

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001300-WC

SENIOR CARE, INC.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-10-91568

JANET HAYES; HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: CLAYTON, STUMBO AND THOMPSON, JUDGES.

STUMBO, JUDGE: Senior Care, Inc. ("Senior Care") appeals from an Opinion of the Workers' Compensation Board ("the Board") which affirmed an Opinion, Order and Award rendered by Hon. William J. Rudloff, Administrative Law Judge ("ALJ"). The ALJ determined that Janet Hayes sustained a permanent partial

disability (“PPD”) based on a 26% impairment rating pursuant to the American Medical Association Guides with the application of the 3.2 multiplier. On appeal, Senior Care argues that the Board improperly sustained the ALJ’s reliance on a supplemental report regarding Hayes’ psychological condition, which it maintains was not admitted into evidence, and that the ALJ improperly substituted his own impairment rating regarding the psychological condition. We find no error, and accordingly affirm the Opinion on appeal.

On October 7, 2011, Hayes filed an application for resolution of injury claim alleging that on March 28, 2010, she sustained a back injury within the scope and course of her employment as a nursing assistant with Senior Care. Hayes maintained that she injured her back when she caught a patient who was falling from his wheelchair. Prior to filing the claim, Hayes had undergone an emergency room visit, doctor appointments and physical therapy.

On January 11, 2012, Hayes filed a motion to amend her claim to include a psychological component (depression) and for an extension of proof time. By Order dated January 13, 2012, the ALJ sustained the motion to amend and gave the parties additional time to tender evidence on the psychological claim. On February 10, 2012, Hayes filed a report of Dr. John J. Griffin, a psychiatrist, who evaluated her on February 2, 2012. Dr. Griffin concluded in relevant part that Hayes had “some symptoms of depression as a result of chronic pain”. Two weeks later, Hayes submitted a February 9, 2012 supplemental report from Dr. Griffin, which characterized Hayes’ depression as a “Class II impairment, 25% according to the

2nd Edition [of the AMA Guides].” In response, Senior Care filed the report of Dr. David Shraberg, who found no psychological impairment related to the March 28, 2010 injury.

A hearing was conducted on February 23, 2012, wherein Senior Care objected to the introduction of Dr. Griffin’s supplement report. As a basis for the objection, Senior Care argued that Hayes had not been granted leave to file the supplemental report, that it was not timely, and/or that Senior Care was given no notice. The ALJ sustained the objection upon finding that Dr. Griffin’s assessment of a 25% impairment was “outside the Class II impairment allowed by the 2nd Edition.”

On February 28, 2012, the ALJ rendered an Opinion and Order, wherein he found the opinions of Dr. Griffin and Hayes’ family physician, Dr. Catlett, more persuasive than that of Dr. Shraberg. Noting that the range of Class II impairment was 10% to 20%, the ALJ found that Hayes sustained a psychological impairment of 20%. The ALJ also found a 7% impairment from the lumbar condition, resulting in a 26% whole body impairment pursuant to the AMA Guides. Senior Care’s Petition for Reconsideration was denied, and the matter was appealed to the Board.

On appeal to the Board, Senior Care argued that the ALJ erred in relying on Dr. Griffin’s supplemental report which it claims was not submitted into evidence. It also argued that the ALJ improperly substituted his own impairment rating based on the supplemental report, and that there was no psychological impairment rating

contained in the evidence upon which the ALJ could properly base a finding of psychological impairment.

In rejecting Senior Care's arguments on these issues, the Board found that the ALJ did not exclude from the evidence in its entirety Dr. Griffin's supplemental report as Senior Care maintained. Rather, the Board found that the ALJ only concluded that the impairment rating of 25% assessed by Dr. Griffin was outside the range for a Class II impairment, but that the supplemental report otherwise was timely and admissible. The Board also concluded that the ALJ acted properly in assessing a 20% impairment rating, as the ALJ is vested with authority to assess the impairment rating within the given range. That is, the Board determined that since Dr. Griffin found a Class II impairment, and because that range is 10% to 20% under the Guides, the ALJ did not err in assessing a 20% psychological impairment. This appeal followed.

Senior Care now argues that the Board erred in ruling that Dr. Griffin's supplement report was properly entered into evidence, and that the Board improperly determined that the ALJ acted within his authority by assessing a 20% psychological impairment. We find no error for the same reasons articulated by the Board in its July 5, 2012 Opinion. On the issue of whether Dr. Griffin's supplement report was properly entered into evidence, the ALJ - in its response to Senior Care's motion to reconsider - noted that its initial ruling on this issue was not intended to exclude the supplement report from the evidence. Rather, the ALJ stated that Dr. Griffin's assessment of 25% psychological impairment was outside

the 10% to 20% range for Class II impairments. Concurrently with his assessment of a 25% psychological impairment, Dr. Griffin also stated that it was a Class II impairment thus placing the two findings at odds. After reviewing the exchange between the ALJ and Senior Care on this issue, as well as the ALJ's response to Senior Care's Motion to Reconsider, the Board determined that the ALJ had not ruled that Dr. Griffin's supplemental report was excluded from the evidence. This determination is supported by the record. Additionally, we find as persuasive the argument adopted by the Board that even if the supplement report was improperly admitted or relied on by the ALJ, such error was harmless since Dr. Griffin's first and primary report already established a Class II impairment. We find no error.

The second and related issue raised by Senior Care is whether the Board properly found that the ALJ did not err in assessing a 20% psychological impairment. As it argued before the Board, Senior Care now contends that the ALJ improperly substituted his assessment of 20% for the 25% assessment of Dr. Griffin. Senior Care maintains that the ALJ's authority to determine the impairment rating must be based on the evidence, and that the ALJ is not at liberty to substitute his own impairment rating based on a supplement report that was not even entered into the record.

In rejecting this argument, the Board relied on *Knott County Nursing Home v. Wallen*, 74 S.W.3d 706 (Ky. 2002), for the proposition that where a class of impairment has been given, the ALJ is permitted to consult the 2nd Edition of the AMA Guides for the purpose of determining the claimant's disability rating and

calculating the income benefits. In the matter at bar, Dr. Griffin opined that Hayes' impairment fell within the Class II rating, though the ALJ found that the 25% impairment rating assessed by Dr. Griffin exceeded the Class II range of 10% to 20%. In assessing Hayes' psychological impairment at 20%, the ALJ fixed the rating within the range allowed for under the Guides. This assessment is supported by the record and the law, and is in conformity with *Knott County Nursing Home, supra*. We find no error on this issue.

For the foregoing reasons, we affirm the Opinion of the Workers' Compensation Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

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