

RENDERED: DECEMBER 21, 2018; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2018-CA-000817-WC

BRIAN PIPER

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-14-58536

ARMSTRONG COAL COMPANY;  
HON. MONICA RICE-SMITH,  
ADMINISTRATIVE LAW JUDGE;  
AND WORKERS' COMPENSATION  
BOARD OF KENTUCKY

APPELLEES

OPINION  
AFFIRMING

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BEFORE: CLAYTON, CHIEF JUDGE; KRAMER AND K. THOMPSON,  
JUDGES.

CLAYTON, CHIEF JUDGE: Brian Piper appeals from an opinion of the  
Workers' Compensation Board which vacated and remanded for further findings

the Administrative Law Judge's (ALJ) assignment of a 16 % impairment rating resulting from Piper's work injury. At issue is whether the ALJ relied on substantial medical evidence in calculating what percentage of Piper's total impairment was attributable to the work injury and what percentage was attributable to a preexisting active condition.

Piper, who was born in 1969, completed the twelfth grade and has no vocational or specialized training. At the time of his injury, he was employed as a coal mine roof bolter by the Armstrong Coal Company. His job involved bending, heavy lifting, twisting, squatting, crawling on his knees and pulling roof bolts. On May 1, 2014, he was struck on the head by a cable and thrown across the floor of the mine, sustaining injuries to his head and lower back. He thereafter experienced sharp pains in his groin, hip and lower back. Piper was employed until October 27, 2014, when he was terminated from Armstrong because he could not return to work due to pain and limited mobility. He has not been employed since that date.

Following the workplace injury, Piper's family physician, Dr. Kristy Chappell, ordered an MRI and referred him to Dr. Benjamin Burkett, a Board-certified orthopedic surgeon, who began treating Piper on November 10, 2014. On April 9, 2015, Piper underwent a discectomy and fusion performed by Dr. Burkett. After the surgery, he continued to be treated by Dr. Burkett with epidural injections.

Prior to the May 1, 2014 injury, Piper had received treatment for chronic pain in his lower back and knees. The records of two physicians, Dr. Karim Rasheed and Dr. Conner Nguyen, indicate that in 2013 he complained of low back pain radiating into his hip and leg. He was treated with pain medication, multiple injections and a radiofrequency procedure. Piper was taking pain medications and muscle relaxers at the time of the May 1, 2014 injury, as well as attending pain management appointments, although he was still able to function and work six to seven days per week at that time.

Piper filed a claim seeking workers' compensation benefits on November 28, 2016. The pertinent medical evidence was provided by Dr. Burkett, Dr. James Butler, who performed an evaluation at Piper's request, and Dr. Michael Best, who performed an evaluation at the employer's request. Of particular significance for this appeal are the doctors' assignments of a whole person impairment rating and, most importantly, the percentage of the impairment they attribute, if at all, to a preexisting condition.

In a report dated March 16, 2015, shortly before Piper's surgery, Dr. Burkett stated:

80% exacerbation of pre-existing condition. Overall, MRI findings are similar, it appears MRI findings from October 2014 and July 2013 [prior to the injury] are the same. The work injury has amplified and expedited the necessity for surgery. Current status is fair, prognosis is good. Recommend lumbar fusion. No change work

restrictions, and this is permanent. He is at maximal improvement now. [P]roceed for lateral interbody fusion. I reviewed risks and benefits of surgery and he wishes to proceed. All of his questions have been answered and no guarantees have been given.

On July 7, 2016, Dr. Burkett wrote a letter opining that Piper was

appropriately rated as 10-13 % impairment of the whole person, based on the diagnosis of herniated disk at the level and side that would be expected from objective clinical findings, associated with radiculopathy and requiring surgery. I do not believe that he meets criteria to reach greater than 20% impairment of the whole person because he does not exhibit findings of significant lower extremity impairment such as atrophy of muscles or loss of reflexes. He could be considered for 20-23% impairment due to the fact that he did have a surgical fusion performed. I am not a specialist in occupational medicine, and I would refer further questions regarding disability ratings to a specialist in the field of occupational medicine[.]

Dr. James Butler's report of October 10, 2016, assigned a 20% whole person impairment based on the AMA Guides, Fifth Edition, Chapter 15 – The Spine, DRE Lumbar Category IV. Dr. Butler based this rating “on the fact [Piper] has loss of motion segment integrity due to surgical arthrodesis at the L2-3 level. He also has multiple other symptoms that do not fit a radicular or dermatomal pattern. Therefore, he does not have the criteria to meet DRE Lumbar Category V.” Dr. Butler did not address a preexisting condition.

Finally, Dr. Michael Best's May 17, 2017 report noted that there appeared to be a preexisting active medical condition and opined it would be

beneficial to be provided with the entirety of Dr. Chappell's treatment records of 2013; Dr. Burkett's records dating from before the injury; and possibly the records of another physician who might have treated Piper before the injury. Dr. Best assessed an impairment rating of 20% minus a preexisting condition rating of 13% to arrive at a 7% whole person impairment rating attributable to the workplace injury on May 1, 2014.

Relying on the opinions of Dr. Butler and Dr. Best, the ALJ found that Piper had sustained a 20% whole person impairment. The ALJ also found that Piper had a preexisting active low back condition. She relied on Dr. Burkett's opinion, which she deemed most persuasive, to find that the work injury had resulted in an 80% exacerbation of this preexisting condition. Based on the opinion of Dr. Burkett, the ALJ found "80% of Piper's 20% impairment is related to his work injury, which would be 16% impairment as a result of the work injury."

Upon review, the Workers' Compensation Board vacated the ALJ's impairment finding. The Board held as a matter of law that Dr. Burkett's medical record of March 16, 2015, stating in part "80% exacerbation of preexisting condition" was too vague and ambiguous to form the basis of the ALJ's calculation of an impairment rating. The Board explained that Dr. Burkett's language failed to specify whether he was referring to a preexisting active condition or whether the impairment rating stemming from the May 1, 2014 injury was 80% of a preexisting

active impairment. The Board pointed out that Dr. Burkett's later assessment of a 10-13% whole person impairment rating made no apportionment to a preexisting active condition. The Board further held that the ALJ's method of calculating the impairment rating as 80% of 20% was incompatible with the AMA Guides.

Our standard of review requires us to show considerable deference to the ALJ and to the Board. The ALJ, as the finder of fact, has the authority to determine the quality, character and substance of the evidence presented. *Ira A. Watson Dep't Store v. Hamilton*, 34 S.W.3d 48, 52 (Ky. 2000). Our role in reviewing the decision of the Board "is to correct the Board only 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." *Western Baptist Hospital v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992).

Piper argues that the Board erred as a matter of law. He points out that the ALJ's assignment of a 20% whole body impairment is based on the opinions of both Dr. Butler and Dr. Best. To calculate the impact of the active preexisting condition on the final impairment rating, the ALJ interpreted Dr. Burkett's statement to mean that 80% of his whole body impairment was due to the May 1, 2014 injury. The ALJ merely calculated 80% of 20% to arrive at a final rating of 16%.

Armstrong argues that the Board correctly vacated the ALJ's finding of a 16% impairment rating because this specific figure was not issued by any physician. Armstrong contends that the ALJ is not permitted to arrive at a separate and distinct impairment rating from those assigned by the physicians of record and consequently was constrained to choose one of the following: 7% (Dr. Best); 10-13% (Dr. Burkett), or 20% (Dr. Butler). Armstrong further argues that the ALJ was confined to Dr. Best's rating because he was the only physician who addressed Piper's preexisting active impairment in accordance with the AMA Guides.

We agree with the Board that the ALJ erred in relying on Dr. Burkett's statement "80% exacerbation of preexisting condition" to calculate the final impairment rating because there is no evidence Dr. Burkett calculated this percentage in accordance with the AMA Guides as required by statute and by our case law.

"Permanent impairment rating" is defined as the "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(35). "The proper interpretation of the *Guides* and the proper assessment of impairment are medical questions." *Lanter v. Kentucky State Police*, 171 S.W.3d 45, 52 (Ky. 2005). "A claimant found to have a compensable, permanent partial disability receives workers' compensation benefits based on the percentage of the employee's

disability assessed by the ALJ in accordance with the AMA Guides.” *Jones v. Brasch-Barry Gen. Contractors*, 189 S.W.3d 149, 153 (Ky. App. 2006) (citing KRS 342.730(1); KRS 342.0011(35)).

Therefore, although it is within an ALJ’s discretion to “believe or disbelieve various parts of the evidence,” *Magic Coal Co. v. Fox*, 19 S.W.3d 88, 96 (Ky. 2000), “an ALJ cannot choose to give credence to an opinion of a physician assigning an impairment rating that is not based upon the AMA Guides. In other words, a physician’s latitude in the field of workers’ compensation litigation extends only to the assessment of a disability rating percentage within that called for under the appropriate section of the AMA Guides.” *Jones*, 189 S.W.3d at 153.

There is no evidence that Dr. Burkett consulted the Guides or had the Guides in mind when he stated “80% exacerbation of a pre-existing condition.” Dr. Burkett made no mention of a preexisting condition in his letter of July 7, 2016, in which he assigned a total impairment of 10-13%. Thus, the Board correctly held that the ALJ erred as a matter of law in relying on Dr. Burkett’s statement because it did not conform to the statutory requirements and therefore did not constitute adequate evidence to support the impairment finding.

As to Armstrong’s contention that the ALJ may rely only on Dr. Best’s 7% rating because he was the only physician to address the preexisting



active impairment, we note the ALJ's reservations about the reliability of Dr.

Best's opinion. The ALJ stated as follows:

Although Dr. Best assigns 7% of the total 20% to the work-related injury, his opinion on whether the condition is due to pre-existing active condition or the work related condition is not definite. Dr. Best says the disc extrusions at L2/3 and L4/5 are preexisting conditions; however, he specifically states the entire 2013 treatment records would help definitively determine the status of the pre-existing condition and determine whether there was a pre-existing active medical condition. He further states that whether this is a work related condition depends on the findings from the 2013 treatment. It is puzzling how Dr. Best can make any apportionment to the work injury or pre-existing when he clearly implies he needs more information to make such determinations.

“[T]he burden of proving the existence of a pre-existing condition falls upon the employer.” *Finley v. DBM Techs.*, 217 S.W.3d 261, 265 (Ky. App. 2007) (citing *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735, 736 (Ky. App. 1984)). It is possible when considering the evidence on remand that the ALJ may find Armstrong did not meet its burden of proving a preexisting active condition, which must “be symptomatic *and* impairment ratable pursuant to the AMA *Guidelines* immediately prior to the occurrence of the work-related injury.” *Id.* The ALJ previously found the preexisting condition to be symptomatic but may conclude the employer failed to prove that it was impairment ratable.

For the foregoing reasons, the opinion of the Board vacating in part and remanding for additional findings is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE  
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