

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: **March 1, 2019**

CLAIM NO. 201263966

RYAN HOUSTON

PETITIONER

VS.

**APPEAL FROM HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE**

GREENUP COUNTY FISCAL COURT
And HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION REVERSING AND REMANDING

* * * * *

BEFORE: ALVEY, Chairman, STIVERS and RECHTER, Members.

RECHTER, Member. Ryan Houston appeals from the September 13, 2018 Opinion on Remand rendered by Hon. Jonathan R. Weatherby, Administrative Law Judge (“ALJ”), dismissing his claim for a psychological injury, which he raised in a motion to reopen. On appeal, Houston argues the ALJ erred in dismissing the claim as

barred by the statute of limitations. For the reasons set forth herein, we reverse and remand.

Houston is a sheriff's deputy and is an employee of Greenup County Fiscal Court ("Greenup County"). He was assaulted on October 31, 2012, when a felon struck him with a truck. On November 25, 2014, Houston resolved his claim without an attorney for injuries to his right ankle, left foot, and left knee. He returned to work until August of 2015, when he became physically and mentally unable to continue as a road duty officer. Greenup County reassigned him to work as a school resource officer.

On May 18, 2016, Houston filed a motion to reopen, alleging his condition had worsened. He noted he had undergone additional surgeries, and had developed a psychological condition which had not previously manifested. Houston claimed he was unable to continue his job as a deputy sheriff due to deterioration of his physical condition, worsening of the psychological condition, and inability to continue working after he underwent the additional surgeries. Responding to the claim of a psychological injury, Greenup County argued Houston was aware of the claim at the time of the settlement agreement and failed to raise it. It also asserted any psychological injury was not related to Houston's work injury.

The issue on appeal is narrow, and involves only Houston's claim on reopening that he has developed a psychological condition since execution of his settlement agreement. Therefore, we will review only the proof relating to that claim. Houston testified he experienced sleeping problems and panic attacks following the accident. In an office note dated December 9, 2013, Dr. Dante Oreta recorded Houston had

trouble sleeping after the accident and prescribed Ambien. In 2015, he was treated by Brooke Vass, a nurse practitioner, for sleep disturbance and panic attacks. Houston was then referred to Leia Meenach, APRN, who prescribed medication for post-traumatic stress disorder (“PTSD”), panic attacks and anxiety. In March 2016, Houston’s psychological state had seriously deteriorated and he received in-patient treatment at the Brook Hospital for PTSD.

Houston then treated with Keith Haas, LCSW. In office notes dated April 22, 2016, July 13, 2016 and September 23, 2016, Mr. Haas noted Houston suffers PTSD linked to his work as a sheriff’s deputy. Houston reported to Mr. Haas that he developed initial symptoms immediately after the accident, which also triggered memories of prior traumatic incidents during his tenure as a sheriff’s deputy. Mr. Haas also concluded none of Houston’s experiences as a sheriff’s deputy significantly impacted his functioning until the 2012 work accident.

In an Opinion dated August 7, 2017, the ALJ dismissed the reopening, finding Houston failed to give notice as soon as practicable for a psychological injury claim. Houston appealed, and this Board reversed the ALJ’s finding regarding notice, observing that Houston had undoubtedly provided timely notice of the work accident, as required by statute. We remanded the claim for the ALJ to determine whether Houston had a known psychiatric claim at the time of the 2014 settlement agreement.

In a remand Opinion dated February 7, 2018, the ALJ determined Mr. Haas’ report established Houston “clearly had knowledge of his psychiatric issues prior to 2014.”

Based on this evidence, the ALJ concluded Houston's claim for benefits for his psychiatric condition is barred by the statute of limitations.

Houston again appealed, emphasizing he was not diagnosed with a psychological condition prior to the settlement of the claim. We again vacated the dismissal of Houston's claim for a psychological injury, noting Mr. Haas' records fall short of establishing Houston was diagnosed with a psychological condition prior to settlement of the claim. The Board further noted Mr. Haas never stated Houston had a psychiatric/psychological diagnosis prior to the settlement. The Board then stated as follows:

We have also reviewed the psychiatric and psychological evidence, including the records, reports and depositions of Dr. Tim Allen, Dr. Dante Oreta, Leia J. Meenach, APRN ("Nurse Meenach"), and Dr. Mohamed S. Khodeir. None of these providers appear to support the ALJ's determination that Houston was diagnosed with a psychological condition at the time of or before he settled his claim. We acknowledge Dr. Oreta, in his somewhat illegible office note of December 9, 2013, noted Houston had some trouble sleeping since he was struck by a car the year before, and prescribed Ambien. However, he did not diagnose a specific psychological or psychiatric condition. Similarly, Nurse Meenach noted on January 28, 2016 Houston had some difficulty with sleep, flashbacks, anxiety, and panic attacks, but she did not specifically diagnose a psychological condition. Nor does her note appear to establish Houston's condition manifested prior to or at the time of the settlement of his claim.

The Board directed the ALJ as follows:

On remand, The ALJ is again directed to review the evidence and make a determination regarding whether Houston has a psychiatric or psychological condition, which had manifested at the time of the settlement of his claim in November 2014. If there is no

such evidence, the ALJ must determine whether Houston has a compensable work-related psychiatric or psychological claim, the extent of the condition, and entitlement to income or medical benefits. We do not direct a particular result, but any determination must be based upon the evidence.

The ALJ's findings on remand relevant to this appeal are as follows:

This matter is before the ALJ upon Remand from the Workers['] Compensation Board with direction to resolve the issue of the compensability of the Plaintiff's alleged psychological condition and the prescription for Viagra. The following additional findings are hereby entered:

1. The ALJ finds in accordance with the Plaintiff's deposition testimony that he began having nightmares immediately after the work injury and that he sought treatment for panic attacks that he attributed to the work injury prior to the 2014 settlement.
2. The Plaintiff, in his deposition dated September 21, 2016, was asked what treatment he next had that he related to the October 31, 2012, injury and he responded that he saw Dr. Oreta for panic attacks, insomnia, nightmares, and generally getting sick. The evidence indicates that he saw Dr. Oreta in December of 2013, and was prescribed Ambien, and a Zpack, along with other medications which are illegible. The ALJ therefore finds that the Plaintiff sought treatment for his psychiatric condition that he specifically attributed to the work incident, prior to the 2014 settlement and that therefore his claim for a workrelated psychological impairment is barred by the statute of limitations.
3. The ALJ further finds that the prescription for Viagra was related to the alleged psychological claim and is therefore **DISMISSED** pursuant to the foregoing findings.

On appeal, Houston argues the ALJ erred in dismissing his psychological injury claim because, when he settled his claim and returned to work, the condition had not manifested. However, after the settlement, his physical and mental condition worsened. Houston contends he initially could not have filed a claim for a psychological condition, and his exclusive remedy was to reopen his claim when his work-related disability increased.

As we noted in our second opinion in this claim, there is no evidence in the record to establish Houston was diagnosed with PTSD or any other psychological condition prior to the 2014 settlement agreement. Instead, the ALJ relies on Houston's testimony to conclude that he experienced symptoms such as panic attacks and nightmares immediately after the work accident. The ALJ also emphasized Dr. Oreta's records, which indicate Houston was prescribed Ambien for sleep disturbance.

Based on this proof, the ALJ concluded Houston must have been aware of a "psychiatric condition" immediately after because he sought treatment for it. Therefore, the narrow issue for this Board's review is whether the fact Houston experienced and was treated for some psychological symptoms immediately after the incident is sufficient to trigger the statute of limitations.

KRS 342.185 requires an application for adjustment of claim be made within two years of the date of the accident. An injured worker must include all conditions known to be work-related in a timely application for benefits, which are known or should reasonably be known, regardless of whether the worker knows a condition's precise diagnosis. KRS 342.270(1). However, Kentucky law recognizes the fact not every injury becomes immediately known after a work-related accident. "[A] worker

[is] not obligated to give an employer notice of a latent injury until he becomes aware that a compensable injury has been sustained.” Smith v. Cardinal Const. Co., 13 S.W.3d 623 (Ky. 2000). “[A] psychiatric condition may be the basis for a reopening where it is the result of the work injury and becomes manifest after the original award.” Slone v. Jason Coal Co., 902 S.W.2d 820 (Ky. 1995), 822 *citing* Fischer Packing Co. v. Lanham, 804 S.W.2d 4 (Ky. 1991).

Therefore, the relevant inquiry is whether there is sufficient evidence in the record to conclude Houston’s psychological injury was “known or should reasonably have been known” prior to the settlement agreement. The ALJ pointed to the fact he experienced some psychological symptoms immediately after the accident and was prescribed a sleeping pill. We conclude this proof is insufficient, as a matter of law, to establish that the psychological condition was “known” to Houston.

The mere presence of any psychological symptom prior to the settlement is insufficient to reject a claim for a specific psychological or psychiatric diagnosis. The record is devoid of evidence to establish Houston was diagnosed with a psychological condition prior to the settlement agreement. *Cf.* Lewis v. Lantech, Inc., 2004 WL 1368993 (Ky. 2004)(claimant’s cervical injury was not “latent” at the time original claim was adjudicated because he had already been diagnosed with spinal stenosis and underwent a cervical discectomy prior to rendition of the final award). *See also* Brunswick Bowling League v. Sims, 2009 WL 3526494 (Ky. 2009)(KRS 342.170(1) did not bar original claim for psychological injury on reopening where proof indicated claimant suffered psychological symptoms prior to initial litigation of the claim but was never diagnosed with a work-related condition).

Notwithstanding that Houston suffered some psychological symptoms immediately after the accident, there is no medical opinion pre-dating the settlement agreement which affirmatively linked these symptoms to his work accident. *See* Pepsi Cola v. Butler, 2008 WL 1850581 (Ky. 2008)(claim for psychological injury was not time barred despite fact claimant took “nerve pills” prior to settlement of the original claim, where no formal diagnosis was yet made and no medical opinion as to causation existed at time of settlement). Furthermore, aside from Dr. Oreta’s prescription for Ambien, Houston was not being treated for any psychological condition prior to the settlement agreement. *Cf.* Jones v. Owensboro Mercy Health Systems, 2005 WL 635046 (Ky. 2005)(claim on reopening for psychological condition was barred where claimant was receiving counseling and prescription treatment for depression for one year prior to rendition of the final award). *See also* Ford v. Keener, 2004 WL 1176259 (Ky. App. 2004)(claimant’s psychological condition was not sufficiently known to him at the time his claim was originally litigated, where he experienced some symptoms but was not being actively treated prior to original award). Upon review of the entire record, we conclude the evidence compels a finding Houston’s psychological injury was not known to him at the time he settled his claim in 2014. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). The evidence on which the ALJ relies – that Houston experienced “panic attacks, insomnia, nightmares, and generally getting sick” and was once prescribed a sleeping pill – is insufficient as a matter of law to establish he had a known, work-related psychological injury in 2014. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986). As such, Houston’s claim for

psychological impairment is not barred by the statute of limitations found at KRS 342.185 nor the joinder requirements of KRS 342.270. This claim is therefore remanded to the ALJ for consideration of the merits of Houston's psychological injury claim.

Accordingly, the September 13, 2018 Opinion on Remand rendered by Hon. Jonathan R. Weatherby, Administrative Law Judge, is hereby **REVERSED**. This claim is **REMANDED** for additional findings and entry of an amended decision in conformity with the views expressed herein.

ALL CONCUR.

DISTRIBUTION:

COUNSEL FOR PETITIONER:

LMS

HON. STUART E. ALEXANDER
2010 EDGELAND AVE
LOUISVILLE, KY 40204

COUNSEL FOR RESPONDENT:

LMS

HON. MARCEL SMITH
300 E. MAIN STREET
SUITE 400
LEXINGTON, KY 40507

ADMINISTRATIVE LAW JUDGE:

LMS

HON. JONATHAN R. WEATHERBY
ADMINISTRATIVE LAW JUDGE
PREVENTION PARK
657 CHAMBERLIN AVENUE
FRANKFORT, KY 40601