# Commonwealth of Kentucky
# Workers' Compensation Board

**OPINION ENTERED: April 17, 2020**

CLAIM NO. 201387035

CHARLES DAVID McGEORGE — PETITIONER/ CROSS-RESPONDENT

VS. **APPEAL FROM HON. CHRIS DAVIS, ADMINISTRATIVE LAW JUDGE**

WAL-MART — RESPONDENT/ CROSS-PETITIONER
and
HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE — RESPONDENT

**OPINION**
**AFFIRMING**

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

**ALVEY, Chairman.** Charles David McGeorge ("McGeorge") appeals and Wal-Mart cross-appeals from the October 14, 2019 Opinion, Award, and Order, and the November 13, 2019 Order on petitions for reconsideration rendered by Hon. Chris Davis, Administrative Law Judge ("ALJ"). The ALJ awarded temporary total disability ("TTD") benefits, an increase in McGeorge's permanent partial disability

("PPD") benefits, and medical benefits for injuries he sustained while working for Wal-Mart on April 13, 2013.

On appeal, McGeorge argues the ALJ erred in finding he is not permanently totally disabled. He argues the ALJ did not properly analyze the factors contained in City of Ashland v. Stumbo, 461 S.W.3d 392 (Ky. 2015). Wal-Mart argues on appeal the ALJ erred in finding McGeorge is entitled to an increase in the award of PPD benefits from the date of reopening, not from the date of the fusion surgery. We determine that although the ALJ did not cite to City of Ashland v. Stumbo, supra, his analysis sufficiently addresses the criteria directed by the Kentucky Supreme Court. Regarding the onset date of increased PPD benefits, we determine the ALJ did not err as a matter of law, and therefore we affirm.

McGeorge filed a Form 101 on November 20, 2013, alleging he sustained a low back injury while pulling cases in the course and scope of his employment with Wal-Mart on April 13, 2013. Hon. Grant S. Roark, Administrative Law Judge ("ALJ Roark"), rendered an Opinion and Order on June 30, 2014, finding McGeorge sustained an injury at L5-S1. ALJ Roark awarded TTD benefits from August 18, 2013 to February 12, 2014, and PPD benefits based upon the 8% impairment rating assessed by Dr. William Lester pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"), enhanced by the three multiplier contained in KRS 342.730(1)(c)1. The decision was not appealed.

On December 29, 2015, Wal-Mart filed a motion to reopen, and a medical dispute challenging L5-S1 fusion surgery proposed by Dr. Amr O. El-

Naggar. In support of the medical dispute, Wal-Mart filed the utilization review report from Dr. Ricky Mendel who found the recommendation was not supported by the ODG, and the proposed surgery was not reasonable or necessary. The dispute was assigned to Hon. Jane Rice Williams, Administrative Law Judge. Telephone conferences were held, and evidence was introduced. On June 9, 2016, McGeorge filed a motion to reopen for an alleged worsening of his condition. On July 18, 2016, Hon. Robert L. Swisher, Chief Administrative Law Judge, issued an order finding McGeorge had established a *prima facie* case for reopening, and the claim was assigned to the ALJ for further proceedings.

Both McGeorge and Wal-Mart introduced numerous medical records and reports regarding whether the proposed fusion surgery was reasonable or necessary. Since the reasonableness and necessity of that surgery is not raised on appeal, we will not summarize those records. On November 22, 2017, the ALJ entered an order bifurcating the reopening for a decision regarding the proposed surgery, and entitlement to an additional period of TTD benefits.

After submission of additional evidence by the parties, the ALJ issued an Opinion, Award, and Order on February 1, 2018. The ALJ first determined ALJ Roark's finding that McGeorge had sustained a lumbar injury is *res judicata*. He determined the evidence did not support the surgery recommendation. He additionally found the epidural steroid injections McGeorge had already received were compensable, but he was not entitled to additional injections. The ALJ permitted the filing of additional evidence to support the remaining issues. Included

in the evidence were records from Dr. El-Naggar, and Dr. Jarred Madden regarding the reasonableness and necessity of the proposed fusion surgery.

On August 24, 2018, the ALJ issued an Interlocutory, Opinion, and Order. Based upon the additional evidence submitted, the ALJ determined the recommended surgery and "all attendant medical treatment" were reasonable and necessary. The ALJ placed the claim in abeyance, and awarded TTD benefits from the date of the surgery until McGeorge reached maximum medical improvement ("MMI"), or until he returned to work. The ALJ suspended the payment of PPD benefits during the period of McGeorge's entitlement to the payment of TTD benefits. The ALJ passed on determining whether McGeorge sustained a worsening of his condition until the final determination on the merits of the claim. Wal-Mart filed a petition for reconsideration requesting additional findings, and requested the surgery not be authorized until McGeorge lost considerable weight. The ALJ denied the petition in an order issued September 13, 2018.

McGeorge underwent the lumbar fusion on November 16, 2018. Wal-Mart filed a motion to terminate the TTD benefits and remove the claim from abeyance on May 11, 2019. Wal-Mart also filed a medical dispute on that date challenging the proposed trial of a spinal cord stimulator. McGeorge had no improvement in his low back and left leg complaints, but his right leg symptoms resolved after the surgery. The ALJ entered an order terminating TTD benefits on June 28, 2019.

Dr. John Gilbert evaluated McGeorge at the request of his attorney on June 20, 2019. Dr. Gilbert noted the surgery performed by Dr. El-Naggar, and the

improvement with McGeorge's right leg. However, he noted persistent left leg symptoms. He diagnosed McGeorge as status post L5-S1 decompressive fusion for stenosis and a ruptured disc with persistent left L5-S1 radiculopathy with dermatomal/myotomal distribution. He assessed a 29% impairment rating pursuant to the AMA Guides, which included levels of the spine in addition to the L5-S1. Dr. Gilbert found McGeorge had reached MMI on June 20, 2019. He additionally found McGeorge's persistent lumbar radiculopathy, mid and low back pain, weakness, and left leg numbness preclude his return to the type of work performed at the time of the injury. He stated McGeorge could engage in sedentary work only.

Dr. Russell Travis evaluated McGeorge at Wal-Mart's request on May 30, 2019. He noted McGeorge complained of low back and left leg pain with numbness. He noted the left lower extremity pain was intermittent. Dr. Travis diagnosed McGeorge with congenital spinal stenosis from shortened pedicles. He stated no acute disk herniations were seen on MRI. He also stated McGeorge was a candidate for decompression surgery, but not a fusion. Dr. Travis additionally stated McGeorge is not a candidate for a spinal cord stimulator trial or implantation. He found McGeorge reached MMI on May 30, 2019. He assessed a 20% impairment rating due to the fusion surgery, which is an increase of 12% from the previous 8% impairment rating for which benefits were awarded. Dr. Travis found no objective basis for restricting McGeorge's activities. However, Dr. Travis indicated McGeorge should be limited to medium work only, with no lifting over fifty pounds maximum, or twenty-five pounds frequently until one year from the date of surgery, with no restrictions afterward. Dr. Travis additionally stated McGeorge failed to follow

reasonable medical advice by not reducing his weight down to 230 pounds prior to the surgery. He also stated McGeorge does not need opioids, Gabapentin, or Flexeril, and should engage in core strengthening.

In a supplemental report dated July 11, 2019, Dr. Travis was very critical of Dr. Gilbert' report. He particularly disagreed with the 29% impairment rating Dr. Gilbert assessed.

The ALJ rendered the Opinion, Award, and Order on October 14, 2019. He found the proposed spinal cord stimulator is not reasonable, necessary, or compensable based upon Dr. Travis' opinion. He likewise found the contested psychological evaluation is not compensable. He found only treatment or impairment for the L5-S1 is compensable, not the other levels of the spine referenced by Dr. Gilbert. The ALJ found McGeorge is not entitled to any additional TTD benefits other than what Wal-Mart had already paid. The ALJ determined McGeorge is not permanently totally disabled, but is entitled to an increase in his PPD award based on a 20% impairment rating, enhanced by the three multiplier contained in KRS 342.730(1)(c)1. The ALJ awarded the increase in PPD benefits beginning June 9, 2016, the date the McGeorge filed the motion to reopen. The ALJ gave Wal-Mart credit for PPD benefits previously paid, and awarded interest at 12% on any unpaid benefits through June 28, 2017, and 6% interest on any unpaid benefits thereafter. The ALJ also found McGeorge is entitled to medical benefits pursuant to KRS 342.020, with the exception of those treatments he found not compensable.

Both McGeorge and Wal-Mart filed petitions for reconsideration. McGeorge argued, as he does on appeal, the ALJ failed to perform the appropriate five-step analysis pursuant to the holding in City of Ashland v. Stumbo, supra, in determining he is not permanently totally disabled. Wal-Mart argued the ALJ erred in awarding the increased PPD benefits from the date the motion to reopen was filed, not from the date the surgery was performed. The ALJ issued an order denying the petitions on November 13, 2019. He addressed why he assessed the increased PPD benefit award from the date the motion to reopen was filed, rather than from the date the surgery was performed. He also noted he did not find McGeorge particularly credible. He stated both petitions were merely attempts to reargue the merits of the claim.

On appeal, McGeorge argues the ALJ erred in failing to find him permanently totally disabled. He argues, as he did in his petition for reconsideration, the ALJ failed to perform the appropriate five-step analysis pursuant to the holding in City of Ashland v. Stumbo, supra. On cross-appeal, Wal-Mart argues the ALJ erred in awarding the increase to 20% PPD benefits from the date of the motion to reopen, rather than from the date of surgery.

As the claimant in a workers' compensation proceeding, McGeorge had the burden of proving each of the essential elements of his claim. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because McGeorge was unsuccessful in convincing the ALJ he is permanently totally disabled, the question on appeal is whether the evidence compels a different result. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Compelling evidence" is defined as evidence that is so

overwhelming, no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985). The function of the Board in reviewing the ALJ's decision is limited to a determination of whether the findings made by the ALJ 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).

As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the sole authority to judge all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/ Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). 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 adversary party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000); Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). Mere evidence contrary to the ALJ's decision is inadequate to require reversal on appeal. Id. In order to reverse the decision of the ALJ, it must be shown there was no substantial evidence of probative value to support his decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to the weight and credibility to be afforded the evidence or by noting reasonable inferences which otherwise could have been drawn from the record. Whittaker v. Rowland, supra. As long as the ALJ's

ruling with regard to an issue is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, supra.

McGeorge requests this Board to re-weigh the evidence and substitute its judgement for that of the ALJ. This we cannot do. The ALJ acted squarely within his discretion in finding McGeorge is not permanently totally disabled. Although he did not specifically cite to the cases, the ALJ appropriately considered the factors set forth in Ira A. Watson Department Store v. Hamilton, supra, and City of Ashland v. Stumbo, supra. The ALJ is required to undertake a five-step analysis to determine whether or not a claimant is totally disabled. The ALJ must determine: 1) if the claimant suffered a work-related injury; 2) what, if any impairment rating the claimant has; 3) what permanent disability rating the claimant has; 4) that the claimant is unable to perform any type of work; and, 5) that the total disability is the result of the work injury. The ALJ outlined his analysis of whether McGeorge is permanently totally disabled. He specifically noted McGeorge's age, and the fact he found him less than credible. He also noted the fact that McGeorge sustained a work-related injury in April 2013 is *res judicata*. The ALJ discussed the impairment ratings, and noted why he relied upon Dr. Travis' impairment assessment. Based upon this analysis, we do not find the ALJ's determination that McGeorge is permanently partially disabled is flawed, and therefore we affirm.

Regarding Wal-Mart's argument on appeal, the ALJ made the following statement in the order denying the petitions for reconsideration:

> The Defendant makes the novel, to me at least, argument that since the Plaintiff's worsening of condition is due to his surgery the date of onset of worsening is the date of the surgery, not the date of the

Motion to Re-Open. Frankly, I find this argument innovative and intriguing but ultimately contrary to the law and the facts.

Awards of permanent income benefits are typically made from either the date of injury, for original claims, or from the date of the Motion to Re-Open for a post-award increase in impairment/disability. There are some circumstances in which this is not true but this is not one of them.

The Plaintiff moved to Re-Open his claim because he was having an increase in pain and symptoms from his work-related L5-S1 injury. That increase was subsequently found to be an herniated disc that required surgery. The condition that necessitated the surgery existed before the surgery. It is that condition, not the surgery alone, which caused the increase in impairment rating and worsening of condition.

The increased award will start on the date of the Motion to Re-Open, June 9, 2016.

KRS 342.125 (1) (c), and (4) state 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:

> (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.

. . .

(4) Reopening and review under this section shall be had upon notice to the parties and in the same manner as provided for an initial proceeding under this chapter. Upon reopening, the administrative law judge may end, diminish, or increase compensation previously awarded, within the maximum and minimum provided in this chapter, or change or revoke a previous order. The administrative law judge shall immediately send all parties a copy of the subsequent order or award.

> **Reopening shall not affect the previous order or award as to any sums already paid thereunder, and any change in the amount of compensation shall be ordered only from the date of filing the motion to reopen.** No employer shall suspend benefits during pendency of any reopening procedures except upon order of the administrative law judge.
> (Emphasis added)

Based upon the plain reading of this KRS 342.125(4), we do not believe the ALJ erred as a matter of law. As the ALJ noted, the basis for the motion to reopen was the fact McGeorge's condition had worsened, and he needed surgery. He ultimately had the surgery, and his impairment rating increased. Although it is not directly on point, we find the holding in Sweasy v. Wal-Mart, 295 S.W.3d 835 (Ky. 2009), analogous and instructive. There the Kentucky Supreme Court determined Sweasy's entitlement to benefits vested at the time of the injury. In this instance, McGeorge's entitlement to enhanced benefits for the worsening of his condition vested on the date he filed the motion to reopen. The increase in impairment was a product of the underlying condition requiring surgery, not necessarily the surgery itself. While the surgery quantified the impairment rating utilized in the calculation, it was not determinative of whether McGeorge's condition has worsened. If that were the case, no injured worker would ever be entitled to an award of PPD benefits prior to surgery being performed, contrary to the holding in Sweasy, supra. We additionally find the increase in PPD benefits from the date the motion to reopen was filed is consistent with the holding in Bartee v. University Medical Center, 244 S.W.2d 91 (Ky. 2008). We therefore affirm the ALJ's determination of increased benefits from the date the motion to reopen was filed.

Accordingly, October 14, 2019 Opinion, Award and Order, and the November 13, 2019 Order on petition for reconsideration rendered by Hon. Chris Davis, Administrative Law Judge, are hereby **AFFIRMED**.

STIVERS, MEMBER, CONCURS.

BORDERS, MEMBER, NOT SITTING.

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