

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000722-WC

DEPARTMENT OF HIGHWAYS
TRANSPORTATION CABINET

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-97-97691

BARRY POE; DONALD L. SMITH,
Administrative Law Judge; and
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING
** **

BEFORE: COMBS, EMBERTON AND GUIDUGLI, JUDGES.

EMBERTON, JUDGE: The Transportation Cabinet appeals from an opinion of the Workers' Compensation Board affirming an award of total and permanent occupational disability benefits to Barry Poe of which fifty percent was found to inactive prior to the injury and noncompensable. The Cabinet asserts that Poe's condition was not caused by a work injury; it was error to find Poe totally disabled based on the definition of permanent and total disability under Kentucky Revised Statutes (KRS) 342.0011(11)(c);

and, that Poe should not be permitted any temporary total disability benefits.

In reviewing decisions of the Workers' Compensation Board, the function of the Court of Appeals "is to correct the Board only where the court perceives that the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice."¹ After review of the record and the briefs of the parties, we find no evidence which compels a finding other than that made by the ALJ and affirmed by the Board.

The Board authored a well-reasoned and factually-detailed opinion on which we cannot improve. We therefore adopt the relevant portions of the Board's opinion as our own:

Poe was born on June 4, 1957 and is a resident of Princeton, Caldwell County, Kentucky. He quit school after the seventh grade. Relevant work experience includes employment as a heavy equipment operator, dish washer, general laborer, maintenance worker, and tree trimmer.

Poe became employed at the Cabinet in 1978 as a heavy equipment operator. In 1993, he suffered a work-related injury to his hip but missed no work for that injury. He settled that claim against the Special Fund for a 15 percent permanent partial disability, but the claim against the Cabinet was dismissed. Thereafter, Poe alleged no trouble working prior to his injury that is the subject of this claim. However, in 1995 Poe sought medical treatment for leg pain. It was determined that he suffered avascular necrosis and degenerative arthritis of his left hip and an osteochondroma of the neck of

¹ Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687-688 (1992).

his left femur. As a result, he was diagnosed as suffering from a Legg-Calve'-Perthes disease. One of his examining physicians, Dr. James M. Donley, stated at that time that Poe would eventually require a total hip arthroplasty. During 1995 and thereafter, Poe continued to work full time at full duty without accommodation or restriction.

On January 21, 1997, Poe suffered an alleged injury to his left hip when he slipped in oil while mopping on a concrete floor. For the 52 weeks preceding the January 21, 1997, injury, Poe's wage records indicate that he worked 45.24 hours per week on a regular basis. The record also reflects that Poe had worked in uninterrupted fashion for the Cabinet for the preceding 19 years. Following his injury, radiographs revealed Poe to be suffering from avascular necrosis in the femoral head of his left hip with osteophytes. Poe was diagnosed with posttraumatic degenerative joint disease of the left hip, and a total hip replacement was recommended. It was also determined that the fall specifically produced subchondral fractures in the hip. Additionally, there were findings on x-ray of Poe's pelvis of mixed lytic and sclerotic changes of the left femoral head with collapse and distortion of the head consistent with aseptic necrosis or avascular necrosis, producing marked degenerative disease. He also alleged the development of psychological problems secondary to his work-related injury. Poe underwent a total hip replacement on February 24, 1997. He has not returned to work anywhere since January 21, 1997.

Poe filed an application for resolution of injury claim on November 10, 1997, with the Department of Workers' Claims. Thereafter, by order rendered November 18, 1997, Poe's claim was assigned to Arbitrator Bonnie Kittinger for binding mediation. A benefit review determination was rendered by the Arbitrator on February 27, 1998, awarding Poe TTD benefits through December 22, 1997. The Arbitrator dismissed Poe's claim for permanent partial disability benefits.

Subsequently, Poe requested a de novo hearing before an ALJ. By order of the

Commissioner issued March 20, 1998, Poe's claim was assigned to ALJ Smith for final adjudication.

In addition to the petitioner's testimony at deposition and at hearing, evidence submitted for the ALJ's consideration consisted of medical records and/or depositions of Dr. Leo Ensalada, Dr. W. Wayne Mosley, Dr. M. L. Stetten, Dr. William Weiss, Dr. Robert Granacher, Jr., and Dr. Lewis Westmoreland III, D.O., and lay testimony from Gary Glass, Eddie Ford, and Dr. Luca E. Conte, a vocational specialist. Also submitted was Poe's deposition from his original claim (94-45315) taken following his 1993 injury as well as the 1995 depositions of Dr. James M. Donley and Dr. James P. Rushing, a chiropractor.

Dr. Ensalada, a specialist in occupational medicine, initially saw Poe for an independent medical evaluation ("IME") on March 8, 1995. At that time, Poe complained of leg pain. Dr. Ensalada diagnosed the respondent as suffering from avascular necrosis and degenerative arthritis of the left femoral head, which was not a work-related condition. The doctor further found osteochondroma of the left lesser trochanter at the neck of the femur, which was also not work-related.

On December 22, 1997, Dr. Ensalada performed a second IME of Poe. At that time, he received an appropriate history of the January 21, 1997, fall at work. Poe had an 8-inch curvilinear surgical scar over his left hip consistent with his history of total hip replacement. Dr. Ensalada's impression was that Poe had Legg-Calve'-Perthes disease of his left hip for which he was treated surgically with a left total hip replacement. The doctor stated that Poe's Legg-Calve'-Perthes disease was an active condition at the time of his fall on January 21, 1997. He defined Legg-Calve'-Perthes disease as idiopathic avascular necrosis of the epiphysis of the femoral head with associated complications. He stated that Poe would have required a left total hip arthroplasty for the treatment of his Legg-Calve'-Perthes disease absent his January 21, 1997, injury. Furthermore, but for Poe's Legg-Calve'-

Perthes disease, he would not have required the left total hip arthroplasty following his work-related fall. He also speculated that Poe likely would not have fallen at work on January 21, 1997, absent his Legg-Calve'-Perthes disease. Based on the AMA Guides, Dr. Ensalada assessed a 20 percent whole person impairment to Poe's condition. None of this, according to Dr. Ensalada, is attributable to the work-related fall that is the subject of this claim. The doctor permanently restricted Poe to no frequent lifting in excess of 10 to 20 pounds and no frequent standing, walking, or bending. He stated that Poe could occasionally lift 20 to 50 pounds and squat, kneel, and climb ladders. Dr. Ensalada opined that the January 21, 1997, incident did not cause or necessitate Poe's surgery.

Dr. Donley's deposition was taken October 11, 1995, as part of Poe's original worker's compensation claim (94-45315), following his first work-related hip injury in 1993. Dr. Donley initially saw Poe on July 7, 1995. At that time, he received a history that in June 1993, Poe had twisted his hip dismounting from a tractor. X-rays revealed two problems in Poe's left hip: (1) avascular necrosis of an arthritic femoral head and (2) an osteochondroma of a lesser trochanter at the neck of Poe's femur. Dr. Donley also made an additional diagnosis of Perthes disease. Dr. Donley testified that, based on Poe's history, prior to June 1993, he had never experienced any problems with his hip. The doctor stated that the twisting injury Poe suffered in 1993 aroused a preexisting, dormant, non-disabling condition into disabling reality. Dr. Donley described Poe's condition as permanent and stated that more than likely it would deteriorate to the point that the respondent required an artificial hip replacement. He assessed a 15 percent total body impairment based upon the AMA Guides following Poe's 1993 injury. He also stated that Poe's impairment would not be there but for his preexisting condition.

Dr. Mosley, a board-eligible orthopedic surgeon, first saw Poe for treatment on January 30, 1997. At that time, Poe complained of pain in his left hip. The doctor received an appropriate history of

Poe's January 21 work injury. At the time of his initial examination, Dr. Mosley found restricted range of motion, producing pain in Poe's left hip. Radiographics conducted at that time revealed evidence of avascular necrosis in his femoral head with osteophytes. The doctor diagnosed posttraumatic degenerative joint disease of the left hip and Legg-Calve'-Perthes disease. On February 24, 1997, Dr. Mosley performed surgery on Poe in the form of a total hip replacement. He compared x-rays taken of Poe's left hip on July 7, 1995, with x-rays performed at his office on January 21, 1997. The older x-rays showed that Poe had less of a flattened femoral head in July 1995, than in January 1997. The doctor also opined that Poe experienced a subchondral fracture that occurred between those two periods of time that manifested itself as a depression of the femoral head. X-rays also showed mixed lytic and sclerotic changes of the left femoral head as well as marked AP of Poe's pelvis.

Dr. Mosley described the differences in the July 1995, and the January 1997, x-ray results as "notable." He felt these changes represented an acute worsening attributable to Poe's January 21, 1997, fall at work. As a result of Poe's injury, Dr. Mosley opined that his femoral head in his left hip was at the point that it was no longer congruent to the acetabulum. As a result, Poe had no choice but to proceed with a total hip arthroplasty. The reason Poe needed surgery, according to Dr. Mosley, was due to his development of a subchondral fracture. The fracture, therefore, further aroused Poe's preexisting hip condition and accelerated his need for surgery.

Based on the AMA Guides, Dr. Mosley assessed Poe as suffering from a 20 percent whole person impairment. The doctor stated that Poe would not have reached maximum medical improvement ("MMI") until one year post surgery. He restricted Poe to occasional lifting of 10 to 20 pounds. During an eight-hour workday, the doctor opined, Poe could sit for six hours and stand for two. He also should not be required to walk for more than two hours. Dr. Mosley recommended that Poe be required to sit no

more than four hours straight at any one time.

Dr. Westmoreland, D.O., performed x-rays of Poe's left hip on January 21, 1997. These x-rays revealed mixed lytic and sclerotic changes of the left femoral head with collapse and distortion of the head consistent with aseptic necrosis or avascular necrosis. There was also evidence of marked degenerative disease in Poe's left hip as well as a mature osteochondroma arising from the medical aspect of the neck of Poe's left femur.

Dr. Westmoreland stated that his finding of depression of Poe's femoral head was synonymous with multiple fractures. However, in his opinion, these were old fractures. He could not make a diagnosis of an acute fracture without some earlier x-ray being available for comparison. Specifically with regard to causation of the multiple fractures seen on x-ray, Dr. Westmoreland could not say one way or the other whether the January 21 trauma superimposed on Poe's preexisting condition accelerated his symptomatology. He testified that the issue of causation was best left to an orthopedist, and for him to render any opinion would be stepping outside his bounds.

Dr. Stetten, an orthopedic surgeon, performed IMEs of Poe on October 26, 1995; December 29, 1997; and July 27, 1998. At the time the doctor examined Poe in 1997, the respondent had already undergone his left hip arthroplasty. Dr. Stetten stated that Poe's Legg-Calve'-Perthes disease preexisted his January 21, 1997, injury. He also testified unequivocally that the January 1997 fall did not cause the necessity of Poe's surgery. According to Dr. Stetten, Poe's surgery would not have been necessary but for the ongoing natural aging process of the respondent's Legg-Calve'-Perthes disease. Based on the AMA Guides, Dr. Stetten assessed Poe as presently having a 20 percent impairment to his body as a whole following his surgery. Although Dr. Stetten performed x-rays at the time of his original examination in 1995, he makes no mention of additional x-rays having been reviewed following the January 21, 1997, incident.

Dr. Rushing, a chiropractor, was deposed on October 12, 1995, as an expert witness in Claim No 94-45315. In February 1994, he began chiropractic treatment of Poe for complaints of low back, left leg, and left groin pain. Poe reported that these symptoms arose following his 1993 work-related injury. Dr. Rushing's treatment consisted of spinal adjustments, physical therapy, and electrical stimulation. X-rays taken by Dr. Rushing showed evidence of marked arthritis in Poe's left hip, which made the doctor think "something funny was going on at the time." Dr. Rushing testified he last treated Poe on May 9, 1994. He further stated that Poe's complaints were consistent with his report of an injury at work in 1993.

Dr. Weiss, a professor of psychology at the University of Evansville and a clinical psychologist, examined Poe at the request of the Division of Disability Determination for purposes of conducting a social security disability evaluation. Dr. Weiss described Poe following academic testing as functionally illiterate. He stated that Poe exhibited a full-scale IQ of 72, placing him in the borderline area of intellectual functioning. He also described Poe as learning disabled. In fact, Poe's MMPI had to be administered orally. Following his overall examination, Dr. Weiss diagnosed Poe as suffering from a major depressive disorder. The doctor stated Poe's depression was a direct result of the effects of his January 21, 1997, injury and subsequent medical consequences. The doctor stated that Poe had no history prior to that time of any pathological depression. Dr. Weiss found evidence of marked restriction of activities of daily living, moderate difficulties in maintaining social functioning, frequent deficiencies of concentration, and episodes of deterioration and decompensation.

Dr. Granacher, a forensic psychiatrist, performed an independent psychiatric evaluation of Poe on July 29, 1998. Poe's IQ was measured to be 71, placing him in the borderline range of intellectual functioning. Scholastic testing conducted by Dr. Granacher identified Poe to be well below average nationally. Based upon his overall examination, the doctor diagnosed Poe as

suffering from mild depression due to adverse life circumstances, prior history of alcohol abuse, functional literacy, and borderline intellectual capacity.

Based upon his overall evaluation, Dr. Granacher opined that Poe has a zero percent whole body psychiatric impairment due to any alleged work injury. He further stated that Poe has the mental capacity to engage in any work he is trained, educated, or experienced to perform. While Dr. Granacher is not an orthopedic surgeon, it was his opinion Poe's hip injury was not related to his work but, in fact, was a preexisting condition. The doctor conceded that Poe is depressed because of his hip injury but did not see any relationship between Poe's depression and any work-induced injury. Dr. Granacher opined that Poe "clearly could not have collapsed his femoral head from the accident described but must have had a defective hip for some time before his alleged work injury." The doctor concluded by stating that he could find no evidence of a causal connection between Poe's mental state and a compensable work injury.

Eddie Ford, an administrative manager for the Cabinet, testified that on February 26, 1998, he met with Poe to discuss accommodations for the respondent to return to work. The Cabinet was willing to make accommodations for the claimant; however, Poe refused to return to work.

Gary Glass works as a timekeeper for the Cabinet. He testified that after June 1, 1993, the date of Poe's first work-related injury, the respondent mentioned that he needed to accumulate sick time so that he could attend doctor's appointments.

Dr. Conte, a vocational rehabilitation practitioner, on January 5, 1998, conducted a vocational analysis and assessment of Poe's ability to return to work. Testing revealed Poe demonstrated verbal skills consistent with a second or third-grade level. In Dr. Conte's opinion, within reasonable vocational probability, any occupational loss suffered by Poe by virtue of his hip replacement surgery would be due entirely to his preexisting, active Legg-Calve'-Perthes

disease. Vocational testing indicated, according to Dr. Conte, that Poe could return to work as a greenhouse worker, a vehicle operator provided the vehicle had an automatic transmission, and a dishwasher. He further stated that there remained a significant number of jobs available to Poe should he seek employment.

As noted above, on August 24, 1999, the ALJ rendered an opinion granting Poe an award of permanent and total occupational disability benefits. However, 50 percent of Poe's disability was determined by the ALJ to have been active and therefore noncompensable. The ALJ also concluded that Poe was suffering from secondary psychological overlay directly attributable to the effects of his January 21, 1997, injury. With regard to these matters, the ALJ stated in relevant part as follows:

The first issue to be addressed by the Administrative Law Judge is the causation/work-relatedness for the Plaintiff's current condition. It is undisputed that the Plaintiff did have Legg-Calve'-Perthes disease for several years prior to the January 21, 1997, injury. However, this Court [sic] did find Plaintiff's treating surgeon, Dr. Mosley, to be persuasive. He specifically indicated that the Plaintiff's current hip condition was a combination of the Legg-Calve'-Perthes disease and the work injury on January 21, 1997. Therefore the Plaintiff's physical condition is deemed to have been caused by the work injury. This Court [sic] further found testimony of Dr. Weiss to be persuasive on the psychological claim. The Court [sic] takes note that the Plaintiff had no prior psychological problems. Dr. Weiss too indicated that the Plaintiff's condition was caused by the work injury. Therefore, the psychological condition is also deemed to be work-related.

The next issue to be decided by the Administrative Law Judge is the extent and duration of Plaintiff's disability as a result of his work-related injury on January 21, 1997. Based upon the

date of injury, Plaintiff would be governed under the amendments found in House Bill 1. Disability under those amendments are to be determined by the use of impairment ratings under the AMA Guidelines. The only exception to this is when the Plaintiff is found to be totally occupationally disabled under KRS 342.730(1)(a). This Court [sic] found the Plaintiff to be very credible regarding both his pain and restrictions. This is further supported by the testimony given by Dr. Mosley and Dr. Weiss. Based upon the totality of the evidence, this Court [sic] does find that the Plaintiff is totally disabled as a result of his injury on January 21, 1997.

The Court [sic] must next determine whether the Plaintiff had any prior active disability. As stated earlier, Plaintiff has been previously diagnosed with Legg-Calve'-Perthes disease. In fact, it was anticipated that the Plaintiff would eventually need the total hip replacement surgery. Yet it was only after the work injury on January 21, 1997, that the surgery had to be performed. Based on the totality of the evidence, not only as summarized here, but as contained in the record, this court [sic] does believe that the Plaintiff's Legg-Calve'-Perthes disease would constitute a 50% prior active disability in this matter.

It is from this language that the petitioner now appeals.

With regard to petitioner's first argument, we find no merit in the Cabinet's contention that the ALJ erred in determining that Poe's work-related fall of January 21, 1997, resulted in both physical and psychological injury. Where the party who bears the burden of proof is successful before the ALJ, the question on appeal is whether the ALJ's decision is supported by substantial evidence in the record. Wolf Creek Collieries v. Crumm, Ky. App., 673 S.W.2d 735 (1984). Substantial evidence is evidence of relevant consequence having the fitness to induce conviction in the minds of

reasonable people. Smyzer v. B. F. Goodrich Chemical Co., Ky., 474 S.W.2d 367 (1971). The ALJ as fact finder has the sole authority to determine the weight, credibility, substance, and inference to be drawn from the evidence. Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418 (1985). The ALJ has the discretion to choose whom and what to believe. Pruitt v. Bugg Brothers, Ky., 547 S.W.2d 123 (1977). Furthermore, the ALJ has the absolute right to choose to believe part of the evidence and disbelieve other parts even when it comes from the same witness or the same party's total proof. Caudill v. Maloney's Discount Stores, Ky., 560 S.W.2d 15 (1977). It is not enough for the Cabinet to show there is merely some evidence that would support a contrary conclusion. McCloud v. Beth-Elkhorn Corp., Ky., 514 S.W.2d 46 (1974). So long as any evidence of substance supports the ALJ's opinion, we may not reverse. Special Fund v. Francis, Ky., 708 S.W.2d 641 (1986).

In the case sub judice, we believe there is ample evidence to support the ALJ's conclusions with regard to causation. Dr. Mosley unequivocally testified that the role Poe's January 1997, work-related fall played in producing injury and an accelerated need for a total hip arthroplasty. Furthermore, x-rays reviewed by Dr. Mosley taken in 1995 did not reveal evidence of subchondral fractures or flattening of the femoral head. However, x-rays conducted only a few days after the January 1997, accident demonstrated multiple fractures and a flattening of Poe's femoral head of his left femur. According to Dr. Mosley, these fractures were acute in nature and left Poe with no alternative but to undergo total hip replacement. The ALJ's reliance on Dr. Mosley's opinion that Poe's hip complaints and need for surgery were attributable to the effects of his work-related accident that is the subject of this claim, in our opinion, sufficiently support the conclusions reached by the ALJ.

Additionally, we find no error in the ALJ's determination that Poe currently suffers depression that is secondary to the effects of his January 21, 1997, injury. These findings are based upon the conclusions of Dr. Weiss whose testimony clearly must be

considered substantial evidence. The fact that Dr. Weiss did not assign a specific impairment rating attributable solely to Poe's secondary psychological overlay does not defeat nor diminish the psychological aspect of Poe's claim. In fact, Chapter 14 of the most recent edition of the AMA Guides dealing with mental and behavioral disorders deliberately makes no provision for numerical impairment ratings for any type of psychological or psychiatric impairment or disability. The authors of that Chapter, at 301, state that the decision not to do so was deliberate. Unlike the situation with some organ systems, there are no precise measures of impairment in mental disorders.

We realize that by definition, pursuant to KRS 342.0011(11)(c), a claimant may be found permanently disabled only upon a showing that due to an injury the employee has a permanent disability rating. KRS 342.0011(36) defines "permanent disability rating" as the permanent impairment rating determined by the latest edition of the AMA Guides times the appropriate factor under KRS 342.730(1)(b). However we must presume that the legislature knew at the time it enacted these definitions that not all medical impairments under the AMA Guides are measured in numerical percentages. Since by law in matters of statutory construction we are to avoid a result that leads to an absurdity or an unreasonable conclusion, we must conclude that the Legislature did not intend to require a specific numerical impairment rating for each and every infirmity alleged as work related. Wesley v. Board of Education of Nicholas County, Ky., 403 S.W.2d 28 (1966); City of Covington v. Sohio Petroleum Co., Ky., 279 S.W.2d 746 (1955). So long as a condition produces medical restrictions, is work related, and is associated with another work-related condition causally related to 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.

We also disagree with the Cabinet's assertions that the ALJ exceeded his authority by law in finding Poe to be

suffering from a permanent total disability. Under the 1996 amendments, the assessment of whether a claimant is totally disabled remains solely within the province of the ALJ, and by law, he continues to be afforded great leeway in making this determination. Kentucky Carbon Corp. V. Dotson, Ky. App., 573 S.W.2d 368 (1978); Seventh St. Road Tobacco Wrhse. v. Stillwell, Ky., 550 S.W.2d 469 (1976). It has long been established that the ALJ may rely in part on the claimant's demeanor, credibility, and testimony in making a determination of permanent and total disability. Hush v. Abrams, Ky., 584 S.W.2d 48 (1979). We believe this remains true even under the "new law." A claimant's testimony may constitute substantial evidence in support of an ALJ's finding of total permanent disability. Further, the ALJ may draw any reasonable inferences from the evidence. Jackson v. General Refractories Company, Ky., 581 S.W.2d 10 (1979).

Although KRS 342.0011(11)(c) requires a claimant to show both a permanent disability rating and a complete and permanent inability to perform any type of work as a result of his injury in order to receive a total disability award, we note that "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." While permanent partial disability assessments provide for very little discretion on the part of the fact finder, total disability assessments are not so strictly limited.

Even after the enactment of the 1996 amendments, in claims involving total disability, we believe that fact finders still retain most of the discretion allowed them under Osborne v. Johnson, Ky., 432 S.W.2d 800 (1968). Although the full impact of Osborne, supra, has been modified, we do not believe it has been abolished. In Osborne, supra, the Court thoroughly analyzed the requirements needed for finding disability. The Court emphasized that medical percentages are not determinative. While that statement is no longer controlling for permanent partial disability cases, it

remains applicable to permanent total disability.

Statutory definition of "disability," as it existed at the time of the decision in Osborne, supra, and thereafter until December 12, 1996, required the fact finder to analyze the worker's competitive abilities based upon the "local labor market." With the 1996 changes to the Kentucky Worker's Compensation Act, the local labor market analysis is no longer appropriate. The ALJ in the instant action did not limit his assessment to the local labor market and, therefore, appropriately disregarded that aspect of Osborne, supra.

We believe that the Legislature's definition of "work" as set out above follows a great deal of the language used by the Court in Osborne, supra, particularly in their quotations from Larson's, wherein it was noted that if the worker's physical condition is such as to disqualify him from regular employment in the labor market, then total disability may be found. See, Id. at 803. The Court went on to state also at 803, "If the Board finds the work[er] is so physically impaired that he is not capable of performing any kind of work of regular employment . . . the [worker] will be considered to be totally disabled."

In defining normal employment conditions, the Court adopted Larson's test of probable dependability to sell services in a competitive labor market. This definition considers whether the individual will be dependable, whether his physiological restrictions prohibit him from using skills within his individual vocational capabilities, and accepts that one is not required to be home bound to be determined totally occupationally disabled. We believe that the definition of "work" in KRS 342.0011(34) echoes this language to a large extent. By defining "work" as providing services "on a regular and sustained basis in a competitive economy," we believe the Legislature has indicated that the fact finder must take into account the claimant's ability to compete for work and not merely his physical ability to perform work tasks.

Here, based on the testimony and AMA impairment assessments of numerous physicians, Poe has established his entitlement by law to a permanent disability rating. Additionally, there is sufficient evidence of record upon which the ALJ could rely and from which he could infer Poe's inability to engage in substantial gainful activity. Poe himself specifically testified that physically and emotionally he has been unable to engage in any work activity since January 21, 1997. Both Dr. Weiss and Dr. Granacher determined Poe's level of intellectual functioning to be borderline. Objective psychological and scholastic testing conducted by Dr. Weiss further established that Poe is functionally illiterate and learning disabled. Dr. Weiss also opined that Poe's depression interferes with his ability to concentrate. When these factors are considered along with the restrictions imposed on Poe's physical activity by Dr. Mosley and contrasted with Poe's relevant past work experience, we can find no justification in law or equity for reversing the ALJ's determination that the respondent is 100 percent disabled. By statute, the Board may not substitute its judgment for that of an ALJ as to the weight of evidence on questions of fact. See KRS 342.285(2).

In that we have affirmed the ALJ's finding that Poe is totally and permanently disabled, any questions raised by the Cabinet with regard to Poe's entitlement to TTD benefits are moot.

Accordingly, the decision of the ALJ is hereby AFFIRMED and this appeal DISMISSED.

The opinion of the Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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