

OPINION ENTERED: MAY 24, 2013

CLAIM NO. 201200462

WALMART STORES, INC.

PETITIONER

VS.

**APPEAL FROM HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE**

LESTER DANIELS
and HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
AFFIRMING**

* * * * *

BEFORE: ALVEY, Chairman, STIVERS, Member.

ALVEY, Chairman. Wal-Mart Stores, Inc. ("Wal-Mart") appeals from the January 11, 2013 Opinion and Order rendered by Hon. William J. Rudloff, Administrative Law Judge ("ALJ") awarding permanent total disability ("PTD") benefits and medical benefits. Wal-Mart also appeals from the February 7, 2013 Opinion and Order denying its petition for reconsideration.

The ALJ found Lester Daniels ("Daniels") permanently totally disabled due to a back injury and a resulting psychological condition he sustained on June 29, 2010. Wal-Mart argues the ALJ erred in 1) finding Daniels sustained a compensable injury, 2) finding Daniels gave proper notice, 3) failing to find a pre-existing active condition, 4) finding a psychological injury and 5) finding Daniels permanently totally disabled. Because the ALJ's determination is supported by substantial evidence, we affirm.

Daniels testified by deposition on June 27, 2012 and at the hearing held January 9, 2013. Daniels, who was born November 2, 1973, is a high school graduate with no specialized or vocational training. Daniels began working for Wal-Mart in 1995, stocking shelves, helping customers and unloading trucks. He performed these duties throughout his employment with the exception of a two month period in 2005 when he worked as a department manager. Daniels testified he left the management position because he was mentally incapable of performing the job.

Daniels acknowledged injuring his back in 2001 while lifting a box of Clorox, and he continued to have some difficulty afterward, but continued to work. He rated his pain as two or three on a scale of one to ten. Daniels

rated his current pain as an eight on a scale of one to ten. He stated he had occasional flare-ups due to his work but would only miss "a couple of days" and it would resolve. He treated with Dr. Emanuel Rader following the 2001 incident and was released to full duty work.

Daniels testified his back condition progressively worsened over the years until he ceased working in 2010. After missing approximately one month of work, Daniels received a telephone call from Wal-Mart on June 29, 2010, informing him he had used all of his sick leave. Daniels informed the employer he was incapable of returning to work.

Daniels acknowledged past psychological problems as a teenager and taking medication for depression in 2004. Additionally, he stated he annually experienced panic attacks.

Dr. David Muffly evaluated Daniels on February 16, 2012 for complaints of low back pain radiating into his hips and legs, numbness in the thighs, and weakness with constant pain in the lumbar spine. Dr. Muffly noted a twenty year history of low back pain without any specific injury. Daniels reported he worked for Wal-Mart for fifteen years, and ceased when his back pain became severe, and he experienced numbness and weakness in his legs. On examination, Daniels lumbar spine was tender and spasms were

present. Forward flexion, extension, and right and lateral bending were limited.

Dr. Muffly reviewed records from Drs. Jim Brasfield, Dahhan, Mohan and Rader. Additionally, Dr. Muffly reviewed x-rays of the lumbar spine dated March 20, 2001 and May 18, 2004. Dr. Muffly reviewed an MRI of the lumbar spine dated August 11, 2010 and a lumbar CT myelogram dated November 2, 2010.

Dr. Muffly diagnosed chronic low back pain related to grade 1 spondylolisthesis at L5-S1 and grade 1 retrolisthesis at L4-5. Dr. Muffly stated Daniels had bilateral lumbar radiculopathy causing right leg weakness and calf atrophy. Dr. Muffly suspected cervical degenerative disc disease although no prior studies were available. He further noted a history of gout controlled with medication and stated Daniels was morbidly obese. Dr. Muffly recommended restrictions of ten pounds maximum lifting and the ability to change position every twenty minutes. He indicated Daniels should not stand or walk more than two hours per eight hour day and could perform only minimal bending and stooping.

Dr. Muffly completed a Form 107 medical report on October 30, 2012. He diagnosed bilateral lumbar radiculopathy, spondylolisthesis grade 1 L5-S1, degenerative

disc disease L4-5 and L5-S1, and chronic low back pain, all caused by the injury as a result of cumulative trauma. Using the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"), Dr. Muffly assigned a 10% whole person impairment, placing Daniels in DRE lumbar category III, none of which was active prior to the injury. Dr. Muffly determined Daniels reached maximum medical improvement on February 16, 2012, and did not retain the physical capacity to return to the type of work performed at the time of injury.

Daniels submitted the report of Phil Pack, M.S., who conducted a psychological evaluation on January 7, 2012. Mr. Pack diagnosed major depression, single episode, mild to moderate without psychotic features; rule out somatoform disorder, N.O.S.; and psychological factors affecting physical condition. Mr. Pack noted Daniels' history indicated long-standing complaints of physical pain as well as a pattern of anxiety issues secondary to avoidant and dependent features in regard to his characterological make-up. Mr. Pack noted Daniels' general stress tolerance was poor and he had left a job in management because he could not handle the pressure. Daniels functioned fairly well in his job in "stock" but reported deterioration in his physical functioning.

Mr. Pack stated Daniels' psychological symptoms suggest significant anxiety and depression as well as somatic preoccupation and he "is having difficulties accepting his current situation." Mr. Pack stated Daniels' mental status presents difficulty for him regarding training and/or attempts at employment. He stated Daniels has a poor ability to deal with the public and work stress, and a fair ability to follow work rules, relate to co-workers, use judgment, interact with supervisors, function independently and maintain attention/concentration. Mr. Pack stated Daniels has a fair ability to behave in an emotionally stable manner and a poor ability to relate predictably in social situations or demonstrate reliability.

Wal-Mart submitted the report of Dr. Brasfield, who performed an independent medical evaluation on July 23, 2012. Dr. Brasfield previously provided treatment to Daniels, including administration of a lumbar steroid injection in November 2010. He noted Daniels could not provide a specific injury date, but indicated he had experienced low back pain for the past twenty years. Dr. Brasfield diagnosed chronic symptomatic grade 1 lumbosacral listhesis unrelated to the work accident of June 29, 2010, and a bilateral pars defects. He noted Daniels was neurologically intact, and noted "the most dramatic finding

on this patient's examination today was his overlay." He opined Daniels' current condition was unrelated to the June 29, 2010 incident, and he assigned no permanent functional impairment.

Wal-Mart submitted the report of Dr. Robert P. Granacher, Jr., who performed a psychiatric evaluation on November 19, 2012. Dr. Granacher determined Daniels has pre-existing anxiety and depression present since adolescence. Dr. Granacher found Daniels has no mental disorder due to the alleged June 29, 2010 work injury or alleged repetitive trauma. Dr. Granacher opined Daniels had a 10% psychiatric impairment pursuant to the AMA Guides immediately prior to the accident of June 29, 2010 and no impairment rating as a result of the work accident. Dr. Granacher found Daniels has the mental capacity to engage in any work for which he is trained, educated or experienced and does not require psychiatric restrictions.

On January 11, 2013, the ALJ made the following findings relevant to this appeal:

**A. Injury as defined by the Act;
work-relatedness/causation.**

KRS 342.0011(1) defines "injury" to mean any work-related traumatic event or series of events, including cumulative trauma, arising out of and in the course

of employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings. KRS 342.0011(33) defines "objective medical findings" to mean information gained through direct observation and testing of the patient applying objective or standardized methods.

I saw and heard the plaintiff Daniels testify at the hearing and found that he was a credible and convincing witness. Based upon the totality of the evidence, including the testimony of the plaintiff and compelling medical report of Dr. Muffly, I make the factual determination that Mr. Daniels did sustain cumulative trauma or repetitive motion injuries to his low back, which became disabling on June 29, 2010. I also make the factual determination that due to Mr. Daniels' physical injuries he developed psychological conditions, as documented in Mr. Pack's report. I found Mr. Pack's report to be very persuasive.

B. Notice.

KRS 342.185(1) mandates that no proceeding for workers' compensation for an injury shall be maintained unless notice of the accident shall have been given to the employer as soon as practicable after the happening thereof.

Based upon the totality of the evidence and specifically on the convincing testimony of the plaintiff, I make the factual determination that Mr. Daniels did give to his employer due and timely notice of his work injuries as soon as practicable after he realized that he had sustained work-related cumulative trauma or repetitive motion injuries, I relied on the decision of

the Kentucky Supreme Court in *Hill v. Sextet Mining Corp.*, 65 S.W.3d 503 (Ky. 2001).

In addition to the plaintiff's sworn testimony, I relied on the opinion of the Supreme Court of Kentucky in *Logan Aluminum, Inc. v. Bullard*, 2006 WL 2707952 (Ky. 2006), where the Supreme Court held that the evidence supported the judge's finding that the employer was not prejudiced when it did not receive notice that the plaintiff's gradual injury was work-related until he actually filed his claim.

C. Exclusion for pre-existing disability/impairment.

The correct standard regarding carve-out for a pre-existing active condition is set forth by the Court of Appeals in *Finley v. DBM Technologies*, 217 S.W.3d 261 (Ky. App. 2007). In *Finley, supra*, the Court instructed in order for a pre-existing condition to be characterized as active, it must be both *symptomatic* and *impairment ratable* pursuant to the AMA Guides immediately prior to the occurrence of the work-related injury. The burden of proving the existence of a pre-existing active condition is on the employer. *Finley v. DBM Technologies, supra*.

Based upon the totality of the evidence in the record, including the plaintiff's testimony and the expert evidence from Dr. Muffly and Mr. Pack, I make the factual determination that the plaintiff did not have any pre-existing active condition at the time of his alleged work injuries on June 29, 2010.

D. Benefits per KRS 342.730.

Based on the totality of the evidence in the record, including the plaintiff's convincing testimony and the persuasive reports of Dr. Muffly and Mr. Pack, I make the factual determination that Mr. Daniels sustained a significant permanent whole person impairment as a result of his work injuries, which became disabling on June 29, 2010, and that as a result thereof lacks the capacity to return to work.

In rendering a decision, KRS 342.285 grants the Administrative Law Judge as fact-finder the sole discretion to determine the quality, character, and substance of evidence. *AK Steel Corp. v. Adkins*, 253 S.W.3d 59 (Ky. 2008). In this case I find very persuasive the opinions of Dr. Muffly and find that the plaintiff did sustain as a result of his work injuries a 10% whole person impairment.

"Permanent total disability" means 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 . . ." Kentucky Revised Statutes (KRS) 342.0011. To determine if an injured employee is permanently totally disabled, an ALJ must consider what impact the employee's post-injury physical, emotional, and intellectual state has on the employee's ability "to find work consistently under normal employment condition [and] to work dependably[.]" *Ira A. Watson Dept. Store v. Hamilton*, 34 S.W.3d 48, 51 (Ky. 2000). In making that determination,

"the ALJ must necessarily consider the worker's medical condition . . . [however,] the ALJ is not required to rely upon the

vocational opinions of either the medical experts or the vocational experts. A worker's testimony is competent evidence of his physical condition and of his ability to perform various activities both before and after being injured."

Id. at 52. (Internal citations omitted.) See also, *Hush v. Abrams*, 584 S.W.2d 48 (Ky. 1979).

In this case, I considered the severity of the plaintiff's work injuries, his age, his work history, his education, his sworn testimony and the specific opinions from Dr. Muffly and Mr. Pack regarding the plaintiff's occupational disability. Based on all of those factors, I make the factual determination that Mr. Daniels cannot find work consistently under regular work circumstances and work dependably. I, therefore, make the factual determination that he is permanently and totally disabled.

Wal-Mart filed a lengthy petition for reconsideration raising essentially the same arguments it now raises on appeal. Additionally, Wal-Mart objected to the ALJ's issuance of the opinion two days following the hearing, contending it violated its right to procedural due process. Wal-Mart requested more extensive fact-finding regarding the ALJ's conclusions concerning the weight assigned to various medical opinions and credibility given to witnesses.

By order dated February 7, 2013, the ALJ denied the petition for reconsideration, noting he had recited in the

January 11, 2013 Opinion and Order all of the evidence which he had carefully reviewed and considered. Further, he noted the Opinion and Order discussed all of the contested issues raised by the parties in the Benefit Review Conference Order.

On appeal, Wal-Mart argues the ALJ erred in finding a compensable back injury because Daniels failed to present any evidence supporting that conclusion. Wal-Mart notes Daniels admitted a history of back pain dating back to 2001. Wal-Mart contends Daniels' back condition is a result of a congenital defect aggravated by morbid obesity. Wal-Mart concedes Dr. Muffly checked "yes" regarding causation on his Form 107, but he provided no explanation for his findings. Wal-Mart contends Dr. Muffly's report is "seriously lacking in credibility and objective findings."

Wal-Mart argues the ALJ erred in finding Daniels provided proper notice. Wal-Mart notes Daniels gave notice of the 2001 injury, but testified he did not give notice when he later took time off for back pain over the years. Wal-Mart asserts it did not receive notice of the back injury until Daniels filed his claim.

Wal-Mart argues the ALJ erred in finding Daniels did not have a pre-existing active back condition. Wal-Mart notes Daniels acknowledged a lengthy history of back

problems and it contends the medical evidence dating back to 2001 establishes he had a pre-existing condition.

Wal-Mart argues the ALJ erred in finding Daniels sustained a work-related psychological injury. Wal-Mart contends Mr. Pack did not address causation and Dr. Granacher was unequivocal in concluding Daniels had a pre-existing actively disabling psychiatric condition. Wal-Mart also contends Mr. Pack was not given complete information regarding Daniels' psychiatric history and was never given access to his treatment records. Pursuant to Cepero v. Fabricated Metals, Inc., 132 S.W.3d 839 (Ky. 2004), Wal-Mart argues Mr. Pack's opinion cannot be considered substantial evidence since he was provided a substantially incomplete medical history.

Finally, Wal-Mart argues the ALJ erred in finding Daniels permanently totally disabled. Wal-Mart again asserts Daniels had a pre-existing back condition for which any award must provide a carve-out, or exclusion, and the psychiatric condition was not shown to be work-related.

Daniels, as the claimant in a workers' compensation proceeding, had the burden of proving each of the essential elements of his cause of action, including causation and the extent of his occupational disability. See KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App.

1979). Since Daniels was successful, the question on appeal is whether there was substantial evidence to support the ALJ's decision. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Substantial evidence" is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971).

In rendering a decision, KRS 342.285 grants an ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). An ALJ may draw reasonable inferences from the evidence, reject any testimony, and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). An ALJ may reject, believe, or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). An ALJ is vested with broad authority to decide questions involving causation. Dravo Lime Co. v. Eakins, 156 S.W. 3d 283 (Ky.

2003). Although a party may note evidence supporting a different outcome than reached by an ALJ, such is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). Rather, it must be shown there was no evidence of substantial probative value to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The function of the Board in reviewing an ALJ's decision is limited to determining whether the findings made are so unreasonable under the evidence they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to weight and credibility or by noting other conclusions or reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

Although the ALJ provided only a *de minimis* analysis, we find substantial evidence exists in the record supporting the determination Daniels sustained a work-related back injury. The ALJ was well within his role as fact-finder in accepting Dr. Muffly's opinion in concluding Daniels sustained a cumulative trauma injury. While the record

contains evidence supporting a contrary conclusion, this is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., *supra*.

As noted by the ALJ, Wal-Mart had the burden of proof on the issue of pre-existing active disability. Wal-Mart identifies ample evidence demonstrating Daniels had pre-existing conditions. However, as noted by the ALJ, the issue is whether those conditions were both *symptomatic and impairment ratable* immediately prior to the work injury. See Finley v. DBM Technologies, 217 S.W.3d 261 (Ky. App. 2007). The ALJ relied on Dr. Muffly's opinion stating Daniels had no pre-existing active impairment. Dr. Muffly's opinion constitutes substantial evidence supporting the ALJ's conclusion.

Since the ALJ concluded Daniels sustained a cumulative injury, notice was not required until he was informed by a "physician" his condition was work-related. The date triggering the obligation to give notice is the "manifestation of disability," which is the date a worker first learns he has sustained a gradual injury and knows it is due to his work. Alcan Foil Products v. Huff, 2 S.W.3d 96 (Ky. 1999). Although Daniels filed his Form 101 on April 12, 2012 alleging a cumulative trauma injury to his back, nothing in the record indicates he was informed by a

physician prior to filing the application that he had sustained a work injury. The Form 107 medical report completed by Dr. Muffly on October 30, 2012 is the first medical opinion indicating Daniels' injury resulted from cumulative trauma. Therefore Daniels filed the Form 101 before his obligation to give notice arose. Given these facts, notice was timely provided as a matter of law.

Mr. Pack's report constitutes substantial evidence supporting the ALJ's finding Daniels' psychological conditions arose from his physical injury. Mr. Pack noted Daniels' physical ability to function had deteriorated and he was "having difficulties accepting his current situation." The ALJ could reasonably conclude from Mr. Pack's report Daniels' current psychological complaints resulted from a worsened physical condition precluding continuation of his stock work. Mr. Pack's report indicates he reviewed Dr. Rader's office notes, the same notes relied upon by Dr. Granacher in offering his opinion regarding any pre-existing psychological condition. Mr. Pack was clearly aware of Daniels' previous complaints of depression and prescriptions for Paxil and Effexor. We are unable to conclude Mr. Pack received a history so incomplete or inaccurate as to render it lacking in probative value pursuant to Cepero, supra. Therefore,

substantial evidence supports the ALJ's finding Daniels' psychological complaints are related to the work injury.

Finally, authority has long acknowledged an ALJ has wide ranging discretion in making a determination granting or denying an award of permanent total disability benefits. Seventh Street Road Tobacco Warehouse v. Stillwell, 550 S.W.2d 469 (Ky. 1976); Colwell v. Dresser Instrument Div., 217 S.W.3d 213, 219 (Ky. 2006). Taking into account Daniels' age, education and past work experience, in conjunction with his post-injury physical and mental status, the ALJ was persuaded Daniels is totally disabled due to the effects of the work-related injury.

Again, we are unable to conclude the outcome arrived at by the ALJ finding Daniels entitled to an award of PTD benefits is so unreasonable under the evidence the decision must be reversed. We are satisfied the ALJ considered the entire record and applied the correct standards in reaching his determinations. Because the outcome selected by the ALJ is supported by substantial evidence, we are without authority to disturb his decision on appeal. See KRS 342.285; Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

Accordingly, the January 11, 2013 Opinion and Order rendered by Hon. William J. Rudloff, Administrative Law

Judge and the February 7, 2013 Opinion and Order on Reconsideration are **AFFIRMED**.

STIVERS, MEMBER, CONCURS.

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