

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-001229-WC

RCS TRANSPORTATION

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-07-00889

ROBERT I. MALIN;
HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION
BOARD

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: MOORE AND THOMPSON, JUDGES; LAMBERT,¹ SENIOR
JUDGE.

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 Kentucky Revised Statutes (KRS) 21.580.

LAMBERT, SENIOR JUDGE: RCS Transportation appeals from a decision of the Workers' Compensation Board that vacated an Opinion, Order and Award of an Administrative Law Judge on the grounds that the ALJ had overstepped his authority. The ALJ found that a permanent partial whole-person impairment rating produced by Robert Malin's physician had been improperly calculated under the tables and figures set forth in the American Medical Association's Guides to the Evaluation of Permanent Impairment, Fifth Edition ("AMA Guides"). To correct this alleged error, the ALJ recalculated the impairment rating using the physician's own range-of-motion measurements. The Board concluded that this was an inappropriate action and that the ALJ's discretion was limited to choosing from among the impairment ratings produced in the record by medical experts. For reasons that follow, we agree. Thus, we affirm the Board.

Facts and Procedural History

Malin was employed by RCS as a rail loader. His job typically involved preparing rail cars for loading by blowing out dirt and debris with a backpack blower. On January 15, 2007, Malin injured his right arm and shoulder when his foot slipped on a ladder and he reached out with his right arm to prevent himself from falling.

Malin was subsequently diagnosed with a labral tear of the right shoulder by Dr. Stacie Grossfeld. He ultimately underwent three surgeries with Dr. Grossfeld to address the tear and the resulting pain and decreased range of motion in the shoulder. On March 17, 2009, Dr. Grossfeld placed Malin at

maximum medical improvement and indicated that he qualified for a permanent partial impairment rating. On that same date, Dr. Grossfeld recorded range-of-motion measurements showing: (1) forward flexion to 170°; (2) abduction to 170°; (3) external rotation to 45°; and (4) internal rotation to 45°. Dr. Grossfeld also noted: “Strength is -5/5 for isolated testing of supraspinatus and external rotators and 5/5 for internal rotational strength testing.” Malin then underwent a functional capacity evaluation, where it was determined that he did not retain the physical capacity to return to his former job.

On June 5, 2009, Dr. Grossfeld addressed a letter “to whom it may concern,” in which she assessed – without explanation – a 10% permanent partial whole-person impairment rating to Malin based on the AMA Guides. In a subsequent letter from RCS’s insurance carrier to Dr. Grossfeld, the carrier noted that it was unable to replicate a 10% impairment rating based on the range-of-motion measurements contained in her medical records. Instead, the carrier was only able to produce a 4% rating. The carrier then asked Dr. Grossfeld for the data she had used to assess the remaining 6% impairment under the Guides.

The record then contains a subsequent letter from RCS’s carrier to Dr. Grossfeld addressing the impairment rating. Although the typed date on the letter is difficult to read, it appears to have been sent via fax on June 19, 2009. The letter states, in relevant part:

Thank you for your response regarding our question as to how you arrived at the assigned 10% WP rating for Mr. Malin. Using the AMA 5th Edition Guidelines, decreased

strength cannot be rated in the presence of decreased motion or pain. It should also be measured one year after an injury or surgical procedure.

The letter then asked Dr. Grossfeld either to provide additional support for her 10% impairment assessment or to provide notification accepting the carrier's calculated 4% impairment as correct. As noted by the Board, the letter then contains what appears to be a notation by Dr. Grossfeld in which: (1) a circle is drawn around the second option, and (2) the word "ok" is handwritten with an arrow pointing towards a similarly handwritten "4% WP." It also appears that Dr. Grossfeld initialed this notation, albeit illegibly.

However, in a subsequent letter addressed to Malin's counsel, Dr. Grossfeld apparently reasserted her 10% impairment rating for Malin, noting: "I rated him at 16% for the upper extremity and 10% for the total body. I am unsure why the other rating was only 4%. My rating follows the Guides to the Evaluation of Permanent Impairment." Medical record notations from Dr. Grossfeld clarify that her 10% whole-person impairment rating was based on her assignment of: (1) a 1% rating for the 170° forward flexion measurement per Figure 16-40 of the AMA Guides; (2) an 8% rating for the 45° external rotation measurement per Figure 16-46 of the AMA Guides; (3) a 3% rating for the 45° internal rotation measurement per Figure 16-46 of the AMA Guides; and (4) a 5% rating for diminished strength in the shoulder per Table 16-35 of the AMA Guides.² These

² The 170° abduction measurement produced a 0% impairment rating per Figure 16-43 of the AMA Guides and was, therefore, not factored into Dr. Grossfeld's calculations.

ratings produced a 16% upper extremity impairment, which converted into a 10% whole-person impairment rating pursuant to Table 16-3 of the AMA Guides.

Per RCS's request, Malin also underwent an independent medical examination with Dr. Robert Baker. Using his own range-of-motion measurements, Dr. Baker opined that Malin had only suffered a 4% impairment of his right upper extremity, which converted into a 2% whole person impairment rating pursuant to the AMA Guides.

In its brief to the ALJ, RCS contended that Dr. Grossfeld's impairment rating had been improperly calculated under the AMA Guides. It specifically asserted that Dr. Grossfeld's assignment of an 8% upper extremity impairment for a 45° external rotation measurement was incorrect under Figure 16-46 of the Guides. Instead, such a measurement produced only a 1% impairment of the upper extremity – not 8%. RCS further argued that Dr. Grossfeld had erroneously used subjective strength diminishment to add an additional 5% impairment of the upper extremity even though the Guides expressly provide that “[d]ecreased strength *cannot* be rated in the presence of decreased motion[.]” Because of this, RCS contended that Dr. Grossfeld's 10% impairment rating was unreliable and that Dr. Baker's 2% rating was the only one supported by the record. RCS further noted, in the alternative, that “Dr. Grossfeld's ratings have been inconsistent, varying from 4% to 10% impairment, depending on which counsel she answers to” but that “if reliance does end up being placed on Dr. Stacie Grossfeld, evidence will show that her 4% rating is closer to being correct

than 10%.” Malin’s brief failed to address Dr. Grossfeld’s calculations.

Moreover, she was not deposed nor did she offer testimony at Malin’s hearing.

On December 21, 2009, the ALJ issued an Opinion, Order and Award concluding that Dr. Grossfeld’s 10% impairment rating did not correlate with her own range-of-motion measurements. The ALJ specifically made the following findings regarding both Dr. Baker’s and Dr. Grossfeld’s impairment ratings:

Instead, plaintiff is entitled to an award of permanent, partial disability and the question becomes which impairment rating is most persuasive. Given the restrictions associated with plaintiff’s injury Dr. Baker’s 2% impairment rating is hard to accept as accurately assessing plaintiff’s impairment. However, in reviewing Dr. Grossfeld’s 10% rating, the Administrative Law Judge agrees she improperly calculated her impairment rating using her own range of motion measurements. Specifically, as the defendant points out, her external range of motion measurement of 45° equates to 1% upper extremity impairment and not the 8% that she used in her calculation. Moreover, Dr. Grossfeld also rated plaintiff’s decreased shoulder strength along with plaintiff’s decreased range of motion, in contravention to the directives in the AMA Guides on page 508 as pointed out by the defendant. For these reasons, the Administrative Law Judge believes Dr. Grossfeld’s impairment rating cannot be used, as a matter of law, to support an award of benefits.

The ALJ then noted, however, that “Dr. Grossfeld’s range of motion measurements are not in dispute.” He then applied these measurements to “the tables and figures set forth in Chapter 16 of the AMA Guides” and determined that Malin “has a 5% upper extremity impairment which equates to a 3% whole person impairment rating using Dr. Grossfeld’s otherwise credible range of motion measurements[.]”

As a result of this recalculation, the ALJ awarded Malin temporary total disability benefits at a rate of \$646.47 per week from January 16, 2007 through May 12, 2009 and permanent partial disability benefits at a rate of \$28.36 per week for 425 weeks beginning May 13, 2009. Malin subsequently filed a petition for reconsideration asserting that the ALJ had erred by recalculating the 10% impairment rating assessed by Dr. Grossfeld. However, this petition was denied by the ALJ.

Malin then filed an appeal with the Workers' Compensation Board in which he again asserted that the ALJ had erred by recalculating the 10% impairment rating assessed by Dr. Grossfeld. Malin argued that impairment ratings are a matter left only to medical experts and that the ALJ consequently lacked the authority to recalculate Dr. Grossfeld's impairment rating. Malin further argued that ALJs are generally restricted to "picking and choosing" from among the ratings produced by medical experts in the record.

The Board agreed with Malin and explicitly disagreed with the ALJ's "recalculation of Dr. Grossfeld's impairment rating." The Board consequently vacated the ALJ's decision and remanded the case for additional findings. The Board explained its decision as follows:

It appears from the record that Dr. Grossfeld, as evidenced by her hand-written notations in response to the carrier's June 19, 2009 letter, agreed with the carrier's 4% whole person impairment rating. While Dr. Grossfeld sent a letter on August 14, 2009, to Malin's counsel reiterating her 10% impairment rating, this does [not] negate the fact that only two months prior, Dr.

Grossfeld indicated she was in agreement with the 4% whole person impairment rating. This inconsistency was ultimately ignored by the ALJ as well as by Malin in both his brief to the ALJ and his appeal brief to this Board. Indeed, only RCS has acknowledged Dr. Grossfeld's inconsistent impairment ratings, asserting in its brief to the ALJ that this inconsistency makes Dr. Grossfeld unreliable. Instead, RCS asserted in its brief to the ALJ that Dr. Baker's 2% impairment rating is the only impairment rating that has remained consistent and, thus, should be the only impairment rating relied upon by the ALJ.

On remand, the ALJ must choose an impairment rating in the record. This includes choosing between the conflicting impairment ratings offered by Dr. Grossfeld – 10% or 4%. While the ALJ certainly may use his discretion to choose among these conflicting impairment ratings, he may not recalculate impairment ratings offered by the medical experts. Except in the rarest cases, the determination of an impairment rating should be left to the doctors, as “the proper interpretation of the AMA Guides and the proper assessment of an impairment rating are medical questions.” Kentucky River Enterprises, Inc. v. Elkins, 107 S.W.3d 206 (Ky. 2003). This is not a case where the ALJ may pick from an impairment range or determine an impairment after being provided a classification in the AMA Guides within which the claimant falls. Certainly, the ALJ may reference the AMA Guides in determining which impairment rating is more credible or accurate, but the ALJ cannot recalculate the impairment rating.

This appeal followed.

Analysis

On appeal, RCS argues that the Board erred in vacating the decision of the ALJ. RCS specifically contends that the ALJ was entitled, even required, to recalculate an impairment rating using Dr. Grossfeld's range-of-motion

measurements pursuant to *Caldwell Tanks v. Roark*, 104 S.W.3d 753 (Ky. 2003).

In response, Malin asserts that the ALJ was required to choose from among the impairment ratings in the record and that the ALJ did not have the discretion to fashion a rating of his own. After careful consideration, we believe that we are obligated to follow the second position under the law as it stands.

Our function in reviewing a decision of the Workers' Compensation Board is to correct the Board only where it "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, 687-88 (Ky. 1992). "As a reviewing court, we are bound neither by an ALJ's decisions on questions of law or an ALJ's interpretation and application of the law to the facts. In either case, our standard of review is *de novo*." *Bowerman v. Black Equip. Co.*, 297 S.W.3d 858, 866 (Ky. App. 2009).

In order to determine permanent partial disability benefits, the ALJ must "select" a permanent impairment rating³ calculated pursuant to the Fifth Edition of the AMA Guides. KRS 342.0011(36) & (37); KRS 342.730(1)(b); *Knott County Nursing Home v. Wallen*, 74 S.W.3d 706, 710 (Ky. 2002). Our courts have consistently held that an ALJ is not authorized to interpret the AMA Guides. See *George Humfleet Mobile Homes v. Christman*, 125 S.W.3d 288, 294 (Ky. 2004). Instead, the proper interpretation of the AMA Guides and any

³ "Permanent impairment rating" means the "percentage of whole body impairment caused by the injury or occupational disease as determined by the 'Guides to the Evaluation of Permanent Impairment[.]'" KRS 342.0011(35).

assessment of an impairment rating in accordance with those Guides are medical questions reserved only to medical witnesses. *Lanter v. Kentucky State Police*, 171 S.W.3d 45, 52 (Ky. 2005); *Ky. River Enters., Inc. v. Elkins*, 107 S.W.3d 206, 210 (Ky. 2003).

This precedent leads us to conclude that an ALJ does not have the discretion to arrive at a separate and distinct impairment rating from that offered by a physician in those cases where medical witnesses specifically assess such ratings. As noted by the Board, this is not a case in which the ALJ was required to pick from an impairment range or to determine an impairment after being provided a classification in the AMA Guides within which Malin fell. Instead, the parties provided the ALJ with impairment ratings assessed by physicians based upon their interpretations of the Guides. Under these circumstances, we do not believe that an ALJ may take on the role of the physician and make an independent determination regarding an impairment rating where such ratings have been provided by medical witnesses. Instead, the ALJ may only consider the AMA Guides in determining the weight to be accorded conflicting opinions.

With this said, there is no requirement that an ALJ must necessarily accept an assessed impairment rating as true. *Greene v. Paschall Truck Lines*, 239 S.W.3d 94, 109 (Ky. App. 2007). Instead, “[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.” *Id.* When medical experts offer differing opinions on such issues as an

injured worker's impairment rating and/or the proper application of the Guides, it is the ALJ's function to weigh the conflicting evidence and to decide which is more persuasive. *See Brown-Forman Corp. v. Upchurch*, 127 S.W.3d 615, 621 (Ky. 2004); *Greene*, 239 S.W.3d at 109. Ultimately, the ALJ retains broad discretion "to believe part of the evidence and disbelieve other parts of the evidence whether it came from the same witness or the same adversary party's total proof." *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15, 16 (Ky.1977).

In this case, there were clear questions presented as to the manner in which Dr. Grossfeld applied the AMA Guides in assigning an impairment rating to Malin. The ALJ believed that Dr. Grossfeld had interpreted a table incorrectly and that her assessment incorrectly included an additional 5% rating for diminished strength despite the fact that decreased range of motion had already been accounted for. The ALJ's concerns in this regard are not without merit. However, the problem with which the ALJ was presented is that there was a complete lack of any *medical* testimony to establish that the Dr. Grossfeld's methodology was erroneous, as is required by *Lanter, supra*, and *Elkins, supra*. The parties here merely submitted medical reports and did not depose the physicians in this case or offer live testimony from them. Neither party sought to specifically question Dr. Grossfeld or Dr. Baker as to why they applied the AMA Guides differently or as to why one application was in error while the other was correct. Moreover, no effort was made to attempt to address Dr. Grossfeld's inconsistent impairment ratings. Per *Lanter, supra*, and *Elkins, supra*, these were medical questions – and ones that

likely could have been easily addressed by a few questions. Instead, the only criticism concerning the alleged inaccuracy of the impairment rating assessed by Dr. Grossfeld is the one offered by RCS's attorneys in their briefs to the ALJ, the Board, and this Court. Such criticism, standing alone, is insufficient.

As such, the evidence regarding the correct impairment rating is to be considered merely conflicting, and the ALJ, as the finder of fact, must pick and choose which doctor's assessment to believe. As noted by the Board, Dr. Baker assessed a 2% whole-person impairment rating, while Dr. Grossfeld assessed conflicting 4% and 10% ratings. Despite Malin's protestations to the contrary, we do not believe that the ALJ is limited to choosing between the 2% and 10% rating. Dr. Grossfeld apparently believed that the 4% assessment made by RCS's insurance carrier was correct at one point, so the ALJ is free to agree or disagree with this determination.

RCS argues that the decision of the Supreme Court of Kentucky in *Caldwell Tanks v. Roark*, *supra*, requires us to reverse the Board, but we are compelled to disagree. That case merely holds that an ALJ is authorized to read the table that converts a binaural hearing impairment into an AMA whole-person impairment if a medical expert fails to do so. *Caldwell Tanks*, 104 S.W.3d at 757. The Supreme Court's rationale in that case was that a medical expert had already determined the hearing impairment, the evidence was unrefuted, and reading the table that converted it into an AMA impairment required no medical expertise. *Id.*

We are disinclined to interpret that decision any more broadly, particularly in light of the fact that the parties herein presented conflicting impairment ratings.

Conclusion

For the foregoing reasons, the decision of the Workers' Compensation Board is affirmed.

ALL CONCUR.

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