

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2016-CA-001648-WC

DANIEL LOTTER

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-14-84904

GENERAL ELECTRIC COMPANY;  
HON. STEVEN G. BOLTON,  
ADMINISTRATIVE LAW JUDGE; AND  
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION  
AFFIRMING

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BEFORE: CLAYTON, COMBS, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Daniel Lotter petitions this Court to review an Opinion of the Workers' Compensation Board entered October 17, 2016, vacating in part and remanding an award of permanent total disability rendered by an Administrative Law Judge. We affirm.

Lotter started working for General Electric Company (GE) in 1994. He suffered work-related injuries to his low back on April 23, 2014, and March 2, 2015. As a result of these work-related injuries, Lotter filed a claim for workers' compensation benefits on July 21, 2015. By Opinion, Award, and Order rendered April 17, 2016, the ALJ found Lotter to be permanently and totally disabled. In making this finding, the ALJ considered that Lotter returned to work for GE in a new position as an end-of-line repairman and worked full-time. However, citing to *Gunderson v. City of Ashland*, 701 S.W.2d 135 (Ky. 1985), the ALJ concluded that Lotter was totally disabled even though he returned to full-time work at GE.

Being dissatisfied with the award, GE then sought review with the Board. GE maintained that Lotter could not be considered permanently and totally disabled as he worked full-time as an end-of-line repairman. By Opinion entered October 17, 2016, the Board vacated in part and remanded to the ALJ. The Board specifically determined that additional fact finding was necessary as to the determination that Lotter was permanently totally disabled since he continued to work full-time at GE. The Board directed the ALJ to particularly find "whether Lotter's position was offered as a special accommodation." Board's Opinion at 18. Also, the Board concluded that the ALJ should reconsider the issue of vocational rehabilitation. Our review follows.

As an appellate court, our review of the Board's opinion is limited. We will only reverse the Board's opinion when "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.” *W. Baptist Hospital v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992).

Lotter contends that the Board erred by vacating the ALJ’s finding that he was permanently and totally disabled. Lotter maintains that substantial evidence supported the ALJ’s finding of permanent total disability and that the ALJ correctly applied the law.

This is a unique case. It is undisputed that Lotter returned to full-time work at GE as an end-of-line repairman after his work-related back injuries. Nonetheless, the ALJ found Lotter to have total permanent disability and cited to *Gunderson*, 701 S.W.2d 135 as authority.

In *Gunderson*, our Supreme Court held that a claimant may still be considered totally and permanently disabled even after a return to employment if such employment resulted from a “business boom, *sympathy of a particular employer* or friends, temporary good luck, or the superhuman efforts of the claimant to rise above his crippling handicaps.” *Gunderson*, 701 S.W.2d at 136<sup>1</sup> (quoting Larson’s, *Workers’ Compensation*, Vol II, § 57.51) (Emphasis added). Although the ALJ cited to *Gunderson*, the ALJ failed to find if Lotter’s continued employment with GE was due to any of the specific factors set forth in *Gunderson*. Consequently, we hold that the ALJ’s opinion must be vacated for additional findings of fact concerning Lotter’s return to work at GE. Upon remand, the ALJ

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<sup>1</sup> Although *Gunderson v. City of Ashland*, 701 S.W.2d 135 (Ky. 1985) was decided in 1985, the Supreme Court of Kentucky recently cited to *Gunderson* in the unpublished case of *Summers v. U.S. Liquids*, Appeal No. 2005-SC-0244-WC, 2005 WL 2679994.

shall reconsider the issue of whether Lotter was totally and permanently disabled. In so doing, the ALJ shall specifically determine whether Lotter's continued employment with GE resulted from GE's sympathy (work-place accommodation), from Lotter's superhuman efforts to perform the duties of his job despite his disability, or from neither. *See Gunderson*, 701 S.W.2d 135.

Additionally, we also conclude that the Board properly vacated and remanded for the ALJ to reconsider the issue of vocational rehabilitation. The Board reasoned that “[b]ecause we have vacated the award of PTD [permanent total disability] benefits, leaving open the possibility that Lotter will be awarded permanent partial disability benefits upon remand, the issue of vocational rehabilitation should be revisited.” Board’s Opinion at 19. We view such reasoning as sound.

For the foregoing reasons, the Opinion of the Workers’ Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE, GENERAL  
ELECTRIC COMPANY:

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