

IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: APRIL 24, 2003
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2002-SC-0343-WC

FINAL
DATE 4-21-03, ENR G. T. H. P. C.
APPELLANT

KINGS DAUGHTERS & SONS NURSING HOME

V. APPEAL FROM COURT OF APPEALS
2001-CA-2041-WC
WORKERS' COMPENSATION BOARD NO. 99-90235

CAROLYN MOTT; HON. DONNA TERRY,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appealing a twice-affirmed finding that the claimant's impairment rating was 18%, the employer has raised three arguments: 1.) that the Administrative Law Judge's (ALJ's) refusal to entertain written arguments after the hearing violated its procedural due process rights; 2.) that the impairment did not conform to the AMA's Guides to the Evaluation of Permanent Impairment (Guides); and 3.) that the ALJ erred by refusing to provide specific findings that explained the reason for choosing to rely on the medical expert who assigned the rating. Inasmuch as the first argument was not presented to the Court of Appeals, it is not preserved for our review. With regard to the second and third arguments, we affirm.

The claimant worked as a certified nursing assistant in a nursing home,

performing direct patient care. On February 13, 1999, she struck her left knee on the metal handle of a patient's bed crank. The knee was painful and soon began to swell, leading her to seek treatment in the emergency room on the following day. On February 23, 1999, she was taken off work and referred to Dr. Schaper, an orthopedic surgeon. She underwent arthroscopic knee surgery in May, 1999, and again in March, 2000. Nonetheless, she continued to have pain and swelling that were aggravated by prolonged standing or walking.

Although the claimant returned to work on July 3, 2000, she later resigned for reasons that were unrelated to the injury. At the time of the hearing, she was working 25 hours per week at another nursing home and testified that she was unable to work more hours due to pain and swelling in her knee. About every twenty minutes she had to stop working to elevate her leg. She continued under treatment with Dr. Collis. Her restrictions included no lifting more than 55 pounds without assistance and no repetitive crawling, kneeling, or squatting.

Dr. Changaris, a neurosurgeon, performed an independent medical examination on June 5, 2000. Testifying on the claimant's behalf, he assigned an 18% impairment rating under the 4th edition of the Guides. Furthermore, he would prohibit bending, stooping, climbing, and crawling; prohibit lifting or carrying more than 20 pounds; require rest breaks as needed to elevate the leg, and limit the work day to 4-6 hours. His report indicated that he assigned a 5% impairment based upon a 3 cm. difference in thigh circumference (Table 37, p. 77); a 5% impairment "for each of flexion and extension" based upon "manual muscle strength [that] revealed a full loss of strength in left knee flexion and extension at 4-5" (Table 39, p. 77); and a 4% impairment for loss of knee flexion that was based upon a measurement of 80 degrees (Table 41, p. 78).

Using the combined values table, the three ratings yielded an 18% impairment.

Dr. Goldman, an orthopedic surgeon, examined the claimant on May 30, 2000, and testified for the employer. He assigned a 1% impairment under the AMA Guides, thought there was evidence of symptom magnification, and indicated that the claimant could return to work with restrictions against squatting and lifting. He recommended a pain management evaluation and indicated that continued narcotic pain medication was not medically necessary.

Dr. Wood, an orthopedic surgeon, examined the claimant on November 15, 2000, for the employer. He diagnosed an internal derangement and a tear in the lateral meniscus of the left knee, noting the partial meniscectomy. He found no evidence of symptom magnification and related the condition to the reported injury. Using the 4th edition of the AMA Guides, he assigned a 1% impairment for the partial meniscectomy (Table 64, p. 85). In his opinion, the claimant could return to medium-duty work but should not squat more than once per hour or kneel more than once per day.

Dr. Wood's report took issue with Dr. Changaris's application of the Guides in three respects. First, citing to a passage on page 76, he maintained that Dr. Changaris's rating was duplicative because it took into account both muscle atrophy and muscle weakness. Second, he maintained that because Dr. Changaris's report contained no raw data concerning the measurement of muscle function and did not indicate that measurements were taken more than once, a rating for muscle weakness was inappropriate. Third, Dr. Woods noted that his measurements varied considerably from those of Dr. Changaris. He measured the left thigh as being .5 cm. larger than the right and, finding no evidence of muscle atrophy, had assigned no Table 37 impairment. Likewise, he measured left knee flexion as being 110 degrees and, therefore, assigned

no impairment for restricted motion under Table 41.

The ALJ reviewed the lay and medical evidence, stated that the medical evidence had been carefully considered, and determined that Dr. Changaris's opinion was "the most authoritative and accurate" with regard to the claimant's permanent impairment rating. Thus, an 18% impairment provided the basis for the claimant's partial disability award. Noting that the employer had presented no evidence that past or future medical expenses were not due to the injury or evidence that no future treatment was required, the ALJ determined that the claimant was entitled to future medical treatment, including reasonable medication to control pain.

In a petition for reconsideration, the employer asserted that the opinion failed to set forth specific findings of fact to support the ultimate finding and to permit a meaningful review. Shields v. Pittsburg & Midway Coal Mining Co., Ky.App., 634 S.W.2d 440 (1982). After stating that the proper use of the Guides was the "sole determining factor as to the appropriate permanent impairment rating," the petition maintained that the impairment rating to which Dr. Changaris testified was "not even remotely consistent" with the Guides and requested specific findings concerning why the ALJ accepted the rating. In a subsequent addendum, the employer argued, in detail, why it believed Dr. Changaris's rating to be invalid.

Overruling the petition, the ALJ reminded the employer of an ALJ's authority as the finder of fact. The ALJ pointed out that Dr. Changaris "is a well-known and Board-certified neurosurgeon who regularly treats patients and who appears to have appropriately applied the [Guides] in his evaluation." As in the initial opinion, the ALJ characterized Dr. Changaris's testimony as being both credible and authoritative. Finally, the ALJ determined that the remainder of the petition and the addendum

amounted to no more than an argument that the evidence should be re-weighted.

Affirming the decision, the Board noted that the proper interpretation of the Guides is a medical question and that the ALJ was authorized to decide the weight and credibility of conflicting medical evidence. Furthermore, despite the statement to which Dr. Wood cited, the previous page of the Guides indicated that there were circumstances where it was appropriate to measure a particular impairment by more than one method. Addressing the large discrepancy in the reported impairment ratings, the Board pointed out that the apparent legislative goal was to adopt an objective standard for assessing permanent partial disability. In practice, however, the Guides provide "a multifaceted approach" that depends on the thoroughness and accuracy of the evaluating physicians. Furthermore, "they offer seemingly endless qualifications to what at first glance appear to be mandatory statements." The Board concluded, therefore, that where the experts differ, it was for the fact-finder to judge the quality and thoroughness of the evidence of record. The Court of Appeals agreed and affirmed the Board's decision.

Contrary to the employer's assertion, this is not a case such as Shields v. Pittsburg & Midway Coal Mining Co., supra, in which the fact-finder made a conclusory finding and failed to set forth sufficient evidence to support it. The opinion summarized the medical evidence and explained that the ALJ found Dr. Changaris's testimony to be persuasive. Furthermore, the order on reconsideration provided an additional explanation for the decision to rely on Dr. Changaris. More was not required. See Big Sandy Community Action Program v. Chaffins, Ky., 502 S.W.2d 526 (1973).

The claimant had the burden to prove every element of her claim, including the extent of her AMA impairment. Although clothed in other arguments, the crux of this

appeal is whether the finding of an 18% impairment was supported by substantial evidence and, therefore, was reasonable. Special Fund v. Francis, Ky., 708 S.W.2d 641, 643 (1986). As the Board pointed out, the proper interpretation of the AMA Guides with regard to orthopedic injuries is a complex matter that requires medical expertise. When medical experts differ concerning an injured worker's impairment rating and concerning the proper application of the Guides, it is the ALJ's function to weigh the conflicting evidence and to decide which is more persuasive. Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418 (1985).

Both Dr. Woods and Dr. Changaris indicated that they relied upon the Guides when calculating the claimant's impairment, but they used different methods, obtained significantly different measurements, and assigned significantly different impairment ratings. Dr. Wood, an orthopedic surgeon, based his rating solely on the partial meniscectomy. Dr. Changaris, a neurosurgeon, did not rate the surgery. Because the measurements that Dr. Wood obtained revealed no impairment, he did not rate loss of knee flexion, muscle weakness, or muscle atrophy. Yet, those conditions formed the basis for Dr. Changaris's rating. Furthermore, Dr. Wood testified that Dr. Changaris erred when rating both muscle atrophy and loss of muscle strength, citing to a particular passage from the Guides.

Faced with the task of determining the weight and credibility of each physician's testimony, including their interpretation of the Guides, the ALJ chose to rely on Dr. Changaris's opinion. Although the employer maintains that Dr. Wood's testimony proves the inaccuracy of the opinion under the Guides, the fact remains that matters of weight and credibility are for the ALJ to decide. Having considered the evidence and the arguments of the parties, we are not convinced that the employer's evidence was so

overwhelming that the decision is unreasonable. Special Fund v. Francis, supra.

The decision of the Court of Appeals is affirmed.

All concur.

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