

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED “NOT TO BE PUBLISHED.” PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: APRIL 23, 2009
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2008-SC-000565-WC

FINAL

DATE 5/14/09 Kelly Klaba D.C.
APPELLANT

MEDICAL CENTER HOSPITAL

ON APPEAL FROM COURT OF APPEALS

V.

CASE NO. 2008-CA-000120-WC

WORKERS' COMPENSATION BOARD NO. 03-69600

CHERYL KING; HONORABLE LAWRENCE
F. SMITH, ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

An Administrative Law Judge (ALJ) determined that the claimant's work-related back injury produced a 13% permanent impairment rating based on the spine and a 15% rating based on a psychiatric condition. The Workers' Compensation Board and the Court of Appeals affirmed. Appealing, the employer continues to assert that the psychiatric rating was not determined in accordance with the latest edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment (Guides). We affirm because the ALJ based the decision on substantial evidence and a correct interpretation of the law.

The claimant worked for the defendant-employer as a nurse. She injured her back while working on October 13, 2003, and filed an application for benefits. Dr. Goldman diagnosed a herniated lumbar disc and degenerative disc disease, and he also diagnosed clinical depression for which he suggested she seek treatment. Two experts testified more extensively regarding the psychiatric condition and offered opinions that differed greatly. The ALJ determined ultimately that the injury and resulting psychiatric condition were partially disabling. This appeal concerns the psychiatric condition.

Dr. Monsma, a clinical psychologist, evaluated the claimant and testified on her behalf. He diagnosed major depressive disorder, moderately severe without psychotic features, which he attributed to the chronic pain and physical difficulties that the October 2003 injury caused. Dr. Monsma stated that he used the most recent edition of the Guides to assign a 15% permanent impairment rating. He explained that standardized scales are used to assign a percentage impairment rating and that the claimant demonstrated mild to moderate impairment. When cross-examined concerning his use of the Guides, Dr. Monsma stated:

I used the most recent edition, and I don't - - I didn't reference in my report which edition that is. I believe that's either 14 or 15.

Dr. Shraberg, a psychiatrist, evaluated the claimant and testified for the employer. He diagnosed an adjustment disorder of adult life and a depressed mood that was associated with the October 2003 injury and lifestyle changes

due to the injury as well as phase of life. In his opinion, the depression had resolved and warranted a 0% permanent impairment rating. He attributed most of the present physical symptoms to a hereditary condition.

The ALJ relied on Dr. Monsma, convinced that he applied the latest edition of the Guides although he misstated the correct edition when deposed. Moreover, the ALJ found the claimant's "demeanor, candor and history," her lifelong history of extraordinary accomplishments, and her "amazing work ethic" to be consistent with Dr. Monsma's opinions. The employer petitioned for reconsideration, pointing to Dr. Monsma's reference to an incorrect edition of the Guides, but the ALJ remained convinced after reviewing the evidence again that Dr. Monsma used the latest edition.

Although the Board and the Court of Appeals affirmed, the employer continues to argue that the claimant presented no credible evidence of a psychiatric impairment rating because Dr. Monsma did not offer an opinion in accordance with the latest edition of the Guides.¹ Noting that no 14th or 15th Edition of the Guides exists, that Dr. Monsma failed to mention that the latest edition does not provide percentages for psychiatric impairments, and that he failed to provide the Class 1 through 5 impairment on which he based the percentage, the employer asserts that he failed to show that he understood the Guides or applied them properly. Moreover, he failed to explain how he arrived at the 15% rating.

¹ See KRS 342.730(1)(b) and KRS 342.0011(35).

The claimant had the burden of proof and risk of non-persuasion to show that her back injury produced a compensable psychiatric impairment.² KRS 342.285 designates the ALJ as the finder of fact and prohibits the Board and reviewing courts from reweighing the evidence. Judicial review of an administrative decision is limited to determining whether the decision was erroneous as a matter of law.³ When the party with the burden of proof prevails before the fact-finder, the issue on appeal is whether substantial evidence supported the finding that the psychiatric condition produced a 15% permanent impairment rating, in other words, whether it was reasonable.⁴ The crux of the inquiry is whether the decision was so unreasonable under the evidence that it must be viewed as being erroneous as a matter of law.

In Knott County Nursing Home v. Wallen, 74 S.W.3d 706 (Ky. 2002), the court addressed the fact that the Guides continue to divide impairments for psychological or psychiatric conditions into five classes of severity but that they have not equated the classes to percentage impairments since the Third Edition was published in 1988. The court rejected the notion that the legislature did not intend for partial disability benefits to be awarded for such conditions and determined that an ALJ may use the table provided in the

² Roark v. Alva Coal Corporation, 371 S.W.2d 856 (Ky. 1963); Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky.App. 1984); Snawder v. Stice, 576 S.W.2d 276 (Ky.App. 1979).

³ American Beauty Homes v. Louisville & Jefferson County Planning & Zoning Commission, 379 S.W.2d 450, 457 (Ky., 1964),

⁴ Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

Second Edition to translate the Class 1 through 5 impairment assigned by a physician into a percentage impairment rating.⁵

We are not convinced that a physician must always state which Class 1 through 5 impairment forms the basis for a percentage rating. Nor are we convinced that a physician must always mention the Second Edition of the Guides. A percentage rating for a psychological or psychiatric condition complies with Chapter 342 if it corresponds to the classification from the latest edition of the Guides that is consistent with the medical evidence.

The ALJ did not err. When summarizing the evidence, the ALJ noted that Dr. Monsma described the claimant's impairment as being mild to moderate. When determining that Dr. Monsma applied the latest edition of the Guides, the ALJ confronted directly the shortcomings to which the employer refers and found them not to be significant. Having reviewed Dr. Monsma's report and deposition, the ALJ found the reference to the Fourteenth or Fifteenth Edition of the Guides to be no more than a misstatement and also found that he had translated an impairment that he determined under the latest edition of the Guides into a percentage impairment. Mindful that a 15% rating falls within the range for mild impairment, we conclude that the finding was reasonable.⁶

⁵ Id. at 710.

⁶ The Fifth Edition, Table 14-1, page 363, describes Class 2 or mild impairment as being "compatible with most useful functioning." It describes Class 3 or moderate impairment as being "compatible with some, but not all, useful functioning." The Second Edition, Table 1, page 220, indicates that Class 2 impairment warrants a 10-20% rating. Class 3 impairment warrants a 25-50% rating.

The decision of the Court of Appeals is affirmed.

All sitting. All concur.

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