

RENDERED: OCTOBER 8, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000684-WC

PEABODY HOLDING, INC.,
(N/K/A PATRIOT COAL
COMPANY)

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-07-75229

GREGORY MCGUIRE;
HON. JOHN B. COLEMAN,
ADMINISTRATIVE LAW
JUDGE; AND WORKERS'
COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: THOMPSON, VANMETER, AND WINE, JUDGES.

VANMETER, JUDGE: Peabody Holding, Inc. (Peabody) petitions for the review of an opinion of the Workers' Compensation Board (Board) vacating and remanding an order of the Administrative Law Judge (ALJ) which awarded Gregory McGuire benefits based on a 9% impairment rating.

On September 25, 2007, while operating a roof bolter in an underground coal mine, McGuire was struck by fallen rock on his head, back, left side, and left leg. He took a few weeks off from work following the accident, and returned to work in his regular capacity until September 28, 2008, at which point he claimed to be no longer fit for work due to the injuries he sustained. McGuire underwent surgery for a left hip replacement on November 18, 2008. Despite improvement after the surgery, he did not feel he retained the ability to return to work in his regular capacity due to continued symptoms related to his left hip injury and total hip replacement. In March 2009, McGuire filed this workers' compensation claim against his employer, Peabody.

Evidence was presented to the ALJ, including the testimony of Dr. Alan Johnson, the orthopedic surgeon who performed McGuire's hip replacement surgery. Dr. Johnson stated during his deposition that McGuire was temporarily totally disabled and would retain a 15% impairment based on the *AMA Guides to the Evaluation of Permanent Impairment (Guides)*. At the request of Peabody, McGuire was evaluated by another orthopedist, Dr. Thomas M. Loeb, who testified during his deposition that based upon the *Guides*, McGuire would retain a 15% impairment.

Later, McGuire supplemented the medical records in this action with a letter by Dr. Johnson that followed a post-surgery examination of McGuire. Dr. Johnson wrote a letter to counsel for McGuire stating that he believed McGuire to have “reached maximum medical improvement and his permanent partial disability is that of 22% of the lower extremity which equates to 9% disability to the whole person.” Dr. Johnson did not reference an applicable section of the *Guides* to support this rating.

After a review of the evidence, the ALJ found McGuire was entitled to benefits based upon a 9% impairment rating. McGuire petitioned the ALJ for reconsideration claiming that Dr. Johnson’s assessment of a 9% impairment rating was not based on any applicable section of the *Guides*. Thereafter, the ALJ confirmed the finding of benefits based upon a 9% impairment rating.

McGuire appealed the order of the ALJ to the Board. The Board held that the evidence did not support Dr. Johnson’s assessment of a 9% impairment rating because no applicable section of the *Guides* was referenced in the letter. The Board vacated the ALJ’s order and remanded the matter to the ALJ with directions to determine if Dr. Johnson’s report was based on the appropriate 5th edition of the *Guides*. This appeal followed.

First, Peabody argues the Board erred by vacating and remanding the order of the ALJ because the ALJ was within his discretion to conclude McGuire had a 9% impairment rating. We disagree.

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)). We are not bound “by an ALJ’s decisions on questions of law or an ALJ’s interpretation and application of the law to the facts.” *Bowerman*, 297 S.W.3d at 866. In either instance, “our standard of review is de novo.” *Id.* (citations omitted).

Peabody argues the proper interpretation of the Guides is a medical question and solely within the province of medical experts. *Ky. River Entererprises, Inc. v. Elkins*, 107 S.W.3d 206 (Ky. 2003). Thus, Peabody contends that the opinion of the Board remanding the matter to the ALJ requiring him to interpret the *Guides* is erroneous. However, *Ky. River* does not preclude an ALJ from determining whether an assessment was based upon the *Guides*.

In *Jones v. Brasch-Barry Gen. Contractors*, 189 S.W.3d 149, 152 (Ky.App. 2006), this court held,

an ALJ cannot choose to give credence to an opinion of a physician assigning an impairment rating that is not based upon the AMA Guides. In other words, a physician’s latitude in the field of workers’ compensation litigation extends only to the assessment of a disability rating percentage within that called for under the appropriate section of the AMA Guides.

McGuire argues, and we agree, the ALJ is not only authorized, but required to determine whether an impairment rating was based upon the *Guides*.

In this case, the ALJ relied upon the 9% impairment rating assessed by Dr. Johnson in his letter to McGuire's counsel without any assurance the rating was based upon the *Guides*. Thus, the ALJ's finding of a 9% impairment was not based on sufficient evidence. Further, upon remand, the ALJ is solely to determine whether Dr. Johnson's assessment of a 9% impairment rating was based on the *Guides*. Such a determination is not a medical question exclusively reserved for medical experts. Accordingly, the Board did not err by vacating and remanding the claim to the ALJ for further findings.

Second, Peabody argues the Board erred because McGuire should be precluded from challenging Dr. Johnson's impairment rating because McGuire offered the evidence. However, this court is unaware of, and Peabody fails to cite to, any applicable law to support this argument.

The opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

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