

OPINION ENTERED: March 29, 2013

CLAIM NO. 201087620

TECO COAL CORPORATION

PETITIONER

VS. **APPEAL FROM HON. JEANIE OWEN MILLER,
ADMINISTRATIVE LAW JUDGE**

JEFFREY COOTS
and HON. JEANIE OWEN MILLER,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
AFFIRMING IN PART,
VACATING IN PART, AND REMANDING**

* * * * *

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

STIVERS, Member. Teco Coal Corporation ("Teco") seeks review of the November 16, 2012, opinion, order, and award rendered by Hon. Jeanie Owen Miller, Administrative Law Judge ("ALJ") finding Jeffrey Coots ("Coots") to be totally occupationally disabled and awarding permanent total disability ("PTD") benefits and medical benefits. Teco

also appeals from the December 28, 2012, order denying its petition for reconsideration.

Teco challenges the ALJ's decision on three grounds asserting Dr. Phillip A. Tibbs' opinion does not qualify as substantial evidence, the ALJ improperly considered a non-work-related psychological impairment in finding Coots totally disabled, and the finding of total disability is not supported by substantial evidence.

Coots testified at an April 9, 2012, deposition and at the September 21, 2012, hearing. At the time of the award, Coots was forty-four years old. He has a Bachelor of Arts degree in Education from Alice Lloyd College. He began working for Teco in April 2009 as a rock duster. Coots was injured on May 17, 2010, when he caught his foot while getting out of a mantrap causing him to fall on his right side. Coots explained that all of his weight came down on the battery light located on the "back side of his right hip at the belt line." Coots testified he initially experienced pain in his right side extending into the lower back. Coots was taken to Hazard Appalachian Regional Hospital ("Hazard ARH").

After being treated at Hazard ARH he sought treatment at Quantum Healthcare, his regular medical treatment facility, where he was treated by Dr. Brett Muha.

Coots attempted light duty for approximately two to three days and was taken off work. Dr. Muha referred him to Dr. Norman Mayer, a neurosurgeon, whom he saw on one occasion. Coots testified Dr. Mayer released him to return to work on June 29, 2010. At the time he was released to return to work, he was still taking Ibuprofen and experiencing pain in his right side and lower back. After he returned to work his lower back problems continued to worsen, his legs would become numb, and his feet burned. He also fell on occasion. Coots worked consistently from June 29, 2010, through May 30, 2011.

In January 2011, Dr. Muha referred Coots to Dr. Tibbs at the University of Kentucky. Coots testified he did not seek to have the medical bills incurred for Dr. Tibbs' treatment paid by the workers' compensation carrier because he thought he would be okay and he "still didn't know what was going on." Similarly, when he applied for short-term disability ("STD") benefits, Coots did not indicate on the application that he was off work for treatment of a work injury. In June 2011, Dr. Tibbs performed fusion surgery.

Coots testified he has constant pain in his lower back, lower legs, and feet. He also experiences numbness in his legs which cause him to fall. At night his legs and

feet burn. Coots acknowledged he had restless leg syndrome before his injury. Except for a muscle strain he experienced in the 90s, he denied having any prior back injuries or back pain. When asked about records indicating he experienced lower back pain in 2004, Coots indicated he had benign prostate hyperplasia and prostatitis for fifteen to eighteen months which caused him to experience back and groin pain.

Coots has been consistently treated by Dr. Robert Bunge, a psychiatrist, since 2004. He testified the injury has worsened his depression, causing his medication to be increased. In October 2011, all of his guns were removed from his home because of his depression.

Prior to working for Teco he had worked for Blue Diamond Coal Company from approximately 1987 to 1990. He then worked for Magic Mart for eighteen months in 1990 and 1991. Coots also worked at Hazard Community College as a life skills instructor in 1995 and 1996. He then worked for Kentucky River Area Development as a transportation planner.¹ Except for walking and mapping, that job involved no physical work. Coots has some computer skills. After working for Kentucky River Area Development, he started and

¹ Coots Form 104 reflects he worked for Kentucky River Area Development from 1996 to 2003.

ran Joshua's Dream Foundation ("Joshua's Dream") which was a rehabilitation facility. Coots performed all the maintenance work on the property because Joshua's Dream could not afford to hire someone. Because of financial problems, Coots eventually had to close Joshua's Dream. He then went to work for Teco in April 2009. He also works as a volunteer associate pastor.

While working for Teco, Coots worked from approximately 10:00 p.m. until 8:30 or 9:00 a.m. the next day, six days a week. When he returned to work, Coots received an hourly wage increase because he obtained an electrician's certificate. He testified he worked more hours after the injury.

At the hearing, Coots testified his work as an electrician involved constant lifting, and working in multiple physical positions. He explained that because of the rib pain he was unable to determine "what all was injured." Coots' family physician sent him to Dr. Karelis at Pain Management Services who he sees once a month. Currently, he takes Morphine Sulfate once daily, Cymbalta once daily, Ibuprofen three to four times daily, Adderall twice daily, Neurontin three times daily, Flomax once daily, Abilify once daily, and Robaxin as needed. The pain

clinic prescribes his pain medication and Dr. Muha prescribes the remainder of the medication.

Even with his medication, Coots testified he still has pain in his lower back, legs, and the bottom of his feet. With medication, Coots estimates his pain to be eight on a scale of one to ten. At best, his pain is five on a scale of one to ten. Without the medication, Coots testified he could not stand the pain which is worse at night. Coots testified it is common for his legs to give out, and he estimated he falls a couple of times a week. He testified his pain is worse on the left side than the right, and he experiences lower back pain even when he sits. His father drove the hour and forty minute trip to the hearing, and stopped the car twice to allow him to get out of the car due to back pain.

Since he did not obtain his Master's Degree, Coots testified his education certificate has expired. He explained his only teaching experience was at Hazard Community College teaching community development courses.

Coots testified due to his psychological problems, he is unable to think on his feet. He now has to stop and think about anything he is going to say or write it down. In October 2011, he contemplated suicide. Coots testified he has trouble getting along with others and he

is frustrated because he is unable to provide for his family. Coots believed he has developed "OCD."

Coots cannot sit or stand very long and is unable to attend his son's school functions. Coots also experiences sexual dysfunction. He does not believe he can perform any of his previous jobs.

Coots denied having any prior low back problems and did not remember telling Dr. Dennis Sandlin, his previous family physician, of back problems with radicular pain in his thighs. Likewise, he did not remember seeing Dr. Muha prior to the injury complaining of lower back and leg pain with weakness and numbness in his legs. Coots acknowledged the MRI performed after his injury was of the thoracic or mid-back area and not his lower back. Coots insisted he experienced lower back pain when he saw Dr. Mayer. He was not aware of Dr. Tibbs' notation Coots has experienced chronic low back pain since he was nineteen. Coots testified that since 2004 he has seen Dr. Bunge for "ADHD" disorder. In 2011, he was told by Dr. Bunge his diagnosis was "Bipolar 1 NOS."

In the November 16, 2012, opinion, order, and award, since Teco did not contest Coots' May 17, 2010, injury, the ALJ identified the issue as whether the work injury caused Coots' low back condition. Based on the

reports of Dr. Tibbs and specifically "his October 21, 2011, statement that opines that it is medically probable that the neural compression occurred due to a fall at work in 2010," the ALJ determined there was a causal relationship between the injury sustained by Coots and his current condition requiring surgery performed by Dr. Tibbs. The ALJ also determined Coots' current psychological condition was causally related to the May 17, 2010, injury, finding as follows:

I further find that there is a causal relationship between the physical injury sustained by Plaintiff on May 17, 2010 and his current psychological condition. I find that the injury was the event that ultimately required Plaintiff's surgery and that the residual chronic and severe pain has resulted in the exacerbation of the psychological condition of the Plaintiff. In making this finding I have relied upon the testimony by report(s) of Dr. Granacher and Dr. Bunge and Dr. Allen as well as the testimony of the Plaintiff. I find Dr. Granacher's testimony the most persuasive and find that Plaintiff's [sic] has suffered 3% impairment pursuant to the AMA Guides as a result of the work injury of May 17, 2010.

In concluding Coots was permanently totally disabled, the ALJ entered the following findings of fact and conclusions of law:

4. Extent and duration with multipliers.

The evidence is certainly contradictory on this issue. The Plaintiff argues he is permanently and totally disabled as defined by the Act. The Defendant/employer argues his occupational disability is not related to his work injury and only affects his ability to return to coal mining. The Defendant/employer points to the 11 month period the Plaintiff returned to work after the injury. After reviewing all of the evidence in this case I find that Plaintiff now suffers from a permanent total occupational disability. In making this finding I rely on [sic] upon the testimony of the Plaintiff, the medical reports of Dr. Tibbs, and Dr. Dubin.

Permanent total disability is defined in KRS 342.0011(11)(c) as the condition of an employee who, due to an injury, has a permanent disability rating and has a complete and permanent inability to perform any type of work as a result of an injury. Hill vs. Sextet Mining Corp., 65 SW3d 503 (Ky. 2001).

"Work" is defined in KRS 342.0011(34) as providing services to another in return for remuneration on a regular and sustained basis in a competitive economy. The statutory definition does not require that a worker be rendered homebound by his injury, but does mandate consideration of whether he will be able to work reliably and whether his physical restrictions will interfere with his vocational capabilities. Ira A. Watson Department Store vs. Hamilton, 34 SW2d 48 (Ky. 2000).

In determining whether a worker is totally disabled, an Administrative Law Judge must consider several factors

including the worker's age, educational level, vocational skills, medical restrictions, and the likelihood that he can resume some type of "work" under normal employment conditions. Ira A. Watson Department Store vs. Hamilton, supra.

In applying the factors set out in Ira Watson, supra, it is apparent that Plaintiff's vocational factors infer his total and permanent disability. Those factors I have considered are: his age, 44 which is middle-aged worker, his educational level - which is high school with a college degree. Plaintiff's most recent work experience, however, has been in the labor intensive job of coal mining. While the Defendant/employer points to his past work in less physically demanding work - such as his work for a non-profit foundation and his college education - his current physical and psychological condition would not permit a return to any "regular" work. In his current physical condition, coupled with his psychological impairment, he is unable to perform any job on a regular and sustained basis. I adopt Dr. Tibbs' restrictions which included no repetitive bending, twisting, lifting, prolonged walking, standing, climbing or crawling, frequent position changes and with current medications that limit any driving and affects some of his cognitive function. These restrictions, coupled with the Plaintiff's psychological condition, would not permit a return to any work on a regular and sustained basis.

The Plaintiff's physical restrictions, the vocational and psychological factors all lead this fact-finder to conclude that the

plaintiff suffers from a permanent and total occupational disability.

The ALJ concluded Coots did not have a pre-existing active disability. Pursuant to KRS 342.730(6), Teco was granted a credit for STD benefits paid.

Teco filed a petition for reconsideration asserting there was insufficient medical evidence to establish Coots' lumbar impairment and restrictions were causally related to the work injury, as Dr. Tibbs' one statement was insufficient to establish medical causation. Teco also asserted it was unclear whether the ALJ relied on Coots' non-work-related pre-existing psychological condition as a factor in determining he was totally occupationally disabled. Therefore, it requested clarification "as to whether the ALJ believes [Coots] has work-related psychological restrictions that would inhibit him from working." Teco also requested reconsideration of the total disability finding as it appeared from the face of the opinion the ALJ was considering Coots' non-work-related psychological condition as one of the factors influencing her decision Coots was totally occupationally disabled.

Teco insisted Coots' age and his education level did not support a finding of total occupational disability.

It asserted the ALJ erred in not considering vocational rehabilitation and requested a vocational rehabilitation referral in order to determine if rehabilitation is appropriate as an alternative to total disability.

In the December 28, 2012, order denying the petition for reconsideration, the ALJ stated as follows:

This cause comes before the undersigned Administrative Law Judge (ALJ) upon the Defendant/employer's Petition for Reconsideration of the Opinion and Order rendered November 16, 2012 and the Plaintiff's Response thereto.

The defendant/employer avers error by the undersigned in relying upon the opinion of Dr. Tibbs in determining the 2010 injury was causally connected to the plaintiff's spinal fusion. The ALJ has discretion in determining the medical evidence that is the most persuasive and credible. See, Magic Coal Company vs. Fox, 19 SW3d 88 (Ky. 2000); Jackson vs. General Refractories, 581 SW2d 10 (Ky. 1979); Caudill vs. Maloney's Discount Stores, 560 SW2d 15 (Ky. 1977). This is true even with the medical testimony. When conflicting evidence is presented, the ALJ may choose whom or what to believe. Pruitt v. Bugg Bros., 547 S.W.2d 123, 125 (Ky. 1977). The ALJ may also choose to accept portions and disregard other portions of an expert witness' testimony. Copar, Inc. v. Rogers, 127 S.W.3d 554 (Ky. 2003).

I find no error in my reliance upon the opinion of Dr. Tibbs in determining Mr. Coots [sic] work injury

was causally related to his physical condition and disability.

I also find no error in relying upon Dr. Allen and Dr. Granacher in determining Mr. Coots [sic] psychological condition is a factor contributing to his disability. It was acknowledged in the Opinion and Award Mr. Coots suffered from pre-existing psychological impairment prior to the work injury. However, both Dr. Allen and Dr. Granacher attribute a portion of his psychological condition to his work injury.

In Transportation Cabinet, Dept. of Highways vs. Poe, 69 SW3d 60 (Ky. 2002), the Kentucky Supreme Court held in pertinent part as follows:

We agree with the Court of Appeals and Board that so long as a psychological condition produces medical restrictions, is work-related, and is a direct result of the same traumatic event for which an impairment rating has been assigned, an ALJ has the discretion to deem said condition contributory and compensable when making a finding of total disability.

Dr. Allen opined Mr. Coots suffered from a GAF (Global Assessment of Functioning) of 50 - which is very low functioning. Dr. Allen also recommended "all current treatment should continue. This patient's level of suicidal ideation should be continually monitored, as he is at some risk for self-harm." These recommendations/restrictions would definitely eliminate Mr. Coots' ability

to work on a regular and sustained basis. I find no error in relying upon Dr. Allen's opinion in determining Mr. Coots' psychological condition was work-related, a direct result of a traumatic event, and his condition produces medical condition.

For all the above stated opinion I find and clarify that the plaintiff's psychological condition was a contributing factor in the total permanent disability.

As to the vocational rehabilitation, the undersigned found no evidence of substance in the record that vocational rehabilitation would assist the plaintiff in returning to work and therefore, the benefits were not awarded.

On appeal, Teco again takes the position Dr. Tibbs' statement in the October 14, 2011, letter is not substantial evidence establishing causation. In addition, Teco maintains Coots' medical records generated prior to the May 2010 injury reference prior low back treatment and injuries. Citing Cepero v. Fabricated Metals Corp., 132 S.W.3d 839 (Ky. 2004), Teco contends Dr. Tibbs' medical opinion was predicated upon erroneous and deficient information and unsupported by any other credible evidence.

Teco also argues the ALJ improperly considered Coots' non-work-related psychiatric impairment in determining he was totally disabled, and the ALJ's finding

of total disability is not supported by substantial evidence.

As the claimant in a workers' compensation proceeding, Coots had the burden of proving each of the essential elements of his cause of action, including causation. See KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Coots was successful in that burden, the question on appeal is whether there was substantial evidence of record to support the ALJ's decision. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Substantial evidence" is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971).

In rendering a decision, KRS 342.285 grants an ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). An 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). An 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 (Ky. 2000). In that regard, an ALJ is vested with broad authority to decide questions involving causation. Dravo Lime Co. v. Eakins, 156 S.W. 3d 283 (Ky. 2003). Although a party may note evidence that would have supported a different outcome than that 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). Rather, it must be shown there was no evidence of substantial probative value to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings made are so unreasonable under the evidence that 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 other conclusions or reasonable inferences that otherwise could have been drawn

from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

We find no merit in Teco's argument Dr. Tibbs' opinion does not constitute substantial evidence. Further, we take issue with Teco's assertion the only evidence regarding causation is contained in Dr. Tibbs' October 14, 2011, letter to Dr. Muha. The June 7, 2011, discharge summary from the University of Kentucky, A.B. Chandler Medical Center, signed by Dr. Tibbs reflects as follows:

REASON FOR HOSPITALIZATION: Mr. Coots is a 43-year-old man who has had low back pain since about the age of 19 when he suffered a work injury. He had a fall about a year prior to admission and has had acute exacerbations, has been off work since. He has had pain radiating down his right leg that he rates a 7/10 and he has had pain that is severe enough to keep him from going to work. He had a workup for his back pain including an MRI of his spine which demonstrated L5-S1 spondylolisthesis. After failing conservative management he elected to have an L5-S1 posterior lumbar intervertebral fusion after consultation with Dr. Tibbs.

Dr. Tibbs' July 11, 2011, medical record reflects as follows:

As you recall, Mr. Coots is a 43-year-old white married male from Hazard who has a long history of chronic low back pain since age 19. He has worked in the mines as an electrician. He had a fall last year with rib fractures and

progressive complaints of low back pain. He was found to have an old compression fracture and spondylolisthesis at L5-S1. He had no change of bowel or bladder, fever, chills or weight loss. His pain averages 7/10 with 75% in the back, 25% in the left, and he had some weakness with right ankle dorsiflexion of extensor hallucis longus. He was having a lot of falls. He elected to undergo an L5-S1 posterior lumbar interbody fusion on 06/06/2011. ...

In the October 14, 2011, letter to Dr. Muha, cited by Teco as the only evidence linking the May 17, 2010, injury to the need for fusion surgery, Dr. Tibbs stated as follows:

MRI today shows postop changes. No evidence of neural compression. We believe it is within all reasonable medical probability that Mr. Coots is disabled from any viable occupation. It is medically probable that the neural compression occurred due to a fall at work in 2010. Will see him back in 3 months.

Dr. Tibbs followed that report with a January 13, 2012, note stating as follows:

Patient is a 43-year-old white male who was last seen on 10/14/2011 which an L5-S1 posterior lumbar interbody fusion on 6/6/2011. He is having increased pain. He had a negative MRI. He was felt disabled secondary to [sic] work fall in 2010. He returns today. He reports he is 'about the same.' His disability was denied. He has been unable to work as an electrician in the mines since 6/1/2011. He does have a

Bachelors in education, but he is unable to sit, stand, walk for any period of time.

. . .

X-ray shows stable L5-S1 fusion. We believe that it is within all reasonable medical probability that he is disabled from any work that would require repetitive bending, twisting, lifting, prolonged walking, standing, climbing or crawling. He would need frequent position changes and his current medications would limit any driving and may affect some of his cognitive function.

From these reports, it is apparent Dr. Tibbs was well aware of Coots' prior back problems dating back to age nineteen and yet consistently linked Coots lower back problems to the May 17, 2010, injury.

We acknowledge Dr. Mayer's records reveal Coots complained of fractured ribs and symptoms only in the thoracic region, and the medical records reflect Coots had lower back problems prior to the injury. In addition, Coots did not seek to have the workers' compensation carrier pay his medical bills. However, these facts are not conclusive on the issue of causation. Likewise, the fact Coots, in applying for STD benefits, did not indicate the surgery was work-related is not dispositive of this issue. Coots explained because of the rib pain, he was not sure what injuries he sustained. He insisted he complained

of lower back pain when he saw Dr. Mayer, and denied having significant pre-existing lower back problems. As was her prerogative, the ALJ chose to accept Coots' testimony regarding these discrepancies.

The medical records reveal Dr. Tibbs was well aware of Coots' pre-existing problems, yet believed the spinal fusion surgery was causally related to the May 17, 2010, injury. In addition, as pointed out by Teco, Quantum Healthcare's May 28, 2010, office note reflects Coots was having continued back pain and its November 30, 2010, office note reveals Coots was complaining of low back problems at that time. Based on these records, the ALJ could easily infer Coots' back problems were caused by the work injury which progressively worsened with the passage of time.

After an examination of the record, we conclude Cepero, supra, is inapplicable in the case *sub judice*. Cepero, supra, was an unusual case involving not only a complete failure to disclose, but affirmative efforts by the employee to cover up a significant injury to the left knee only two and a half years prior to the alleged work-related injury to the same knee. The prior, non-work-related injury had left Cepero confined to a wheelchair for more than a month. The physician upon whom the ALJ relied

in awarding benefits was not informed of this prior history by the employee and had no other apparent means of becoming so informed. Every physician who was adequately informed of this prior history opined Cepero's left knee impairment was not work-related but, instead, was attributable to the non-work-related injury two and a half years previous. We find nothing akin to Cepero in the case *sub judice*.

In this case, although Teco asserts Dr. Tibbs was not aware of Coots' prior medical history there is nothing in the record which supports its assertion. Dr. Tibbs was not deposed and was not requested to provide the medical history he obtained from Coots. We find significant Teco's request, if the Board disagrees with its assertion Dr. Tibbs' opinion cannot constitute substantial evidence, we remand in order for it to depose Dr. Tibbs to determine the history he obtained and the rationale for his opinion regarding causation. This we decline to do, as Teco should have developed this issue during the pendency of the claim.

That said, the fact Dr. Tibbs may not have had a complete medical history does not render his opinions less than substantial. Rather, such information goes to the weight to be assigned Dr. Tibbs' testimony, which was a question solely to be decided by the ALJ in her role as

fact-finder. Luttrell v. Cardinal Aluminum Co., 909 S.W.2d 334 (Ky. App. 1995).

The ALJ is free to draw reasonable inferences from the evidence. Jackson v. General Refractories Co., supra. Moreover, while medical causation usually requires proof from a medical expert, the ALJ may properly infer causation or a lack of causation from the totality of the circumstances as evidenced by the lay and expert testimony of record. See Mengel v. Hawaiian-Tropic Northwest & Central Distributors, Inc., 618 S.W.2d 184 (Ky. App. 1981); Union Underwear Co. v. Scearce, 896 S.W.2d 7 (Ky. 1995). In this case, the ALJ was free to rely upon Dr. Tibbs' opinion in resolving the issue of causation. Because the ALJ's determination regarding causation is supported by substantial evidence, we are without authority to disturb her decision.

Concerning Teco's second argument, there is no dispute Coots sustained a psychological injury as a result of the May 17, 2010, injury. Although Dr. Granacher assessed a pre-existing 8% psychiatric impairment pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"), he also assessed a 3% psychiatric impairment due to the May 17, 2010, work injury. Dr. Granacher

characterized the increased impairment as an aggravation of Coots' psychiatric condition.

Likewise, Dr. Allen assessed a 9% psychological impairment due to the work injury and concluded Coots' accident and the "physical and psychological consequences have added an increment of psychological distress to that which existed prior to the accident." He opined Coots' "current significant psychological and psychosocial difficulties result from the combination of longstanding psychiatric difficulties and the effects of his recent accident." Dr. Allen stated Coots had a poor prognosis since he has "undergone apparent adequate treatment since his accident without notable improvement." Dr. Allen opined treatment was absolutely necessary to maintain Coots' "current level of functioning" and to marginally improve his condition.

Based on the ALJ's December 28, 2012, order denying the petition for reconsideration, we conclude remand is necessary, as the order never specifically addressed Teco's assertion the ALJ considered a non-work-related psychiatric impairment along with the effects of the physical injury in determining Coots is totally occupationally disabled. In the December 28, 2012, order the ALJ stated she found no error in relying upon Drs.

Allen and Granacher in determining Coots' psychological condition is a factor contributing to his disability. The ALJ acknowledged both physicians attributed a portion of his psychological condition to his work injury. After citing to language in Transportation Cabinet v. Poe, 69 S.W. 3d 60 (Ky. 2002), the ALJ then relied upon the fact Dr. Allen believed Coots suffered from a global assessment function ("GAF") which is very low functioning and recommended all current treatment continue. The ALJ concluded Dr. Allen's recommendations definitely eliminate Coots' ability to work on a regular and sustained basis. Although the ALJ relies upon Dr. Allen's opinions, she does not specifically state whether she believes Coots' psychological condition due solely to the effects of the work injury along with the physical injury caused him to be totally permanently disabled. Rather, the ALJ refers generally to Coots' psychological condition. Significantly, Dr. Allen did not state whether the need for further treatment is due solely to the psychological problems resulting from the work injury. In his report, Dr. Allen refers to Coots' current psychological "difficulties" as being a combination of his "long-standing psychiatric difficulties and the effects of his recent accident."

Dr. Allen noted Coots manifested significant pre-morbid psychological difficulties for which he was undergoing treatment at the time of the accident and it is more likely than not Coots' accident and its physical psycho-social consequences have added an increment of psychological distress to that which existed prior to the accident. Therefore, it was incumbent upon the ALJ to separate the effects of Coots' psychological problems and determine the extent of his psychological problems and need for treatment caused solely by the work injury. Unfortunately, Dr. Allen never specifically delineated between the treatment necessary for the pre-existing psychological condition and that needed for the psychological condition resulting from the May 17, 2010, work injury.

The ALJ's mere reference to Coots' psychological condition as being work-related is not accurate since it is clear from Dr. Allen's report that part of Coots' current psychological condition is due to problems which pre-existed the work injury. Conversely, a portion of Coots' psychological condition is a direct result of the traumatic event. Thus, a general reference by the ALJ to Coots' psychological condition must be further refined to the extent, in determining the extent of Coots' occupational

disability, the ALJ must only consider the psychological condition caused by the work injury. Further, we are confused by the ALJ's statement Coots' "condition produces medical condition."

As previously noted, the ALJ's reference to a general psychological condition does not establish the ALJ only considered the psychological condition which is work-related in determining Coots to be totally occupationally disabled. Thus, the ALJ must specifically separate the effects of Coots' psychological condition which pre-existed the injury and that which was caused by the work injury. In stating that she clarified Coots' "psychological condition was a contributing factor in the total permanent disability," the ALJ failed to find Coots' work-related psychological condition was a contributing factor in determining he is permanently totally disabled.

On remand, the ALJ must determine whether Coots' psychological condition caused solely by the work injury along with his physical problems resulting from the work injury resulted in him being totally occupationally disabled.

That said, we disagree with Teco's assertion Dr. Allen did not place any restrictions upon Coots as a result of the psychological condition caused by the work-related

injury. Since Dr. Allen believed continued treatment was necessary, the ALJ was permitted to conclude Coots had medical restrictions, in part, due to the psychological condition caused by the work injury. Thus, as in Transportation Cabinet v. Poe, supra, the ALJ appropriately determined Coots' work-related psychological condition, which in part necessitated ongoing treatment, was contributory and compensable.

In light of our ruling regarding the need for remand, it is necessary to vacate the ALJ's determination Coots is totally occupationally disabled. At first blush, it appears in determining Coots was totally occupationally disabled, the ALJ relied solely upon Coots' testimony and the medical reports of Drs. Tibbs and Dubin.² However, the ALJ later stated Coots' "current physical condition, coupled with his psychological impairment" caused him to be "unable to perform any job on a regular and sustained basis." After stating she adopted Dr. Tibbs' restrictions, the ALJ then stated those restrictions coupled with Coots' psychological condition do not permit a return to work on a regular and sustained basis.³ The ALJ concluded "[Coots']

² See bottom of page 19 of the November 16, 2012, opinion, order, and award.

³ See page 21 of the November 16, 2012, opinion order, and award.

physical restrictions, the vocational, and psychological factors" led her to conclude Coots was permanently occupationally disabled. Thus, it is obvious in determining Coots was totally occupationally disabled, the ALJ relied in part, upon his psychological condition. Therefore, the award of PTD benefits must be vacated since remand is necessary for the ALJ to distinguish between the effects of Coots' psychological condition pre-injury and post-injury and to determine whether the psychological condition attributable solely to the work injury in conjunction with his physical condition causes Coots to be totally occupationally disabled.

That said, we are unconvinced by Teco's argument there is not substantial evidence which would support a determination Coots is permanently totally disabled. Dr. Tibbs' stringent physical restrictions as recited herein, and Coots' testimony regarding his inability to perform all of his previous jobs, due to his work-related physical and mental problems, would constitute substantial evidence supporting the ALJ's determination Coots is totally occupationally disabled.

In making a determination as to whether a claimant is permanently totally disabled, an ALJ is vested with broad discretion. See Seventh Street Road Tobacco

Warehouse v. Stillwell, 550 S.W.2d 469 (Ky. 1976). Coots' testimony regarding his post-injury ability to work and his level of pain is substantial evidence, as an injured worker's credible testimony is probative of his ability to labor post-injury. See Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979); See also Carte v. Loretto Motherhouse Infirmary, 19 S.W.3d 122 (Ky. App. 2000).

Accordingly, those portions of the November 16, 2012, opinion, order, and award and the December 28, 2012, order denying the petition for reconsideration with respect to the ALJ's determination Coots' lower back problems and the lumbar fusion surgery performed by Dr. Tibbs are causally related to the May 17, 2010, injury, are **AFFIRMED**. However, the ALJ's determination Coots is totally occupationally disabled is **VACATED** and this claim is **REMANDED** to the ALJ for entry of an opinion and award determining whether Coots is totally occupationally disabled as a result of the physical and mental conditions caused solely by the May 17, 2010, injury.

ALVEY, CHAIRMAN, CONCURS.

SMITH, MEMBER, NOT SITTING.

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