

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000465-WC

MCDONALD'S

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-90-33559

DEBRA PETTY; HON. LAWRENCE
F. SMITH, ADMINISTRATIVE
LAW JUDGE; AND WORKERS'
COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: TAYLOR, CHIEF JUDGE; CAPERTON AND LAMBERT, JUDGES.

LAMBERT, JUDGE: McDonald's petitions for review of an opinion of the

Workers' Compensation Board. The Board affirmed an opinion of an

Administrative Law Judge dismissing the majority of McDonald's claims in this

reopening and medical fee dispute. At issue is the preclusive effect of an earlier opinion of the Board in the same case.

Debra Petty suffered work-related injuries to her neck and lower back as the result of a slip and fall which occurred on August 31, 1990, while she was employed by McDonald's. On September 2, 1993, an Administrative Law Judge (ALJ) entered an opinion and award which found Petty to be 50% permanently disabled as a result of the injury. The award was affirmed by the Board and subsequently by this Court in an opinion rendered on July 21, 1995. The ALJ's opinion and award provided that, in addition to disability benefits, Petty would also recover

of the defendant/employer and/or its insurance carrier for the cure and relief from the effects of the injuries such medical, surgical, and hospital treatment, including nursing, medical and surgical supplies and appliances, as may reasonably be required at the time of the injuries and thereafter during disability.

Petty designated Dr. Cary Twyman, a neurologist, to be her treating physician, and he has continued to treat Petty and prescribe her medications.

Kentucky Revised Statutes (KRS) 342.125(3) provides for a four-year limitations period within which to file motions to reopen workers' compensation awards.

Except for reopening solely for determination of the compensability of medical expenses, fraud, or conforming the award as set forth in KRS 342.730(1)(c)2., or for reducing a permanent total disability award when an employee returns to work, or

seeking temporary total disability benefits during the period of an award, no claim shall be reopened more than four (4) years following the date of the original award or order granting or denying benefits, and no party may file a motion to reopen within one (1) year of any previous motion to reopen by the same party.

The statute further specifies that “claims decided prior to December 12, 1996, may be reopened within four (4) years of the award or order or within four (4) years of December 12, 1996, whichever is later[.]” KRS 342.125(8). In Petty’s case, therefore, the period for reopening her claim, except as to the grounds listed in section (3), expired on December 12, 2000.

On March 27, 2007, McDonald’s filed a motion to reopen and medical fee dispute. It submitted medical reports which claimed that there were no links between Petty’s current physical and psychiatric conditions and the injury which occurred in 1990. McDonald’s also filed a supplemental medical fee dispute with medical documentation purporting to show that there was no objective evidence to support Petty’s ongoing medical treatment, and that any treatment she was receiving was not related to her work injury. At the hearing which followed, evidence was introduced that Dr. Twyman saw Petty on average every six months for treatment. According to Dr. Twyman, Petty suffered from chronic neck and low back pain, which were directly related to the work injury, and from anxiety, depression, migraine and tension headaches, and gastroesophageal reflux disease which he stated were indirectly related to the injury.

By contrast, Dr. Timothy Kriss stated that there was no connection between the 1990 injury and Petty's current symptoms, which he attributed in part to naturally occurring degenerative changes, and described as largely psychological in nature. Similarly, Dr. Douglas Ruth, a psychiatrist, opined that Petty's psychiatric symptoms did not arise as a result of the 1990 accident. Dr. Gerald Goldberg performed a utilization review of the medical reports and concluded that there was no objective evidence that Petty's ongoing treatment was related to the 1990 injury.

The ALJ entered an opinion and order, ruling that McDonald's should no longer be required to pay for any of the medical and psychological treatment and prescription medications that Petty was receiving from Dr. Twyman. The medical evidence presented by physicians for McDonald's convinced the ALJ that Petty "is no longer disabled from the effects of her work injury and that her current medical condition is not related to the injury she experienced 17 years ago."

Petty appealed to the Board, which issued an opinion on September 17, 2008, in which it held that the ALJ's inquiry into whether Petty continued to be disabled from the effects of her work-related injury exceeded the limited scope of reopening that is allowed under KRS 342.125(3). The Board agreed with Petty that McDonald's was not contesting the compensability of any particular medical bill, which is permissible under KRS 342.125(3), but was rather attempting to reopen and modify the award so as to eliminate its obligation for any and all further treatment. As support for this view, the Board pointed to the fact that no

statements, services, or specific treatment had been put in dispute by McDonald's in its Form 112. The Board directed the ALJ to deny the motion to reopen/medical fee dispute to the extent that it was time-barred under KRS 342.125(3). The Board further cautioned, however, that its holding

should not be interpreted as preventing McDonald's with a means by which it can contest specific medical expenses incurred in the future on work-relatedness or reasonableness grounds. . . . [A]n employer is free to move to reopen an award to contest the reasonableness and necessity of any specific medical treatment and also whether the need for treatment is due to the effects of the injury[.]

Upon remand, the ALJ issued an order dismissing the motion to reopen filed by McDonald's. McDonald's filed a petition for reconsideration. While the petition was pending, McDonald's filed another motion to reopen and medical fee dispute. McDonald's contested the following expenses: (1) preauthorization for TENS unit supplies on the grounds that the supplies were not work related based on the 2007 medical report of Dr. Kriss; (2) medication charges from Rite Aid prescribed by Dr. Twyman; (3) medical treatment from Dr. Twyman; (4) all treatment for depression and anxiety; and (5) all prospective care for Petty's neck, low back, and psychiatric conditions on the ground that the treatment was unrelated to the 1990 injury. As a basis for arguing that the treatment was not work related, McDonald's resubmitted the 2007 medical reports of Drs. Kriss, Ruth, and Goldberg. The ALJ denied the petition for reconsideration and entered an order dismissing the medical disputes. McDonald's appealed to the Board,

which entered an opinion on February 11, 2010, affirming the ALJ's decision in part, reversing in part, and remanding for further action.

In its opinion, the Board held that, for the most part, the ALJ upon remand had acted properly in dismissing the motion to reopen at the prima facie stage of the process. The Board noted that McDonald's expressly stated that it was challenging "prospective care" for Petty's neck and low back on the grounds that the treatment was unrelated to the original work injury, and had resubmitted the same physicians' reports that had accompanied its original motion. The Board held that this claim was precluded under the doctrines of res judicata and collateral estoppel, since it involved the same parties, the same evidence, and the same issue as the prior adjudication.

The Board then addressed matters which it deemed were not res judicata: the preauthorization for TENS unit supplies; charges for Dr. Twyman's treatment of Petty on January 17, 2008, and May 30, 2008; and a dispute regarding charges for prescription medications from Rite Aid. This appeal by McDonald's followed.

"KRS 342.020 provides that an employer shall pay for the reasonable and necessary medical expenses of an injured worker." *Mitee Enterprises v. Yates*, 865 S.W.2d 654, 655 (Ky. 1993). The statute states in pertinent part that

[i]n addition to all other compensation provided in this chapter, the employer shall pay for the cure and relief from the effects of an injury or occupation disease the medical, surgical, and hospital treatment, including nursing, medical, and surgical supplies and appliances, as may reasonably be required at the time of the injury and thereafter during disability, or as may be required for the

cure and treatment of an occupational disease. The employer's obligation to pay the benefits specified in this section shall continue for so long as the employee is disabled regardless of the duration of the employee's income benefits.

KRS 342.020(1).

McDonald's argues that its second motion to reopen and medical fee dispute was well within the parameters of KRS 342.125(3), which permits reopening beyond the limitations period in order to determine "the compensability of medical expenses[.]" It contends that the ALJ and the Board ignored the directive of the Board's first opinion, which stated that its holding should not be interpreted as preventing McDonald's from contesting specific medical expenses on the grounds of work-relatedness, reasonableness, or necessity. McDonald's insists that the Board's first opinion focused primarily on the semantics of the ALJ's opinion, which misstated that Petty's condition had changed rather than stating that her ongoing treatment was not reasonable and necessary for treatment of her work-related injury. McDonald's contends that the ALJ's original opinion should in fact stand, with only slight modifications in language. McDonald's argues that in its subsequent motion, it closely followed the directive of the Board's first opinion by submitting specific bills for dispute, and that res judicata did not bar the resubmission of the physicians' reports as support for these specific disputes.

Our standard of review requires this Court to show considerable deference to the opinion of the Board. The function of the Court of Appeals in reviewing the decisions of the Board is to correct the Board only where "the Court perceives that

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 Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992).

We agree with the Board that McDonald’s broad challenge to the compensability of all prospective care for Petty’s neck and lower back goes beyond the scope of KRS 342.125(3) and is barred by the Board’s first opinion in this case, where it pointed out that McDonald’s was merely contesting all prospective treatment on the ground that Petty’s disability had changed from being work related to nonwork related. As the Board noted,

the opinion and award of September 2, 1993 has already established that the August 31, 1990 injury produced an occupation disability of 50%. This judicial finding rendered by the ALJ in her opinion is res judicata and cannot be revisited at this point absent a timely motion to reopen alleging a change of disability.

Although McDonald’s was estopped under the terms of the first Board opinion from challenging Petty’s underlying disability, the physicians’ reports of 2007 were not res judicata except insofar as they had been previously used to challenge the existence of Petty’s underlying disability. For instance, Dr. Kriss’s report stated that “The administrative law judge awarded Ms. Petty cervical spinal work-related impairment as a result of the August 30, 1990 slip and fall at McDonald’s, but upon review of the available voluminous medical records, I cannot discern the factual physical basis for this.” This statement, in questioning

the original finding of impairment and disability, goes far beyond the scope of what is contemplated under KRS 342.125(3).

Moreover, we agree with the Board that the physicians' reports were of limited probative value in supporting McDonald's prima facie case as it related to the following specific expenses: (1) the medications charges from Rite Aid Pharmacy, (2) a bill from Dr. Twyman dated October 31, 2008; (3) requested preauthorization for TENS unit supplies, and future TENS unit treatment.

We find no error in any of the Board's rulings on these four issues. As to the Rite Aid medications, the Board noted that McDonald's submitted no expert opinion which directly disputed the compensability of the medications. The only supporting evidence was Dr. Goldberg's report from March 2007, which recommended against further prescriptions for various medications but contained no explanation that these medications were generically the same as those filled by Rite Aid. We agree with the Board that this did not constitute sufficient evidence to sustain a prima facie case as to this issue. As to the bill from Dr. Twyman dated October 31, 2008, the Board reversed the ALJ's ruling on this issue and instructed him to reopen the proof time and allow the taking of evidence on this issue. As to the TENS unit supplies and treatment, the Board observed that McDonald's had submitted no contemporaneous opinion from any medical expert, either in the form of treatment records, independent medical evaluation or utilization review, directly addressing the compensability of these charges. The Board concluded that "McDonald's provided absolutely no evidence demonstrating a substantial

possibility of success with respect to its challenge to either the work-relatedness or reasonableness and necessity of these charges in the event additional evidence was taken.” On these grounds, the Board agreed with the ALJ that McDonald’s had failed to present the requisite prima facie showing.

Because the Board did not misconstrue any statutes or commit any error in assessing the evidence, we affirm its opinion.

ALL CONCUR.

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