

RENDERED: APRIL 12, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2018-CA-001345-WC

TRAVIS BOLLENBECKER

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. 14-WC-70107

H & H SHEET METAL;
HON. W. GREG HARVEY, ADMINISTRATIVE LAW JUDGE;
and WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

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

COMBS, JUDGE: Appellant, Travis Bollenbecker, appeals from an opinion of the
Workers' Compensation Board which determined that the Administrative Law

Judge did not abuse his discretion in relying upon the impairment rating of the treating physician. We affirm.

On August 25, 2014, Bollenbecker sustained a severe injury to his lower extremity while working for Appellee, H & H Sheet Metal (H & H). The issue on appeal is whether the Board erred in affirming the ALJ's choice of impairment rating. We limit our discussion of the record accordingly.

Three physicians assigned impairment ratings in this case -- Dr. McLaughlin, the treating orthopedic surgeon, as well as Dr. DeGruccio and Dr. Roth, both of whom performed Independent Medical Examinations (IMEs).

On June 13, 2017, Bollenbecker filed Dr. McLaughlin's records as evidence. His September 9, 2014, office note reflects that Bollenbecker "had a markedly comminuted [left femur] fracture from a crush injury with muscular damage extending from the lesser troch[anter] all the way down to the metaphyseal area distally." On September 17, 2015, Dr. Laughlin noted that Bollenbecker was approaching maximum medical improvement.

On October 23, 2015, Bollenbecker returned. He had had an FCE (Functional Capacity Evaluation). Dr. McLaughlin stated "We will go ahead and release him at this point. I will place him at maximum medical improvement. 13% impairment referable to the Kentucky Fifth Edition of the AMA Guides to the Evaluation of Permanent Impairment." (Underline original). Dr. McLaughlin

noted that: “We will put him on some limited duty as per the FCE. We may reevaluate him at some point. I will keep the door open to reevaluate him as I anticipate that this injury will get somewhat better.”

Dr. McLaughlin’s office note dated November 12, 2015, provided as follows:

He is not seen today. The history is he has an impairment rating apparently according to the Sixth Edition of the AMA Guidelines to Impairment. To my reading, Table 17-6, he has an impairment for moderate atrophy which he certainly has and it is persistent and moderate. Table 17-6 gives him a 3 to 4% and Table 17-3 for a femur fracture the minimum here is 10%. This will give him 13% to the body as a whole based upon the Sixth Edition of the AMA Guidelines to Impairment. This is filled out on his C31 form.

(Underline original).¹

On July 1, 2016, Dr. DeGruccio performed an IME at the defendant-employer’s request and opined in relevant part that:

In terms of impairment rating, there are several manners in which to try to calculate an impairment for this claim. First would be just to consider the femoral shaft fracture. Femoral shaft fractures that heal with any angulation are imparted impairments. Fortunately, his femur fracture went on to heal completely, but there is no mal-rotation

¹ As discussed further below, it appears that Dr. McLaughlin was referring to the Fifth, rather than the Sixth Edition of the *AMA Guides*. Tables 17-6 and 17-3 in the Sixth Edition deal with the spine. However, *Chapter 17 of the 5th Edition* governs the Lower Extremities and includes Table 17-6, entitled “Impairment Due to Unilateral Muscle Atrophy.” The 5th Edition also includes a Table *17-33* entitled “Impairment Estimates for Certain Lower Extremity Impairments” which provides a minimum of 10% whole person impairment for a Femoral Shaft Fracture “Healed with 10-14 [degrees] of angulation or malrotation.”

or angular deformity to speak of, so there is no calculable impairment based on the fracture alignment. Also another manner of potential calculation would be for limp or gait derangement but per my examination today in the office, there was no significant sign of gait derangement. He had no consistent antalgia. Even though he did discuss that he has been told he might be limping, there was no evidence that he was limping today. Next is for the thigh atrophy that was measured today in the office as 1 cm, which would put him in a mild impairment degree. Utilizing Page 530 of Chapter 17, Table 17-6, this would impart a 2% whole person impairment and 8% lower extremity impairment. . . . [T]his 2% impairment would be the totality for the work-related injury

On July 6, 2017, Dr. Alan Roth performed an IME at Bollenbecker's request. He assigned 19% body as a whole under the Fifth Edition of the AMA *Guides* as outlined in detail in his report, which Bollenbecker filed as evidence.

On November 3, 2017, H & H filed a report from Dr. McLaughlin captioned "Medical Questionnaire" asking what degree of functional impairment would be assessed utilizing the Fifth Edition of the AMA Guides. Dr. McLaughlin's signed hand-written response dated November 1, 2017, reflects 10% to the body, 25% to the LE (lower extremity) "5th Edition AMA," noting that his opinion was based upon a reasonable medical probability.

On January 8, 2018, Bollenbecker filed a supplemental report from Dr. Roth in rebuttal as follows in relevant part:

I reviewed Dr. McLaughlin's initial impairment rating from 2015 using the 6th Edition and his revised statement

in 2017 using the 5th edition. I read through my copies of those editions and believed that although Dr. McLaughlin stated he used the 6th edition initially, I find that his references are all directly referencing the 5th Edition. The tables referenced in his 11-12-15 dictation are tables from the 5th Edition, as the lower extremity is chapter 17, but in the 6th edition, the lower extremity is chapter 16. The 6th Edition doesn't have the same tables with the same impairment ratings Although Dr. McLaughlin may have thought he was using the 6th Edition of the AMA Guidelines, I truly believe it was the 5th edition. Therefore, I believe his original impairment from 2015 is more accurate, as it was calculated closer to the time he was providing treatment to Mr. Bollenbecker.

On March 8, 2018, the ALJ rendered an opinion, award and order.

The ALJ noted that Bollenbecker argued that Dr. Roth's opinion was the most credible and that H & H "touts Dr. DeGruccio as the best opinion." The ALJ also noted that Bollenbecker had attacked Dr. McLaughlin's opinions as dishonest, characterizing "the revision of [his] opinion to 10% . . . as an intentional effort on the part of Dr. McLaughlin to favor the Defendant."

However, the ALJ was not persuaded that the doctor attempted to be dishonest. The ALJ explained that Dr. McLaughlin's practice is in Tennessee which (unlike Kentucky) uses the Sixth Edition of the AMA Guides. The ALJ did not view "[t]he revision of his rating . . . as lacking credibility. . . . [A]s the treating physician, Dr. McLaughlin has had the opportunity to examine Bollenbecker and observe his progress throughout his treatment." The ALJ found that Dr. McLaughlin's opinion was the most reliable and that his 10% rating was

the most credible assessment of impairment. The ALJ based the award upon that rating.

Bollenbecker filed a petition for reconsideration, which the ALJ denied by order entered April 9, 2018.

Bollenbecker then appealed to the Board. By opinion rendered August 10, 2018, the Board affirmed, determining that the ALJ did not abuse his discretion in relying on “Dr. McLaughlin’s final 10% rating.” The Board explained that:

First, we must emphasize that Bollenbecker did not identify that Dr. McLaughlin’s impairment rating is not compliant with the Fifth Edition of the AMA Guides as a contested issue at the benefit review conference. Nor does Bollenbecker, on appeal, directly argue that Dr. McLaughlin’s impairment rating does not conform to the Fifth Edition of the AMA Guides. Furthermore, Bollenbecker did not depose Dr. McLaughlin to question him about the revisions to his initial impairment rating.

Rather, Bollenbecker’s argument is that Dr. McLaughlin arbitrarily adjusted his initial impairment rating. Bollenbecker offered the explanation that Dr. McLaughlin initially included 3% impairment for muscle atrophy, but dropped this added rating after conferring with defense counsel. The ALJ considered and rejected this attack on Dr. McLaughlin’s character and credibility, and articulated his reasoning in doing so. The ALJ exercised his discretion and it is not the function of this Board to revisit his assessment. We find no other rationale upon which to conclude Dr. McLaughlin’s impairment rating is otherwise not in conformity with the Fifth Edition of the AMA Guides.

On September 12, 2018, Bollenbecker filed a petition for review in this Court. “The function of further review of the [Board] in the Court of Appeals is to correct the Board only where [this] 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 Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992).

Bollenbecker argues that the Board erred in affirming the ALJ’s choice of impairment ratings, but that the issue is bigger than that. He contends that Dr. McLaughlin initially assigned a 13% rating but that he erroneously indicated that it was based upon the Sixth Edition of the *AMA Guides* when clearly it was based upon the Fifth Edition. Bollenbecker also contends that H & H introduced a second report in which the doctor ostensibly corrected his rating by issuing a 10% rating under the Fifth Edition. Bollenbecker believes that the doctor arbitrarily dropped the 3% rating for quad atrophy, that he “did not offer a reasonable explanation for the assignment of only a 10%” rating and that the “only valid explanation . . . is Dr. McLaughlin’s desire and intent to favor the Defendant.” Bollenbecker submits that the doctor’s “obvious bias renders his reports completely untrustworthy and altogether invalid.”

As the Board explained, “[t]he ALJ considered and rejected [the] attack on Dr. McLaughlin’s character and credibility, and articulated his reasoning

in doing so. The ALJ exercised his discretion and it is not the function of the Board to revisit his assessment.” Nor is it ours.

In rendering a decision, KRS 342.285 grants an ALJ—as fact-finder—sole discretion to determine the quality, character, and substance of the evidence. An ALJ may draw reasonable inferences from the evidence, 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. . . .

...

The appellate tribunal may not usurp the ALJ’s role as fact-finder by superimposing its own appraisals as to weight and credibility or by noting other conclusions or reasonable inferences that otherwise could have been drawn from the evidence. If an ALJ's findings of fact are supported by substantial evidence, a finding contrary to the ALJ's findings cannot be sustained.

Miller v. Go Hire Employment Dev., Inc., 473 S.W.3d 621, 629 (Ky. App. 2015)

(internal citations omitted). Clearly, Bollenbecker submitted evidence that would have supported a different outcome in this case, and had we been the fact-finder, we might have reached a different result. However, “the fact that we may have decided differently does not mean that the [ALJ’s] decision . . . was completely unreasonable or that a different decision was compelled.” *Special Fund v. Francis*, 708 S.W.2d 641, 644 (Ky. 1986).

Accordingly, we affirm the August 10, 2018 opinion of the Workers’ Compensation Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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