

OPINION ENTERED: June 28, 2013

CLAIM NO. 201072813

JOHN ROBERT RAY

PETITIONER

VS.

APPEAL FROM HON. J. LANDON OVERFIELD,
CHIEF ADMINISTRATIVE LAW JUDGE

DIEBOLD/BROADSPIRE INSURANCE
and HON. J. LANDON OVERFIELD,
CHIEF ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION AND ORDER
AFFIRMING

* * * * *

BEFORE: ALVEY, Chairman, and STIVERS, Member.

ALVEY, Chairman. John Robert Ray ("Ray") appeals from the order entered November 26, 2012 by Hon. J. Landon Overfield, Chief Administrative Law Judge ("CALJ"), overruling the motion to reopen his claim from an injury sustained on August 12, 2010 while working for Diebold. No petition for reconsideration was filed.

On appeal, Ray argues the CALJ erred in overruling the motion to reopen as a matter of law. Because the CALJ did not err in determining Ray failed to present a *prima facie* case setting forth a basis for reopening pursuant to KRS 342.125, we affirm.

Ray filed a Form 101, Application for Resolution of Injury Claim, on July 18, 2011, alleging he sustained a low back injury due to pulling a box or module from his truck while working for Diebold on August 12, 2010.

An opinion was rendered by Hon. John B. Coleman, Administrative Law Judge ("ALJ Coleman"), on March 30, 2012, finding, pursuant to Robertson v. United Parcel Service, 64 S.W.3d 284 (Ky. 2001), Ray sustained a temporary injury, and awarding temporary total disability ("TTD") benefits from August 12, 2010 through February 16, 2011. ALJ Coleman also awarded medical benefits during the period TTD benefits was paid, but dismissed Ray's claim for permanent benefits. Ray filed no petition for reconsideration of the ALJ's decision, nor did he file an appeal.

On October 15, 2012, Ray filed a motion to reopen the claim on the basis of a change of disability as shown by objective evidence, and also based upon mistake. Ray attached the following to his motion to reopen:

1. A request for leave pursuant to the Family and Medical Leave Act completed by Ray on September 17, 2012;
2. A Form 106;
3. A Form 104;
4. A Form 113 listing Dr. Joseph Catalano as his designated physician;
5. The March 30, 2012 opinion rendered by ALJ Coleman;
6. Office notes from Dr. Louie Williams dated July 10, 2012; August 20, 2012; and September 5, 2012 noting Ray's back and neck pain remain unchanged, but wax and wane.
7. Ray's affidavit dated October 12, 2012 stating the claim should be reopened due to mistakes made by his attorney;
8. A note from Spencer County Physical Therapy dated August 26, 2010;
9. A letter from Ray to ALJ Coleman dated August 26, 2010;
10. An undated and unaddressed letter;
11. An undated Benefits Committee appeal form;
12. Physical therapy records from December 15, through January 7, however the years of treatment are not indicated;
13. A canceled check from Ray to Diebold dated January 30, 2011;
14. Another undated letter;

15. The January 20, 2011 report prepared by Dr. Jules Barefoot;

16. An undated unaddressed eleven page letter prepared by Ray;

17. Physical therapy records from Spencer County Physical Therapy for treatment administered August 26, 2010; December 30, 2010; and, January 4, 2011;

18. An undated letter from Ray to his attorney;

19. And, another copy of ALJ Coleman's opinion.

In an order entered November 26, 2012, the CALJ

found as follows:

This matter is before the undersigned Chief Administrative Law Judge (CALJ) on the Frankfort Motion Docket upon Plaintiff's motion to reopen the above styled claim on the grounds of a worsening of physical condition and/or mistake. Plaintiff has supported the motion with his affidavit, copies of various pieces of correspondence between Plaintiff and his counsel and copies of medical records of Louie N. Williams, M.D. None of the medical records introduced substantiates that there has been a change in Plaintiff's condition since the award sought to be reopened which are shown by objective medical evidence. There is also no showing of a mistake upon which a reopening can be based. In essence, Plaintiff argues that he was not adequately represented and the appropriate medical evidence was not gathered and submitted to the

trier of fact. Plaintiff's motion to reopen is procedurally deficient.

Being fully and sufficiently advised, the undersigned Administrative Law Judge concludes that Plaintiff has failed to establish a *prima facie* case for reopening this claim.

Therefore, **IT IS HEREBY ORDERED** the Plaintiff's motion to reopen is **OVERRULED**.

Reopening of claims is governed by KRS 342.125.

Specifically, KRS 342.125 (1)(d) states as follows:

(1) Upon motion by any party or upon an administrative law judge's own motion, an administrative law judge may reopen and review any award or order on any of the following grounds:

(a) Fraud;

(b) Newly-discovered evidence which could not have been discovered with the exercise of due diligence;

(c) Mistake; and

(d) Change of disability as shown by objective medical evidence of worsening or improvement of impairment due to a condition caused by the injury since the date of the award or order.

(2) No claim which has been previously dismissed or denied on the merits shall be reopened except upon the grounds set forth in this section.

ALJ Coleman previously awarded TTD benefits and temporary medical benefits, but dismissed Ray's claim for

permanent benefits. No appeal was taken from that March 30, 2012 decision. The question now before this Board is whether the CALJ erred in overruling Ray's motion to reopen for failing to establish a *prima facie* basis for doing so. We conclude he did not.

It is well established the procedure for reopening a prior workers' compensation claim pursuant to KRS 342.125 is a two-step process. Colwell v. Dresser Instrument Div., 217 S.W.3d 213, 216 (Ky. 2006). The first step is the *prima facie* motion, which requires the moving party to provide sufficient information to demonstrate a substantial possibility of success in the event evidence is permitted to be taken. Stambaugh v. Cedar Creek Mining, 488 S.W.2d 681 (Ky. 1972). "*Prima facie* evidence" is evidence which "if unrebutted or unexplained is sufficient to maintain the proposition, and warrant the conclusion [in] support [of] which it has been introduced ... but it does not shift the general burden" Prudential Ins. Co. v. Tuggle's Adm'r., 254 Ky. 814, 72 S.W.2d 440, 443 (1934). The burden during the initial step is on the moving party and requires establishment of grounds for which the reopening is sought under either KRS 342.125(1) or (3). Jude v. Cabbage, 251 S.W.2d 584 (Ky. 1952); W.E. Caldwell Co. v. Borders, 301 Ky. 843, 193 S.W.2d 453 (Ky. 1946). It is only after the moving

party prevails in making a *prima facie* showing as to all essential elements of the grounds alleged for reopening that the adversary party is put to the expense of further litigation. Big Elk Creek Coal Co. v. Miller, 47 S.W.3d 330 (Ky. 2001).

Here, the CALJ determined Ray failed to present a *prima facie* case for reopening the claim. As noted by the CALJ, none of the materials submitted by Ray with the motion to reopen establish he sustained a change of condition subsequent to the opinion rendered by ALJ Coleman. In fact, a significant portion of the documentation accompanying the motion to reopen is either undated or existed prior to the entry of ALJ Coleman's opinion. The attachments are completely bereft of any documentation supporting either a change of condition, or a mistake which would permit a reopening.

Ray argues his claim should be reopened based upon mistake, and he has sustained a change of his condition. The principle of *res judicata* is central to our legal system. Although some relief from *res judicata* is permitted in limited circumstances outlined in KRS 342.125, none of those criteria exist in the claim *sub judice*. Bolin v. T & T Mining, 231 S.W.3d 130 (Ky. 2007). Pursuant to Stambaugh v. Cedar Creek Mining, Co., 488 S.W.2d 681

(Ky. 1972), Ray failed to make a *prima facie* showing of any possibility he could prevail on reopening. We cannot say the CALJ's assessment is erroneous.

We also acknowledge Diebold's request that sanctions be levied against Ray pursuant to KRS 342.310 and 803 KAR 25:010 §24 for filing a frivolous appeal. Such request is not taken lightly. Finding Ray, in this instance, did not file a frivolous appeal, **IT IS HEREBY ORDERED** the request for sanctions is **DENIED**. However, Ray is cautioned that appeals without the likelihood of success are frowned upon, and any such additional filings in the future may result in sanctions.

For the foregoing reasons, we **AFFIRM** the decision of the Chief Administrative Law Judge.

STIVERS, MEMBER, CONCURS.

MICHAEL W. ALVEY, CHAIRMAN
WORKERS' COMPENSATION BOARD

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