RENDERED: JULY 20, 2007; 2:00 P.M.
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2007-CA-000011-WC

JAMES SENGER — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-02-72896

UNITED PARCEL SERVICES;
WORKERS' COMPENSATION BOARD;
and HON. JOHN W. THACKER,
ADMINISTRATIVE LAW JUDGE — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: HOWARD AND STUMBO, JUDGES; BUCKINGHAM,[1] SENIOR JUDGE.

STUMBO, JUDGE: This appeal comes from a ruling by the Workers' Compensation Board affirming an ALJ award to James Senger (Appellant). The ALJ and Workers' Compensation Board awarded Appellant income benefits based on a 20% impairment rating. This impairment rating was then apportioned as 15% whole person impairment due to Appellant's non-work related injuries and a 5% whole person impairment due to a

[1] Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

September 10, 2002 work-related injury. Appellant claims that he should be entitled to benefits based on the full 20% and not the apportioned 5%. Appellant's employer, United Parcel Service (Appellee), claims that the benefits provided by the Board and ALJ are correct. We find that the evidence supports the decisions of the Board and ALJ and affirm the 5% apportioned award.

Appellant's medical history and this case's procedural history are important for our purposes because both are relevant to arguments made by Appellant on this appeal. The injury that led to this claim for workers' compensation occurred on September 10, 2002. While unloading packages on his UPS route, Appellant twisted his left knee while going underneath a shelf in his truck. Prior to this incident, Appellant had many problems with his left knee. In 1986, Appellant injured his left knee while playing football and was treated by Dr. Alan Roth. In 1992, Appellant tore his ACL in the same knee and was treated again by Dr. Roth. This injury required extensive surgery. In 1994, Appellant had an on-the-job injury to the same knee. He filed a workers' compensation claim and settled for a lump sum payment of $4,000. Another work-related injury occurred in 1997, but no claim was filed. In 1999, the same knee was injured while Appellant was operating a jackhammer. Dr. Roth performed an arthroscopy to repair the damage. After the September 2002 injury, Appellant had two more left knee arthroscopies and then a total left knee replacement.

Taking into account all these injuries, Appellant was seen by six different doctors: Dr. Roth, who was the physician who treated Appellant's early injuries and

continued to see him after the September 2002 injury; Dr. Phillip Browne, who saw Appellant in October 2002 and then performed a left knee arthroscopy in November 2002; Dr. David Caborn, who examined Appellant in September 2003; Dr. Gregory Gleis, who performed Independent Medical Evaluations on Appellant in May 2003 and April 2005; Dr. Cyna Khalily, who performed a left knee arthroscopy in February 2004, and did the total knee replacement in July 2004; and Dr. Luca Conte, who performed a vocational evaluation of Appellant in August 2005.

The procedural history which pertains to the arguments being considered on appeal begins with the Opinion, Award and Order rendered on May 9, 2006. The ALJ found that Appellant sustained a compensable injury and based the awarded benefits on the testimony and records of Dr. Browne. Dr. Browne assessed Appellant a 10% impairment rating and apportioned it as 75% pre-existing and 25% as work-related. This apportionment made the work-related impairment rating become 2.5% for which Appellant was awarded.

On May 17, 2006, Appellant filed a Petition for Reconsideration and argued that Dr. Browne's rating had been assessed before the total knee replacement and that the proper assessment to use would be that of Dr. Gleis. Dr. Gleis' assessment was a 20% impairment. On June 5, 2006, by an Order on Petition for Reconsideration, the ALJ found he made a patent error in the previous award and substituted the benefits based on Dr. Browne's 2.5% impairment rating with the 20% of Dr. Gleis, which was ultimately apportioned to 5% impairment. The ALJ found that only Dr. Gleis had fully addressed

the whole person impairment due to the knee replacement. Dr. Gleis has said that Appellant had a 20% impairment rating and that 15% of that is due to non-work-related injuries and natural aging process and 5% is due to the work-related injuries. In effect, the ALJ kept the apportionment ratios, but changed the impairment rating to the one which reflected all the injuries and surgeries to date.

The Appellant then appealed to the Workers' Compensation Board. He argued that the ALJ erred in limiting the award based on the 5% impairment rating, in changing his reliance from Dr. Browne to Dr. Gleis, and in not considering his arthritic condition based on the AMA Guides. Appellant argued that these errors entitled him to an unapportioned 20% impairment rating.

The Board affirmed the opinion of the ALJ. The Board held that it was up to the ALJ as fact-finder to determine, based on Appellant's extensive medical records, that the 75% apportionment was attributable to his pre-existing active conditions. The Board felt there was no merit in the argument that because Dr. Gleis did not use the term "active disability" that there was no active disability. The ALJ was free to interpret Dr. Gleis' apportionment opinion to include active disability.

The Board also found that an ALJ cannot change his findings of fact on apportionment and prior active disability on a petition for reconsideration, but that the ALJ here did not do these things. The Board held that the ALJ only changed his reliance on the opinion of Dr. Browne to that of Dr. Gleis. This was done to correct a patent error to the original opinion and award and not to change the above-mentioned findings of fact.

The Board felt that the ALJ had misinterpreted the evidence to say that Dr. Browne's impairment rating was based on all the medical facts of the case. Dr. Browne had not examined Appellant after the total knee replacement. Dr. Gleis had done so, therefore his impairment rating was based on the most current medical information.

Finally the Board held that there was no error in not using the AMA Guides in order to consider an arthritic condition. The Board cited *Caldwell Tanks v. Roark*, 104 S.W.3d 753 (Ky. 2003), which held that an ALJ can consider the AMA Guides, but is never compelled to. That, coupled with the Board finding that the assessment of impairment and apportionment are medical questions, resulted in the Board finding that there was no error in not considering the arthritis component.

In the current appeal, Appellant is arguing that the ALJ erred as a matter of law in finding a five-percent impairment, in changing his opinion as to which physician's testimony was the most credible, and in apportioning the 20% award 25% to the work-related injury and 75% due to a pre-existing, active condition. We find that the ALJ and Board made no errors and affirm their decisions.

The function of the Court of Appeals in a workers' compensation case 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 Hosp. v. Kelly*, 827 S.W.2d 685, 687-688 (Ky. 1992). We cannot find any precedent or statute that has been overlooked or misconstrued in this case. All case law and statutes cited by the parties are

right on point. The issue here is whether or not the Board flagrantly erred in the way it assessed the evidence. We hold that the Board did not.

First, it was not improper for the ALJ to change which doctor's opinion he relied on. According to KRS 342.281, upon a petition for reconsideration, an ALJ is limited in the review of his decision to the correction of errors patently appearing on the face of the award. Here, the initial reliance on the opinion of Dr. Browne was a patent error. Dr. Browne had not examined Appellant after the total knee replacement. The only doctor who assessed Appellant after the total knee replacement was Dr. Gleis. As stated above, an ALJ cannot revisit the case on the merits and change his findings of fact on apportionment and prior active disability. The case of *Shorewood Packing v. Brooks*, 2005 WL 2674983 (October 20, 2005) is persuasive on this point. In that case, an ALJ used the opinion of a Dr. Jacob who came to an impairment rating of 8.5% and an apportionment ratio of 50/50. Upon a petition for reconsideration, the ALJ noted that Dr. Jacob used an old version of the AMA Guides and decided to change his opinion in order to rely on the impairment rating and apportionment ratio of a Dr. DeGruccio.

On appeal, the Board held that it was improper for the ALJ to change his opinion regarding the apportionment ratio because it had nothing to do with the old AMA Guides. It was a separate medical opinion. Only the impairment rating was based on incorrect information. The Court of Appeals and Supreme Court of Kentucky affirmed the Board's decision. We find this case persuasive. The ALJ here did not change his finding of fact of the 75/25 apportionment ratio. He only changed which medical expert

the impairment rating was based on. It was a patent error for the ALJ to use the impairment rating set forth by Dr. Browne since Dr. Gleis was the only doctor to have examined Appellant after the total knee reconstruction. The ALJ saw that the wrong evidence was used in determining which impairment rating to use and applied the correct evidence. The ALJ here was not reconsidering the case based on the merits or changing his findings of fact. He was merely correcting a decision made based on a patent error as is allowed on a petition for reconsideration.

As for the decision of the Board and ALJ to give Appellant a 5% impairment award based on the 20% impairment modified by the 75% non-work-related and 25% work-related apportionment, we find no error. After a review of the record, we find substantial evidence to show why the ALJ and Board decided to use these figures. It is up to the ALJ, as fact-finder, to determine which testimony is most persuasive. The case of *Whittaker v. Rowland*, 998 S.W.2d 479 (Ky. 1999), put it best when it stated:

> the fact-finder, rather than the reviewing court, has the sole discretion to determine the quality, character, and substance of evidence; that an ALJ, as fact-finder, may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it came from the same witness or the same adversary party's total proof; and that where the party with the burden of proof was successful before the ALJ, the issue on appeal is whether substantial evidence supported the ALJ's conclusion. Substantial evidence has been defined as some evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable men. Although a party may note evidence which would have supported a conclusion contrary to the ALJ's decision, such evidence is not an adequate basis for reversal on appeal.

*Id.* at 481-482 (citations omitted). As mentioned above, the function of the Court of Appeals is to correct the Board and ALJ in instances of misconstrued statutes or precedent and flagrant errors in assessing the evidence. We find no such flagrant errors in this case. There is substantial evidence to support the ALJ's decision. Multiple doctors examined Appellant and the ALJ was within his right to determine which doctor's analysis he found most persuasive.

For the foregoing reasons, we affirm the decisions of the ALJ and Board and uphold the award of 5% impairment benefits.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE,
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