

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-000767-WC

CHARLIE LAMPLEY

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-95-05501

MARION COUNTY BOARD OF EDUCATION;
SPECIAL FUND; HONORABLE LLOYD R.
EDENS, ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
REVERSING AND REMANDING

** ** * * *

BEFORE: EMBERTON, CHIEF JUDGE; DYCHE AND HUDDLESTON, JUDGES.

DYCHE, JUDGE: Charlie Lampley brings this petition for review from an opinion of the Workers' Compensation Board (the Board) affirming an opinion and order of an administrative law judge (ALJ) dismissing his motion for reopening against the Marion County Board of Education (Marion County) and the Special Fund. We reverse and remand.

On January 5, 1995, while employed as an Assistant Principal with the Marion County Board of Education, Lampley was assaulted by a student, causing injury to his jaw, head, and

right hip. He sustained a femoral neck fracture which required the implantation of an anatomic fixture device into his hip. Surgery was performed on his right hip the day after the injury.

Lampley subsequently filed an Application for Adjustment of Injury Claim with the Department of Workers' Claims on June 6, 1996. His case was assigned to an ALJ for final adjudication. In addition to Lampley's testimony, evidence submitted for the ALJ's consideration in the original proceeding consisted of medical reports or depositions from Dr. Lawrence Schaper, Dr. Daniel A. Duran, and Dr. Phillip F. Corbett. The doctors assessed whole body impairments ranging from 8% to 12%. They also placed lifting, standing, and walking restrictions on Lampley.

By opinion and award rendered December 20, 1996, the ALJ determined Lampley to be suffering from a 50% permanent partial occupational disability. All liability was found to be the responsibility of Marion County, and the Special Fund was dismissed as a defendant.

Following the original award, Lampley developed avascular necrosis involving the entire femoral head of his hip socket. As a result, he underwent a total hip replacement in 1999 and a hip replacement revision in 2000. He filed a motion to reopen his original award on November 22, 1999.

On reopening, Lampley and Dr. Corbett testified by deposition and at hearing. Also submitted for the ALJ's consideration was updated medical information from Dr. Schaper and a Dr. Roth.

Lampley testified that he had not returned to work since the original injury and had been on total disability retirement since June, 1995. He also testified that he continued to suffer constant pain in his hip, made worse by sitting or walking for extended periods. He testified that if he sits for periods greater than 15 to 20 minutes his symptoms increase. His right leg is now shorter than his left leg, and he wears a special shoe to compensate. He testified that he generally spends his days trying to walk, watching television, and doing genealogy work.

Dr. Corbett testified that, since the initial award, Lampley had undergone a total hip replacement performed by Dr. Schaper and a revision procedure. He assigned Lampley a 30% whole body impairment. He testified that all of Lampley's current impairment is the result of the work-related assault. He also testified that his assessment in 1996 that Lampley could lift 40 to 50 pounds was in error and that he should not lift any weights in excess of 15 pounds. Dr. Corbett also testified that Lampley has now been diagnosed with heterotopic ossification, which is development of bone in the gluteus muscle as a result of the surgeries. Dr. Corbett identified this as the primary cause of Lampley's discomfort in sitting.

Dr. Schaper's report stated that he believed Lampley's condition had worsened and that Lampley had an increased AMA impairment rating but that at the time of the report Lampley's condition had not stabilized and so Schaper could not give an

exact rating. Dr. Roth assessed Lampley as suffering from a 33% whole person impairment.

Both parties filed post-hearing briefs. Based on the testimony, reports, and post-hearing briefs, the ALJ issued an opinion and order dismissing Lampley's claim. Lampley subsequently filed a petition for reconsideration, incorporating his post-hearing brief. The ALJ denied relief, stating that Lampley was seeking to reargue the merits of his claim.

Lampley subsequently appealed to the Board, arguing that the ALJ failed to apply the proper standard of review, that the ALJ based his opinion on a misstatement and misunderstanding of the medical testimony, that the ALJ improperly relied upon Lampley's testimony from the original proceeding, and that the evidence mandated an award of increased benefits. The Board affirmed the decision of the ALJ, finding no merit in Lampley's arguments.

Lampley assigns these same errors in his appeal to this court. Marion County replies that the errors have been waived. It also replies that Lampley is precluded as a matter of law and fact from a reopening. Finding that the ALJ relied on a misstatement of Dr. Schaper's testimony, we reverse.

Marion County cites Halls Hardwood Floor Co. v. Stapleton, Ky. App., 16 S.W.3d 327 (2000), to support its position that Lampley waived the claim that the ALJ misstated Dr. Schaper's testimony. We believe that the Board of Education has read Halls too narrowly. In Halls, the Court was faced with determining whether, by amending KRS 342.281 in 1996, the

legislature intended to revive the holding in Eaton Axle Corporation v. Nally, Ky., 688 S.W.2d 334 (1985), that required a party to file a petition for reconsideration with the finder of fact before seeking appellate relief. This Court held that, in amending KRS 342.281, the General Assembly made a conscious decision to return to the requirement. However, Halls is distinguishable from the instant case. In Halls the petition for reconsideration failed to raise the fact that the ALJ had improperly calculated the benefit. This court affirmed the Board determination that, as a result of that failure, the issue was not properly preserved. In the instant case, Lampley argued the issue of Dr. Schaper's testimony to the Board. Although Marion County argued that the issue had been waived, the Board did not address the issue of waiver and did not dismiss Lampley's claim on this basis. A proper interpretation of both Halls and Eaton is that they require parties to exhaust their administrative remedies as the price of "a ticket to the judicial process." Eaton, supra. Since Lampley raised the issue to the Board and the Board addressed the merits of Lampley's argument, it cannot be said that Lampley failed to exhaust his administrative remedies.

Further, we believe the facts in the instant case are distinguishable and perhaps explain why the Board did not dismiss Lampley's arguments as waived. Lampley filed a petition for reconsideration asking the ALJ to incorporate his post-hearing brief. In that brief, Lampley addressed the content of Dr. Schaper's testimony, arguing that it mandated reopening. On

appeal to the Board, Lampley stated more specifically that the ALJ had misstated and misunderstood Dr. Schaper's testimony. On review, the Board addressed Dr. Schaper's testimony, again quoting the misstatement attributed to him. Since this issue was addressed in Lampley's post-hearing brief, incorporated into his petition for reconsideration, and then considered by the Board, we find that it is appropriately preserved for appellate review.

The next two issues that Marion County argues have been waived are: 1) that the ALJ failed to apply the proper standard for reopening in that the 1996 amendment applies, rather than the 1987 amendment; and 2) that the ALJ improperly relied upon Lampley's testimony from his original claim that he was totally disabled after the finding of partial disability in the original claim was res judicata. In arguing that KRS 342.281 and Halls bar Lampley from raising these issues on appeal, Marion County fails to take into consideration KRS 342.285, which governs appeals to the Board, and KRS 342.290, which governs appeals of Board decisions to this Court.

KRS 342.285 (1) states that,

An award or order of the administrative law judge as provided in KRS 342.275, if petition for reconsideration is not filed as provided for in KRS 342.281, shall be conclusive and binding as to all questions of fact, but either party may in accordance with administrative regulations promulgated by the commissioner appeal to the Workers' Compensation Board for the review of the order or award.

This provision clearly allows for appeal to the Board on issues not raised in a petition for reconsideration, or even when no petition is filed at all. It only mandates that if a

party fails to raise an issue regarding a finding of fact in a petition for reconsideration, that finding of fact is binding on review. We review workers' compensation claims in accordance with the standard set forth in Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687-688 (1992). We are allowed to correct the Board only where we perceive 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." Id. Since these issues are questions of law and not questions of fact, they are properly before the Court.

Having determined that Lampley has not waived these issues on appeal, we now address the substance of his claims. In the findings of fact and conclusions of law dismissing Lampley's claim, the ALJ stated that he was relying partly upon the restrictions placed upon Lampley by Dr. Schaper in the original claim. The testimony relied upon and cited by the ALJ included a purported statement by Dr. Schaper in the original claim that Lampley "could not return to an administrative position working six to eight hours per week." Lampley argued to the Board that this testimony simply did not exist. The Board stated "we find nothing in the record to indicate the ALJ misinterpreted or misunderstood the evidence before him." However, a review of Dr. Schaper's testimony from the original claim shows no such statement. In Cook v. Paducah Recapping Service, Ky., 694 S.W.2d 684 (1985), the Kentucky Supreme Court was compelled to remand for additional findings of fact sufficient to afford appellate review when the Board stated that its finding was based upon a

statement attributed to a doctor that was entirely false. The Court stated that "an ultimate finding based upon underlying basic findings, some of which were totally false, must be reversed and remanded for a proper determination in light of correct basic findings." Id. at 688. Dr. Schaper did place a number of restrictions on Lampley in the original claim; however, nowhere in his assessment is the statement attributed to him by the ALJ and accepted by the Board on review. In light of this error, we must remand.

Lampley next argues that the ALJ applied the wrong standard of review by applying the 1987 amendment as opposed to the 1996 amendment to KRS 342.125. At the time of Lampley's injury KRS 342.125 required a showing of "change of occupational disability" for reopening. On December 12, 1996, after Lampley's injury but before the award, the legislature amended KRS 342.125 providing for a reopening upon a showing of "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." KRS 324.125 (1996). Lampley argues he is entitled to have the 1996 version of KRS 342.125 apply since the basis of a reopening is the worsening of the condition. Marion County argues that the standard of review on reopening is the same, no matter which amendment is applied, since the 1996 standard states: "The law in effect on the date of the original injury controls the rights of the parties." KRS 342.125(6).

The opinion of the Kentucky Supreme Court in McCool v. Martin Nursery and Landscaping, Ky., 43 S.W.3d 256 (2001), is dispositive. McCool had argued that the 1996 amendment for reopening did not apply in his case since his injury occurred prior to its enactment. The Court held that, since the original award was entered after December 12, 1996, and reopening is a remedy for an increase in disability that occurs after an award is entered, the proper standard for reopening is the law in effect at such time as the increase in disability occurs. Id. Lampley is correct, therefore, in his assertion that the 1996 amendment should be applied, since the alleged worsening of his injury occurred after December 12, 1996.¹ We do not determine whether applying the 1996 standard for reopening requires a finding in Lampley's favor but only that this is the proper standard for reopening.

Finally, we address the claim that the ALJ improperly relied on Lampley's testimony in the original claim as to total disability. We agree with Lampley that the finding of 50% permanent partial occupational disability is res judicata. In the findings of fact and conclusions of law the ALJ does state that Lampley claimed he was totally disabled in the original claim and upon reopening. Lampley argues that in essence the ALJ ruled that, because Lampley argued for total disability in his original claim, he cannot be heard to argue now that this

¹In all fairness to the ALJ and the Board, this case had not been decided at the time of Lampley's motion; however, since we remand we believe it is important to clarify which standard is to be applied.

condition has worsened. If this were the ruling of the ALJ, we would agree with Lampley. The issue to be determined upon reopening is "change of disability." KRS 342.125(1)(d). While it is appropriate for the ALJ to compare Lampley's description of his physical condition in the original claim and at the reopening hearing, Lampley is not precluded from arguing total disability in a motion for reopening. However, we do not believe from the opinion and order that this was the ruling of the ALJ. The ALJ stated in his opinion that he was relying upon Lampley's description of his condition. Therefore, we find no error.

In reply, Marion County argues that because of appellant's age and employment status that he is precluded as a matter of fact and law from a reopening award. We find no authority, and Marion County offers none, to support its proposition that age and disability retirement status precludes a reopening of a worker's compensation claim.

We reverse and remand with direction that this case be remanded to the ALJ for further findings of fact. Upon remand, the ALJ shall apply the standard for reopening stated in the 1996 amendment to KRS 342.125.

ALL CONCUR.

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