

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002652-WC

RITA OSBORNE

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-99-75897

CLARK REGIONAL MEDICAL CENTER;
HON. BONNIE C. KITTINGER, ADMINISTRATIVE
LAW JUDGE; AND THE WORKERS'
COMPENSATION BOARD

APPELLEES

OPINION

REVERSING AND REMANDING

** ** * * *

BEFORE: BARBER, KNOPF, AND SCHRODER, JUDGES.

SCHRODER, JUDGE. Rita Osborne (Osborne) petitions for a review of a decision of the Workers' Compensation Board, entered on November 19, 2003, reversing and remanding to the Administrative Law Judge (ALJ) with instructions to enter an order of dismissal of her reopening claim. We believe the Board misconstrued the controlling statutes. Therefore, we reverse and remand in order to reinstate the ALJ's opinion and order.

Osborne is fifty-nine years old and has an eleventh grade education with a certificate in patient care. She began working as a patient care technician at the Clark Regional Medical Center in 1977. Osborne injured her back on two occasions, October 28, 1998, and June 1, 1999, when she was attempting to weigh patients. Osborne subsequently filed a workers' compensation claim. An opinion and award dated October 19, 2000, awarded her temporary total benefits for approximately four months, and permanent partial disability benefits based on a finding that she had a 5% permanent partial impairment. In making the latter determination, the ALJ relied on the report of Dr. Vaughan, who assessed the 5% impairment using the DRE Model and the 4th edition of the American Medical Association Guides to the Evaluation of Permanent Impairment (AMA Guides). The ALJ's opinion also stated that the issue of whether Osborne was totally disabled was "a close question."

One year later, Osborne filed a motion to reopen her workers' compensation claim, on the grounds that her condition had worsened as a result of the back injury. She attached a letter from her primary care physician that stated that she had developed severe deep vein thrombosis and massive pulmonary embolus. He attributed these developments to the immobility caused by her back pain. On December 14, 2001, the ALJ entered an order granting the motion to reopen, stating that Osborne had

made a prima facie showing that her condition had worsened. The matter was accordingly reopened.

Two evaluations were performed at the University of Kentucky Medical Center, pursuant to KRS 342.315. One expert evaluated Osborne's pulmonary condition; the other expert, Dr. Prince, evaluated her back problems.

After considering the evidence presented, which included Osborne's own testimony, the reports of the two experts, and reports by other physicians, the ALJ determined that Osborne's deep vein thrombosis and pulmonary embolisms were not primarily caused by her back injury. This issue is not contested on appeal.

The ALJ also found, however, that there had been a worsening in Osborne's back condition. In arriving at her final decision to award total disability benefits, the ALJ relied in part on the fact that the university evaluator, Dr. Prince, had assessed a 7% impairment as compared to Dr. Vaughan's original diagnosis of a 5% impairment. In arriving at the 7% impairment rating, Dr. Prince had used a more recent edition of the AMA Guides and a different assessment model (Range of Motion rather than DRE) than those used by Dr. Vaughan. Dr. Prince did not explain in his report how his assessment, based as it was on different standards and methodology, compared to that of Dr. Vaughan. The ALJ analyzed the issue as follows:

Dr. Prince assessed a 7% impairment caused by the work injuries. Although he used the 5th Edition of the AMA Guides, which was not available during Plaintiff's original claim pendency [sic], he also used the Range of Motion Model for his assessment. He could have used the DRE Model and explained any difference in his impairment [rating] and that of Dr. Vaughan [the physician who performed the assessment on the original claim]. He had, for review, the original Opinion and Award showing a 5% impairment as the basis of the award and how it was determined. He also knew the purpose of the university evaluation. He assigned a greater impairment than had been determined in 2000 and his opinion will be given presumptive weight herein.

The ALJ also placed considerable weight on Osborne's own account of her current condition.

In addition to Dr. Prince's opinion, the ALJ relies on the very credible testimony of the Plaintiff, who explained how her life has changed since the award and how it is governed by pain. Judge Nanney [the ALJ on the original claim] thought the issue of whether she was totally disabled was a close call two years ago, yet he thought, at that time, she could do sedentary work. It appears to the undersigned that she would be incapable of even light work at this time, due in large part to the amount of pain medication she must take to obtain any relief from her back pain.

Clark Regional appealed the decision to the Workers' Compensation Board. The main issue that troubled the Board in its review of the case was the ALJ's assessment of Dr. Prince's report. The Board reversed and remanded the case for further findings, primarily on the grounds that the ALJ had not shown a

change in Osborne's impairment by means of objective medical evidence. The Board specifically cited the report of Dr. Prince, and the different rating system and edition of the AMA Guides he had used in performing his evaluation. The Board contended that this made it impossible to compare his findings with those of Dr. Vaughan, and that therefore, the ALJ had erred in finding that Prince's report showed a worsening in Osborne's condition simply on the basis that 7% indicated a higher impairment than 5%. In a separate opinion, one member of the Board also noted that the ALJ had failed to consider the report of Dr. Sheridan, a physician retained by Clark Regional, who had stated that if Dr. Prince and Dr. Sheridan had used the same edition of the AMA Guides, their assessment of Osborne's impairment would have been the same. Our review of this issue is hampered by the fact that Dr. Sheridan's report is not in the record before us, so we must rely solely on the quotations and references to his report contained in the ALJ and Board opinions.

On remand, the ALJ reaffirmed her finding that Osborne was totally disabled. She rejected Dr. Sheridan's explanation of the difference between Dr. Prince's and Dr. Vaughan's impairment rating as follows:

A significant issue in determining whether Plaintiff has shown a change in her impairment by objective medical evidence is

whether the 7% impairment rating assessed by Dr. Prince is, in fact, indicative of a greater impairment than the 5% assessed by Dr. Vaughan in 1999. The undersigned finds Dr. Sheridan's explanation for the difference in the two impairment ratings to be entirely inadequate. Dr. Sheridan merely said that he thought the DRE model was appropriate on both occasions, "so, the reason for the discrepancy . . . is that I believe Dr. Vaughan used the DRE II, which gave her 5% from the 1993 AMA Guides, Fourth Edition, and Dr. Prince gave her 7% using the diagnostic Table 15-7, rather than the DRE. If the same guidelines were used in each case, the impairment would be the same, that is comparing Dr. Vaughan's and Dr. Prince's ratings." Dr. Sheridan did not attempt to explain why he thought the ratings would be the same if the same guidelines were used.

Clark Regional again appealed to the Board. The Board reversed the ALJ's decision and remanded the matter for an order of dismissal on the grounds that there was still insufficient evidence to support the ALJ's findings. The Board's opinion stated in part as follows:

As we stated in our original opinion, KRS 342.125 mandates that by objective medical evidence, a claimant, to be successful on reopening, must show an increase in impairment rating due to a condition caused by the injury since the date of the award or order. Therefore, we are of the opinion that in order to succeed on reopening on the merits, it must be established that the change in impairment rating is not simply a change based on the edition of the Guides used. This finding can be made only if evidence exists of record that provides the ALJ a basis to validly compare evidence in existence at the time of the original award

with the medical evidence of impairment produced on reopening. Again having carefully scrutinized the evidence in the original claim and on reopening and the ALJ's further analysis of the evidence, we believe Clark Regional is correct in that the ALJ's decision is not supported by substantial evidence in the record. Under the DRE Model, Osborne's impairment rating would be the same.

It is from this order that Osborne appeals.

The duty of this Court is to correct the Board only where it 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); Whittaker v. Rowland, Ky., 998 S.W.2d 479, 482 (1999).

We believe that the Board applied the wrong statutory standard in its review of the ALJ's findings of fact. KRS 342.125(1)(d), as amended in 1996, allows reopening and review of any award based upon:

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.

The purpose of this statute is to establish the grounds upon which a motion to reopen may be granted, not to establish the standard of evidence necessary for a finding of total permanent

disability. In a recent opinion, the Kentucky Supreme Court explained the function of this statutory provision:

Effective December 12, 1996, the legislature amended KRS 342.125(1) by enacting KRS 342.125(1)(a)-(d). KRS 342.125(1)(d) permits the reopening of a final award upon evidence of a "[c]hange 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." . . . As we attempted to explain in our recent decision in Woodland Hills Mining, Inc. v. McCoy, [Ky., 105 S.W.3d 446 (2003)], **the amendment does not govern the type of evidence necessary to establish the right to greater benefits under KRS 342.730 with respect to a reopened claim.** It changes only a procedural requirement, i.e., one of the grounds upon which a motion to reopen may be granted. In other words, KRS 342.125(1)(d) addresses the necessary prima facie showing in order to prevail on a motion to reopen that is filed on or after December 12, 1996. . . . **the merits of a worker's right to receive additional income benefits at reopening are governed by the version of KRS 342.730 that was effective on the date of injury.** (emphasis added.)

Dingo Coal Co. v. Tolliver, Ky., 129 S.W.3d 367, 370-71 (2004).

See also Stambaugh v. Cedar Creek Mining Co., Ky., 488 S.W.2d 681, 682 (1972).

In her order granting Osborne's motion to reopen, the ALJ found that she had made a prima facie showing of a worsening in her condition based on an objective medical opinion. This objective medical opinion consisted of the letter from her primary care physician regarding her pulmonary problems. Clark

Regional did not challenge the motion to reopen. The issue is not therefore preserved for appeal, and once the prima facie showing has been made, the evidentiary standard of "objective medical evidence of impairment" under KRS 342.125 is no longer applicable.

In its review, the Board essentially adopted the "objective medical evidence" standard under the reopening statute, and interpreted it to mean that in order for a claimant to succeed in obtaining total permanent disability benefits upon reopening, she was required to show an increased impairment under the AMA Guides.

The standard for determining whether the worker will receive additional benefits once the case is reopened, however, is controlled by KRS 342.730. See Woodland Hills Mining, Inc. v. McCoy, Ky., 105 S.W.3d 446 (2003). Furthermore, the standard differs significantly for findings of permanent partial and permanent total disability.

When enacting the 1996 amendments, the legislature employed different standards for awarding benefits under KRS 342.730(1)(a) and (1)(b). In Ira A. Watson Dept. Store v. Hamilton, Ky., 34 S.W.3d 48 (2000), we explained that although an impairment rating due to the work-related injury is a prerequisite to a finding of total disability under the 1996 Act, some of the Osborne v. Johnson, Ky., 432 S.W.2d 800 (1968), factors still remain relevant to the determination. **Thus, awards under KRS 342.730(1)(a) continue to be based upon a**

finding of disability. In contrast, an award of permanent partial disability under KRS 342.730(1)(b) is based solely on a finding that the injury resulted in a particular AMA impairment rating, with the amount of disability being determined by statute. In other words, KRS 342.730(1)(a) requires the ALJ to determine the worker's disability, while KRS 342.730(1)(b) requires the ALJ to determine the worker's impairment. Impairment and disability are not synonymous. (emphasis added.)

Roberts Brothers Coal Company v. Robinson, Ky., 113 S.W.3d 181, 182-83 (2003).

"Permanent total disability" means the condition of an employee who, due to an injury, has a permanent disability rating and has a complete and permanent inability to perform any type of work as a result of an injury[.]" KRS 342.0011(11)(c).

[I]t is clear that the ALJ has very limited discretion when determining the extent of a worker's permanent, partial disability. See KRS 342.730(1)(b) and (c). However, **determining whether a particular worker has sustained a partial or total occupational disability as defined by KRS 342.0011(11) clearly requires a weighing of the evidence concerning whether the worker will be able to earn an income by providing services on a regular and sustained basis in a competitive economy.**

Ira A. Watson Dept. Store v. Hamilton, Ky., 34 S.W.3d 48, 51 (2000), (reh'g denied 2001) (emphasis added.)

Clearly, therefore, the ALJ did not err in relying on factors other than the impairment rating in deciding whether

Osborne is totally permanently disabled as a result of her work injury.

As to the evaluation by Dr. Prince, the Board correctly noted that it is to be given presumptive weight under KRS 342.125:

Except as otherwise provided in KRS 342.316, **the clinical findings and opinions of the designated evaluator shall be afforded presumptive weight by administrative law judges and the burden to overcome such findings and opinions shall fall on the opponent of that evidence.** When administrative law judges reject the clinical findings and opinions of the designated evaluator they shall specifically state in the order the reasons for rejecting that evidence.

KRS 342.315(2) (emphasis added.)

In reversing the ALJ's opinion and order, the Board stated that she had improperly shifted the burden to Clark Regional to prove that Dr. Prince's assessment was not proper. Instead, the Board wrote,

it was incumbent upon Osborne to provide evidence as a basis to validly compare the rating in existence at the time of the original award with an increased impairment produced on reopening. Dr. Prince's evidence simply does not support a finding of an increase in impairment on reopening.

The Board was persuaded instead by Dr. Sheridan's explanation of the ratings, and found that the ALJ had erred in not adopting his interpretation.

Dr. Sheridan's explanation of the significance of the 5% and 7% impairment ratings in comparison to the application of the Fourth and Fifth Editions of the Guides constituted an uncontradicted medical opinion that could not be casually disregarded by the ALJ without providing a sufficient explanation for her rejection. No explanation was provided because there was none available inasmuch as neither Dr. Prince's report, nor any other medical evidence contained in the record, provided a basis for the ALJ to reject Dr. Sheridan's clearly stated medical conclusions addressing pre- and post-award impairment ratings.

We disagree with the Board's analysis. Although a party may note evidence [such as Dr. Sheridan's] which would have supported a conclusion contrary to the ALJ's decision, such evidence is not an adequate basis for reversal on appeal. McCloud v. Beth-Elkhorn Corp., Ky., 514 S.W.2d 46 (1974). The ALJ, rather than the reviewing court, has the sole discretion to determine the weight, credibility, quality, character, and substance of evidence and the inference to be drawn from the evidence. Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418, 419 (1985). The ALJ has the discretion to choose whom and what to believe. Addington Resources, Inc. v. Perkins, Ky. App., 947 S.W.2d 421, 422 (1997). In instances where the medical evidence is conflicting, the sole authority to determine which witness to believe resides with the ALJ. Pruitt v. Bugg Brothers, Ky., 547 S.W.2d 123, 124 (1977). The ALJ was free to

disregard Dr. Sheridan's interpretation of Dr. Prince's report. Dr. Prince did assess a higher impairment rating, for whatever reason. The burden therefore shifted to Clark Regional to prove that the higher impairment rating was potentially illusory due to the use of a different methodology and more recent edition of the Guides.

Furthermore, we believe that there was substantial evidence to support the ALJ's finding that Osborne is totally permanently disabled because KRS 342.730(1)(a) permits the consideration of factors other than the change in the numerical impairment rating.

The ALJ found that there had been a change in Osborne's degree of disability because she could no longer perform even sedentary work, "due in large part to the amount of pain medication she must take to obtain any relief from her back pain." In her second opinion, the ALJ also found that Osborne's activities are highly restricted due to her pain. It takes her 45 minutes to change the sheets on her bed because she has to stop, sit down, and wait for the pain to subside before continuing. She must sit in a chair to wash dishes because of her back pain. She now uses a cane and wheelchair. "A worker's testimony is competent evidence of his physical condition and of his ability to perform various activities both before and after being injured." Hush v. Abrams, Ky., 584 S.W.2d 48 (1979).

The ALJ also noted that Dr. Sheridan had pointed out that Osborne's lumbar MRI performed in 2002 showed additional disc bulging that was not present in her 1999 MRI and that Dr. Prince recommended additional restrictions on the weight Osborne is permitted to lift.

Because we adjudge that the Board misconstrued the controlling statutes, and that the ALJ's opinion met the standard for a finding of total permanent disability pursuant to KRS 342.730 (1)(a), we reverse the opinion of the Board and reinstate the opinion, award and order of the ALJ.

ALL CONCUR.

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