

RENDERED: APRIL 19, 2013; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001482-WC

KEVIN A. WATKINS

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-08-73193

KOBE ALUMINUM; HONORABLE DOUGLAS
W. GOTT, ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION AFFIRMING

** ** * * * * *

BEFORE: KELLER,¹ LAMBERT, AND MOORE, JUDGES.

LAMBERT, JUDGE: Kevin A. Watkins has petitioned this Court for review of the July 30, 2012, opinion of the Workers' Compensation Board (the Board) vacating in part the opinion, award, and order of the Administrative Law Judge (the ALJ) and remanding the case to the ALJ for further findings related to the

¹ Judge Michelle M. Keller concurred in this opinion prior to her appointment to the Kentucky Supreme Court. Release of this opinion was delayed by administrative handling.

20% impairment rating assigned by Dr. Colin Looney. Watkins contends that the Board exceeded its authority in making inferences from the evidence and erroneously directed the ALJ to perform an analysis of the American Medical Association (AMA) *Guides*. We disagree with Watkins that the Board acted erroneously or exceeded its authority; hence, we affirm the Board's decision.

Watkins is currently a thirty-nine year old resident of Bowling Green, Kentucky. He has two years of technical college education. Watkins began work for Kobe Aluminum in 2006 as a maintenance technician and alleged that he injured his low back, left hip, and left leg in a 2008 incident when he was lifting a lid on a water tank. He alleged that he aggravated this condition in 2010 when he was working on a press machine. Watkins sought treatment after both incidents, and stopped working after the 2010 incident when he was terminated for missing work.

Because the issue in this case turns on the medical opinion of Watkins' treating orthopedic surgeon, Dr. Looney, we shall confine our remarks regarding the medical evidence to his records. Dr. Looney performed a hip arthroscopy in November 2010 and noted that Watkins continued to have persistent pain following the surgery. In his final medical report dated May 6, 2011, Dr. Looney stated:

The patient has significant hip pathology which will certainly be activity limiting. My hope is with this procedure we can buy him about three to four years before we have to proceed toward arthroplasty. I suspect that we can get this and he is in agreement, but

nonetheless he has significant changes throughout his hip and he has a labral tear as well. What I have suggested is at this [point] that we have reached our impairment rating and to conclude the postoperative evaluation with an impairment rating. I also suggested that he should at this point avoid any work that involves bending, squatting, ladders, picking up objects heavier than 20 pounds, repetitive deep hip flexion as I think this will aggravate his condition. A more sedentary job would be appropriate for him and I have recommended this. We have talked about vocational training, but it does not sound like we have made much headway in this regard. Because he is from Kentucky, we will use the Fifth Edition of the AMA Guides to Permanent Impairment and based on the information in this edition I made my assessment of impairment based on page 529 of the Guide to Evaluation of Permanent Impairment, Fifth Edition. This was largely due to a lower limb impairment due to gait derangement as well as early arthritis. His impairment rating of the whole person is 20 percent. The early arthritic change would result in an impairment of 3 percent of whole person and that is according to table 17.3 noted on page 527, but [due to] the gait derangement a higher rating is given based on table 17.5 where he has significant gait disturbance and pain secondary to his hip. This also takes into account as hip continues to deteriorate he may need a total hip arthroplasty in the future. Based on this, I have arrived at a whole person impairment of 20 percent.

Throughout the proceedings before the ALJ, Kobe Aluminum disputed that Watkins met his burden of establishing evidence of impairment as determined by the Fifth Edition of the *AMA Guides* because Dr. Looney's 20% whole body impairment rating was not consistent with the *AMA Guides*. Kobe Aluminum contended that there was no evidence that Dr. Looney or any physician required Watkins to use an assistive device, such as a cane or crutch, which is required under Table 17-5 of the *AMA Guides*.

In the opinion, award and order, the ALJ relied on the medical reports of several medical experts, including Dr. Looney, to find that Watkins had incurred a permanent injury to his left hip in 2008. The ALJ stated that he had “considered all of the Defendant’s contrary arguments on causation and impairment” and noted that “[t]he Defendant argued that the impairment rating assigned by the treating physician, Dr. Looney, was too high, but its other evaluator, Dr. Stanton, provided no alternative in a case where impairment clearly results from injury; he curiously ignored the prospect of impairment from the surgery for the work related labral tear.” The ALJ then awarded Watkins permanent partial disability benefits based on a permanent disability rating of 20%, as Dr. Looney assigned.

Kobe Aluminum filed a petition for reconsideration, requesting the ALJ to correct an error in the opinion in that the ALJ characterized its argument related to Dr. Looney’s impairment as “too high” when it in reality argued that the rating was not as determined by the *AMA Guides*. The ALJ denied Kobe Aluminum’s petition, stating that it was a reargument of the case. The ALJ then stated:

The Defendant objects to the ALJ’s characterization of its argument as being that Dr. Looney’s rating was “too high.” In making that generalization, the ALJ was clearly aware of the nature of the Defendant’s evidence and its argument as to the accuracy of Dr. Looney’s impairment. However, the ALJ believed, and continues to believe that Dr. Looney’s opinion on impairment is more credible than that of Dr. Stanton, for the reasons stated in the Opinion. Among the bases for that conclusion was that Dr. Stanton’s opinion that no work related injury had occurred – an opinion contrary to that of the Defendant’s first evaluator – had a negative impact on the persuasiveness of his opinion on impairment.

Kobe Aluminum appealed the ALJ's rulings to the Board.

The Board agreed with Kobe Aluminum in its opinion entered July 30, 2012, in which it vacated, in part, the ALJ's decision and remanded the matter for further findings related to the impairment rating. The Board held that Kobe Aluminum was entitled to have the ALJ consider its argument that Dr. Looney's impairment reading was inconsistent with the *AMA Guides*, which the ALJ never addressed either in the initial opinion, award and order, or in the order denying the petition for reconsideration. In explaining this ruling, the Board stated:

As set forth in the May 6, 2011, report, Dr. Looney cited to Table 17-3 of the *AMA Guides*, "Whole Person Impairment Values Calculated From Lower Extremity Impairment," to assess a 3% whole person impairment. However, Dr. Looney did not assess a lower extremity impairment rating in the May 6, 2011, report. Additionally, it appears Dr. Looney exclusively relied upon Table 17-5, "Lower Limb Impairment Due to Gait Derangement," to assess a 20% whole person impairment. This is unclear from Dr. Looney's report, as he never directly states the 20% impairment rating is derived exclusively from Table 17-5. Nevertheless, we assume the 20% whole person impairment rating is based on Table 17-5. As noted in the *Guides*, "[e]xcept as otherwise noted, the percentages given in Table 17-5 are for full-time gait derangements of person who are dependent on **assistive devices**." (emphasis in original). An assessment of a 20% whole person impairment pursuant to Table 17-5 "[r]equires routine use of [a] cane, crutch, or long leg brace (knee-ankle-foot orthosis [KAFO])." However, a review of Watkins' deposition and hearing testimony reveals no testimony regarding Watkins' use of an assistive device. Additionally, there is no recommendation of assistive devices within Dr. Looney's May 6, 2011, report.

Recognizing that it was not its function to evaluate the evidence and decide upon an appropriate impairment rating, the Board stated that the ALJ must explain his decision to rely upon Dr. Looney's impairment rating due to the lack of evidence that Watkins needed an assistive device. Specifically, the Board remanded the case for the ALJ to determine whether Dr. Looney correctly assessed a 20% impairment rating, including addressing Kobe Aluminum's concerns with Dr. Looney's reliance upon Table 17-5 of the *AMA Guides*. The Board concluded by stating that if the ALJ determined that Dr. Looney's 20% impairment rating was inconsistent with the *AMA Guides*, then the rating could not be relied upon. This petition for review follows.

In his brief, Watkins contends that the Board exceeded its authority by requiring the ALJ to make additional findings to support his decision and to perform a medical analysis of the *AMA Guides*. Kobe Aluminum, on the other hand, argues that the Board properly remanded the matter to the ALJ to consider whether Dr. Looney's impairment rating was consistent with the *AMA Guides*. We agree with Kobe Aluminum that the Board properly remanded the case to the ALJ to address the impairment rating issue.

In *Western Baptist Hospital v. Kelly*, 827 S.W.2d 685 (Ky. 1992), the Supreme Court described the role of the Court of Appeals in reviewing decisions in workers' compensation actions. "The function of further review of the WCB in the Court of Appeals is to correct the Board only where the [] 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.” *Id.*, at 687-88. With this standard in mind, we shall review Watkins’ arguments.

In *Burton v. Foster Wheeler Corp.*, 72 S.W.3d 925, 929 (Ky. 2002), the Supreme Court described the role of the ALJ in workers’ compensation cases:

This Court has construed KRS 342.285 to mean that the fact-finder, rather than the reviewing court, has the sole discretion to determine the quality, character, and substance of evidence, *Paramount Foods, Inc. v. Burkhardt*, Ky., 695 S.W.2d 418, 419 (1985); that an ALJ, as 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, *Caudill v. Maloney's Discount Stores*, Ky., 560 S.W.2d 15, 16 (1977); and that where the party with the burden of proof is successful before the ALJ, the issue on appeal is whether substantial evidence supported the ALJ's conclusion. *Special Fund v. Francis*, Ky., 708 S.W.2d 641, 643 (1986). Substantial evidence has been defined as some evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable people. *Smyzer v. B.F. Goodrich Chemical Co.*, Ky., 474 S.W.2d 367, 369 (1971). Although a party may note evidence that would have supported a conclusion that is contrary to the ALJ's decision, such evidence is not an adequate basis for reversal on appeal. *McCloud v. Beth-Elkhorn Corp.*, Ky., 514 S.W.2d 46, 47 (1974).

As a reviewing body, neither the Board nor this Court is permitted to substitute its judgment for that of the ALJ, or “render our own findings or direct the findings or conclusions the ALJ shall make.” *Jones v. Brasch-Barry General Contractors*, 189 S.W.3d 149, 152-53 (Ky. App. 2006) (footnote omitted).

In the present case, we do not agree with Watkins' contentions that the Board exceeded its authority in making assumptions regarding how Dr. Looney decided upon an impairment rating or that it was requiring the ALJ to perform a medical analysis related to the application of the *AMA Guides*. Rather, the Board was correctly requiring the ALJ to support its decision to assign a 20% disability rating on substantial evidence of record. And based upon Kobe Aluminum's argument throughout these proceedings, whether that disability rating is based upon substantial evidence and is in accordance with the *AMA Guides*, is not clear.

In KRS 342.730(1), the General Assembly provided for the payment of income benefits for disability:

Except as provided in KRS 342.732, income benefits for disability shall be paid to the employee as follows:

.....

(b) For permanent partial disability, sixty-six and two-thirds percent (66-2/3%) of the employee's average weekly wage but not more than seventy-five percent (75%) of the state average weekly wage as determined by KRS 342.740, multiplied by the permanent impairment rating caused by the injury or occupational disease *as determined by the "Guides to the Evaluation of Permanent Impairment,"* times the factor set forth in the table that follows[.] [Emphasis added.]

In *Jones, supra*, this Court recognized the role the *AMA Guides* play in deciding whether a claimant is entitled to disability benefits:

A claimant found to have a compensable, permanent partial disability receives workers' compensation benefits based on the percentage of the employee's disability

assessed by the ALJ in accordance with the AMA Guides. Thus, the AMA Guides are an indispensable tool utilized by an ALJ to determine the nature and severity of any claimant's injuries.

Jones, 189 S.W.3d at 153 (footnote omitted). The *Jones* Court went on to state:

We agree with *Jones* that the AMA Guides do not abrogate a physician's right to assess independently an individual's impairment rating. We also agree that if the physicians in a case genuinely express medically sound, but differing, opinions as to the severity of a claimant's injury, the ALJ has the discretion to choose which physician's opinion to believe. But an ALJ cannot choose to give credence to an opinion of a physician assigning an impairment rating that is not based upon the AMA Guides. In other words, a physician's latitude in the field of workers' compensation litigation extends only to the assessment of a disability rating percentage within that called for under the appropriate section of the AMA Guides. The fact-finder may not give credence to an impairment rating double that called for in the AMA Guides based upon the physician's disagreement with the disability percentages called for in the AMA Guides[.]

Under our law, the AMA Guides are an integral tool for assessing a claimant's disability rating and monetary award. So to be useful for the fact-finder, a physician's opinion must be grounded in the AMA Guides, meaning that a physician's personal antagonism toward the AMA Guides, such as that demonstrated by Dr. Reasor in this case, is legally irrelevant. And any assessment that disregards the express terms of the AMA Guides cannot constitute substantial evidence to support an award of workers' compensation benefits.

Id. at 153-54.

The specific section of the AMA *Guides* at issue in this case is found on page 527, as Dr. Looney stated in his report. Under the subheading 17.2c addressing gait derangement, the AMA *Guides* state:

An impairment rating due to a gait derangement should be supported by pathologic findings, such as x-rays. Except as otherwise noted, the percentages given in Table 17-5 are for full-time gait derangement of persons who are dependent on **assistive devices**. [Emphasis in original.]

Table 17-5 lists the impairments for the lower limb due to gait derangement. A

20% impairment is in the moderate range and lists the individual's signs as:

“Requires routine use of cane, crutch, or long leg brace (knee-ankle-foot orthosis [KAFO]).” Because there is nothing in the record to establish that Watkins uses or has ever been required to use an assistive device, Dr. Looney's assignment of a 20% impairment by referencing a section of the *AMA Guides* that is for individuals who use an assistive device certainly calls the disability rating into question. In remanding the matter, the Board was not requiring the ALJ to perform a medical analysis of this section of the *AMA Guides*, but rather to support his decision with findings sufficient to ensure that the rating was made in accordance with the *AMA Guides*.

Accordingly, because the Board did not overlook or misconstrue any controlling statutes or case law in remanding the matter for further findings by the ALJ related to the propriety of the impairment rating, we affirm the Board's opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Michael D. Lindsey
Bowling Green, Kentucky

BRIEF FOR APPELLEE, KOBE
ALUMINUM:

R. Christion Hutson
Paducah, Kentucky