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Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-001627-WC

KINDRED HEALTHCARE — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-17-99840

CARLYE P. HARPER; DOUGLAS W. GOTT, CHIEF ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GOODWINE, KRAMER, AND MAZE, JUDGES.

MAZE, JUDGE: KRS[1] 342.710(1) establishes "restoration of the injured employee to gainful employment" as one of the primary purposes of Kentucky's

[1] Kentucky Revised Statute.

Workers' Compensation Act. To that end, the General Assembly ensured that an employee whose covered injury precludes returning to work for which he has previous training or experience "*shall be entitled* to such vocational rehabilitation services, including retraining and job placement, as may be reasonably necessary to restore him to suitable employment." KRS 342.710(3)(emphasis added). Kindred Healthcare argues in this appeal that the Workers' Compensation Board erred in concluding that because the statute does enumerate a time frame for seeking vocational rehabilitation benefits, a claimant may assert the right to those benefits even after her award has become final. Discerning no error in the decision of the Board, we affirm.

Appellee Carlye Harper sustained a work-related injury in the course of her employment with Kindred Healthcare for which she received an award based upon an eight percent impairment rating. Finding that the restrictions imposed by her treating physician precluded Harper's return to work as a certified occupational therapist, the Administrative Law Judge enhanced her permanent partial benefits by application of the triple multiplier set out in KRS 342.730(1)(c).

Pertinent to the matter before us, the ALJ also denied Harper's request for a vocational rehabilitation evaluation due to her failure to preserve entitlement to those benefits as a contested issue at the benefit review conference or at the hearing. After Kindred's motion for reconsideration was denied, neither party

appealed and the award became final. A little more than one year later, after obtaining a vocational evaluation on her own, Harper filed an electronic motion to reopen in which she stated, "[t]his is an application for vocational rehabilitation benefits. It is not a motion to reopen as provided in KRS 342.125, but is the closest available option available on LMS."[2] The Chief Administrative Law Judge denied Harper's motion on the basis that "an attempt to obtain vocational rehabilitation benefits is not a cause to reopen under KRS 342.125(1), and because she waived a claim to those benefits in the original litigation." Harper then filed a petition for reconsideration explaining that although she did not request vocational rehabilitation benefits in her brief before the ALJ, she had requested a vocational evaluation. Harper also requested a clarification of the CALJ's reasoning in denying her motion for purposes of appellate review. The CALJ again denied Harper's motion for vocational rehabilitation benefits stating that she "can only be entitled to voc rehab by having sought it in the original litigation (which she did not preserve); or possibly proving entitlement to it within a reopening under one of the grounds permitted by KRS 342.125 (which she has not sought to do)[.]"

Harper then sought relief in an appeal to the Board arguing that KRS 342.710 does not contain language permitting the limitations imposed by the

[2] The Department of Workers' Claims requires attorneys to use the Litigation Management System's web-based forms for all pleadings. https://labor.ky.gov/comp/Pages/Claims-Process.aspx

CALJ. Rather, Harper asserted that the statute directs that an employee *shall* be entitled to vocational rehabilitation services upon a showing that she is unable to return to work "for which she has previous training or experience." Citing *Pinkston v. Teletronics, Inc*., 4 S.W.3d 130 (Ky. 1999), the Board reversed the decision of the CALJ, noting that the Supreme Court of Kentucky allowed a claimant to utilize KRS 342.125 to seek mileage and an extension of rehabilitation benefits despite the fact that none of the KRS 342.125 grounds were implicated. The Board also relied upon *Neighbors v. River City Interiors*, 187 S.W.3d 319 (Ky. 2006), in concluding that "KRS 342.125(1) is not the sole vehicle by which reopening can be achieved in order to obtain vocational rehabilitation" and that "KRS 342.710 contemplates motions to reopen based on grounds set forth exclusively within this statute." The Board remanded the matter to the CALJ for a determination of Harper's entitlement to vocational rehabilitation benefits.

In this appeal, Kindred argues that the Board exceeded its authority in creating a new, unlimited right to seek vocational rehabilitation by ignoring the clear language of KRS 342.125(1) which limits a claimant's right to reopen a claim to specifically enumerated circumstances. Kindred also insists that the Board's reliance upon *Pinkston* and *Neighbors* is misplaced, asserting that those cases were based upon a previous version of KRS 342.710 and both involved situations in which vocational rehabilitation benefits had been awarded as part of the original

claim. Finally, Kindred contends that the Board failed to recognize the preclusive effect of the ALJ's unappealed denial of vocational rehabilitation benefits. We are not persuaded that any of these contentions require reversal and thus affirm the decision of the Board.

Our analysis commences with our Supreme Court's explanation of the practical application of the vocational rehabilitation statute:

> KRS 342.710(3) entitles an injured worker who is unable to perform work for which he has previous training or experience to receive reasonable vocational rehabilitation services at the worker's request. It also permits an ALJ to order a rehabilitation evaluation at the employer's request or upon the ALJ's own motion. The Department's procedure for implementing KRS 342.710(3) appears to be informal and to involve a subsequent ALJ order only in instances where the parties disagree. We infer this based on Mr. Mahin's letter of December 6, 2002; on 803 KAR 101, § 4(1), which indicates that a Department employee will assist an injured worker in implementing rehabilitation services; and on 803 KAR 25:101, § 4(6), which provides:
>
> > Upon receipt of the vocational evaluation report, the employee and employer or insurance carrier **shall cooperate in the implementation of services designed to restore the employee to suitable employment.**
>
> KRS 342.710(3) and 803 KAR 25:101, § 4 anticipate that a Department representative will present the results of the evaluation and the available options for physical and/or vocational rehabilitation to the parties. They also anticipate that the parties will cooperate in devising and implementing a reasonable plan for the injured worker's

> rehabilitation. KRS 342.710(5) and (6) help to ensure their cooperation.

Neighbors, 187 S.W.3d at 323-24. The *Neighbors* court also emphasized that "[p]ost-award disputes concerning vocational rehabilitation under KRS 342.710(3) and requests for a reduction in benefits under KRS 342.710(5) are matters that arise under Chapter 342; therefore, KRS 342.325 grants an ALJ jurisdiction to decide them." *Id*. at 324. The Board interpreted *Neighbors* as supporting the conclusion that KRS 342.125(1) "is not the sole vehicle by which reopening can be achieved in order to obtain vocational rehabilitation" and that "KRS 342.710 contemplates motions to reopen based on grounds set forth exclusively within this statute." We agree.

In both *Pinkston* and *Neighbors*, the Supreme Court permitted a claim to be reopened in order to consider requests to modify awards of vocational rehabilitation despite the fact that neither request implicated the criteria set out in KRS 342.125(1). More specifically in *Neighbors*, the Supreme Court rejected the claimant's contention that KRS 342.125 did not permit reopening under the circumstances. *Neighbors* also refuted the suggestion that due to KRS 342.710's silence regarding the mechanism to be used for considering a request to reduce an award, jurisdiction to decide the employer's request for such relief appeared to lie in circuit court. Further, despite Kindred's contention that reopening can occur only if there has been a previous award of vocational rehabilitation benefits, we are

convinced that both the analysis in *Neighbors* and the language of KRS 342.710 are to the contrary.

In our view, the Supreme Court in *Neighbors* attempted to clarify that the vocational rehabilitation benefits provided in KRS 342.710 do not fall neatly within the category of contested issues advanced in a claim. A vocational rehabilitation evaluation may be ordered at the claimant's request, the employer's request, or upon the ALJ's own motion. 187 S.W.3d at 323. KRS 342.710(3) specifically mandates that "[i]n all such instances, the administrative law judge shall inquire whether such services have been voluntarily offered and accepted." And, as the previously cited language from *Neighbors* explained, "[t]he Department's procedure for implementing KRS 342.710(3) appears to be informal and to involve a subsequent ALJ order only in instances where the parties disagree." *Id*. at 323-24.

We also note that Kindred's complaint concerning the creation of a lifetime entitlement to seek vocational rehabilitation benefits is unavailing. Requesting an evaluation or making a request for benefits is a far cry from proving entitlement to such benefits. As any *contested* request for such benefits falls within the purview of an ALJ, the timeliness of such a request is a matter which may be addressed as part of the ALJ's review.

Our conclusion with regard to the nature of vocational rehabilitation benefits also dispels Kindred's contention that the Board erred in failing to give preclusive effect to Harper's failure to appeal the ALJ's refusal to consider her request for a vocational evaluation. The ALJ's refusal stemmed solely from Harper's failure to list a vocational evaluation as a contested issue in the benefit review conference. Unlike truly contested issues, the statute itself places an affirmative duty on the ALJ to "inquire whether such services have been voluntarily offered and accepted" in every case in which an injury precludes a claimant from returning to "work for which he or she has previous training or experience." KRS 342.710(3). And, like the Board, we can

> conceive of situations wherein the injured worker does not perceive vocational rehabilitation is necessary or underestimates the need for vocational rehabilitation during the pendency of the claim. Instead, only after the claim has concluded does the claimant realize that, without some form of vocational rehabilitation, he or she is unable to return to suitable employment. In those cases, the worker is not precluded from seeking rehabilitation to secure suitable employment.

As the Supreme Court emphasized in *Neighbors*, the procedures established by the Department of Workers' Claims envision an informal disposition of vocational rehabilitation benefits, requiring intervention by an ALJ only where the parties disagree. We are therefore persuaded that Harper's failure to appeal the ALJ's

refusal to consider her request for a vocational evaluation did not preclude her from raising the matter of vocational rehabilitation benefits post-award.

Finally, like the Board, we find absolutely no merit in Kindred's contention that improper service barred consideration of Harper's motion to reopen. The failure to serve Kindred's counsel with a paper or email copy of the motion to reopen in no way prejudiced its ability to respond to the motion as its response was filed on LMS within seven days of the filing of the motion.

Because we are convinced that the decision of the Board advances the statutory goal of restoring injured workers to gainful employment, we affirm its decision in this case.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Cate A. Poole Lexington, Kentucky	Rodger W. Lofton Paducah, Kentucky