

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-000557-WC

DEBORAH SUE FISHER

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-91-33551

HIGHLAND CROSSING; SPECIAL FUND;
HON. DONALD G. SMITH, ADMINISTRATIVE
LAW JUDGE; AND KENTUCKY WORKERS'
COMPENSATION BOARD

APPELLEES

AND

NO. 2002-CA-000690-WC

HIGHLAND CROSSING

CROSS-APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-91-33551

DEBORAH SUE FISHER; SPECIAL FUND;
HON. DONALD G. SMITH, ADMINISTRATIVE
LAW JUDGE; AND KENTUCKY WORKERS'
COMPENSATION BOARD

CROSS-APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: GUDGEL, JOHNSON, AND McANULTY, JUDGES.

McANULTY, JUDGE: Appellant Deborah Sue Fisher petitions for review of a decision of the Workers' Compensation Board (Board) which denied her request to reopen her workers' compensation claim. Appellee Highlands Crossing also cross-appeals that portion of the decision which allowed Fisher to present her claim on reopening for the second time. We affirm both decisions.

Fisher was a dining room supervisor employed by Appellee Highland Crossing, an assisted living facility. In 1991, Fisher was injured while loading silverware into a dishwasher, sustaining a broken navicular bone in her wrist. While she was in a cast for the healing wrist, Fisher developed De Quervains tendonitis and a torn rotator cuff, both of which required surgery.

In 1995, an opinion and award was entered in Fisher's behalf for the workers' compensation claim she filed on the 1991 injury. The Administrative Law Judge (ALJ) on that case determined that Fisher was 30% occupationally disabled, and recognized that she suffered also from thoracic outlet syndrome and reflexive sympathetic dystrophy. The ALJ also directed Appellees to pay Fisher's medical expenses.

Fisher reopened her claim in 1997, based on several allegedly unsuccessful surgeries that had been performed on her wrist and arm a year earlier. The parties met with an arbitrator and came to a settlement before a hearing was held on the reopening. The settlement, which read that it was made "[i]n

full and final satisfaction of payment of any future income benefits," extended the original benefits awarded to Fisher in 1995 and added a \$15,000.00 lump sum payment to Fisher from Highland Crossing.

Fisher moved to reopen her claim a second time in 1999, claiming she was entitled to increased benefits because her injuries had worsened and she was totally occupationally disabled. Her motion was opposed by Highland Crossing, which argued that the 1998 lump sum settlement was final and precluded Fisher from receiving any additional benefits. An arbitrator assigned to review the motion to reopen denied it, based on the opinion that Fisher had already been determined to be totally occupationally disabled in the previous proceedings and that the settlement terms represented the final resolution of her claims. Fisher filed a request for a hearing with an ALJ, who disagreed that the terms of the settlement precluded her from seeking additional benefits. Thus, Fisher was allowed to present her claim to be resolved on its merits.

The only evidence presented at the second reopening consisted of Fisher's own testimony and medical records, and a deposition of Fisher taken by Highland Crossing. The ALJ, however, found Fisher's evidence to be unpersuasive and held that she had experienced no increase in occupational disability since the 1998 settlement. The Board agreed, and Fisher petitioned for review of the Board's opinion. Additionally, Highland Crossing now cross-appeals that portion of the Board's opinion affirming

the ALJ's decision that Fisher's claim was not precluded by the 1998 settlement. We affirm on both counts.

First, we must note that we will only reverse the Board's decision when "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." Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687-88 (1992).

Fisher now alleges that the Board erred when it found that the ALJ's decision was proper, because there was no evidence to support his decision. She argues that in order to determine whether her occupational disability had increased, a baseline measure would have to exist from the 1998 reopening with which her current disability could be compared. However, she claims the 1998 settlement produced no evidence, and no measure against which her current disability could be examined, therefore the ALJ's decision cannot be supported by the evidence. We disagree.

It is clear that when a party seeks to reopen an award or order pursuant to KRS 342.125, the burden of proof falls upon the movant party. Griffith v. Blair, Ky., 430 S.W.2d 337 (1968), W.E. Caldwell Co. v. Borders, 301 Ky. 843, 193 S.W.2d 453 (1946). Where the party with the burden of proof is unsuccessful before the ALJ, the issue on appeal is whether the evidence compels a different result. Wolf Creek Collieries v. Crum, Ky. App., 673 S.W.2d 735 (1984). Compelling evidence is that evidence which is so overwhelming that no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, Ky. App., 691

S.W.2d 224 (1985). As long as any evidence of substance supports the ALJ's opinion, it cannot be said that the evidence compels a different result. Special Fund v. Francis, Ky., 708 S.W.2d 641 (1986). Further, the controlling factor on reopening pursuant to KRS 342.125 is whether the moving party presented credible proof that his or her occupational disability increased. Peabody Coal Co. v. Gossett, Ky. 819 S.W.2d 33 (1991).

In the case sub judice, it was incumbent upon the Appellant to prove that her occupational disability had increased. However, as the Board pointed out, the ALJ found Fisher's testimony and evidence unconvincing. Further, the Board found that the ALJ supported his decision with sufficient findings of fact, and we do not believe this was "an error in assessing the evidence so flagrant as to cause gross injustice." Western Baptist Hospital, supra.

In truth, this case turns on the difference between occupational disability and functional impairment. The evidence introduced on the second reopening could be construed to show that Fisher's functional impairment has increased since 1998, but we agree that she was already totally occupationally disabled at the time of her last reopening. Fisher herself indicates during her deposition that she had not worked since two years prior to the 1998 settlement, and that she believed she was physically unable to work since that time. And according to her testimony, the treatment Fisher received for her injuries from the time of the 1998 settlement to the second reopening was conservative at best, seemingly aimed at controlling her pain, not curing it.

Those treatments did not include any further surgeries, but did include therapy and an attempt to lessen Fisher's pain through acupuncture. Finally, the ALJ noted that Fisher's medical reports indicated that her pain had never truly been under control, an opinion that we feel is borne out by her testimony. Therefore, we cannot find that the ALJ or the Board erred in assessing this evidence.

We also agree with the Board's decision in regards to Highland Crossing's cross-appeal. We do not believe Fisher's right to reopen her claim was cut off by the 1998 settlement, because there was no explicit waiver on the face of the document. As the Board pointed out, in Huff Contracting v. Sark, Ky. App., 12 S.W.3d 704 (2000), this court turned down a similar argument dealing with a waiver of future medical benefits because no corresponding terms were explicitly set out in the settlement document. In that case, we wrote, "[t]he waiver of any right under the Kentucky Workers' Compensation Act in a settlement document must meet this standard." Huff, supra, at 706. We agree that there are no terms on the face of the settlement in this case that meet that standard.

Based on the foregoing, we affirm the decision of the Workers' Compensation Board.

ALL CONCUR.

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