

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001874-WC

CORNERSTONE CARE, LLC

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-00-01244

REBECCA DAWSON;
HON. RICHARD M. JOINER,
ADMINISTRATIVE LAW JUDGE; AND
THE WORKERS' COMPENSATION BOARD

APPELLEES

OPINION AFFIRMING

** ** * ** * ** *

BEFORE: NICKELL AND TAYLOR, JUDGES; PAISLEY,¹ SENIOR JUDGE.

TAYLOR, JUDGE: Cornerstone Care, LLC, petitions this Court to review an Opinion of the Workers' Compensation Board (the Board) that vacated and remanded an opinion of the Administrative Law Judge (ALJ) dismissing Rebecca Dawson's claim. We affirm.

¹ Senior Judge Lewis G. Paisley sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

Dawson suffered a work-related injury on July 31, 1999, while employed by Cornerstone Care, LLC (Cornerstone). Dawson filed a claim for workers' compensation benefits, and the claim was eventually settled by agreement of the parties. The settlement was approved by the ALJ on May 4, 2001, and provided permanent partial disability (PPD) benefits based upon a 15% impairment rating attributed to the work-related injury. Dawson's permanent impairment rating was 23% with 8% attributed to an active pre-existing injury.

On December 19, 2003, Dawson filed a "Motion to Reopen For TTD Due to Change in Condition." Therein, Dawson sought to reopen the claim to obtain temporary total disability (TTD) benefits as a result of a recent surgical spine procedure. Cornerstone filed a motion opposing the reopening and specifically argued that Dawson failed to prove entitlement to TTD benefits.

By order entered January 29, 2004, the ALJ granted Dawson's motion to reopen. In that order, the ALJ specifically stated that the motion to reopen was for TTD benefits. Thereupon, the claim was assigned to an ALJ for "further adjudication." Cornerstone then voluntarily paid TTD benefits to Dawson. Consequently, Dawson filed a motion stating that Cornerstone was voluntarily paying TTD benefits and requesting that the claim be held in abeyance. The motion was granted. The record indicates that the claim was held in abeyance until Dawson reached maximum medical improvement and the claim was returned to the active docket.

By opinion and order entered April 7, 2006, the ALJ determined that Dawson's claim was for permanent total disability (PTD) benefits. Additionally, the ALJ particularly framed the issues presented for adjudication by agreement of the parties as:

Has the plaintiff experienced a change to warrant reopening under KRS 342.125?, [sic] Is the claimant Permanently Totally Disabled?, [sic] What is the extent of permanent partial disability?, [sic] Is any exclusion proper because of pre-existing active disability or impairment?, [sic] and Is the disability or impairment proximately caused by the injury?

The ALJ ultimately denied Dawson's "motion to reopen" for PTD benefits and determined that Dawson failed to present a *prima facie* case under Kentucky Revised Statutes (KRS) 342.125(1)(d) to justify reopening for PTD benefits. Specifically, the ALJ concluded that Dawson's claim for PTD benefits could not be reopened because she failed to demonstrate an increase in her impairment rating from the time of the original award:

At the time of the settlement, the parties identified the report of Dr. Patrick at 23% as the basis for the settlement. There is other evidence that has been obtained retrospectively to confirm that Ms. Dawson had a 23% impairment at the time of the settlement. The plaintiff acknowledges that her impairment remains the same. . . . A plaintiff must establish a change in impairment before a claim can be reopened under KRS 342.125(1)(d). . . .

It does appear that there has been a worsening of condition insofar as Ms. Dawson's functional abilities and she may well be totally disabled. However, without a change in the impairment, the claim cannot be reopened. The remaining issues need not be addressed.

Being unsatisfied with the decision, Dawson sought review with the Board.

In a twenty-three page opinion, the Board vacated the ALJ's opinion and remanded the claim for a decision on Dawson's claim for PTD benefits upon the merits. The Board held the ALJ erred by concluding that Dawson could not reopen for failing to prove a change in impairment under KRS 342.125(1)(d). Rather, the Board opined that Cornerstone failed to timely object to Dawson's reopening for PTD benefits; thus, her claim for PTD benefits was "tried by implied consent of the parties." The Board pointed out that KRS 342.125(1)(d) only addressed the necessary *prima facie* showing sufficient to initially reopen a claim; however, once a claim was reopened, KRS 342.125(1)(d) had no relevance to a decision upon the merits. As Dawson's claim for PTD benefits proceeded by "implied consent" to a decision on the merits, the Board concluded that KRS 342.125(1)(d) was inapplicable and the ALJ erred as a matter of law by concluding otherwise:

Had Cornerstone filed a motion to dismiss at the time Dawson's claim was removed from abeyance or otherwise timely objected to the reopened claim proceeding to a decision on the question of permanent total disability, the outcome might be different. However, as we explain hereinabove, it is plain from our review of the proceedings below that the issue of Dawson's entitlement to an increase in permanent income benefits first arose when her claim was removed from abeyance and was, thereafter, tried by implied consent of the parties.

Thus, we agree that the ALJ erred as a matter of law in dismissing Dawson's claim based on the standards applicable to a *prima facie* motion to reopen brought under KRS 342.125(1)(d). The claim was properly reopened under KRS 342.125(3). On remand, the ALJ shall consider the merits of

Dawson's claim on reopening. Specifically, the ALJ shall determine whether Dawson has met her burden to prove that she is now permanently totally disabled pursuant to the versions of KRS 342.730 and KRS 342.0011(11)(c) in effect on the date of her injury, as established by a comparison of Dawson's disability at the time of the original settlement with her disability at the time of reopening.

Upon remand, the Board directed the ALJ to reach the merits of Dawson's claim and to determine whether Dawson was permanently and totally disabled. It is from this opinion that Cornerstone now seeks judicial review.

Cornerstone argues that the Board erroneously vacated the ALJ's opinion denying Dawson's reopening for PTD benefits. We affirm the Board's opinion albeit upon different grounds. *See Vega v. Kosair Charities Comm. Inc.*, 832 S.W.2d 895 (Ky.App. 1992).

In the opinion and order denying Dawson's reopening for PTD benefits, the ALJ interpreted KRS 342.125(1)(d) as requiring the claimant to submit medical evidence of a worsening of her impairment (i.e. an increase in impairment rating) after the date of the original award. The ALJ specifically noted that Dawson's impairment rating was 23% at the time of her original award and that Dawson admitted that the rating had not changed at reopening. While the ALJ acknowledged that the evidence demonstrated a worsening of Dawson's "functional abilities" and that "she may well be totally disabled," the ALJ, nevertheless, concluded that "without a change in the impairment, the claim cannot be reopened." We believe this conclusion and the ALJ's interpretation of KRS 342.125(1)(d) to be in error.

KRS 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.

In *Colwell v. Dresser Instrument Division*, 217 S.W.3d 213 (Ky. 2006), the Supreme Court held that an increased impairment rating was not the sole method for proving a “worsening of impairment” necessary to reopen a claim for PTD benefits under KRS 342.125(1)(d). *See also, Farris v. City of Louisville*, 209 S.W.3d 486 (Ky.App. 2006). Instead, the Colwell Court stated that a “worsening of impairment” under KRS 342.125(1)(d) may also be proved by “objective medical findings”; such findings were defined as “information gained through direct observation and testing of the patient applying objective or standardized methods.” *Colwell*, 217 S.W.3d at 218 (citation omitted). To demonstrate a worsening of impairment for PTD benefits under KRS 342.125(1)(d), the Court specified that the objective medical findings must:

[D]emonstrate that an injured worker suffers a greater loss, loss of use, or derangement of a body part, organ system, or organ function due to a condition caused by the injury, they demonstrate a worsening of impairment. A worsening of impairment may or may not warrant increasing the worker's permanent impairment rating under the *Guides*.

Colwell, 217 S.W.3d at 218. It was also recognized that a claimant may, of course, still prove a worsening of impairment by showing an increased impairment rating when pursuing a reopening for PTD benefits under KRS 342.125(1)(d).

Under the dictates of *Colwell*, we hold that the ALJ erroneously denied Dawson's "motion to reopen" for PTD benefits under KRS 342.125(1)(d) because her impairment rating had not increased since the original award. When seeking to reopen a claim for PTD benefits, a worsening of impairment under KRS 342.125(1)(d) may be proved not only by an increased impairment rating but also by objective medical findings demonstrating "a greater loss, loss of use, or derangement of a body part, organ system, or organ function due to a condition caused by the injury" *Colwell*, 217 S.W.3d at 218. In the opinion and order, the ALJ remarked that Dawson's functional abilities had worsened and that she may be totally disabled. While the record certainly supports reopening Dawson's claim, we believe this cause should be remanded to the ALJ for reconsideration of his decision to deny reopening of Dawson's claim for PTD benefits.

Additionally, we cannot agree with the Board that the ALJ erred by reaching the question of whether Dawson presented a *prima facie* case necessary to reopen the claim for PTD benefits under KRS 342.125(1)(d). The Board believed that Cornerstone's failure to object to reopening for PTD benefits before the ALJ rendered a decision upon the merits of the claim amounted to waiver. However, the ALJ specifically stated that the question of reopening for PTD benefits under KRS 342.125(1)(d) was being tried by agreement of the parties. Moreover, we are unconvinced that a decision to

reopen under KRS 342.125(1)(d) may not be later revisited upon the merits of the claim as such decision is innately interlocutory. Nevertheless, considering the unique facts of this case, we conclude that the ALJ properly considered the question of whether Dawson presented a *prima facie* case to justify reopening under KRS 342.125(1)(d).

In sum, the ALJ's opinion and order is vacated and this cause remanded to the ALJ to reconsider reopening Dawson's claim for PTD benefits under KRS 342.125(1)(d) and if reopened, to render a decision upon the merits. In so doing, the ALJ shall be guided by the recent Supreme Court decision in *Colwell v. Dresser Instrument Division*, 217 S.W.3d 213 (Ky. 2006). Thus, the opinion of the Board is affirmed upon different grounds.

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:

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