

RENDERED: DECEMBER 12, 2008; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2008-CA-000856-WC

REBECCA DAWSON

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-00-01244

CORNERSTONE CARE, LLC.,  
HON. RICHARD M. JOINER, ALJ,  
AND WORKERS' COMPENSATION  
BOARD

APPELLEES

OPINION  
AFFIRMING

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BEFORE: CAPERTON, KELLER AND NICKELL, JUDGES.

CAPERTON, JUDGE: Rebecca Dawson appeals the April 4, 2008, order of the Kentucky Workers' Compensation Board (WCB), affirming the November 8, 2007, opinion and order of the Administrative Law Judge (ALJ), which was issued on remand from a Court of Appeals opinion rendered on June 22, 2007.

On remand, the ALJ dismissed Dawson's motion to reopen for the purpose of claiming permanent total disability (PTD) benefits from her claim against appellee, Cornerstone Care, LLC. Having reviewed the record and applicable law, we affirm.

Dawson sustained a work-related back injury on July 31, 1999, for which she filed the instant claim. Following a low back fusion surgery, Dawson settled her claim on May 4, 2001, based on a 23% permanent partial impairment rating. This included an exclusion for a preexisting active 8% impairment attributable to a previous discectomy and the application of the 1.5 multiplier for lack of physical capacity to return to the type of work performed at the time of injury.

On December 17, 2003, Dawson filed a motion to reopen her claim for the purpose of seeking temporary total disability (TTD) benefits pursuant to KRS 342.125(3). Over the objection of Cornerstone Care, the claim was reopened by the CALJ on January 29, 2004, for assignment to an ALJ.

On February 17, 2004, this matter was assigned to the ALJ and proof was scheduled. Although Cornerstone filed a timely notice of claim denial, TTD benefits were voluntarily initiated. The matter thus remained in abeyance pending such time as Dawson reached maximum medical improvement. The claim was removed from abeyance on June 30, 2005, and proof was taken. To date, all medical experts in this claim have concurred on a 23% permanent partial impairment rating for Dawson's back, which was the same rating upon which her

claim was initially settled. During the taking of proof, Dawson conceded that she never returned to work following her 1999 injury, as she had not experienced sufficient relief from her pain. Dawson also confirmed that her current pain remains localized in the same area as at the time of settlement, but is more intense.

A benefit review conference was held on March 1, 2006. The ALJ considered whether Dawson had sufficiently demonstrated a change in her condition so as to allow reopening under KRS 342.125. On April 7, 2006, the ALJ issued an order dismissing Dawson's claim for reopening based upon a lack of evidence of an increase in her permanent impairment rating.

The ALJ characterized Dawson's claim on reopening as one brought under KRS 342.125(1)(d), which allows the ALJ to reopen and review an award based upon a "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 ALJ interpreted this to mean that "[u]nder this section, a plaintiff must show a change of disability with objective medical evidence of a worsening of impairment." The ALJ found that Dawson had failed to meet this standard, and dismissed the reopening.

Dawson appealed the ALJ's dismissal to the WCB, asserting that the ALJ erred as a matter of law in concluding that Dawson's claim could not be reopened in the absence of evidence of an increased permanent impairment rating. In an August 11, 2006, decision, the Board found it error for the ALJ to invoke the procedural requirement of KRS 342.125(1)(d), finding that it applied only to the

threshold question of whether the motion to reopen established a prima facie case so as to allow the claim to be assigned for the taking of proof and a decision on the merits. The Board further concluded that the ALJ's determination should have addressed the merits of Dawson's claim for PTD, which does not require evidence of an increase in the percentage of permanent impairment.

Cornerstone appealed to this Court. On June 22, 2007, this Court rendered a decision affirming the Board, though on different grounds. In so doing, we held that contrary to the findings of the Board, it was not error for the ALJ to address the issue of whether Dawson had established a prima facie case for reopening to claim PTD benefits under KRS 342.125(1)(d) because the issue was tried by the implied consent of the parties, and because the original order reopening the claim is "innately interlocutory" and may be revisited upon the merits during the pendency of the claim.

Nevertheless, this Court noted that in the interim between the opinion of the Board and that of the Court of Appeals, the Supreme Court rendered a decision in *Colwell v. Dresser Instrument Division*, 217 S.W.3d 213 (Ky. 2006), in which it interpreted the "worsening of impairment" for purposes of reopening to mean "a greater loss, loss of use, or derangement of a body part, organ system, or organ function due to a condition caused by the injury ..." and not necessarily a greater impairment rating. Accordingly, as the ALJ had dismissed Dawson's claim based upon her failure to establish an increase in impairment, which this Court interpreted to mean impairment *rating*, the matter was vacated and remanded to the

ALJ for reconsideration of his decision to deny reopening of Dawson's claim for PTD benefits. In remanding, this Court specifically directed the ALJ to make his findings on remand in accordance with *Colwell*.

On remand, this matter was briefed to the ALJ, who rendered an opinion and order on November 8, 2007. In that opinion, the ALJ specifically acknowledged the standard for reopening set forth by the Supreme Court in *Colwell*, stating:

The Kentucky Supreme Court, in *Colwell v. Dresser Instrument Division*, 217 S.W.3d 213 (Ky. 2007)[sic], decided that the phrase 'worsening of impairment' in KRS 342.125 referred to worsening of impairment as impairment is defined in the *AMA Guides*, not a worsening of impairment rating. The Court of Appeals, in this case, has instructed the Administrative Law Judge to determine whether there has been a worsening of impairment as identified by objective medical findings which demonstrate that an injured worker suffers a greater loss, loss of use or derangement of a body part, organ system, or organ function due to a condition caused by the injury.

After so stating, the ALJ reviewed the evidence of record and rendered an opinion stating that, after a review of all medical evidence and the briefs of the parties, he found no indication of any objective medical findings to support a determination of worsening impairment. The ALJ noted that aside from Dawson's own testimony, there was no objective medical evidence of greater loss of use, or derangement of a body part, organ system, or organ function since the date of initial settlement. Thus, the ALJ found that the claim could not be reopened pursuant to the standards set forth in *Colwell*.

Dawson appealed to the WCB, who upheld the ALJ. The WCB correctly framed the issue in this matter as: what factors may an ALJ properly consider in determining whether a claimant has increased disability on reopening, in light of the recent *Colwell* holding.<sup>1</sup> As noted by the WCB, KRS 342.0011(33) defines “objective medical findings,” as “information gained through direct observation and testing of the patient applying objective or standardized methods.” Likewise, in *Gibbs v. Premier Scale Co.*, 50 S.W.3d 754 (Ky. 2001), the Supreme Court established that a harmful change can indirectly be established through information gained from direct observation, and/or testing applying objective or standardized methods that demonstrate the existence of symptoms of such a change.

Citing to KRS 342.0011(33) and *Gibbs*, the Board found it clear that the factors to be considered by the ALJ must be supported by *objective* medical findings. The Board noted, and we believe correctly, that while a claimant’s testimony may be credible, a diagnosis of a harmful change based solely on complaints of symptoms is not sufficient to support an increased award on reopening.

On reopening, Dawson asserts that the findings of Drs. Troutt and Mazloomdoost indicated increased pain, and such was sufficient to support an award of total occupational disability. The Board found that complaints of increased pain alone, even if considered a “diagnosis,” do not constitute objective

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<sup>1</sup> In *Colwell* the Supreme Court held that an increased impairment rating is not always necessary for an award of permanent total disability benefits on reopening.

medical evidence of the nature required by KRS 342.0011(33). As the Board correctly noted, “While a diagnosis based solely on complaints of symptoms may be valid for the purpose of medical treatment, KRS 342.0011(33) requires more.”

Dawson now appeals the decision of the Board to this Court. When reviewing a decision of the Workers’ Compensation Board, the function of the Court of Appeals is to correct the Board only where it perceives the Board 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*, 827 S.W.2d 685, 687-88 (Ky. 1992). We review this matter with that standard in mind.

In the instant appeal, Dawson argues that the Board incorrectly reviewed this matter under a substantial evidence analysis. Dawson asserts that increased pain which has caused loss of use is evidence of a greater loss of use of a body part, which is documented by objective findings, namely, muscle spasms. Having reviewed the record in detail, we concur with the Board that increased complaints of pain alone, even if translated into a “diagnosis” by a physician, do not constitute objective medical evidence of a worsening of impairment as required by KRS 342.0011(33) and *Gibbs*, nor do we believe it to be sufficient to satisfy the standards recently set forth by our Supreme Court in *Colwell*.

Dawson also argues that the muscle spasms documented by Drs. Troutt and Mazloomdoost constitute the necessary objective findings to document greater loss of use of a body part and, thus, greater impairment.

While we agree that muscle spasms in and of themselves can constitute objective findings, in this particular instance, we find it significant that Dawson complained of muscle spasms prior to the initial settlement of her claim, and as long ago as 2001. Accordingly, we do not believe that continuing findings of muscle spasms constitute the necessary evidence of worsening of impairment, or greater loss of use of a body part.

Furthermore, in our review of the record, we find no evidence that either Dr. Troutt or Dr. Mazloomdoost associated Dawson's subjective complaints of increased pain with muscle spasms. Lastly, we find it significant that the issue of muscle spasms was not raised by Dawson herself when she was asked to compare her condition at the time of reopening with her condition at the time of settlement. Indeed, the only change identified by Dawson was a greater intensity of pain. While we certainly do not doubt Dawson's veracity, we believe that this testimony alone, even if credible, does not rise to the standards set by existing statutory and case law for documentation of a greater loss of use or worsening of impairment as proven by objective medical findings.

Having reviewed this matter in detail, we cannot find that the Board has overlooked or misconstrued controlling law, nor has it committed an error in assessing the evidence so flagrant as to cause gross injustice. We believe that in this instance, the Board has correctly construed both *Colwell* and *Gibbs*, and has correctly applied existing statutory law. Accordingly, we hereby affirm the decision of the Board in upholding the ALJ's dismissal of this matter on reopening.

NICKELL, JUDGE, CONCURS.

KELLER, JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANT:

David R. Marshall  
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BRIEF FOR APPELLEES:

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