OPINION ENTERED: NOVEMBER 9, 2012

CLAIM NO. 200780468 & 200695103

BERT KILBURN PETITIONER

VS. **APPEAL FROM HON. DOUGLAS W. GOTT, ADMINISTRATIVE LAW JUDGE**

ICG HAZARD, LLC
and HON. DOUGLAS W. GOTT,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

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

SMITH, Member. Bert Kilburn ("Kilburn") appeals from the June 11, 2012 Opinion and Order rendered by Hon. Douglas W. Gott, Administrative Law Judge ("ALJ Gott") and from the July 6, 2012 order overruling Kilburn's petition for reconsideration. ALJ Gott determined Kilburn had not proven a worsened condition on reopening. On appeal, Kilburn argues ALJ Gott did not apply the appropriate standard in reaching his decision. We disagree and affirm.

In order to adequately identify the issues before the Board, it is first necessary to review the litigation history. The Department of Workers' Claims ("DWC") assigned claim number 2006-95103 to Kilburn's Form 101, filed October 11, 2007. Therein, he alleged physical injuries to his back, head, neck, arms, legs, shoulders, as well as a psychological injury, all resulting from picking up a piece of metal on February 8, 2006. Kilburn later filed motions to amend his claim to include an August 2, 2007 upper back strain injury and cardiac complaints. For administrative reasons, the DWC identified the amended claim with a new claim number, 2007-80468. The claims were assigned to Hon. John B. Coleman, Administrative Law Judge, ("ALJ Coleman") who consolidated the claims by order of January 4, 2008.

In an Opinion, Award and Order rendered April 27, 2009, ALJ Coleman found in part as follows:

> The first issue to be discussed by the Administrative Law Judge is the issue of apportionment. The plaintiff alleges two separate dates of injury being February 8, 2006 and August 2, 2007. Luckily, the plaintiff was seen by Dr. James Bean, a well respected [sic] neurosurgeon, after the first event as well as the second event. He noted after the first event that the plaintiff had sustained a lumbar sprain with an annular tear at L4-5 on the left. After the second event, he was able to review additional diagnostic studies and commented that there were no new

> findings or changes in appearance from the earlier MRI. These comments confirmed the apportionment testimony of Dr. Potter who opined that the plaintiff's complaints were caused by the injury of February 8, 2006 and that he suffered only an aggravation of that condition from the work event of August 2, 2007. This evidence convinces the Administrative Law Judge that the proper apportionment of the plaintiff's disability is with the event of February 8, 2006 filed under claim number 06-95103. The Administrative Law Judge finds that the event of August 2, 2007 was only an aggravation of the prior work injury which caused no new additional structural changes as noted by Dr. Bean. As such, claim number 07-80468 must be dismissed.

Having determined the August 2, 2007 event was only an aggravation of the prior work injury, ALJ Coleman dismissed claim number 2007–80468. ALJ Coleman found as follows regarding the extent and duration of Kilburn's disability from the February 8, 2006 injury:

> The final issue to be determined by the Administrative Law Judge is the issue of extent and duration of disability including whether there should be an offset for prior active impairment or disability. The plaintiff argues for an award of permanent total disability benefits while the defendant argues for an award based on a 5% impairment. 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. In this case,

the Administrative Law Judge is convinced by the plaintiff's testimony that he is suffering from severe lower back pain and that he is unable to return to his usual occupation as a welder which required him to do a lot of heavy lifting and manual labor work. However, the restrictions placed upon the plaintiff by the numerous physicians in the record are not of such a severe nature to indicate that the plaintiff would not be able to compete for any type of work as a result of his lumbar injury. The plaintiff is only age 51 and has a high school education and a demonstrated ability to be vocationally retrained. The mental health testimony in the record does not indicate occupational implications beyond those which the plaintiff suffers from a physical standpoint. While the mental health physicians believe the plaintiff needs additional treatment for his condition neither have placed additional restrictions on the plaintiff from a mental health standpoint. As such, the Administrative Law Judge has not been convinced that the plaintiff has been rendered permanently and totally disabled as a result of the injury of February 8, 2006. The Administrative Law Judge is convinced the plaintiff retains a 6% impairment for the lumbar injuries as opined by Dr. Snyder. While the Administrative Law Judge is convinced Dr. Snyder correctly assessed a 6% whole person impairment, he notes that he was more persuaded by other testimony in the record in regards to which accident was the cause of the impairment. The Administrative Law Judge is further convinced that Phil Pack correctly assessed the plaintiff with a 15% impairment for his mental health condition.

Utilizing the Combined Values Chart of the American Medical Association Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"), ALJ Coleman determined Kilburn had a 20% whole person impairment and was entitled to enhancement by the three multiplier pursuant to KRS 342.730(1)(c)1.

Kilburn filed a motion to reopen on October 21, 2011, alleging his condition had worsened to the point he "is no longer able to do anything that he used to be able to do." Kilburn stated he is on more medication than he had been due to increased pain. Kilburn supported the motion with a statement from Dr. W. Grady Stumbo, indicating his condition had worsened. Since MRI results showed more encroachment on the nerve pathway, Dr. Stumbo determined Kilburn was now 100% occupationally disabled due to the work-related injury.

Kilburn testified by deposition on February 27, 2012 and on April 17, 2012. He stated he continues to see Dr. Stumbo approximately every two months. He also indicated he now takes more medication than he did at the time the original decision was rendered. He continues to have a sharp, stabbing pain about halfway up his back, making it difficult for him to walk and negotiate steps. He stated "it takes me three hours to get to where I can move around and that is after I take two pain pills." Kilburn indicated

his pain, which he rates as a nine on a ten scale, goes down his back to just above his tailbone. Kilburn can only sit for about ten minutes at a time. He has tried to walk a mile every day for his heart condition. However, he can only lift up to 20 pounds.

Kilburn introduced Dr. Stumbo’s medical records and the April 20, 2012 deposition testimony. Dr. Stumbo noted Kilburn had been a regular patient since before 2005 when he treated Kilburn for inflammatory arthritis. Dr. Stumbo acknowledged the first MRI done in 2006 showed degenerative osteoarthritic changes in Kilburn's spine. He noted, comparing the July 22, 2011 MRI with the 2007 MRI revealed a progression of Kilburn’s disease with evidence of more encroachment of the spine caused by a bony osteophyte. Dr. Stumbo opined Kilburn's condition had worsened and he did not believe Kilburn could return to any kind of meaningful employment.

Dr. Stumbo indicated the current medications prescribed for Kilburn's back condition included Percocet, four times per day, Tramadol, two pills three times per day, and Skelaxin, 800 mg three times per day. Dr. Stumbo stated he presumed the work injury or injuries likely aggravated a pre-existing dormant and non-disabling condition in Kilburn’s back.

Kilburn filed the July 22, 2011 MRI report of Ace Clinique of Medicine. The MRI revealed the following:

> L4–5 central disc herniation with bilateral neural foraminal encroachment to lateral bulging disc and hypertrophic facet joint change, L5–S1 bulging disc and osteophyte formation with bilateral neural foraminal encroachment and no acute fracture or high-grade spinal stenosis.

ICG Hazard, LLC ("ICG") filed the report of Dr. Ralph Crystal, who conducted a vocational evaluation on March 20, 2012. Dr. Crystal stated, based on the physical work assessments from Drs. Vaughan and Kriss, Kilburn was qualified to perform alternate work. From a vocational perspective, there had not been a change in Kilburn's ability to perform work following the Opinion and Award. Dr. Crystal opined Kilburn was qualified to perform the same type of work at present as he was prior to the entry of the Opinion and Award. Dr. Crystal identified numerous jobs he believed Kilburn could perform including positions in security, manufacturing, clerical/cashier, and service categories. Dr. Crystal concluded Kilburn does not have a complete and permanent inability to perform any type of work as a result of the injury and, with or without education or training, there are jobs Kilburn is qualified to perform

physically and mentally. Dr. Crystal stated Kilburn did not have a change in his ability to access jobs.

ICG filed the report of Dr. Timothy Kriss, who performed an independent medical evaluation on March 5, 2012. Dr. Kriss reviewed extensive medical records from Drs. Snyder, Nemeth, Travis, Ruth, Pack (MS), Vaughan, Yalamanchi, Bean, Potter, Brasfield, Stumbo, Sharma, Podapati, and Appakondu. He also reviewed the April 27, 2009 Opinion and Award and the motion to reopen. Dr. Kriss concluded there was an absence of significant change in Kilburn's medical condition since April 27, 2009. He noted Dr. Stumbo's medical report declared Kilburn's ongoing symptoms to be low back pain and sciatica pain. However, the symptoms were no different than those noted by Dr. Stumbo on the January 21, 2008 Form 107, listing Kilburn's symptoms as "back pain, burning in the left foot, radicular pain, left hip pain, pain getting in and out of the truck, no improving bending and squatting." Dr. Kriss opined the more recent symptoms were no different qualitatively or quantitatively compared to Kilburn's "catalog of complaints" documented by Dr. Stumbo and numerous other physicians prior to April 27, 2009.

Dr. Kriss stated the MRI "encroachment" Dr. Stumbo observed was a marker for ongoing, naturally occurring,

inevitable progressive osteoarthritis and spondylosis. He indicated the sequential MRI scans were simply documenting the natural history of degenerative disc disease, osteoarthritis, and spondylosis. Further, he stated the encroachment was caused by the gradual increase in size of the facet joints – growing bone spurs – and these were from arthritis, not from the February 8, 2006 work injury. Dr. Kriss noted no treating or examining physician had ever diagnosed Kilburn with facet hypertrophy or bone spurs caused by trauma on February 8, 2006. Dr. Kriss concluded Dr. Stumbo had not provided any medical evidence of lumbar worsening since April 27, 2009, much less objective or convincing medical evidence of worsening within a reasonable degree of medical probability.

Dr. Kriss stated he could not discern any medical evidence of increased impairment or increased occupational disability since April 27, 2009. Although Kilburn claimed subjective worsening, his description of his pain, severity, and its impact on his life and physical activities was not substantially different than the same subjective complaints voiced by Kilburn prior to April 27, 2009. Dr. Kriss stated there was an obvious degree of symptom magnification.

Dr. Kriss assigned a 5% DRE category II whole person lumbar work-related impairment and would have assigned the

same degree of impairment on April 27, 2009. Dr. Kriss would assign work-related permanent restrictions of no lifting more than 30 pounds and the avoidance of unusually frequent/repetitive bending and twisting at the waist. He indicated he would have assigned the same restrictions on April 27, 2009.

ALJ Gott rendered an Opinion and Order on June 11, 2012, making the following findings relevant to this appeal:

> 6. The ALJ observed and reviewed Kilburn's testimony. He has only treated with Dr. Stumbo since 2009. Dr. Stumbo referred him to a neurosurgeon, but that referral was denied. He said his pain is now 9/10 whereas before it was 7–8/10. He cannot sit or stand more than 10–15 minutes, and cannot lift more than 20 pounds. His left lower extremity numbness goes to the knee.
>
> 7. Plaintiff argues upon reopening he has demonstrated a change from permanent partial to permanent total disability. KRS 342.125(1)(d). It is well established that in a reopening, the burden of proof falls upon the party seeking a change in the award. *Griffith vs. Blair*, 430 S.W.2d 337 (Ky. 1968). In this case, the ALJ finds that Kilburn has not proven that his condition has worsened since the award in April of 2009.
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> The foremost reason the ALJ reached this conclusion is that Dr. Stumbo's opinion of total disability is unchanged from prior to April of 2009. The most significant testimony in this case is Dr. Stumbo's acknowledgment that he thought Kilburn was totally disabled

when he issued a report to that effect in January of 2008. (p. 9). He reiterated that opinion in a treatment note dated November 4, 2009, several months after the original Opinion but clearly an expression of a long–held belief: “reviewed work injury – not likely to ever work again.” The new MRI in July of 2011 did not cause Dr. Stumbo to reach the opinion of total disability; he had long ago expressed that opinion. Dr. Stumbo mentioned clinical support for his opinion of a worsened condition, but he did not explain how findings had changed since 2009.

When Dr. Kriss asked Kilburn why he believed he was now worse, Kilburn responded by saying that the numbness in his left leg was much worse. But among Kilburn's ailments that are not part of this low back claim is a left knee condition. In his deposition, Kilburn attributed the numbness in his left leg to a prior knee injury. (p. 16-17, 22). The medical evidence appears conclusive that Kilburn does not suffer left lower extremity radiculopathy from his work related low back injury. Dr. Kriss noted, “I concur with Dr. Snider, Vaughn, Travis, Bean, Sharma, and Potter that Mr. Kilburn does not have radiculopathy or nerve root compression. Mr. Kilburn has no radicular symptoms, no radicular findings, and no nerve root compression on any of his imaging studies.” (p. 7).

The ALJ was not impressed with Kilburn's testimony that his pain is now worse because it had increased from 7–8/10 to 9/10. (p. 14). As itemized by Dr. Kriss in his report, Kilburn complained of pain at either 9/10 or 10/10 on 14 occasions prior to April of 2009. (p. 9). Kilburn also reported to

> Dr. Potter prior to April of 2009 that he had trouble sitting or standing more than 10 minutes or lifting more than 10 pounds, the same level of complaints he currently describes. (Kilburn p. 15; Kriss p. 10). The sharp stabbing pain in Kilburn's back, a “cyst” he called it, was similarly reported to Dr. Travis in September of 2008. (Kilburn p. 14; Kriss p. 12). Kilburn claimed to be and argued for total disability in the original case, and currently presents the same argument based on the same evidence. He has not proven a worsened condition on reopening.

Kilburn filed a petition for reconsideration on June 18, 2012, raising essentially the same arguments he now raises on appeal to the Board. The ALJ overruled Kilburn’s petition by order dated July 6, 2012.

On appeal, Kilburn argues the ALJ used an improper standard of review. Kilburn takes issue with the ALJ’s statement that the foremost reason he reached his conclusion was that Dr. Stumbo's opinion of total disability is unchanged from his opinion prior to April of 2009. Kilburn notes the baseline for a determination of whether there has been a change in impairment or occupational disability upon reopening is the original opinion and award. Kilburn argues only the findings of fact and conclusions of law reached by ALJ Coleman in the original opinion are relevant for comparison to the evidence presented upon reopening. Kilburn argues that a physician’s belief that the claimant

is totally disabled at the time of an original decision does not preclude consideration of the doctor’s opinion on reopening that the claimant's impairment or occupational disability increased.

Kilburn argues the evidence presented on reopening, when compared with the findings set forth in the original opinion, is sufficient to justify a finding of increased impairment and occupational disability. Kilburn argues he met his burden of proof to establish an increase in his occupational disability. Kilburn requests the Board to remand this matter to the ALJ for a re-examination of the record based on the correct standard of review upon reopening consistent with the holding in Woodland Hills Mining Inc. v. McCoy, 105 S.W.3d 446 (Ky. 2003).

It is the claimant’s burden to prove his right to additional benefits on reopening, including the allegation his condition has worsened to the extent he is permanently and totally disabled. Stambaugh v. Cedar Creek Mining, 488 S.W.2d 681 (Ky. 1972); Griffith v. Blair, 430 S.W. 2d 337 (Ky. 1968); Jude v. Cubbage, 251 S.W.2d 584 (Ky. 1952). If he fails to do so, his burden on appeal is to show the evidence was so overwhelming as to compel a favorable decision. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986). The mere existence of evidence that would have

supported a different decision will not compel reversal on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974).

KRS 342.275 and KRS 342.285 designate the ALJ as the finder of fact. As fact-finder, the ALJ has the sole discretion to determine the quality, character, and substance of the evidence. Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). The 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 party's total proof and may choose whom and what to believe. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977); Pruitt v. Bugg Bros. (Ky. 1977) 547 S.W.2d 123.

KRS 342.125(1)(d) permits a prior award to be reopened upon evidence of a "[c]hange of disability as shown by objective medical evidence of worsening ... of impairment due to a condition caused by the injury since the date of the award or order." In ascertaining whether there has been a change in condition on reopening, the ALJ is obligated to analyze not only the proof presented at the time of reopening, but also the evidence available in the original claim. W. E. Caldwell Co. v. Borders, 301 Ky. 843, 193 S.W.2d 453 (1946).

In the case *sub judice*, the ALJ did not believe Kilburn met his burden of showing a worsening of his condition on reopening.

Contrary to ICG's argument, we believe the ALJ understood and applied the appropriate standard on reopening. ALJ Gott clearly indicated he considered the evidence at the time the claim was decided when he stated Kilburn "currently presents the same argument based on the same evidence. He has not proven a worsened condition on reopening."

ALJ Gott was simply not persuaded by the opinion of Dr. Stumbo. The ALJ did not believe Dr. Stumbo sufficiently explained how his findings had changed since 2009. ALJ Gott's rejection of Dr. Stumbo's opinion was not based solely on the fact Dr. Stumbo had offered the opinion that Kilburn was totally disabled prior to the original decision. Further, ALJ Gott was not convinced Kilburn's complaints were different from those documented in medical records prior to the original decision. As noted by ALJ Gott, Dr. Kriss reviewed the medical records and itemized numerous reports by Kilburn of either "9/10 or 10/10" pain levels prior to the original decision.

Additionally, the record contains ample substantial evidence to support ALJ Gott's finding that Kilburn's

condition did not worsen. Dr. Kriss unequivocally stated there was no worsening of the work-related condition. Further, Dr. Crystal stated there was no change in Kilburn's ability to access jobs following the opinion and award. The evidence simply does not compel a finding of a worsened condition.

Kilburn, in his brief, requested oral arguments before this Board. We have reviewed the record and arguments on appeal and find no novel or complicated issues. Therefore, no oral argument is necessary.

Accordingly, the June 11, 2012 Opinion and Order and the July 6, 2012 Order overruling Kilburn's Petition for Reconsideration rendered by Hon. Douglas W. Gott are **AFFIRMED**. **IT IS HEREBY ORDERED** Kilburn's request for oral arguments to be held is **DENIED**.

ALL CONCUR.

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LAWRENCE F. SMITH, MEMBER
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