RENDERED: NOVEMBER 9, 2007; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001122-WC

OWENSBORO MEDICAL HEALTH SYSTEM — APPELLANT

v.

APPEAL FROM WORKERS' COMPENSATION BOARD
HONORABLE WILLIAM BRUCE COWDEN, JUDGE
ACTION NO. WC-99-66969

BRENDA WORTHINGTON;
HON. JOHN B. COLEMAN,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: STUMBO AND WINE, JUDGES; GUIDUGLI,[1] SENIOR JUDGE.

STUMBO, JUDGE: This is a Petition for Review from a decision of the Workers' Compensation Board, (hereinafter "Board"), entered April 30, 2007. The Board affirmed an Opinion and Award on Reopening rendered by Administrative Law Judge John B. Coleman on October 20, 2006, and an Order Denying Reconsideration entered on December 1, 2006. The Opinion and Award on Reopening granted Brenda Worthington

[1] Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

(Appellee) increased income benefits for a work-related injury. Owensboro Medical Health Systems (Appellant) was Appellee's employer at the time of the injury. Appellant contends that the Board erred in affirming the Administrative Law Judge's (ALJ) decision. Specifically, Appellant argues that the Board flagrantly erred by accepting the ALJ's decision to admit a Dr. Huffnagle's medical report into evidence, that the Board erred by accepting the decision to award increased benefits, that the Board erred by accepting the ALJ's findings that Appellee suffers from work-related dysphagia, and that the Board erred by affirming the ALJ's decision to award benefits for 520 weeks as opposed to 425 weeks. After considering these arguments and reviewing the record and the law, we find that the Board made no errors and affirm its decision.

On August 18, 1999, Appellee injured her neck while at work as a housekeeper at Owensboro Medical Health Systems. She underwent an anterior cervical fusion performed by Dr. Cannon in January, 2000. She did not resume her employment with Owensboro Medical Health Systems after the surgery. On January 16, 2001, Appellant and Appellee entered into a settlement agreement for her work-related injury. This agreement reflected a 15 percent impairment rating and she was compensated accordingly.

Following the settlement, Appellee began working for the City of Owensboro in the beautification department. She was partnered with another worker in order to limit the amount of weight she would have to lift. Gradually her cervical and arm pain returned and began to increase. She was referred to Drs. Raque and Dimar in

Louisville who performed a second surgery. After this surgery, her pain continued and she also developed problems swallowing. Appellee moved to reopen her workers' compensation claim and on October 20, 2006, the ALJ entered an Opinion and Award on Reopening that increased her benefits. The ALJ found that Appellee had proven an increase in her disability rating. Appellant filed a Petition for Reconsideration, but it was denied. Appellant then appealed to the Board, which affirmed the ALJ's opinion.

On review, the Court of Appeals will only reverse when we "perceive that the Board has overlooked or misconstrued controlling law or committed an error in assessing the evidence so flagrant as to cause gross injustice." *Daniel v. Armco Steel Co., L.P.*, 913 S.W.2d 797, 798 (Ky.App. 1995).

Appellant first argues that the Board flagrantly erred by affirming the ALJ's decision to allow Dr. Huffnagle's medical report into evidence assessing Appellee's whole body impairment at 32 percent. The ALJ relied upon Dr. Huffnagle's assessment in awarding the increased benefits. Appellant argues that this report should not have been admitted because it was deficient in that it was not signed by Dr. Huffnagle, nor was it verified as required by 803 KAR 25:010 §10(3).

Appellee attempted to correctly introduce this report twice during the reopening proceedings. As initially submitted, it was neither signed nor accompanied by an affidavit. Appellant moved to strike the report. Appellee moved to file a corrected report and filed the report again, accompanied by a verification from her attorney stating that it was a true and accurate report. However, this verification was not executed under

oath, and therefore was not an affidavit. The corrected report was also filed outside the time for rebuttal evidence. Appellant argued to the Board that the ALJ should not have admitted the report due to these procedural errors. The Board found that these procedures are in place to ensure that reports admitted into evidence are authentic and that the verification provided satisfied the "spirit" of the rule. The ALJ is in the best position to determine whether or not to strictly adhere to the rules of procedure and to determine the quality and substance of the evidence. *See Messer v. Drees*, 382 S.W.2d 209 (Ky. 1964); *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418 (Ky. 1985).

Here, Appellant is arguing that the report did not meet the procedural requirements for admission, not that the report was falsified. Further, Appellant had the opportunity to rebut this report with its own evidence and experts. Because we find that there was no gross injustice in the report's admission and the ALJ and Board are in the best position to determine procedural issues, we affirm the ALJ's decision and hold that Dr. Huffnagle's report was properly admitted into evidence.

Appellant next argues that the Board flagrantly erred by accepting the decision of the ALJ to award Appellee increased benefits. Appellant asserts that there should be no increased benefits because Appellee failed to prove a worsening of her impairment. To prove a worsening of impairment, there must be a comparison of the impairment at two points in time. *Hodges v. Sager Corp.*, 182 S.W.3d 497, 501 (Ky. 2005). Appellant argues that this comparison should be done by the same doctor, and that since Dr. Huffnagle only examined Appellee after the second surgery, he is unable to

compare his assessment with the previous one. Appellee believes that *Hodges* does not require the same doctor to make the comparison, only that a comparison be made. We agree with Appellee and find that a comparison can be made from the evidence in the record. The settlement agreement was part of the record upon reopening. This agreement had Dr. Cannon's report attached to it which assessed a 15 percent impairment rating. This can be compared to Dr. Huffnagle's 32 percent impairment rating. We find this comparison sufficient.

Appellant also contends that the report attached to the settlement agreement cannot be used for comparison purposes. Appellant cites KRS 342.125(7) which states:

> Where an agreement has become an award by approval of the administrative law judge, and a reopening and review of that award is initiated, no statement contained in the agreement, whether as to jurisdiction, liability of the employer, nature and extent of disability, or as to any other matter, shall be considered by the administrative law judge as an admission against the interests of any party. The parties may raise any issue upon reopening and review of this type of award which could have been considered upon an original application for benefits.

We do not find that this statute precludes the consideration of Dr. Cannon's report. The statute states that nothing in the agreement can be used as an admission against interest, not that it cannot be considered as evidence of Appellee's prior impairment which could be rebutted by evidence from Appellant. This statute does not forbid consideration of a settlement agreement, just that it not be used as an admission against interest.

Appellant also argues that there were other medical opinions which refuted Dr. Huffnagle's 32 percent impairment rating and that they should have been utilized by

the ALJ. While this may be true, when there is conflicting evidence, the question of what evidence carries the most weight is one left to the ALJ and Board. *Pruitt v. Bugg Bros.*, 547 S.W.2d 123 (Ky. 1977). If the ALJ relied primarily on Dr. Huffnagle's report and not on the other reports, that is his prerogative. We find that the use of Dr. Cannon and Dr. Huffnagle's reports allowed a comparison of the impairments and that KRS 342.125(7) does not preclude the use of the Cannon report. We cannot see that the Board made such a flagrant error that would cause gross injustice, and, therefore, we affirm its decision in this regard.

Appellant's next argument is that the Board flagrantly erred by accepting the findings of the ALJ that Appellee suffers from work-related dysphagia (difficulty swallowing). Appellee began complaining of trouble swallowing around the time of her second surgery. Appellant introduced evidence from Dr. Sayed that Appellee had gastroesophageal reflux disease, which is not related to her injury, and not dysphagia. Appellant also provided evidence from Dr. Naas that Appellee underwent a swallowing study that showed normal swallowing. Appellee's evidence from Dr. Huffnagle supported her claims of dysphagia as did her own testimony. The ALJ, as finder of fact, has the sole authority to determine the weight, credibility, substance, and inferences to be drawn from the evidence and may choose what evidence to believe or disbelieve. *Pruitt, supra*. We find that Appellee's difficulty swallowing was substantiated by evidence and affirm the increase in benefits dues to dysphagia. Since there was some evidence to

suggest dysphagia and the ALJ can determine what evidence he finds most persuasive, we cannot view this as an instance of flagrant error.

Finally Appellant argues that the Board erred by accepting the ALJ's decision to award Appellee income benefits for 520 weeks as opposed to 425 weeks. Appellant contends that KRS 342.730(1)(e) requires a "carve out" of impairment for conditions previously compensated. That section of the statute states that "[f]or permanent partial disability, impairment for non-work-related disabilities, conditions previously compensated under this chapter, conditions covered by KRS 342.732, and hearing loss covered in KRS 342.7305 shall not be considered in determining the extent of disability or duration of benefits under this chapter." Appellant's argument is as follows: Appellee's 15 percent whole body impairment translates into an 18.75 percent permanent disability rating. Appellant believes this percentage should be removed from the 32 percent whole body impairment (64 percent permanent disability rating) found by the ALJ. This would result in the permanent disability rating of 42.25 percent, which would require only 425 weeks of benefits under KRS 342.730(1)(d), whereas a 64 percent rating would require 520 weeks.

We believe that Appellant has misconstrued the requirements of the statute. We find that the ALJ in his Opinion and Award on Reopening put it best. He stated that,

> Based upon the plaintiff's temporary total disability rate of $197.07, her current permanent partial disability for her 64% permanent partial disability increased by a factor of 1.5 would equal $189.00. However, the plaintiff already had an 18.75% permanent partial disability at the time of her prior settlement and the defendant-employer would be entitled to credit in the

> amount of $55.42 per week for the portion of the occupational disability the plaintiff had prior to her worsening. The Administrative Law Judge further notes that as the plaintiff's impairment has increased above 50%, her award of permanent partial disability benefits shall be for a period of 520 weeks rather than the 425 weeks which previously existed
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> ***
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> The plaintiff, Brenda Worthington, shall recover from the defendant-employer, Owensboro Medical Health System, temporary total disability benefits as were previously ordered from May 12, 2003 through March 18, 2005 in the amount of $197.07 per week. Thereafter, she shall further recover from the defendant-employer, permanent partial disability benefits, in the amount of $133.77 per week for the remainder of the 425 week period which commenced on April 5, 2000, but was interrupted for the period of May 12, 2003 through March 18, 2005. This amount represents permanent partial disability benefits in the amount of $189.19 per week with credit in the amount of $55.42 for the plaintiff's already existing 18.75% permanent partial disability for which she was previously compensated by her settlement of January 16, 2001. Therefore, at the end of the initial 425 week period, the plaintiff's benefits shall increase to the amount of $189.19 per week for an additional 95 weeks until the plaintiff has received permanent partial disability benefits for a total of 520 weeks.

The ALJ's calculations adhere to KRS 342.730(1)(e) by giving Appellant credit for the award previously bestowed on Appellee. We find that the ALJ was sound in his reasoning and did not flagrantly err as Appellant contends.

For the forgoing reasons we affirm the decision of the Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

John C. Morton
Kurt R. Denton
Henderson, Kentucky

FOR APPELLEE,
BRENDA WORTHINGTON:

M. Michele Cecil
Owensboro, Kentucky

NO BRIEF FILED FOR APPELLEES,
HON. JOHN B. COLEMAN,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD