

RENDERED: NOVEMBER 26, 2014; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2013-CA-001733-WC

JANICE RICHMOND

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-12-82062

MASCO BUILDING CABINET GROUP,
HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: DIXON, LAMBERT, AND NICKELL, JUDGES.

NICKELL, JUDGE: Janice Richmond has petitioned for review of an opinion of the Workers' Compensation Board (Board) vacating and remanding the opinion

and order of the Administrative Law Judge (ALJ). Having reviewed the record, we affirm.

BACKGROUND

After injuring her left knee while working at Masco Building Cabinet Group (Masco) on November 4, 2011, Richmond applied for workers' compensation benefits on July 2, 2012. A scheduling order was issued on August 14, 2012, setting a Benefits Review Conference (BRC) on December 4, 2012. However, because Richmond was scheduled to undergo knee surgery, her case was placed in abeyance on September 17, 2012, until Richmond was found to be at maximum medical improvement (MMI).

On October 8, 2012, Richmond filed a Form 107 medical report completed by Dr. James Owen, who diagnosed a work-related left knee injury, but declined to assess an impairment rating in light of Richmond's upcoming knee surgery. Richmond also submitted treatment records from Dr. Travis Hunt. Masco filed an independent medical examination (IME) report by Dr. Rick Lyon on December 26, 2012, and a supplemental report on February 8, 2013. Dr. Lyon assessed a 5% permanent impairment rating in accordance with the AMA¹ *Guides*² due to Richmond's work-related left knee injury.

On February 13, 2013, Richmond filed a motion to remove the case from abeyance. In her motion, Richmond advised she was released from Dr.

¹ American Medical Association.

² *Guides to the Evaluation of Permanent Impairment*.

Hunt's care and the case was ready to be re-docketed for a combined BRC and final hearing. Richmond further advised she was scheduled to return to her physician for an IME, and expected a report within two weeks. On February 19, 2013, the ALJ removed the case from abeyance and scheduled a combined BRC and final hearing for April 25, 2013.

On April 8, 2013, Masco moved to extend proof time and reschedule the combined BRC and final hearing. As grounds, Masco stated it had not yet received the IME report discussed in Richmond's February motion. Arguing it had a right to cross-examine Richmond and her medical expert, Masco claimed it would not be possible to obtain this testimony prior to the hearing.

On April 10, 2013, Richmond filed a Form 107 medical report completed by Dr. Owen. Dr. Owen examined Richmond on March 13, 2013, and assessed an 8% permanent impairment rating in accordance with the *AMA Guides* due to the work-related injury. Dr. Owen opined Richmond did not retain the physical capacity to return to her previous employment, and had permanent restrictions of no bending, squatting, or stooping. Dr. Owen concluded Richmond should not engage in prolonged walking or standing.

Objecting to Masco's motion, Richmond argued Dr. Owen's report was timely filed, and claimed further delay would be financially detrimental to her. In response, Masco stated it was willing to withdraw its motion for an extension of proof time if Richmond would stipulate she would not seek a permanent total disability (PTD) award.

On April 16, 2013, the ALJ entered an order reiterating the combined BRC and final hearing would be held on April 25, 2013, and ordering both parties to submit proof by the date of the hearing. The combined BRC and final hearing were held as scheduled. PTD was listed among the contested issues on the BRC order. Masco submitted an additional letter from Dr. Lyon. Dr. Lyon stated he reviewed Dr. Owen's IME and reaffirmed his previous opinion assessing a 5% permanent impairment rating under the AMA *Guides*.

The ALJ issued an opinion and award on April 30, 2013. The ALJ found Richmond was entitled to temporary total disability (TTD) and PTD benefits as a result of the work-related left knee injury, for which he determined Richmond had sustained an 8% permanent impairment. The ALJ found Richmond was entitled to PTD based on

the severity of the plaintiff's work injury, her age, her work history, her education, her sworn testimony at the Final Hearing, and Dr. Owen's specific opinions.

After Masco's subsequent petition for reconsideration was denied, Masco appealed to the Board. On September 6, 2013, the Board entered an opinion vacating and remanding the ALJ's opinion and order upon concluding the ALJ erred in failing to give Masco additional time to submit rebuttal proof after Richmond's proof time expired, thereby denying Masco an adequate opportunity to present its case. The Board held the ALJ's proof schedule did not comply with the

“60-30-15” format set forth at 803 KAR³ 25:010 § 8, which provides in pertinent part:

Section 8. Discovery, Evidence, and Exchange of Records. (1) Proof taking and discovery for all parties shall begin from the date of issuance by the executive director of the scheduling order.

(2)(a) Plaintiff and defendants shall take proof for a period of sixty (60) days from the date of the scheduling order;

(b) After the sixty (60) day period, defendants shall take proof for an additional thirty (30) days; and

(c) After the defendant's thirty (30) day period, the plaintiff shall take rebuttal proof for an additional fifteen (15) days.

Further, the Board held the ALJ erroneously conducted a combined BRC and final hearing on the same date, in contravention of 803 KAR 25:010 § 13. The Board held these errors violated Masco’s due process rights.

In addition, although the ALJ had listed numerous factors supporting his decision, the Board held his finding of PTD deficient as a matter of law due to his failure to provide the analysis required by *Ira A. Watson Department Store v.*

Hamilton, 34 S.W.3d 48, 51-52 (Ky. 2000), which states:

An analysis of the factors set forth in KRS 342.0011(11)(b), (11)(c), and (34) clearly requires an individualized determination of what the worker is and is not able to do after recovering from the work injury. Consistent with *Osborne v. Johnson*, [432 S.W.2d 800 (Ky. 1968),] it necessarily includes a consideration of factors such as the worker’s post-injury physical,

³ Kentucky Administrative Regulations.

emotional, intellectual, and vocational status and how those factors interact. It also includes a consideration of the likelihood that the particular worker would be able to find work consistently under normal employment conditions. A worker's ability to do so is affected by factors such as whether the individual will be able to work dependably and whether the worker's physical restrictions will interfere with vocational capabilities. The definition of "work" clearly contemplates that a worker is not required to be homebound in order to be found to be totally occupationally disabled. *See, Osborne v. Johnson, supra*, at 803.

The Board held the ALJ's bare references to Dr. Owen's opinions and Richmond's age, education, work history, severity of injury, and testimony, with no explanation of their individual or combined occupational significance or impact, failed to comport with the foregoing guidelines. Though superfluous or extraneous details or discussion is not required, the Board noted an ALJ must provide adequate facts and reasoning to apprise the parties of the basis of any ultimate conclusion. *Big Sandy Community Action Program v. Chafine*, 502 S.W.2d 526, (Ky. 1973); *Cornett v. Corbin Materials, Inc.*, 807 S.W.2d 56 (Ky. 1991). Thus, the Board vacated the ALJ's finding of PTD, and remanded for imposition of an appropriate proof schedule, conduct of a BRC and a final hearing, and rendition of an opinion and order with adequate findings and analysis. This petition for review followed.

Before this Court, Richmond advances two allegations of error in seeking reversal. First, she argues the Board erred in determining Masco's due process rights had been violated. Second, she argues the Board erred in vacating the ALJ's finding of PTD.

STANDARD OF REVIEW

The ALJ, as fact-finder, has sole authority to determine the weight, credibility, substance, and inferences to be drawn from the evidence. *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418, 419 (Ky. 1985). When conflicting evidence is presented, the ALJ may choose whom and what to believe. *Pruitt v. Bugg Brothers*, 547 S.W.2d 123, 124 (Ky. 1977). The Board is charged with deciding whether the ALJ's finding “is so unreasonable under the evidence that it must be viewed as erroneous as a matter of law.” KRS⁴ 342.285; *Ira A. Watson Department Store*, 34 S.W.3d at 52. On review, the function of this Court is to correct the Board only where the Court perceives the Board has overlooked or misconstrued controlling statutes or precedent, or has committed an error in assessing the evidence so flagrant as to cause gross injustice. *See Western Baptist Hospital v. Kelly*, 827 S.W.2d 685, 687 (Ky. 1992).

ANALYSIS

On appeal, Richmond first alleges the Board erred in holding the ALJ violated Masco’s due process rights. In support of her argument, Richmond claims Masco waived any objection to the combined BRC and final hearing and the truncated proof schedule by failing to object when the ALJ issued the scheduling order. Richmond asserts it is commonplace for ALJs to combine a BRC and final hearing, and to deviate from the statutory 60-30-15 proof schedule. Further, Richmond argues Masco could have obtained proof and taken depositions as early

⁴ Kentucky Revised Statutes.

as February, when the case was removed from abeyance, and there was no legitimate reason for Masco to wait until Dr. Owen's report was filed.

It has long been accepted that an ALJ has broad discretion to control the taking and presentation of proof in a workers' compensation proceeding, and this power to control proceedings should not be usurped by reviewing courts unless the ALJ acts arbitrarily or unreasonably so as to indicate an abuse of discretion. *New Directions Housing Authority v. Walker*, 149 S.W.3d 354, 358 (Ky. 2004); *Elkhorn Coal Co. v. Bates*, 236 S.W.2d 946, 949 (Ky. 1951). In the present case, we agree with the Board in holding the ALJ abused this broad discretion by failing to afford Masco an adequate opportunity to develop rebuttal evidence.

When the ALJ removed this case from abeyance, he failed to issue a scheduling order pursuant to 803 KAR 15:010 § 8(2), which would have required the granting of sixty days to Richmond for submission of direct proof, thirty days thereafter to Masco for submission of responsive proof, and fifteen days thereafter to Richmond for submission of rebuttal proof. Masco sought to assert this right by moving to extend proof time and reschedule the BRC and final hearing—thereby preserving the issue for appellate review. However, the ALJ denied Masco's request and ordered all proof to be completed by the April 25, 2013, combined BRC and final hearing. Richmond argues it is commonplace for ALJs to deviate from the statutory 60-30-15 proof format and to schedule BRCs and final hearings on the same date. However, while we do not doubt such actions may occur in

other cases upon agreement of the parties, here, there was no such agreement.⁵ As such, we hold the ALJ failed to provide Masco an adequate opportunity to rebut Richmond's evidence.

The ALJ's failure to give Masco an adequate opportunity to rebut Richmond's proof deprived Masco of its due process right to be heard at a meaningful time and in a meaningful manner. *See Hilltop Basic Resources, Inc. v. County of Boone*, 180 S.W.3d 464, 469 (Ky. 2005) (citing *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)). Among the proof Masco was unable to obtain due to the inadequate rebuttal time was a cross-examination of Dr. Owen. Administrative due process requires an opportunity to confront and cross-examine adverse witnesses. *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970); *Kaelin v. City of Louisville*, 643 S.W.2d 590, 591-92 (Ky. 1982).

We further reject Richmond's argument that Masco could have developed evidence well in advance of the date Dr. Lyon's report was submitted. The nature of rebuttal evidence is evidence "which tends to counteract or overcome the legal effect of the evidence for the adverse party." *Arnold v. Commonwealth*, 192 S.W.3d 420, 425 (Ky. 2006) (quoting *Houser v. Coursey*, 310

⁵ In his May 22, 2013, opinion and order on reconsideration, the ALJ found the case was set for a combined BRC and final hearing "pursuant to agreement of the parties on April 16, 2013." However, the Board held there was no evidence in the record of any such agreement, and we likewise find no evidence Masco ever agreed to schedule the BRC and final hearing on the same date. The order entered by the ALJ on April 16, 2013, was not an agreed order, and the record does not reflect any telephone or other conference being held prior to entry of the order. Moreover, the record indicates Masco never withdrew its request to reschedule the hearing.

Ky. 625, 221 S.W.2d 432 (1949)). Masco could not have reasonably anticipated and responded to the contents of Dr. Owen's examination report until after it was submitted on April 10, 2013.⁶

The ALJ's failure to provide Masco adequate opportunity for submission of rebuttal evidence was compounded by the ALJ's error in conducting the BRC and final hearing on the same date, in contravention of 803 KAR 25:010 § 13. The purpose of the BRC is to expedite the processing of the case by aiding settlement and narrowing the contested issues. 803 KAR 25:010 § 13(1). The ALJ is to schedule a hearing at the conclusion of a BRC if the parties have not reached an agreement on the issues. 803 KAR 25:010 § 13(13)(b). By rejecting Masco's request to extend proof and reschedule the final hearing—and proceeding to conduct the BRC and final hearing on the same date—the ALJ's actions defeated the BRC's purpose of facilitating agreement and the processing of the case, and impeded Masco's ability to develop rebuttal evidence.

Based on the foregoing, we hold—consistent with the Board—that the ALJ erred by failing to grant Masco thirty days after the completion of Richmond's proof to submit rebuttal evidence, and by holding the combined BRC and final hearing. We, too, are convinced these errors effectively denied Masco its due process rights.

⁶ Although Richmond asserts she forwarded Dr. Owen's written report to Masco's counsel within a few days of its receipt, well in advance of the date it was submitted, nothing in the record suggests Richmond exchanged or submitted this report prior to April 10, 2013.

Next, Richmond argues the Board erred by vacating the ALJ's finding of PTD. Richmond claims the Board usurped the ALJ's role as fact finder by superimposing its own appraisals as to the weight, credibility, and inferences to be drawn from the evidence. *See Whittaker v. Rowland*, 998 S.W.2d 479, 481 (Ky. 1999). We disagree.

PTD is “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. In determining whether an employee has suffered PTD, 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.” *Ira A. Watson Dept. Store*, 34 S.W.3d at 51. An ALJ is required to support his conclusions with facts drawn from the evidence in each case so that both sides may be dealt with fairly and be properly apprised of the basis for the decision. *Id.*; *Shields v. Pittsburgh & Midway Coal Mining Co.*, 634 S.W.2d 440, 444 (Ky. 1982). An ALJ's opinion must not only summarize the conflicting evidence concerning disputed facts and weigh that evidence to make findings of fact; it must also set forth the legal significance of those findings. *Arnold v. Toyota Motor Mfg.*, 375 S.W.3d 56, 61–62 (Ky. 2012).

We agree with the Board, and hold the ALJ's opinion does not provide a sufficient factual basis to support his award of PTD benefits. To support his finding of PTD, the ALJ merely cites “the severity of the plaintiff's work injury, her age, her work history, her education, her sworn testimony at the Final

Hearing, and Dr. 's Owen's specific opinions.” The ALJ fails to discuss how these factual factors—in combination with Dr. Owen's opinions—contribute to and establish Richmond's inability to perform any meaningful type of work.

In particular, based on restrictions placed on her bending, squatting, stooping, and prolonged walking, Dr. Owen opined Richmond was unable to return to her previous employment. However, Dr. Owen was silent regarding other work activities, and the ALJ must address whether Richmond could return to any gainful employment. Here, the ALJ's opinion is conclusory, merely listing facts on which he relied without explanation concerning their occupational significance *vis-à-vis* his ultimate legal determination of PTD.

As a result, though recognizing the ALJ's broad discretion as fact finder, we hold the record does not contain a sufficient evidentiary basis to allow meaningful review. Even so, nothing in this opinion should be understood to preclude the ALJ from again determining PTD—so long as all parties are provided adequate due process and any award—or absence thereof—is supported by adequate factual findings and legal analysis.

For the foregoing reasons, the opinion and order of the Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

BRIEF FOR APPELLEE, MASCO

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