions this court for review of the Board's opinion, claiming the Board erred in assessing the evidence of record, the ALJ and Board overlooked and/or misconstrued controlling precedent, and these errors have caused gross injustice so as to require reversal. We believe the Board did err in assessing the evidence, since the ALJ did not make sufficient findings to support the award of PTD benefits, and therefore reverse and remand.

The well-established standard of review for the appellate courts of a workers' compensation decision "is to correct the [Workers' Compensation] Board only where the Court perceives the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice." *E.g., W. Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992); *Butler's Fleet Serv. v. Martin*, 173 S.W.3d 628, 631 (Ky. App. 2005); *Wal-Mart v. Southers*, 152 S.W.3d 242, 245 (Ky. App.

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<sup>2</sup> Per the BRC order, a contested issue was Miles's entitlement to benefits per KRS 342.730, which includes benefits for TTD, PTD and PPD. Accordingly, we fail to appreciate Bluegrass's assertion that Miles never requested PTD benefits.

2004). *See also Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986) (if the fact-finder finds in favor of the person having the burden of proof, the burden on appeal is only to show that there was some substantial evidence to support the decision); *cf. Gray v. Trimmaster*, 173 S.W.3d 236, 241 (Ky. 2005) (if the ALJ finds against the party having the burden of proof, the appellant must “show that the ALJ misapplied the law or that the evidence in her favor was so overwhelming that it compelled a favorable finding.”).

The ALJ as fact-finder has sole discretion in determining the quality, character, and substance of evidence. *AK Steel Corp.*, 253 S.W.3d at 64. The ALJ is given broad discretion to weigh the quality and substance of the evidence. *Square D Co. v. Tipton*, 862 S.W.2d 308, 309 (Ky. 1993). While a party may point to evidence that would have supported an alternate outcome, this is not a sufficient basis for reversal. *McCloud v. Beth-Elkhorn Corp.*, 514 S.W.2d 46, 47 (Ky. 1974).

Bluegrass asserts the Board overlooked and/or misconstrued controlling precedent by not requiring the ALJ’s reasoning for his findings be adequately set forth in his order. Bluegrass further argues the evidence does not support the award of PTD benefits and Miles should have been awarded permanent partial disability (“PPD”) benefits instead. Bluegrass points to Miles’s testimony and Drs. Madden’s and Owens’ reports in support of its claim that while Miles is unable to return to her *pre-injury* work, triggering the three multiplier for PPD under KRS 342.730(1)(c)(1), Miles is not unable to return to *any* type of work, implicating PTD as defined by KRS 342.0011(11)(c).



The Kentucky Workers' Compensation Act ("Act") KRS 342.0011, *et. seq.*, distinguishes between PTD and PPD benefits as follows: PTD is defined as "the condition of an employee who, due to an injury, has a permanent disability rating and has a complete and permanent inability to perform any type of work as a result of an injury[.]" KRS 342.0011(11)(c). On the other hand, "[i]f, due to an injury, an employee does not retain the physical capacity to return to the type of work that the employee performed at the time of injury, the benefit for permanent partial disability shall be multiplied by three (3) times the amount otherwise determined[.]" KRS 342.730(1)(c)(1). In determining whether an employee has suffered a permanent total disability, the ALJ is required to consider factors "such as the worker's post-injury physical, emotional, intellectual, and vocational status and how those factors interact." *Hamilton*, 34 S.W.3d at 51.

In awarding PTD benefits to Miles, the ALJ stated, "I make the factual determination that the plaintiff cannot find work consistently under regular work circumstances and work dependably." However, this statement is merely a recitation of the ultimate fact necessary to sustain an award of PTD. While the ALJ stated that he considered Miles's injury, age, work history, and education, his opinion contains no analysis demonstrating how he weighed those factors to reach his ultimate conclusion, as required. Indeed, the Kentucky Supreme Court has held that an ALJ must consider these factors in relation to one another:

KRS 342.275(2) and KRS 342.285 contemplate an [ALJ] opinion that summarizes the conflicting evidence concerning disputed facts; **weighs that evidence to**

**make findings of fact; and determines the legal significance of those findings.** Only when an opinion summarizes the conflicting evidence accurately and states the evidentiary basis for the ALJ's finding does it enable the Board and reviewing courts to determine in the summary manner contemplated by KRS 342.285(2) whether the finding is supported by substantial evidence and reasonable.

*Arnold v. Toyota Motor Mfg.*, 375 S.W.3d 56, 61-62 (Ky. 2012) (emphasis added)  
(internal citations omitted).

Here, the record shows no evidence that the ALJ balanced Miles's age, work history, and education against her physical restrictions, the availability of more sedentary jobs, and her ability to perform those jobs. Instead, the ALJ's opinion is simply conclusive, stating that he considered the evidence without any explanation of how he did so. As a result, the record does not contain the evidentiary basis for the ALJ's findings so as to allow for a meaningful review of this case. We believe the Board erred in affirming the ALJ's decision, since the ALJ did not make sufficient findings to support his award of PTD benefits.

The opinion and order of the Workers' Compensation Board is reversed, and this case is remanded to the Board with instructions to remand this matter to the ALJ to vacate his award of PTD benefits and, if appropriate, award benefits based on adequate evidentiary grounds.

ALL CONCUR.

BRIEF FOR APPELLANT:

Lucas R. Braun  
Kimberly D. Newman  
Lexington, Kentucky

BRIEF FOR APPELLEE:

McKinnley Morgan  
London, Kentucky