

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-001193-WC

TOKICO (USA), INC.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-06-88984

JERRY POYNTER; LAWRENCE F. SMITH,
ALJ; AND WORKERS COMPENSATION
BOARD

APPELLEES

OPINION
AFFIRMING

** ** * ** * **

BEFORE: CAPERTON AND COMBS, JUDGES; LAMBERT,¹ SENIOR
JUDGE.

COMBS, JUDGE: Tokico (USA), Inc., appeals from the decision of the Workers' Compensation Board affirming an award of permanent disability benefits to Jerry Poynter. After our review, we affirm the Board.

Poynter started work at Tokico in 2002 as an assembly line worker. His job required him to lift heavy parts. In 2006, he injured his right shoulder. Surgery

¹ Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

was required in order to repair a superior labrum anterior posterior (SLAP) lesion with impingement and mild AC joint arthritis in March 2007.

Poynter returned to work in August 2007 performing the same job. In November 2007, he sustained another injury to the same shoulder. He kept working, using narcotics to alleviate the pain. He underwent a second surgery on his right shoulder in November 2008. However, at the time of the hearing, the shoulder had deteriorated to the point that Poynter had been forced to resign from his job. His physician had recommended that he undergo a third surgery. We will elaborate additional details as needed for our analysis.

Tokico and Poynter participated in a hearing before an Administrative Law Judge (ALJ) on October 26, 2009. The ALJ entered his findings on December 28, 2009. Among his findings, the ALJ awarded Poynter temporary total disability benefits for the time he spent recovering from the March 2007 surgery along with permanent disability benefits for 425 weeks. Tokico filed a petition for reconsideration, which was denied on February 18, 2010. It then appealed to the Workers' Compensation Board. The Board affirmed the ALJ's order, and Tokico now appeals.

On appeal, if a claimant has been successful and the employer appeals, "the question before the court is whether the decision of the board is supported by substantial evidence." *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735, 736 (Ky. App. 1984). In our review, we may "correct the Board only where [we perceive]

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 (Ky. 1992).

Tokico’s sole argument is that the ALJ committed error when it relied on an impairment rating assigned by a physician, Dr. Owen, in October 2008, prior to Poynter’s second surgery. We disagree.

It has long been held that the ALJ is the “sole judge of the weight and inferences to be drawn from the evidence,” and he can choose which pieces of evidence to believe or to disbelieve. *Garrett Mining Co. v. Nye*, 122 S.W.3d 513, 518 (Ky. 2003). (citations omitted). Additionally, this court has recently held that “[a]n impairment rating is but one piece of the total evidence that the ALJ, as fact-finder, must evaluate for ‘quality, character, and substance’ and, in the exercise of his discretion, either accept or reject.” *Greene v. Paschall Truck Lines*, 239 S.W.3d 94, 109 (Ky. App. 2007). It is not a factor that supersedes all other evidence.

Tokico argues that the ALJ improperly considered the pre-surgery impairment rating because the assessment was performed before Poynter had reached maximum medical improvement. We do not find this argument persuasive. The ALJ relied on other evidence as well, specifically Poynter’s testimony at the hearing. Our Supreme Court has explicitly held that “[a] worker’s testimony is competent evidence of his physical condition and of his ability to

perform various activities[.]” *Ira A. Watson Dept. Store v. Hamilton*, 34 S.W.3d 48, 52 (Ky. 2000).

As the ALJ acknowledged, Poynter testified that several treating physicians had told him that he was unable to return to the type of work that he had been performing at Tokico. Even after two surgeries, his shoulder continued to deteriorate and was likely to deteriorate in the future. At the time of the hearing, he had been advised that yet another surgery was already needed. The ALJ considered the evidence and concluded that Poynter was once again in the same position that he had been before his previous surgery, thus rendering the impairment rating relevant. As the Board stated:

[w]hile it is true Dr. Owen performed his evaluation prior to the second surgery, the fact is Poynter was physically unable to continue working after August 2009. This would apparently support the opinion expressed by Dr. Owen. Based upon the totality of the evidence and reasonable inferences drawn therefrom, the ALJ could reasonably conclude Poynter sustained a 5% functional impairment rating as a result of his work injury.

Furthermore, as the Board noted in its opinion affirming the ALJ, Tokico did not present **any** evidence that contradicted the impairment rating or Poynter’s testimony that he is unable to perform the job of heavy lifting.

The record reveals that the ALJ and the Board based their opinions on substantial evidence. Therefore, we affirm its award of benefits.

ALL CONCUR.

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