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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000267-WC

GREYHOUND LINES, INC. APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-13-91370

KERRY SLIDER;
HON. TANYA PULLIN,
ADMINISTRATIVE LAW JUDGE;
and WORKERS' COMPENSATION
BOARD APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; KRAMER AND NICKELL, JUDGES.

KRAMER, JUDGE: Appellee Kerry Slider was employed by Greyhound Lines, Inc., ("Greyhound") as a bus driver when she sustained a work-related injury to her right shoulder on October 11, 2012, while loading a passenger who was in a

wheelchair onto her bus. Her injury required extensive medical treatment, including scapular muscle reattachment surgery; and an administrative law judge (ALJ) ultimately determined that it entitled Slider to workers' compensation benefits from Greyhound based upon an 11% whole person impairment (WPI) rating.

The issue presented in this appeal concerns the propriety of that rating, which the ALJ adopted over Greyhound's objection. The ALJ based it upon a May 19, 2016, Form 107 medical report submitted by Slider's treating physician, Dr. Ben Kibler, who had arrived at "11%" by combining two separate impairment ratings he attributed to the work-related condition of Slider's upper right extremity – namely, 12% for what he listed as "due to diagnosis[1] – [unintelligible] GH instability," and "6% due to muscle weakness." The ALJ held that Dr. Kibler's impairment rating was not inconsistent with what was permitted by Section 16.8a of the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, Fifth Edition ("AMA *Guides*"), which provides in relevant part:

> In a rare case, if the examiner believes the individual's loss of strength represents an impairing factor that has not been considered adequately by other methods in the *Guides*, the loss of strength may be rated separately. An

[1] Dr. Kibler's diagnosis was scapular muscle detachment caused by her work injury. Though not germane to this appeal, Greyhound suggests what Dr. Kibler meant to convey in his notation of "[unintelligible] GH instability" was "glenohumeral instability."

> example of this situation would be loss of strength due to a severe muscle tear that healed leaving a palpable muscle defect. If the examiner judges that loss of strength should be rated separately in an extremity that presents other impairments, the impairment due to loss of strength *could be combined* with the other impairments, *only* if based on unrelated etiologic or pathomechanical causes. *Otherwise, the impairment ratings based on objective anatomic findings take precedence*. Decreased strength *cannot* be rated in the presence of decreased motion, painful conditions, deformities, or absence of parts (eg, thumb amputation) that prevent effective application of maximal force in the region being evaluated.

(Emphasis in original.)

In sum, the ALJ found that Slider was the "rare case" as defined above. In a subsequent appeal to the Workers' Compensation Board (Board), Greyhound contended, as it had before the ALJ, that Dr. Kibler's combined 11% rating was erroneous for two reasons. First, assuming it *was* proper to combine the separate 12% and 6% impairment ratings, Greyhound argued Dr. Kibler had calculated the combination of those two ratings in a manner inconsistent with the AMA *Guides*, and that the proper combined WPI value should have been 10%. Second, and for the reasons discussed below, Greyhound argued Dr. Kibler should *not* have combined the 12% and 6% impairment ratings.

Upon review, the Board only agreed with Greyhound's first argument, and reversed only to the extent of requiring the ALJ to enter an award in favor of Slider based upon a 10% impairment rating. Greyhound now appeals to this Court,

arguing the ALJ and Board both incorrectly rejected its second argument. We disagree, and therefore affirm the Board.

As indicated, the crux of Greyhound's appeal is that in its view Dr. Kibler should not have combined the 12% and 6% impairment ratings. In that vein, Greyhound argues[2] that the 6% impairment rating which Dr. Kibler assessed "due to muscle weakness" was actually *prohibited* by Section 16.8a of the AMA *Guides* because Dr. Kibler made no findings specifically indicating: (1) the part of the AMA Guides he relied upon to arrive at that impairment rating; (2) that he believed Slider's injury presented the "rare case" where the individual's loss of strength represents an impairing factor that has not been considered adequately by other methods in the AMA *Guides*; (3) he believed Slider's loss of strength was based on unrelated etiologic or pathomechanical causes; and (4) that he believed Slider's well-documented decreased motion and painful conditions associated with her work injury did *not* prevent effective application of maximal force in the region of her right shoulder for purposes of assessing her strength in that area of her body. Greyhound also noted that Dr. Kibler was the only physician who had assessed to Slider a separate impairment rating due to loss of strength; and, that another

[2] Greyhound also asserts that Dr. Kibler's impairment ratings of Slider's condition were flawed because he assessed them on May 19, 2016 – prior to when he determined Slider reached maximal medical improvement (MMI) on June 1, 2016. We will not address this point, however, because Greyhound did not raise it before the ALJ or the Board. *See, e.g., Urella v. Ky. Bd. of Med. Licensure*, 939 S.W.2d 869, 873 (Ky. 1997) (explaining the failure to raise an issue before an administrative body precludes that issue from judicial review).

evaluating physician, Dr. Jeffrey Fadel, had refused to do so, opining "one cannot include weakness as a ratable part of [Slider's] pathological process when the joint has motion loss. This is outlined in the Guides for permanent impairment."

With that said, Greyhound's argument lacks merit. Section 16.8a does not absolutely prohibit the inclusion of a rating for a loss of strength. Whether Slider's pain and decreased motion should have prohibited the assessment of a separate loss of strength rating, pursuant to the terms of this or any other section of the AMA *Guides*, is a medical question properly left to the examining physicians. *See Kentucky River Enters. v. Elkins*, 107 S.W.3d 206, 210 (Ky. 2003). And, as the Board explained below,

> [T]he proper way to challenge a doctor's impairment rating is to present medical testimony concerning the impropriety of an impairment rating or cross-examine the doctor. In this case, no physician directly critiqued Dr. Kibler's impairment rating, nor was his deposition taken. As Greyhound emphasizes, Dr. Fadel explained the rationale for his rating and noted that he would not assign additional impairment for weakness in the presence of loss of motion. However, his reports were not provided in direct response to Dr. Kibler's rating, and there is no indication he reviewed the Form 107. Greyhound did not object to the admission of Dr. Kibler's opinion.
>
> As such, the opinions of Dr. Kibler and Dr. Fadel constitute conflicting opinions as to the impairment rating and the proper application of the AMA Guides. Where there are conflicting opinions from medical experts as to the appropriate rating, it is the ALJ's function as fact-finder to weigh the evidence and select the rating upon which permanent disability benefits will

> be awarded. Knott County Nursing Home v. Wallen, 74 S.W.3d 706 (Ky. 2002). Though an ALJ is not authorized to independently interpret the AMA Guides, she may as fact-finder consult them in the process of assigning weight and credibility to evidence. George Humfleet Mobile Homes v. Christman, 125 S.W.3d 288 (Ky. 2004). Although assigning a permanent impairment rating is a matter for medical experts, determining the weight and character of medical testimony and drawing reasonable inferences therefrom are matters for the ALJ. Knott County Nursing Home, id.
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> Moreover, the ALJ enjoys the discretion to choose whom and what to believe. Staples, Inc. v. Konvelski, 56 S.W.3d 412 (Ky. 2001). A fact-finder does have the authority to consult the AMA Guides when determining the weight to be assigned the evidence, though he is not necessarily compelled to do so. Caldwell Tanks v. Roark, 104 S.W.3d 753 (Ky. 2003). Here, it appears the ALJ limited her review of the AMA Guides to the role of assisting her in determining the credibility of the physicians.

The Board is charged with deciding whether the ALJ's finding "is so unreasonable under the evidence that it must be viewed as erroneous as a matter of law." *Ira A. Watson Dep't Store v. Hamilton*, 34 S.W.3d 48, 52 (Ky. 2000); KRS[3] 342.285). When reviewing the Board's decision, we reverse only where it has overlooked or misconstrued controlling law or so flagrantly erred in evaluating the evidence that it has caused gross injustice. *W. Baptist Hosp. v. Kelly*, 827 S.W.2d

[3] Kentucky Revised Statute.

685 (Ky. 1992). Here, we find nothing improper with respect to the Board's decision. Accordingly, we AFFIRM.

ALL CONCUR.

BRIEF FOR APPELLANT:

Douglas U'Sellis
Louisville, Kentucky

BRIEF FOR APPELLEE, KERRY SLIDER:

John W. Spies
Louisville, Kentucky