

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000303-WC

PENNY FRAIM CATT

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-95-26325

THE MEDICAL CENTER AT BOWLING GREEN;
SPECIAL FUND; HON. DONALD SMITH,
ACTING ARBITRATOR; HON. J. LANDON
OVERFIELD, ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, JOHNSON AND KNOPF, JUDGES.

JOHNSON, JUDGE: Penny Fraim Catt has petitioned for review of the opinion of the Workers' Compensation Board rendered on January 14, 2000, which affirmed the decision of the Administrative Law Judge dismissing her claim for an increased award of disability benefits upon reopening. Having reviewed the record and the applicable law, we are unable to conclude that the Board has

committed an error in construing the law or in assessing the evidence.¹ Thus, we affirm.

Catt sustained an injury to her back on June 27, 1995, while working as a technician in a surgery unit for the appellee, The Medical Center at Bowling Green.² The injury was the result of Catt's standing for more than an hour in a bent position while wearing a protective lead apron during an open heart surgical procedure. Catt sought medical treatment the next day and was unable to return to work.

An MRI of Catt's spine revealed that the 24-year-old woman had degenerative disks at L3/4, L4/5 and L5/S1. Dr. William Schwank, Catt's treating neurosurgeon, recommended a course of epidural blocks to treat the symptoms Catt experienced. On September 26, 1995, with several other restrictions, Dr. Schwank released Catt to return to part-time work. Catt worked one four-hour shift and could not tolerate the work. However, in November, she began working four hours a day and after two weeks, she began working six-hour shifts. She was again unable to work in January 1996, but returned to working four-hour shifts the first of February 1996.

¹See Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687-688 (1992) ("The function of further review of the WCB in the Court of Appeals 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.").

²The job entailed working in the operating room and passing instruments to the surgeon. It required long hours of standing in the same position, as well as doing a lot of twisting and turning movements.

In November 1995, Catt filed an application for workers' compensation benefits. In his deposition, taken on January 26, 1996, Dr. Schwank testified that Catt's degenerative disk disease was aroused into disabling reality by the June 1995 work-related incident. He also stated that Catt had a permanent physical impairment under the AMA guidelines of 5% to the whole body. Dr. Robert Weiss, a neurosurgeon who examined Catt on behalf of her employer, testified that he found no evidence of a permanent injury or impairment. Dr. Weiss attributed Catt's pain to a musculoligamentous sprain or strain, a condition he opined should relent with exercise and over-the-counter anti-inflammatory drugs.

Faced with conflicting evidence on the issue of whether she had a compensable, permanent impairment, Catt settled her claim in April 1996, based on an 8% occupational disability apportioned between the Special Fund and The Medical Center. Under the terms of the settlement, the Special Fund made a \$2,800 lump sum payment, and The Medical Center agreed to pay \$20.37 per week for 212.5 weeks.³

Although Catt was working part-time at the time she settled her claim, she stopped working altogether in December 1997, due to alleged "excruciating pain." In April 1998, two years after the settlement, Catt moved to reopen her claim. She claimed that she was totally disabled "as a result of the change in her medical condition and the resulting treatment of Dr.

³The total value of the award was \$7,128.63 of which \$1,425.73 was paid to Catt's attorney.

[David] Rouben, [and that] she [was] unable to perform any type of work." The motion to reopen was sustained and the matter was assigned to an arbitrator who found that Catt's condition had changed and that she was now totally disabled.

The Medical Center requested a de novo hearing before an ALJ. In her brief before the ALJ, Catt argued that there had been a "change and/or a worsening" in her condition which had "resulted in [her] inability to perform any work of any nature" [emphases original]. The Medical Center argued that the evidence submitted on reopening failed "to establish an increase in [Catt's] occupational disability" and further suggested that the evidence failed to show that her medical condition had changed since the initial settlement. After summarizing all the evidence presented on reopening, the ALJ found and concluded that Catt had failed to prove that she had either a worsened medical condition, or an increased occupational disability, since the April 1996 settlement:

[Catt] is a very credible and convincing witness. However, in a reopening such as this, [Catt] must prove that she has had a change in her medical condition and, to sustain that burden, she must produce medical evidence to support such a showing. The medical evidence presented through [Catt's] medical experts fails to convince me that there has been a change in her medical condition relating to her original injury of June 1995. Neither Dr. [Rolando] Puno, Dr. Rouben nor Dr. [David] Gaw gave evidence indicating that there had been any change in [Catt's] original medical condition relating to the original injury. Dr. Rouben did indicate that there was some "progression" in some of the findings on the imaging studies but this was apparently very minimal and the nature of the progression was not described. Dr. Puno indicated that [Catt's] imaging

studies were basically unchanged. Thus, there is no evidence to support a finding that there has been a change in [Catt's] medical condition.

[Catt] has further failed to prove to the satisfaction of the trier of fact that there has been an increase in her occupational disability. Although [Catt] stated that her pain is more severe now than it was when she settled her claim, the medical evidence indicates that she was under rather severe restrictions in April of 1996 when she settled her claim. The restrictions placed on her at that time were from her treating neurosurgeon, Dr. Schwank. Dr. Schwank noted that [Catt] should be restricted from "lifting, bending, stooping, sitting and crouching. . . restricted to 30 pounds lifting and avoiding lifting and bending and stooping." [Citation to record omitted]. When she settled her claim she was obviously not able to return to her regular duties. She was able only to work within these restrictions working four hours per day. Although Drs. Rouben and Gaw believe [Catt] is unable to work at this time, they gave no definitive restrictions and gave no opinion that her functional abilities are less upon reopening than they were at the time of her settlement in 1996.

Catt appealed the ALJ's dismissal of her claim to the Board. After its review, the Board rendered its opinion in which it recited the relevant evidence and the applicable statute controlling on reopening, KRS⁴ 342.125, and affirmed the ALJ's decision:

In reviewing the reopening statute as it became effective on April 4, 1994, an individual who has not returned to work must show both a change in "medical condition" and a change in occupational disability. While we and the ALJ are sympathetic to [Catt's] situation at the present time, a thorough analysis of the evidence as performed by the ALJ does not establish a change in medical

⁴Kentucky Revised Statutes.

condition. None of the physicians offering evidence subsequent to the reopening assessed a percentage of impairment that would be higher than the 5% assessed by Dr. Schwank in the original claim. The restrictions offered were virtually identical. Although an effort could be made to infer from the testimony of Drs. Puno, Ruben [sic] and Gaw that there was a worsening of her physiological condition, even such an inference would be difficult since their testimony was primarily directed at the appropriateness of treatment and an increase in symptomatology without specific alteration in physiological condition. The ALJ, in our opinion, applied the standard necessary under the law as it existed at the time of [Catt's] injury and which therefore would be applicable to her reopening.

Catt has now sought further review in this Court. In her brief, she frames the issue as whether she "suffered a change in medical condition which resulted in her total occupational disability and whether an award for total occupational disability" should have been made by the ALJ. Catt does not refer to any specific error committed by the Board in its review of the ALJ's dismissal of her claim, but simply asks that we remand "for findings consistent with KRS 342.125 and KRS 342.730 et seq."

As The Medical Center points out, since Catt had the burden of proof upon reopening, the issue is not whether the record would support a different decision, but rather whether the evidence compelled a determination in her favor.⁵ In other words, the evidence must be "so overwhelming that no reasonable

⁵Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418, 419 (1985).

person" could reach the same conclusion as the ALJ.⁶ It is clear from the thorough review of the evidence set forth in the Board's opinion that the ALJ was not confronted with evidence that compelled a finding that either Catt's medical condition, or her ability to labor, had changed in any significant manner since the settlement of her claim.

It is apparent that the ALJ and the Board believed that at the time Catt settled her claim with her employer and the Special Fund, her occupational disability was greater than the level reflected in the settlement. Indeed, the evidence, particularly the testimony of Catt herself and her treating physician Dr. Schwank, supports the ALJ's finding that Catt had significant restrictions and symptoms at that time. However, as our Supreme Court recently reiterated, the fact that Catt may have settled for less than she may have been awarded is not relevant on a motion to reopen:

The figure for occupational disability which is contained in a settlement agreement represents a compromise and might or might not equal the worker's actual occupational disability at the time; therefore, additional benefits are authorized at the reopening of the settled claim only to the extent of an actual increase in the worker's occupational disability.⁷

Having failed to persuade the finder of fact that her medical condition or occupational disability had worsened since the 1996 settlement to such a degree to justify an increase in her

⁶REO Mechanical v. Barnes, Ky.App., 691 S.W.2d 224, 226 (1985).

⁷Whittaker v. Rowland, Ky., 998 S.W.2d 479, 482 (1999).

benefits under the standard required by KRS 342.125, and having further failed to convince this Court that the findings of the ALJ are not supported by substantial evidence, we hold that the Board did not commit an error in assessing the evidence or misconstrue the law and, accordingly, its decision must be affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE, SPECIAL
FUND:

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BRIEF FOR APPELLEE, THE
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