

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-000752-WC

ALICE M. MIDDLETON

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-98-00793

HARLAN COUNTY BOARD OF EDUCATION,
SPECIAL FUND, WORKERS' COMPENSATION
BOARD AND J. LONDON OVERFIELD, ADMINISTRATIVE
LAW JUDGE

APPELLEES

AND: NO. 2002-CA-00838-WC

HARLAN COUNTY BOARD OF EDUCATION

CROSS-APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-98-00793

ALICE M. MIDDLETON

CROSS-APPELLEE

OPINION
AFFIRMING
** ** * * * * *

BEFORE: BARBER, BUCKINGHAM, AND MILLER, JUDGES.

BUCKINGHAM, JUDGE: Alice M. Middleton petitions for our review of an opinion by the Workers' Compensation Board which affirmed an opinion and order by an administrative law judge (ALJ) denying Middleton's claim on reopening. We affirm.

Middleton was employed by the Harlan County Board of Education as a cook. She was required to serve food, clean, and perform duties as a dishwasher. She also operated a slicer that was located on a cart. In performing these duties, she was required to press her knees against the cart on a regular and sustained basis and was required to stand on her feet for prolonged periods of time.

In early 1996, Middleton began to experience pain and discomfort in her left knee. She was forced to seek medical attention and later filed a claim with the Department of Workers' Claims. She entered into a settlement agreement with the school board that was approved by an arbitrator on September 10, 1998. As a result of the settlement, Middleton received a lump sum payment of \$10,385, representing a 20% permanent partial disability.

In June 1999, Middleton underwent a left knee replacement surgery. On December 8, 2000, she filed a motion to reopen due to change of condition. In an opinion and order rendered on November 13, 2001, the ALJ dismissed Middleton's claim on reopening for failure to sustain her burden of proving an increase in occupational disability since the date of her

settlement. See KRS¹ 342.125(1)(d). Middleton appealed to the Board, and it entered an opinion on March 13, 2002, affirming the ALJ. The Board stated in its opinion that:

On review, we find Middleton's appeal is simply a reargument of her case on reopening before ALJ Overfield. Middleton impermissibly requests this Board to substitute its judgment as to the weight and credibility of the evidence for that of the finder of fact. As we admonish so frequently, this is not the Board's function.

This petition for review by Middleton followed.

In her petition for review, Middleton states that the Board affirmed the ALJ "indicating that probably the Appellant was totally disabled from gainful employment before her knee replacement surgery as well as afterwards." On page eleven of the Board's opinion, it stated, "Dr. Dubin opined that Middleton was probably totally disabled from performing any gainful employment before and that her knee surgery has not changed that fact. We believe that evidence, in of itself, is sufficient to justify the ultimate conclusion reached by ALJ Overfield."

Apparently asserting that a mistake was made when she reached her initial settlement with the school board in 1998, Middleton urges us to correct the "mistake" and determine that she should be awarded additional benefits based on a total disability. She makes her argument in one sentence: "The law and the Workers' Compensation Act should be administered so as to encourage settlement, however, where a mistake is made, if it is not corrected it will not encourage settlement but will have the

¹ Kentucky Revised Statutes.

opposite effect." Middleton makes no further argument, and, specifically, she does not argue that the ALJ and the Board erred in their determinations that she failed to sustain her burden of proving an increase in occupational disability since the date of her original settlement.

In its cross-petition for review, the school board states that it filed a motion with the Board to dismiss Middleton's appeal because she had failed to file a petition for reconsideration following the ALJ's decision as was required by Halls Hardwood Floor Co. v. Stapleton, Ky. App., 16 S.W.3d 327 (2000). The school board states that the Board passed its motion to dismiss until the merits of this appeal have been considered. Thus, the school board argues that if this court is persuaded by the merits of Middleton's petition, then the appeal should nevertheless be dismissed because Middleton failed to file a petition for reconsideration with the ALJ.

Our function in reviewing the Board's decision "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." Western Baptist Hosp. v. Kelly, Ky., 827 S.W.2d 685, 687-88 (1992). Middleton cites no legal authority to support her argument, and we are not aware of any. To accept her argument would be contrary to established law concerning reopenings. See Commercial Drywall v. Wells, Ky. App., 860 S.W.2d 299 (1993), which is directly on point.

The Board's opinion is affirmed.²

ALL CONCUR.

BRIEF FOR APPELLANT/CROSS
APPELLEE, ALICE M. MIDDLETON:

John Crockett Carter
Harlan, Kentucky

BRIEFS FOR APPELLEE/CROSS
APPELLANT, HARLAN COUNTY BOARD
OF EDUCATION:

Douglas W. Gott
Bowling Green, Kentucky

BRIEF FOR APPELLEE, WORKERS'
COMPENSATION BOARD:

David W. Barr
Frankfort, Kentucky

² The school board's cross-petition for review is moot.