

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001553-WC

TIMOTHY HOWARD

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-96-04468

ASHLAND, INC.; HON DONNA H.
TERRY, ADMINISTRATIVE LAW
JUDGE; WORKERS' COMPENSATION
FUNDS; AND WORKERS' COMPENSATION
BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: EMBERTON, CHIEF JUDGE; BUCKINGHAM AND KNOPF, JUDGES.
BUCKINGHAM, JUDGE. Timothy Howard petitions for review of an
opinion of the Workers' Compensation Board, which affirmed the
opinion and order of an administrative law judge (ALJ) denying
and dismissing Howard's motion to reopen his previous claim for
disability benefits. We affirm.

On July 10, 1995, Howard injured his back and shoulder
while employed as a pipefitter for Ashland, Inc. Howard was
examined by Dr. Phillip Tibbs, a neurosurgeon, who diagnosed him

as suffering from a herniated disc at the L5-S1 level of the lumbar spine, which was confirmed by a magnetic resonance imaging (MRI) test performed in August 1995. When conservative treatment failed to relieve Howard's pain in his lower back and sciatica in the right leg and foot, Dr. Tibbs recommended lumbar microdiskectomy surgery.

Despite periodic continuing problems, Howard declined to have surgery and returned to the same position at Ashland after approximately eight months, but the work was adjusted to light duty. In March 1997, he received treatment for a short time from Dr. Mary Humkey. In April 1997, Howard was laid off from Ashland. He performed a few independent assignments in 1997 and early 1998, but he had extreme difficulty with heavy lifting and believed that he could not perform the requirements for work as a pipefitter.

Howard filed his initial application for resolution of injury claim on May 14, 1997. Upon referral by his attorney, Dr. Pearson Auerbach, an orthopedic surgeon, examined Howard in November 1997 and diagnosed degenerative change at the L4-L5 and L5-S1 levels with marked bulging of the disc at the L5-S1 level evidenced by an MRI performed in May 1997. Dr. Auerbach indicated that Howard could possibly perform light or sedentary work but should not return to his previous heavy work unless his problem was corrected surgically. In his Form 107 report, Dr.

Auerbach assessed a 10% permanent whole person impairment utilizing the American Medical Association (AMA) Guides to Evaluation of Permanent Impairment (Fourth Edition). In March 1998, the parties reached a settlement of Howard's claim with compensation based on a 25% permanent partial disability apportioned equally between Ashland and the Special Fund. Following the settlement, Howard did not return to work except for an attempt at selling real estate, which he abandoned because it generated only a very small income of \$500-\$1,000 per year.

On April 13, 2001, Howard filed a motion to reopen his workers' compensation claim. His motion included an affidavit wherein he stated that his back condition had worsened and extended to his left hip. He also attached a letter by Dr. Auerbach stating that his reexamination of Howard on March 28, 2001, indicated that Howard's condition had worsened and would qualify for a 20% functional impairment rating under the AMA Guides (Fifth Edition).

On July 9, 2001, Dr. Kenneth Graulich, a neurologist, examined Howard. Based on his examination and review of the medical records, Dr. Graulich assessed a 10-13% functional impairment rating under the AMA Guides (Fifth Edition) using the Diagnosis Related Estimates (DRE) method, and he further opined that he found no objective evidence of a significant change in

Howard's condition since the time of the initial settlement award. On August 1, 2001, Dr. James Templin, a specialist in pain management, examined Howard and assessed a 21% functional impairment rating utilizing the AMA Guides Range of Motion (ROM) method. The reports of two vocational experts were submitted; one indicated no change in Howard's occupational standing, while the other suggested a worsening of his options in the labor market based on the reports of Drs. Auerbach and Templin.

On November 19, 2001, ALJ Ronald May issued an opinion finding Howard totally occupationally disabled and awarding increased benefits as of April 2001, the date of filing of the motion to reopen. The opinion contained a review of the medical and vocational evidence with the ALJ stating that while recognizing the conflicts, he was more persuaded by Howard's evidence. Following a petition for reconsideration, ALJ May amended his opinion to include a finding that the original settlement appeared to be commensurate with Howard's vocational disability at that time. Ashland and the Workers' Compensation Funds appealed the decision.

On May 1, 2002, the Board entered an opinion reversing, vacating, and remanding ALJ May's decision. First, the Board held that under the version of KRS¹ 342.125(1)

¹ Kentucky Revised Statutes.

applicable on the date of injury (i.e., July 10, 1995), on reopening of a claim, the claimant was required to show both a change of medical condition and a change in occupational disability in order to receive additional benefits if the initial claim was settled or decided under KRS 342.730(1)(c) (claimant did not return to work at the same or greater wage) or KRS 342.730(1)(d) (claimant sustained disability greater than 50%); whereas, if the initial claim was settled or decided under KRS 342.730(1)(a) (claimant totally disabled) or KRS 342.730(1)(b) (claimant returned to work at same or greater wage), the claimant need show only a change of occupational disability. The Board stated that ALJ May specifically addressed only a change in occupational disability without analyzing the evidence showing the differences since the initial settlement and that he did not make a finding on which subsection of KRS 342.730(1) applied in this case.

Second, the Board indicated that ALJ May merely made a conclusory statement that Howard's occupational disability under the settlement was commensurate with his actual disability at that time without providing a factual analysis supporting that conclusion. See Whittaker v. Rowland, Ky., 998 S.W.2d 479 (1999) (requiring finding and analysis of actual disability at time of settlement in reopening claim). The Board further said that ALJ May's brief statement of reliance on Howard's evidence

was not sufficiently specific to allow appellate review and apprise the parties of his reasoning and that the evidence from Drs. Auerbach and Templin did not support a conclusion of a change in Howard's medical condition or occupational disability. The Board reversed the ALJ's decision, vacated the opinion and award, and remanded the matter "for further findings and analysis in accordance with this opinion."

Due to the retirement of ALJ May, the claim was reassigned to ALJ Donna Terry. On November 7, 2002, ALJ Terry held a benefit review conference and set forth three remaining issues: (1) whether Howard presented a prima facie case for reopening; (2) whether the March 3, 1998, settlement was based on KRS 342.730(1)(a), (b), (c) or (d); and (3) whether there was an increase in disability since the settlement under the standards of KRS 342.125. Ashland and the Workers' Compensation Funds argued that there was insufficient evidence of a change of condition to justify a reopening. Howard maintained that ALJ Terry should not conduct a de novo review of the evidence but should only set forth sufficient detailed factual findings to support ALJ May's decision. Howard did not dispute the application of KRS 342.730(1)(c), but he claimed there was sufficient evidence to support a finding of a worsening in his condition and an award for total disability.

In an opinion and order, ALJ Terry denied the motion to reopen and dismissed the action. She held that KRS 342.730(1)(c) applied because Howard did not return to his prior employment following his layoff and earned substantially less than during his employment at Ashland. She found that Howard had an actual occupational disability of 50%, which was higher than the settlement figure because of a substantial decrease in wage-earning capacity and loss of ability to compete for manual labor jobs.

ALJ Terry discounted Dr. Auerbach's opinions because he utilized the Fourth Edition of the AMA Guides in deriving his 10% functional impairment rating in 1997 and the Fifth Edition for his 20% impairment rating in 2001. She also said that comparison of Dr. Auerbach's 1997 and 2001 reports was hindered by his failure to address physical restrictions in the earlier report. ALJ Terry also said that Dr. Templin's report did not specifically discuss changes in Howard's condition since 1997. She relied in part on Dr. Graulich's analysis and opinion that Howard's impairment level had not changed after the settlement award and Howard remains able to perform light duty jobs. ALJ Terry concluded that Howard had not shown a change in either medical condition or occupational disability.

Howard filed a petition for reconsideration challenging the scope of ALJ Terry's authority under the remand,

which was denied. In an opinion dated June 25, 2003, the Board affirmed ALJ Terry's decision denying Howard additional benefits. This petition for review followed.

A major issue raised by Howard following the remand involved the scope of ALJ Terry's authority to decide the merits of the reopening claim. Howard argued that the Board's opinion directed ALJ Terry to merely make additional factual findings necessary to support ALJ May's initial conclusion that Howard was entitled to increased benefits. We believe the Board adequately addressed this issue in rejecting Howard's position as follows:

The first issue we must address is whether the ALJ applied the right standard and followed our directives on remand. Howard believes the ALJ was limited on remand to finding support for what ALJ May had already done. We admit there have been cases in the past such a limitation was placed upon certain findings upon remand. However, we would direct the parties' attention to the action we ordered, which included reversing, vacating and remanding. The vacating of an opinion is, in essence, to render it null and void. Black's Law Dictionary defines "vacate" in part as, "to nullify or cancel, make void, invalidate." Vacating an ALJ's decision is one of the authorized directives from a reviewing body The effect, therefore, of our directives was to set aside the ultimate conclusions of ALJ May and upon remand he or, since he was no longer an ALJ at the time, the ALJ to whom it was assigned was not limited in her ultimate conclusion. She was limited to the issues that were to be addressed based upon the record before her.

She identified those issues as (1) whether he (Howard) presented a prima facie case for reopening; (2) whether 3-3-98 settlement based on KRS 342.730(1)(a), (b), (c), (d)? and (3) "increase in disability since 3-3-98 under KRS 342.125 standards." We believe those issues accurately and thoroughly identify the defects we found in the original decision and the need for vacating and remanding. In our opinion ALJ Terry accurately analyzed its directives and followed those directives. (Emphasis in original).

In its first opinion, the Board held that ALJ May not only failed to provide sufficient specific factual support for his conclusions, but his conclusion that Howard had sustained his burden of making a prima facie showing that his condition had worsened since the settlement was based on a legal error in failing to address both a change in medical condition and a change in occupational disability. Given these deficiencies in ALJ May's opinion, ALJ Terry had the authority to re-evaluate the evidence and make an independent assessment of the claim in light of the proper legal standards. Accordingly, we agree with the Board that ALJ Terry did not exceed her authority on remand.

Howard attacks the Board's action by arguing that it applied a "double standard" by reviewing ALJ Terry's opinion more leniently than ALJ May's opinion in order to substitute its own judgment for that of the ALJ. While we agree that the Board cannot substitute its opinion for that of the ALJ on factual matters, see, e.g., KRS 342.285(2); Burton v. Foster Wheeler

Corp., Ky., 72 S.W.3d 925, 929 (2002), it is not required to defer to the ALJ on legal issues. See Jecker v. Plumbers' Local 107, Ky. App., 2 S.W.3d 107, 109-10 (1999). Moreover, an ALJ must make specific factual findings sufficient to apprise the parties and a reviewing body of the basis for the decision. See Cook v. Paducah Recapping Service, Ky., 694 S.W.2d 684 (1985); Magic Coal Co. v. Fox, Ky., 19 S.W.3d 88, 97 (2000); Shields v. Pittsburg and Midway Coal Mining Co., Ky. App., 634 S.W.2d 440, 444 (1982). A review of ALJ May's opinion reveals that it was deficient in explaining the basis for the conclusions contained therein. ALJ Terry, on the other hand, carefully addressed the deficiencies noted by the Board in the earlier opinion and specifically identified evidence to support her conclusions. We disagree with Howard that the Board applied a double standard or heightened scrutiny to ALJ May's opinion.

Howard also asserts that ALJ Terry improperly applied KRS 342.730(1)(c) and suggests that KRS 342.730(1)(b) should have been applied. First, we note that Howard is procedurally barred from raising this issue. In his brief before ALJ Terry on remand, Howard stated, "Howard does not dispute there is no substantive evidence in the record that, following his settlement, he returned to work at a wage that was equal to or greater than his pre-injury wage. The Board notes the ALJ did not make a specific finding that the claim was settled pursuant

to KRS 342.730(1)(c) and Howard believes such a finding is warranted." See Original Record of the Workers' Compensation Board at 695. Similarly, in his brief before the Board, Howard stated, "The Petitioner has never contended that the original settlement was based upon a return to work at a wage equal to or greater than his average weekly wage. Thus, ALJ Terry's finding that the settlement was pursuant to the provisions of KRS [342] 730(1)(c), is not in question." Id. at 763 n.1. Given these representations, Howard has waived review of this issue.

In addition to the procedural default, Howard's argument lacks substantive merit. Howard alleges that ALJ Terry erroneously confused the facts and timeline of his employment by relying on his employment status after the date of the settlement on March 3, 1998, in determining his occupational disability rating at that time. In fact, although Howard returned to his previous job at Ashland for approximately 4-5 months before being laid off in April 1997, he worked on only three or four pipefitting jobs before January 1998, when he admitted deciding that he could no longer perform the heavy physical demands required for that type of work. ALJ Terry referred to this time period in deciding to apply KRS 342.730(1)(c), not to the period following the settlement date. She properly decided that the settlement award was based on KRS 342.730(1)(c) because Howard was awarded benefits for a

permanent, partial disability and was unable to return to work at a wage equal to or greater than his preinjury wage.

The appellate court's function is limited to correcting the Board only where the reviewing court perceives the Board 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); Whittaker v. Rowland, 998 S.W.2d at 482. The Board applied the appropriate legal principles in reviewing the opinions of both ALJ May and ALJ Terry. Howard has not shown that the Board acted erroneously in vacating and remanding ALJ May's opinion and affirming ALJ Terry's subsequent decision on remand.

For the foregoing reasons, we affirm the opinion of the Workers' Compensation Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE—Ashland,
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