

IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED “NOT TO BE PUBLISHED.” PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

Supreme Court of Kentucky

2020-SC-000546-WC

XENIA R. MYERS

APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS
NO. 2020-CA-0634
WORKERS' COMPENSATION BOARD
NO. WC-18-91428

MERIT ELECTRIC, LLC; HONORABLE
BRENT E. DYE, ADMINISTRATIVE LAW
JUDGE; WORKERS' COMPENSATION
BOARD

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Xenia Myers appeals the opinion of the Court of Appeals affirming the Workers' Compensation Board's benefits award. Myers raises here the same arguments she made to the Court of Appeals: (1) the ALJ erroneously invaded the province of medical experts when he used a conversion table to arrive at an impairment rating; (2) the ALJ erroneously determined the date at which Myers reached maximum medical improvement (MMI); (3) the ALJ erred by failing to award benefits for a psychological impairment; and (4) the ALJ erred by failing to award benefits for permanent total disability (PTD). For the reasons explained below, we affirm the decision of the Court of Appeals.

I. FACTUAL AND PROCEDURAL BACKGROUND

On March 25, 2008, Myers suffered a work-related crush-injury to her left foot and ankle while operating a mini-excavator for Merit Electric, LLC, at a job site in Cedar Park, Texas. Following the incident, Myers received medical treatment in Texas that required amputation of the left leg below the knee. Eight years later, on March 4, 2016, Myers underwent stump-revision surgery to accommodate a left-leg prosthesis.

Merit Electric paid to Myers three distinct periods of temporary total disability income benefits (TTD): the first running from March 26, 2008, through May 25, 2014; the second was from May 26, 2014, to August 17, 2014; and the third was from March 4, 2016, to July 14, 2016. The ALJ identified September 2, 2009, as the date Myers reached MMI before a physician ordered stump-revision surgery. The revision procedure took place on March 4, 2016, so the next period of TTD payment resumed and continued until Myers was again determined to have reached MMI by September 6, 2016. The ALJ's decision ultimately allowed a credit to Merit Electric to the extent that it overpaid TTD.

Myers sought PTD benefits, claiming the impairment caused by the work-related injury, both physically and psychologically, rendered her totally incapable of returning to any type of gainful employment. But the ALJ awarded permanent partial disability benefits (PPD) to run 425 weeks following March 25, 2008; two periods of TTD, one period running from March 26, 2008, through September 1, 2009, and the other from January 8, 2015, through

September 5, 2016; and medical expenses. The ALJ did not award Myers benefits for the claimed psychological impairment. Myers appealed to the Workers' Compensation Board, and the Board affirmed the decision of the ALJ. Myers sought judicial review of the Board's decision in the Court of Appeals. The Court of Appeals affirmed the Board, as do we.

II. ANALYSIS

A. The ALJ properly exercised his discretion to consult a conversion chart in determining Myers's degree of impairment.

Myers asserts that the Board and the Court of Appeals erred in concluding the ALJ was at liberty to "recalculate" the impairment rating suggested by the medical evidence. Merit Electric contends that the Court of Appeals was right to affirm and to hold the ALJ had the discretion to consult the combined-values chart of the AMA guides to determine Myers's level of impairment. Merit Electric argues that Myers mischaracterizes the ALJ's action as a recalculation. To the contrary, Merit Electric asserts that the ALJ simply took Dr. Robert Jacob's assigned percentage and plugged it into the conversion chart.

Merit Electric cites *Caldwell Tanks v. Roark* in which we held that, notwithstanding the ALJ's lack of medical expertise, the ALJ had the authority to use a conversion table.¹ Merit Electric concedes the role of the ALJ is not to interpret the AMA guides themselves,² but it maintains that the ALJ did not do

¹ 104 S.W.3d 753, 757 (Ky. 2003).

² *George Humfleet Mobile Homes v. Christman*, 125 S.W.3d 288, 294 (Ky. 2004).

that here. Merit Electric maintains that under KRS 342.285 the ALJ, as the finder of fact, has the sole discretion to examine the evidence and to draw reasonable inferences from it and that ALJ Dye fulfilled that role as fact-finder, properly applying the conversion table in this case.³

Myers calls Merit Electric's use of *Roark* into question, claiming that *Roark's* application was limited in *Advance Auto Parts v. Mathis*, where the Court stated:

Caldwell Tanks v. Roark, supra, stands for only the principle that an ALJ is required to read the table that converts a binaural hearing impairment into an AMA impairment if a medical expert fails to do so. Our rationale was that a medical expert had determined the hearing impairment, and reading the table that converted it into an AMA impairment required no medical expertise.⁴

Myers asserts that the ALJ is not allowed to calculate impairment ratings when a physician has already done so, except in extremely rare circumstances which are not present here.

We disagree with Myers. Dr. Jacob failed to read the table properly, so the ALJ used the table himself as allowed under *Roark*. The ALJ's use of the table also would have a similar justification as in *Advance Auto Parts*, as here a medical expert, Dr. Jacob, determined the level of impairment, and all that was left to do was properly convert the rating using the chart, a task that required no medical expertise. The ALJ did not assume the role of a medical expert. Instead, he took the determination of Dr. Jacob and converted it using an

³ *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418, 419 (Ky. 1985); *McCloud v. Beth-Elkhorn Group.*, 514 S.W.2d 46, 47 (Ky. 1974).

⁴ No. 2004-SC-0146-WC, 2005 WL 119750, at *1, 2 (Ky. Jan. 20, 2005).

existing chart. The ALJ did not pick a “separate and distinct impairment rating,” i.e., “recalculate” the rating, but took what Dr. Jacob said and properly ran his testimony through a conversion chart.⁵ So the principles and holding of *Caldwell Tanks* apply. The ALJ properly applied the conversion table to the evidence of record.

B. The ALJ’s determination of the date Myers achieved MMI was supported by substantial evidence.

Myers argues that the date she was determined to be at MMI is incorrect. The ALJ awarded Myers TTD benefits set to expire on September 1, 2009. On September 2, 2009, Dr. Bartko determined that Myers had achieved MMI. When Dr. Bartko informed Myers of this, he also told her that she needed to remain on medication. So Myers argues that it was unreasonable for her TTD benefits to be terminated and that the date she was determined to be at MMI is incorrect because her medical treatment had not totally resolved and she could not return to her customary work.

The factual determination of an ALJ will be upheld if it is supported by substantial evidence.⁶ And Myers had the burden of proof to show the date she was determined to reach MMI was incorrect.⁷ Because she failed to carry the burden of proof, this Court will not overturn the ALJ’s findings of fact unless the evidence compels a contrary finding.⁸ Evidence compels such a finding

⁵ *RCS Transp. v. Malin*, No. 2010–CA–001229–WC, 2011 WL 4537903, at *1, 5 (Ky. App. Sept. 23, 2011).

⁶ *Hale v. CDR Operations, Inc.*, 474 S.W.3d 129, 140 (Ky. 2015).

⁷ *Burton v. Foster Wheeler Corp.*, 72 S.W.3d 925, 929 (Ky. 2002) (citations omitted).

⁸ *Wolf Creek Colliers v. Crum*, 673 S.W.2d 735, 736 (Ky. App. 1984).

when it has such overwhelming force that no reasonable person could conclude as the ALJ did.⁹ Here, Myers relied on certain physicians' assessments, under which Myers was found to require revisional surgery and that her treatment would not be complete until after this surgery. So, she argues, she could not be at MMI pre-surgery on September 2, 2009.

The ALJ made his determination relying on the expert opinion of Dr. Jacob. The ALJ stated:

Myers originally reached MMI on September 2, 2009. This was approximately a year and three months after Myers had her left leg amputated. Dr. Jacob assigned this date. He assigned it after reviewing Myers' medical records. He noted that Myers' activity levels have significantly increased around this time. Dr. Jacob notes that a North Carolina Pain Management provider issued a similar opinion around this period.

Because the ALJ's determination was supported by substantial evidence, we accept the ALJ's finding that Myers achieved MMI on September 2, 2009.

C. The ALJ's decision to use the psychological impairment rating assigned by Dr. Butler was not erroneous.

Myers contends that the ALJ's finding a lack of psychiatric impairment was erroneous and that the ALJ should have used Dr. Wilkerson's psychiatric impairment rating, which was favorable to Myers. Merit Electric argues the ALJ's finding was not clear error, that "when medical experts offer different opinions on such issues as an injured worker's impairment rating and/or the

⁹ *REO Mech. v. Barnes*, 691 S.W.2d 224, 226 (Ky. App. 1985).

proper application of the AMA Guides, it is the ALJ's function to weigh the conflicting evidence and to decide which is more persuasive."¹⁰

Here, the ALJ found Dr. Butler's opinion to be more persuasive than Dr. Wilkerson's and assigned a psychological impairment rating accordingly. As this is a factual determination, the question once again is whether it was clear error for the ALJ to rely on Dr. Butler's opinion and whether the evidence compels a different finding.¹¹ Here, there was evidence of substance supporting Dr. Butler's rating, which led him to disagree with Dr. Wilkerson. Dr. Butler believed that the rating Dr. Wilkerson assigned was excessive, and that Myers's medical history supported a lower impairment rating based on Myers's symptoms, which were non-debilitating in this case. Dr. Butler found it significant that Myers had not received any psychological treatment for "approximately a decade" and that Myers had not taken any medication for the purported psychiatric conditions. The ALJ relied on these facts and Dr. Butler's opinion in finalizing a psychological impairment rating, so the decision of the ALJ stands as supported by substantial evidence.

D. It was not error for the ALJ to determine Myers does not lack the capacity to return to work.

Myers contends that she is totally disabled and lacks the capacity to return to work. The ALJ found otherwise. As this is again a factual finding against the party with the burden of proof, the question on appeal is whether

¹⁰ Merit Electric cites in support of this proposition *Brown-Forman Corp. v. Upchurch*, 127 S.W.3d 615, 621 (Ky. 2004), and *Greene v. Paschall Truck Lines*, 239 S.W.3d 94, 109 (Ky. App. 2007).

¹¹ *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986); *Wolf Creek Collieries*, 673 S.W.2d at 736.

the evidence is so overwhelming as to compel a PTD award.¹² Myers relies on evidence that her insurance carrier continued to pay her benefits as conclusive proof that she was disabled, lacking the physical capacity to return to work altogether. Myers argues that if the nurse manager for this insurance company thought her capable of returning to work, then her benefits would have stopped. And the carrier did not stop her benefits.

The ALJ performed an extensive review of the record evidence to consider whether Myers was totally occupationally disabled. In making its determination, the ALJ considered Myers's post-injury physical, emotional, intellectual, vocational status, and how those factors interact. After conducting his review, the ALJ may translate the impairment rating into partial or total disability.¹³ The ALJ here made this translation and simply reached a different conclusion than that urged by Myers. But the evidence did not compel the conclusion Myers asserts, so again we decide not to disturb the finding.

III. CONCLUSION

For the foregoing reasons, we affirm the decision of the Court of Appeals.

All sitting. All concur.

¹² *REO Mech.*, 691 S.W.2d at 226.

¹³ *Ira A. Watson Dep't Store v. Hamilton*, 34 S.W.3d 48 (Ky. 2000).

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