

**Commonwealth Of Kentucky
Court of Appeals**

NO. 2003-CA-000332-WC

DEBORAH WALKER

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-00-93490

NEW DIRECTIONS HOUSING AUTHORITY; JAMES
L. KERR, Administrative Law Judge;
and WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
VACATING AND REMANDING WITH DIRECTIONS

** **

BEFORE: BAKER, COMBS, and SCHRODER, Judges.

COMBS, JUDGE. Deborah Walker petitions for review of a decision of the Workers' Compensation Board rendered January 15, 2003, which affirmed the dismissal of her claim for occupational disability benefits. The Board concluded that the Administrative Law Judge (the ALJ) had acted properly within his discretion in dismissing Walker's claim because of her failure to comply with regulations in tendering her proof. After reviewing the record, we cannot determine whether the ALJ deliberately exercised any discretion in dismissing Walker's

claim or whether he mistakenly believed that dismissal was mandatory. Therefore, we vacate and remand.

On January 27, 2000, Walker fell into a glass window at a bank where she was attending a work-related seminar. She sustained an injury to her back, which was treated conservatively for more than two years. On January 25, 2002, she timely filed an application for occupational disability benefits. A schedule for taking proof was mailed to the parties on February 15, 2002, by the Commissioner of the Department of Workers' Claims. Walker was given sixty (60) days for taking proof; her employer, New Directions Housing Authority, was allotted thirty (30) days for taking proof; Walker was granted fifteen (15) days for rebuttal.

Walker's attorney, Eric Lamb, immediately began collecting evidence to support his client's claim. He obtained two reports from Walker's treating physician, Dr. Paul Sherman, dated February 21, 2002; however, neither report contained a specific American Medical Association (AMA) impairment rating. Because Dr. Sherman was on medical leave, Lamb scheduled an evaluation for Walker with Dr. Warren Bilkey within the proof time. However, new developments indicating a change in her medical condition occurred unexpectedly near the end of the sixty-day proof period, raising a question as to whether she had actually reached maximum medical improvement (MMI).

Because Walker's physical condition failed to respond to conservative treatment, Dr. Wayne Villanueva, a neurosurgeon, advised Walker to undergo new diagnostic tests, including CT scans and myelograms. Initially, Walker believed that she would have the test results and an evaluation within the sixty-day proof period. Unfortunately, Walker did not receive the results of the tests prior to April 16, 2002, the last day for submitting proof. On that day, Walker was deposed by the appellee. At her deposition, Lamb informed counsel for New Directions that he would need an extension of time to submit Walker's proof. Counsel for New Directions told Lamb that he was not the employer's primary attorney and that he could not agree to an extension.

On that same day, Walker mailed a motion to the Board seeking to hold the matter in abeyance, or in the alternative, to extend the proof time. Dr. Sherman's medical reports were attached to her motion. The motion was received by the Board and filed on April 18, 2002. Walker noted that the workers' compensation insurance carrier for New Directions had refused to pay for the tests ordered by Dr. Villanueva. This refusal caused the delay in her undergoing the tests and getting the results because she had to obtain the testing by recourse to her health insurance coverage, a slower procedure than workers' compensation insurance. Without the test results, she could not

obtain a medical opinion as to whether she had reached maximum medical improvement (MMI). Thus, the delay in the medical testing necessitated that she postpone the impairment evaluation. She informed the ALJ that she had an EMG scheduled on April 19th and that she anticipated receiving Dr. Villanueva's records shortly thereafter. She requested an extension of the proof time, at which time she believed that she would be in a better position to know whether or not she had reached MMI and, therefore, whether the case was ready for adjudication or should be held in abeyance.

New Directions objected to Walker's motion and moved to dismiss her claim entirely. The employer argued that it was entitled to such relief, alleging that Walker had failed to submit any evidence during her proof time and that she had failed to comply with 803 KAR¹ 25:010(E) § 15. This regulation requires that a motion for extension of time to submit proof be filed no later than five days before the deadline that is the subject of the extension. Relying on Cornett v. Corbin Materials, Inc., Ky., 807 S.W.2d 56 (1991), New Directions asked the ALJ to dismiss the claim for lack of prosecution.

In response, on April 26, 2002, Walker formally filed the medical reports and records of Dr. Sherman as evidence. New Directions moved to strike the records because Walker had failed

¹ Kentucky Administrative Regulations.

to submit them during the scheduled sixty-day period for proving her case-in-chief.

Prior to any ruling by the ALJ, Walker filed a verified and supplemental motion to hold her claim in abeyance. She reiterated that the delay in obtaining medical evidence was caused by forces beyond her control – but largely within the control of New Directions. She argued that New Directions should be estopped from pursuing dismissal of her claim since the delay in obtaining medical evidence was primarily attributable to its insurance carrier's refusal to pay for the tests. She also contended that the regulation relied upon by the appellee did not contemplate the dismissal of a claim when proof had been taken but not submitted during the proof time. She finally noted that her attorney had previously enjoyed a collegial working relationship with the law firm representing New Directions. Consequently, she had no reason to anticipate that the appellee's counsel would object to a short extension of the proof time -- especially in light of circumstances that compelled such an extension.

On May 29, 2002, the ALJ entered the following order dismissing Walker's claim:

This matter comes before the undersigned Administrative Law Judge upon plaintiff's motion to hold this claim in abeyance or extend proof time. The Administrative Law Judge notes that the

scheduling order was entered on February 14, 2002, granting all parties 60 days for initial proof taking. Plaintiff's time to submit evidence in her case in chief expired on April 16, 2002. No proof was filed by the plaintiff during that period. As the plaintiff had the burden of proof to submit evidence establishing a prima fascia [sic] case by April 16, 2002 and no proof was filed, plaintiff's claim shall be dismissed pursuant to Cornette vs. Corbin Materials, Inc. [, Ky.,] 807 S.W.2d 56 (1991). The Administrative Law Judge notes that the plaintiff has tendered the records and reports of Dr. Sherman and those were received by the Department of Workers' Claims on April 26, 2002, some ten days after plaintiff's proof time had expired. The defendant-employer has moved to strike Dr. Sherman's records and reports and that motion is **GRANTED**.

The Administrative Law Judge further notes that the plaintiff has filed a motion to hold this claim in abeyance or extend proof time and the same was filed on April 18, 2002. However, 803 KAR 25:010(e), section 13, requires that a motion for an extension of time be filed no later than five days before the deadline sought to be extended. Wherefore, plaintiff's motion to hold this claim in abeyance or extend proof time was not timely filed and must be **OVERRULED**.

All other motions which have been filed are hereby **OVERRULED** as moot.

Wherefore, plaintiff's claim shall be and hereby is **DISMISSED**.

Walker's petition for reconsideration was denied.

In its review, the Board held that the ALJ "made sufficient findings of fact to support his dismissal" and that

it was within his discretion to dismiss the claim for failure to prosecute. It rejected both of Walker's arguments: (1) that there is a difference between taking evidence and submitting evidence and (2) that counsel for New Directions should be estopped from objecting to the motion for an extension of the proof time since its own conduct had caused most of the delay. While expressing sympathy for Walker's plight, the Board reasoned that there was no excuse for her failure to seek an extension of her proof time within five days of the original deadline. This appeal followed.

Walker lists ten issues that she believes are involved in her appeal. However, we believe that the dispositive question is whether the Board correctly determined that the ALJ did not abuse his discretion in dismissing Walker's claim for failure to prosecute. The function of this Court in reviewing a decision of the Board is:

to correct the Board only where the Court perceives 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 Hospital v. Kelly, Ky., 827 S.W.2d 685, 687-688 (1992).

We agree with the Board's observation that the resolution of both Walker's motion for an extension of the proof

time and New Dimension's motion to dismiss Walker's claim were matters within the discretion of the ALJ. See, Cornett, 807 S.W.2d at 59-60. However, we disagree with the Board's conclusion that the ALJ articulated sufficient findings to allow for meaningful review of his exercise of that discretion.

In dismissing the claim, the ALJ's findings recited only Walker's failure to submit any evidence within the allotted proof time and her failure to timely move for an extension. The ALJ did not address any of the extenuating circumstances set forth by Walker in support of her motion for an extension of time and in response to the motion to dismiss her claim. These were circumstances that presented compelling reasons for imposing a less extreme sanction than dismissal -- if indeed any sanction at all was warranted. If her medical testing revealed that her condition had changed, MMI may not have been reached as a matter of law. That medical fact was critical to the practice of the case on both sides and needed to be determined before the case could proceed properly. Walker should not be penalized because her injury flared up "out of time."

Moreover, the ALJ did not make any findings with respect to the prejudice -- if any -- suffered by New Directions as a result of Walker's failure to meet the deadline for submitting evidence or to comply with the five-day rule. Because there is no analysis of the highly unusual circumstances

presented to the ALJ, we question whether his ruling was based on his discretion. It appears that the ALJ may have believed that a denial of Walker's motion and the dismissal of her claim were beyond his discretionary intervention and were instead mandated by Walker's failure to comply strictly with the deadlines for submitting her proof.

However, even if the ALJ's ruling was the result of an exercise of discretion, he did not set forth a reasoned analysis for dismissing the claim in order to provide an adequate basis for our review. The factual situation, though similar to that in Cornett, is sufficiently distinguishable to require some explanation for the imposition of the ultimate sanction of dismissal of the claim so as to allow for adequate review. Unlike the claimant in Cornett, Walker's attorney attempted to obtain the evidence within the proof time; however, unexpected developments arose in the claimant's medical condition near the end of her proof time. She informed opposing counsel within the proof time that she would be seeking an extension of time, and it had been her counsel's experience that such extensions were frequently agreed to as a matter of professional courtesy without the necessity of filing a formal motion -- or that extensions were often routinely granted by the ALJ when such motions were made.

It is impossible to discern from the ALJ's order whether any of these factors distinguishing this case from Cornett were considered in his ruling -- a ruling which, in essence, awarded New Directions a default judgment and rewarded it for its own arguably obstructionist behavior in refusing coverage for necessary medical testing. Due process requires some consideration of the factual circumstances and the necessity of imposing the ultimate sanction for noncompliance with rules relating to procedure - especially in the area of workers' compensation, where a humane and beneficent purpose underlies that procedure. We are ever mindful that:

compensation laws are fundamentally for the benefit of the injured workman, [and that] a just claim must not fall victim to rules of order unless it is clearly necessary in order to prevent chaos.

Messer v. Drees, Ky., 382 S.W.2d 209 (1964).

Therefore, we remand this case to the ALJ for his consideration of all the extenuating and mitigating circumstances surrounding Walker's failure to comply with the scheduling order and to render an order from which effective appellate review may be undertaken.

The decision of the Workers' Compensation Board is vacated, and the matter is remanded for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Eric M. Lamb
Louisville, Kentucky

BRIEF FOR APPELLEE NEW
DIRECTIONS HOUSING AUTHORITY:

Mark R. Bush
Louisville, Kentucky