

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: November 21, 2014

CLAIM NO. 201280968

A & R TRUCKING

PETITIONER

VS.

APPEAL FROM HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE

RANDY FOUTS; DR. GRADY STUMBO/EAST KY
HEALTH SERVICE CENTER; HAZARD RADIOLOGY ASSOC.;
MEDICAL MALL IMAGING CENTER AND
HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING IN PART,
VACATING IN PART
AND REMANDING

* * * * *

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

RECHTER, Member. A & R Trucking ("A & R") appeals from the July 14, 2014 Opinion and Order and the August 5, 2014 Opinion and Order on Reconsideration rendered by Hon. William J. Rudloff, Administrative Law Judge ("ALJ") finding

Randy Fouts ("Fouts") permanently totally disabled as a result of a May 31, 2012 work-related motor vehicle accident. A & R argues the ALJ erred in finding Fouts permanently totally disabled and in failing to make specific findings addressing its medical disputes filed during litigation of the claim. We affirm the finding of permanent total disability and remand for additional findings on the merits of the medical disputes.

Fouts is a 50-year old man who has a high school education. He holds a commercial driver's license and a surface mine card, and has worked as a truck driver for the past twenty years. Prior to that, he worked three or four years at a coal tipple.

Fouts was employed by A & R as a coal truck driver from 1995 until May 31, 2012. He was operating a tractor and trailer when he dropped off the edge of the road, causing the vehicle to flip and ejecting him from the cab. Fouts testified he continues to have a stabbing pain in his back radiating into his hips and thighs. He is unable to perform a number of activities such as hunting, fishing, mowing the grass or walking for more than ten minutes. His pain interferes with his ability to sleep.

Dr. Jerry Morris examined Fouts on June 27, 2013 and diagnosed multiple impact trauma "well above the limit

of human tolerance"; aggravation of lumbar degenerative disc and degenerative joint disease; aggravation of spinal stenosis, L3-5; traumatically induced left L4-5 radiculopathy with atrophy of the left lower extremity; and iatrogenic narcotic induced hypometabolic state interfering with the healing response and resulting in adult failure to thrive. Dr. Morris assigned a 16% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides") and stated Fouts is unemployable as a truck driver. Dr. Morris assigned restrictions of avoiding lifting more than ten pounds occasionally, five pounds frequently or two pounds while reaching. Fouts should not reach frequently and is unable to bend, twist, stoop, sit, stand, walk, crawl or kneel in a competitive work environment.

Dr. Bruce Guberman examined Fouts on July 16, 2013 and diagnosed acute cervical strain, improved; acute and chronic lumbosacral stain, post-traumatic; and chest wall contusion, resolved. Dr. Guberman assigned an 8% impairment rating pursuant to the AMA Guides. He limited Fouts to lifting twenty pounds occasionally and ten pounds frequently. Fouts can stand and/or walk at least two hours in an eight hour workday. He can sit less than six hours and must periodically alternate sitting and standing to

relieve pain or discomfort. He can occasionally climb ramps and stairs but should never climb ladders, ropes or scaffolds. He should never balance, kneel, crouch, crawl or stoop and should have no exposure to vibration, humidity/wetness or hazards such as machinery or heights.

Dr. Daniel Primm evaluated Fouts on June 5, 2013 and diagnosed a lumbar strain by history and symptom exaggeration. He found no objective signs of a specific or permanent injury following the May 31, 2012 strain injury. Dr. Primm opined Fouts has no permanent impairment as a result of the work injury, needs no restrictions, and needs no further medical treatment, diagnostic testing or medications.

Dr. David J. Jenkinson examined Fouts on October 24, 2012 and noted a history of motor vehicle accident with possible minor contusions to his neck and low back which have resolved. Dr. Jenkinson opined Fouts had reached maximum medical improvement and assessed no permanent impairment rating as a result of his work injury. Dr. Jenkinson declined to recommend restrictions or further treatment for the work-related incident.

During the pendency of the claim, A & R filed medical disputes challenging the reasonableness and necessity of an MRI of Fouts' brain and a subsequent

interpretation of the MRI, the work-relatedness of lumbar epidural steroid injections or repeat MRI of the lumbar spine, and a bill for a September 3, 2013 office visit with Dr. Warren G. Stumbo of East Kentucky Health Service Center.

In the July 14, 2014 Opinion and Order, the ALJ found Fouts suffered significant physical injuries to his back and neck. The ALJ determined Fouts did not have a pre-existing active impairment or occupational disability. The ALJ made the following findings relevant to this appeal:

In this case, I make the factual determination that the lay testimony of Mr. Fouts, as covered in detail above, was very credible and convincing. In addition, I found very persuasive and compelling the medical evidence from both Dr. Guberman and Dr. Morris, as covered in detail above. I make the factual determination that Mr. Fouts will as a result of his work-related motor vehicle accident on May 31, 2012 sustain multiple injuries to his back and will sustain under the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, a 16% permanent partial impairment to the body as a whole, as per the opinion of Dr. Jerry Morris. I also make the factual determination pursuant to the medical evidence from Dr. Morris that the plaintiff is unemployable as a truck driver, has stringent permanent physical restrictions and would not pass a pre-employment examination for a physically demanding job based on standards commonly accepted.

Based upon the credible and convincing lay testimony of Mr. Fouts,

which is covered in detail above, and the persuasive and compelling medical evidence from Dr. Morris, which is covered in detail above, Mr. Fouts has serious low back pain and pain running down his legs, as well as neck pain. I make the factual determination that he has difficulty sleeping well at night, cannot do yard work or hunt or fish, and cannot return to work. Mr. Fouts is now 50 years of age and is, therefore, an older worker with significant limitations for re-employment in the highly competitive job market. I make the factual determination that Mr. Fouts has had a good work history showing a good work ethic, but that he will not be able to return to any regular gainful employment in the highly competitive job market. Based upon all of the above factors, I make the factual determination that Mr. Fouts cannot find work consistently under regular work circumstances and work dependably. I, therefore, make the factual determination that he is permanently and totally disabled.

The ALJ determined Fouts is entitled to recover medical bills and expenses, both past and future, for treatment of his back, neck and legs and indicated the medical disputes filed by A & R are overruled and dismissed.

A & R petitioned for reconsideration, challenging the sufficiency of the ALJ's findings with respect to permanent total disability and the medical disputes. In a subsequent Opinion and Order on Reconsideration, the ALJ denied the petition.

A & R now appeals, arguing the ALJ abused his discretion in finding Fouts permanently totally disabled. A & R contends the ALJ's determination is not supported by substantial evidence and he considered factors outside the evidence or otherwise not "due" to the injury. It notes the ALJ found Fouts had a "serious" neck and back condition, even though no medical evaluator rated the neck condition and Drs. Guberman, Morris, Jenkinson and Primm diagnosed either an arousal of degenerative changes or a soft tissue sprain/strain. None of the medical experts suggested the injuries were "serious." A & R also objects to the ALJ's reference to Fouts' ability to secure employment in the "highly competitive job market."

As the ALJ correctly noted, an employee is permanently totally disabled when he has a permanent disability rating and has a complete and permanent inability to perform any type of work as a result of the injury. KRS 342.0011(11)(c). In making a determination of total disability, the ALJ must consider several factors including the worker's age, education level, vocational skills, medical restrictions, and the likelihood he can resume some type of work under normal employment conditions. Ira A. Watson Dept. Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). After concluding Fouts is unable to return to work as a

truck driver, the ALJ noted he has stringent permanent physical restrictions, neck pain and serious low back pain radiating to his legs. Fouts is an older worker whose only employment has been in physical labor and as a truck driver. The opinions of Drs. Morris and Guberman are substantial evidence supporting the ALJ's determination. The ALJ applied the correct standard and considered the Watson factors in determining the extent of Fouts' disability. The presence of evidence that might support a different result is not a sufficient basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). The ALJ was faced with conflicting evidence on the issue of the extent of disability. He properly exercised the wide discretion afforded to him in granting or denying an award of permanent total disability. Colwell v. Dresser Instrument Div., 217 S.W.3d 213 (Ky. 2006).

We find no error in the ALJ's characterization of Fouts' injury as a "serious" injury. The restrictions assigned by Dr. Morris or Dr. Guberman preclude Fouts from working as a truck driver, the only work he had performed for approximately twenty years. Certainly, in terms of the impact on Fouts' ability to perform work for which he has training or experience, the injury can reasonably be characterized as "serious."

We find no error in the ALJ's reference to a "highly competitive job market." Again, we note the ALJ recited the appropriate standard as set forth in Watson and specifically found Fouts "cannot find work consistently under regular work circumstances and work dependably."

A & R again argues the ALJ erred in failing to make specific findings of fact and conclusions of law regarding the medical disputes. We agree and therefore find it necessary to remand the matter for additional findings of fact. The ALJ did not find Fouts suffered a brain injury, or explain how an MRI of the brain could be related to the compensable work injuries. However, the ALJ summarily found the medical disputes raised by A & R are "overruled and dismissed." These findings are contradictory. The ALJ must provide a sufficient basis to support his determination. Cornett v. Corbin Materials, Inc., 807 S.W.2d 56 (Ky. 1991). Conclusory determinations are insufficient. The decision must adequately set forth the basic facts upon which the ultimate conclusion was drawn so the parties are reasonably apprised of the basis of the decision. Big Sandy Community Action Program v. Chafins, 502 S.W.2d 526 (Ky. 1973). On remand, the ALJ must review the evidence, and clearly and unambiguously address the merits of the medical disputes.

The ALJ is asked to support his determination with the appropriate findings of fact.

Accordingly, the July 14, 2014 Opinion and Order and the August 5, 2014 Opinion and Order on Reconsideration rendered by Hon. William J. Rudloff, Administrative Law Judge are hereby **AFFIRMED IN PART**. We **VACATE** that portion of the opinion overruling the medical fee disputes, and this claim is **REMANDED** for additional findings addressing the merits of the medical disputes.

ALL CONCUR.

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