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Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001415-WC

MARSHALL JARRELL — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-03-95660

CZAR COAL CORPORATION;
HON. GRANT ROARK,
ADMINISTRATIVE LAW JUDGE;
and WORKERS' COMPENSATION
BOARD — APPELLEES

OPINION
AFFIRMING IN PART
AND VACATING AND REMANDING IN PART

** ** ** ** **

BEFORE: ABRAMSON AND VANMETER, JUDGES; EMBERTON,[1] SENIOR JUDGE.

VANMETER, JUDGE: Marshall Jarrell petitions for the review of a Workers'

Compensation Board's opinion affirming an Administrative Law Judge's (ALJ's) opinion

[1] Senior Judge Thomas D. Emberton, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

and award. Jarrell argues that the ALJ erred by failing to find him permanently totally disabled, by failing to award him additional temporary total disability (TTD) benefits, and by finding that 6% of his 10% psychiatric impairment rating must be excluded as being a prior active impairment. For the following reasons, we affirm in part, and vacate and remand in part.

When Jarrell was working for Czar Coal Company as a roof bolter on February 7, 2003, a large slab of rock fell and struck him, causing lower back pain. Jarrell continued to work for almost two weeks, but then left and has not returned to work since. He underwent two back surgeries in 2003. Following a hearing, the ALJ summarized the medical evidence in the matter as follows:

> On June 15, 2004 **Dr. B.B. Aranas** indicated that plaintiff could not be gainfully employed because he suffered from constant pain after undergoing a micro discectomy for a disc herniation caused by the work injury. Plaintiff reported lower back pain with a knot on the right side, numbness in the legs, and difficulty sitting for long periods of time. Based on an MRI, Dr. Aranas diagnosed a herniated disc at L4-5 and L5-S1 with radiculopathy. Plaintiff reported a neck and back injury. In May the doctor referred plaintiff to Dr. Tibbs and recommended a stress test. In September plaintiff reported worsening pain. Dr. Aranas diagnosed chronic lumbosacral pain.
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> On June 6, 2004 **Dr. Ira Potter** indicated that plaintiff continued to work with significant back pain for ten to twelve days after the accident. He was taken off work in February 2003. Plaintiff's condition initially improved after the surgery but did not resolve. An MRI taken after he reported increased lower back pain showed two levels of recurrent disc herniation. He underwent a second micro discectomy in September and participated in a six to eight week work hardening program, but his condition failed to improve. In December 2003 plaintiff began treatment with a pain clinic.

He medicated with Percocet. Three epidural steroid injections provided no relief. His neurosurgeon considered lumbar fusion.

Plaintiff suffered from severe low back pain, stiffness, weakness, constant right lower extremity pain with weakness and paresthesia into the foot, intermittent left lower extremity pain with weakness and paresthesia into the foot, along with multiple positional intolerances and limitations with instrumental activities of daily living. Plaintiff had experienced a muscle strain in his upper back three to four years prior to the injury, but the strain resolved after a few weeks of chiropractic treatment. His back was asymptomatic at the time of his injury.

Dr. Potter assigned a 29% whole person impairment caused by the injury. He assigned restrictions and concluded that plaintiff could not return to his former job. Dr. Potter stated in Social Security Disability interrogatories that plaintiff's impairments disabled him from engaging in substantial gainful activities. The doctor said plaintiff met the criteria for impairment for a spine disorder with lumbar spinal stenosis resulting in pseudo claudication, established by findings on appropriate medically acceptable imaging and manifested by chronic nonradicular pain and weakness which resulted in an inability to effectively ambulate. He placed restrictions on plaintiff's ability to lift, stand, walk, sit, push and pull. He concluded that plaintiff could stand for 30 minutes without interruption for a total of two hours per work day. He concluded he could sit for one hour without interruption for a total of three hours per work day. An MRI noted distortion of the posterior margin of the thecal sac on the left at L4-5 and mild deformity on the anterior margin of the thecal sac at L5-S1.

In a June 2004 IME report, **Dr. Timothy Wagner** indicated that x-rays taken in August 2003 revealed nerve root compression and stenosis. Dr. Wagner concluded that if plaintiff underwent physical conditioning and aqua therapy, he would reach maximum medical improvement by August 30, 2004, at which time he would assign a 12% WPI. He did not recommend further EPIs. On November 4th he concluded

that plaintiff had reached MMI whether or not he had undertaken any form of exercise.

Plaintiff was examined by **Dr. William Witt** in February 2005. Dr. Witt diagnosed post laminectomy syndrome, neuropathic pain of the left leg in the distribution of L5 and S1, and lumbar degenerative disc disease. Dr. Witt recommended plaintiff begin on a dosage of 300 mg of Neurontin and increase it to 800 mg per day. In March he recommended weaning plaintiff off the Neurontin in order to avoid seizures. He prescribed Topamax. In September Dr. Witt amended his diagnoses to include lower extremity neuropathic pain, lumbar spinal stenosis, and a history of lumbago. He recommended Lidoderm patches, lumbar facet injections, trigger point injections, and physical therapy. He wanted to wean plaintiff off of Topamax.

Dr. Russell Travis performed an IME at defendant's request in April 2005. He said plaintiff had complaints of low back pain and pain in the lower extremities of undetermined etiology. He said there were no objective findings on neurological evaluation. A March 2005 MRI showed no evidence of residual or recurrent disc herniation. There was no evidence of instability, listhesis or segmental instability. He said plaintiff demonstrated significant symptom magnification and placed him at maximum medical improvement. He assigned a 20% whole person impairment caused by the work injury. He released plaintiff to return to work with permanent medium work restrictions. He recommended an aggressive work hardening and cognitive based physical conditioning program but was concerned that plaintiff would not undertake such a program due to his attitude and tendency to magnify symptoms. Dr. Travis found absolutely no evidence of the need for a spinal cord stimulator and no identifiable process that was generating pain. He recommended the disuse of narcotics.

Plaintiff underwent a psychological evaluation by **Dr. Mark Etscheidt** in May 2005. Plaintiff's most recent MRI showed post surgical changes and scar tissue at L5-S1. There were no new disc protrusions or free fragments. Plaintiff could not sleep in a bed because it worsened his pain. He lay on a broken down couch and slept two to three hours per

night. He said he slept well on a Tempur-Pedic mattress owned by a friend but could not afford to buy one.

Plaintiff was sedentary and could walk for only ten minutes. He had episodes of sadness and crying, had experienced suicidal ideation following the injury, and felt guilty because he could not work. He had financial pressures. He was taking Topamax 100 mg and preferred to avoid the use of dependency-producing medications. Plaintiff had been a good student in high school and was receptive to the idea of going back to school, although there was a possibility that he had an attention deficit disorder or reading disability. Dr. Etscheidt concluded that he was an appropriate candidate for placement of a spinal cord stimulator for pain control. The doctor diagnosed lumbago, post laminectomy syndrome, depressive disorder NOC, anxiety state, unspecified, and other sleep disturbances.

In July **Dr. Witt** diagnosed neuropathic pain in the lower extremities and mechanical pain in the back. He recommended plaintiff's back pain be brought under better control before he obtained a stimulator. **Dr. Witt** wrote a prescription for a Tempur-pedic mattress and Cymbalta. Plaintiff's request for the mattress was denied. **Dr. John Rademaker** said claims that the mattress helped to maintain spine alignment and reduce pain for post-laminectomy syndrome were not based on objective clinical evidence. On August 9th he upheld the denial.

On July 15, 2005, under peer review for the Topamax prescription, Dr. Rademaker indicated that **Dr. Philip Tibbs** had reported a 65% improvement after the second surgery. After that, his physical therapy treatment aggravated his symptoms and he was recommended for referral to a pain clinic. A social security interrogatory in June 2004 written by Dr. Potter mentioned post-traumatic stress disorder as an emotional limitation for plaintiff and chronic pain syndrome as an impairment. In February 2005 Dr. Witt discontinued plaintiff's Neurontin due to unacceptable side effects and prescribed narcotics and muscle relaxants. Plaintiff medicated with Topamax, which also caused adverse side effects. Dr. Tibbs recommended Cymbalta for its anti-

depressant and neuropathic treatment qualities. Dr. Rademaker recommended continuing plaintiff on Topamax.

On May 24, 2005 Dr. Tibbs said he believed plaintiff's main problem was a loss of structural support in the spine subsequent to his injury. He believed plaintiff had developed loss of motion segment integrity which would put him into DRE Lumbar Category IV. He did not think a Functional Capacities Evaluation would be useful.

Deposition of Dr. William Witt. Dr. Witt testified that plaintiff's MRI reports and physical examinations following the second surgery were abnormal. At that time plaintiff was considered to be a good candidate for a spinal cord stimulator to help alleviate the leg pain. When Dr. Witt saw plaintiff in July of 2005, he noted that the Neurontin had helped reduce his leg pain somewhat, but the back pain had increased, possibly because he had been taken off of narcotics. Plaintiff was having difficulty sleeping, so Dr. Witt prescribed a Tempur-pedic mattress. Many of his patients who suffered from lack of sleep due to mechanical low back pain had had success using this mattress.

Plaintiff had sustained disc degeneration, disc injury, and disc herniation that de-stabilized his back. Scar tissue had developed after the surgery that involved the nerve roots in his back, which caused the pain in his legs. He thought plaintiff's mechanical back pain might possibly respond to fusion surgery. He told plaintiff to lose weight and stop smoking, which he did. Dr. Witt said that the mattress, the weight loss, the cessation of smoking, and the cessation of narcotics afforded the best hopes for an outcome that would eliminate the need for a spinal stimulator or fusion surgery. Dr. Witt offered objective evidence of plaintiff's subjective complaints; he said plaintiff had had a disc herniation, two surgical procedures that had altered the geometry of his back, and scar tissue as revealed on an MRI. The physical examination corroborated plaintiff's symptoms. Dr. Witt said the mattress was included in a list of conservative measures which he hoped would work. If they did not, he would recommend the stimulator and ultimately a fusion, if it was necessary.

Dr. Witt testified that plaintiff could not return to his former employment but saw no reason why he could not continue to work without performing heavy lifting if he received some kind of retraining. He recommended a functional capacity evaluation followed by an occupational evaluation. He felt his patients were much better off when they were working. He believed plaintiff to be a good candidate for retraining. He was impressed by plaintiff's high level of motivation, which was the one factor that differentiated successful from non-successful patients. He said that any person who had chronic pain had difficulty focusing.

On cross-examination, Dr. Witt explained that mechanical back pain was aggravated by motion and responded to positioning. The leg pain, on the other hand, was neuropathic and caused by an irritated or damaged nerve, this being the reason why it tended to be constant and did not respond to changes in positioning. He said it was essential for plaintiff to sleep during the night, because the body healed during a particular stage of sleep. He deemed it reasonable to make whatever adjustments were necessary to allow plaintiff to get adequate sleep of the proper quality.

Dr. James Templin performed an IME on May 31, 2005. Plaintiff said his legs collapsed from under him twice several weeks after the first surgery. Dr. Templin diagnosed chronic low back pain syndrome, lumbar disc herniation at L5-S1 and L4-5, recurrent disc herniation at L5-S1, and lumbar radiculopathy. Utilizing the ROM method, he assigned a 19% impairment caused by the work injury and a 3% impairment for pain, which totaled 21%. He assigned restrictions on frequent bending, stooping, kneeling, squatting, crouching, lifting, carrying, climbing, or riding in or on vibratory vehicles for any extended distance or time. He concluded plaintiff did not have the physical capacity to return to his job.

Phil Pack, MS, performed a psychological evaluation at the request of plaintiff on July 20, 2005. Plaintiff reported chronic and acute pain, symptoms of depression, and limitations and restrictions on his activities. He drove a vehicle on occasion and helped his wife with the household

chores. He said his medical treatment had not helped him thus far. Plaintiff believed his history was troubled with some psychological issues. He was able to give very specific examples of someone, whom he believed to be an agent of the insurance company, following or watching him.

Plaintiff's WRAT-3 indicated a high school level of reading. His Mini Mental Status Examination, WRAT-3, and interview did not reflect any signs of malingering. Plaintiff's DPRS showed symptoms of depression and agitation. He did not present with a history of chronic personality dysfunction. Dr. Pack diagnosed depressive disorder NOS on Axis I. He assigned a 10% WPI based on the AMA *Guides*, 2nd edition. He recommended formal psychological counseling aimed at helping plaintiff adjust to circumstantial changes in his life and develop strategies for coping.

Plaintiff told **Dr. Ralph Crystal**, who performed a vocational evaluation in August 2005 at defendant's request, that he was not supposed to drive because he was taking medication. He used a cane when he went out of the house. Plaintiff reported that he had a learning disability in reading and difficulty with comprehension. The difficulty with comprehension had worsened since the injury. Plaintiff had become anxious and depressed since the injury but had developed no other impairments. He did not feel capable of returning to work or attending school due to severe pain.

The Differential Aptitude Test Battery results indicated plaintiff would do best in a job related to a skilled trade learned on the job or through a formal educational program at a technical or community college. Dr. Crystal recommended educational remediation in spelling and arithmetic. Plaintiff's dexterity test results indicated he could use his hands for fine and gross bilateral dexterity work activities. He was of average intelligence and read at a level that was necessary for the reading and following of instructions, technical information, and reports related to a skilled trade. He was capable of performing the positions of clerical dispatcher, inventory clerk, and shipping and receiving worker. He demonstrated a high interest in jobs related to manual labor and problem solving work activities. Plaintiff's skills as a mine equipment operator would transfer to a range of

equipment operation jobs at the light level of exertion. He had other vocational skills that were transferable. Dr. Crystal concluded that plaintiff's academic abilities were not affected by his injury; therefore, plaintiff was not disabled from employment.

Deposition of Dr. Ralph Crystal. Dr. Crystal interpreted Dr. Potter's 2004 report to mean that plaintiff could do sedentary work but would need to change positions every thirty minutes and walk around for five minutes afterward. Plaintiff was able to sit for thirty minutes during the testing before having to change positions.

On cross examination, Dr. Crystal said that he would recommend low stress entry level types of work activities at a moderate level. He posited the possibility that plaintiff could do a reduced range of sedentary bench type jobs that would allow him to alternate positions during an eight hour day. He said the *DOT* was a starting point in terms of classifying jobs. Many jobs that were classified as sedentary allowed people to sit or stand at will. He said that if plaintiff had to miss work at an entry level job more than two whole days a month, whether due to pain or the need for medical treatment, it would become problematic. He said that if plaintiff truly experienced a level of pain that interfered with his attention and concentration, then there would be no work he could perform on a full-time basis, but Dr. Crystal did not acknowledge that plaintiff suffered from pain that reached that level of severity.

Dr. William Weikel performed a vocational evaluation at plaintiff's request on August 18, 2005. Plaintiff said he was afraid to drive while on medication and drove an average of five miles per week or less. Plaintiff walked stiffly and with a limp. He was trying to wean himself from pain medication. He had obtained a prescription for nerve medication but had not filled it. Plaintiff said he could sit for fifteen minutes and stand for ten minutes. He said he mowed the grass occasionally with a riding mower. He felt that his medical condition had improved little, if any, during the previous two and a half years. Dr. Weikel concluded that plaintiff had suffered a 100% loss of access to the labor market and was unable to work. He posited the possibility

that if a cord stimulator or something else reduced plaintiff's pain, rehabilitation for easier work might then become possible.

Dr. Douglas Ruth performed a psychiatric evaluation in October 2005 at plaintiff's request. He said that an assessment of permanent psychiatric impairment could not be made at that time because plaintiff was not under treatment for his psychiatric symptoms, and therefore, had not reached maximum medical improvement. He provided a hypothetical assessment of plaintiff's psychiatric functional impairment based on his symptoms and the unlikely assumption that he would not improve. He assigned, under those assumptions, a class 2, mild psychiatric impairment of 10%. He apportioned 6% to causes that arose prior to and were unrelated to the injury; those were, specifically, prior emotional symptoms and a learning disorder that caused impaired verbal comprehension. He felt that both impairments should improve by 50% with treatment.

He found some evidence of symptom exaggeration which arose from a sense of desperation that caused plaintiff to worry that he was not effectively conveying the seriousness of his situation. His impairment estimate arose from psychiatric symptoms and did not include impairment directly related to physical functional limitations or pain. He concluded that plaintiff was restricted from work that required a high level of literacy, but that the restriction was unrelated to the injury and would persist indefinitely. He felt that plaintiff's current state of irritability would probably interfere with a job that required frequent or sustained interaction with others. His episodic panic attacks would interrupt his activity and make it impractical for him to work in a hazardous environment or operate a vehicle consistently. Those two restrictions were caused by his injury and would probably improve after six months of psychiatric treatment. Plaintiff's symptoms were unlikely to improve without treatment. The doctor recommended a psychiatric consultation that would render a prescription for medication and follow up visits sufficient to maintain the medication for approximately two years. He diagnosed major depression, single episode, due to back and lower extremity pain; anxiety disorder NOS; and learning disorder NOS. Plaintiff's score

> on the MAL weighed against malingering. Three other tests were compatible with sufficient effort.

Pursuant to this evidence, the ALJ assigned Jarrell a 21% physical impairment rating and a 4% psychological impairment rating, resulting in a total impairment rating of 24%. He was awarded permanent partial disability in the amount of $354.86 per week beginning May 10, 2005, and continuing for 425 weeks. The Board affirmed, and this petition for review followed.

At the outset, we note that a workers' compensation claimant bears the burden of proving his claim. *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735, 736 (Ky.App. 1984). When a claimant is unsuccessful, the question on appeal is "whether the evidence was so overwhelming, upon consideration of the entire record, as to have compelled a finding in his favor." *Id.* Compelling evidence is that which is "so overwhelming that no reasonable person could reach the same conclusion as the ALJ." *Toyota Motor Mfg., Ky., Inc. v. Czarnecki*, 41 S.W.3d 868, 871 (Ky.App. 2001). Further, this court is to correct the Board only when "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." *Western Baptist Hospital v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992).

Jarrell's first argument is that the ALJ erred by finding him partially rather than totally disabled. We disagree.

A claimant who has a permanent partial or a permanent total disability due to a work-related injury is entitled to a permanent disability rating. KRS

342.0011(11)(b); KRS 342.0011(11)(c). However, an employee with a permanent partial disability retains the ability to work, KRS 342.0011(11)(b), while an employee with a permanent total disability "has a complete and permanent inability to perform any type of work as a result of an injury[.]" KRS 342.0011(11)(c).

We summarize below the evidence that the ALJ considered in finding that Jarrell was only partially disabled:

- Dr. Ira Potter assigned a 29% whole-person impairment rating and concluded that Jarrell could not return to his former job. He also placed restrictions on Jarrell's ability to lift, stand, walk, sit, push and pull. He further concluded that Jarrell could stand for 30 minutes without interruption (two hours per work day) and sit for one hour without interruption (three hours per work day).
- Dr. Russell Travis assigned a 20% whole-person impairment rating and released Jarrell to return to work with permanent medium work restrictions. He recommended an aggressive work hardening and cognitive-based physical conditioning program but was concerned that Jarrell would not undertake such a program due to his attitude and tendency to magnify symptoms.
- While Dr. Ralph Crystal, a vocational expert, recommended Jarrell participate in educational remediation in spelling and arithmetic, he opined that Jarrell was of average intelligence and could read at a level necessary for working in a skilled trade. He recommended low stress

entry level types of work activities at a moderate level. He also opined that if Jarrell experienced pain that interfered with his attention and concentration, Jarrell would be fully disabled; however, he did not believe Jarrell's pain had reached that level.

- Vocational expert Dr. William Weikel opined that Jarrell had suffered a 100% loss of access to the labor market and was unable to work.

Further, the ALJ analyzed this evidence as follows:

> The relevant medical opinions range from that of Dr. Travis, who opined that plaintiff remained capable of returning to work so long as he could alternate between sitting and standing and lift no more than 50 pounds, to Dr. Potter, who imposed very severe restrictions on plaintiff's ability to return to work. The defendant also relies on the vocational evaluation of Ralph Crystal. He evaluated plaintiff's occupational possibilities using the various restrictions imposed by the physicians of record. Dr. Crystal concluded that there are jobs available to plaintiff within any of the restrictions chosen. Conversely, plaintiff's vocational expert, Dr. Weikel, concluded plaintiff has an effective loss of occupational opportunities of 100%.
>
> Having considered all the evidence of record, the Administrative Law Judge is ultimately persuaded that there are some jobs to which plaintiff could return on a regular and sustained basis, even with his current limitations and pain and, as such, he is not permanently, totally disabled. To be sure, plaintiff is quite limited in his occupational functioning with his current condition. But he does have a high school education and, according to Dr. Travis, his current diagnostic testing does not show significant enough abnormalities to prevent plaintiff from returning to any and all employment on a regular and sustained basis. Indeed, plaintiff appeared quite intelligent at the hearing and made such a good impression that the Administrative Law Judge is able to accept Ralph Crystal's vocational opinion that there are jobs to which plaintiff can return even if one considers the most severe

> restrictions of Dr. Potter. Based on the restrictions imposed by all physicians, plaintiff is not able to return to the kind of work he performed at the time of the injury, thereby requiring a 3 multiplier in an award of permanent, partial disability. However, based on the foregoing analysis, the Administrative Law Judge does not believe plaintiff is totally disabled at this time.

Although the ALJ also ordered that Jarrell subsequently undergo a vocational rehabilitation assessment, we are not persuaded that the evidence compelled a finding that Jarrell could reenter the workforce only after vocational rehabilitation. Instead, it is clear from the ALJ's language that he found that Jarrell could currently return to work without the need for vocational rehabilitation as "there are some jobs to which [Jarrell] could return on a regular and sustained basis, even with his current limitations and pain and, as such, he is not permanently, totally disabled."

Further, given the conflicting evidence, the ALJ was not compelled to reach a different conclusion. On the contrary, as fact finder the ALJ "may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof." *Magic Coal Co. v. Fox*, 19 S.W.3d 88, 96 (Ky. 2000). More specifically, we are not persuaded by Jarrell's argument that the ALJ speculated as to whether Jarrell could return to work. As set forth above, although Dr. Crystal recommended that Jarrell participate in educational remediation in spelling and arithmetic, he opined that Jarrell currently could read at a level necessary for working in a skilled trade. The ALJ also relied upon Dr. Crystal's conclusion that there were jobs available to Jarrell within each of the doctors' stated

restrictions. Given the extensive conflicting evidence, we cannot say that the ALJ erred by finding that Jarrell is partially rather than totally disabled.

Next, Jarrell argues that the ALJ erred by failing to award him additional TTD benefits as he had not yet reach maximum medical improvement (MMI) for his psychological condition at the time of the award. We disagree.

We first note that the parties stipulated that Czar paid Jarrell TTD benefits in the amount of $510.33 per week from February 14, 2003, through May 9, 2005. The ALJ awarded Jarrell those benefits as already paid, and that decision has not been appealed. Jarrell argues, however, that he is entitled to additional TTD benefits as he has neither been treated nor reached MMI for his psychological condition. As the Kentucky Supreme Court recently explained, in order to be eligible for TTD, KRS 342.0011(11)(a) requires a claimant to prove that he has reached neither MMI nor a level of improvement that would permit a return to employment. *Double L Construction v. Mitchell*, 182 S.W.3d 509, 513 (Ky. 2005). The phrase "return to employment" has been construed as meaning a return to the type of work that was customary for the claimant or the type of work the claimant was performing at the time of the injury. *Central Ky. Steel v. Wise*, 19 S.W.3d 657, 659 (Ky. 2000).

Here, the ALJ held that even if Jarrell was not at MMI regarding his psychological condition, he was not entitled to any additional TTD benefits because there was no evidence that this condition alone ever prevented him from returning to his regular or customary employment. Upon Jarrell's request for additional findings, the ALJ stated that the doctors could not have assigned impairment ratings "unless each believed

plaintiff was at MMI or, at the very least, that plaintiff's impairment rating would not change significantly even after reaching MMI." Since Jarrell produced no evidence that his psychological condition alone ever prevented him from working, the evidence supports a finding that he has always been at a level of psychological functioning that would permit him to return to his employment. As an award of TTD must be based upon a finding of disability, *Roberts Bros. Coal Co. v. Robinson*, 113 S.W.3d 181, 183 (Ky. 2003), the ALJ did not err by failing to award Jarrell additional TTD benefits for his psychological condition.

Finally, Jarrell argues that the ALJ erred by accepting Dr. Ruth's psychological impairment rating, which excluded 6% of his 10% psychiatric impairment rating as being prior active impairment. We agree.

In October 2005, Dr. Ruth reported that

> Mr. Jarrell is not under treatment for his psychiatric symptoms. Therefore, he is not at a state of maximum medical improvement. According to instructions in the AMA Guides to the Evaluation of Permanent Impairment an assessment of permanent psychiatric impairment cannot yet be made.
>
> If a hypothetical assessment of his psychiatric impairment is desired, based upon his current symptoms and psychiatric functional impairment, and given the (unlikely) assumption that he would not improve and, therefore, would then be at the state of maximum medical improvement, the following estimate is offered[.]

Dr. Ruth went on to opine that Jarrell hypothetically had a 10% psychiatric impairment, 6% of which

> arose prior to and unrelated to the injury. This arises from some preceding emotional symptoms as well as a (preceding) learning disorder causing impaired verbal comprehension. That six percent is unlikely to improve with treatment. The remaining impairment, or four percent, is due to symptoms arising as a result of the injury. This impairment is likely to improve with treatment. By best estimate this should undergo an approximately a [sic] 50% reduction with treatment.
>
> Again, this estimate is hypothetical given that Mr. Jarrell has not reached a state of maximum medical improvement regarding his psychiatric symptoms.

The extent of a worker's impairment and the proper interpretation of the *Guides* are medical questions. *Kentucky River Enterprises, Inc. v. Elkins*, 107 S.W.3d 206, 210 (Ky. 2003). Where medical experts differ in their interpretation of the *Guides*, it is the ALJ's function to weigh the conflicting testimony and decide which expert to rely upon. Here, while the ALJ recognized in his summary of the evidence that Dr. Ruth's impairment rating was based upon a hypothetical assessment, he still accepted Dr. Ruth's impairment rating. As the only other evidence besides this hypothetical impairment rating that the ALJ discussed with regard to Jarrell's psychiatric impairment rating was Dr. Pack's assessment, no reasonable person would fail to be persuaded by Dr. Pack's assessment, and a finding in Jarrell's favor is compelled, *Magic Coal Co. v. Fox*, 19 S.W.3d 88, 96 (Ky. 2000). Because of this conclusion, we do not reach the issue of whether Dr. Ruth made the requisite findings for the ALJ to carve out 6% of Jarrell's 10% psychological impairment rating.

The Workers' Compensation Board's opinion is affirmed in part and vacated and remanded in part.

ALL CONCUR.

BRIEF FOR APPELLANT:

Thomas W. Moak
Prestonsburg, Kentucky

BRIEF FOR APPELLEE CZAR COAL CORPORATION:

Walter W. Turner
Lexington, Kentucky