

RENDERED: AUGUST 21, 2015; 10:00 A.M.
 NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2015-CA-000478-WC

COURTNEY TAYLOR

APPELLANT

v.
PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-07-84763

WHITLEY COUNTY HOME HEALTH;
HON. JEANIE OWEN MILLER,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING AND REMANDING

*** * * * *

BEFORE: COMBS, NICKELL, AND VANMETER, JUDGES.

COMBS, JUDGE: Courtney Taylor petitions for review of an opinion of the
Workers' Compensation Board that vacated and remanded a decision of the

Administrative Law Judge (ALJ). In a reopening proceeding, the ALJ awarded Taylor permanent total disability benefits for the worsening of a work-related back injury sustained in June 2007. Taylor contends that the Board erred by requiring the ALJ to detail her findings to an extent not required by the provisions of our workers' compensation act. Finding no error, we affirm.

Taylor, a home health care nurse, suffered a work-related back injury on June 14, 2007. She filed a workers' compensation claim against her employer, Whitley County Home Health, and decided to undergo lumbar spinal fusion surgery in April 2008. In July 2009, Taylor was able to return to work in a less demanding position as a school nurse.

After considering evidence presented at a hearing conducted in October 2009, the ALJ found that Taylor had sustained a 22% permanent impairment as a result of her work-related injury. Since it was determined that Taylor lacked the physical capacity to perform her previous work, her award was enhanced by the triple multiplier provided for in Kentucky Revised Statute[s] (KRS) 342.730(1)(c)(1). The opinion and award were entered on December 11, 2009.

Taylor began missing significant periods of work in 2011. Because she felt that her back condition had worsened substantially, she left her employment as a school nurse in September 2012.

Taylor filed a motion to reopen her workers' compensation claim in November 2013. The motion was accompanied by the report of Dr. David Muffly, who indicated that as a consequence of the lumbar fusion at L5-S1, degenerative

changes to Taylor's low back meant that she could no longer perform even sedentary work on a consistent basis. Dr. Muffly assigned an additional 3% impairment rating attributable to Taylor's pain.

In response, Home Health submitted the report and deposition of Dr. Joseph Zerga. Dr. Zerga performed an independent medical evaluation of Taylor in May 2014 and compared his findings to a similar evaluation that he had conducted in 2009. Dr. Zerga indicated that there had been no objective medical changes to Taylor's condition since the ALJ's determinations were made on December 11, 2009, and that Taylor was capable of engaging in exactly the same type of activities in 2014 as she had been in 2009. Dr. Zerga questioned the necessity of Taylor's current prescription pain medication regimen and criticized the findings and conclusions of Dr. Muffly -- specifically his assignment of an additional 3% impairment for pain. Dr. Zerga indicated that Taylor should be weaned from Oxycontin.

Home Health also submitted the report and deposition of Dr. Henry Tutt. Dr. Tutt performed an independent medical evaluation of Taylor in April 2014. He indicated that Taylor's neurological examination was "perfectly normal"; that her physical condition remained unchanged from 2009; and that no increase in her initial impairment rating was warranted. Dr. Tutt stated that Taylor had exhibited signs of symptom magnification upon his examination. He was also critical of Taylor's pain relief regimen and surmised that she had developed an iatrogenic narcotic dependence, which is a medical condition inadvertently resulting from a

physician's treatment. Dr. Tutt suggested that Taylor should be completely weaned from narcotic analgesics.

Additionally, the medical records of Dr. El-Naggar, Taylor's treating physician, were filed. Diagnostic studies performed by Dr. El-Naggar in February 2011, confirmed to him that Taylor's fusion was solid and stable. Dr. El-Naggar was not persuaded that Taylor's condition had deteriorated or that her work restrictions had increased since 2009.

After conducting a hearing on the matter in July 2014, the ALJ concluded that Taylor had suffered a worsening of her condition and awarded her benefits based upon a permanent total occupational disability. Home Health filed a timely petition for reconsideration in which it argued that the record was devoid of any objective medical evidence of a worsening of Taylor's impairment and occupational disability since the date of her December 2009 award. It also complained that the ALJ's findings were legally deficient as she had failed to identify any evidence beyond Taylor's subjective complaints of pain in support of her claim. Finally, Home Health requested a specific finding as to whether Dr. Muffly's assignment of a 3% impairment rating for pain conformed to provisions of the *AMA Guides to the Evaluation of Permanent Impairment*. The ALJ denied the petition, and Home Health appealed to the Board.

On appeal, the Board concluded that the ALJ's opinion and award failed to include sufficient findings of fact and conclusions of law which would allow for a meaningful review of her determination that Taylor sustained a worsening of her

occupational disability after December 11, 2009. While the Board rejected Home Health's claim that Dr. Muffley's conclusions were necessarily based solely upon Taylor's subjective complaints, it agreed that the ALJ's failure to identify the objective medical evidence relied upon by Dr. Muffly required the award to be vacated. Finally, the Board determined that upon remand the ALJ should determine whether Dr. Muffly's assessment of an additional impairment for pain conformed to standards set out in the *AMA Guides*.

The applicable standard of the Board's review differs depending upon whether questions of fact or law are presented for its consideration. As the claimant, Taylor had the burden of proving each of the essential elements of her claim upon reopening. *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735 (Ky.App. 1984). As the fact-finder, the ALJ was free to judge the credibility of the testimony and to choose which evidence to believe. *Caudill v. Maloney's Disc. Stores*, 560 S.W.2d 15 (Ky. 1977). Where the claimant has been successful before the ALJ, the findings of fact cannot be disturbed as long as they are supported by substantial evidence of probative value. *Special Fund v. Francis*, 708 S.W.2d 641 (Ky. 1986). However, the ALJ's application of the *law* to the facts as she finds them is subject to the Board's plenary review. *A & A Mech., Inc., v. Thermal Equip. Sales, Inc*, 998 S.W.2d 505 (Ky. App. 1999). When reviewing the Board's decision, we reverse *only* where the Board has overlooked or misconstrued controlling law or has so flagrantly erred in evaluating the evidence that is has

caused gross injustice. *Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685 (Ky. 1992).

In *Arnold v. Toyota Motor Mfg.*, 375 S.W.3d 569 (Ky. 2012), the Supreme Court of Kentucky observed that provisions of KRS 342.275(2) and KRS 342.285 contemplate and require an opinion that: summarizes the conflicting evidence concerning disputed facts; weighs that evidence to make findings of fact; and determines the legal significance of those findings. The Court emphasized that only where an opinion summarizes the conflicting evidence accurately and states the evidentiary basis for the ALJ's findings "does it enable the Board and the reviewing courts to determine in the summary manner contemplated by KRS 342.285(2) whether the finding is supported by substantial evidence and reasonable." *Arnold*, 375 S.W.3d at 61-62.

Here, the Board determined that the ALJ's opinion did not provide an adequate evidentiary basis for her finding that Taylor is permanently and totally disabled. The Board observed that "Dr. Muffly's opinion is the only opinion which could be relied upon by the ALJ in finding there had been a change of disability as shown by objective medical evidence of a worsening of impairment." Opinion at 21. While the ALJ stated that "she had relied upon Dr. Muffly's opinion she did not reference the objective medical evidence which supports his opinion Taylor had a worsening of impairment since [the award made in December 2009]." *Id.* The Board concluded that "it was incumbent upon the ALJ to ensure Dr. Muffly's opinion was based upon objective medical evidence." *Id.*

We agree that the disputed award failed to articulate the necessary evidentiary basis for the ALJ's opinion that Taylor was entitled to the benefits awarded. The record contains conflicting objective medical evidence which would support a finding either of the existence -- or of the absence -- of evidence sufficient to justify the finding of a worsening of Taylor's impairment and occupational disability. As the Board aptly noted, “[t]he ALJ's reference to Taylor's testimony, Dr. Muffly's opinion, and other medical records does not sufficiently advise this Board or the parties of the objective medical evidence which supports Dr. Muffly's opinions.” Opinion at 22. We agree that the ALJ is required to identify specifically the objective medical evidence by which she was persuaded that Taylor had established a worsening of her impairment and a change in disability since the award of December 2009.

Additionally, we are not persuaded that the Board erred by concluding that the ALJ is required to address the issue of whether Dr. Muffly's assignment of a 3% impairment rating for pain conformed to provisions of the *AMA Guides*. The propriety of Dr. Muffly's impairment rating was a contested issue throughout the proceedings, and Home Health specifically requested a finding on the issue. Since the finding could arguably support the conclusion that Taylor had established a worsening of impairment through objective medical evidence, the Board did not err by determining that the ALJ must address the issue upon remand.

We affirm the opinion of the Workers' Compensation Board.

Consequently, the claim is remanded for further proceedings in accordance with its requirements.

ALL CONCUR.

BRIEF FOR APPELLANT:

John E. Anderson
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**BRIEF FOR APPELLEE WHITLEY
COUNTY HOME HEALTH:**

Ralph D. Carter
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