Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: April 17, 2014

CLAIM NO. 200169052

JEFF PACE PETITIONER

VS. **APPEAL FROM HON. GRANT S. ROARK, ADMINISTRATIVE LAW JUDGE**

KENTUCKY DARBY COAL CO., INC.
and HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

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

RECHTER, Member. Jeff Pace ("Pace") appeals from the January 6, 2014 Order on Petition for Reconsideration rendered by Hon. Grant S. Roark, Administrative Law Judge ("ALJ"). The sole issue on appeal is whether the ALJ erred in finding Pace reached maximum medical improvement ("MMI")

by January 2006. Because the ALJ's determination is supported by substantial evidence, we affirm.

Pace was injured on November 9, 2001, while operating a continuous miner machine when a rock fell on him. He suffered multiple fractures of his pelvis and back, as well as other internal injuries. His employer, Kentucky Darby Coal Co., Inc. ("Kentucky Darby"), paid temporary total disability ("TTD") benefits from November 15, 2001 through May 9, 2011.

Pace submitted the report of Dr. Martin Fritzhand who performed an independent medical examination ("IME") on October 14, 2011 at Kentucky Darby's request. Dr. Fritzhand reviewed extensive medical records from Drs. Milam, Eubank, Montenegro and Colton, and from Appalachian Orthopedic Associates, Appalachian Regional Hospital in Harlan, Johnson City Medical Center, North Side Hospital, Clover Fork Clinic, and Vanderbilt University Medical Center. Additionally, he reviewed reports from Investigations Unlimited and notes from BRI Case Management. Dr. Fritzhand was also provided diagnostic studies and performed a physical examination.

Dr. Fritzhand opined Pace reached MMI by January 2006 and assigned a 37% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of

Permanent Impairment, 5th Edition. His report includes a notation that Pace had returned work as a miner. However, there is no indication in the report that Dr. Fritzhand relied on this fact in formulating his opinion concerning Pace's date of MMI.

Ultimately, the ALJ relied upon Dr. Fritzhand's opinion that Pace reached MMI as of January 1, 2006. In a June 24, 2013 Opinion and Order, the ALJ stated he was "also persuaded by an application [Pace] submitted to Black Mountain Coal in which [he] indicated he had returned to work from 2006 through 2010, which is consistent with Dr. Fritzhand's determination of MMI." As a consequence of this determination, Kentucky Darby was granted a credit against past due permanent partial disability benefits for the overpayment of TTD benefits.

Pace filed a petition for reconsideration, arguing the evidence established he is permanently totally disabled. Pace also challenged the ALJ's finding concerning the date MMI was reached, arguing he had not returned to work until 2009. Pace sought to introduce records from the Social Security Administration indicating he had no earnings from 2002 through 2008.

In a July 29, 2013 Order on Reconsideration, the ALJ reopened proof time on the limited issue of whether

Pace was employed in 2006. Pace appealed the Order. This Board dismissed the appeal as interlocutory, and remanded the matter to the ALJ. On remand, the ALJ issued a second Order on Petition for Reconsideration. In this January 6, 2014 Order on Reconsideration, the ALJ determined Pace had not returned to work in 2006. However, the ALJ found nothing in Pace's additional evidence affected the prior finding he had reached MMI as of January, 2006. As such, Kentucky Darby remained entitled to a credit against outstanding PPD benefits for TTD benefits paid after January 1, 2006.

It is from this Order that Pace now appeals. He challenges the ALJ's conclusion regarding his date of MMI with several arguments. He first attacks the validity of Dr. Fritzhand's report. Though Pace acknowledges Dr. Fritzhand opined MMI was met by January 2006, he contends the doctor's opinion is not substantial evidence because he did not explain how he arrived at that conclusion. Pace further believes the employer created a false impression that he returned to work in 2006. According to Pace, any work he performed in 2006 was merely "make work". On this basis, he argues Kentucky Darby should only receive credit for the weeks he was paid wages. Finally, Pace contends he

is entitled to TTD benefits until 2009, when he attempted to return to work.

Pace had the burden of proving each of the essential elements of his cause of action before the ALJ, including the duration of TTD benefits. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because he was unsuccessful regarding any greater period of TTD benefits, 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).

Temporary total disability is the condition of an employee who has not reached MMI following a work-related injury *and* who has not reached a level of improvement that would permit a return to employment. KRS 342.0011(11)(a). Both conditions must be satisfied for an employee to qualify for TTD benefits. Double L Const., Inc. v. Mitchell, 182 S.W.3d 509, 513-4 (Ky. 2005). Pace argues he is entitled to TTD until the date he was able to return to work. This is not so, as the ALJ determined he reached MMI *before* the date he returned to work, thus disentitling him to TTD benefits. For this reason, any dispute as to

whether Pace worked in 2006 is irrelevant to the issue the duration of temporary total disability.

Furthermore, Dr. Fritzhand's opinion constitutes substantial evidence supporting the ALJ's finding Pace reached MMI by January 1, 2006. Dr. Fritzhand reviewed extensive evidence, including medical evidence from treatment/evaluation after the date he determined Pace reached MMI. While Dr. Fritzhand may have noted a belief Pace had returned to work in 2006, nothing in his report indicates he relied on this fact in forming his medical opinion. Furthermore, a medical expert is not required to state the basis for his determination of the date an individual reaches MMI. Failure to provide an explanation may be considered by the ALJ in weighing the credibility or persuasiveness of the opinion, but failure to provide additional explanation does not mandate rejection of the opinion. *See* Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993)(the ALJ enjoys the sole authority to determine the weight and credibility of the evidence). The ALJ was well within his authority in choosing to rely on Dr. Fritzhand's opinion, as opposed to other evidence presented by Pace. *See* McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974)(although a party may note evidence supporting a different outcome than that reached by an ALJ, such proof

is not an adequate basis to reverse on appeal). There being substantial evidence supporting the date the ALJ chose to terminate TTD benefits, it cannot be said the evidence compels any greater period of TTD benefits.

Accordingly, the January 6, 2014 Order on Petition for Reconsideration rendered by Hon. Grant S. Roark, Administrative Law Judge is **AFFIRMED**.

ALL CONCUR.

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