

Commonwealth Of Kentucky

Court Of Appeals

NO. 2003-CA-000443-WC

WAL-MART STORES, INC.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
CLAIM NO. 99-WC-66231

LARRY FRENCH;
BRUCE COWDEN, JR., Administrative
Law Judge; and WORKERS' COMPENSATION BOARD

APPELLEES

OPINION

AFFIRMING

** ** * * *

BEFORE: PAISLEY and TACKETT, Judges; HUDDLESTON, Senior Judge.¹
HUDDLESTON, Senior Judge: Wal-Mart Stores, Inc. appeals a
decision by the Workers' Compensation Board which affirmed an
Administrative Law Judge's award of permanent occupational

¹ Senior Status Judge Joseph R. Huddleston sitting as Special Judge by designation of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Ky. Rev. Stat. (KRS) 21.580.

disability benefits to Larry French. French was injured in September 1999 when, in the course of his employment with Wal-Mart, a piece of iron weighing over 200 pounds fell and struck him in the head. French suffered a concussion, followed by a stroke ten months later which the ALJ found to have been caused by the work injury.

As stated by the Board,

[A]lthough the record contains an abundance of evidence from various expert medical witnesses, only Dr. James Anthony assessed an impairment rating reportedly in accordance with the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"). [I]n his report, Dr. Anthony, a neurologist, in a Form 107, Medical Report, concluded that French had suffered several brain infarctions documented by a SPECT scan, producing a stroke that had resulted in a 15% whole person impairment pursuant to Chapter 3, page 65 of the AMA Guides. Dr. Anthony further indicated that within a reasonable degree of medical probability, French's work-related injury at Wal-Mart was the cause of these findings. All other expert medical witnesses either failed to address French's resulting impairment based upon the AMA Guides or found no measurable rating.

Dr. Anthony was not cross-examined by Wal-Mart, nor was any other expert witness questioned as to the validity of Dr. Anthony's impairment rating for purposes of impeachment.

The first question we must answer is whether the ALJ could properly rely on the impairment rating assessed by Dr. Anthony which cited an incorrect section of the AMA Guides. The parties have not cited us to, nor has our research uncovered, any published Kentucky authority dealing with this precise issue.

A disability rating is based upon a statutory factor and the extent of the worker's permanent impairment "as determined by" the latest edition of the Guides.² As the Board recognized, the proper interpretation of the Guides and the assessment of an impairment rating under the Guides are medical questions. For that reason, medical testimony concerning the proper use of the Guides limits the ALJ's authority to pick and choose among impairment ratings that are in evidence. According to the Board, in this case

Wal-Mart made no attempt to impeach Dr. Anthony's impairment assessment through the expert testimony of any other medical witness. Rather, [] Wal-Mart's

² See Adkins v. R & S Body Co., Ky., 58 S.W.3d 428 (2001).

condemnation of the impairment rating in question, though skillfully argued and admittedly enticing, is based solely on an independent review of the AMA Guides by an attorney-at-law, not a physician.

While struggling to ascertain the level of discretionary authority of an Administrative Law Judge and primarily focusing on KRS 342.732, we and the Supreme Court have repeatedly acknowledged that there are limitations on an ALJ's discretion as to the application and recalculation of medical impairment ratings under the AMA Guides.³ Our courts have permitted ALJs to recalculate the FVC and FEV-1 measurements in occupational lung disease claims only in circumstances where the tables are contained in the AMA Guides and the recalculations of predicted normal values result in nothing more than simple mathematical function. It seems obvious that if we do not permit an ALJ to perform the function of personally measuring an individual to determine his height for purposes of recalculation of spirometric test results, a separate analysis of the degree of impairment on a physical examination would clearly be inappropriate.

³ See, e.g., Newberg v. Garrett, Ky., 858 S.W.2d 181 (1993); Wright v. Hopgood Mining, Ky., 832 S.W.2d 884 (1992); and Watkins v. Ampak Mining Co., Ky. App., 834 S.W.2d 699 (1992).

Accordingly, it was not improper for the ALJ to rely on Dr. Anthony's impairment rating. Its inaccurate citation to the AMA Guides does not render it incompetent. The ALJ could have used its inaccuracy to discount its credibility, but chose not to do so. Matters of credibility and the weight to be assigned to various testimony are solely for the ALJ.⁴

Wal-Mart's second argument on appeal addresses the relationship between French's work injury and subsequent stroke. Because we believe that in analyzing this issue the Board did not overlook or misconstrue controlling statutes or precedent or commit an error in assessing the evidence so flagrant as to cause gross injustice,⁵ we adopt its analysis as follows:

We [the Board] find no merit in Wal-Mart's position that the record contains no competent medical evidence of record to support the ALJ's determination that French's work injury produced his stroke and subsequent disability. As pointed out by the ALJ, Dr. Anthony, in his expert capacity as a neurologist, concluded that the SPECT scan was abnormal and

⁴ Magic Coal Co. v. Fox, Ky., 19 S.W.3d 88 (2000); Codell Construction Co. v. Dixon, Ky., 478 S.W.2d 703 (1972); and Smyzer v. B.F. Goodrich Chemical Co., Ky., 474 S.W.2d 367 (1971).

⁵ Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687 (1992).

diagnosed French with a brain infarction. Based on that SPECT scan, Dr. Pretoritus opined [that] the results were more consistent with a prior head trauma than with multi-focal areas of cerebral vascular disease. What is more, Dr. Anthony unequivocally concluded that within a reasonable degree of medical probability, French's 1999 work-related head injury was the cause of his complaints. Hence, we find there was ample substantial evidence of probative value to support the ALJ's conclusions.^[6] It is well established that, as a matter of law, ALJ Cowden was vested with the authority to reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it came from the same witness or the same adversary party's total proof, and was free to draw all reasonable inferences from the evidence.^[7] Although we concede the record contains conflicting evidence upon which the ALJ could have reached an opposite result, it is well established that mere evidence contrary to the ALJ's decision is not

⁶ Wolf Creek Collieries v. Crum, Ky. App., 673 S.W.2d 735 (1984).

⁷ Magic Coal v. Fox, Ky., 19 S.W.3d 88 (2000); Miller v. East Kentucky Beverage/Pepsico, Inc., Ky., 951 S.W.2d 329 (1997); Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418 (1985).

adequate to require reversal on appeal.[⁸] Hence, we again find no error.

Accordingly, the Board's decision is affirmed.

ALL CONCUR.

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BRIEF FOR APPELLEE:

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⁸ Whittaker v. Rowland, Ky., 998 S.W.2d 479 (1999).