OPINION ENTERED: May 14, 2012

CLAIM NO. 200997191

AARON NICHOLSON PETITIONER

VS. **APPEAL FROM HON. RICHARD JOINER, ADMINISTRATIVE LAW JUDGE**

MULTIBAND CORPORATION RESPONDENTS

OPINION AFFIRMING

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BEFORE: ALVEY, Chairman; STIVERS and SMITH, Members.

ALVEY, Chairman. Aaron Nicholson (Nicholson) seeks review of the opinion and award on remand rendered January 4, 2012 by Hon. Richard M. Joiner, Administrative Law Judge ("ALJ") denying his psychological injury claim and an additional period of temporary total disability ("TTD") benefits for that condition against Multiband Corporation ("Multiband"). Nicholson also appeals from the order denying his petition for reconsideration entered February 2, 2012.

On appeal, Nicholson argues he suffered from a psychological injury as a result of his work-related, low back injury, and he is entitled to additional TTD and medical benefits. Nicholson also argues the ALJ erroneously failed to consider whether he was entitled to permanent total disability benefits.

It is undisputed Nicholson slipped and fell on ice on February 3, 2009 as he was carrying equipment to load onto his satellite television installation truck. Nicholson fell on his back, striking his head, causing an injury to his low back necessitating treatment. The ALJ ultimately determined Nicholson was entitled to a period of TTD benefits, permanent partial disability ("PPD") benefits based upon an 8% impairment rating increased by the 3 multiplier pursuant to KRS 342.730(1)(c)1, and medical benefits for his low back injury. The ALJ declined to award benefits for Nicholson's psychological injury, which is the subject of this appeal.

Nicholson underwent a vocational evaluation at Gateway Community and Technical College on May 11, 2010. The report from that evaluation stated:

> Testing results show Mr. Nicholson is currently experiencing a great deal of tension and anxiety. He suffers from feeling inadequate and less worthy of others. In addition, he feels as

> though he cannot cope when things appear to keep going wrong for him. He is finding it difficult to be optimistic and hopeful about his prospects. . . . Results suggest he would benefit from personal counseling . . . .

Testing performed as part of that evaluation demonstrated he exhibited reasoning skills at the second year of college level, math skills at the seventh grade level, language reading skills at the ninth to twelfth grade level, and a low aptitude on intelligence testing. The evaluation noted Nicholson could be successful in a number of educational and training programs. Based upon the vocational report, Nicholson amended his claim to include the allegation of a psychological injury.

Dr. Conte performed a vocational evaluation at Multiband's request on August 9, 2010. His report was filed as evidence, and he subsequently testified by deposition on August 16, 2010. Dr. Conte administered the reading and math portions of the Wide Range Achievement Test demonstrating Nicholson functioned at the high school level. Dr. Conte stated Nicholson advised he earned good money working as a disc jockey on the weekends and indicated he had rebuilt computers for people. Based upon the restrictions imposed by Dr. Kelly, he opined Nicholson could perform sedentary and light work. Based upon the

functional capacity evaluation, he opined Nicholson could perform a full range of sedentary, light and some medium work. Based upon Dr. Best's report, he opined Nicholson could perform a full range of the jobs he could have performed before the accident. Dr. Conte opined Nicholson could not return to his previous work at the lumberyard, steel mill or Multiband due to his restrictions.

Dr. Noelker, a psychologist, evaluated Nicholson on September 2, 2010. He stated Nicholson engaged in little daily activity, had trouble sleeping and worried about returning to gainful employment. He observed Nicholson had a flat affect and depressed mood. He noted Nicholson lacked the ability to concentrate and pay attention for a reasonable amount of time. He diagnosed Nicholson with adjustment disorder and depressed mood with a chronic pain disorder. Dr. Noelker opined the conditions were "the result of a pre-existing, dormant condition brought into disabling reality" by his work injury. Dr. Noelker opined Nicholson had a poor prognosis for a return to competitive employment and to his pre-injury psychological status. He stated Nicholson is not capable of returning to the labor market in any capacity, and recommended supportive counseling and medication for depression/anxiety. He assessed a 35% impairment rating

based upon the American Medical Association, Guides to the Evaluation of Permanent Impairment, 2nd Edition ("AMA Guides").

Dr. Garst, a psychiatrist, evaluated Nicholson at Multiband's request on September 16, 2010. His report was filed as evidence, and he subsequently testified by deposition on October 17, 2010. Dr. Garst stated Nicholson advised he was participating in a wide variety of activities including fixing computers, editing video/audio, preparing video montages, mowing his aunt's lawn, building and repairing computers and working as a disc jockey. Nicholson stated he sleeps during the day so he can work on computers at night. Nicholson also advised of trouble paying rent and child support, and had been investigated by the IRS.

Dr. Garst noted Nicholson had few psychiatric complaints. He complained of decreased energy, sleep disruption, fluctuant weight and anxiety. Dr. Garst noted at the time of the evaluation, Nicholson was alert, oriented, appeared comfortable and cooperative displaying a full range of affect. Dr. Garst noted Nicholson appeared joyful at times, but never tearful. He also did not see any signs of psychomotor retardation.

Dr. Garst diagnosed Nicholson as having adjustment disorder with depressed mood, which did not appear to be chronic. Dr. Garst stated:

> The primary cause seems to be related to a pre-existing back condition he has had for many years (first diagnosed in the 1990s). Other contributing factors include, conflict over child support and with the IRS as well as a reported incident of slipping and falling on ice.

He assessed a 0% impairment rating for the psychological condition pursuant to the AMA Guides, 2nd Edition and found he did not need any psychological restrictions. At the deposition, Dr. Garst confirmed his psychological opinion. Dr. Garst disagreed with Dr. Noelker's opinion Nicholson had moderate impairment and noted few adjustment disorders are chronic. Dr. Garst also testified he sometimes used psychotherapy to treat adjustment disorder and, in certain circumstances, prescribed antidepressant medication. In this case, Dr. Garst testified he would not recommend medication and psychotherapy "could probably help just about any of us, but I don't think that this gentleman requires it."

Nicholson testified by deposition on July 21, 2010, and again at the hearing held December 13, 2010. At the time of his deposition, Nicholson resided in

Cincinnati, Ohio, where he was living at the time of the accident. At the time of the hearing, Nicholson was living in Alabama and explained he was “in between homes” due to financial difficulties. Nicholson is a high school graduate who attended one and a half years at a junior college in Alabama. He testified he only went to college to play basketball. Nicholson’s prior work experience includes working at a lumber yard, carpet manufacturing facility, steel mill, as an inspector in a mattress factory, and part-time disc jockey.

Nicholson began working for JBM in 2005, which later changed its name to Multiband, as a satellite dish installation technician. His duties with Multiband involved lifting, climbing on roofs and ladders, bending, twisting, stooping and crawling. Nicholson testified he pulled a muscle in his low back in 1993 prior to his employment with JBM, for which he received brief treatment but missed no work. Nicholson experienced no other problem with his back before February 3, 2009.

Nicholson testified on February 3, 2009, he slipped and fell on ice when loading a truck with DVRs in Multiband’s parking lot, landing flat on his back. He initially felt pain on the back of his head, lower back, upper back near the right shoulder blade and right

shoulder. Nicholson received treatment from Saint Elizabeth Hospital and currently treats with Dr. John Kelly for pain management of his low back. He saw Dr. Grefer once for his low back at Multiband's request. He testified both at his deposition and at the hearing he continues to have pain, numbness, stiffness, and spasm in his low back since February 3, 2009. Nicholson has not returned to work with Multiband since the slip and fall.

Nicholson testified he is able to drive and he works on computer equipment. He also prepares video montages and music mixes. Nicholson also testified he has worked as a disc jockey on a couple of occasions since his injury. Nicholson testified he cannot perform any of his past work, yard work or house work.

Nicholson has not undertaken any of the recommended retraining or educational classes because he cannot afford to do so. Nicholson confirmed he was anxious and nervous about taking the required tests for the vocational rehabilitation evaluation with Gateway Community Technical College. Nicholson testified he feels he is going through a great deal of tension and anxiety, but has not had any psychological counseling. He also testified he believed counseling along with vocational rehabilitation would help him find a job. He disputed Dr. Garst's

psychological evaluation by testifying he cannot sleep at night due to his back pain and spasms. He also testified his financial difficulties with child support and the IRS all began after he was injured and unable to return to work.

In an opinion and order dated January 20, 2011, the ALJ found: 1) TTD payable from February 4, 2009 to November 17, 2009, the day Dr. Kelly found Nicholson had obtained medical maximum improvement ("MMI") for his low back; 2) he was not permanently totally disabled because, although he may be precluded from performing some work he had done in the past, neither restrictions from Dr. Grefer or Dr. Kelly demonstrate a complete and total inability to perform work, and; 3) he is entitled to PPD benefits for his low back based on an 8% impairment rating and increased by the 3 multiplier pursuant to KRS 342.730(1)(c)1. In addressing whether Nicholson's disability or impairment was proximately caused by the injury, the ALJ stated:

> **This is a thornier question. Mr. Nicholson has too many other things going on in his life to attribute a significant portion of his psychological condition to the injury that he sustained on February 3, 2009.** His physical condition does appear to be the result of the interaction of the slip and fall with the previously dormant nondisabling condition of the lumbar spine such that the two together

> produce an impairment and the need to restrict activity. Therefore, I conclude that the disability and impairment relating to the physical difficulties are proximately caused by the injury. (Emphasis added)

Nicholson's petition for reconsideration argued the uncontroverted medical evidence demonstrated Nicholson suffered from an adjustment disorder as a result of the work-related injury, is entitled to an additional period of TTD for his psychological injury and is permanently totally disabled. The ALJ denied Nicholson's petition for reconsideration on March 28, 2011. Nicholson appealed the ALJ's January 20, 2011 opinion and order and the March 28, 2011 order on reconsideration to this Board. In vacating and remanding the opinion and order on reconsideration, this Board concluded:

> That said, it is apparent the ALJ did not specifically address the issue of whether "the causation issues relates[sic] to the psychological claim" which was preserved at the Benefit Review Conference and Hearing, and also outlined as a preserved issue in the opinion and order. The claim for psychological injury was simply not sufficiently addressed. The ALJ stated in the opinion and award, "Mr. Nicholson has too many other things going on in his life to attribute a significant portion of his psychological condition to the injury that he sustained on February 3, 2009". **However, he stops short of determining whether Nicholson has a work-related**

psychological condition, is entitled to TTD, PPD and medical benefits for any psychological injury, or if indeed he may be permanently totally disabled due to the combined effects of the physical and psychological injuries. We therefore remand this matter to the ALJ for a determination pertaining to the compensability of the psychological claim, and duration of same, and to make a determination pertaining to future treatment for that condition as required by FEI Installation, Inc. v. Williams, 214 S.W.3d 313 (Ky. 2007).

Emphasis added.

As it applies to TTD benefits, on appeal, Nicholson argues the ALJ erred in finding he was only entitled to TTD benefits from February 4, 2009 through November 17, 2009, despite Dr. Kelly's assessment he had reached MMI on November 17, 2009. KRS 342.0011(11)(a) defines temporary total disability 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".

The above definition has been determined by our courts of justice to be a codification of the principles originally espoused in W.L. Harper Construction Company v. Baker, 858 S.W.2d 202, 205 (1993), wherein the Court of Appeals stated generally:

> TTD is payable until the medical evidence establishes the recovery process, including any treatment reasonably rendered in an effort to improve the claimant's condition, is over, or the underlying

> condition has stabilized such that the claimant is capable of returning to his job, or some other employment, of which he is capable, which is available in the local labor market. Moreover, . . . the question presented is one of fact no matter how TTD is defined.

Id. at 205.

In Central Kentucky Steel v. Wise, 19 S.W.3d 657 (Ky. 2000), the Kentucky Supreme Court further explained that "[i]t would not be reasonable to terminate the benefits of an employee when he is released to perform minimal work but not the type that is customary or that he was performing at the time of his injury." Id. at 659. In other words, where a claimant has not reached MMI, TTD benefits are payable until such time as the claimant's level of improvement permits a return to the type of work he was customarily performing at the time of the traumatic event.

In Magellan Behavioral Health v. Helms, 140 S.W.3d 579, 581 (Ky. App. 2004), the Court of Appeals instructed that until MMI is achieved, an employee is entitled to a continuation of TTD benefits so long as he remains disabled from his customary work or the work he was performing at the time of the injury. The court in Magellan, supra, stated:

> In order to be entitled to temporary total disability benefits, the claimant must not have reached maximum medical improvement and not

> have improved enough to return to work.

Id. at 580-581.

In Double L Const., Inc. v. Mitchell, 182 S.W.3d 509, 513-514 (Ky. 2005), the Supreme Court further elaborated with regard to the standard for awarding TTD as follows:

> As defined by KRS 342.0011(11)(a), there are two requirements for TTD: 1.) that the worker must not have reached MMI; and 2.) that the worker must not have reached a level of improvement that would permit a return to employment.

The ALJ found Nicholson had reached MMI as of November 17, 2009, the date assessed by Dr. Kelly, his treating physician. If on remand the ALJ determines Nicholson is not entitled to any additional period of TTD benefits based upon a psychological condition, we find no flaw with the TTD award. However, if the ALJ determines Nicholson is entitled to an additional period of TTD benefits based upon consideration of a psychological condition, the ALJ is directed to determine the appropriate period for which such benefits are to be paid.

Accordingly, the opinion and award rendered January 20, 2011 by Hon. Richard M. Joiner, Administrative Law Judge, and the order ruling on the petition for reconsideration rendered March 28, 2011, are hereby **VACATED** and **REMANDED** for further proceedings consistent with the views expressed in this opinion.

In his opinion and award on remand dated January 4, 2012, the ALJ stated as follows:

> In my decision rendered on January 20, 2011, I found that Mr. Nicholson has an 8% impairment as a result of the injury of February 3, 2009, and that he did not retain the physical capacity to perform the type of work he was doing at the time of his injury. In considering the psychological claim, I was not persuaded that the evidence demonstrated a sufficient relationship between the physical injury and the psychological condition alleged to warrant an award of benefits for the psychological condition. The plaintiff appealed this decision to the Workers' Compensation Board. In its decision of October 19, 2011, the Board vacated my decision and remanded the claim to determine the compensability of the psychological claim, the duration of same, and to determine the compensability of future treatment for that condition, citing *FEI Installation v. Williams, 214 S.W.3d 313 (Ky. 2007).* Although the Board's opinion seemingly vacates the entire decision, because the remand directions relate only to the psychological portion of the claim, I assume that I can retain that portion of the decision relating to the physical injury and only address the psychological condition as directed.
>
> The issues to be addressed on remand are: Is the disability or impairment proximately caused by the injury? This is qualified with the statement in the BRC Order, "The causation issue relates to the psychological claim." The evidence bearing on this issue comes from the testimony of the claimant, the

> psychological reports of Dr. Robert Noelker dated 9/2/10 and 9/16/10, the medical report of Dr. Daniel R. Garst dated 9/16/10, and the deposition of Dr. Daniel Garst taken on 10/7/10. To a lesser extent the reports of Dr. Kelly offer some evidence on this issue because of the absence of findings.
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> The evidence remains the same as it was at the time of the initial decision. With respect to the claimed psychological condition, I find that the assessment of Dr. Garst is more credible when he states, "Using the 5th Edition of the AMA Guides to Evaluation of Permanent Impairment, I would assign class I- no impairment from a psychological perspective alone. This employs chapter 14, table 14-1." Dr. Garst diagnosed an adjustment disorder with depressed mood. He believed that the primary cause was a pre-existing back problem that he has had for a long time. The report of Dr. Noelker finding a 35% impairment grossly overstates Mr. Nicholson's condition. There was no period of time that the adjustment disorder with depressed mood prevented Mr. Nicholson from working. Therefore, there is no additional period of temporary total disability related to the psychological condition.

In his petition for reconsideration from the opinion and award on remand, as with his pending appeal to this Board, Nicholson puts forth the same arguments: 1) the uncontroverted medical evidence demonstrated Nicholson suffered from an adjustment disorder as a result of the work-related injury; 2) he is entitled to an additional period of TTD for his psychological injury; and 3) he is

permanently totally disabled. The ALJ denied Nicholson's petition for reconsideration on February 2, 2012 and stated as follows:

> The first is whether or not the Administrative Law Judge adequately addressed the issue of whether he suffered a psychological injury as a result of his work related injury. I believe that I adequately addressed that question in the Opinion and Award on Remand. While Mr. Nicholson may have an adjustment disorder, as found by Dr. Garst, it does not rise to the level of requiring medical treatment nor does it produce an impairment. I inferred from the testimony of Dr. Garst that psychotherapy might help Mr. Nicholson (as it might help all of us), but that it is not required. (Deposition of Dr. Daniel Garst, page 10-11). I am also not persuaded that the adjustment disorder was caused by the injury of February 3, 2009.
>
> Second, the plaintiff raises the question of whether the psychological injury requires an additional period of temporary total disability benefits. I found that it does not. I have reviewed the evidence again and remain unpersuaded that there is any period of temporary total disability benefits that arise out of the adjustment disorder alleged. Temporary total disability benefits are payable when, as a result of the injury an employee has not reached maximum medical improvement from an injury and has not reached a level of improvement that would permit a return to employment. I am not persuaded that there was any time that the adjustment disorder alleged produced an inability to return to employment.

Third, the plaintiff asserts that I insufficiently determined that Mr. Nicholson is not permanently and totally disabled. In order to be found permanently totally disabled, the employee must demonstrate that he has a condition, due to an injury, that produces a permanent disability rating and "has a complete and permanent inability to perform any type of work as a result of an injury…" There are some exceptions that do not apply here. Those exceptions are that total disability shall be irrebuttably presumed to exist for an injury that results in:

> 1. Total and permanent loss of sight in both eyes;
> 2. Loss of both feet at or above the ankle;
> 3. Loss of both hands at or above the wrist;
> 4. Loss of one (1) foot at or above the ankle and the loss of one (1) hand at or above the wrist;
> 5. Permanent and complete paralysis of both arms, both legs, or one (1) arm and one (1) leg;
> 6. Incurable insanity or imbecility; or
> 7. Total loss of hearing;[sic]

An adjustment disorder does not rise to the level of showing a complete and permanent inability to perform any type of work as a result of an injury. Further, there is no impairment associated with the adjustment disorder.

I do not find patent errors appearing on the face of the Opinion and Award on

> Remand. On this basis, the petition for reconsideration is **DENIED.**

As the claimant in a workers' compensation proceeding, Nicholson had the burden of proving each of the essential elements of his cause of action including causation/work-relatedness of the alleged injuries, entitlement to TTD benefits and permanent total disability benefits. Burton v. Foster Wheeler Corp., 72 S.W.3d 925 (Ky. 2002). Since Nicholson was unsuccessful before the ALJ regarding causation/work-relatedness and TTD benefits in regards to his alleged psychological injury, the question on appeal is whether the evidence compels a finding in his favor. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). Compelling evidence is defined as evidence so overwhelming no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985).

In rendering a decision, KRS 342.285 grants the ALJ 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). The ALJ may draw reasonable inferences from the evidence, 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. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). Although a party may note evidence supporting a different outcome than reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). The function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings are so unreasonable they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 200). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to weight and credibility or by noting reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 79 (Ky. 1999).

That said, we find the evidence does not compel a finding Nicholson's adjustment disorder was causally related to his low back injury sustained on February 3, 2009. The ALJ found the expert opinion of Dr. Garst more credible than that of Dr. Noelker. At the time of the psychological evaluation, Dr. Garst noted Nicholson had few psychiatric complaints. He diagnosed Nicholson as having adjustment disorder with depressed mood, which did not

appear to be chronic. He opined his condition seemed to be primarily caused by a pre-existing back condition, but he also noted other contributing factors such as the February 3, 2009 slip and fell and various financial difficulties. Pursuant to the AMA Guides, Dr. Garst assigned a class I, or no impairment rating for his psychological condition. Dr. Garst later confirmed his opinion at the deposition and also explained why he disagreed with Dr. Noelker. The ALJ specifically found Dr. Noelker's assessment of a 35% impairment rating to be a gross overstatement of Nicholson's condition. The ALJ found while Nicholson may well suffer from adjustment disorder as found by Dr. Garst and Dr. Noelker, it was not caused by the February 3, 2009 injury, does not rise to a level of impairment nor require medical treatment.

Similarly, the evidence regarding Nicholson's alleged psychological condition does not compel a finding of additional TTD, future medical benefits or permanent total disability. TTD benefits are payable when: 1) the worker must not have reached MMI; and 2) the worker must not have reached a level of improvement that would permit a return to employment. Double L Const., Inc. v. Mitchell, 182 S.W.3d 509, 513-514 (Ky. 2005). In the case *sub judice,* the ALJ found there was no period of time

Nicholson's adjustment disorder with depressed mood prevented him from working. This finding is supported by the evidence of record, mainly Dr. Garst. Dr. Garst opined a 0% impairment rating and found no need for any psychological restrictions. The evidence supported the finding of no future medical treatment, by way of Dr. Garst's testimony who would not recommend medication or psychotherapy in this particular circumstance. Finally, the ALJ's finding of no permanent total disability is affirmed since his finding of no permanent impairment rating and ability to perform some type of work is supported by substantial evidence in the record and does not compel a different result.

We believe the ALJ's decision finding a lack of causation between Nicholson's psychological condition and the February 3, 2009 work-related low back injury, as well as his determination Nicholson was not entitled to additional TTD benefits and is not permanently and totally disabled is supported by substantial evidence, and no contrary result is compelled.

Accordingly, the ALJ's decision on remand rendered January 4, 2012, and order on reconsideration entered February 2, 2012 are hereby **AFFIRMED**.

ALL CONCUR.

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