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Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000975-WC

FORD MOTOR COMPANY (LAP) APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-13-98836

JEFFREY B. ROGERS;
HON. JANE RICE WILLIAMS,
ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, STUMBO AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Ford Motor Company (LAP) appeals from the portion of the Workers' Compensation Board's opinion affirming in part, vacating in part and remanding the Administrative Law Judge's (ALJ) opinion, award and order finding

Jeffrey B. Rogers suffered a 5% whole person impairment and he was entitled to the three times multiplier.[1]

On September 25, 2012, while working for Ford as a standup forklift driver, Rogers suffered an injury to his left shoulder when he made a sharp turn which threw him off balance and pulled his arm. Rogers was later diagnosed with a torn rotator cuff. Rogers had two surgeries on his rotator cuff, in January 2013 and March 2014.

Rogers is currently employed at Ford as a sit-down forklift truck operator. He changed from being a standup forklift operator due to his injury; he was able to switch jobs because he had the necessary seniority.

Rogers testified that before his second surgery he experienced pain when raising his shoulder or arm. His second surgery decreased his pain level, but he still has pain anytime he raises his arm above his shoulder, which increases the higher he lifts his arm. The higher his arm is raised, the weaker it is, but he also has decreased strength when his arm is down. Rogers continues to take muscle relaxers and anti-inflammatories for his shoulder and a preexisting back condition.

[1] Ford raised an additional issue in its appeal to the Board regarding temporary total disability (TTD) benefits. The Board vacated and remanded on this issue for additional findings and Rogers did not appeal from this decision. Therefore, the evidence relating to TTD benefits is irrelevant to this appeal.

Although the standup forklift driver position did not require lifting, it required use of Rogers's arms and shoulders as he was required to steer with his left arm and work the throttle with his right arm and stand sideways inside the truck. While driving the standup forklift, he had to balance himself and put pressure on his arm. When he turned the standup forklift, he was constantly off balance.

Rogers stated the sit-down job is much easier because all he has to do is turn, there is no pressure on his arm and it is more like driving a car.

Rogers testified that based on his limitations, he could not go back to being a standup forklift operator because he could not perform "the balancing of driving and pulling." He would not be able to perform the duties of his other pre-injury jobs at Ford due to the movements required. He can no longer return to being a standup forklift operator because Ford no longer operates its standup forklifts.

Dr. James Farrage opined based on his independent medical examination (IME) performed on January 8, 2014, that other than a brief course of physical therapy to address range of motion and update his home exercise program, Rogers had reached maximum medical improvement (MMI). No further surgically amenable lesions were identified. Dr. Farrage opined Rogers should avoid above

shoulder level activity but did retain the physical capacity to return to operating a standup forklift.

Pursuant to the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, Fifth Edition (AMA *Guides*), Dr. Farrage assessed a 9% upper extremity impairment (based upon flexion impairment of 2%, extension of 1%, abduction impairment of 3%, internal rotation impairment of 2% and external rotation of 1%) which converted to a 5% whole person impairment related to the work injury. He stated "[t]his rating is not anticipated to significantly change in the near future."

According to Dr. Farrage's letter dated July 7, 2014, after Rogers's second surgery, Dr. Farrage opined:

> Based upon the more specific information regarding Mr. Rogers' job description prior to his work-related injury and his currently established permanent work restrictions, it would be medically inadvisable for him to return to the competitive physical demands of his previous description without undue potential for symptom exacerbation and placing the surgical repair at significant risk of re-injury.

Dr. Peter Sallay performed Rogers's surgeries. He opined that on September 6, 2013, after Rogers's first surgery, Rogers reached MMI and had a 5% whole person impairment and no formal restrictions. Dr. Sallay opined that on June 20, 2014, after Rogers's second surgery, Rogers reached MMI and had a 4% impairment converted to a 2% whole person impairment, with a permanent

restriction of no lifting or repetitive reaching above shoulder level. However, in giving these opinions, Dr. Sallay did not state he was relying on the AMA *Guides*.

Dr. Ellen Ballard conducted an IME on January 7, 2015. She found Rogers reached MMI in June 2014, and under the AMA *Guides* had a 2% impairment for shoulder abduction and 3% for flexion for a total of a 5% upper extremity impairment converted to a 3% whole person impairment related to his work injury. His permanent work restriction with the left arm is no overhead work. She opined Rogers retained the physical capacity to return to the same kind of work as that performed at the time of his injury.

Dr. Ballard reviewed the impairment ratings assigned by Dr. Sallay and Dr. Farrage, and opined: "Dr. Sallay previously assigned a 5% impairment. This would appear to be the correct impairment. It has not changed since his second surgery. This is not substantively different from the impairment assigned by Dr. Farrage. Although the motions are slightly different, the total is not."

The ALJ found that Rogers sustained a permanent partial disability (PPD) and that Rogers has a 5% whole person impairment based on ratings from all three physicians. Dr. Farrage found a 5% whole person impairment and Dr. Sallay found a 5% whole person impairment following the first surgery. The ALJ noted that although Dr. Ballard assessed a 3% whole person impairment, she

reviewed the ratings assigned by Dr. Farrage and Dr. Sallay, found them to be accurate and opined the rating would not change as a result of the second surgery.

The ALJ found that Rogers did not retain the physical capacity to work as a standup forklift operator because physicians stated Rogers should not return to the type of work he performed at the time of the injury and Rogers testified that he does not believe he is able to do the work of a standup driver. The ALJ noted the parties stipulated Rogers's preinjury wage as a standup forklift driver was higher than his post injury wage as a sit-down forklift operator. In applying these findings, the ALJ concluded that as a matter of law, Rogers was entitled to the three times multiplier under Kentucky Revised Statutes (KRS) 342.730(1)(c)1 because Rogers does not retain the physical capacity to return to his work as a standup forklift operator and does not earn the same or greater wage as before.

Ford's petition for reconsideration challenging the award of the three times multiplier was denied. Ford appealed, arguing there was not substantial evidence that Rogers suffered a 5% whole person impairment and he was not entitled to the three times multiplier because his restrictions did not prevent him from returning to his prior position.

The Board determined that the ALJ could not rely upon the impairment ratings assessed by Dr. Sallay because Dr. Sallay failed to state his

impairment ratings were made pursuant to the AMA *Guides* and, thus, could not constitute substantial evidence. The Board determined that the ALJ could reasonably rely on Dr. Farrage's impairment rating even though it was made prior to Rogers's second surgery. At the time of the rating, Dr. Farrage opined that Rogers was at MMI and there was no medical testimony establishing the results of the second surgery caused Dr. Farrage's impairment rating to be inaccurate. Additionally, Dr. Ballard's report provided unequivocal support for Dr. Farrage's impairment rating because she opined that the other physician's impairment ratings of 5% were accurate and were unchanged since the second surgery.

The Board also determined that the ALJ did not err in awarding Rogers the three times multiplier because the ALJ properly relied on Rogers's self-assessment of his ability to perform his prior work and Dr. Farrage's July 7, 2014 letter that it was not medically advisable for Rogers to return to the demands of his previous job. Rogers's self-assessment and Dr. Farrage's opinion provided substantial evidence for the ALJ's finding.

Our standard of review of a decision of the Board "is limited to determining whether the decision was erroneous as a matter of law." *Ira A. Watson Dept. Store v. Hamilton*, 34 S.W.3d 48, 52 (Ky. 2000). We will only correct the Board where "the . . . Court perceives the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing

the evidence so flagrant as to cause gross injustice." *Pike County Bd. of Educ. v. Mills*, 260 S.W.3d 366, 368 (Ky.App. 2008) (quoting *Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687–88 (Ky. 1992)).

The ALJ is the exclusive finder of fact pursuant to KRS 342.285(1). The ALJ "has the sole discretion to determine the quality, character, weight, credibility, and substance of the evidence, and to draw reasonable inferences from the evidence." *Bowerman v. Black Equip. Co.*, 297 S.W.3d 858, 866 (Ky.App. 2009). "[A]n ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof." *FEI Installation, Inc. v. Williams*, 214 S.W.3d 313, 316 (Ky. 2007). *See Copar, Inc. v. Rogers*, 127 S.W.3d 554, 561 (Ky. 2003).

"Although a party may note evidence that would have supported a different outcome than reached by an ALJ, such proof is an inadequate basis for reversal on appeal. Rather, it must be shown there was no evidence of substantial probative value to support the decision." *Miller v. Go Hire Employment Dev., Inc.*, 473 S.W.3d 621, 629 (Ky.App. 2015) (internal citation omitted).

We agree with the Board that Dr. Sallay's opinion as to Rogers's whole person impairment could not be relied upon because Dr. Sallay did not state that his opinion was based upon the AMA *Guides*. *Jones v. Brasch-Barry Gen. Contractors*, 189 S.W.3d 149, 154 (Ky.App. 2006). However, the evidence

provided by Dr. Farrage and Dr. Ballard provided sufficient evidence for the ALJ to determine that Rogers had a 5% whole person impairment.

As noted in *Miller*, 473 S.W.3d at 632, "MMI is critical in the context of assessing a 'whole person impairment' rating because the AMA *Guides* prohibit physicians from assessing an impairment rating for a medical condition unless the patient has achieved MMI." Although Dr. Farrage's opinion as to Rogers's whole person impairment was made prior to his second surgery, it was based on Rogers's having reached MMI. Dr. Ballard opined after Rogers's second surgery that though she concluded a 3% impairment was proper, she also agreed that a 5% impairment appeared to be the correct and Rogers's impairment did not change following his second surgery. Rogers's testimony following the second surgery also supports this conclusion as the only improvement Rogers noted was a decrease in his pain. Therefore, the ALJ's finding was supported by sufficient evidence and the Board acted properly in affirming it.

We also agree with the Board that the ALJ acted properly in applying the three times multiplier. KRS 342.730(1)(c)1 provides for a three times multiplier of PPD benefits "[i]f, due to an injury, an employee does not retain the physical capacity to return to the type of work that the employee performed at the time of injury[.]" However, under KRS 342.730(1)(c)2 "[i]f an employee returns to work at a weekly wage equal to or greater than the average weekly wage at the

time of injury," the worker is not entitled to a multiplier unless there is a "period of cessation of that employment" in which case the employee is entitled to a two times multiplier.

In *Fawbush v. Gwinn,* 103 S.W.3d 5, 12 (Ky. 2003), the Kentucky Supreme Court determined that if both (c)1 and (c)2 apply, "an ALJ is authorized to determine which provision is more appropriate on the facts. If the evidence indicates that a worker is unlikely to be able to continue earning a wage that equals or exceeds the wage at the time of injury for the indefinite future, the application of paragraph (c)1 is appropriate."

In *Toyota Motor Mfg., Kentucky, Inc. v. Tudor*, 491 S.W.3d 496, 506 (Ky. 2016), the Court further clarified the findings and determinations the ALJ must make to properly award the three times multiplier:

> To be clear, if an ALJ finds that an injured employee "does not retain the physical capacity to return to the type of work that the employee performed at the time of injury" as set forth in KRS 342.730(1)(c)1 and relevant case law, the ALJ shall award benefits at three times the rate otherwise payable. However, if the ALJ also determines that the employee is earning a wage equal to or greater than the pre-injury wage, the ALJ must then determine if the employee is likely to do so for the foreseeable future. If the ALJ determines that the employee is not likely to do so, then the employee is entitled to receive benefits at three times the rate otherwise payable. If the ALJ determines that the employee is likely to continue earning the equal or greater post-injury wage, then the employee is not entitled to the three times multiplier.

The ALJ properly followed these steps in awarding Rogers the three times multiplier. First, the ALJ found that Rogers did not retain the physical capacity to return to his work as a standup forklift driver. This finding was properly supported by substantial evidence in the form of Dr. Farrage's letter and Rogers's testimony. A claimant's testimony that he is unable to perform the duties of his former job is competent evidence. *Ira A. Watson Dept. Store*, 34 S.W.3d at 52; *N. G. Gilbert Corp. v. Russell*, 451 S.W.2d 613, 615 (Ky. 1970).

Second, the ALJ considered whether Rogers was earning a wage equal to or greater than his preinjury wage. Because the parties stipulated that Rogers was not earning a wage equal to his preinjury wage, the ALJ's inquiry ended and the ALJ properly awarded Rogers PPD benefits enhanced by the three times multiplier.

Accordingly, we affirm the opinion of the Board, affirming in part, vacating in part and remanding the ALJ's opinion, award and order.

ALL CONCUR.

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