

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-002217-WC

LINDA POTTER

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-09-01154

WAL-MART STORES, INC.; CAROLINE
PITT CLARK, Administrative Law Judge; and
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: COMBS and LAMBERT; and SHAKE,¹ Senior Judge.

COMBS, JUDGE: Linda Potter petitions for review of a decision of the Workers' Compensation Board. The Board dismissed Potter's appeal from a decision of the administrative law judge (ALJ). The ALJ provisionally granted her claim for permanent partial disability benefits against Wal-Mart Stores, Inc., due to

¹ Senior Judge Ann O'Malley Shake sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

the physical effects of a work-related injury; however, the ALJ ordered the claim to be held in abeyance till Potter reached maximum medical improvement with respect to the alleged psychological overlay associated with her injury. Since the ALJ's order required additional findings of fact and a subsequent decision on the merits, the Board concluded that the ALJ's order was interlocutory. Potter challenges the Board's conclusion and asks that we remand the matter for a decision on the merits of the appeal. After carefully considering Potter's contention, we conclude that the Board did not err in dismissing the appeal.

Potter worked for Wal-Mart from October 2000 until November 12, 2009, when she voluntarily left her part-time employment. On July 26, 2009, Potter injured her neck and back while collecting shopping carts from the parking lot. She filed an application for workers' compensation benefits and was treated by numerous medical providers.

Following a formal hearing and a review of conflicting medical evidence, the ALJ found that Potter suffered a *temporary* cervical strain attributable to her work injury of July 26, 2009. However, the ALJ found that the injury caused *permanent* impairment with respect to Potter's lumbar spine. The ALJ accepted a medical expert's opinion assigning a 3% impairment rating to Potter's low-back condition. Since Potter did not have to miss any work, the ALJ was not convinced that she was entitled to any temporary total disability benefits as a result of the physical injuries that she sustained on July 26, 2009. Based on these findings and

on data related to Potter's average weekly wage, the ALJ calculated a provisional award of benefits.

With regard to Potter's psychological complaints, the ALJ found that Potter "did suffer a psychological injury as a result of her work injuries, because her low back and neck injuries aggravated (did not entirely cause) her depressive disorder." Opinion, Award and Order at 16. However, Potter had not received psychological treatment as of the date of the evidentiary hearing; she had not reached maximum medical improvement; and she had not been assigned any permanent impairment rating with respect to the psychological component of her injury.

The ALJ concluded that Potter was entitled to recover from Wal-Mart all medical expenses "as may be reasonably required for the care and relief from the effects of her work-related . . . psychological injur[y]" and ordered the claim to be placed in abeyance until Potter reached maximum medical improvement. *Id.* at 20. The ALJ required status reports from the parties every 60 days and indicated that the provisional award of benefits "could change pending [Potter's] attaining [maximum medical improvement] from her psychological injuries, and whether or not she is assigned any permanent, work-related, impairment as a result thereof." *Id.* at 19.

There was no evidence to indicate that Potter's work-related psychological injury caused her to be unable to perform her work for Wal-Mart, and no doctor had restricted her from work due to her psychological condition. Therefore, the

ALJ was not persuaded that Potter was entitled to an award of temporary total disability benefits as a result of the psychological injury.

Potter filed a petition for reconsideration. In her petition, Potter asked the ALJ to set aside her decisions with respect to the neck and back injuries and to place the **entire** matter “in abeyance until [she, Potter] reaches maximum medical improvement on the psychiatric portion of her claim.” Petition at 2. The petition for reconsideration was denied by the ALJ, and Potter appealed to the Board.

Before the Board, Potter contended that the ALJ abused her discretion by failing to award temporary total disability benefits in association with her psychological injuries and by making an award with respect to her physical injuries before her psychological injuries reach maximum medical improvement. Walmart contended that the ALJ’s opinion, award, and order were interlocutory in nature and requested that the appeal be dismissed. The Board dismissed the appeal as interlocutory.

On appeal from that determination, Potter argues that the opinion, award, and order entered by the ALJ on June 14, 2010, were not interlocutory and instead amount to a final judgment on the merits. Citing this court’s decision in *Tube Turns Division v. Logsdon*, 677 S.W.2d 897 (Ky.App.1984), she contends that the order is final and appealable since the ALJ’s failure to award her temporary total disability benefits with respect to the psychological component of her claim resulted in irreparable harm and divested her of the right to collect those benefits.

Upon review, we must show considerable deference to the Workers' Compensation Board. Our function "is to correct the Board only where . . . the Court perceives the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice." *Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky.1992).

Pursuant to Kentucky Revised Statute[s] (KRS) 342.0011(11)(a), awards of temporary total disability benefits are appropriate where a worker is totally disabled by the effects of a compensable injury but has not yet reached maximum medical improvement. An ALJ is specifically authorized by provisions of the Kentucky Administrative Regulations (KAR) to order interlocutory relief for a claimant in the form of income benefits. 803 KAR 25:010. Pursuant to the regulations, an ALJ is required to place a claim in abeyance if she orders the payment of temporary total disability benefits. 803 KAR 25:010, Section 12. However, the ALJ is not required to order payment of those benefits simply because she decides to place a claim in abeyance pending the claimant's maximum medical improvement. *See Bowerman v. Black Equipment Co.*, 297 S.W.3d 858 (Ky.App. 2009).

More significantly, we are not persuaded that the Board erred by concluding that the ALJ's order was interlocutory. In the exercise of her reasonable discretion, the ALJ was plainly authorized to reverse any dispositive interlocutory factual finding on the merits in a subsequent final opinion. Thus, the ALJ's order of June

14, 2010, did not adjudicate **finally** any of the rights of the parties in this case. Interlocutory orders and judgments determining issues which are not specifically disposed of in a final judgment are deemed to be readjudicated as of the date of the final order. Therefore, Potter will have a full opportunity to appeal this disputed order when the ALJ makes a final disposition of all the issues. We affirm the decision the Kentucky Workers' Compensation Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

Glenn Martin Hammond
Pikeville, Kentucky

BRIEF FOR APPELLEE:

Ronald J. Pohl
Andrew F. Manno
Lexington, Kentucky