

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000216-WC

TIMMY S. PARRIS

APPELLANT

vs. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-98-59462

STAFFING ALTERNATIVE, INC.,
HON. KEVIN KING, ALJ, and
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: BUCKINGHAM, DYCHE, and JOHNSON, JUDGES.

BUCKINGHAM, JUDGE: Timmy S. Parris petitions for review of an opinion by the Workers' Compensation Board affirming an order by an administrative law judge (ALJ) dismissing Parris's claim for increased income benefits on reopening. The issue concerns an interpretation of KRS¹ 342.125(1)(d) and what an injured worker must prove to prevail on a reopening claim under that portion of the statute. We affirm the ALJ and the Board.

¹ Kentucky Revised Statutes.

Parris was employed by Staffing Alternative, Inc., as an underground coal miner. On October 20, 1998, he sustained internal injuries and multiple injuries to his right side, back, and beneath his arm, extending down the length of his body. He signed a settlement agreement on September 27, 1999, that provided for a lump sum payment of \$17,924.01, representing a ten percent permanent partial disability. The agreement was approved on November 16, 1999.

On December 3, 2001, Parris filed a motion to reopen pursuant to KRS 342.125(1)(d). His claim was assigned to an ALJ, and, on July 19, 2002, the ALJ entered an order denying and dismissing Parris's claim. The ALJ subsequently entered an order denying Parris's petition for reconsideration. On January 8, 2003, the Board rendered an opinion affirming the ALJ's decision. This petition for review by Parris followed.

KRS 342.125 provides in relevant part as follows:

- (1) Upon motion by any party or upon an arbitrator's or administrative law judge's own motion, an arbitrator or 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.

KRS 342.125(1)(d). This wording of the subsection of the statute became effective December 12, 1996.²

Parris never returned to work after his 1998 injury. In support of his motion to reopen, Parris introduced medical evidence from Dr. Roderick MacGregor, Dr. Clinton Mallari, and Dr. Tudor Popescu. He also introduced a report from Dr. Tom Wagner, a psychologist and vocational expert. This evidence generally noted Parris's physical limitations impacting his occupational opportunities. Further, Parris himself testified.

In dismissing Parris's claim for increased income benefits on reopening, the ALJ held as follows:

KRS 342.125(1)(d) provides that a claim can be reopened upon a showing of a "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." This portion of the ACT requires the moving party to show, with objective medical evidence, a change of disability and an increase in impairment. The medical evidence indicates that Parris had a 10% impairment at or near the time he settled his claim. There is no evidence that his impairment has changed. Furthermore, the medical evidence since Parris's settlement reveals a change in symptoms but does not show any objective change in his condition. Based on the above, the Administrative Law Judge must dismiss Parris's claim for additional income benefits.

² Prior to the 1996 amendment, the statute required only a showing of "a change in occupational disability."

On appeal to the Board, Parris argued that the ALJ erroneously interpreted KRS 342.125(1)(d) as requiring a showing of an increase in functional impairment in order to establish entitlement to additional income benefits on reopening. Parris also argued that the ALJ ignored uncontradicted evidence, including an admission by Staffing Alternative that Parris was unable to work. He asserted that the record compelled a finding that he was permanently and totally disabled and thus entitled to an increase in benefits.

The Board disagreed with Parris's arguments. First, it agreed with the ALJ's interpretation of the statute. The Board held that "Parris's failure to submit proof of an increase in his functional impairment rating subsequent to the original settlement required the ALJ, as a matter of law, to dismiss his claim for additional income benefits on reopening." Regarding Parris's argument that the evidence compelled a finding of total disability, the Board stated that there was evidence to support a finding that Parris was permanently and totally disabled at that time. Further, the Board noted that there was also evidence that Parris was permanently and totally disabled at the time he settled his claim. However, the Board stated that the evidence did not compel a finding that Parris was permanently and totally disabled either before or after his initial claim was settled and that the ALJ did not err in determining that

Parris had not met his burden of proof. Thus, the Board affirmed the ALJ.

Parris's arguments in his petition for review to this court are similar to the arguments he made to the Board. First, Parris argues that the ALJ and the Board erroneously interpreted KRS 342.125(1)(d). The Board held that "the above-quoted language of KRS 342.125(1)(d), as amended December 12, 1996, requires a claimant to demonstrate, by objective medical evidence, a change in his degree of functional impairment before an increased award may be issued on reopening." Parris argues that this is an erroneous interpretation of the statute and that he was only required to prove that the change in his physical condition has resulted in an increase in occupational disability, not an increase in his impairment rating.

Parris cites several cases in support of his argument, including Robinson v. Bailey Mining Co., Ky., 996 S.W.2d 38 (1999); McCool v. Martin Nursery & Landscaping, Inc., Ky., 43 S.W.3d 256 (2001); Whittaker v. Ivy, Ky., 68 S.W.3d 386 (2002); Newberg v. Davis, Ky., 841 S.W.2d 164 (1992); Whittaker v. Rowland, Ky., 998 S.W.2d 479 (1999); and Ira A. Watson Dep't Store v. Hamilton, Ky., 34 S.W.3d 48 (2000). The Robinson, McCool, Ivy, Newberg, and Rowland cases are not applicable because the injury in each of the cases occurred prior to the 1996 amendment of the statute. Therefore, the version of the

statute in effect prior to the 1996 amended statute was applicable in those cases. See Woodland Hills Mining, Inc. v. McCoy, Ky., 105 S.W.3d 446 (2003). The Hamilton case is distinguishable because it does not involve a reopening claim and the statute applicable to this case.

This is an issue of first impression. We agree with the Board that there is no "judicial precedent that is controlling on this issue." We also agree with the Board that the language of the reopening statute, as amended effective December 12, 1996, is determinative.

KRS 342.125(1)(d) requires that the change of disability must be 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." [Emphasis added.] The prior version of the statute required only a "change in occupational disability." Unlike the present version of the statute, the prior version did not specify how the change was to be shown. We agree with the Board that Parris was required to show by objective medical evidence a change in his impairment rating from the time of the 1999 settlement and that his failure to do so required the ALJ to dismiss his claim.

Prior to the 1996 amendment, a reopening had to be based on a change in physical condition. Continental Air Filter Co. v. Blair, Ky., 681 S.W.2d 427, 428 (1984). However, the

1996 amendment of KRS 342.125(1) "changed the standard for reopening." Woodland Hills, 105 S.W.3d at 448. By the terms of the present version of the statute, a worsening or improvement of impairment must be shown. KRS 342.125(1)(d).

Furthermore, "the terms physical condition and functional impairment involve different medical concepts and should not be equated for purposes of the reopening statute." Beale v. Rolley, Ky., 777 S.W.2d 921, 924 (1989). In the Beale case, the Kentucky Supreme Court held that, under the pre-1996 version of the statute, an injured worker did not have to prove an increase in the percentage of functional impairment in order to establish a change in his physical condition. Id. at 923. As the Kentucky Supreme Court noted therein, "the terms 'physical condition' and 'functional impairment' address different concerns." Id.

While Parris urges us to follow prior case law interpreting the version of the statute in effect prior to the 1996 amendments, we refuse to do so. With the passage of the amended version of the statute now in effect, the legislature has directed that a change in disability be shown by objective medical evidence of a worsening or improvement of impairment. KRS 342.125(1)(d). "Medical testimony as to a worker's functional impairment . . . consists of a medical evaluation of the percentage by which the worker's bodily functions or systems

have been impaired by a particular compensable injury or disease." Beale, 777 S.W.2d at 923-24. Parris did not present evidence of a change in his impairment rating since his initial injury. His evidence concerning a change in disability related only to a change in his physical condition. As a change in physical condition is no longer the basis of an award on reopening, the ALJ and the Board properly dismissed the claim.

Parris's second argument is that the ALJ erred by ignoring uncontradicted evidence, and his third argument is that the evidence compelled a finding of total disability. In light of our ruling on the first issue, these arguments are moot.

The opinion of the Board is affirmed.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR
APPELLANT:

Dick Adams
Madisonville, Kentucky

BRIEF AND ORAL ARGUMENT FOR
APPELLEE, STAFFING
ALTERNATIVE, INC.:

Stephen B. Lee
Owensboro, Kentucky