FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D21-0758

CITY OF ORLANDO and CORVEL CORPORATION,

Appellants,

v.

KENNETH MOORE,

Appellee.

On appeal from an order of the Office of the Judges of Compensation Claims.
Neil P. Pitts, Judge.

Date of Accident: June 6, 2017.

October 26, 2022

PER CURIAM.

The Employer, City of Orlando, and its Servicing Agent, CorVel Corporation, (collectively "Appellants") appeal the Judge of Compensation Claim's ("JCC's") order granting Claimant, Kenneth Moore's, claims for impairment benefits, attorney's fees, and costs. Their primary contentions concern whether the JCC was correct in appointing an expert medical advisor ("EMA") and in accepting the EMA's opinions. The remaining issues are corollary to these. For the reasons explained below, we affirm the order.

Factual Background

Claimant has hypertension previously adjudicated as compensable under section 112.18(1), Florida Statutes (2016). Appellants did not appeal that order. Claimant subsequently filed a petition for benefits seeking payment of impairment benefits for his hypertension.

Claimant's authorized treating physician, Dr. Kakkar, assigned a 10% permanent impairment rating ("PIR"). Claimant's independent medical examiner ("IME"), Dr. Parikh, assigned a 50% PIR. Finally, Appellants' IME, Dr. Nocero, assigned a 0% PIR. The experts also all assigned different dates for maximum medical improvement ("MMI").

Because of these conflicts in the medical evidence, the JCC appointed an EMA. Appellants objected to the appointment, arguing no conflict existed because Dr. Parikh did not correctly apply the 1996 Florida Uniform Impairment Rating Schedule (hereafter the "Guides"). The JCC rejected this argument, reasoning that even if this was accurate, a conflict still existed between the ratings provided by Drs. Nocero and Kakkar. The JCC appointed Dr. Borzak as the EMA. In Dr. Borzak's report, he concluded that Claimant reached MMI for his hypertension on May 23, 2018, with a 42% PIR based on the Guides. The parties were given the opportunity to depose Dr. Borzak to further address or challenge his opinions, but neither elected to do so.

The JCC accepted Dr. Borzak's opinions and found that Claimant was entitled to impairment benefits based on his 42% PIR, along with penalties, interest, costs, and attorney's fees. The JCC also determined that Appellants did not present any clear and convincing evidence that would allow him to reject Dr. Borzak's opinions.

Discussion

Appellants first argue on appeal that the JCC erred as a matter of law in appointing an EMA because there was no legitimate conflict in the medical opinions. "If there is disagreement in the opinions of the health care providers, if two health care providers disagree on medical evidence supporting the

employee's complaints or the need for additional medical treatment . . . the judge of compensation claims shall, upon his or her own motion or within 15 days after receipt of a written request by either the injured employee, the employer, or the carrier, order the injured employee to be evaluated by an expert medical advisor." § 440.13(9)(c), Fla. Stat. (2016). "If there is conflict or contradiction on any material aspect of the experts' medical or psychological opinions, the JCC *must* appoint an EMA." *Donald v. Albertson's and Specialty Risk Servs., Inc.*, 10 So. 3d 666, 667 (Fla. 1st DCA 2009) (quoting *Chapman v. Nationsbank,* 872 So. 2d 390, 392 (Fla. 1st DCA 2004)) (emphasis in original).

Here, the JCC determined that there was a conflict in the medical evidence regarding Claimant's impairment rating and the date of MMI. We have previously held that the JCC must appoint an EMA under similar circumstances. *See Donald*, 10 So. 3d at 667. The testimony of the treating and examining physicians supports the JCC's findings, including his finding that, even if Dr. Parikh's opinion was somehow invalidated by his purported failure to follow the Guides, there remained a conflict between Drs. Kakkar and Nocero.

Once an EMA is appointed, section 440.13(9)(c) mandates that the EMA's opinion is "presumed to be correct unless there is clear and convincing evidence to the contrary as determined by the [JCC]." *Olvera v. Hernandez Constr. of SW Fla., Inc.,* 283 So. 3d 447, 450–51 (Fla. 1st DCA 2019) (quoting *McKesson Drug Co. v. Williams*, 706 So. 2d 352, 353 (Fla. 1st DCA 1998)). Clear and convincing evidence is evidence "of a quality and character so as to produce in the mind of the JCC a firm belief or conviction, without hesitancy, as to the truth of the allegation sought to be established." *Id.* As discussed in *Olvera*, this heightened standard of proof does not change this Court's standard of review. "[T]he appellate court's function is not to conduct a *de novo* proceeding or reweigh the evidence by determining independently whether the evidence as a whole satisfies the clear and convincing standard, but to determine whether the record contains competent substantial evidence to meet the clear and convincing evidence standard." *Williams,* 706 So. 2d at 353–54.

The JCC accepted the EMA's opinion that Claimant reached MMI on May 23, 2018, with a 42% impairment. The JCC determined there was no clear and convincing evidence to reject the opinion of Dr. Borzak. The testimony of the treating physicians did not support any departure from the EMA's opinion, and in fact supported the JCC's decision to accept the EMA's opinion because none of the other doctors could agree on the date of MMI or the impairment rating.

Appellants next argue that the JCC failed to address their objection to Dr. Borzak's opinion based on *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). They first raised this objection in an amendment to the parties' pretrial stipulation which provided:

> Dr. Parikh and Dr. Borzak's opinions regarding the impairment rating should be stricken as they failed to follow the proper guidelines and also pursuant to [*Daubert*].

Appellants did not reaffirm the objection at trial or on rehearing. They made no attempt to depose the EMA to ascertain whether he had a sufficient basis for his opinions, and they did not file a motion in limine, motion to strike, or any other motion to limit or exclude any medical expert's opinions in this matter or provide any specifics for the basis of their objection. The JCC did not reference the *Daubert* objection in his order, and on rehearing, Appellants did not raise the *Daubert* issue or request that the JCC rule on it. Under these facts, Appellants failed to preserve their *Daubert* argument for appeal. To be preserved on appeal, the issue "must be presented to the lower court and the specific legal argument or ground to be argued on appeal must be part of that presentation." *Holland v. Cheney Brothers, Inc.*, 22 So. 3d 648, 649–650 (Fla. 1st DCA 2009).

Appellants also argue that the JCC erred in accepting Dr. Borzak's opinions because Dr. Borzak relied solely on an echocardiogram instead of an ECG in assigning Claimant a Class 3 impairment rating for his left ventricular hypertrophy ("LVH"). The dissent focuses on the Guides' requirement that LVH be detected via ECG, and not by echocardiogram, and Dr. Borzak's

opinion that the presence of LVH was based on echocardiogram results, which, the dissent argues, requires a finding that his opinion is not legally sufficient. The dissent acknowledges, however, that the law requires a JCC to afford a presumption of correctness to an EMA's opinion unless there is clear and convincing evidence to reject it. Here, although the dissent points out that Dr. Parikh found evidence of LVH on two out of three echocardiograms, this overlooks that Dr. Parikh, when asked if he would diagnose Claimant with LVH based on the *ECG*, responded, "I would do borderline [LVH]."* Dr. Borzak noted this in his report; he also noted that Dr. Parikh opined Claimant had LVH according to both an ECG and an echocardiogram. As the dissent also acknowledges, echocardiograms are recognized as being more sensitive and accurate for detecting LVH. But here, both an ECG and echocardiogram showed Claimant had LVH. The Guides require LVH for a Class 3 impairment. They do not require a certain "level" or "amount" of LVH. And Dr. Borzak placed Claimant on the low end of Class 3 based on the mild LVH, but then increased the level based on the "high doses of three drugs" Claimant required. Again, as the dissent points out, Dr. Borzak opined that the important factor here is the presence of LVH, regardless of the test. Thus, ultimately, Dr. Borzak's opinion that Claimant had LVH is supported by the record, meaning there was no clear and convincing evidence to warrant rejecting it.

It is important not to lose sight of the posture this case was in by the time it went before the JCC - with a conflict in opinions on the impairment rating question requiring the appointment of an EMA to give a presumptively correct opinion on the matter. The EMA's opinion that Claimant had LVH was supported by the evidence, including a diagnosis of LVH based on an ECG. Thus,

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* Despite this, the dissent insists no ECG performed on Claimant showed LVH. It should also be noted that Dr. Nocero was asked in deposition about Dr. Parikh opining that LVH "was demonstrated on echocardiogram *and* the ECG that he performed while preparing his IME report" (emphasis added), and later in the same deposition about Dr. Parikh's deposition testimony concerning evidence of LVH on the *ECG* he performed during his IME. (Dr. Parikh's report shows that he ordered an electrocardiogram as part of his IME.)

there was no basis for the JCC to reject the EMA's presumptively correct opinion under these circumstances.

With respect to the remainder of the issues raised by Appellants, we affirm without comment except to remind counsel that the "standard of review in worker's compensation cases is whether competent substantial evidence *supports* the decision below, *not* whether it is possible to recite contradictory record evidence which supported the arguments rejected below." *Wintz v. Goodwill*, 898 So. 2d 1089, 1093 (Fla. 1st DCA 2005) (quoting *Mercy Hosp. v. Holmes*, 679 So. 2d 860, 860 (Fla. 1st DCA 1996)). We therefore affirm the JCC's order.

AFFIRMED.

LEWIS and BILBREY, JJ., concur; TANENBAUM, J., dissents with opinion.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

TANENBAUM, J., dissenting.

A district court of appeal has the authority to directly review administrative orders to the extent prescribed by the Legislature. *See* Art. V, § 4(b)(2), Fla. Const. For the most part, such legislative parameters appear in the Administrative Procedure Act ("APA"), wherein the Legislature specifies exactly what the appellate court should be looking for when deciding whether a typical administrative order is the product of "reversible" error. *See* § 120.68(7), Fla. Stat. (detailing the various grounds on which a district court "shall remand a case to the agency for further proceedings consistent with the court's decision or set aside agency action, as appropriate"). The Legislature, however, excepts administrative proceedings under the Workers' Compensation Law from application of the APA, meaning in appeals under that law, we do not have the luxury of relying on the legislative

guidance for judicial review set out in section 120.68. *See* § 440.021, Fla. Stat. (exempting workers' compensation adjudications from chapter 120).

Instead, the Legislature gives us only the following provision to govern judicial review of compensation orders: "Review of any order of a judge of compensation claims entered pursuant to this chapter shall be by appeal to the District Court of Appeal, First District." § 440.271, Fla. Stat. There is nothing else in the way of legislative guidance: no statutory parameters for what might constitute a legal basis for setting aside an administrative order rendered under chapter 440. I mention all of this because I fear the majority's focus on judicially created preservation and review standards[1] has distracted it from what should be our primary—if not only—mission when reviewing a compensation order: to set it aside when the order runs counter to an express legislative direction. I have no doubt that the Legislature expects us to do this as the minimum, even if the lack of specificity in section 440.271 might leave some uncertainty as to how much deference we are supposed to give a judge of compensation claims. Because we fail to do what is required—set aside the order before us that is in conflict with statutory requirements—I dissent.

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[1] The majority, for instance, spends some time addressing whether the employer preserved a "*Daubert*" objection. First of all, section 90.702 of the Florida Evidence Code does not codify the decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). *Daubert* merely applied nearly identical language found in Federal Rule of Evidence 702 that had, at the time, just been adopted by Congress. Second of all, the Supreme Court's application of the federal rule in *Daubert* was limited to opinion testimony setting out "*scientific*" knowledge, not "technical" or "otherwise specialized knowledge." *Id.* at 589–90 (emphasis supplied). Where doctors are applying an impairment rating schedule based on record reviews and medical examinations like they were in this case, any opinion offered does not rely on the scientific knowledge addressed in depth in *Daubert*. *Daubert*, then, has nothing to do with this case or whether the JCC committed error, so whether a *Daubert* issue was preserved does not matter.

The legislative direction I maintain has been ignored is in section 440.15(3)(c), Florida Statutes. The employee sought permanent impairment income benefits, and this statutory provision requires that "[a]ll impairment income benefits [] be based on an impairment rating using the impairment schedule" established by the three-member panel described in section 440.13(12), Florida Statutes, and adopted by the Division of Workers' Compensation by rule. § 440.15(3)(b), (c), Fla. Stat. The division adopted such a rule. It states in pertinent part as follows:

> [T]he Florida Impairment Rating Guide, which is adopted by reference as part of this rule, shall be used. The Florida Impairment Rating Guide shall also be known as the Florida Impairment Rating Schedule, which is the "uniform permanent impairment rating schedule" and the "uniform disability rating schedule" referenced in Section 440.15(3)(a)2., F.S. The impairment rating must always be applied to the body as a whole.
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> [] The 1996 Florida Uniform Permanent Impairment Rating Schedule is incorporated into this rule by reference and shall be used for injuries occurring on or after its effective date.

Rule 69L-7.604(1), Fla. Admin. Code.

"Determination of permanent impairment under this schedule must be made by a" licensed physician. § 440.15(3)(b), Fla. Stat. In his compensation order, the JCC relied on a licensed physician when he accepted the opinion of the expert medical advisor ("EMA") he appointed, Dr. Borzak. *See* § 440.13(9)(c), Fla. Stat. Pertinent to this appeal, Dr. Borzak was asked to determine the employee's permanent impairment rating ("PIR") "per the 1996 Florida Uniform Impairment Guides" for his otherwise compensable hypertension. Dr. Borzak opined that the employee's impairment fell within "Class 3" for hypertensive cardiovascular disease (which has a range of impairment between 30 and 54 percent) and that the employee's impairment was in the middle of that range. He put the employee's PIR for hypertension at 42%. The JCC accepted this opinion over the employer's objection, based on a conclusion that there was no clear and convincing evidence to reject that opinion.

Of course, there is a presumption of correctness that attaches to an EMA's opinion. *See id.* ("The opinion of the expert medical advisor is presumed to be correct unless there is clear and convincing evidence to the contrary as determined by the judge of compensation claims."). The majority, however, mistakes my acknowledgement of this clear statutory requirement as some sort of fatal concession. I can acknowledge that there is a presumption and still point out that we do not have before us a question of whether there is clear and convincing evidence running contrary to the EMA's opinion. My point is that, as a matter of law, either the presumption cannot attach in the first place, or the presumption is overcome, if the EMA's opinion on its face goes outside what the Legislature directs.

After all, Florida's Workers' Compensation Law contemplates that the JCC, not the EMA, is ultimately responsible for administratively adjudicating claims for benefits like the one here. *Cf.* § 440.192(9), Fla. Stat. The EMA is just an advisor to the JCC; he is not an adjudicator. This means that even if an EMA's opinion is presumptively correct, the JCC still must consider whether the advice runs counter to statutory requirements. If it does, the JCC has a duty to follow the law and reject the advice as he adjudicates the claim. Here, as part of his advice that the employee fell within Class 3, Dr. Borzak expressly ignored what the schedule requires, thereby also rejecting what the law requires. The JCC clearly recognized this, but he followed the advice anyway in adjudicating the claim in favor of the employee.

Dr. Borzak based his opinion on indications that the employee had lower ventricular hypertrophy ("LVH"). He agreed that *regardless of the test used*, the presence or absence of LVH determines whether the employee should be in Class 3 rather than Class 1 (a lower range of PIR). As part of his exam, Dr. Borzak performed an electrocardiogram (an "ECG" or "EKG"), which revealed no LVH or other abnormality. He nevertheless concluded that the employee had LVH—and commensurately, was in Class 3—because the employee's independent medical examiner, Dr. Parikh, noted that two out of three *echo*-cardiograms (not ECGs) performed over the course of three years pointed to the presence of LVH.

The problem here is that for an employee to be put in Class 3 based on LVH, the schedule requires the finding of LVH to be made by "physical examination, *ECG*, or chest radiograph." (emphasis supplied).[2] There is no evidence in the record of an ECG performed that indicated LVH in the employee. Dr. Borzak even acknowledged this absence in his report.[3] Dr. Borzak, however, discounted the requirement that a determination of LVH be based

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[2] I am not sure what the point is behind the majority's note that the applicable portion of the schedule was not placed in evidence or judicially noticed upon request. Perhaps the majority missed the JCC's acknowledgement in his denial of rehearing that he mistakenly had overlooked that the schedule was in the record, as an attachment to one of the depositions. The JCC clearly was aware of the schedule because in the same order, he attempted to interpret a different provision in the same guideline. Despite the acknowledgement, the JCC stated that the schedule did not change his decision regarding the final compensation order's disposition.

[3] Strangely, the majority still twice claims that LVH was detected in the employee using an ECG. This never happened. Dr. Parikh did three *echo*-cardiograms: one each in 2017, 2018, and 2019. The 2017 and 2019 tests showed LVH; the 2018 did not. In fact, the EMA later addressed this aberrant 2018 *echo*-cardiogram. The EMA also acknowledged Dr. Parikh's *speculation* regarding what level of LVH an ECG might have shown—had he actually performed one. Obviously, this speculation was requested of Dr. Parikh in deposition because an ECG in fact was not performed that showed LVH. The EMA, then, ultimately did not rely on a finding of LVH based on an ECG either. At best, Dr. Borzak relied on someone else's *guess* about what an ECG might have shown, and in doing so, he ignored both that there was no other ECG indicating LVH in the employee, and that the ECG he himself performed did *not* indicate LVH. The majority completely misses the mark in its conclusion that the EMA's opinion was supported by evidence of an LVH diagnosis based on an ECG performed on the employee. This is my main point: The guide requires an LVH diagnosis *using an ECG*, not an echo-cardiogram. If there is no ECG showing LVH, there can be no recovery for the employee based on LVH under the current schedule.

on an ECG instead of an echocardiogram, and he did so based on his personal assessment that the latter “has supplanted” the former as an “accurate and reliable method of determining LVH.” That was not his call to make; Dr. Borzak did not have the authority to advise the JCC on impairment based on what he thinks is the better testing method. The manner of testing used to detect LVH matters because the statutorily mandated guide says that it does. The majority nevertheless sloughs off this clear refusal by the EMA to follow the letter of the law, ignoring in the process the critical fact that Dr. Borzak’s task was simply to advise the JCC as to the employee’s PIR *under the schedule*, not to opine separately as to a diagnosis for the employee based on state-of-the-art testing. *Cf.* § 440.15(3)(c), Fla. Stat.

The “three-member panel”—which consisted of the State’s chief financial officer or his designee, plus two members appointed by the governor and confirmed by the Florida Senate—established the schedule using precise terms, and it had to “be based on medically or scientifically demonstrable [and objective] findings as well as the systems and criteria set forth in the American Medical Association’s Guides to the Evaluation of Permanent Impairment; the Snellen Charts, published by the American Medical Association Committee for Eye Injuries; and the Minnesota Department of Labor and Industry Disability Schedules.” § 440.15(3)(b), Fla. Stat. The Legislature directs that the schedule be followed as established by the panel, and neither the EMA nor the JCC had the authority to amend the schedule.

It is true that LVH can be detected through either an ECG or an echocardiogram. There is no dispute that both are accurate and that an echocardiogram is a more sensitive tool that can detect milder forms of LVH that an ECG might miss. For all we know, the three-member panel has decided not to amend the schedule to include an echocardiogram as a method of finding LVH precisely because it *is* more sensitive. That is to say, the panel possibly concluded that for an employee to be placed into Class 3, he must have LVH severe enough to be detected by the less sensitive ECG. Certainly, the debate over the usefulness of ECG’s and echocardiogram’s sensitivity to detect LVH preceded the establishment of the current schedule. *See* Richard B. Devereux, MD, *Is the Electrocardiogram Still Useful for Detection of Left*

Ventricular Hypertrophy? American Heart Association, *Circulation*, March 1990, at 1144. Simply put, whether echocardiograms should be included in the schedule for hypertension PIR is a policy decision to be made as directed by the Legislature. The EMA had no basis to rest his PIR determination squarely on a test that is not there, even if he disagrees with the use of the required test.

Regardless of the presumption set out in section 440.13(9)(c), the JCC had no authority to make an impairment benefits award based on an EMA's determination that, on its face, runs counter to a legislative directive. Alternatively, if I had to put it in terms of the presumption, I would say that the plain fact the EMA went beyond the statutorily mandated schedule in making his determination is itself clear and convincing evidence that it is not correct. Either way, as I mentioned at the beginning, the prime legislative directive to us in our conducting judicial review of compensation orders is that we ensure the Legislature's prescriptions for the workers' compensation system are assiduously followed. *See Hardy v. City of Tarpon Springs*, 81 So. 2d 503, 505—06 (Fla. 1955) ("This Court upon review of a final order of the Full Commission has the duty of determining whether the Commission properly fulfilled its function with reference to the evidence to support the findings and the law applied to the findings."). If we were true to this directive, we would be setting the final compensation order aside. Unfortunately, that does not occur here with the majority's affirmance.

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