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Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000171-WC

PELLA CORPORATION

APPELLANT

v.

PETITION AND FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-08-00818

JOYCE BERNSTEIN; HON. DOUGLAS
GOTT, ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD

APPELLEES

AND

NO. 2010-CA-000282-WC

JOYCE BERNSTEIN

CROSS-APPELLANT

v.

CROSS-PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-08-00818

PELLA CORPORATION; HON.
DOUGLAS GOTT, ADMINISTRATIVE
LAW JUDGE; AND WORKERS'
COMPENSATION BOARD

CROSS-APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON, LAMBERT, AND NICKELL, JUDGES.

LAMBERT, JUDGE: Pella Corporation appeals a December 23, 2009, opinion rendered by the Workers' Compensation Board which affirmed in part and vacated in part an Administrative Law Judge's (ALJ's) decision determining, among other things, that Joyce Bernstein failed to prove compensable claims for left and right shoulder injuries. Regarding the left shoulder, the Board vacated the ALJ's ruling because the ALJ mistakenly believed that he was without authority to find an impairment rating for that shoulder. Pella claims this holding is erroneous as a matter of law.

Bernstein cross-appeals, alleging the Board erred in affirming the ALJ's determination that she failed to prove a permanent right shoulder injury. After careful review, we affirm the Board's opinion.

I. Factual Background

Bernstein is a fifty-five year-old high school graduate. Pella is a window manufacturer. On June 27, 2008, Bernstein filed an application for workers' compensation benefits. While lifting window frames into a cleaner in the course and scope of her employment with Pella, Bernstein alleged that she sustained cumulative wear and tear injuries to her "[n]eck, shoulder, arm, hand, low back, and any other [harmful change] noted in medical records."

After considering evidence submitted by both parties, the ALJ determined that Bernstein did suffer work-related permanent injuries to her neck and low back. These injuries resulted in the assignment of a 49.5% disability rating to Bernstein.

The ALJ determined that Bernstein was also afflicted with a work-related permanent left shoulder injury. However, he found that Bernstein did not suffer a work-related right shoulder injury. In the alternative, the ALJ found that even if there was a work-related right shoulder injury, any symptoms involving Bernstein's right shoulder were only temporary in duration. In so ruling, the ALJ stated as follows:

In regard to the shoulders, this claim was practiced by the lawyers as a "left shoulder case." The ALJ finds that Bernstein has not sustained her burden of proving a work related right shoulder "injury."

In addition to the persuasive medical evidence, a credible factor supporting the ALJ's conclusion that the left shoulder injury is work related was Bernstein's testimony . . . that she had to drop the window and catch it in order to turn it. "So every window we made, my shoulder was being jerked by the window because I couldn't lift it up off [the cleaner]." Bernstein did not say that this work activity injured her shoulders (plural) but rather her one shoulder on the left side.

Dr. Jackson did not note a right shoulder complaint on July 18, 2005. He first mentions the right shoulder on February 20, 2006, but this is four months into Bernstein's recovery from neck surgery when she was no longer performing the frame cleaner job. Therefore, Bernstein was not performing work duties for [Pella] when she first made complaints regarding the right shoulder.

Also supporting the conclusion that no right shoulder “injury” was sustained is the fact that just several months after Dr. Jackson noted a right shoulder complaint in February 2006 he indicates that it was largely resolved. Dr. Davies similarly noted resolution of right shoulder complaints. (Dr. Davies’ January 8, 2008[,] report only addressed causation of the left shoulder; there is no mention of the right shoulder).

Two physicians opined that Bernstein’s left shoulder injury was work-related; however, neither physician assigned an impairment rating solely to the left shoulder. Rather, one physician declined to assign a rating and the other physician (Dr. Jackson) assigned a ten percent (10%) impairment rating for “adhesive capsulitis of the shoulders greater on the left than the right.”

Because no impairment rating was attributed solely to the left shoulder, the ALJ refused to grant Bernstein any benefits for her left shoulder injury. He reasoned as follows:

[T]he ALJ is unable to make an award because Dr. Jackson assigned a combined 10% rating to both shoulders, which leaves the ALJ unable to decipher what rating would be attributable to the left shoulder. As stated, the ALJ has found that . . . [Bernstein] did not sustain her burden of proving a right shoulder “injury.” Even if she had sustained a right shoulder injury, the evidence would lead to the conclusion that the injury was not permanent or one that merited an impairment rating . . . Bernstein’s testimony at her deposition and at the [h]earing was that she was not having a current problem with her right shoulder. That testimony is confirmed by the medical evidence. Because there was no right shoulder injury, there is no basis for assigning a rating to the right shoulder. Since Dr. Jackson does not separate his rating between the two shoulders, which would allow the ALJ to make an award for left shoulder impairment,

the ALJ does not find the evidence to allow an award for the left shoulder.

In his order denying Bernstein's petition for rehearing, the ALJ added the following:

The ALJ again closely reviewed the Opinion as it pertains to his decision that the evidence did not permit an award based on left shoulder impairment. The reasoning behind that was that Dr. Jackson assigned 10% impairment to both shoulders, but the evidence failed to establish that [Bernstein] had suffered a right shoulder injury The ALJ believes he has the discretion to reject Dr. Jackson's unrebutted opinion on bilateral shoulder impairment if the evidence fails to support the occurrence of a right shoulder "injury" pursuant to KRS 342.0011(1). [Bernstein] is correct that, had Dr. Jackson apportioned his rating between the shoulders, the ALJ would have made an award for left shoulder impairment, but he believes he lacks the discretion to invade the evidence of bilateral shoulder impairment and speculate on a percentage that is applicable to the left shoulder.

On appeal, the Board affirmed the ALJ's determination that Bernstein failed to prove a permanent right shoulder injury. In so doing, the Board held that the evidence was not so overwhelming as to compel a finding in Bernstein's favor. *See Wolf Creek Collieries v. Crum*, 673 S.W.2d 735, 736 (Ky. App. 1984) (setting forth standard of review when unsuccessful claimant appeals fact-finder's decision).

As to the ALJ's determination that he was without discretion to assign an impairment rating to Bernstein's work-related left shoulder injury, the Board held as follows:

In this instance, it is clear from the ALJ's decision and order on petition for reconsideration that he incorrectly believed[] under the evidence [that] he lacked the discretion to select an impairment rating relative to Bernstein's left shoulder injury. While there is no published authority concerning the issue, the Kentucky Supreme Court has addressed the matter to some extent in the unpublished decision of *Appalachian Racing, Inc. v. Blair*, 2002-SC-0581-WC, 2003 WL 21355872 (Ky. 2003). See also *Lourdes Hospital v. Wininger*, 2003-CA-001810-WC, 2004 WL 315177 (Ky. App. 2004). In *Blair, supra*, the ALJ was faced with a range of impairment of 12% to 15% assessed by a physician relative to a claimant's cervical and lumbar injuries. No apportionment was made by the physician with reference to each individual body part. Nevertheless, the Supreme Court determined the ALJ had the discretion to select a whole body impairment rating within the combined range provided by the physician applicable to each body part.

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Pursuant to the Supreme Court's holding in *Blair, supra*, we believe it is evident the ALJ misconstrued the scope of his fact-finding authority when he stated he "would have made an award for left shoulder impairment," but believed he lacked "the discretion to invade the evidence of bilateral shoulder impairment and speculate on a percentage that is applicable to the left shoulder." As already discussed, the ALJ determined Bernstein's right shoulder resulted in no permanent impairment. That finding is supported by substantial evidence and has been affirmed. It is undisputed that Dr. Jackson characterized Bernstein's left shoulder condition as being worse than her right shoulder condition. In light of these facts, we believe the ALJ using the 10% range assessed by Dr. Jackson could reasonably have determined Bernstein suffered an impairment rating of between 6% and 10% to the body as a whole affecting the left shoulder.

The Board went on to hold that assignment of an impairment rating to the left shoulder was not mandatory, as the ALJ was also vested with discretion to reject Dr. Jackson's testimony altogether. Holding the ALJ erred as a matter of law in concluding that he lacked discretion to consider either of the above options, the Board vacated the ALJ's left shoulder ruling and remanded the matter for further consideration.

II. Pella's Appeal

On appeal to this Court, Pella maintains the Board erred, as a matter of law, in holding that the ALJ had discretion to apportion a part of Dr. Jackson's ten percent (10%) impairment rating for "adhesive capsulitis of the shoulders greater on the left than the right" to assess an individual impairment rating for Bernstein's left shoulder. For the reasons set forth herein, we disagree.

The question presented before this Court is one of law. Thus, our function is to correct the Board only if we perceive that it has overlooked or misconstrued controlling statutes or precedent. *Western Baptist Hospital v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992). Questions of law are reviewed *de novo*. *Gosney v. Glenn*, 163 S.W.3d 894, 898 (Ky. App. 2005).

Pella argues on appeal that the Board misconstrued the Kentucky Supreme Court's holding in *Blair*. In that case, the Supreme Court determined that an ALJ may, without the assistance of a medical expert, utilize a table in the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (AMA Guides) to convert Diagnosis Related Estimate (DRE)

categories assigned by a physician into numerical impairment ratings. *Blair*, 2003 WL 21355872 at *2.

In *Blair*, a physician assigned an overall impairment rating for the back and neck at twelve to fifteen percent (12-15%). *Id.* at *1. He categorized the back injury as a DRE category III and the neck injury as a DRE category II. *Id.* The ALJ used a table set forth in the *AMA Guides* to assign a ten percent (10%) impairment rating for the back (which corresponded with DRE category III) and a two to five percent (2-5%) impairment rating for the neck (the corresponding rating under DRE category II was 5%). *Id.* at *2. In holding that the ALJ was vested with discretion to make such findings, the Supreme Court reasoned that no medical expertise was necessary to determine the respective impairment ratings. *Id.*; see *Caldwell Tanks v. Roark*, 104 S.W.3d 753, 757 (Ky. 2003) (“Although medical expertise is required to perform audiometric testing, it is apparent that no medical expertise is required to read this conversion table.”).

Pella argues that this case is distinguishable from *Blair* since DRE categories have not been assigned to allow for a similar conversion. Because this case involves more than the simple reading of a conversion table, Pella argues that a left shoulder apportionment is not appropriate without the guidance of a medical expert. See *Kentucky River Enterprises, Inc. v. Elkins*, 107 S.W.3d 206, 210 (Ky. 2003) (“[T]he proper interpretation of the *Guides* and the proper assessment of an impairment rating are medical questions.”).

We agree that competent medical expertise is required to determine medical questions such as the proper assessment of an impairment rating. *See Magic Coal Co. v. Fox*, 19 S.W.3d 88, 96 (Ky. 2000) (“Where the question at issue is one which properly falls within the province of medical experts, the fact-finder may not disregard the uncontradicted conclusion of a medical expert and reach a different conclusion.” (citing *Mengel v. Hawaiian-Tropic Northwest and Central Distributors, Inc.*, 618 S.W.2d 184, 187 (Ky. App. 1981))). Without such expertise, claimants cannot meet their burden of proving permanent disability. *See Greene v. Paschall Truck Lines*, 239 S.W.3d 94, 108 (Ky. App. 2007) (one of three elements claimant must establish to be entitled to disability benefits is an impairment rating pursuant to the *AMA Guides*); *Cepero v. Fabricated Metals Corp.*, 132 S.W.3d 839, 842 (Ky. 2004) (claimant denied benefits because his medical evidence was corrupt and, thus, not sufficient to support an award).

However, upon careful review of this record, we agree with the Board that sufficient medical guidance does exist on which to determine an impairment rating for Bernstein’s left shoulder. Notably, Dr. Jackson opined a ten percent (10%) impairment rating for “adhesive capsulitis of the shoulders greater on the left than the right.” No medical expertise is necessary to deduce from this opinion that the impairment rating for the left shoulder is between six and ten percent (6-10%). As noted by the Board, an impairment rating of even ten percent (10%) for Bernstein’s left shoulder is not unreasonable or outside the ALJ’s discretion since other evidence on this record established that any right shoulder injury suffered by

Bernstein was not permanent and only temporary in duration. *See Magic Coal Co.*, 19 S.W.3d at 96 (as fact-finder, ALJs are free to “reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness.”); *Greene*, 239 S.W.3d at 109 (“When medical evidence is conflicting, the question of which evidence to believe is the exclusive province of the ALJ.”)(internal quotation and citation omitted). Accordingly, we affirm the Board’s holding that the ALJ was vested, as a matter of law, with discretion to find an impairment rating for Bernstein’s left shoulder. *See Tokico (USA), Inc. v. Kelly*, 281 S.W.3d 771, 774 (Ky. 2009) (ALJ is vested with authority to determine legal significance of conflicting medical evidence); *see also Young v. Kentland-Elkhorn Coal Corp.*, 473 S.W.2d 119, 120 (Ky. 1971) (fact-finder is authorized to make legitimate interpretations of medical evidence).

III. Bernstein’s Cross-appeal

In her cross-appeal, Bernstein argues the Board erred in affirming the ALJ’s dismissal of her right shoulder claim. Bernstein bore the burden of proof and risk of persuasion before the ALJ. *Wolf Creek Collieries*, 673 S.W.2d at 736. Thus, compelling circumstances must exist to justify a reversal of the ALJ’s determination. *Id.*

In this case, Dr. Jackson was the only medical expert to address Bernstein’s right shoulder. He opined that she did suffer a work-related permanent right shoulder injury. In light of this un rebutted testimony, Bernstein argues that

the ALJ was compelled to adopt Dr. Jackson's opinion. For the reasons set forth herein, we disagree.

An ALJ may reject un rebutted medical testimony, but only if the ALJ adequately sets forth a reasonable explanation for doing so. *Collins v. Castleton Farms, Inc.*, 560 S.W.2d 830, 831 (Ky. App. 1977); *Commonwealth v. Workers' Compensation Board of Kentucky*, 697 S.W.2d 540, 541 (Ky. App. 1985). Here, the ALJ set forth the following reasons for not adopting the opinion of Dr. Jackson as to Bernstein's right shoulder claim: (1) Bernstein's right shoulder complaints were too far removed from the time she alleged her work-related activities culminated in an injury (injury was sustained on January 27, 2005, but right shoulder complaints did not emerge until February 2006); (2) Bernstein's testimony indicated that only one of her shoulders was affected by her work activities; and (3) testimony from Bernstein, Dr. Jackson, and Dr. Davies indicated that Bernstein's right shoulder injury, if any, was resolved.

Bernstein concedes that her right shoulder injury did not occur at the same time as the wear and tear injury to her left shoulder. However, she claims it was nevertheless compensable because it was sustained during her treatment of the left shoulder injury. *See Elizabethtown Sportswear v. Stice*, 720 S.W.2d 732, 734 (Ky. App. 1986) (aggravation of injury by necessary medical or surgical treatment is compensable).

Presuming this to be true, both the ALJ and the Board determined that any work-related right shoulder injury was completely resolved and thus, in any

event, a permanent impairment rating for the right shoulder was simply not warranted. Bernstein concedes that there is sufficient evidence in this record to support a finding that her right shoulder injury resulted in no permanent impairment. However, she argues that if this is the case, then the ALJ is compelled to assign the full ten percent (10%) impairment rating assigned by Dr. Jackson to her left shoulder (since, consistent with the above finding, the right shoulder must be zero percent (0%)).

As set forth above, we agree that the ALJ, on remand, is vested with discretion to make such a finding. However, pursuant to that same discussion, we do not agree the ALJ is compelled to make such a finding. *See Magic Coal Co.*, 19 S.W.3d at 96. Rather, upon consideration of the totality of the circumstances, the ALJ may assign a lesser rating or may even reject Dr. Jackson's testimony altogether so long as he sets forth a reasonable explanation. *Collins*, 560 S.W.2d at 831. Accordingly, the Board did not err in remanding this matter back to the ALJ for further consideration.

Having been presented with no reversible error, we hereby affirm the Board's December 23, 2009, opinion.

ALL CONCUR.

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