

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000295-WC

HATZEL & BUEHLER, INC.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-08-78270

GARY L. FULLER;
HON. JOHN B. COLEMAN,
ADMINISTRATIVE LAW JUDGE;
and WORKERS' COMPENSATION
BOARD

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: ACREE, MOORE, AND NICKELL, JUDGES.

MOORE, JUDGE: Hatzel & Buehler, Inc. (Hatzel), appeals from the decision of an administrative law judge (ALJ) awarding Gary Fuller permanent partial disability (PPD) benefits based upon a 21% functional impairment rating, and the opinion of the Workers' Compensation Board affirming the ALJ's decision. The

ALJ based Fuller's award, in part, upon an alleged malunion of the calcaneus of Fuller's right foot following a comminuted fracture in that region. The sole issue Hatzel raises on appeal is whether substantial evidence of record supported that this condition existed. After careful review, we affirm.

FACTUAL AND PROCEDURAL HISTORY

On August 22, 2008, Fuller sustained an injury to his right foot during the course and scope of his employment as an electrician with Hatzel. Fuller was pulling a rope attached to a tugger (a device used to pull cable similar to a winch) and in an attempt to stop the rope from coming loose from the tugger, Fuller was pulled approximately twelve feet off of the ground and fell. Fuller experienced immediate pain in his right foot, and his right foot was placed in a cast for approximately nine weeks.

After filing his claim in this matter, Fuller submitted several medical records regarding the nature of his injury. Included with these records is an August 27, 2008 treatment note from Dr. Rolando Cheng, who evaluated Fuller and reviewed an x-ray of Fuller's right ankle that was taken at Meadowview Hospital on the date of Fuller's injury. The treatment note states:

A lot of swelling around the R foot, especially around the calcaneus area;

Pain on range of motion with limitation;

Circulation of the R lower extremity is otherwise intact.

Dr. Cheng's treatment note further states that the x-ray "shows R ankle negative for acute fracture. Mild deformity of the calcaneus suggesting an old fracture but see discussion above."

However, in another treatment note of October 28, 2008, Dr. Cheng stated that a subsequent CT scan of Fuller's right foot

[s]how[ed] comminuted fracture of the calcaneus. It is best seen on axial views and there is [sic] basically three components. An anterior, posterior and anterior medial component including the sustentaculum tali. There is mild distraction of these fractures but the coronal and sagittal views show that the impact upon this subtalar joint is relatively minor with the posterior facet and anterior facet joint intact with only slight variation at the offset of the medial facet noted, otherwise.

The record also contains the report of Dr. Robert Johnson, who consulted with Fuller on February 18, 2010. Dr. Johnson noted that Fuller's treatment records from Harrison Memorial Hospital between August 22, 2008, and March 10, 2009, reflected that Fuller had sustained a comminuted fracture of the calcaneus of the right foot that had progressively healed with some deformity. Dr. Johnson noted that Fuller had consulted with Dr. Nicholas Gates on June 15, 2009, and that Dr. Gates had diagnosed Fuller with right hindfoot pain secondary to posttraumatic subtalar arthritis, calcaneal malunion and arthrofibrosis.

Next, Dr. Johnson reviewed a standing x-ray of Fuller's right foot that Dr. Gates had ordered on June 15, 2009. Dr. Johnson opined that the x-ray demonstrated a

malunion of the calcaneus, the loss of Bohler's angle, subtalar arthritis in the form of sclerotic bone but with maintenance of the joint space. . . . There is a major degree of calcification in the region of the sustentaculum and the Bohler's angle is virtually flat. There is fairly good joint space but poor joint congruity.

Dr. Johnson also noted that Fuller had consulted with Dr. John Kelly from September 8 through December 17, 2009,¹ and that

Dr. Kelly states that the fracture appears well healed so there is no apparent structural or orthopaedic [sic] impairment that would prevent [Fuller from] returning to work as an electrician.

Dr. Johnson also conducted a physical examination of Fuller. In light of that examination and the records of Fuller's prior treatment, Dr. Johnson diagnosed Fuller with a "comminuted fracture of the right calcaneus with malunion," and stated that within reasonable medical probability Fuller's injury had caused this condition. Dr. Johnson assigned Fuller a whole person impairment rating of 21%.

On March 4, 2010, Fuller was evaluated by Hatzel's expert, Dr. Joseph Zerga. In his own review, Dr. Zerga noted that Fuller's hospital records reflected that "Right ankle films were said to be negative for acute fracture. There was a mild deformity of the calcaneous [sic] suggesting an old fracture. Ultimately, a CT scan was done in Cynthiana on 10/17/08 which did show a comminuted fracture of the calcaneous [sic]." Dr. Zerga also reviewed Dr.

Cheng's August 25, 2009 treatment note, stating, "[Dr. Cheng's] note is a bit

¹ Although Dr. Johnson's report summarizes Dr. Kelly's opinions, the record contains nothing directly from Dr. Kelly.

confusing whether he feels [Fuller] has a new or old fracture, but the CT scan eventually resolved that issue. It was a new fracture.” Dr. Zerga diagnosed Fuller with “status post calcaneal fracture with residual plantar nerve damage resulting in neuropathic pain, paresthasias and numbness, which results in gait disturbance,” and assigned Fuller a whole person impairment rating of 5%.

On May 25, 2010, another x-ray was performed on Fuller’s right foot. In relevant part, the reviewing radiologist, Dr. Daniel Beineke, noted that there was “possible soft tissue swelling laterally,” but that he saw “no bony abnormality,” and “no evidence of recent or old fracture.” And, similar to Dr. Cheng’s treatment note of August 27, 2008, Dr. Beineke concluded “Films negative for fracture.”

On June 2, 2010, Dr. Zerga supplemented his opinion of Fuller’s condition, stating in relevant part:

[T]here have been impairment ratings given based on the opinion that [Fuller] had a calcaneal fracture. This opinion was somewhat conflicted in the records, including Dr. Kelly’s records, who stated [Fuller] did not have a fracture. Because of the conflicts, I recommended a repeat x-ray of his right foot and ankle which was done at Harrison Memorial Hospital on May 25, 2010. Enclosed is a copy of that record. The x-ray of the right ankle showed possible soft tissue swelling, but no bony abnormality. The x-ray of the right foot was negative for fracture. Therefore, there is no evidence of an active calcaneal fracture.

Dr. Zerga also re-emphasized that he would assign Fuller a 5% whole person impairment rating.

The record contains nothing from Dr. Johnson regarding the May 25, 2010 x-ray. However, Hatzel did not depose Dr. Johnson, nor was Dr. Johnson's impairment rating critiqued by any other physician.

The main point of disagreement between Fuller and Hatzel, and the source of the disparity between Dr. Johnson's and Dr. Zerga's respective ratings, became whether Fuller had suffered a malunion from a calcaneal fracture.² Upon submitting this matter to the ALJ, Hatzel argued that Dr. Johnson's rating of Fuller's impairment was invalid because Dr. Johnson had offered no opinion regarding the May 25, 2010 x-ray. In a similar vein, Hatzel pointed out that Drs. Zerga and Beineke had found no evidence of malunion. Hatzel urged that because Drs. Zerga and Beineke were the only medical experts to incorporate a review of the May 25, 2010 x-ray into their opinions, their opinions constituted the only accurate evidence of Fuller's condition. Nevertheless, after reciting the evidence of record, the ALJ relied upon Dr. Johnson's report and assigned Fuller a 21% whole person impairment rating.

In its petition for rehearing, Hatzel took umbrage with a statement contained within the ALJ's twelve-page order:

I am convinced by the opinion of Dr. Johnson that the plaintiff was appropriately assessed with a 21% whole person impairment. Further, I am not convinced by the opinion of Dr. Zerga that the plaintiff lacked evidence of a fracture. A review of the records of Dr. Cheng clearly

² Hatzel also argued that Dr. Johnson's method of calculating Fuller's disability rating failed to comply with the rules set forth in the AMA guides, but the ALJ disagreed. On appeal before the Board, the Board also disagreed with this argument. Hatzel does not reassert this argument in its appeal before this Court.

indicate the plaintiff was treated for a fracture in the right foot.

Hatzel argued:

Dr. Zerga did not state or imply that the claimant never had a fracture; instead, he only stated that, based on the most recent x-ray, there is no evidence of an “active calcaneal fracture,” thus ruling out the displacement. Further, the radiologist report of the right foot x-ray taken on May 26, 2010, clearly showed no evidence of a displaced fracture. The 5th AMA Guides do not allow for an undisplaced healed fracture of the hind foot to be rated. Accordingly, the ALJ’s reasoning for rejecting the opinions of Dr. Zerga is clearly erroneous.

The ALJ denied Hatzel’s petition. On appeal before the Board, Hatzel argued that Dr. Johnson’s rating of Fuller’s impairment did not constitute substantial evidence, and that the ALJ had, therefore, erred in relying upon it in calculating Fuller’s award. As it did before the ALJ, Hatzel again pointed out that Drs. Zerga and Beineke had found no evidence of malunion and urged that because Drs. Zerga and Beineke were the only medical experts to incorporate a review of the May 25, 2010 x-ray into their opinions regarding Fuller’s condition, their opinions were uncontroverted; therefore Dr. Johnson’s opinion was invalid. Also, Hatzel argued that the ALJ must have misunderstood the opinions of Drs. Zerga and Beineke because otherwise the ALJ would never have relied upon Dr. Johnson’s opinion.

The Board affirmed the ALJ’s opinion in its entirety. This appeal followed, and Hatzel reasserts the same argument described in the preceding paragraph.

ANALYSIS

We preface our own analysis of Hatzel's argument by stating that the standard for appellate review of a Board decision "is limited to correction of the ALJ when the ALJ has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice." *Bowerman v. Black Equip. Co.*, 297 S.W.3d 858, 866 (Ky.App.2009) (citing *W. Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky.1992)).

As to Hatzel's contention that the ALJ was required to rely upon the opinions of Drs. Zerga and Beineke and disregard the opinion of Dr. Johnson because the opinions of Drs. Zerga and Beineke were "uncontroverted," it is the ALJ's function to consider all of the relevant evidence, to determine the character, quality, and substance of a physician's statements and to draw reasonable inferences from them. Therefore, an ALJ may choose to reject even uncontradicted medical testimony if the choice is supported by a reasonable explanation. *Commonwealth v. Workers' Compensation Bd. of Kentucky*, 697 S.W.2d 540 (Ky. App. 1985); *see also Collins v. Castleton Farms, Inc.*, 560 S.W.2d 830 (Ky. App. 1977).

That aside, the issue in this matter is not whether an ALJ chose to disregard uncontradicted medical evidence. The issue is whether it was proper for the ALJ to favor a less-recent medical opinion from one physician over a more recent medical opinion from another. Certainly, the date of a medical opinion and

the information available to the physician who renders it are factors bearing upon its weight as evidence. But, Hatzel did not cite authority prohibiting an ALJ from relying upon an older medical opinion that conflicts with a newer one. Indeed, “where the medical evidence is conflicting, the sole authority to determine which witness to believe resides with the ALJ.” *Staples, Inc. v. Konvelski*, 56 S.W.3d 412, 416 (Ky. 2001) (citing *Pruitt v. Bugg Brothers*, 547 S.W.2d 123 (Ky. 1977)).

With the foregoing in mind, the Board’s reasoning behind affirming the ALJ’s decision is not indicative of clear error. We agree with the Board’s reasoning and adopt it as our own:

Here, the ALJ chose to rely on the impairment assigned by Dr. Johnson, whose methodology went unquestioned. We are satisfied Dr. Johnson’s opinion constitutes substantial evidence supporting the ALJ’s decision. *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418 (Ky. 1985). We have noted on numerous occasions that mere arguments by counsel as to the weight to be afforded the evidence are insufficient to require rejection of an impairment rating. We also find no merit in Hatzel’s argument that merely because Dr. Zerga and a radiologist reviewed a more recent x-ray, the ALJ would be required to reject Dr. Johnson’s opinion. Clearly, past x-rays were not conclusive as to the nature of Fuller’s injury. Even Dr. Zerga acknowledged there was some question initially as to whether Fuller sustained a fracture and even whether there had ever been a fracture. A CT scan was obtained which Dr. Zerga acknowledged was proof that a comminuted fracture did result from the work injury. Some disagreement continued as evidenced by the radiologist’s report of the May 25, 2010 x-ray which indicates there was “no evidence of recent or old fracture.”

It does not appear the ALJ was confused on this issue. The ALJ’s summary of Dr. Zerga’s reports clearly

indicates the ALJ understood Dr. Zerga diagnosed a fracture. Further, in summarizing the supplemental report, the ALJ specifically noted Dr. Zerga “did not find any evidence of an active calcaneal fracture.” The ALJ’s statement that, “I am not convinced by the opinion of Dr. Zerga that the plaintiff lacked evidence of a fracture” obviously referred to Dr. Zerga’s opinion as to what was shown on the May 25, 2010 x-ray. The ALJ was well within his role as fact finder in accepting the opinion of Dr. Johnson and in rejecting the opinion of Dr. Zerga regarding impairment. There being substantial evidence to support the ALJ’s selection of Dr. Johnson’s impairment rating, we may not conclude otherwise.

CONCLUSION

For these reasons, the respective decisions of the ALJ and Board are
AFFIRMED.

ALL CONCUR.

BRIEF FOR APPELLANT:

Douglas A. U'Sellis
Louisville, Kentucky

BRIEF FOR APPELLEE:

McKinnley Morgan
London, Kentucky