

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: November 25, 2015

CLAIM NO. 200585239

WAL-MART

PETITIONER

VS.

APPEAL FROM HON. ROBERT L. SWISHER,  
CHIEF ADMINISTRATIVE LAW JUDGE

JOSHUA PERKINS and  
HON. ROBERT L. SWISHER,  
CHIEF ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION  
AFFIRMING  
\* \* \* \* \*

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

**ALVEY, Chairman.** Wal-Mart seeks review of the June 17, 2015 order rendered by Hon. Robert L. Swisher, Chief Administrative Law Judge ("CALJ"), overruling its motion to reopen. The CALJ found Wal-Mart did not make a *prima facie* case demonstrating Joshua Perkins' ("Perkins") work-related condition has improved and found its request for vocational rehabilitation benefits premature. Wal-Mart also seeks

review of the September 1, 2015 order denying its petition for reconsideration.

Wal-Mart filed a motion to reopen on May 12, 2015 alleging Perkins' work-related condition has improved pursuant to KRS 342.125 and requested vocational rehabilitation be ordered. In support of the motion, Wal-Mart filed the Opinion and Award rendered June 6, 2011 by Hon. Howard E. Frasier, Jr., Administrative Law Judge ("ALJ Frasier"), the March 23, 2015 report of Dr. Warren Boling, and the 16% impairment rating assessed by Dr. Darryl Kaelin on May 4, 2015.

In the June 6, 2011 opinion, ALJ Frasier noted the parties stipulated Perkins sustained a work-related injury on March 27, 2005 and does not retain the physical capacity to return to his former job. The parties also stipulated Perkins has not returned to any employment since his work injury. ALJ Frasier noted Perkins injured his low back on March 27, 2005 when he was unloading a crate of glass pickle jars, which ultimately required two surgical procedures. ALJ Frasier noted the 16% impairment rating assessed by Dr. Timothy Kriss, which he found credible.

Despite Perkins' age and education<sup>1</sup>, ALJ Frasier found him permanently totally disabled based upon

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<sup>1</sup>Perkins was born December 19, 1985, and has a twelfth grade education.

restrictions imposed by Dr. Jeffery Fadel. The ALJ also relied upon Perkins' testimony regarding the inability to perform any work and his worsening symptoms. ALJ Frasier awarded permanent total disability and medical benefits.

Dr. Fadel restricted Perkins to working only in an office setting. ALJ Frasier did not find persuasive the restrictions imposed by Dr. Kriss, which consisted of no lifting over twenty pounds, and avoidance of repetitive bending or twisting of the low back. ALJ Frasier noted Perkins had testified he is only able to sit for ten to fifteen minutes before experiencing pain, and has constant pain when walking. Perkins testified he was incapable of any work. Perkins stated he had to discontinue his college classes at Elizabethtown Community Technical College because he could not sit through the fifty minute class and had to drive thirty miles to school.

In the opinion, ALJ Frasier noted the fact Perkins is totally disabled does not mean he must give up on returning to college or eventually being able to engage in vocational rehabilitation. "If his symptoms improve to the extent he is able to again sit through college classes, Mr. Perkins might consider taking advantage of his right to pursue vocational rehabilitation benefits at that time. However, in light of his credible testimony, pursuit of any

vocational rehabilitation would not be feasible at this time." Therefore, ALJ Frasier awarded permanent total disability benefits and medical benefits.

In his March 23, 2015 report, Dr. Boling noted Perkins reported pain in his left hip, left leg, back, and right leg. Perkins reported he can walk only fifty feet before experiencing pain. Perkins reported gaining approximately fifty pounds since 2011 due to inactivity. Dr. Boling performed an examination, and noted Perkins has very limited range of motion in his back, and his extension is limited to approximately ten degrees.

After noting Perkins has had significant back and leg pain since his work injury, Dr. Boling restricted him from lifting over fifteen to twenty pounds, and from repetitive bending or twisting. Dr. Boling opined Perkins is not 100% permanently totally disabled, and could reasonably return to work with the above restrictions. However, due to his limited education and skills, Perkins would require considerable training to migrate into a more skilled and less physically demanding occupation. Regarding Perkins' need for additional treatment, Dr. Boling noted he ultimately developed failed back syndrome and radiculitis. Dr. Boling then stated:

Perkins relayed to me that he has not undergone medical treatment with antidepressants. Mr. Perkins describes he currently has depressive symptoms. Chronic pain has a very close relationship with depression. Amitriptyline would have a good opportunity to provide him some benefit particularly since he describes that his pain wakes him at night. I would prescribe Amitriptyline at night . . .

Dr. Boling did not recommend additional decompressive or fusion surgery, but suggested a spinal cord stimulator for pain amelioration may be helpful.

Dr. Boling opined Perkins has the physical capacity to be vocationally retrained but, "he should have his depression treated medically to realize the most success with this approach." Likewise, he opined Perkins retains the physical capacity to attend college classes, "particularly if his depression can be adequately managed." Dr. Boling opined Perkins could sit through college classes, but "would need appropriate medical management for his depression and pain as well as he would likely need to begin with part-time schooling then work-up to twelve hour per week of classes to be considered full-time." Dr. Boling stated Perkins has the capacity to drive between Campbellsville and Elizabethtown, but may benefit from alternative travel options.

In a letter dated May 4, 2015, Dr. Kaelin assessed a 16% impairment rating pursuant to the Fifth Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment.

In the June 17, 2015 order overruling Wal-Mart's motion to reopen, after summarizing the evidence, the CALJ stated as follows:

Having carefully and thoroughly reviewed the defendant/employer's motion to reopen with respect to the allegation that plaintiff's condition has improved and that he is no longer totally occupationally disabled, the CALJ finds that the defendant/employer has not carried its burden of proof and has not made a *prima facie* case for reopening pursuant to KRS 342.125. Initially, the CALJ notes that no physician has offered an opinion that plaintiff's impairment rating is now lower than 16%. Moreover, there is no compelling or persuasive evidence in the record, including the report of Dr. Boling, in support of the position that plaintiff is capable of returning to employment on a sustained basis. In fact, Dr. Boling, while indicating that plaintiff is not permanently and totally disabled, did not explain the basis for that opinion and, in any event, indicated that plaintiff has now developed psychological symptoms related to the effects of his chronic work-related pain and that those symptoms need to be addressed before either consideration of a return to the work force or vocational rehabilitation could be considered. In short, the medical evidence submitted by the defendant/employer in the form of the

report by Dr. Boling establishes that plaintiff's condition has, in fact, worsened and not improved.

With respect to the issue of vocational rehabilitation, while it is unclear from the evidence presented whether plaintiff has achieved a level of improvement which will allow him to sit through college classes, the report of Dr. Boling establishes with clarity that before plaintiff would be able to participate in college classes, his depressive symptoms needs[sic] to be addressed and treated. Until that is done, however, even assuming plaintiff is physically capable of sitting through a college class, any consideration of vocational rehabilitation benefits is premature. Accordingly, the defendant/employer's motion to reopen is hereby **OVERRULED**.

Wal-Mart filed a petition for reconsideration, alleging several errors. In the September 1, 2015 order denying its petition for reconsideration, the CALJ made the following additional findings of fact:

... Specifically, the defendant/ employer contends that the undersigned made a patent error in determining that the defendant/employer has failed to establish a *prima facie* case for reopening pursuant to KRS 342.125, in finding that the employer must submit a functional impairment rating below 16% in order to establish a *prima facie* case for reopening, in finding no compelling evidence that plaintiff is now capable of returning to employment on a sustained basis, in finding that plaintiff's condition has actually worsened due to an alleged work-related

psychological disability, and in finding that plaintiff is not now a suitable candidate for vocational rehabilitation. The defendant/employer requests that the undersigned make several findings of fact related to its position and argument herein. Plaintiff has filed a response to the petition for reconsideration in which he contends that the Order overruling the motion to reopen contains no patent error and that the petition is simply a re-argument of the merits of the original motion.

With respect to the occupational disability aspect of this matter, the defendant/employer moved "to reopen this claim due to a change in the plaintiff's disability, specifically an improvement in the plaintiff's condition and, thus, a reduction in his disability." In addressing this aspect of the motion, the CALJ noted that there was no evidence submitted by the employer establishing that plaintiff's impairment rating is lower than 16%, the rate ALJ Frazier found in the underlying Opinion and Award. Contrary to the defendant/employer's assertion in its petition for reconsideration, the undersigned did not reach "a legal conclusion that the defendant/employer must produce medical proof that the plaintiff's current functional impairment rating is below the 16% rating which was found to be applicable by the previous ALJ..." Reopening, pursuant to KRS 342.125, is appropriate when one of several grounds is established including that there has been a 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. Certainly, a decrease in pertinent

permanent functional impairment rating would be a relevant consideration in determining whether there has been an improvement of impairment as that language appears in the statute itself. The CALJ did not make a finding, however, that a lower impairment rating is required to show a change of disability in a case of permanent total disability. The defendant/employer simply misreads the order and misconstrues the impact of the undersigned's observation that a lower impairment rating had not been submitted.

More importantly, however, is the question of whether Dr. Boling's report constitutes *prima facie* evidence that plaintiff's disability has decreased since the date of the underlying Opinion and Award. First, the CALJ would point out that Dr. Boling is not a vocational expert. His opinion, therefore, with regard to whether plaintiff is totally disabled is neither binding nor particularly persuasive. What is persuasive, however, is Dr. Boling's opinion with respect to restrictions and his recording of a history of present symptoms reported by plaintiff. Specifically, Dr. Boling noted that plaintiff could return to work with restrictions so long as he does not lift more than 15 to 20 pounds and further noted that plaintiff would not be capable of extensive bending or twisting activities. Further, he noted that plaintiff reported that his back pain continues at a severity of 8 on a scale of 0 to 10 with nothing improving his pain. Plaintiff reported that his back pain is aggravated by certain positions including sitting and twisting, and that although he indicated that walking does not

particularly aggravate his back pain, he indicated that plaintiff described that he can walk about 50 feet until he must stop due to left leg pain more than back pain. In the underlying proceeding the defendant/employer relied heavily upon the multiple opinions and deposition testimony of neurosurgeon Timothy Kriss who was of the opinion that plaintiff, ... could perform sedentary duties or activities that required standing/ambulation and activities that are modestly physically demanding. He should not lift more than 20 pounds and should avoid unusually repetitive bending or twisting of the low back. He would need to avoid physical demanding jobs that put a lot of stress on his low back.

These are essentially the same restrictions that Dr. Boling offers now and which Judge Frazier previously rejected. It is on the basis of plaintiff's limited sitting and standing that Judge Frazier determined that plaintiff would not be able to maintain regular and consistent employment. There is no persuasive evidence in the record to suggest that any of the limiting factors existing at the time of the underlying Opinion and Award have been eliminated to the point that plaintiff is now less vocationally impaired than he was then.

The defendant/employer also takes issue with its own physician's reference to plaintiff's current depressive symptoms. The work-relatedness of those symptoms is evident from Dr. Boling's report in that following discussion of plaintiff's surgical procedures and resultant chronic pain, Dr. Boling noted in his report,

Mr. Perkins describes he currently has depressive symptoms. Chronic pain has a very close relationship with depression. Amitriptyline would have a good opportunity to provide him some benefit particularly since he describes that his pain wakes him at night. I would prescribe Amitriptyline at night starting with 25 mg and titrating up ... A reasonable approach for pain amelioration could be taken with placement of a spinal cord stimulator. Spinal cord stimulator would have an opportunity to provide some benefit; although, unlikely to be a dramatic benefit and unlikely to be a cure for his pain symptoms, and also unlikely to allow him to return to his prior laboring type occupation.

The clear inference to be drawn from Dr. Boling's report is that plaintiff's work-related chronic pain has resulted in depressive type symptoms for which specific treatment has been recommended. The defendant/employer's attempt to disavow a causal connection between plaintiff's depressive symptoms, as identified by its own evaluating expert, and plaintiff's work-related chronic pain is unpersuasive. Moreover, it is precisely as a result of these additional depressive symptoms that Dr. Boling qualifies his answers with respect to plaintiff's ability to work and ability to participate in vocational retraining. Accordingly, the undersigned finds no patent error on the face of the order of June 17, 2015, with respect to denial of the defendant/employer's motion to reopen for a reduction in plaintiff's disability income benefits.

With respect to the issue of vocational rehabilitation, the only reasonable

inference from Dr. Boling's report is that for vocational rehabilitation efforts to be maximally effective and beneficial, plaintiff must have his depressive symptoms treated. The primary objective of the vocational rehabilitation statute is to provide an additional benefit for the injured worker, not a procedure by which an employer may obtain a reduction in benefits. Dr. Boling has made a reasonable suggestion with respect to treatment of plaintiff's depressive symptoms, regardless of whether they are work-related, with a view towards putting plaintiff in a position to obtain meaningful benefit from vocational rehabilitation. The defendant/employer's own evidence, therefore, compels a finding that in the absence of such treatment, vocational rehabilitation remains a mere possibility and not a presently viable option. Accordingly, the defendant/employer's petition for reconsideration is **OVERRULED** in its entirety.

On appeal, Wal-Mart argues it was prematurely prevented from litigating the claim on the merits, and the proper standard of review is *de novo*. Wal-Mart maintains Dr. Boling's report constitutes *prima facie* evidence supporting a reduction of disability and vocational rehabilitation benefits. Wal-Mart argues the CALJ erred in finding Dr. Boling's opinions unpersuasive regarding whether Perkins is totally disabled since he is not a vocational expert. Wal-Mart asserts there is no

requirement that only a vocational expert may address matters of vocational ability. Wal-Mart argues the CALJ erred in interpreting Dr. Boling's opinion to mean Perkins' condition is now worse, and requires psychological treatment prior to vocational retraining. Finally, Wal-Mart contests the CALJ's finding there is no evidence to support a finding Perkins could return to work on a sustained basis since Dr. Boling opined he is not totally disabled and could return to work with restrictions.

It is well established the procedure for reopening a 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 adverse party is put to the expense of further litigation. Big Elk Creek Coal Co. v. Miller, 47 S.W.3d 330 (Ky. 2001). When an ALJ determines the movant failed to present a *prima facie* case for reopening, the decision is reviewed for an abuse of discretion. Harold Turner v. Bluegrass Tire Co., 331 S.W.3d 605, 610 (Ky. 2010). An abuse of discretion occurs when the decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. Id.; Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1999).

Here, the CALJ determined Wal-Mart failed to present a *prima facie* case for reopening the claim. KRS 342.125 allows an ALJ to reopen a claim upon the grounds of a) fraud; b) newly discovered evidence; C) mistake; and d) "change in 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." Wal-Mart did not allege fraud, newly discovered

evidence or mistake. Rather, it alleged a change in Perkins' disability. Based upon Dr. Boling's opinion, Wal-Mart alleged Perkins' condition has improved since the June 6, 2011 opinion by ALJ Frasier, and is now suitable for vocational rehabilitation benefits.

After reviewing Wal-Mart's motion to reopen and its supporting documents, we find the ALJ did not abuse his discretion in finding it failed to present *prima facie* evidence in support of its claim. The ALJ clearly articulated his reasoning for finding Dr. Boling's opinion did not present *prima facie* evidence demonstrating a change in disability as shown by objective evidence caused by the work injury since the opinion rendered by ALJ Frasier and in finding vocational rehabilitation premature. As noted by the CALJ, there appears to be no decrease in the impairment rating since the original award. In addition, the report of Dr. Boling is, at best, equivocal regarding whether there has been an improvement in Perkins' condition since the original June 2011 opinion.

As noted by the ALJ, Dr. Boling provided no explanation for his opinion Perkins is not permanently totally disabled. However, he indicated Perkins described probable depressive symptoms, a condition with a close relationship to chronic pain. Dr. Boling recommended

Amitriptyline, and a spinal cord stimulator for pain amelioration. Dr. Boling indicated Perkins has the physical capacity to attend school and sit through classes, but "should have his depression treated medically" and "would need appropriate medical management for his depression and pain as well . . . ." The above amply supports the CALJ's conclusion Dr. Boling's report supports the proposition Perkins' condition has worsened, rather than improved.

The CALJ provided additional findings of fact in the September 1, 2015 order denying Wal-Mart's petition for reconsideration. The CALJ clarified he did not make a finding a lower impairment rating is required to show a change of disability in a case of permanent total disability, but simply considered this as a factor. The CALJ found Dr. Boling's report unpersuasive regarding whether Perkins is totally disabled since he is not a vocational expert. We do not interpret this observation as requiring a vocational expert to express an opinion as to whether one is permanently and totally disabled as advocated by Wal-Mart. Rather, it is clear the CALJ considered this as one of many factors which led to his determination.

The CALJ found the restrictions assessed by Dr. Boling were essentially the same as those expressed by Dr. Kriss in the underlying proceeding, and specifically rejected by ALJ Frasier. The CALJ also relied on Dr. Boling's recording of Perkins' present symptoms summarized above. The CALJ again found Dr. Boling's report supported a finding his work-related chronic pain has resulted in depressive symptoms for which treatment was recommended, and qualified his answers regarding Perkins' vocational training and ability to return to work.

The CALJ clearly articulated his reasoning for determining Wal-Mart failed to set forth *prima facie* evidence in support of its motion to reopen and in finding vocational rehabilitation premature, and did not abuse his discretion in doing so. Therefore, we decline to disturb his decisions on appeal.

Accordingly, we **AFFIRM** the June 17, 2015 and September 1, 2015 orders rendered by Hon. Robert L. Swisher, Chief Administrative Law Judge.

ALL CONCUR.

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