

RENDERED: SEPTEMBER 26, 2003; 2:00 P.M.  
NOT TO BE PUBLISHED

**Commonwealth Of Kentucky  
Court of Appeals**

NO. 2003-CA-000268-WC

MCDOWELL APPALACHIAN  
REGIONAL HOSPITAL

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-95-05102

BRENDA RICE; HON. ROGER RIGGS,  
ADMINISTRATIVE LAW JUDGE; AND  
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION  
AFFIRMING

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BEFORE: BUCKINGHAM, GUIDUGLI, AND TACKETT, JUDGES

TACKETT, JUDGE: McDowell Appalachian Regional Hospital (ARH) petitions for review from a decision of the Workers' Compensation Board (Board) finding Brenda Rice to be totally occupationally disabled following her motion to reopen her claim. We affirm.

Rice, a high school graduate, was employed by ARH for thirty-one years prior to sustaining a work-related injury on January 14, 1995. She was working as a licensed practical nurse

when she injured her back attempting to move a very heavy patient in order to change his bed linens. Rice was diagnosed with an L5-S1 disc herniation and underwent surgery followed by treatment at Cardinal Hill Rehabilitation Center. At the time of her original workers' compensation claim, Rice was able to do moderate exercise, light housework, and cook at least one meal a day. She was awarded permanent partial disability benefits with an occupational disability rating of forty-five percent.

Two years later, Rice was hospitalized with severe back pain, spasms, and right leg pain all the way down to the ankle. She was placed in pelvic traction with heating pads, given physical therapy and prescribed stronger pain medication. Because of the increase in pain and the strong, narcotic medications being prescribed, Rice moved to reopen her claim. She gave deposition testimony that she had difficulty sleeping, suffered spasms in both hips, could no longer exercise or perform housework, and had been forced to hire someone to clean her house once a week. In addition, Rice received no relief from her pain as a result of spinal injections and had stopped taking her Methadone and OxyContin prescriptions because she did not want to be on that type of medication. After the motion to reopen was sustained, an MRI conducted in September 2001 revealed scarring on the right side at L5, at the site of her

original injury, and a new ruptured disc on the left side at L4-5.

Although Rice had never returned to work after her initial injury, the Administrative Law Judge (ALJ) found that her testimony of additional pain was very persuasive and that the left sided L4-5 herniation was related to the 1995 work injury. Due to her additional injury and the restrictions that examining physicians would impose on Rice's ability to work, the ALJ found that she was totally occupationally disabled. ARH appealed the ALJ's decision, arguing before the Board that there was no objective evidence that Rice's condition had worsened and that the left sided herniation was unrelated to her work injury. The Board affirmed the decision of the ALJ, and this appeal followed.

On appeal, ARH continues to argue that there was no objective evidence presented that Rice's physical condition had deteriorated. In addition, ARH points out that Rice had always believed herself to be completely occupationally disabled as a result of the 1995 injury and that she was awarded Social Security disability benefits prior to the decision on her original workers' compensation claim. The Board's excellent analysis of ARH's arguments is compelling, and we adopt the following portion:

The only issue on appeal is whether there was substantial evidence of probative value to support the ALJ's conclusion. Wolf Creek Collieries v. Crum, Ky. App., 673 S.W.2d 735 (1984) and Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418 (1985). ARH believes the ALJ erred in concluding there was evidence of any kind that would support a finding of increase of occupational disability. ARH emphasizes that neither Dr. Pajel nor Dr. Templin testified to a change or increase in occupational disability. ARH also emphasizes the award of Social Security disability prior to the original Opinion and Award and the lack of any return to work on the part of Rice. Of course, the award of Social Security disability is not controlling either in an original claim or upon reopening. If it were, Rice would have been entitled to a finding of total occupational disability at the time of [the original] award. Nor is it significant, in our opinion, that neither Dr. Templin nor Dr. Pajel testified to an increase in occupational disability. Occupational disability is a factual finding that is uniquely within the authority of the ALJ. Osborne v. Johnson, [Ky., 432 S.W.2d 800 (1968).] Physicians offer evidence relating to functional impairment and physiological restrictions while occupational disability is a legal determination.

Although ARH argues otherwise, the evidence from Dr. Templin as to restrictions he assigns now as opposed to those at the time of the original claim are significantly different. Dr. Templin, in his deposition given April 22, 1996 at page 26, indicates Rice has an ability to lift 20 pounds from the waist to above shoulder level and 15 pounds from floor to waist. In both his March 2001 report and his February 2002 report, Dr. Templin states Rice is unable to lift items weighing greater than 10 pounds from the waist level and is unable to do any lifting from the floor level.

Although Dr. Kriss' restrictions are a little more liberal, 25 pounds, they are still much more restrictive than those assessed by Dr. Wagner in the original claim.

As we have so frequently noted, simply because the individual worker testified in the original claim in such a way as to indicate the worker's belief that she was totally occupationally disabled, when, as here, the original ALJ concludes otherwise, it in no way prohibits a subsequent ALJ from viewing the medical evidence and the testimony of the individual worker as being more credible and leading to the conclusion of the entitlement to total occupational disability benefits. The testimony of the injured worker is itself probative. Caudill v. Maloney's Discount Stores, Ky., 560 S.W.2d 15 (1977) and Ruby Construction Company v. Curling, Ky., 451 S.W.2d 610 (1970).

Additionally, pain in and of itself is a disabling factor and may be considered upon reopening in addressing the issue of increase in occupational disability. See Beale v. Rolley, Ky., 777 S.W.2d 921 (1989).

Finally, ARH believes there is no objective evidence to support a worsening. Neither Dr. Pajel nor Dr. Templin offers evidence of "no change." Rather, they use the terminology no "significant" change. What is significant medically is not necessarily significant occupationally. When one considers the limitations on physical activities, as suggested by Dr. Templin, and the evidence of an additional [disc] at L4/5, it is difficult to conclude there has been "no change."

At the reopening, evidence existed that Rice was subjectively suffering from more pain than when her original claim was resolved. However, the Board also found objective evidence that her occupational impairment was greater based on the work

restrictions suggested by Dr. Templin and the additional left sided disc herniation. Consequently, we agree with the Board's conclusion that sufficient objective evidence existed to support reopening Rice's claim and the subsequent finding of total occupational disability.

The opinion and order of the Workers' Compensation Board is affirmed.

ALL CONCUR.

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