

**Commonwealth Of Kentucky
Court of Appeals**

NO. 2003-CA-002366-WC

LESA WELCH

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-01-73589

UROLOGY GROUP OF PADUCAH;
Hon. J. KEVIN KING, Administrative
Law Judge; MIDWESTERN INSURANCE
ALLIANCE; and WORKERS'
COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: COMBS, DYCHE, and KNOPF, Judges.

COMBS, JUDGE. Lesa Welch petitions this Court for review of an opinion of the Workers' Compensation Board affirming a decision of the Administrative Law Judge (ALJ) which had awarded her benefits based upon a 5% permanent impairment rating. Welch contends that the evidence compels an award of benefits based upon a 13% rating. Having reviewed the record and the Board's opinion, we cannot conclude that the Board erred in assessing the evidence or in construing the applicable legal precedents.

See, Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685
(1992). Thus, we affirm.

In 1994, Welch, a licensed practical nurse, sustained an injury to her back while employed at Western Baptist Hospital. Following spinal surgery in 1997, she was able to return to work. In 1999, Welch became employed by the appellee, Urology Group of Paducah. While at work on September 25, 2001, she attempted to break the fall of a paraplegic patient and sustained another injury to the same area of her back. She again had spinal surgery on March 20, 2002.

Two doctors assessed the degree of Welch's impairment in the litigation for workers' compensation benefits based on her 2001 injury. Her surgeon, Dr. Sean McDonald, testified that Welch had sustained a 13% permanent impairment to her body as a whole attributable to the 2001 incident. When asked about her previous degree of impairment, Dr. McDonald was unable to give an opinion. Dr. Warren McPherson, a neurosurgeon who examined Welch at the request of her employer's insurance carrier, testified that she had a 10% medical impairment rating. He attributed most of that rating to her earlier injury and impairment.

In his opinion and award, the ALJ elected to rely on Dr. McDonald's testimony as the more persuasive. However, the

ALJ also believed that Welch had a significant degree of active impairment prior to the 2001 incident, stating as follows:

The Administrative Law Judge finds that Dr. McPherson's testimony regarding pre-existing active impairment is essentially un rebutted. Furthermore, the Administrative Law Judge finds that Welch's previous surgery and her own self-imposed restrictions of no heavy lifting or pushing lend credence to Dr. McPherson's opinion. Therefore, the Administrative Law Judge finds that Welch had an 8% pre-existing active impairment.

The ALJ subtracted Dr. McPherson's pre-existing impairment rating (8%) from Dr. McDonald's current impairment rating (13%) to arrive at her award on a 5% rating.

In its review, the Board affirmed the ALJ's treatment of the two medical opinions as follows:

Here, Dr. McDonald testified that Welch's permanent impairment rating at present is 13%. He declined to address the issue of Welch's permanent impairment rating prior to the work injury of September 25, 2001. Such testimony is far different from an affirmative opinion that the claimant's previous condition did not warrant the assignment of impairment under the AMA Guides. Of course, even if Dr. McDonald had expressed an opinion that Welch had a 0% rating at the time of the work injury at issue, or no pre-existing active impairment, the ALJ would not have been bound by that evidence. As alluded to above, it is within the ALJ's discretion to rely on the testimony of one physician when determining the claimant's current impairment and to rely on the conflicting opinion of another physician concerning pre-existing active impairment. Whether we believe Dr.

McPherson's testimony to be more persuasive is irrelevant. This Board may not substitute its own judgment for that of the ALJ. KRS¹ 342.285. Substantial evidence is defined as evidence of relevant consequence, having the fitness to induce conviction in the minds of reasonable people, and Dr. McPherson's opinions meet this minimal standard.

In this appeal, Welch argues that the ALJ was required either to accept or to reject Dr. McDonald's opinion in its entirety. She contends that the Board erred in affirming the ALJ's award, alleging that the Board essentially evaded ("skirted") the issue. (Appellant's brief, p. 9). However, our review of relevant precedent persuades us that the Board accurately summarized the evidence and applied the correct standard in reviewing the ALJ's decision.

As the fact finder, the ALJ retains the sole authority to ascertain the weight, credibility, substance, and inferences to be drawn from the evidence. Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418 (1985); McNutt Construction/First General Services v. Scott, Ky., 40 S.W.3d 854, 859-860 (2001). The ALJ may pick and choose among conflicting medical opinions and may exercise his discretion to determine whom and what to believe. Pruitt v. Bugg Brothers, Ky., 547 S.W.2d 123 (1977); Carte v. Loretto Motherhouse Infirmary, Ky.App., 19 S.W.3d 122, 124 (2000). Two doctors gave medical opinions concerning the

¹ Kentucky Revised Statutes.

degree of Welch's impairment. Accordingly, the ALJ was entitled to rely on Dr. McDonald's opinion to determine that Welch had sustained a 13% medical impairment while simultaneously relying on Dr. McPherson's opinion to conclude that 8% of that impairment was attributable to her earlier 1994 injury. He correctly arrived at her impairment rating by calculating the difference in the two ratings.

As we find no error, we affirm the opinion of the Workers' Compensation Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

Roger W. Lofton
Paducah, Kentucky

BRIEF FOR APPELLEE UROLOGY
GROUP OF PADUCAH:

R. Christian Hutson
Paducah, Kentucky