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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-002342-WC

TOKICO (USA), INC. APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-06-01277

KRYSTAL KELLY; HON. CHRIS DAVIS, ADMINISTRATIVE LAW JUDGE; AND THE WORKERS' COMPENSATION BOARD APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KELLER, TAYLOR, AND VANMETER, JUDGES.

VANMETER, JUDGE: Tokico (USA), Inc. petitions for the review of an opinion of the Workers' Compensation Board (Board) affirming an opinion of an Administrative Law Judge (ALJ) which awarded Krystal Kelly certain temporary total and permanent partial disability benefits. Tokico argues on appeal that several impairment ratings which the ALJ relied upon either did not comply with

the Fifth Edition of the American Medical Association *Guides to the Evaluation of Permanent Impairment* (*Guides*), or were not supported by the evidence. For the following reasons, we affirm.

While attempting to remove a bolt pin from a caliper assembly on February 11, 2004, Kelly's right hand slipped, striking the corner of the machine. She immediately experienced pain but finished her shift. When Kelly returned to work the next day she was unable to perform her work due to pain and swelling, so she clocked out and has not worked since. Kelly filed an Application for Resolution of Injury Claim on October 5, 2006, alleging injury to her right hand, both upper extremities, and her right shoulder, as well as depression.

The record shows that after Kelly left work on February 11, she reported to the Rockcastle County Hospital and was diagnosed with cellulitis. Dr. Karen Saylor, Kelly's family doctor, initially concurred with this diagnosis; however, after viewing a bone scan, Dr. Saylor changed her diagnosis to reflex sympathetic dystrophy (RSD), which is also known as Complex Regional Pain Syndrome Type One (CRPS-1).

Beginning in March 2004, Dr. Ronald Burgess treated Kelly with therapy and injections for what he initially diagnosed as early dystrophy. Dr. Burgess subsequently diagnosed and treated Kelly for CRPS-1. He ultimately opined, in a June 2006 report, that Kelly had reached maximum medical improvement (MMI). He assigned an 18% impairment of the upper extremity, secondary to a decrease in range of motion of the wrist, plus an additional 3%

impairment rating to the body as a whole, for a total impairment rating of 14% to the body as a whole.

Dr. William J. Lester, who also treated Kelly, opined that she reached MMI in April 2006. He assigned an 18% whole body impairment rating based on loss of grip strength. He concluded that Kelly did not meet the criteria for CRPS which are set forth in the *Guides*.

Dr. Timothy Kriss performed an independent medical examination (IME) in January 2007. He diagnosed CRPS-1, despite the fact that Kelly only had seven symptoms of the syndrome, while the *Guides* require a patient to have eight of the eleven possible symptoms in order to be diagnosed with the syndrome. Ultimately, Dr. Kriss found that Kelly had a 28% impairment to the body. He also opined that to the extent Kelly had an orthopedic problem, Dr. Burgess's loss of motion rating should apply. The ALJ noted that when combined, these two impairment ratings resulted in a whole person impairment of 36%.

Dr. David George Pursley also performed an IME of Kelly. He opined that Kelly's hand and wrist symptoms were more likely caused by carpal bone dislocation than by CRPS. He concluded that Kelly's bones could be manipulated into place, and that her complaints were not work-related but instead consistent with poor body mechanics.

The parties also introduced evidence regarding Kelly's psychological claim. More specifically, Dr. Dennis Sprague opined that Kelly had an adjustment disorder with anxiety and depressed mood, a pain disorder associated with both

psychological factors and her general medical condition, and a pre-existing mathematics disorder. Dr. Sprague assigned Kelly a 5% impairment rating to the body as a whole, with 1% attributed to the mathematics disorder. On the other hand, Dr. Douglas Ruth opined that Kelly had a 2% psychiatric impairment to the body as a whole due to her depression.

After summarizing this evidence, the ALJ held that Kelly suffered a permanent work-related injury of CRPS/RSD to the right hand. The ALJ adopted a 36% impairment rating, based upon Dr. Kriss's impairment rating and adoption of Dr. Burgess's loss of motion rating. With regard to Kelly's psychological claim, the ALJ adopted Dr. Sprague's 4% impairment rating. The ALJ awarded benefits based on a whole person impairment rating of 40%. Upon Tokico's petition for reconsideration, however, the ALJ determined that the award instead should be based upon a combined impairment rating of 39%. The Board affirmed the ALJ's award, and this petition for review followed.

First, Tokico argues that the ALJ erred by relying upon Dr. Kriss's impairment rating because it did not conform to the *Guides*. We disagree.

The *Guides* require that "[a]t least eight of [eleven] findings must be present concurrently for a diagnosis of CRPS." The parties do not dispute that Dr. Kriss diagnosed Kelly with CRPS-1, despite the fact that she only exhibited seven of the eleven listed criteria. Indeed, he indicated in his report that Kelly had an "absolutely classic case" of CRPS-1. Dr. Kriss testified that he rated Kelly under CRPS-1 in the *Guides* because he "felt like falling one short and trying to rate her

some other way . . . would be more inaccurate than rating her as some variation of complex regional pain syndrome that has seven out of the eight criteria." Dr. Burgess, by contrast, also diagnosed Kelly with CRPS-1, but opined that because Kelly did not meet the criteria for CRPS set forth in the *Guides*, she should instead be rated for loss of range of motion.

Tokico's sole reason for challenging Dr. Kriss's impairment rating is the rating's noncompliance with the *Guides*. However, the workers' compensation statutes do not require a doctor's medical diagnosis to comport with the *Guides*. Rather, KRS[1] 342.0011(35) only requires a doctor's permanent impairment rating to comport with the *Guides*. Thus, the fact that Dr. Kriss's diagnosis did not comply with the *Guides*' criteria for diagnosing CRPS did not invalidate the impairment rating, which he assigned in conformity with the *Guides*. The ALJ therefore did not err by relying upon Dr. Kriss's impairment rating, and the Board did not err by affirming the ALJ's opinion in that regard.

Jones v. Brasch-Barry General Contractors, 189 S.W.3d 149 (Ky.App. 2006), which Tokico cites, does not compel a different result. In *Brasch-Barry*, two doctors opined that the claimant qualified for a Category III disability, which would result in an impairment rating of between 10% and 16%. A third doctor opined that the claimant qualified for a Category IV disability, which would result in an impairment rating of between 20% and 26%. Upon questioning, the third doctor "conceded that [the claimant] did not meet the

[1] Kentucky Revised Statutes.

textbook definition for a 'Category IV' disability under the AMA Guides, but rather, his condition fell within the parameters of a 'Category III' disability." *Id.* at 151. Still, the doctor maintained his conclusion of 26% impairment for the claimant. On appeal, a panel of this court affirmed the Board's decision to remand the matter back to the ALJ, who had relied upon the doctor's 26% impairment rating. *Id.* at 154. To that end, we held that the doctor's opinion was "not competent, substantial evidence because such a finding is greatly in excess of the express terms of the AMA Guides for the Category III injury [the doctor] found [the claimant] to have." *Id.* Thus, the ALJ was instructed to select an impairment rating in accordance with Category III of the *Guides*.

Here, by contrast, Dr. Kriss assigned an impairment rating which fell within the parameters for a diagnosis of CRPS-1. Although the diagnosis of CRPS did not comply with the *Guides*' "objective diagnostic criteria for CRPS," we hold that under these circumstances, Dr. Kriss's medical diagnosis was not required to comply with the *Guides*' diagnostic criteria.

Next, Tokico argues that Dr. Burgess's 14% impairment rating for loss of motion is not in conformity with the *Guides*. Alternatively, Tokico argues that even if the rating does conform with the *Guides*, the ALJ erred by finding that Dr. Kriss adopted that rating. We disagree and adopt the Board's opinion in this regard, set forth as follows:

> Tokico next argues the ALJ erred in relying on the impairment rating ascribed by Dr. Burgess and adopted by Dr. Kriss, because that rating did not adhere to the

> Guides clinical evaluation instructions. On this point, Tokico is critical of Dr. Burgess's impairment rating arguing it did not comply with Section 16.4 of the Guides, which requires that range of motion testing should compare both of the upper extremities and the physician must evaluate both the active and passive motion. Tokico also contends that even Dr. Kriss abandoned Dr. Burgess's impairment rating when Dr. Kriss agreed with Dr. Pursley that range of motion would not be an appropriate method of assessment since Kelly's pain fluctuates from exam to exam.
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> In Kentucky River Enterprises, Inc. v. Elkins, 107 S.W.3d 206 (Ky. 2003), the Kentucky Supreme Court determined that the proper interpretation of the Guides is a medical question that must be resolved by the medical experts, including the amount of impairment physicians assign to separate injuries at various points in time. Despite the fact that Dr. Pursley and/or Dr. Kriss may have disagreed with Dr. Burgess's range of motion measurements and impairment ratings, this Board remains of the opinion that the fact finder is not obligated to punctiliously sift the evidence so as to discern whether the worker's symptoms harmonize with underlying medical criteria advanced by the Guides or any other medical treatise. Dr. Burgess took range of motion measurements and specifically stated that he used the Guides to assess his impairment rating. The fact that other physicians may disagree is an argument that goes to the weight of the evidence, not its substantiality.

Finally, Tokico argues that the ALJ erred by relying upon Dr. Sprague's impairment rating regarding Kelly's psychological condition, as Kelly was not at MMI at the time Dr. Sprague issued his impairment rating. We disagree.

Tokico argues that the statement in Dr. Sprague's report assessing an impairment rating, that Kelly had "not received any psychiatric or psychological

treatment . . . post-injury," is tantamount to declaring that Kelly was not yet at MMI. Of course, pursuant to the *Guides*, "an impairment should not be considered permanent until the clinical findings indicate that the medical condition is static and well stabilized, often termed the date of maximal medical improvement (MMI)." *Guides*, p. 19. Still, we hold that Dr. Sprague's statement that Kelly had not received any psychiatric treatment did not equate to an opinion that Kelly was not at MMI. Thus, the ALJ was free to accept his opinion, and the Board did not err by affirming the ALJ's decision to do so.[2]

The Workers' Compensation Board's opinion is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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[2] We note that Dr. Sprague indicated in his report that Kelly was taking at the time, *inter alia*, Cymbalta, which the National Institute of Health describes as a brand name of Duloxetine, "used to treat depression and generalized anxiety disorder[.]" Medline Plus, http://www.nlm.nih.gov/medlineplus/druginfo/medmaster/a604030.html (last revised Feb. 1, 2008).