

RENDERED: OCTOBER 9, 2015; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2014-CA-000570-WC

UNITED PARCEL SERVICE, INC.

APPELLANT

v.

PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-08-70062

ANTHONY WOODS; HONORABLE R.  
SCOTT BORDERS, ADMINISTRATIVE  
LAW JUDGE; AND WORKERS'  
COMPENSATION BOARD

APPELLEES

OPINION  
AFFIRMING

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BEFORE: ACREE, CHIEF JUDGE; J. LAMBERT AND THOMPSON,  
JUDGES.

ACREE, CHIEF JUDGE: Appellant, United Parcel Service (UPS), appeals the  
February 28, 2014 Opinion of the Worker's Compensation Board (Board). The

Board's opinion upheld the ALJ's award of permanent total disability (PTD) benefits to Appellee, Anthony Woods. After careful review, we affirm.

### **I. Background**

In 2008, Woods was driving a utility vehicle for UPS when he struck another vehicle, injuring his back and ribs. Woods' back injury eventually required surgery, leaving him with debilitating pain and diminished capacity to perform physical activities. His injuries now require that he walk with a cane, and Woods maintains he is unable to do most basic work-related tasks. Medical records corroborate Woods' complaints. Doctors Robert Baker and Warren Bilkey rated Woods' impairment at twenty and twenty-three percent, respectively. And other reports indicate that Woods has not responded well to conservative treatment to mitigate his impairment. Ultimately, Woods' prognosis for his physical injuries is bleak. Woods' surgeon, Dr. Stephen Glassman, opined that Woods' injuries reached Maximum Medical Improvement (MMI) on April 23, 2012.

Woods' physical injuries have also taken a toll on his psychological health. Both parties concede Woods suffers from depression and anxiety. However, despite Wood's ongoing psychological issues, he has not received any evaluation or treatment since June 13, 2012. Nor have doctors determined whether Woods' psychological issues have reached MMI. But in any event, Woods maintains that the sum total of his physical and psychological issues renders him unable to work.

An ALJ determined Woods suffered permanent total disability (PTD) as a result of his injuries and awarded him commensurate benefits on August 15, 2013. UPS petitioned for reconsideration on August 27, 2013. In its petition, UPS requested the ALJ specify whether Woods' PTD determination was based solely on Woods' back injury, his psychological issues, or a combination thereof. In an order rendered September 20, 2013, the ALJ explained that he had based his PTD determination on "a combination of [Woods'] physical and psychological problems." The ALJ stated further that it was "readily apparent" that Woods suffered psychological issues and the cumulative effect of Woods' psychological and physical issues rendered him "permanently and totally disabled." The Board later affirmed the ALJ's determination on February 28, 2014. UPS now appeals.

## **II. Standard of Review**

"The function of . . . review of the [Board] in the Court of Appeals is to correct the Board only where the Court perceives 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." *Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992). However, this Court must review the ALJ's decision to determine whether it was erroneous as a matter of law. *See* KRS 342.285(2)(c)-(e). We review questions of law which arise in a Workers' Compensation adjudication *de novo*. *Bowerman v. Black Equip. Co.*, 297 S.W.3d 858, 866 (Ky. App. 2009).

## **III. Discussion**

UPS now argues the ALJ erred as a matter of law by relying on Woods' psychological issues as a partial basis for finding him permanently and totally disabled. Specifically, UPS claims that because Woods has never been determined to have reached MMI for his psychological issues, Woods has necessarily never received a permanent whole-person impairment rating for those issues. According to UPS, determining whether a claimant is at MMI for an injury is a prerequisite to apportioning any whole-person impairment rating. And that rating, says UPS, is a prerequisite to determining whether Woods suffers permanent disability. Therefore, because the record is silent as to whether Woods' psychological issues are at MMI, it is necessarily silent as to whether he suffers any ratable whole-person impairment for his psychological issues. Thus, the ALJ could not use that silent record to determine that Woods suffered permanent total disability due to his depression and anxiety.

Put simply, UPS argues that it cannot be determined whether Woods' psychological issues could improve with treatment. Therefore, UPS maintains the ALJ should have awarded Woods *temporary*, not permanent, total disability benefits while Woods undergoes psychological treatment that may allow him to return to work.

After thorough review, we reject UPS' argument because we understand the ALJ to have considered evidence of Woods' psychological issues as part of a holistic inquiry regarding Woods' post-injury capabilities. Such an inquiry is permissible under our precedent.

To be sure, UPS correctly notes that determinations of permanent total disability under KRS 342.0011(11) (c) must be supported by evidence of a permanent disability rating. *Colwell v. Dresser Instrument Division*, 217 S.W.3d 213, 217-18 (Ky. 2006). Permanent *disability* ratings must be founded upon permanent *impairment* ratings determined under the latest available edition of the American Medical Association Guides to the Evaluation of Permanent Impairment (Guides). *Id.* The latest edition of the Guides considers impairment to be permanent when “it has reached maximum medical improvement, meaning it is well stabilized and unlikely to change substantially in the next year with or without medical treatment.” *American Medical Association Guides to the Evaluation of Permanent Impairment*, ch. 1, p. 2. (5th ed. 2000). Therefore, UPS is correct that a claimant must present evidence of (1) an injury, (2) that has reached MMI and (3) that causes ratable impairment in order to be awarded PTD benefits.

Here, the record reveals that Woods presented such evidence. Woods demonstrated he was injured on the job while driving his vehicle. Dr. Glassman opined that Woods reached MMI for those injuries on April 23, 2012. And both Dr. Baker and Dr. Bilkey assessed Woods as having ratable permanent impairment as a result of that injury.

But evidence of Woods’ physical injuries only solves half the puzzle in this case, because UPS accurately notes the ALJ relied on “a combination of [Woods’] physical and psychological problems” in awarding Woods PTD benefits. So, how

may an ALJ utilize evidence of a claimant's psychological issues, even though those issues have never been determined at MMI or rated for impairment?

Kentucky law permits an ALJ to make an "individualized determination of what the worker is and is not able to do after recovering from the work injury" in order to determine whether the worker is permanently and totally disabled. *Ira A. Watson Dep't Store v. Hamilton*, 34 S.W.3d 48, 51-52 (Ky. 2000). When an ALJ determines a claimant's post-injury capacity to work, the ALJ must necessarily consider "factors such as the worker's post-injury physical, *emotional*, intellectual, and vocational status and how those factors interact." *Id.* (emphasis added). Using these factors, it is the ALJ's duty to "translate the lay and medical evidence into a finding of occupational disability." *Id.* In doing so, an ALJ may consider a worker's testimony regarding his "physical condition and of his ability to perform various activities both before and after being injured." *Hush v. Abrams*, 584 S.W.2d 48 (Ky. 1979). Here, the record indicates that the ALJ relied on Woods' psychological limitations, not as evidence of an independent injury, but as part of his multi-factored assessment of Woods' post-injury "emotional" capacity to work.

The ALJ considered Woods' testimony at the hearing where Woods described his post-injury physical limitations and their corresponding effect on his mental state. In testifying, Woods described his constant pain and inability to perform basic physical tasks, noting how those limitations contributed to his depression, anxiety and a host of other psychological issues. Clearly, the ALJ believed that Woods' injuries have taken a serious emotional toll, which in light of

his physical injuries, diminishes his capacity to return to work. The ALJ noted that Woods presented “very credible” testimony, and that it was “readily apparent” that Woods still suffers from psychological issues. Therefore, the ALJ properly relied on Woods’ psychological issues as part of his holistic, multi-factored evaluation of Woods’ post-injury capacity to work.

Finally, we note that while it would have been permissible for the ALJ to have determined Woods was temporarily totally disabled, the ALJ was not required to do so in light of all the evidence proffered. UPS is correct that Woods’ psychological condition may improve with treatment, and thus allow him to return to work. However, should that happen, UPS is permitted to reopen Woods’ case. Until then, however, the ALJ’s award of PTD benefits remains valid.

#### **IV. Conclusion**

We affirm the February 28, 2014 Opinion of the Worker’s Compensation Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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