

IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: August 21, 2003
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2002-SC-0892-WC

FINAL
DATE 9-11-03 EVAG:GROU:HT, D.C.

MARION COUNTY BOARD OF EDUCATION

APPELLANT

APPEAL FROM COURT OF APPEALS

2002-CA-0767-WC

V.

WORKERS' COMPENSATION BOARD NO. 95-5501

CHARLIE LAMPLEY; HON. LLOYD R.
EDENS, ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD

APPELLEES

MEMORANDUM OPINION OF THE COURT

REVERSING

This appeal concerns a claim that arose on January 5, 1995, and in which a 50% occupational disability was awarded on December 20, 1996. In a subsequent reopening proceeding, the Administrative Law Judge (ALJ) determined that the claimant failed to prove an increase in occupational disability under the definition that was effective at the time of his injury. Reversing a decision of the Workers' Compensation Board (Board), the Court of Appeals determined that the claim must be reconsidered because the ALJ misstated certain medical testimony and, furthermore, that the December 12, 1996, version of KRS 342.125(1)(d) governed the standard for reopening. We reverse.

The claimant was born in 1928 and has both a master's degree in education and vocational training as an athletic coach. He worked as a teacher, coach, and athletic director from 1954 until 1977, at which time he was promoted to assistant principal. On

January 5, 1995, he was assaulted by a student and sustained injuries to his jaw, head, and right hip. On the following day, he underwent surgery to repair a femoral neck fracture by implanting various fixation devices into his hip.

During the initial litigation, the claimant testified that he experienced constant hip pain that increased with activity, that he could only sit for 15-20 minutes at a time, and that it was painful to ride in a car for long periods of time. He also complained of difficulty sleeping, difficulty concentrating, and a low energy level. He indicated that his employer had offered him another job but that he could not perform the duties of a principal or assistant principal and was unaware of any other job he could perform.

Robert Davenport testified for the employer. He indicated that he had offered the claimant a job as an assistant principal at a middle school. He explained that the position would have been less demanding than the claimant's former job because the school had fewer students.

Dr. Schaper, the treating orthopedic surgeon, testified that the claimant's right leg was 1/4 inch shorter than the left and that he walked with a slight limp. Furthermore, some of the pins in his hip caused tenderness in the abductor region and upper lateral thigh. In October, 1996, Dr. Schaper assigned a 12% impairment and limited the claimant to lifting or carrying a maximum of 20 pounds but limited frequent and occasional lifting to less than 10 pounds. He limited the claimant to standing or walking for less than 3 hours and to sitting for less than 3 hours. Finally, he prohibited climbing, balancing, kneeling, and crawling and limited the claimant to occasional stooping, crouching, and bending.

Dr. Duran performed an independent examination in March, 1996, noting the difference in leg length. He assigned a 16% impairment and indicated that the claimant

was unable to sit for a very long time in the same position without shifting and standing. He was unable to walk for very long, had a restricted ability to squat or remain with his knees and hips flexed, had a restricted ability to climb ladders, and had some restriction on his ability to climb stairs.

In February, 1996, Dr. Corbett assigned an 8% impairment. In his opinion, the claimant could return to work as an assistant principal with restrictions, including the ability to sit for 5-10 minutes per hour of standing. Other restrictions included limited squatting, stooping, and crawling; no standing and walking for more than 30 minutes; no running or climbing stairs; and no repetitive lifting of more than 40-50 pounds at bench level.

In an award that was entered on December 20, 1996, an ALJ determined that the claimant had a 50% occupational disability. Subsequently, the claimant developed avascular necrosis of the entire femoral head and underwent a total hip replacement in 1999 as well as a revision of the procedure in 2000. On November 22, 1999, he moved to reopen the award.

At reopening, the claimant stated that he had been on disability retirement since June, 1995, and that since the surgeries he suffered from constant hip pain that was made worse by extended sitting or walking. Furthermore, sitting for more than 15-20 minutes caused an increase in symptoms. He also stated that he must wear a special shoe on his right foot because that leg is shorter than his left one. Although he no longer had radiating pain in his right leg, he continued to have difficulty riding long distances in the car, sleeping, and concentrating. Although he had been a basketball coach and was very active before the injury, he could no longer lift weights of more than

20-25 pounds and could no longer perform many of the recreational activities that he did before the injury.

In April, 2001, Dr. Corbett noted a restricted range of motion in the right hip, 1.5 cm. of thigh atrophy, and a 1.6 cm. difference in the length of the claimant's legs. He assigned a 30% impairment but thought that the claimant could perform sedentary work on a part- to full-time basis depending on how quickly he fatigued and whether he was able to change position frequently to relieve pain. Although he no longer thought that an occasional lifting limit of 40-50 pounds would have been appropriate in 1996, he did think that the claimant should presently be restricted from lifting more than 15 pounds.

In November, 1999, Dr. Schaper indicated that the claimant's condition had worsened due to increasing right hip pain. Although stating that the claimant's impairment rating had undoubtedly increased, Dr. Schaper indicated that his condition had not yet stabilized sufficiently to assign a rating. In January, 2001, he indicated that the claimant had reached maximum medical improvement.

After performing an independent medical examination in February, 2001, Dr. Roth assigned a 33% impairment.

In deciding the reopening, the ALJ noted that the sole issue for determination was whether there was a worsening of condition under the definition of "disability" that was effective at the time of the claimant's injury. KRS 342.0011(11). After summarizing the testimony of each witness, the ALJ indicated that at the time the claimant was awarded a 50% disability, he had not returned to work, had rejected an offer of employment as a middle school assistant principal, and testified that it was necessary for him to lie down periodically due to hip discomfort. Turning to the medical evidence, the ALJ stated as follows:

Dr. Schaper stated in the original claim that the Plaintiff could lift a maximum of 20 pounds but less than 10 pounds on a frequent basis with standing and sitting of no greater than three hours. The records of Dr. Schaper have been presented in the reopened claim and stated the Plaintiff could not return to an administrative position working six to eight hours per week. Dr. Corbett testified in the original and the reopened claim and was of the opinion that in both instances the Plaintiff could perform sedentary work.

Relying upon Dr. Corbett "as well as the [claimant's] description of his condition and restrictions placed on him by Dr. Schaper in the original claim," the ALJ concluded that the claimant had failed to prove an increase in disability.

In a petition for reconsideration, the claimant asserted that the ALJ had not provided sufficient factual findings to allow him to ascertain the basis for the decision, but he did not request any specific findings. He also maintained that there was no substantial evidence to support the finding that his occupational disability had not changed since the initial award, asserting the ALJ had failed to consider two elements of the definition of disability, impairment and disfigurement. Finally, he maintained that the evidence compelled a finding of increased disability. Nowhere did he complain that the ALJ misunderstood Dr. Schaper's testimony with respect to the initial claim. After determining that the petition sought only to reargue the merits, the ALJ overruled it.

Appealing, the claimant maintained that although the ALJ had used "the definition of disability which he was obliged to apply," he had "left out part of the definition" and had failed to consider the claimant's impairment and disfigurement. He also maintained that the ALJ had misunderstood Dr. Schaper's testimony when rejecting his assertion of increased disability at reopening because the physician never stated that he could not work in an administrative position for 8 hours a week at the time of the original claim. A third argument was that the ALJ had improperly relied upon

the claimant's allegation of total disability in the initial claim when the finding of a 50% disability was res judicata. Finally, he argued that the evidence compelled an increased award. However, the Board rejected each of the claimant's arguments, determined that the evidence was not so overwhelming as to compel a favorable decision, and affirmed.

Appealing to the Court of Appeals, the claimant maintained for the first time that the ALJ erred by failing to apply the December 12, 1996, version of KRS 32.125(1)(d) and maintained that KRS 342.125(8) characterized the provision as being remedial. He also argued that even if the pre-1996 version of the statute applied, the evidence compelled a favorable award and, alternatively, that the ALJ's decision was based upon a misstatement of Dr. Schaper's testimony. Agreeing with the claimant's final argument, the Court of Appeals reversed. Furthermore, it concluded that McCool v. Martin Nursery & Landscaping, Inc., Ky., 43 S.W.3d 256 (2001), required the amended reopening statute to be applied on remand. This appeal by the employer followed.

The Court of Appeals determined that the ALJ misstated Dr. Schaper's testimony when concluding that there was no change of disability, and, therefore, must reconsider the evidence. Its rationale was that the ALJ had relied partly upon restrictions that Dr. Schaper imposed in the initial claim and that it had been unable to find in the record of the initial claim a statement by Dr. Schaper concerning the claimant's inability to "return to an administrative position working six to eight hours per week." However, a review of the opinion, itself, indicates that the ALJ attributed the statement that is at issue to the records that were "presented in the reopened claim," not to those that were presented in the initial claim. The records from Dr. Schaper that were presented at reopening related to the period after the initial award. As such, the statement would have helped the claimant's case, not hurt it. When the ALJ's actual statements are considered, in

context, it is apparent that the decision was not based upon a mistaken belief that Dr. Schaper thought the claimant could not work in an administrative position for six to eight hours per week at the time of the initial claim. Because there was substantial evidence to support the conclusion that there was no change in the claimant's disability since the initial award, it should not have been reversed on appeal. Finally, the claimant did not ask the ALJ to consider the reopening under the December 12, 1996, version of KRS 342.125(1)(d) and, in fact, conceded to the Board that the definition of disability on the date of injury was correct. Under those circumstances, a question concerning the applicability of the amended statute was not properly before the Court of Appeals and should not have been considered.

The decision of the Court of Appeals is reversed.

All concur.

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