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Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001315-WC

RICHIE PHARMACAL CO.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-96-84861

KATHY DUNN; HON. R. SCOTT BORDERS,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, JOHNSON AND MINTON, JUDGES.

JOHNSON, JUDGE: Richie Pharmacal Co. has petitioned for review of an opinion of the Workers' Compensation Board entered on May 28, 2003, which affirmed the Administrative Law Judge's decision granting Kathy Dunn's motion to reopen her injury claim and awarding her benefits based upon a finding of a permanent, total disability. Having concluded that the Board did not err by affirming the ALJ's granting of Dunn's motion to reopen and

awarding her benefits based upon the version of KRS¹ 342.125 that was in effect on the date of her injury, we affirm.

In approximately May 1993, Dunn began working for Richie in Glasgow, Barren County, Kentucky, selling prescription drugs to pharmacies and doctors' offices over the telephone. On February 27, 1996, Dunn was leaving the office for lunch when she slipped and fell on the rain-soaked parking lot and injured her right knee. Dunn underwent arthroscopic surgery for a torn meniscus on March 29, 1996. Following surgery, Dunn briefly attempted to return to work in May 1996, but was unable to do so.

On December 11, 1996, Dunn filed an application for resolution of injury claim with the Department of Workers' Claims. Dunn claimed that she suffered from and had been diagnosed with reflex sympathetic dystrophy (RSD) in her right leg, which is marked by chronic pain and swelling to the affected area. As both parties have noted, the issue of whether Dunn suffered from RSD was "hotly contested" during the litigation before the ALJ. The ALJ ultimately found that Dunn did in fact suffer from RSD in her right leg, and as a result, on January 12, 1998, Dunn was awarded benefits based upon a 20% occupational disability rating.² The Board affirmed the ALJ's

¹ Kentucky Revised Statutes.

² Dunn was awarded temporary total disability benefits in the amount of \$217.31 per week, plus 12% interest for the time periods from March 15, 1996, through June 20, 1996, and October 6, 1997, through October 18, 1997. Dunn was also awarded \$43.46 per week in permanent partial occupational disability

findings and award in an opinion entered on February 26, 1998.

On January 14, 2002, Dunn filed a motion to reopen her injury claim under KRS 342.125. Dunn attached an unsigned affidavit to the motion to reopen, alleging that she had suffered a "change of disability" since the entry of her original award approximately four years earlier.³ In addition, Dunn attached medical reports from Dr. Benjamin Johnson and Dr. Peter Konrad. The basis for Dunn's motion to reopen was that her RSD had spread to her left leg. On March 29, 2002, the ALJ granted Dunn's motion to reopen based upon the version of KRS 342.125 that was in effect when Dunn was injured on February 27, 1996.⁴

On November 25, 2002, the ALJ found that Dunn "has had a worsening of her physical condition and an increase in her occupational disability. . . ." Specifically, the ALJ found that Dunn's RSD had spread to her left leg. In so finding, the ALJ applied the version of KRS 342.125 that was in effect at the time of Dunn's injury on February 27, 1996. The ALJ concluded

benefits beginning June 21, 1996, and continuing for as long as Dunn was disabled, but not to exceed 425 weeks, plus any applicable interest on unpaid benefits. Finally, Richie was ordered to pay for Dunn's medical expenses associated with her injury.

³ Upon objection by Richie, the ALJ passed on considering Dunn's motion to reopen and gave her 20 days to file a proper affidavit as required by 803 Kentucky Administrative Regulations (KAR) 25:010E § 4(6)(a)(2). Dunn filed a second affidavit on March 19, 2002, and the ALJ granted Dunn's motion to reopen on March 29, 2002. Although Dunn's second affidavit was apparently filed after the 20-day deadline had passed, Richie made no objection with respect to the late filing.

⁴ KRS 342.125 was amended on December 12, 1996.

that Dunn was "permanently and totally disabled" and that there was "no likelihood [Dunn] [would] be able to return to any work for which she ha[d] experience or training." Dunn was awarded \$217.31 per week for as long as she is disabled, plus medical expenses.⁵

In an opinion entered on May 28, 2003, the Board affirmed the ALJ's award of permanent disability benefits. The Board agreed that the version of KRS 342.125 that was in effect on the date of Dunn's injury governed the burden of proof required to initially reopen her claim and to support an increase in her disability payments. Richie's petition for review to this Court followed.

Richie first claims that the ALJ erred by granting Dunn's motion to reopen and awarding her benefits based upon the version of KRS 342.125 that was in effect at the time of her injury on February 27, 1996. In particular, Richie argues:

Before December 12, 1996, KRS 342.125 authorized reopening of a workers' compensation award upon a "showing of change of occupational disability."⁶ "Occupational

⁵ On January 7, 2003, the ALJ denied Richie's petition for reconsideration. Richie sought to apply the post-1996 evidentiary burden of KRS 342.125 to Dunn's claim. The ALJ stated that Dunn had supported her claim with "objective medical evidence" of a worsening of her condition; thus, there was no need to reconsider Dunn's claim since she had satisfied her burden under either standard. However, the ALJ granted Richie's petition for reconsideration seeking to apply the post-1996 version of KRS 342.730(4), and ordered that Dunn's permanent total disability benefits would terminate upon her qualification for Social Security Retirement Benefits at age 65. Dunn did not appeal this order to the Board.

⁶ The version of KRS 342.125 that was in effect prior to December 12, 1996, provided, in pertinent part, as follows:

(1) [U]pon its own motion or upon the application of any party and a showing of change of occupational

disability" was an all-encompassing assessment which considered any factors relevant to the reduction in the claimant's earning capacity, including the claimant's age, educational attainment, and medical impairment, as well as the claimant's subjective complaints. In fact, under the "old" version of KRS 342.125 an award could be increased upon reopening based solely upon a claimant's increased subjective complaints [citations omitted].

House Bill 1, enacted effective December 12, 1996, changed this standard for reopening to require a "[c]hange of disability as shown by objective medical evidence of worsening . . . of impairment" KRS 342.125(1)(d).⁷ As properly noted by the Board, the newer standard places a significantly greater burden upon claimants seeking increased benefits for post-award changes in their condition by requiring objective medical proof of a change in impairment [citation to record omitted].

According to Richie, since Dunn's original award was not entered until January 12, 1998, she was required to meet the more rigorous version of KRS 342.125 that was in effect on that

disability, mistake or fraud, or newly discovered evidence, the administrative law judge may at any time reopen and review any award or order. . . .

⁷ The current version of KRS 342.125 provides, in pertinent part, as follows:

(1) Upon motion by any party or upon an administrative law judge's own motion, an administrative law judge may reopen and review any award or order on any of the following grounds:

(a) Fraud;

(b) Newly-discovered evidence which could not have been discovered with the exercise of due diligence;

(c) Mistake; and

(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.

date, i.e., Dunn was required to prove a “[c]hange of disability as shown by objective medical evidence of worsening . . . of impairment . . .” [emphasis added]. Richie claims that Dunn failed to do so and that the ALJ therefore erred by granting her motion to reopen and awarding her benefits for a permanent, total disability. We disagree.

In Woodland Hills Mining, Inc. v. McCoy,⁸ our Supreme Court stated that where a claim had arisen and had been settled prior to the 1996 amendments to KRS 342.125, the date of the injury controlled which version of KRS 342.125 would govern the evidentiary standard on a motion to reopen:

As a general rule, the law in effect on the date of injury controls the rights and obligations of the parties. Effective December 12, 1996, KRS 342.125(1) was amended to change the relevant ground for reopening from “a change in occupational disability” to “a change of disability as shown by objective medical evidence of worsening or improvement of impairment” Contrary to the employer’s assertion, we are not persuaded that the amendment was remedial. . . . [citation omitted].

Unlike the situation in McCool v. Martin Nursery & Landscaping, Inc., Ky., 43 S.W.3d 256 (2001), and Brooks v. University of Louisville Hospital, Ky., 33 S.W.3d 526 (2000), this appeal does not concern a statute of limitations, which may be enlarged or restricted without impairing vested rights. Furthermore, unlike the situation in McCool and Brooks, this claim both arose and was decided before December 12, 1996. Under those circumstances, we are persuaded that the requirements for

⁸ Ky., 105 S.W.3d 446, 448 (2003).

reopening that existed on the date of injury controlled the rights and obligations of the parties even though the claimant's motion to reopen was filed after December 12, 1996.

While the facts of the case sub judice are somewhat different in that Dunn's original claim was adjudicated after the 1996 amendments to KRS 342.125 had taken effect, we nonetheless conclude that McCoy is controlling. Central to the Supreme Court's holding in McCoy was its conclusion that the amendments to KRS 342.125(1) were not remedial in nature and that the law in effect at the time of the injury would therefore control the evidentiary standard on the motion to reopen.⁹ Accordingly, we hold that the Board did not err by affirming the ALJ's application of the evidentiary standard of KRS 342.125 that was in effect on the date of Dunn's injury in considering her motion to reopen.

Richie next argues that the Board erred by affirming the ALJ's granting of Dunn's motion to reopen on grounds that

⁹ See KRS 342.0015, which provides in full as follows:

The substantive provisions of 1996 (1st Extra. Sess.) Ky. Acts ch. 1 shall apply to any claim arising from an injury or last exposure to the hazards of an occupational disease occurring on or after December 12, 1996. Procedural provisions of 1996 (1st Extra. Sess.) Ky. Acts ch. 1 shall apply to all claims irrespective of the date of injury or last exposure, including, but not exclusively, the mechanisms by which claims are decided and workers are referred for medical evaluations. The provisions of KRS 342.120(3), 342.125(8), 342.213(2)(e), 342.265, 342.270(3), 342.320, 342.610(3), 342.760(4), and 342.990(11) are remedial.

See also Commonwealth, Dept. of Agriculture v. Vinson, Ky., 30 S.W.3d 162, 169 (2000)(holding that statutory changes to evidentiary burdens are substantive changes and may not as a general rule be applied retroactively).

Dunn failed to support her motion with "objective medical evidence of a worsening of impairment." As we stated above, Dunn's motion to reopen was governed by the evidentiary standard that was in effect on the date of her injury. Hence, she was not required to proffer "objective medical evidence of a worsening of impairment." Rather, Dunn merely had to offer proof that she had suffered a "change of occupational disability." Our review of the record shows that Dunn met this evidentiary standard.

In support of her motion to reopen, Dunn attached a medical report from Dr. Peter Konrad indicating that after the date of her original award, she had undergone surgery in June 1999, to implant a dorsal column stimulator in an attempt to alleviate her increased pain. In addition, Dunn attached a report from Dr. Benjamin Johnson dated January 2, 2002, which diagnosed her RSD as having spread to her left leg. Finally, Dunn attached her own affidavit wherein she stated that she had "incurred a change of disability" since the entry of her original award. Thus, we conclude that Dunn proffered sufficient evidence to warrant a finding that there was a "substantial possibility" that she would be entitled to additional benefits under KRS 342.125.¹⁰ Accordingly, the Board

¹⁰ See Stambaugh v. Cedar Creek Mining Co., Ky., 488 S.W.2d 681, 682 (1972)(holding that "on an application to reopen[,] [the movant] should be required to make a reasonable prima facie preliminary showing of the existence of a substantial possibility of the presence of one or more of the prescribed conditions that warrant a change in the [original] decision before his adversary is put to the additional expense of relitigation").

did not err by affirming the ALJ's granting of Dunn's motion to reopen.

Our review of the record also shows that Dunn proffered sufficient evidence to support the ALJ's finding that her level of occupational disability had increased to 100% since the entry of her original award in January 1998. As mentioned above, Dr. Johnson's medical records indicated that Dunn's RSD had spread to her left leg. Dr. Johnson's records also noted that Dunn had undergone surgery for the implantation of a dorsal column stimulator for both lower extremities.

In addition, Dunn offered a medical report from Dr. Pamela Harston, which indicated that her condition had worsened and that her RSD had spread to her left leg. Dr. Harston further opined that Dunn should not engage in "climbing or working at heights, working in cold temperatures, working on heavy machinery or around heavy machinery, repetitive walking, stooping, crawling, kneeling, or squatting."

Finally, Dunn testified via deposition that since the entry of her original award, she had undergone surgery to implant the second stimulator to alleviate the pain in both of her legs. Dunn also testified that she could only stand or sit for approximately ten minutes without experiencing pain and swelling in her legs, and that she could only walk for approximately 40 feet without having to stop and rest. Dunn

stated that these restrictions on her activities represented a worsening of her condition since her original award.

Hence, there is substantial evidence in the record to support the ALJ's finding that Dunn had experienced an increase in "occupational disability" to the point of being totally disabled. As long as the ALJ's findings are supported by substantial evidence from the record, those findings will not be disturbed on appeal.¹¹ Although, as the Board noted, the evidence presented to the ALJ regarding the extent and duration of Dunn's disability was conflicting, the mere fact that there was evidence which would have supported a contrary finding by the ALJ is not sufficient to warrant a reversal on appeal.¹² The ALJ, as the fact-finder, "has the sole discretion to determine the quality, character, and substance of evidence" presented.¹³ Therefore, the Board did not err by affirming the ALJ's awarding Dunn permanent, total disability benefits.

Finally, Richie argues that Dunn's motion to reopen should have been dismissed on grounds that Dunn's second affidavit supporting her motion to reopen was not filed within the 20-day deadline imposed by the ALJ. However, this issue was never raised before the ALJ; and "[i]t is well settled that failure to raise an issue before an administrative body

¹¹ See Whittaker v. Rowland, Ky., 998 S.W.2d 479, 481-82 (1999).

¹² Id. at 482.

¹³ Id. at 481.

precludes the assertion of that issue in an action for judicial review"14 Accordingly, we will not consider this argument for the first time on appeal.

Based on the foregoing, the opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Greg N. Stivers
Bowling Green, Kentucky

BRIEF FOR APPELLEE:

Mary Ann Kiwala
Louisville, Kentucky

¹⁴ Urella v. Kentucky Board of Medical Licensure, Ky., 939 S.W.2d 869, 873 (1997).