IMPORTANT NOTICE

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THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: March 17, 2005
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2004-SC-0288-WC

FINAL
DATE 6-16-05 Barbi Yeast CDC

RICHIE PHARMACAL — APPELLANT

V.

APPEAL FROM COURT OF APPEALS
2003-CA-1315-WC
WORKERS' COMPENSATION BOARD NO. 96-84861

KATHY DUNN; HON. R. SCOTT BORDERS,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

An Administrative Law Judge (ALJ) granted a motion to reopen the claimant's award for a February, 1996, injury and subsequently increased the income benefit based upon a finding of permanent, total occupational disability. The employer appealed on the ground that the ALJ failed to apply the December 12, 1996, version of KRS 342.125(1) when granting the motion and when awarding increased benefits. Nonetheless, the Workers' Compensation Board (Board) and the Court of Appeals affirmed. Their rationale was that the 1996 amendment was substantive; therefore, the law on the date of injury governed both the motion to reopen and the merits of the claim for increased benefits. We affirm, but our reasoning is different.

The claimant was born in 1965 and had a tenth-grade education. She had worked as a seamstress and then as a receptionist for her father's wrecker service until he retired in 1992. Although she had obtained certification as a nursing assistant, she

later let it expire. In May, 1993, she began working for the defendant-employer's wholesale pharmaceutical company as a "sales executive," selling products to pharmacies and physicians by telephone. The job involved little physical work.

The claimant's injury occurred on February 27, 1996, when she fell and injured her right knee. She underwent surgery to repair a torn meniscus in March, 1996, and attempted to return to work in May, 1996, but was unable to do so. On December 11, 1996, she filed an application for workers' compensation benefits, alleging that she suffered from reflex sympathetic dystrophy (RSD) in her right leg.

Several medical experts testified. Dr. Limbird assigned a 2% impairment to the right knee condition. He thought that RSD was a complication of the claimant's knee surgery, but he did not perform a formal impairment rating examination when he last saw her and could not assign an impairment for the condition. He noted, however, that it warranted various restrictions because it caused the claimant's lower right leg to be weakened and easily fatigued. Dr. Clendennin agreed with the RSD diagnosis and imposed similar restrictions. He assigned a 2% impairment to the right knee condition and assigned a 39% impairment to the right leg based on the RSD. Dr. Johnson agreed with the RSD diagnosis. Dr. Harston took a history and reviewed the claimant's medical records. She imposed various restrictions and assigned a 26% whole-body impairment, attributing a 2% impairment to the meniscal tear and the remainder to the RSD. Dr. Ensalada found nothing wrong with the claimant.

In an award that was rendered on January 12, 1998, the ALJ relied on the testimony and records of Drs. Limbird, Clendennin, and Johnson when concluding that the claimant sustained an appreciable injury, that she developed RSD in her right leg, and that her "symptoms, impairment and occupational disability resulting from the

impairment to her right leg were caused by [her] work-related injury." Convinced that the claimant could continue to work, the ALJ determined that she had sustained a 20% occupational disability. The claimant appealed on the ground that her occupational disability was greater than 20%, but the decision was affirmed by the Board and became final.

On January 14, 2002, the claimant filed a document that was styled as a motion/affidavit to reopen. The sworn statement alleged a post-award change of disability and was signed by counsel but not by the claimant. Accompanying the motion were reports from Drs. Johnson and Konrad. Dr. Konrad's reports indicated that he had implanted a dorsal column stimulator on June 23, 1999, to treat RSD in the claimant's lower right leg. In a January 2, 2002, report, Dr. Johnson noted that devices had been implanted to stimulate the dorsal column of both of the claimant's legs. He diagnosed type 1 complex regional pain syndrome that affected both legs and also diagnosed a bilateral myofascial pain syndrome that affected the spinae erector muscles and rhomboid muscles and was secondary to her abnormal gait. He recommended myofascial trigger point injections and, if they were unsuccessful, Botulinum toxin injections.

The employer objected to the motion. Citing the December 12, 1996, version of KRS 342.125(1)(d), it asserted that the claimant alleged a "change of disability" but offered no factual basis for such a change by submitting an affidavit evidencing the ground for reopening. The employer also asserted that she offered no "objective medical evidence of worsening . . . of impairment due to a condition caused by the injury" or evidence of a change in her physical limitations.

The ALJ passed consideration of the claimant's motion for 20 days to permit her to support the motion with the required affidavit. 803 KAR 25:010E, Section 4(6)(a)2. On March 19, 2002, the claimant filed an affidavit in which she stated that RSD presently affected her left leg as well as her right, causing a "change of disability." The motion was then granted, and the parties proceeded to take proof on the merits.

In addition to the reports from Drs. Johnson and Konrad, the claimant introduced a June 19, 2002, report from Dr. Harston, which compared her condition at the time of the initial claim with her condition at reopening. Dr. Harston noted that the dorsal column stimulator that was implanted in June, 1999, was later replaced with a dual stimulator when the left leg became affected by the pain syndrome. Based on the claimant's present condition, Dr. Harston recommended a morphine pump but noted that the claimant was not yet ready to consider it. Her report noted mild medial inferior scapular winging and paraspinus spasm in the thoracolumbar region that was worse on the right side. She noted that the skin on the claimant's legs was mottled, that both legs were cool, and that the skin was overly moist and clammy. There was soft tissue atrophy on the bottom of her feet, her shoe size had decreased from 7 to 6, and her toenails were curved and talon-like. Patches on her legs no longer had hair, and the texture of the hair that remained was generally finer. Dr. Harston diagnosed the 1996 meniscal tear of the right knee, subsequent surgical repair, and a chronic regional pain syndrome that began in the right leg and spread to the left. She assigned a 9% impairment under the Fifth Edition of the AMA Guides. A second report, dated July 6, 2002, stated that the claimant's condition had worsened between June 23, 1999, and August 1, 2001; that the RSD had spread to the left leg; and that a dual dorsal column stimulator had been implanted.

The claimant also introduced a September 10, 2002, report from Dr. Schooley, a neurosurgeon. He noted that the claimant continued to experience pain where a morphine pump had been implanted and attributed the pain to cutaneous nerve irritation. In his opinion, the claimant could not perform any activity that required her to sit for an extended period of time, nor could she operate any type of equipment due to the morphine. Furthermore, she could neither bend nor lift due to the irritation of nerves as she changed position.

The employer introduced an evaluation from Dr. McInnis, an orthopedic surgeon. He reported a normal vascular examination of the claimant's legs. He found no significant temperature change between her legs, no abnormal sweating pattern in either leg, no hypersensitivity, and no appreciable skin changes. He did note that the claimant ambulated slowly, with a slight limp on the right. He did not doubt the claimant's complaints of pain but questioned the initial RSD diagnosis and expressed an opinion that there was no evidence of true RSD. He thought that the left leg problems probably were not work-related and that the claimant could return to restricted work with excellent treatment.

When the merits of the claimant's request for additional benefits were taken under submission, the employer raised two arguments. Both were based on the December 12, 1996, version of KRS 342.125(1)(d). First, the employer argued that the claimant's motion to reopen was improperly granted because it did not support a prima facie finding of increased disability. Second, addressing the merits, the employer argued that the claimant failed to prove a change of disability as evidenced by objective medical findings of a worsening of impairment.

Rejecting the first argument, the ALJ determined that the claimant's affidavit and the medical reports from Drs. Johnson and Konrad demonstrated a substantial possibility that she would be able to prevail on the merits. Therefore, they adequately supported the motion to reopen. Stambaugh v. Cedar Creek Mining Co., 488 S.W.2d 681 (Ky. 1972). In doing so, the ALJ noted that the initial award was based on surgery for a torn meniscus and on a complex regional pain syndrome, both in the right leg. The affidavit stated that the claimant experienced increased disability and that she relied on the medical reports. They reflected that the pain syndrome presently affected both of the claimant's legs and had necessitated the implantation of a dorsal column stimulator for both legs. Explaining that the merits of the reopening would be decided under the law on the date of injury and also that on the date of the claimant's injury KRS 342.125 permitted reopening upon evidence of a "change of occupational disability," the ALJ concluded that the motion was properly granted. Maggard v. International Harvester Co., 508 S.W.2d 777 (Ky. 1974); Stambaugh v. Cedar Creek Mining Co., supra.

Turning to the merits, the ALJ reiterated that KRS 342.125 permitted reopening upon evidence of a "change of occupational disability" at the time of the claimant's injury. Having reviewed the evidence, the ALJ was convinced that the claimant had shown a post-award worsening of her physical condition and increase in her occupational disability. Dr. Johnson's records documented the fact that both of the claimant's legs were now affected by the pain syndrome and that dorsal column stimulators had been implanted. Furthermore, Dr. Harston testified to a worsening of the claimant's physical condition and an increase in her restrictions. Dr. Schooley was of the opinion that the claimant could not perform even sedentary work if it required her to be seated for an extended period of time. Finally, the claimant testified to a post-

award decrease in the amount of time she could stand before her legs began to swell, to a decrease in the distance she could walk, and to a decrease in the amount of time she could sit before her pain increased and her legs began to swell. Taking into account the claimant's age, limited education and academic skills, and work history, the ALJ concluded that her present occupational disability was total and that she lacked the skill for any significant retraining opportunity. Osborne v. Johnson, 432 S.W.2d 800 (Ky. 1968).

The Board and the Court of Appeals affirmed. Shortly thereafter, this Court rendered Dingo Coal Co. v. Tolliver, 129 S.W.3d 367 (Ky. 2004), in which we considered the effects of the 1996 amendment to KRS 342.125(1) on the reopening of a claim that arose before the amendment's effective date. We explained that, under KRS 342.125, a motion to reopen is the procedural device for invoking the jurisdiction of the Department of Workers' Claims to reopen and amend an otherwise final award. An ALJ must determine that the motion is supported by prima facie evidence of one of the grounds for reopening that are listed in KRS 342.125(1) before further evidence is taken and the merits are considered. We explained that the purpose of the two-step procedure is to avoid putting the respondent to the expense of litigation unless there is a substantial possibility that the movant will able to prevail on the merits. Stambaugh v. Cedar Creek Mining Co., supra. We acknowledged, however, that just as occurred previously in Peabody Coal Co. v. Gossett, 819 S.W.2d 33 (Ky. 1991), changes in the law between the date of injury and the date of a motion to reopen sometimes create inconsistencies between the grounds for granting the motion and the standards for awarding increased benefits when the merits are considered. Noting that Mr. Tolliver received additional benefits at reopening and that the appeal was taken from the

decision on the merits, we determined that the award was supported by substantial evidence and was properly affirmed on appeal.

In summary, KRS 342.125(1)(d) is procedural. It addresses the prima facie showing that is necessary to prevail on a motion to reopen that is filed on or after December 12, 1996, but it has no effect on the substantive proof requirements for a claim that arose before December 12, 1996. As is reflected in KRS 342.125(6), the merits of a worker's right to additional benefits at reopening continue to be governed by the version of KRS 342.730 that was in effect when the worker's injury occurred. Dingo Coal Co. v. Tolliver, supra at 370-71.

An ALJ has the sole authority to judge the credibility of witnesses and the weight of conflicting evidence. KRS 342.285. In the present case, the increased award was supported by what the ALJ found to be the credible testimonies of the claimant, Dr. Johnson, and Dr. Harston, all of whom had testified in the initial proceeding. It was rendered under the version of KRS 342.730 that was in effect on the date of injury. The employer asserts that there was no change in disability, pointing to portions of the claimant's testimony in the initial proceeding in which she stated that she was having some problems with her left leg and was receiving physical therapy for both legs. The fact remains, however, that the ALJ who considered the initial claim determined from the medical evidence that only the right leg was affected at that time. This is not a situation where a condition was both known and disabling during the initial proceeding but raised for the first time at reopening. See Slone v. Jason Coal Co., 902 S.W.2d 820 (Ky. 1995). Although Dr. McInnis's testimony differed from that of the physicians on whom the ALJ relied, the finding of increased occupational disability at reopening was

based on substantial evidence and, therefore, was properly affirmed on appeal. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The employer is correct in its assertion that the 1996 version of KRS 342.125(1) governed the claimant's motion to reopen. Dingo Coal Co. v. Tolliver, supra. But in view of the fact that she succeeded in prevailing on the merits, any error the ALJ might have committed in granting her motion and ordering further proof to be taken would be harmless. See Stambaugh v. Cedar Creek Mining Co., supra. For that reason, it is unnecessary for us to consider whether her prima facie showing complied with the amended provision.

The decision of the Court of Appeals is affirmed.

Lambert, C.J., and Johnstone, Keller, Scott and Wintersheimer, JJ., concur.

Cooper and Graves, JJ., concur in result only.

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