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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-001455-WC

KROGER

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-06-069756

JAPHETH LIGON; HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD

APPELLEES

AND: NO. 2009-CA-001619-WC

JAPHETH LIGON

CROSS-APPELLANT

v. CROSS-PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-06-069756

KROGER,
HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE; AND
THE WORKERS' COMPENSATION BOARD

CROSS-APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, NICKELL AND THOMPSON, JUDGES.

NICKELL, JUDGE: Kroger appeals from a decision of the Workers' Compensation Board reversing the Administrative Law Judge's (ALJ) finding that Japheth Ligon was not entitled to future medical benefits. On cross-petition for review, Ligon appeals from the Board's decision affirming the dismissal of his claim for permanent income benefits. After reviewing the record and the briefs, we affirm the opinion of the Board in its entirety.

Kroger employed Ligon. Ligon injured his shoulder while lifting a seventy pound box of chicken. Dr. Stacie Grossfeld performed arthroscopic surgery to repair a labral tear. Following a period of physical therapy, Dr. Grossfeld released Ligon to left-handed duty and stated Ligon would not reach maximum medical improvement (MMI) until five months post surgery.

At Kroger's direction, Ligon changed physicians and began treating with Dr. Frank Bonnarens. Following an examination, Dr. Bonnarens found no recurrent tear, but noted marked limitations in the internal rotation of Ligon's shoulder and felt additional physical therapy was appropriate. Dr. Bonnarens released Ligon to work with restrictions of no overhead use of his right arm and no lifting over twenty pounds with his left arm, while using the right arm for light assistance. Following a subsequent examination, Dr. Bonnarens released Ligon to

regular work duty. Ligon last visited Dr. Bonnarens on August 29, 2007, at which time Dr. Bonnarens noted Ligon continued to exhibit some tightness with internal shoulder rotation. Dr. Bonnarens recommended Ligon continue stretching and following a home exercise routine and pronounced Ligon had achieved MMI. Dr. Bonnarens assessed Ligon as having a zero percent whole person impairment and did not address the reasonableness and necessity of future medical care.

Ligon next came under the care of Dr. Thomas Dovan, complaining of right shoulder pain and stiffness. Following an examination, Dr. Dovan recommended work restrictions of no lifting of the right hand above shoulder level and no lifting in excess of ten pounds. After follow-up examinations, Dr. Dovan pronounced Ligon at MMI and released him to full duty. Dr. Dovan assessed Ligon as having a 1.5 percent whole person impairment, but stated his condition did not merit any permanent restrictions or further treatment.

Ligon did not return to work at Kroger for reasons unrelated to his injury. Dr. Richard Fishbein performed an independent medical evaluation (IME) of Ligon on July 29, 2008. Dr. Fishbein assessed Ligon as having an eight percent whole person impairment and requiring continued symptom relieving measures for the indefinite future. Dr. Fishbein recommended no overhead lifting on a repetitive basis and no lifting in excess of thirty pounds.

The ALJ found Ligon had a zero percent whole person impairment rating and dismissed Ligon's claims for additional income benefits and future medical benefits. The Board affirmed the dismissal of the claim for additional

income benefits but reversed the dismissal of the claim for future medical benefits.

This petition for review followed.

Kroger argues the Board erred by reversing the ALJ's dismissal of Ligon's claim for future medical benefits. On cross-petition, Ligon argues the Board erred in affirming the ALJ's dismissal of his claim for permanent income benefits. This Court's function when reviewing a workers' compensation decision is to correct the Board only where "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).

Relying on *FEI Installation, Inc., v. Williams*, 214 S.W.3d 313, 319 (Ky. 2007), the Board concluded the ALJ erred as a matter of law by dismissing Ligon's claim for future medical benefits. The Supreme Court of Kentucky held "disability exists for the purposes of KRS 342.020(1)¹ for so long as a work-related injury causes impairment, regardless of whether the impairment rises to a level that it warrants a permanent impairment rating, permanent disability rating, or permanent income benefits." *Id.* In *FEI Installation*, the claimant suffered a work-

¹ KRS 342.020(1) provides in pertinent part "[i]n addition to all other compensation provided in this chapter, the employer shall pay for the cure and relief from the effects of an injury or occupational disease the medical, surgical, and hospital treatment, including nursing, medical, and surgical supplies and appliances, as may reasonably be required at the time of the injury and thereafter during disability, or as may be required for the cure and treatment of an occupational disease. The employer's obligation to pay the benefits specified in this section shall continue for so long as the employee is disabled regardless of the duration of the employee's income benefits."

related injury requiring surgery. The claimant was released to work without restrictions and was assessed a zero percent impairment rating. The claimant testified that he continued to receive treatment for the injury and no physician testified that future medical treatment would be unreasonable or unnecessary. The Court held that the claimant was entitled to future medical benefits despite the lack of an impairment rating with the *caveat* that the employer could contest the reasonableness or necessity of any future medical treatment. *Id.* at 319.

This case presents an almost identical situation. It is undisputed that Ligon's injury was entirely work-related and serious enough to require surgery to embed two metal anchors in his shoulder. Although Ligon reached MMI and there was evidence that no further treatment was currently required, there was no testimony adduced that any future medical treatment would be unnecessary or unreasonable. Ligon testified he continues to experience pain and tightness in his shoulder.

Kroger cites *Mullins v. Mike Catron Construction/Catron Interior Systems, Inc.*, 237 S.W.3d 561, 563 (Ky. App. 2007), for the proposition that awards of future medical benefits are not always mandated. However, contrary to the facts of the present case, the claimant in *Mullins* did not require surgery and had experienced flare-ups of a preexisting injury. Under the facts of the present case, we conclude that the Board properly reversed the ALJ pursuant to *FEI Installation*.

On cross-petition for review, Ligon argues the Board committed a flagrant error in assessing the evidence. He asserts the ALJ erred in finding no permanent impairment.

“The claimant in a workman's compensation case has the burden of proof and the risk of persuading the board in his favor.” *Snawder v. Stice*, 576 S.W.2d 276, 279 (Ky. App. 1979) (citations omitted). “[I]f the claimant is unsuccessful before the board . . . the question before the [appellate] court is whether the evidence was so overwhelming, upon consideration of the entire record, as to have compelled a finding in his favor.” *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735, 736 (Ky. App. 1984). “Compelling evidence is evidence ‘so overwhelming that no reasonable person could reach the conclusion’ of the ALJ.” *Neace v. Adena Processing*, 7 S.W.3d 382, 385 (Ky. App. 1999) (citation omitted). Where the evidence conflicts, “the finder of fact, and not the reviewing court, has the authority to determine the quality, character and substance of the evidence presented. . . .” *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418, 419 (Ky. 1985). “The fact-finder may 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.” *Magic Coal Co. v. Fox*, 19 S.W.3d 88, 96 (Ky. 2000).

Dr. Bonnarens testified Ligon qualified for a zero percent impairment rating according to the AMA *Guides*. Ligon argues Dr. Bonnarens’s assessment is invalid because it was given before he reached MMI. However, the “ALJ may

pick and choose among conflicting medical opinions and has the sole authority to determine whom to believe.” *Copar, Inc. v. Rogers*, 127 S.W.3d 554, 561 (Ky. 2003). Ligon has merely pointed to conflicting evidence and has not cited any cases on point in support of his argument. The ALJ was free to rely upon the opinion of Dr. Bonnarens and to disbelieve the other medical opinions offered. The Board did not err in assessing the evidence.

Accordingly, the decision of the Workers’ Compensation Board is affirmed in its entirety.

ALL CONCUR.

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