

RENDERED: December 10, 2004; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2004-CA-000822-WC

HERMAN DOTSON

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-89-08451

BLACKFIELD COAL COMPANY; AND
HON. SHEILA C. LOWTHER,
CHIEF ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER, McANULTY, AND MINTON, JUDGES.

McANULTY, JUDGE: Herman Dotson (Dotson) has petitioned for review of an opinion of the Workers' Compensation Board (Board) entered on March 24, 2004, which affirmed orders of the Chief Administrative Law Judge (CALJ) rendered on December 21, 2000, and November 14, 2003, overruling Dotson's fourth motion to reopen his injury award. We affirm.

On February 27, 1989, Dotson suffered a work-related low back injury while employed by Blackfield Coal Company (Blackfield). A settlement based on a 30% occupational

disability was approved on March 7, 1990. Dotson later petitioned for reopening and on December 22, 1990, based on a psychiatric condition, he was awarded an increase to a 50% occupational disability. His second and third motions to reopen and motion for reconsideration of the latter were denied on July 31, 1996, November 9, 1999, and December 29, 1999, respectively.

On November 14, 2000, just over a year from the denial of the third motion to reopen, Dotson's fourth motion to reopen and the subject of this action was filed. In the motion Dotson alleged a worsening of his physical condition over the previous year and requested reopening to assess his present occupational disability. The only evidence in support of the motion was two letters to his counsel from Dr. Saroj B. Dubal, M.D., who had been treating Dotson since March 22, 2000, at the St. Joseph Hospital Advanced Pain Management Center.

In a letter dated October 6, 2000, Dr. Dubal expressed the opinion that Dotson's condition had worsened since the original injury in 1989, but the letter did not address the interval subsequent to the denial of Dotson's third motion to reopen. This was clarified in a second letter dated two weeks later wherein Dr. Dubal, based on his general knowledge of Dotson's disc and joint disease of the cervical and lumbar spine and the prognosis, stated that Dotson's disease was degenerative and non-curable and his condition would keep worsening as time

went by. Dr. Dubal went on to indicate "I am willing to make the statement that it has been worsening since November 9, 1999, even though I haven't been taking care of the patient all that time. I only started taking care of him in March, 2000. . ."

Blackfield argued in response that Dotson's motion to reopen should be dismissed as it failed to satisfy the requirements of Kentucky Revised Statutes (KRS) 342.125(1)(d) in that Dr. Dubal's opinion was not supported by any documented objective medical evidence.

On December 21, 2000, the CALJ overruled Dotson's fourth motion to reopen, concluding that the motion failed to "make a prima facie case for worsening of condition/increase in occupational disability." The CALJ also indicated that she was not "persuaded by the report submitted by Dr. Dubal that there has been a change of plaintiff's condition since the Opinion and Order issued by Judge Roger Riggs on November 9, 1999 overruling the plaintiff's third motion to reopen." Dotson's petition for reconsideration was denied on November 14, 2003.¹

¹ The delay between the overruling of the motion to reopen in December, 2000, and the overruling of the petition for reconsideration in November, 2003, is not at issue. Procedurally, Dotson's original petition for reconsideration was denied on February 15, 2001. Dotson, arguing that he never received it, filed a motion to set aside the order of denial. Although finding Dotson's motion credible, the CALJ overruled the motion to set aside under the assumption that she did not have authority to set aside the order of denial. Dotson appealed to the Board. The Board, relying on Fluor Construction International, Inc. v. Kirtley, Ky., 103 S.W.3d 88 (2003), vacated the CALJ's order and remanded to the CALJ to reconsider Dotson's original motion to set aside the order overruling his petition for reconsideration. The CALJ sustained Dotson's motion to set aside the order which overruled Dotson's

Dotson appealed to the Board and in an opinion entered March 24, 2004, the Board affirmed the CALJ's denial of Dotson's motion to reopen and dismissed the appeal. In finding that Dr. Dubal's letters did not make a prima facie showing of a worsening of impairment, the Board relied on the version of KRS 342.125 in effect at the time of the filing of the motion to reopen:

While the law in effect at the time of the injury governs a determination on the merits once a claim is reopened, the threshold determination of whether to reopen is governed by the law in effect at the time the motion to reopen is filed. Hence, even though his injury was sustained prior to 1996, the threshold showing Dotson must make to warrant reopening for a determination on the merits is governed by the law in effect when he filed his motion to reopen on November 14, 2000.

The Board concluded that Dr. Dubal's letters did not make a prima facie showing of a worsening of impairment because they did not express an impairment rating pursuant to the latest edition of the Guides to the Evaluation of Permanent Impairment, KRS 342.0011(35) and KRS 342.730(1)(b). Additionally, under KRS 342.125(1)(d) the requisite showing must be made by objective medical evidence. The Board concluded that Dr. Dubal's letters did not address whether Dotson had a change in condition during the time period between the denial of the third motion to reopen

petition for reconsideration, but once again overruled Dotson's petition for reconsideration and his motion to reopen.

and the filing of the fourth motion to reopen as Dr. Dubal's opinion was instead based on his general knowledge of the nature of the disease. This petition for review followed.

Dotson claims before us that the Board erred by failing to recognize that the standard for reopening an injury claim was controlled by the version of KRS 342.125 in effect at the time of the injury, and that under that standard he presented a prima facie case to warrant reopening by demonstrating a change in his occupational disability. Our standard of review of a decision of the Board "is to correct the Board only where the the [sic] Court perceives the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing evidence so flagrant as to cause great injustice." Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687-88 (1992). For the reasons that follow, we conclude that the Board committed no error.

Dingo Coal Company, Inc. v. Tolliver, Ky., 129 S.W.3d 367 (2004) is dispositive as to which version of KRS 342.125(1) is to be used in determining whether to grant the motion to reopen:

Reopening is the remedy for addressing certain changes that occur or situations that come to light after benefits are awarded. Under KRS 342.125, a motion to reopen is the procedural device for invoking the jurisdiction of the Department of Workers' Claims to reopen a final award. In

order to prevail, the movant must offer prima facie evidence of one of the grounds for reopening that are listed in KRS 342.125(1). Stambaugh v. Cedar Creek Mining Co., Ky., 488 S.W.2d 681 (1972). Only after the motion has been granted will the opponent be put to the expense of litigating the merits of an assertion that the claimant is entitled to additional income benefits under KRS 342.730. Id. The grounds for granting a motion to reopen and the standards for awarding increased benefits when the merits of the reopening are considered are not necessarily consistent.

. . .
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.” This requirement differs from the previous standard for granting a motion to reopen where increased income benefits are sought under KRS 342.730. It also differs from the standard for awarding such benefits in a pre-December 12, 1996, claim. As we attempted to explain in our recent decision in Woodland Hills Mining, Inc. v McCoy, [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. See KRS 342.0015. It has no effect on the substantive proof requirements for a claim that arose before its effective date. Id. 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. [citations omitted].

Id. at 370-71.

Thus, as applied in the instant case, the current version of KRS 342.125(1) controls the standard for reopening Dotson's award.

The next issue is whether Dotson made a prima facie showing to warrant reopening under KRS 342.125(1), as amended effective December 12, 1996, which provides in pertinent part:

(1) Upon motion by any party or upon an administrative law judges own motion, an 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.

As stated in Stambaugh v. Cedar Creek Mining Co., Ky., 488

S.W.2d 681, 682 (1972), the burden is on Dotson to make a prima facie showing of a change in disability to warrant reopening:

[O]n 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.

Dotson's motion was supported by two letters from Dr. Dubal, his treating physician for nine months of the twelve that

had elapsed since the denial of the third motion to reopen and the filing of the fourth. According to the letters, Dotson's medical history indicated that Dotson had disc and joint disease of the cervical and lumbar spine that had worsened since originating from the work related injury in 1989. An MRI performed since the denial of the third motion was normal, but an x-ray performed at Dr. Dubal's request showed spurring and neural foraminal impingement. Dr. Dubal's opinion was that Dotson's condition had been worsening since the original injury and since the denial of the third motion. His opinion, however, was not based on the x-ray or anything specific to Dotson. Instead he admitted that his opinion was based on general knowledge regarding the disease and the prognosis.

We agree with the CALJ and the Board that Dr. Dubal's letters do not rise to the level of a prima facie showing of a change in disability warranting reopening of the award. KRS 342.0011(33) defines "[o]bjective medical findings" as "information gathered through direct observation and testing of the patient applying objective or standardized methods," and Dr. Dubal's opinion of a "worsening" condition is based not on testing and observation of Dotson but on his "general knowledge regarding this disease and the prognosis." The letters also fail to address the change in "impairment" through application of "objective or standardized methods." The letters at most set

forth Dr. Dubal's opinion on the progression of the disease without any causal link to Dotson's actual condition. Even accepting the content of the letters as true, the letters fall short of a showing of the existence of a substantial probability of a change of disability that would warrant a reopening.

Since the Board did not misconstrue controlling statutes or precedent, the opinion of the Board dismissing the appeal and affirming the CALJ's order denying the motion to reopen is affirmed.

ALL CONCUR.

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