

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: October 5, 2018

CLAIM NO. 200874483

BIG LOTS, INC.

PETITIONER

VS.

APPEAL FROM HON. DOUGLAS W. GOTT,
CHIEF ADMINISTRATIVE LAW JUDGE

LORITTA F. WHITWORTH and
HON. DOUGLAS W. GOTT,
CHIEF ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

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

ALVEY, Chairman. Big Lots, Inc. ("Big Lots") appeals from the June 19, 2018 Order, and the July 17, 2018 Order denying its petition for reconsideration rendered by Hon. Douglas W. Gott, Chief Administrative Law Judge ("CALJ"). The CALJ overruled Big Lots' motion to reopen to reduce Loritta F. Whitworth's ("Whitworth") award of permanent total disability ("PTD") benefits based upon a change of disability pursuant to KRS 342.125(1)(d). On appeal, Big Lots argues the

CALJ erred in finding it failed to set forth *prima facie* evidence in support of its motion to reopen. For the foregoing reasons, we affirm.

Whitworth filed a Form 101 on July 23, 2009, alleging she injured her left upper extremity when a boxed recliner fell on her on April 25, 2008, while working for Big Lots as a furniture sales manager. Whitworth underwent surgery to her left shoulder on October 7, 2008. In a March 24, 2010 Opinion, the CALJ¹ awarded permanent partial disability benefits based upon an 11% impairment rating for Whitworth's work-related left shoulder condition, enhanced by the three multiplier contained in KRS 342.730(1)(c)1 because the CALJ found Whitworth did not retain the physical capacity to return to her job as a furniture sales manager. The CALJ also awarded temporary total disability ("TTD") benefits and medical benefits for Whitworth's work-related injury.

Whitworth filed a motion to reopen on July 14, 2011, alleging her condition had worsened necessitating the need for additional surgery to her cervical spine. Whitworth underwent fusions at C4-5 and C5-6 on July 13, 2011 performed by Dr. Michael Doyle. Over Big Lots' objection, Hon. J. Landon Overfield, then Chief Administrative Law Judge, concluded Whitworth had set forth a *prima facie* case for reopening. Multiple medical records were submitted into evidence, including a report by Dr. Michael Best, who evaluated Whitworth at Big Lots' request on October 3, 2012. Hon. Jonathan R. Weatherby, Administrative Law Judge ("ALJ Weatherby") rendered an opinion on February 11, 2013. He determined the phrase, "left upper extremity" as used in the original Form 101

¹ This was prior to his appointment as CALJ.

encompassed a cervical spine injury. ALJ Weatherby therefore found Whitworth did not allege a new cause of action. He determined the motion to reopen alleging a worsening of her condition had been timely filed. ALJ Weatherby relied upon the 25% impairment rating for the cervical condition assessed by Dr. Doyle. He also noted the left shoulder had been assigned an 11% impairment rating in the March 2010 opinion. Considering both the cervical and left shoulder conditions, ALJ Weatherby determined Whitworth is permanently totally disabled. He awarded additional TTD benefits and PTD benefits commencing on December 25, 2011, the day Dr. Doyle found Whitworth attained maximum medical improvement for her cervical condition. ALJ Weatherby overruled Big Lots' petition for reconsideration.

On May 16, 2018, Big Lots filed a motion to reopen based upon a change of disability shown by objective medical evidence. In support of its motion, Big Lots filed the April 9, 2018 report by Dr. Best, who re-evaluated Whitworth at its request. Whitworth moved to dismiss the motion to reopen arguing it failed to demonstrate a change of disability by objective medical evidence.

The CALJ overruled Big Lots' motion to reopen on the following grounds:

This claim is on the Frankfort motion docket on the Defendant's motion to reopen to reduce Plaintiff's award based on a change of disability under KRS 342.125(1)(d).

....

There is no explanation or support for the pending motion but the attachment of an April 9, 2018 report of Dr. Michael Best. Dr. Best had evaluated Whitworth at its request in 2012 during the litigation on reopening. The current report repeats much of the prior one. It

challenges causation. It does not acknowledge either prior ALJ opinion. Dr. Best assigned 25% impairment for the cervical fusion and 2% for the distal clavicle excision.

The Defendant's motion is overruled because it has not shown the requisite grounds to support reopening. KRS 342.125(1)(d) requires change of disability to be "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." Dr. Best's opinion on cervical impairment and shoulder impairment are the same 25% and 2% he expressed in 2012. His 2018 report never speaks to a "change of condition," or improvement in impairment.

Whitworth pointed out the lack of evidence on improvement of impairment in her response. To that, the Defendant replied that even though the impairment rating had not changed, Dr. Best said Whitworth now had no work restrictions, and, therefore, her "disability" had improved. There are several problems with that position. First, an easing of work restrictions is not the standard for reopening under the statute; an improvement in impairment is required. Second, Dr. Best said in 2012 that Whitworth required no restrictions, so his opinion is unchanged. And third, Dr. Best quoted another physician, Dr. Doyle, as saying in 2011 that Whitworth could return to normal activities. (4/9/18, p. 23)

(There was no allegation of a return to work following an award of total disability, which is one of the optional boxes to check as the basis for reopening on the Form MTR filed by the Defendant.)

Big Lots filed a petition for reconsideration essentially arguing it had made a *prima facie* case establishing improvement in disability, noting "the Plaintiff's lack of medical care over the last seven (7) years would suggest strongly that her condition has stabilized."

The CALJ denied the petition for reconsideration, stating as follows:

The Defendant has petitioned the CALJ for reconsideration of an Order overruling its motion to reopen to challenge ongoing permanent total disability. The Defendant aptly points out that given Plaintiff's surgery her impairment rating may not be capable of improving; it may be that "it is what it is." However, the statute requires an improvement in impairment to make a prima facie case of a "change of disability." Some conditions are amendable to improvement of impairment, and some may not be. Absent that, the Defendant must show evidence of current employment to serve as basis for the preliminary showing that she is no longer totally disabled, and that is not offered here. The petition is denied.

On appeal, Big Lots argues the CALJ's determination is "overly narrow." It argues it demonstrated a *prima facie* case for reopening pursuant to KRS 342.125(1)(d), and that Whitworth is no longer totally disabled. It first argues Dr. Best assessed a 2% impairment for the left shoulder condition in his 2018 report, which is lower than the 11% impairment adopted by CALJ Gott in the original opinion. Big Lots also points out the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"), do not allow a reduction in the 25% impairment rating for the cervical fusion. Big Lots also points to the fact that Whitworth reported to Dr. Best that she has not treated with an orthopedic physician or neurosurgeon since 2012, suggesting her condition had stabilized or improved. Dr. Best also opined Whitworth is able to work.

Big Lots argues the standard for reopening utilized by the CALJ "would prevent any reopening other than for a return to work, for all individuals who have suffered an injury which can be arbitrarily described pursuant to the [AMA Guides], such as a cervical fusion. He is not addressing the dual role of disability per

Osbourne, supra.” It argues that in cases of total disability, the impairment rating and the injured worker’s ability to return to employment are to be considered.

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. 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).

After reviewing Big Lots' motion and the attached report of Dr. Best, we determine the CALJ did not abuse his discretion in finding it failed to present *prima facie* evidence demonstrating a substantial possibility of success. The CALJ clearly articulated his reasoning for finding Dr. Best's opinion does not establish a *prima facie* basis demonstrating a change in disability as shown by objective evidence caused by the work injury since the opinion rendered by ALJ Weatherby. As noted by the CALJ, the 2012 report prepared by Dr. Best is largely identical to the one he prepared in 2018. Dr. Best provided an identical analysis addressing diagnoses, causation, maximum medical improvement, prognoses, impairment rating for the left shoulder, restrictions, and Whitworth's ability to return to her former job with Big Lots. In both reports, Dr. Best opined Whitworth's cervical injury and surgery are due to a chronic, active medical condition, and therefore not work-related. He assessed a 2% impairment for the left shoulder condition. He declined to assign permanent restrictions for either the shoulder or cervical spine, and opined Whitworth is capable of returning to her former job with Big Lots.

Of note, Dr. Best's 2018 report does not acknowledge or discuss the February 11, 2013 opinion rendered by ALJ Weatherby, and the fact he found Whitworth permanently totally disabled from her work-related left shoulder and cervical conditions. Similarly, Dr. Best's report does not discuss or establish a basis for finding a change of disability as shown by medical evidence of improvement of impairment due to a condition caused by the injury since the date of the 2013

opinion and award. Likewise, there is no explanation or discussion addressing why Whitworth is no longer totally disabled. The 2018 report fails to establish a change or improvement in Whitworth's condition since the 2013 opinion rendered by ALJ Weatherby.

The CALJ clearly articulated his reasoning for determining Big Lots failed to set forth *prima facie* evidence supporting its motion to reopen and did not abuse his discretion in doing so. Therefore, we decline to disturb his decisions on appeal.

Accordingly, the June 19, 2018 Order, and the July 17, 2018 Order on petition for reconsideration rendered by Hon. Douglas W. Gott, Chief Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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