OPINION ENTERED: April 2, 2012

CLAIM NO. 201086463

JEREMY HOWARD PETITIONER

VS. **APPEAL FROM HON. CHRIS DAVIS, ADMINISTRATIVE LAW JUDGE**

ICG KNOTT COUNTY, LLC
and HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION AFFIRMING IN PART, VACATING IN PART AND REMANDING

* * * * * *

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

ALVEY, Chairman. Jeremy Howard ("Howard") seeks review of the decision rendered September 29, 2011 by Hon. Chris Davis, Administrative Law Judge ("ALJ"), awarding temporary total disability ("TTD") benefits and medical benefits for his lumbar injury against ICG Knott County, LLC ("ICG"), but dismissing his claim for benefits for thoracic

and psychological injuries, and denying permanent partial disability ("PPD") benefits and additional medical benefits for his lumbar spine injury. Howard also appeals from the order entered October 31, 2011 denying his petition for reconsideration.

On appeal, Howard argues the ALJ erred 1) by relying upon the medical opinions of Dr. Dean and Dr. Shraberg over his own testimony and the opinions of Dr. Nadar and Dr. Johnson in concluding he did not sustain compensable lumbar, thoracic and psychological injuries; 2) failing to award permanent total disability, or in the alternative, PPD benefits for all alleged injuries; 3) failing to award TTD benefits up to and including December 20, 2010, the date of Dr. Bean's last treatment at which time he assessed Howard had reached maximum medical improvement ("MMI"); and 4) failing to award future medical benefits. Howard also argues in general the ALJ "did not remain in the role of fact finder and the board should re-weigh all the evidence and substitute its judgment for that of the [ALJ] with respect to questions of fact." We affirm in part, vacate in part, and remand.

Howard testified by deposition on June 21, 2011 and again at the hearing held August 18, 2011. Howard was born January 18, 1976, and is a resident of McRoberts,

Kentucky. Howard is a high school graduate who completed two years of college, although he never obtained a degree. He also holds a commercial driver's license. Howard's work history includes work as a drilling rig laborer, coal miner, bridge repair and maintenance worker, truck driver and construction worker. At the time of his injury, Howard was working for ICG as a utility man.

Howard testified on May 17, 2010, he was operating a bolt machine in approximately 40 to 42 inch high coal, requiring him to work on his knees. He experienced "a sharp pain and like a pop" in his low back when he was bending and pulling on the bolts. Howard notified his section foreman of the injury who asked him if he could continue to work on the bolt machine. Howard's low back pain worsened, and began radiating down his leg as he continued to work. By the end of his shift, he was unable to walk and had to be assisted from the coal mine. Howard sought medical treatment the next morning at Jenkins Appalachian Regional Healthcare ("ARH"), where he was treated by Alicia Cook, a nurse practitioner, who ordered x-rays and an MRI of his back. Thereafter, she recommended physical therapy and work conditioning, which Howard could not complete due to increased pain.

Ms. Cook referred Howard to Dr. Bean, a neurosurgeon. Howard testified Ms. Cook did not restrict him from returning to work at ICG because Dr. Bean had released him with no restrictions. Howard testified he did not understand why Dr. Bean initially assessed a 5% impairment rating for his lumbar spine on September 28, 2010 with light duty work restrictions, then later re-assessed a 0% impairment on December 20, 2010, with no permanent restrictions. Howard testified he was unsure of the date of his last visit with Dr. Bean.

Ms. Cook continued to treat Howard with prescription medication after Dr. Bean released him. Ms. Cook currently prescribes Cymbalta, Ultram and Flexeril on an as needed basis. Howard testified he was prescribed Cymbalta because he was "down in the dumps." His depression stemmed from not working as a coal miner, sitting around the house all day and financial worries. Other than prescribing Cymbalta, Ms. Cook has not referred Howard for additional psychological treatment or counseling. He testified the Cymbalta has helped somewhat, and he did not believe his psychological condition prevented him from returning to work with ICG.

Howard has not worked since the May 17, 2010 accident. At his deposition, Howard testified he continues

to experience muscle spasms and throbbing pain in his low back, radiating into his left leg. At the hearing, Howard testified he also experiences sporadic mid-back pain. Concerning his low back, Howard testified his pain varies from day-to-day. He does not believe he can return to his employment with ICG due to his injuries, but believes he might be able to return to a more non-physical job. Howard testified he needs continuing treatment for injuries sustained in the May 17, 2010 accident. Howard received a payment for short-term disability benefits provided by ICG, for a period from October 28, 2010 through November 24, 2010.

In support of the Form 101, Howard attached the medical records from ARH. X-rays taken at ARH appeared normal. Subsequent lumbar and thoracic MRI's were performed, demonstrating disc herniations at L4-5, L5-S1 and T3-T4. Howard attended physical therapy from June 8, 2010 through September 14, 2010. On July 5, 2010, it was noted Howard had met all goals for range of motion and muscle strength, and had plateaued regarding the goals for decreased pain and tenderness. In August and September 2010, Howard experienced increased back and leg pain due to the physical therapy and he had difficulty completing work conditioning.

Howard also submitted the medical notes of Ms. Cook and Dr. Bean with the Form 101. Ms. Cook examined Howard on July 8, 2010 for back pain and bilateral hand numbness and listed his diagnosis as lumbar disc herniation and depression. Ms. Cook later noted a thoracic disc herniation. On August 5, 2010, she diagnosed left annular L4-L5 tear. Ms. Cook restricted Howard from work on August 5, 2010 through October 15, 2010. She also noted increased pain with physical therapy in September 2010.

Dr. Bean began treating Howard on July 27, 2010 for complaints of low back and left leg pain. He diagnosed a lumbar sprain with annular tear, L4-5, left paracentral, and recommended work conditioning for the next month. Dr. Bean also noted a disc bulge at T3, which he opined was unrelated to the injury and complaints of pain. In a follow-up note dated August 23, 2010, Dr. Bean noted continued pain in the mid back without leg pain and recommended an additional four weeks of physical therapy. On September 28, 2010, Dr. Bean noted Howard had plateaued with physical therapy and further stated:

> He is better in the past 2 weeks than he was when he was doing his work conditioning, but he hasn’t recovered enough to return to work as a roof bolter.

> He has reached maximum medical improvement. Restrictions are 25 lbs. lifting and no repetitive bending, stooping or working in a bent cramped position. These restrictions will be in effect for a 3-month period. He has a 5% impairment rating by AMA guidelines.

On December 20, 2010, Dr. Bean noted Howard had been kept on light duty restrictions since he was last seen on September 28, 2010. Howard complained of muscle spasms in his back, though not constant. Dr. Bean then stated: "I think he has reached maximum medical improvement, and I think he can return to work now without restrictions. No permanent impairment is assigned."

Dr. Bean testified by deposition on April 21, 2011. Dr. Bean opined the thoracic disc bulge was not related to his work injury because "it looked like a chronic finding" and he declined to assess an impairment rating. Dr. Bean testified Howard's condition had improved by September 28, 2010, but not enough to return to full unrestricted work. He estimated Howard had reached MMI and returned Howard to work with restrictions, assessing a 5% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment 5th Edition ("AMA Guides") based upon the MRI results and continued complaints of pain. Dr. Bean noted

Howard still had some muscle spasms when he was last seen on December 20, 2010. He again stated Howard had reached MMI, but revised his assessment of impairment to 0% pursuant to the AMA Guides, and recommended no permanent restrictions. Regarding his change of opinion, Dr. Bean testified:

> That's a subjective assignment based on symptoms of pain that are subjective without more objective findings like a ruptured disk. I think I thought on the 20th of September (sic) the issue was that he had continued to improve from what I heard from him and that it wasn't necessary to maintain a permanent impairment rating.
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> . . . .
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> The only difference was the reduced subjective complaint. That was all. When I assigned that in September, I thought it was fair because he had some kind of bright annular signal in his MRI scan, which I would consider an objective finding, and I assumed it was on the left side, it was related to his pain. He came back to me after I made those comments based at that point in time in September and said, better, I want to be released for work, I want to work. I said, well, okay, that's fair enough. And so he must have gotten better, so it really wasn't necessary to have the long-term permanent impairment.

Howard submitted the medical evaluation of Dr. Anbu Nadar, an orthopedic surgeon, dated January 20, 2011. Dr. Nadar noted Howard complained of significant low back pain with pain radiating down both legs, predominantly on

the left, with muscle spasm. Dr. Nadar diagnosed lumbosacral strain with radiculopathy and thoracic strain. Dr. Nadar assessed a 5% impairment rating for his thoracic injury and an 8% impairment rating for his lumbar injury, for a combination of a 13%, pursuant to the AMA Guides, of which none was active prior to the date of the accident. Dr. Nadar opined Howard's injuries caused his complaints. Dr. Nadar opined Howard had reached MMI despite persistent symptoms which might require symptomatic analgesics and anti-inflammatory treatment. Dr. Nadar recommended Howard not lift more than twenty-five pounds occasionally, nor over ten pounds on a more frequent basis. He also opined Howard does not retain the physical capacity to return to the type of work performed at time of injury.

Howard also submitted the report of Dr. Eric Johnson, a psychologist, dated January 12, 2011. Dr. Johnson noted Howard presented with low back and left leg pain and expressed he had lost control of his life. Howard further complained of mood swings, problems sleeping, financial worries, irritability, anxiety in public, and lack of self-esteem. After administering several psychological tests, Dr. Johnson diagnosed adjustment disorder with depressed mood, R/O Somatoform disorder and stresses due to financial and medical conditions. Dr. Johnson assessed a 7%

psychological impairment rating pursuant to the AMA Guides, 2nd Edition, but noted the rating should decrease with additional treatment. He further noted Howard's psychological complaints are the direct result of his physical work-related injuries. He recommended further medical care, possible counseling and vocational training if Howard cannot return to previous work.

Dr. David Shraberg, a psychiatrist, evaluated Howard on May 16, 2011, at ICG's request. Dr. Shraberg noted Howard takes medication for pain and depression. He noted Howard's complaints of low back pain with radiation into the left leg. Howard reported he could not work for ICG and did not know what to do. Howard wanted to be retrained, and expressed an interest in jobs allowing him to exert himself within reasonable limitations. Dr. Shraberg noted Howard's primary problem was vocational in nature and he diagnosed adjustment disorder associated with vocational uncertainty. Dr. Shraberg opined Howard has no permanent psychiatric impairment pursuant to the AMA Guides due to the adjustment disorder. He opined Howard does not need Cymbalta or counseling, other than a possible vocational consult. From a psychiatric standpoint, Dr. Shraberg assessed no restrictions, and opined Howard could return to his usual and customary work. Dr. Shraberg further noted Howard's

situational stressors could be relieved by re-employment by either returning to coal mining or to a variety of other jobs consistent with his high school degree, literacy, two years of college credit and age.

In the decision rendered September 29, 2011, the ALJ dismissed Howard's claim for thoracic and psychological injuries and found his lumbar injury did not result in permanent impairment. The ALJ awarded TTD benefits and medical benefits for Howard's lumbar injury. In so finding, the ALJ stated:

> As fact finder, the ALJ has the authority to determine the quality, character and substance of the evidence. Square D Company v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the sole authority to judge the weight and inferences to be drawn from the evidence. Luttrell v. Cardinal Aluminum Co., 909 S.W.2d 334 (Ky. App. 1995). In weighing the evidence the ALJ must consider the totality of the evidence. Paramount Foods Inc., v. Burkhardt, 695 S.W. 2d 418 (Ky., 1985).
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> In analyzing this claim the Administrative Law Judge has reviewed all of the evidence in this claim, as summarized above. The Administrative Law Judge has also reviewed the parties' briefs and arguments.
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> The undersigned has considered the Plaintiff's subjective allegations of on-going pain and limitations as well as his testimony that he is depressed. I have also considered that the Plaintiff's hearing testimony serves, in

some fashion, to contradict Dr. Bean's conclusion that he has subjectively improved. I have considered Dr. Nadar's findings more closely align with the Plaintiff's testimony, at the hearing.

However, I note the lack of objective evidence to support the Plaintiff's claim for permanent income and medical benefits. I note that Dr. Bean is a treating neurosurgeon and, as the Defendant points out, has examined the Plaintiff on several occasions, for treatment only. Dr. Bean is a trained and highly respected specialist in diagnosing and assessing back injuries. Dr. Bean specifically opined that that [sic] the thoracic injury is not work-related.

Dr. Bean did, at one point, assign the Plaintiff a 5% impairment rating for his low back injury. This was due to the annular tear combined with the Plaintiff[sic] presentation on exam, including the Plaintiff's subjective allegations. Contrary to having no reason to change his rating of the Plaintiff Dr. Bean noted that the Plaintiff's symptoms had improved and thus there was no longer any reason to assess a 5% impairment rating.

In reliance on Dr. Bean the Plaintiff's thoracic injury is not work-related and the lumbar injury resulted in no permanent injury.

However, in reliance on the evidence as a whole, including the overwhelming weight of the evidence, the lumbar sprain was a temporary work-related injury causing the need for medical treatment from May 17, 2010, the date of injury, through December 20, 2010, the date Dr. Bean released him. He is also entitled to temporary total

disability benefits at a rate of $711.79 per week from May 18, 2010 through September 28, 2010.

The issue of credit for short term disability is moot as no award of temporary total disability benefits is being made beyond that which the Defendant has already paid.

In reliance on Dr. Shraberg the Plaintiff's claim for a psychological injury is dismissed. I do not believe the Plaintiff has any work-related psychological condition, temporary or otherwise. I do not believe he has sufficient pain or restrictions to trigger a psychological condition. I believe all of his stressors, if any, revolve around money and his feeling of having been "wronged" by his employer and this process as a whole.

ORDER

1. The Plaintiff, Jeremy Howard, shall recover of the Defendant-Employer, ICG Knott County LLC, and/or its insurance carrier, the sum of $711.49 per week, from May 18, 2010 through September 28, 2010, as temporary total disability benefits, with the Defendant taking credit for benefits already paid and with 12% interest per annum on any past due amounts.

2. Plaintiff shall recover of the Defendant-Employer, and/or its insurance carrier, such medical expenses including but not limited to provider's fees, hospital treatment, surgical care, nursing supplies, and appliances, as may be reasonably required for the care and relief from the effects of the temporary work-related injury for the lumbar sprain, from May 17, 2010 through September 28, 2010. Defendant's

> obligation shall be commensurate within the limits set by the Kentucky Medical Fee Schedule.

In his petition for reconsideration, Howard argued the ALJ erred in 1) awarding TTD benefits through September 28, 2010, rather than December 20, 2010; 2) finding Howard's thoracic injury not work-related and no permanent impairment for his lumbar injury; 3) dismissing his psychological claim pursuant to Dr. Shraberg's opinion; 4) not awarding future medical expenses, and 5) failing to award additional TTD, PPD and PTD benefits. On October 31, 2011, the ALJ summarily overruled the petition for reconsideration.

As the claimant in a workers' compensation proceeding, Howard had the burden of proving each of the essential elements of his cause of action including extent and duration, causation/work-relatedness, and entitlement to TTD and medical benefits. Burton v. Foster Wheeler Corp., 72 S.W.3d 925 (Ky. 2002). Since Howard was unsuccessful before the ALJ, 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. 2000). 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).

We do not believe the evidence compels a finding in Howard's favor regarding a thoracic injury, or a finding of permanent impairment regarding his lumbar injury. The ALJ found more persuasive the opinion of Dr. Bean, who opined the thoracic injury to be unrelated to the May 17, 2010 accident and assessed no permanent impairment for the lumbar injury. As noted by the ALJ, Dr. Bean was Howard's treating physician, and is a trained and highly respected specialist who had examined him on several occasions. Howard asks us to re-weigh the evidence and adopt the contrary opinion of Dr. Nadar, which we decline to do.

Similarly, the evidence does not compel a finding of psychological impairment. The ALJ also found the psychological opinion of Dr. Shraberg to be more persuasive. Although Howard points to the contrary opinion of Dr. Johnson and Howard's testimony, such is not an adequate basis to reverse on appeal.

Howard argues the ALJ erred in not awarding additional TTD benefits through December 20, 2010, rather than September 28, 2010. KRS 342.0011(11)(a) defines TTD as follows:

> [T]he 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 to be a codification of the principles originally espoused in W.L. Harper Const. Co., Inc. v. Baker, 858 S.W.2d 202, 205 (Ky. App. 1993), wherein the Court of Appeals stated:

> 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.

In Central Kentucky Steel v. Wise, 19 S.W.3d 657 (Ky. 2000), the Supreme Court further explained:

> "[i]t would not be reasonable to terminate the benefits of an employee when she is released to perform minimal work but not the type that is customary or that she 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 (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 Helms, 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.
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> Id. at 580-581.

In the case *sub judice,* Dr. Bean originally opined on September 28, 2010, Howard had reached MMI, assessed a 5% impairment rating and restricted Howard to light duty work. In a later medical note dated December 20, 2010, Dr. Bean again opined Howard had reached MMI, assigned a 0% impairment rating, releasing him to work without restrictions. Dr. Bean later testified the difference between the two opinions was based upon Howard's reduced subjective complaints of pain. From this testimony, he concluded Howard's condition had improved.

Based upon Dr. Bean's testimony regarding Howard's improvement between September 28, 2010 and December 20, 2010, we believe the evidence compels a finding Howard did not reach MMI until the latter date. Therefore, consistent

with that determination, on remand the ALJ shall determine Howard is entitled to TTD benefits until December 20, 2010, and he shall award a commensurate period of TTD benefits. On remand, the ALJ is further directed to determine whether ICG is entitled to credit for short term disability benefits paid against any additional award of TTD benefits.

Howard also argues the ALJ erred in failing to award future medical benefits. While medical benefits can be awarded despite the absence of a permanent impairment rating, it is not a requirement in every case. In Robertson v. United Parcel Service, 64 S.W.3d 284 (Ky. 2001), the Kentucky Supreme Court held it is possible for a claimant to submit evidence of a temporary injury for which temporary income and medical benefits may be awarded, yet fail in the burden to prove a permanent harmful change to the human organism for which permanent benefits are appropriate.

In line with Robertson, we do not believe the ALJ erred in finding Howard sustained only a temporary injury and is not entitled to future income and medical benefits. The ALJ's findings are supported by substantial evidence and in conformity with the Act. Likewise, we believe the ALJ performed an appropriate analysis pursuant to FEI Installation v. Williams, 214 S.W.3d 313 (Ky. 2007) in

determining Howard was entitled to no additional medical benefits for his temporary injury which occurred on May 17, 2010. However, on remand, the ALJ shall determine whether Howard is entitled to any additional period of medical benefits through December 20, 2011.

Accordingly, the decision rendered September 29, 2011, and the October 31, 2011 order overruling Howard's petition for reconsideration are hereby **AFFIRMED IN PART, VACATED IN PART AND REMANDED** for further findings and entry of an amended opinion and award in conformity with the views expressed herein.

ALL CONCUR.

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