

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2013-CA-000565-WC

EPI CORPORATION

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-05-85559

JENNIFER BOLING; HONORABLE  
ALLISON E. JONES, ADMINISTRATIVE  
LAW JUDGE; AND WORKERS'  
COMPENSATION BOARD

APPELLEES

OPINION  
AFFIRMING

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BEFORE: NICKELL, THOMPSON, AND VANMETER, JUDGES.

VANMETER, JUDGE: EPI Corporation ("EPI") petitions this court for review of an opinion of the Workers' Compensation Board ("Board") affirming an Administrative Law Judge's ("ALJ") decision on reopening to deny EPI's request for reduction of permanent partial disability ("PPD") benefits awarded to Jennifer

Boling. EPI argues that it presented sufficient evidence to support a reduction of Boling's benefits and therefore, the ALJ's decision was erroneous. For the following reasons, we affirm.

Boling injured her right thumb in April 2005 while working for EPI as a physical therapy assistant. Boling was assisting her supervisor with a patient when the patient fell back onto her hand, dislocating her thumb. When her pain and swelling continued, Boling visited a Dr. Jacob and was subsequently taken off work. She was eventually referred to Kleinert Kutz Hand Care Center and placed under the care of Dr. Warren C. Breidenbach. Later that year, Boling began to suffer additional symptoms, including drops in blood pressure and passing out.

Dr. Breidenbach testified by deposition that Boling suffered from dystrophy related to the thumb injury. Dr. Donald G. Wood, who had been treating Boling since August 2003, diagnosed Boling with reflex sympathetic dystrophy ("RSD"), also known as complex regional pain syndrome ("CRPS"),<sup>1</sup> resulting from her thumb injury. Dr. Wood found that Boling's RSD was complicated by autonomic dysfunctions, including the inability to control her blood pressure. Dr. Wood believed that Boling had POTS,<sup>2</sup> but was uncertain. Per the ALJ's order, Dr.

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<sup>1</sup> RSD (or CRPS) is characterized by pain disproportionate to the underlying injury intensifying over time. RSD symptoms include: burning pain; changes to skin temperature, color, and texture; swelling; and extreme sensitivity to touch. NINDS Complex Regional Pain Syndrome Information Page, [http://www.ninds.nih.gov/disorders/reflex\\_sympathetic\\_dystrophy/reflex\\_sympathetic\\_dystrophy.htm](http://www.ninds.nih.gov/disorders/reflex_sympathetic_dystrophy/reflex_sympathetic_dystrophy.htm) (last visited Nov. 18, 2013).

<sup>2</sup> POTS, or postural orthostatic tachycardia syndrome, is a disorder in which an insufficient volume of blood returns to the heart when an individual rises to a standing position. POTS causes symptoms such as a rapid heartbeat, lightheadedness, and fainting. Lying down is generally the only way to relieve these symptoms. NINDS Postural Tachycardia Syndrome Information Page, [http://www.ninds.nih.gov/disorders/postural\\_tachycardia\\_syndrome/postural\\_](http://www.ninds.nih.gov/disorders/postural_tachycardia_syndrome/postural_)

Robert B. Nickerson performed a university evaluation and determined that Boling sustained a right thumb ligament injury in April 2005, resulting in CRPS. Dr. Nickerson also diagnosed Boling with POTS, which although not caused by the thumb injury, was exacerbated by the injury and resulting pain.

Boling filed her original claim for workers' compensation benefits in December 2006, and a hearing on the matter was held in October 2009. At the time of this hearing, Boling testified that she could not do any work as she was unable to sit, stand or walk for more than 90 minutes at a time. Frequent drops in blood pressure caused her to experience dizziness and loss of consciousness.

The ALJ<sup>3</sup> issued an opinion in December 2009 concluding the following: both Boling's RSD and POTS were related to the April 2005 work injury; Boling had a 25% whole person impairment; and she was incapable of returning to her prior work. Boling was awarded PPD benefits accordingly. Boling and EPI each appealed this decision to the Board. While the appeal was pending, EPI filed a motion to reopen on the grounds that new evidence from Dr. Breidenbach showed Boling's condition had changed and therefore Boling's PPD award needed to be reevaluated. The Board partially remanded the case to the ALJ to consider EPI's motion to reopen, but affirmed the opinion that Boling was not permanently totally disabled. The ALJ granted EPI's motion to reopen.

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tachycardia\_syndrome.htm (last visited Nov. 18, 2013).

<sup>3</sup> Former ALJ Smith was originally assigned to this case, but was replaced by ALJ Jones after the motion to reopen was granted.

After several delays related to the second university evaluation, Dr. Nickerson, who had some expertise with POTS, was no longer available. The ALJ then concluded that the physician scheduled to perform the second evaluation, Dr. Gregory Gleis, an orthopedist, was not qualified to render an opinion as to the status of Boling's POTS. In the interest of avoiding further delay, the ALJ decided to move forward with hearing EPI's motion to reopen without a second university evaluation.

At the hearing on the motion to reopen, EPI presented records from Dr. Breidenbach stating that his previous opinion of Boling's condition had changed. Dr. Breidenbach reported that Boling's whole person impairment rating with respect to her hand injury was 0%. Boling in return submitted a note from Dr. Wood stating that he continued to treat her for RSD and POTS, her condition had not improved, and her whole person impairment rating had not decreased. Dr. Wood reported that he had not released Boling to return to work. Boling herself testified that as a result of her POTS, she experiences nausea, fainting spells, sudden increases in blood pressure, and aggravation of the pain caused by her RSD. She further asserted that she has suffered multiple falls related to dizziness she experiences, and these falls have caused severe injuries. Boling testified that, out of financial need, she returned to work part time as a physical therapist in August 2010. She was unable to continue this work, and thus took an administrative job in March 2011. Boling claimed that she frequently misses work

due to her POTS symptoms, and has been reprimanded by her supervisor for her poor attendance.

The ALJ concluded that EPI's evidence from Dr. Breidenbach was insufficient to prove that Boling's 25% impairment rating was now 0%. The ALJ opined that Dr. Breidenbach's opinion did not address the interaction between Boling's hand injury, RSD, and POTS, all of which were considered in the original 25% impairment rating. Further, Dr. Wood, who was involved with treating Boling's POTS, reported that Boling's whole person impairment rating had not decreased and that Boling continued to suffer from RSD and POTS related to her work injury.

Finally, the ALJ performed a *Fawbush* analysis to determine which award multiplier was appropriate in Boling's case. Pursuant to *Fawbush v. Gwinn*, 103 S.W.3d 5 (Ky. 2003), the ALJ is authorized to determine which provision of KRS<sup>4</sup> 342.730(1)(c) is better suited to the individual when both (c)(1) and (c)(2) apply. Both provisions were applicable in Boling's case, for although she could not return to the type of work performed at the time of the injury, she had subsequently returned to work in a higher paying, though less physically demanding, position. After a thorough evaluation, the ALJ determined that the three multiplier from KRS 342.730(1)(c)(1) was appropriate. The ALJ reached this decision despite Boling's return to work at a higher wage because she found that due to her

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<sup>4</sup> Kentucky Revised Statutes.

condition, Boling was unlikely to be able to continue earning the same or greater wage in the foreseeable future.

The Board affirmed the ALJ's opinion in March 2013. The Board found EPI did not meet its burden of proving that Boling was no longer entitled to PPD benefits, and the evidence was not so compelling as to demand a finding in EPI's favor. Finally, the Board concluded that the *Fawbush* analysis was not in error, since Boling's ability to perform some work did not necessarily require a reduction or cessation of benefits. Thus, the Board affirmed the ALJ's decision, and this appeal followed.

The well-established standard of review for the appellate courts of a workers' compensation decision "is to correct the [Workers' Compensation] 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." *E.g., Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992); *Butler's Fleet Serv. v. Martin*, 173 S.W.3d 628, 631 (Ky.App. 2005); *Wal-Mart v. Southers*, 152 S.W.3d 242, 245 (Ky.App. 2004). *See also Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986) (if the fact-finder finds in favor of the person having the burden of proof, the burden on appeal is only to show that some substantial evidence supported the decision); *cf. Gray v. Trimmer*, 173 S.W.3d 236, 241 (Ky. 2005) (if the ALJ finds against the party having the burden of proof, the appellant must "show that the ALJ misapplied the

law or that the evidence in her favor was so overwhelming that it compelled a favorable finding”).

Furthermore, Kentucky case law has long recognized that the party seeking to reopen a claim and have the award changed bears the burden of proving every element of the claim. *House v. BJK Indus.*, 103 S.W.3d 13, 16 (Ky. 2003)(citing KRS 342.125); *Young v. Harris*, 467 S.W.2d 588, 589 (Ky. 1971); *W.E. Caldwell Co. v. Borders*, 301 Ky. 843, 847 (1946). The ALJ is given broad discretion to weigh the quality and substance of the evidence in making a determination. *Square D Co. v. Tipton*, 862 S.W.2d 308, 309 (Ky. 1993). EPI bore the burden to prove on reopening that a reduction in benefits was proper, and EPI did not meet that burden. Sufficient and substantial evidence support the ALJ’s findings, and thus the Board’s affirmation.

The only new evidence presented by EPI on reopening was Dr. Breidenbach’s opinion that Boling no longer experiences pain from her thumb injury. However, the decision not to reduce Boling’s award was predicated on the fact that the 25% whole person impairment rating stemmed from the interaction between Boling’s injury, her RSD, and her POTS. Dr. Breidenbach was not involved in treating Boling’s POTS. The ALJ appropriately considered Dr. Breidenbach’s opinion, as well as Dr. Wood’s consistent opinion of Boling’s condition and Boling’s own testimony as to her condition in reaching its conclusion. The decision not to reduce Boling’s whole person impairment rating was not unreasonable based upon the evidence presented at the hearing.

Finally, EPI alleges that the ALJ's *Fawbush* assessment led to an erroneous conclusion. We disagree. EPI contends that because Boling has been back to work for over two years, and working full time for eighteen months, she should not be entitled to the three multiplier in KRS 342.730(1)(c)(1). We find that the ALJ carefully considered not only Boling's return to work, but also her higher wages. Despite these considerations, the ALJ noted that Boling is currently employed in an administrative position, as she is unable to return to the type of work she performed prior to the work injury. Boling returned to work out of financial necessity, as she has not been cleared to work by Dr. Wood, her POTS treating physician. Finally, the ALJ found that Boling is unlikely to be able to maintain her current full time position as a result of her health issues. Ultimately, the ALJ found that the three multiplier was appropriate. While a party may point to evidence that would have supported an alternate outcome, this is not a sufficient basis for reversal. *McCloud v. Beth-Elkhorn Corp.*, 514 S.W.2d 46, 47 (Ky. 1974). Boling's return to work is insufficient to require reversal of the ALJ's decision. The determination of which multiplier to apply is within the discretion of the ALJ, and in the absence of clear error, such a decision will not be overturned. Thus, the Board did not err in affirming the ALJ's decision under the *Fawbush* analysis.

The Workers' Compensation Board's opinion is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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