

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2010-CA-001248-WC

WEST IRVING DIE CAST

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-04-95492

LOREN RICE; HON. R.  
SCOTT BORDERS,  
ADMINISTRATIVE LAW  
JUDGE; AND WORKERS'  
COMPENSATION BOARD

APPELLEES

OPINION  
AFFIRMING  
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BEFORE: CAPERTON, MOORE, AND VANMETER, JUDGES.

VANMETER, JUDGE: West Irving Die Cast (West Irving) petitions for the review of an opinion of the Workers' Compensation Board (Board) affirming the order of an Administrative Law Judge (ALJ) that dismissed West Irving's motion

to reopen Loren Rice's workers' compensation claim. For the following reasons, we affirm.

On January 3, 2004, while working for West Irving, Rice injured his back when he attempted to tighten a bolt located above his head. Dr. Robert Adams, a psychologist, conducted a psychological examination of Rice on December 12, 2004, and subsequently diagnosed Rice with major depression with psychotic features as a result of the work-related injury and loss of income. Due to the depression, Dr. Adams assigned Rice a 75% impairment rating. Additionally, Dr. William Kelly Vincent, Rice's treating physician, opined that Rice suffered from depression that was causally related to the work-related injury.

In an opinion and order dated April 15, 2005, the ALJ found as a result of the work-related injury, Rice was permanently and totally occupationally disabled due to his back injury and psychiatric condition. In so finding, the ALJ noted:

In this instance, the Administrative Law Judge is persuaded by the testimony of Dr. Vincent, coupled with that of Dr. Adams, as well as the Plaintiff's credible testimony that his prior emotional problems had resolved before the January 3, 2004 [work injury].

Subsequently, West Irving appealed to the Workers' Compensation Board, which affirmed the ALJ's order.

On November 2, 2007, West Irving filed a motion to reopen the claim, arguing that Rice's physical and psychiatric conditions had substantially improved since the date of the ALJ's opinion. In an order dated February 15, 2008, the ALJ denied West Irving's motion to reopen for failure to make a prima facie showing of

a change in Rice's disability since the time of the award. West Irving petitioned the ALJ for reconsideration, which the ALJ denied. West Irving then appealed the ALJ's order to the Board, which remanded the case to the ALJ on the basis that the evidence established a prima facie case and directed the ALJ to issue an opinion on the merits of West Irving's claim to reopen.

In support of its assertion that Rice's psychiatric condition had improved, West Irving submitted the medical reports of Dr. Andrew Cooley and Dr. David Shraberg, who both found that Rice has no residuals from a psychiatric standpoint as a result of the work injury. Dr. Cooley conducted an independent medical examination of Rice on June 30, 2006, and opined that Rice was not honestly reporting symptoms and displayed a pattern of malingering. Dr. Cooley further opined that Rice did not have a legitimate psychiatric disorder, stressing that he administered four different cognitive measures testing effort and validity, all of which Rice failed. In addition, Dr. Shraberg's examination of Rice on October 2, 2007, revealed no evidence of a psychiatric disorder related to Rice's work injury. He further noted that Rice's symptoms were lifestyle induced, associated with opiate and tobacco dependency.

West Irving also submitted the medical report of Dr. Martin Schiller to prove Rice's physical condition improved since 2004. Dr. Schiller performed an independent medical evaluation on March 22, 2007, which revealed multiple Waddell findings indicating non-structural disease and pain behavior. Dr. Schiller opined that Rice had reached maximum medical improvement, but due to

psychiatric problems and the diagnosis of malingering, assessment of the impairment rating was difficult. Ultimately, Dr. Schiller assigned Rice a 0% impairment rating to the body as a whole.

Dr. Robert Weiss evaluated Rice in 2004, and again on February 5, 2009. He reported that his diagnosis of Rice had not changed since 2004 and he still believed Rice did not need surgery or any additional treatment to his back, and that Rice's injury was nothing more than a strain on his lower back. Dr. Weiss stressed that Rice had reached maximum medical improvement from the strain.

In response, Rice submitted the medical record of Dr. Adams who conducted a psychological evaluation of Rice on March 31, 2009. Dr. Adams concluded that Rice's psychological condition had not substantially changed since his prior examination in 2004. In a letter to Rice's counsel, Dr. Adams further stated that he disagreed with Dr. Cooley's report, and believed that Rice's lack of effort was due to his depression, not because he was malingering.

Rice also submitted the medical report of Dr. Vincent, who stated that based on Mr. Rice's psychological, as well as his physical condition, he was not suited for any kind of work that was to be performed in a forty-hour work week because of his problems with concentration and his need to lie down throughout the day. Dr. Vincent noted that he has increased the strength and quantity of Rice's antidepressant, and continues to prescribe Rice chronic pain medication and muscle relaxants for his lower back pain.

Rice acknowledged that he takes medication for treatment of depression. He also stated that since his injury, his crying spells have increased and now occur once or more every day. In addition, Rice testified that he avoids his family, has feelings of hopelessness, often has physical outbursts due to anger, and has difficulty focusing his attention. Rice testified that he still experiences severe pain in his lower back which radiates down his right leg and has recently moved down his left leg as well. As a result of the pain, Rice has difficulty sleeping.

West Irving argues the Board erred by not reversing the ALJ's order that found Rice to still be "permanently and totally occupationally disabled" because the finding was not supported by substantial evidence in the record. More specifically, West Irving contends the evidence compels a finding that Rice no longer suffers from a psychiatric condition or physical condition.

The standard for appellate review of a Board decision "is limited to correction of the ALJ when the ALJ has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice." *Bowerman v. Black Equip. Co.*, 297 S.W.3d 858, 866 (Ky.App. 2009) (citing *W. Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992)). We review an award by an ALJ to determine whether its findings were reasonable under the evidence. *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986). We note that the "ALJ, as the finder of fact, and not the reviewing court, has the sole authority to determine the quality, character, and substance of

the evidence.” *Square D Co. v. Tipton*, 862 S.W.2d 308, 309 (Ky. 1993) (citation omitted).

KRS<sup>1</sup> 342.125 provides, in part:

(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.

Well-settled is the notion that “the burden [of proof] is upon the one moving for a reopening of a compensation award[.]” *W.E. Caldwell Co. v. Borders*, 301 Ky. 843, 847 193 S.W.2d 453, 454 (1946) (citations omitted).

In this case, the record reveals that after Dr. Adams’ psychological evaluation of Rice in 2009, Dr. Adams concluded that no change had occurred in Rice’s psychiatric condition since his psychological evaluation in 2004. Dr. Adams also disagreed with Dr. Cooley’s conclusion that Rice was malingering, and attributed Rice’s lack of effort to an inability to focus and an apathetic view towards his life, both of which Dr. Adams believed were signifiers of Rice’s depression. In addition, Dr. Vincent opined that Rice’s psychiatric condition had deteriorated since 2005, citing Rice’s sleep disturbances with severe insomnia, along with irritability towards his family. As a result, Dr. Vincent had to increase Rice’s depression medication.

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<sup>1</sup> Kentucky Revised Statutes.

Dr. Vincent and Rice both offered evidence to support the court's conclusion that the physical condition of Rice's lower back had not changed since his original award in 2004. Dr. Vincent continues to prescribe pain medication, and has had to increase the potency of medications Rice requires. Rice testified his back pain has continued and increased, recently moving down both his right and left legs. Rice is unable to lift objects, has difficulty completing daily tasks and sleeping through the night.

Despite the introduction of Dr. Cooley's and Dr. Shraberg's medical reports, both opining that Rice was not suffering from a psychiatric disorder, and any symptoms were related to his dependence on narcotics, the evidence presented by Dr. Adams, Dr. Vincent, and Rice was sufficient to support the ALJ's conclusion that Rice's psychiatric condition had not improved since the original workers' compensation award in 2004. Likewise, the medical reports of Dr. Schiller and Dr. Weiss found Rice to have reached maximum medical improvement and stressed that Rice did not require additional treatment for his lower back. However, Dr. Vincent and Rice provided evidence to show that Rice's lower back condition had either not improved or deteriorated since 2004. Such evidence was adequate to support the ALJ's conclusion. *See Square D Co.*, 862 S.W.2d at 309 (the ALJ has the sole authority to weigh the evidence). Accordingly, we decline to disturb the ALJ's findings.

The opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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