

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: January 25, 2019

CLAIM NO. 201367013

KY FUELS CORPORATION

PETITIONER

VS.

APPEAL FROM HON. JONATHAN R. WEATHERBY,  
ADMINISTRATIVE LAW JUDGE

RICHARD COLE  
And HON. JONATHAN R. WEATHERBY,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION  
AFFIRMING IN PART  
VACATING IN PART  
AND REMANDING

\* \* \* \* \*

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

**RECHTER, Member.** Kentucky Fuels Corporation appeals from the August 27, 2018 Opinion and Award, and the October 15, 2018 Order on Reconsideration rendered by Hon. Jonathan R. Weatherby, Administrative Law Judge (“ALJ”).

Kentucky Fuels challenges the ALJ's determination that Richard Cole has suffered a worsening of his work-related condition. It claims there is insufficient evidence to support this finding, and that the ALJ failed to provide sufficient findings of fact to explain his determination Cole is now permanently totally disabled.

Cole worked for Kentucky Fuels as a bulldozer operator and truck driver. On September 15, 2013, the driver's seat of the dump truck malfunctioned as he drove over a sharp dip in the pavement. He suffered injuries to his low back. In a February 16, 2015 Opinion, Hon. Thomas Polites, Administrative Law Judge ("ALJ Polites"), relied on a 10% impairment rating for the low back injury assessed by Dr. Anbu Nadar. Significant proof was entered to establish Cole suffered an underlying degenerative lumbar spine condition. ALJ Polites agreed Cole suffered a pre-existing condition, but rejected the assertion this condition was active prior to the work injury. Instead, he concluded the work injury aroused the previously dormant condition into disabling reality. ALJ Polites also dismissed Cole's claims for hip and neck injuries. The opinion was not appealed.

Cole moved to reopen the claim on November 8, 2017, arguing he had suffered a worsening of his condition. He attached a September 21, 2017 letter from Dr. Nadar, who noted Cole's gradually worsening low back pain, which now radiates into his legs. Dr. Nadar re-evaluated Cole on May 16, 2017 and assessed a 13% impairment pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5<sup>th</sup> Edition. He concluded Cole's work-related condition had worsened since his 2014 examination.

Cole testified at a deposition on January 24, 2018. He explained his low back pain has gradually worsened since the 2013 injury, and he continues to treat with Dr. Mansoor Mahmood. Since the work injury, he has not been able to drive extended periods of time, dress himself, or get out of bed on his own. These circumstances continue, but other limitations have developed, such as pain when lifting bags of groceries. When asked to describe how his condition has worsened, Cole generally described a worsening of his pain.

Dr. Thomas Loeb conducted an independent medical evaluation (“IME”) on March 20, 2018. Dr. Loeb diagnosed congenital, multi-level degenerative disc disease. He disagreed that the 2013 work incident caused any injury beyond a transient sprain, and instead attributed Cole’s lumbar condition to degenerative factors with a congenital overlay. He assigned a 13% impairment rating for Cole’s lumbar condition, entirely attributable to degenerative and congenital factors. Dr. Loeb did not agree that the work accident caused any permanent impairment, and does not believe any worsening of Cole’s condition since 2013 is attributable to the work injury.

A lumbar spine MRI from June 25, 2014 was submitted into evidence. It revealed mild to moderate degenerative disc disease throughout the lumbar spine and disc herniations or mild bulging at every level. A March 23, 2018 lumbar spine MRI again revealed multi-level degenerative disc disease, worst at L4-5. At L4-5, the reviewing physician noted circumferential disc osteophyte complex bulge with broad-based posterocentral disc protrusion of 8mm.

Dr. Nadar compared the 2018 MRI to the 2014 MRI. In a May 10, 2018 letter, he concluded the 2018 MRI shows “a progression of Cole’s disc osteophyte complex at L3-4 and L4-5 levels.” Dr. Loeb also reviewed the 2018 MRI and, in a May 2, 2018 letter, stated that his prior opinions had not changed.

Cole again testified at a hearing on June 28, 2018. He explained he has more difficulty walking long distances and bending over. He stated the pain was severe after the work injury but is now “beyond what I can bear.” He previously used a walker but it was difficult to lift, so Cole now uses a cane.

Kentucky Fuels submitted a December 23, 2016 Opinion and Order in a prior medical fee dispute. In the prior dispute, the ALJ determined certain contested prescriptions are non-compensable because they were prescribed for conditions other than Cole’s work-related injury. The ALJ relied on the opinion of Dr. John Vaughn, who diagnosed Cole with degenerative disc disease and stenosis, both of which he opined are unrelated to the work injury.

The ALJ first noted Drs. Loeb and Nadar agree Cole now suffers a 13% impairment rating, which is an increase from the 10% impairment rating adopted by ALJ Polites. He also gave *res judicata* effect to ALJ Polites’ prior determination that Cole suffered a work-related injury caused by the arousal of a previously dormant condition. The ALJ next examined whether Cole is not permanently totally disabled. After citing the definition of permanent total disability and Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000), he provided the following analysis:

[Cole] testified that he is unable to dress himself or put on shoes without help from his wife due to his inability to bend because of his back condition. Despite the relatively young age of [Cole], he presented at the hearing as someone much older and demonstrated an unmistakable difficulty with ambulation.

The ALJ finds that [Cole's] description of his current abilities is credible and is supported by the MRI findings of Dr. Nadar who noted the progression of [his] injury. The ALJ finds based upon the testimony and presentation of [Cole] as supported by the objective medical evidence cited by Dr. Nadar that [Cole] would be unlikely to be able to provide services to another in return for remuneration on a regular and sustained basis in a competitive economy.

Kentucky Fuels petitioned for reconsideration, raising the same issues it now raises on appeal. The petition was denied. On appeal, Kentucky Fuels first argues there is insufficient evidence to support the determination Cole's condition has worsened.

Dr. Nadar's opinion constitutes the requisite substantial evidence to support the determination Cole's condition has worsened. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). We disagree with Kentucky Fuels' assertion Dr. Nadar did not attribute the worsening to the work injury. Throughout his narrative report and the Form 107, Dr. Nadar expresses his belief Cole's underlying dormant degenerative conditions were aroused and exacerbated by the work injury. He also repeatedly states that Cole's "condition" and "symptoms" have worsened since 2013. He discusses no other non-work-related condition in his report, and offers no other explanation for the worsening of the work-related condition. Though Dr. Nadar may not have explicitly and directly stated that the

worsening is work-related, or employed some other magic words, it is entirely reasonable to draw this conclusion from the context of his report. We find no error in the ALJ's reliance on Dr. Nadar's opinion and impairment rating to determine Cole's work-related condition has worsened.

In a related argument, Kentucky Fuels asserts the ALJ failed to afford *res judicata* effect to his prior opinion in the 2016 medical fee dispute. There, the ALJ relied upon Dr. Vaughn's opinion to conclude contested medications were used to treat Cole's degenerative conditions, not his work-related condition. According to Kentucky Fuels, this determination precludes further litigation of whether any worsening is work-related. The doctrine of *res judicata* generally bars relitigation of an issue previously decided in a prior controversy between the same parties. Whitaker v. Cecil, 69 S.W.3d 69 (Ky. 2002). KRS 342.125 provides some relief from the finality of judgements in workers' compensation claims, but only for the reasons specifically enumerated in the statute.

Kentucky Fuels' argument rests on the apparent contradiction between ALJ Polites' Opinion and the ALJ's decision in the 2016 medical fee dispute. ALJ Polites determined that Cole's degenerative conditions were dormant prior to the injury, and brought into disabling reality by the work accident. In the 2016 medical fee dispute, however, the ALJ relied upon Dr. Vaughn's opinion to conclude the contested medications were non-compensable. Dr. Vaughn stated Cole suffered degenerative disc disease and spinal stenosis, which he opined are unrelated to the work injury. He referenced his 2014 IME report, which was entered in the original litigation of this claim and designated in both subsequent re-openings. In his 2014

IME report, Dr. Vaughn opined Cole's work accident caused no permanent injury, and all of his spinal conditions are congenital.

In the 2016 medical fee dispute, the ALJ adopted Dr. Vaughn's opinion that the contested medications are non-compensable. He stated,

[A]fter review of the evidence, it is determined that the opinion of Dr. Vaughn is persuasive in that while [Cole] has major medical problems, for which the contested medications are prescribed, they are unrelated to his work injury of September 2013.

Kentucky Fuels interprets this statement as a finding Cole's current low back condition is not work-related, which is entitled to *res judicata* effect.

We disagree for a number of reasons. First, the decision in the 2016 medical fee dispute is very narrow. The precise issue for adjudication was the work-relatedness, reasonableness, and necessity of the contested medications. For this reason, we disagree that the ALJ's reliance on Dr. Vaughn's opinion in the 2016 medical fee dispute is tantamount to a determination that Cole suffers no work-related back condition. At best, the decision in the 2016 medical fee dispute establishes only that Cole suffers non-work-related spine conditions for which the contested medications were prescribed.

Second, a subsequent judgement in a medical fee dispute cannot contravene the primary findings contained in the original decision of a workers' compensation claim. Even if we accept that the ALJ implicitly found Cole suffers no work-related back condition by adopting Dr. Vaughn's opinion in the medical fee dispute, this finding would be impermissible in light of ALJ Polites' prior decision. ALJ Polites determined Cole's work accident brought his degenerative back

conditions into disabling reality. That decision was not appealed and became the law of the case. Likewise, the ALJ's decision in the 2016 medical fee dispute was not appealed and it is not within the province of this Board to conduct a review. Regardless of any apparent conflict created by the ALJ's decision in the medical fee dispute, ALJ Polites' determination remains binding on the claim.

The narrow decision in the 2016 medical fee dispute does not, and cannot, contravene ALJ Polites' original decision in this claim. Therefore, the ALJ was not permitted, and in fact did not, fully adopt Dr. Loeb's opinion that the work accident caused merely a temporary injury. For this reason, Kentucky Fuels was properly precluded from arguing the entirety of Cole's current condition is non-work-related, a theory advanced by Drs. Loeb and Vaughn. Yeoman v. Com., Health Policy Board, 983 S.W.2d 459 (Ky. 1998).

Kentucky Fuels next argues the ALJ failed to provide sufficient analysis for the determination Cole is now permanently totally disabled. It further claims there is insufficient evidence to support this conclusion. We agree the ALJ failed to conduct the required analysis to determine permanent total disability.

Permanent total disability is the condition of an employee who has a permanent impairment rating and who has a complete and permanent inability to perform any type of work. KRS 342.0011(11)(c). There is no requirement that the claimant be home bound; rather, he must be unable to perform services for remuneration on a sustained and regular basis. KRS 342.0011(34). When considering permanent total disability, the ALJ is required to conduct an individualized analysis. In addition to the nature and extent of the work injury,

factors to consider are the claimant's post-injury physical, emotional, intellectual and vocational status. Hamilton, 34 S.W.3d at 51.

In his analysis of permanent total disability, the ALJ noted Cole's young age but cited his difficulty ambulating and the fact his wife has to assist him with many tasks, such as dressing himself. The ALJ did not articulate his consideration of Cole's prior work history or education, or his ability to otherwise perform sedentary work. Nor did the ALJ discuss the physical restrictions imposed by the reviewing and treating physicians, and whether these restrictions have changed since the original litigation of the claim and now prevent a return to any work. Importantly, the ALJ also did not discuss whether Cole's difficulty ambulating is work-related. It must be emphasized that ALJ Polites dismissed Cole's claim for a work-related hip injury. Because the ALJ specifically cited Cole's difficulty ambulating as a primary reason he is now permanently totally disabled, he was required to cite a medical opinion establishing this difficulty is caused by his work-related injuries.

The ALJ must provide a sufficient basis to support his determination so that the parties are apprised of the basis of his conclusions. Cornett v. Corbin Materials, Inc., 807 S.W.2d 56 (Ky. 1991). The ALJ's discussion of permanent total disability does not satisfy the individualized analysis required by Hamilton, nor does it adequately identify which factors support his conclusions. Because we must remand this claim for further findings of fact, we decline to address Kentucky Fuels' additional assertion that the ALJ's determination of permanent total disability lacks sufficient supporting evidence.

Accordingly, the August 27, 2018 Opinion and Award, and the October 15, 2018 Order on Reconsideration rendered by Hon. Jonathan R. Weatherby are hereby **AFFIRMED IN PART, VACATED IN PART and REMANDED**. The ALJ's determination that Cole has suffered a worsening of his work-related injury is **AFFIRMED**. The ALJ's determination that Cole is now permanently totally disabled is **VACATED**. This claim is **REMANDED** to the ALJ for further findings of fact concerning the extent of Cole's current disability, in accordance with the views expressed herein.

ALL CONCUR.

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