

RENDERED: AUGUST 22, 2008; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-000456-WC

GERALDINE HALL

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-03-66747

APPALACHIAN REGIONAL HEALTHCARE, INC.;
HON. LAWRENCE F. SMITH, ADMINISTRATIVE
LAW JUDGE; AND WORKERS' COMPENSATION
BOARD

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: ACREE, DIXON AND TAYLOR, JUDGES.

ACREE, JUDGE: Geraldine Hall appeals from a decision of the Workers' Compensation Board which reversed the Administrative Law Judge's order on a petition for reconsideration. In his original order, the ALJ found Hall sustained a three percent whole body impairment due to a work-related injury. In her petition

for reconsideration, Hall claimed the ALJ erred by assigning an impairment rating before she had reached maximum medical improvement. The ALJ agreed and issued a second order rescinding his prior finding of partial permanent impairment and granting total temporary disability until Hall could schedule and recover from knee replacement surgery. On appeal, the Board reversed the second order because the ALJ exceeded his statutory authority by changing a factual finding. We agree.

At the time of her injury, Hall was working for Appalachian Regional Healthcare, Inc. as a registered nurse. Her job duties included providing in-home nursing care. She was required to carry supplies, turn patients in their beds, and help them get in and out of bed. In addition, some of her patients lived in areas with poorly maintained roads and driveways, resulting in Hall having to walk up hills to reach some homes. She was sixty years old and had been in the nursing profession for over twenty years when she was injured.

In November 2003, Hall was alighting from her vehicle onto a dirt and gravel road when her left knee twisted and gave out. She fell toward the ground, catching herself on the side of her vehicle and ending up in a squatting position. Hall was able to finish her shift and to work the next day, but she later sought medical care for the pain in her knee. She was prescribed pain medication and taken off work. Hall notified her employer of her injury and filed a claim for workers' compensation benefits. Dr. Gregory D'Angelo performed arthroscopic surgery on Hall's knee in March 2004 to relieve symptoms caused by her injury

the previous November. She remained on light duty after the surgery until June 2004 when she temporarily ceased work because her employer was unable to accommodate her medical restrictions. Hall was released from restrictions and returned to her regular duties in July 2004.

A year and a half later, Hall's knee troubles began again. She experienced pain and swelling and her left knee sometimes would lock up. Dr. D'Angelo recommended that Hall undergo knee replacement surgery. In March 2006 at a benefits review conference, the ALJ extended the time for taking proof to allow the parties to present evidence of whether the knee replacement surgery was necessary and compensable. Hall requested total temporary disability in September, claiming that Appalachian could no longer provide her with employment within her medical restrictions.

The ALJ issued an order awarding benefits on May 8, 2007. The order specifically stated that the only contested issues were the extent and duration of disability and the compensability of the proposed knee replacement surgery. Opinions from several doctors were offered, rating Hall's disability as low as one percent and as high as seven percent. The ALJ accepted the three percent whole person impairment found by Dr. D'Angelo as the most persuasive, although he noted the doctor's caution that Hall's rating could increase following knee replacement surgery. The ALJ was also persuaded by Dr. D'Angelo's opinion that the knee replacement surgery was necessary because of Hall's work-related injury. In addition, the ALJ refused to find that Hall was permanently totally disabled,

despite her inability to return to the work for which she was trained, and found that she was entitled to vocational rehabilitation.

Both parties filed petitions for reconsideration, but only Hall's arguments are relevant to this appeal. Hall claimed that the ALJ's decision that she was entitled to knee replacement surgery should have prevented any determination of her level of impairment until after she reached maximum medical improvement post-surgery. She further requested temporary total disability benefits until after she recovers from the surgery. The ALJ found that the original order contained errors and entered an amended order on July 24, 2007. In this second order, the ALJ rescinded the portion of the prior order assigning Hall an impairment rating. He placed her claim in abeyance until she should reach maximum medical improvement after knee replacement surgery and ordered Appalachian to pay temporary total disability benefits from the date on which Hall ceased employment until she recovers fully from surgery.

Appalachian filed a second petition for reconsideration, arguing that the ALJ abused his discretion when he rescinded the previous determination that Hall was permanently partially impaired and placed the claim in abeyance. The petition was denied, and Appalachian appealed to the Board presenting the same argument. In its decision reversing and remanding, the Board agreed that the ALJ abused his discretion when he modified his previous decision, made on the merits of the claim. The Board recognized that Kentucky Revised Statute (KRS) 342.281 only allowed the ALJ to correct patent errors appearing on the face of his prior

order. Further, the Board reminded Hall that KRS 342.125 would allow her to move to reopen the claim should she experience a period of temporary total disability post-surgery, or an increase in permanent partial disability once she has fully recovered. Consequently, the ALJ was ordered to reinstate his order of May 8, 2007. This appeal followed.

On appeal, Hall argues that the ALJ did not abuse his discretion in rescinding his finding that she was partially permanently disabled and placing the claim in abeyance pending her recovery from knee replacement surgery. KRS 342.281 specifically limits the ALJ's authority in response to a petition for reconsideration to "the correction of errors patently appearing upon the face of the award[.]" "This statutory limitation . . . expresses a legislative policy that the [ALJ] shall not have authority to reverse [himself] on the merits of a claim." *Beth-Elkhorn Corp. v. Nash*, 470 S.W.2d 329, 330 (Ky. 1971). The Kentucky Supreme Court has further held that "a logical extension of the fact-finder's authority to correct errors on petition for reconsideration is the authority to decide a still unresolved question on the merits." *Bullock v. Goodwill Coal Co.*, 214 S.W.3d 890, 893 (Ky. 2007). Thus, the outcome of Hall's appeal turns on the question of whether the ALJ's second order decided a question which had not been resolved on the merits in the order of May 8, 2007.

Hall argues that permanent partial disability benefits could not be properly awarded until she reached maximum medical improvement which, she contends, will not occur until sometime after her knee replacement surgery.

Therefore, she claims the ALJ made a patent error in failing to award her temporary total disability benefits until such time as she recovered from the proposed knee replacement surgery. We disagree with this characterization of the proceedings.

As previously noted, the only issues before the ALJ at the time the original order was issued were the extent and duration of Hall's disability and the compensability of the surgery recommended by Dr. D'Angelo. 803 Kentucky Administrative Regulation §13(14) states that issues which are not contested at the benefit review conference shall not be subject to further proceedings. Thus, when Hall and Appalachian stipulated to all of the issues regarding her claim, except the two identified as contested in the ALJ's May 8, 2007, order, Hall failed to preserve maximum medical improvement as an issue. Further, all of the medical experts who submitted evidence opined that Hall had reached maximum medical improvement from the injury and the first surgery.

After reviewing the medical records of several physicians who treated or evaluated Hall, the ALJ made a factual finding that she suffered a three percent permanent impairment. He further ordered Appalachian to cover the cost of the proposed knee replacement surgery. In response to the parties' petitions for reconsideration, the ALJ issued a second order addressing Hall's newly raised contention that she would not reach maximum medical improvement until after her recovery from the surgery.

[Appalachian] has filed a response correctly noting that the only contested issues in the claim were extent and duration and the compensability of [Hall's] total knee replacement. The issue of whether [Hall] was at maximum medical improvement was never preserved and [Hall] did not request that the claim be placed in abeyance or that [temporary total disability] be reinstated.

While this Administrative Law Judge agrees with the defendant's position, it is clear that since I awarded the medical treatment [that Hall] has sought, the claim must be placed in abeyance during the time of her recovery from surgery until she reaches maximum medical improvement. I also agree that temporary total disability benefits should be restarted and continue pursuant to the statute until [maximum medical improvement] is achieved. To that extent, my original opinion, order, and award contained errors on its face relating to those issues and [Hall's] petition should be granted.

...

Having reviewed the petitions for reconsideration filed by the parties and being otherwise sufficiently advised, IT IS HEREBY ORDERED that the opinion, order, and award of May 8, 2007 is hereby corrected and amended as follows:

1. The determination of occupational disability is hereby rescinded. . . .

(Order of the Administrative Law Judge, dated July 24, 2007).

Although Hall would have us believe that the ALJ's second order merely dealt with issues that were previously unresolved, this simply is not so. Hall argued before the ALJ that she was one hundred percent occupationally disabled. The ALJ made a factual finding that Hall's permanent impairment was only three percent. It was this finding, made on the merits of the medical evidence presented at the hearing, which the ALJ's second order sought to rescind. The

extent of Hall's permanent partial disability was not an issue left unresolved by the ALJ's initial order. Thus, the language in the second order which attempted to unmake a factual finding exceeded the statutory authority granted by KRS 342.281. Consequently, the Board properly determined that the ALJ's subsequent decision must be reversed and remanded for reinstatement of the original order.

As noted by the Board, Appalachian does not dispute that it would be liable for temporary total disability benefits in the event that Hall does decide to undergo the knee replacement surgery. However, the General Assembly has also furnished Hall with a legislative remedy to address that situation. KRS 342.125(1)(d) permits an ALJ to reopen a claim and review an award where "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" causes a change in a claimant's disability. Thus, Hall could request temporary total disability during her recovery from knee replacement surgery and even an increase in the award of partial permanent disability benefits if Dr. D'Angelo's prediction that her level of permanent impairment would increase after the surgery is correct.

For the foregoing reason the order of the Workers' Compensation Board, reversing and remanding this case to the ALJ with instructions, is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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Katherine Banks
Pikeville, Kentucky

BRIEF FOR APPELLEE,
APPALACHIAN REGIONAL
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