

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001054-WC

DERRICK BROWN

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-15-93236

PSC INDUSTRIES; HON. JEANIE OWEN MILLER,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
REVERSING AND REMANDING

** ** * * * **

BEFORE: DIXON, D. LAMBERT, AND SMALLWOOD, JUDGES.

DIXON, JUDGE: Derrick Brown petitions for review of an opinion of the
Workers' Compensation Board vacating an Administrative Law Judge's award of
permanent total disability benefits to Brown. Because we conclude the Board

erred as matter of law, we reverse the decision and remand this matter to the Board for further proceedings.

Brown was employed by PSC Industries as a machinist. Brown injured his back and neck when a tool cabinet tipped over and pinned him against a table. Brown was unable to return to his position at PSC, and he filed a claim for workers' compensation benefits alleging his injuries resulted in permanent physical impairment.

Brown introduced the medical records of his treating neurosurgeon, Dr. Thomas Becherer. A February 24, 2016, report indicated Brown had recovered from cervical fusion surgery, and he had current complaints of radiating lumbar pain. Dr. Becherer opined Brown's lumbar complaints did not require surgery and referred Brown to Dr. Rodney Chou for rehabilitative treatment. Brown also introduced the March 8, 2016, IME report of Dr. Jules Barefoot. Dr. Barefoot reviewed Brown's medical records and performed a physical examination. Dr. Barefoot noted the following diagnoses:

1. Status post anterior cervical discectomy and fusion with partial corpectomies and bone arthrodesis with instrumentation at C6-7, 11/24/2015.
2. Lumbar spondylosis with moderately severe left and moderate right facet arthropathy at L5-S1 with evidence of a right sided L% [sic] radiculopathy.

As to MMI, Dr. Barefoot stated:

Mr. Brown does appear to be at his point of maximal medical improvement if no further treatment is available. As he does continue to be symptomatic, particularly in his lumbar spine, I would recommend ongoing treatment through Dr. Chou.

Dr. Barefoot assessed a 37% whole person impairment rating pursuant to the 5th Edition of the AMA Guides, and he opined Brown was not able to return to his prior employment at PSC.

PSC filed the medical records of Dr. Chou. Brown had an office visit with Dr. Chou on June 9, 2016. Dr. Chou noted Brown had previously tried physical therapy and pain medication. Dr. Chou diagnosed cervical sprain, lumbar sprain, pain in limb, and displacement of cervical intervertebral disc without myelopathy. Dr. Chou prescribed a “transdermal poly pharmaceutical cream to help with pain and keep him off narcotics” and refilled Brown’s other medications. Dr. Chou found that Brown had reached MMI, and in a subsequent letter, he assessed a 25% impairment rating for Brown’s cervical condition.

The ALJ issued an opinion and award, which stated, in relevant part:

The Plaintiff argues he is permanently and totally disabled as defined by the Act. The Defendant/employer argues the plaintiff’s disability is partial if any. After reviewing all of the evidence in this case, I find that Plaintiff now suffers from a permanent total occupational disability. In making this finding I rely on [sic] upon the testimony of the Plaintiff and the opinion of Dr. Barefoot and the records of Dr. Chou.

It is undisputed that Mr. Brown injured his cervical and lumbar spine as a result of his work injury. The parties stipulated that he did not retain the physical capacity to return to the same type of work he was performing at the time of the injury. His impairment ratings vary from 25% from Dr. Chou to 37% from Dr. Barefoot. I find Dr. Barefoot's impairment rating more persuasive than Dr. Chou's. This is due to the obvious fact that despite ongoing, and unabated lumbar spine symptoms, Dr. Chou placed no impairment on his lumbar spine. That is not reasonable. The medical evidence is rather straightforward, with significant permanent restrictions from both physicians. Again, Dr. Barefoot's restrictions are more convincing to this fact-finder because he considers not just the cervical limitations but also the lumbar limitations.

PSC filed a petition for reconsideration, arguing the evidence supported an award of permanent partial disability benefits rather than permanent total disability benefits. The ALJ denied the petition, and PSC appealed, contending there was insufficient evidence to support a finding of permanent total disability. The Board, *sua sponte*, addressed the issue of MMI, concluding as follows:

Clearly, the ALJ relied upon the opinions and impairment rating of Dr. Barefoot in finding Brown is entitled to PTD benefits. However, in Dr. Barefoot's March 8, 2016, report, regarding MMI, he opined Brown is at MMI 'if no further treatment is available.' Further, Dr. Barefoot opined that 'as [Brown] does continue to be symptomatic, particularly in his lumbar spine, [he] would recommend ongoing treatment through Dr. Chou.' Significantly, the record indicates Brown received treatment from Dr. Chou subsequent to Dr. Barefoot's March 8, 2016, IME. Brown saw Dr. Chou on June 9,

2016. Dr. Chou performed an examination, prescribed refills of Celebrex, Cyclobenzaprine, and Neurontin, and prescribed a new topical cream to help with pain. Consequently, as Brown received treatment after Dr. Barefoot assessed his conditional impairment rating, Dr. Barefoot's impairment rating does not meet the definition of 'permanent' per the AMA Guides. Consequently, the ALJ's award of PTD benefits, as a matter of law, must be vacated.

On remand, the ALJ must identify a permanent impairment rating in conformity with the AMA Guides. In the alternative, should the ALJ identify in the record a date of MMI that predates March 8, 2016, the date upon which Dr. Barefoot assessed his 37% whole person impairment rating, the ALJ is permitted to rely upon that MMI date in order to rehabilitate Dr. Barefoot's impairment rating. Only after making these essential additional findings of fact can the ALJ analyze Brown's ability to perform any type of work anew. However, if the ALJ is unable to identify a permanent impairment rating in the record or an MMI date that predates the date upon which Dr. Barefoot assessed a 37% impairment rating, or should the ALJ identify a permanent impairment rating assessed in accordance with the AMA Guides and choose not to rely upon it, the ALJ may not award income benefits and the ALJ's modified award should only reflect an award of medical benefits.

Brown now seeks review in this Court, contending the Board exceeded its authority and erred as a matter of law by vacating and remanding the award of PTD benefits.

When this Court reviews a decision rendered by the Board, our function is to correct the Board only where we believe it "overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing

the evidence so flagrant as to cause gross injustice.” *Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992).

Brown contends substantial evidence supported the ALJ’s finding of a 37% permanent impairment rating. He asserts the Board erred by vacating the ALJ’s award and remanding the matter for the ALJ to identify a new impairment rating.

“The date that an injured worker reaches MMI and the assessment of a permanent impairment rating under the American Medical Association’s *Guides* . . . are medical questions to be answered by the medical experts.” *Kroger v. Ligon*, 338 S.W.3d 269, 274 (Ky. 2011). It is within the province of the ALJ, however, to “decide the legal significance of conflicting medical evidence.” *Tokico (USA), Inc. v. Kelly*, 281 S.W.3d 771, 775 (Ky. 2009).

In his report, Dr. Barefoot asserted that Brown was at MMI “if no further treatment is available.” Dr. Barefoot also acknowledged Brown’s complaints of lumbar pain and recommended continuing treatment with Dr. Chou. Although he recommended additional treatment, Dr. Barefoot assessed Brown’s permanent impairment as follows:

In regard to his cervical spine, refer to page 392, table 15-5. He would be placed in a DRE cervical category IV in that he has undergone a cervical arthrodesis.

As noted on page 381, ‘If residual symptoms or objective findings impact the ability to perform ADL despite

treatment, the higher percentage in each range should be assigned.’

Therefore, he would be placed in the upper limits of a DRE cervical category IV and would be assigned a 28% whole person impairment.

In regard to his ongoing persistent lumbar complaints, refer to page 384, table 15-3. He would be placed in a DRE lumbar category III. He does have signs of a radiculopathy. He was noted to have weakness with extension of his right great toe which is consistent with an L5 radiculopathy.

Once again, referring to page 381, because ‘residual symptoms impact the ability to perform ADL’s despite treatment,’ he would be assigned a 13% impairment. Referring to page 604 of the Guides, combined values chart, combining a 13% with a 28% impairment equals a 37% whole person impairment.

Therefore, I would rate Mr. Brown’s whole person impairment at 37%.

Three months later, Brown presented to Dr. Chou with complaints of low back and neck pain. Dr. Chou examined Brown, ordered refills on his medications (along with a new non-narcotic cream prescription), and determined Brown was at MMI. Notably, Dr. Chou assigned an impairment rating only for Brown’s cervical condition. Dr. Chou released Brown to return to work with certain lifting restrictions.

It was within the province of the ALJ to weigh the credibility of the evidence. *Caudill v. Maloney’s Discount Stores*, 560 S.W.2d 15, 16 (Ky. 1977).

“MMI refers to the time at which a worker’s condition stabilizes so that any impairment may reasonably be viewed as being permanent.” *Tokico (USA), Inc.*, 281 S.W.3d at 775-76. Furthermore, “[t]he need for additional treatment does not preclude a finding that a worker is at MMI.” *Id.* at 776.

Here, Dr. Barefoot opined, if no further treatment was available, Brown was at MMI, i.e., Brown’s cervical and lumbar conditions were stable and reasonably viewed as permanent. *See id.* Three months after Dr. Barefoot’s evaluation, Dr. Chou prescribed medication for Brown’s ongoing pain management. Dr. Chou also found only Brown’s cervical condition to be impairment-ratable. We are simply not persuaded the evidence of Brown’s office visit with Dr. Chou rendered Dr. Barefoot’s impairment rating invalid or not supported by substantial evidence. We reiterate, “[t]he need for additional treatment does not preclude a finding that a worker is at MMI.” *Id.* The ALJ explained her reasoning for relying on Dr. Barefoot’s evaluation, noting she also found Brown’s own testimony about his lumbar symptoms to be credible. Further, she was not persuaded by Dr. Chou’s evaluation because he did not consider Brown to have any lumbar impairment. “The [ALJ], as the finder of fact, and not the reviewing court, has the authority to determine the quality, character and substance of the evidence presented” *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418, 419 (Ky. 1985). Furthermore, the ALJ is free “to believe part of

the evidence and disbelieve other parts of the evidence whether it came from the same witness or the same adversary party's total proof." *Caudill*, 560 S.W.2d at 16.

We conclude substantial evidence supported the ALJ's finding of a 37% permanent impairment rating; consequently, the Board erred as a matter of law by vacating the award on that basis. We reverse the Board's opinion and remand this matter for the Board to address the issues presented in PSC's original appeal.

ALL CONCUR.

BRIEF FOR APPELLANT:

Scott C. Justice
Louisville, Kentucky

BRIEF FOR APPELLEE:

Melanie B. Gabbard
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