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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001457-WC

JEFFREY M. CRUMP — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-15-00071

UNITED MECHANICAL, INC.; CHIEF ADMINISTRATIVE LAW JUDGE ROBERT SWISHER; and WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
REVERSING AND REMANDING
** ** ** ** **

BEFORE: JOHNSON,[1] JONES, AND THOMPSON, JUDGES.

JONES, JUDGE: The Appellant, Jeffrey Crump, appeals from an opinion of the Kentucky Workers' Compensation Board (the "Board"). For the reasons set forth

[1] Judge Robert G. Johnson dissented in this opinion prior to the expiration of his term of office. Release of the opinion was delayed by administrative handling.

below, we reverse with instructions to remand to this claim to the Administrative Law Judge.

I. BACKGROUND

The Appellant, Jeffrey Crump, sustained two injuries to his neck while employed by the Appellee, United Mechanical, Inc. ("United"). Crump sustained the first injury on October 2, 2013, when he was carrying a compressor. He underwent surgery on November 27, 2013, and returned to work without restrictions on March 17, 2014. On August 27, 2014, Crump again injured his neck. This injury, which occurred while Crump was carrying an extension ladder, necessitated his second surgery on February 24, 2015. Crump was restricted from work from January 22, 2015, through March 30, 2015. On May 18, 2015, Crump, unable to return to his previous job, went to work for Alpha Mechanical as a HVAC Service Tech through the Pipefitter's Union doing primarily preventative maintenance requiring less physical exertion.

On January 26, 2015, Crump filed his claim with the Department of Workers' Claims. Crump submitted into the record the medical report of Dr. Warren Bilkey, who determined that Crump was not at Maximum Medical Improvement ("MMI") and could not be considered at MMI until February 25, 2016, one year after his last surgery. In addition, Dr. Bilkey assigned Crump a 28% Permanent Partial Impairment ("PPI") using the Diagnosis Related

Evaluation, ("DRE") method. His diagnosis was based on his statement that "regardless of outcome at MMI, the DRE rating does not change."

The hearing on Crump's claim was held on June 24, 2015, by William J. Rudloff, Administrative Law Judge ("ALJ"). In his order, the ALJ granted temporary total disability benefits for the periods of time that Crump was off work at United, November 27, 2013, to March 17, 2014, and again from September 22, 2014, to May 18, 2015. In addition, the ALJ determined that Crump was entitled to recover enhanced permanent partial disability ("PPD") benefits based upon a 28% permanent impairment.

United appealed to the Board, and on January 25, 2016, the Board issued an Opinion Affirming in Part, Vacating in Part and Remanding. The Board affirmed the ALJ's decision that Crump's injuries were work-related as defined by the Workers' Compensation Act; however, the Board vacated the ALJ's award of permanent partial disability benefits. Regarding the award of PPD benefits, the Board stated as follows:

> On remand, the ALJ must review the medical evidence and determine if there is evidence regarding an MMI date that pre-dates May 27, 2015, the date Dr. Bilkey assigned his impairment ratings. It is important to note that there are no other impairment ratings in the record. Thus, an award of PPD benefits based upon Dr. Bilkey's impairment rating can only be rehabilitated through other medical evidence relating to MMI that pre-dates the date upon which Dr. Bilkey assigned his impairment ratings—May 27, 2015. If the ALJ is unable to discern that

> medical evidence supports an MMI date which satisfies this requirement permanent income benefits cannot be awarded.

On remand, the claim was reassigned to the Chief ALJ. The Chief ALJ rendered an opinion on March 30, 2016. Therein, the Chief ALJ stated as follows:

> The initial task, on remand, is to determine whether there is any evidence in the record that plaintiff reached maximum medical improvement prior to the date of Dr. Bilkey's report, May 27, 2015. Having carefully and thoroughly reviewed every page of every medical record submitted by the parties in this matter, the undersigned Chief Administrative Law Judge finds that there is no such evidence. . . . As instructed by the Workers' Compensation Board, therefore, the absence of a finding of maximum medical improvement following either injury is fatal to an award of permanent partial disability benefits. Accordingly, plaintiff's claim for permanent partial disability benefits is dismissed.

Crump appealed the Chief ALJ's dismissal to the Board. On appeal, Crump argued that the Chief ALJ erred by dismissing his claim for PPD benefits. Crump asserted the ALJ was not compelled to dismiss his claim for PPD. Specifically, he pointed out that the only evidence of record from Dr. Bilkey was clear that he sustained a permanent impairment. Crump maintains that instead of dismissing the claim, the ALJ should have vacated the award of PPD and placed his claim in abeyance until he reached MMI. The Board rejected Crump's

arguments. It held that the Chief ALJ did not err because he followed the Board's directives on remand.

II. STANDARD OF REVIEW

Pursuant to KRS[2] 342.285, the ALJ is the sole finder of fact in workers' compensation claims. Our courts have construed this authority to mean that the ALJ has the sole discretion to determine the quality, character, weight, credibility, and substance of the evidence, and to draw reasonable inferences from that evidence. *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418, 419 (Ky. 1985); *McCloud v. Beth-Elkhorn Corp.*, 514 S.W.2d 46, 47 (Ky. 1974). Moreover, an ALJ has sole discretion to decide whom and what to believe, and 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. *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15, 16 (Ky. 1977).

On review, neither the Board nor the appellate court can substitute its judgment for that of the ALJ as to the weight of evidence on questions of fact. *Shields v. Pittsburgh & Midway Coal Mining Co.*, 634 S.W.2d 440, 441 (Ky. App. 1982). A reviewing body cannot second-guess or disturb discretionary decisions of an ALJ unless those decisions amount to an abuse of discretion. *Medley v. Bd. of Educ., Shelby Cty.*, 168 S.W.3d 398, 406 (Ky. App. 2004). Discretion is abused

[2] Kentucky Revised Statutes.

only when an ALJ's decision is arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Downing v. Downing*, 45 S.W.3d 449, 454 (Ky. App. 2001). To demonstrate an abuse of discretion, "[a] party who appeals a finding that favors the party with the burden of proof must show that no substantial evidence supported the finding, *i.e.*, that the finding was unreasonable under the evidence." *Abel Verdon Const. v. Rivera*, 348 S.W.3d 749, 754 (Ky. 2011).

III. ANALYSIS

While it is true that Dr. Bilkey assigned an impairment rating before the date of MMI, he provided a reasonable explanation for doing so that is grounded in the *AMA Guides*. Dr. Bilkey opined that Crump would not reach MMI until at least one year from the date of his last surgery: February 25, 2016. Nevertheless, he explained that it was appropriate for him to assign a prospective impairment rating because the preferable method of evaluation, the DRE Method, was based on the fact that Crump had undergone two surgeries on the same area of his spine as a result of his injury. Dr. Bilkey explicitly stated that the passage of additional time would not decrease the impairment rating. He explained his decision to assign an permanent impairment rating prior to date of MMI as follows:

> A permanent partial impairment rating has been acquired by Mr. Crump as a result of these work injuries. According to the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, there are two ways to do impairment ratings for a spine injury. The DRE method is utilized when there has been a maximum one

> injury to one spinal level with surgery. In using this, Mr. Crump has a Cervical DRE Category IV impairment as referenced on Table 15-5. This allows a range of impairment of 25%-28%. Since there have been two surgeries, one would select the 28% whole personal impairment rating here.
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> . . .
>
> The Range of Motion method would apply at the date of MMI. Assuming no complications with bone healing or further operative care, this would not occur until one year after the last surgery. The DRE Method in contrast applies to the diagnosis for which Mr. Crump underwent surgery. Therefore regardless of outcome if the DRE Method were to be used, it would apply subsequent to the second surgery and would not need to wait until MMI status is reached. This means that as a result of the 2 work injuries, Mr. Crump has acquired at least 28% whole person impairment. After one year subsequent to the second surgery, Mr. Crump may prove to have a higher level of impairment according to the Range of Motion method and this impairment rating would have to be calculated at that time to apply. The Range of Motion method however may also show a lower impairment rating than 28% whole person impairment. In that event, according to the Guides, when there are pertinent but competing methods to calculate impairment, the highest is utilized. Therefore if at the one year anniversary the Range of Motion method yields a lower impairment rating than the DRE method, the DRE method impairment would apply.

R. at 185-86.

It is clear from Dr. Bilkey's report that Crump's injuries caused him to sustain a permanent impairment rating and that, at a minimum, that rating would be 28%.

The Chief ALJ construed the Board's remand directive as limiting his authority to do anything other than dismiss Crump's claim for PPD benefits since no medical evidence indicated that he had obtained MMI. While the *Guides* do state that a physician should not assign a permanent impairment prior to MMI, Dr. Bilkey provided a solid explanation for his decision to assign an impairment rating prior to the Crump obtaining MMI from the second injury. Nothing in the record contradicts Dr. Bilkey's assessment that Crump's work injuries left him with at least a 28% permanent impairment rating.

"'Permanent impairment rating' means percentage of whole body impairment caused by the injury or occupational disease as determined by the 'Guides to the Evaluation of Permanent Impairment[.]'" KRS 342.0011. Based on the evidence of record, it is clear that Crump demonstrated that he sustained a permanent impairment rating that was caused by his work injuries. While Dr. Bilkey did not strictly follow the *Guides*, in that he assessed a permanent impairment rating prior to Crump obtaining MMI from his second surgery, his report shows that his opinion is grounded in the *Guides*, in that he explained that even if he waited until Crump obtained MMI from the second surgery, he would be left with an impairment rating of at least 28%. Although Dr. Bilkey's opinion did not strictly adhere to the *Guides* insomuch as it was rendered prior to MMI, Dr. Bilkey adequately explained his rationale. Most importantly, his opinion was

based on the methods set forth in the *Guides*. As such, the Chief ALJ could have given credence Dr. Bilkey's opinion. *See Plumley v. Kroger, Inc.*, 557 S.W.3d 905, 912-13 (Ky. 2018), *reh'g denied* (Nov. 1, 2018) (holding that an ALJ is entitled to give credence to an opinion that is based upon the *Guides* even if the opinion does not strictly adhere to them).

In the opinion before us, the Board rejected that on remand the ALJ had discretion to do anything with Crump's claim other than to dismiss. We disagree. Given the undisputed evidence that Crump's work injuries caused him to sustain a permanent impairment rating of at least 28%, the ALJ was not required to dismiss the claim. KRS 342.275(2) provides that: "The administrative law judge may grant continuances or grant or deny any benefits afforded under this chapter, including interlocutory relief, according to criteria established in administrative regulations promulgated by the commissioner." In light of the evidence, it would have been entirely appropriate for the ALJ to award Crump PPD beginning at the MMI date or place the claim in abeyance pending the MMI date. *See Watts v. Danville Hous. Auth.*, 439 S.W.3d 158, 160 (Ky. 2014). The Board's conclusion that the ALJ lacked this discretion was in error. Accordingly, we reverse and remand for further consideration of Crump's claim for PPD benefits.

THOMPSON, JUDGE, CONCURS.

JOHNSON, JUDGE, DISSENTS WITHOUT SEPARATE OPINION.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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