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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000524-WC

DAIRY QUEEN

APPELLANT

V. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
CLAIM NO. WC-03-88169

SHIRLEY NOE;
HONORABLE RICHARD M. JOINER,
ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION AFFIRMING

** ** * * * * *

BEFORE: MINTON AND SHRODER, JUDGES; EMBERTON, SENIOR JUDGE.¹

MINTON, JUDGE: When a mental injury is an issue in a workers' compensation case, the ALJ² is authorized to translate from the

¹ Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

² Administrative Law Judge.

psychiatric class impairment under the *AMA Guides*³ assessment of the severity of a mental impairment into a percentage so that the disability rating can be determined and the income benefits calculated. The issue we are asked to review in this case is whether the ALJ exceeded the scope of his authority as fact-finder by selecting the missing psychiatric class impairment under the *Guides* in order to support the translation to the required percentage of disability. We hold that the ALJ did not exceed his authority and that the Board properly affirmed the award. Accordingly, we affirm the decision of the Board.

On March 27, 2003, while making gravy on the job at Dairy Queen, Shirley Noe bent over to pick up a kettle of water and felt severe pain in the low back. She filed for workers' compensation benefits claiming that she received a physical injury and developed a psychological impairment from this work-related incident. The ALJ ultimately found that "[t]he physical impairment has resulted in the depression, producing a psychological impairment." The ALJ found that Noe had a 25 percent impairment related to the psychological condition, which produced a 31 percent whole person impairment when combined with the 8 percent the ALJ found for the physical

³ American Medical Association *Guides to the Evaluation of Permanent Impairment*.

injury. Dairy Queen's appeal to the Board and to this Court focuses on the assignment of the psychological impairment.

Two physicians evaluated Noe for the psychological impact of the injury. Dr. Andrew Cooley, a board certified psychiatrist, performed a mental status examination and evaluated Noe's condition using standardized mental test instruments. Dr. Cooley found that Noe had no psychiatric disorder and assigned her a 0 percent whole person impairment. Dr. Jeffrey Grand, a psychologist, diagnosed Noe with clear and acute depression, consistent with "a Major Depressive Episode of Moderate severity." He evaluated Noe's level of impairment in the range of 25 percent to 29 percent. Dr. Grand's analysis and impairment rating was based on the Fourth Edition of the *Guides*.

Dairy Queen argues that the ALJ erred in relying on Dr. Grand's evaluation; specifically, Dairy Queen claims that Dr. Grand's report was insufficient because Dr. Grand did not classify Noe's impairment with a Class I through IV label. Rather, the ALJ relied on Dr. Grand's assessment of Noe's impairment as "Moderate" following "a Major Depressive Episode of Moderate severity" and interpreted Dr. Grand's assessment of Noe's impairment as Class III. So the real focus of our review is whether the ALJ abused his discretion in interpreting Noe's impairment class as Class III and, then, awarding Noe benefits based on this class.

Kentucky law is clear concerning the scope of our review with regard to decisions of the Board. This Court is to correct the Board only where it "has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice."⁴

The Board determined that Dr. Grand's report provided substantial evidence in support of the ALJ's determination based on two aspects of Dr. Grand's evaluation. First, Dr. Grand repeatedly used the word "Moderate" in his evaluation of Noe. He diagnosed Noe with a major depressive disorder that he characterized as "Moderate" and established that Noe's depressive disorder resulted in a "Moderate impairment to her occupational functioning." Because both the Fourth and Fifth Editions of the *Guides* establish "Moderate impairment" as Class III impairment, the Board found that the ALJ's determination of Noe's impairment as Class III was sufficient.⁵

Second, the Board took note of Dr. Grand's determination that Noe's psychological impairment fell within the range of 25 percent to 29 percent. This percentage range is within the range established for a moderate impairment in the Second Edition of the *Guides*, the latest edition to use

⁴ Western Baptist Hospital v. Kelly, 827 S.W.2d 685, 687-688 (Ky. 1992).

⁵ See Table 14-1 in both editions. Fourth Edition, p. 301. Fifth Edition, p. 363.

percentage ratings for psychological impairment. Although the *Guides* provide percentage ratings for all other types of impairment, Chapter 14, which addresses mental and behavioral disorders, no longer utilizes percentage ratings for impairments.⁶ This move away from percentage measurements of mental disorders clashes with KRS⁷ 342.730, which requires a percentage impairment rating "as determined by [the *Guides*]" to be multiplied by a factor set forth in KRS 342.730. The editors of the *Guides* take note of this and offer that "[n]otwithstanding the lack of percentages in the fifth and fourth editions, the evaluator may assign a percentage of the whole person rating to a mental or behavioral disorder."⁸ Thus, Dr. Grand's assignment of a 25 percent to 29 percent impairment to Noe on both the Form 107-P and in his written evaluation further supports the ALJ's determination of a Class III impairment.

According to the Supreme Court's decision in Knott County Nursing Home v. Wallen, when a mental injury is at issue

⁶ Both the commentary at the end of Chapter 14 in the Fourth Edition, and the text of Section 14.3 of the Fifth Edition, explain the lack of percentages corresponding to impairment levels in the two editions. The Fourth Edition notes that the Second Edition assigned percentage ranges for each of the five impairment classes but that the *Guides* have not used percentages of impairment for mental conditions since 1988.

⁷ Kentucky Revised Statutes.

⁸ Cocchiarella, Linda, and Stephen J. Lord, *Master the AMA Guides, Fifth: A Medical and Legal Transition to the Guides to the Evaluation of Permanent Impairment, Fifth Edition*. 2001 American Medical Association, p. 177.

in a workers' compensation case, the ALJ has the authority "to translate a Class 1 through 5 impairment into a percentage impairment for the purpose of determining the worker's disability rating and calculating the income benefit."⁹ The Board's acceptance of the ALJ's opinion in the instant case was essentially a variation on the facts of Wallen. The Board permitted the ALJ to translate Dr. Grand's evaluation and repeated description of Noe's impairment as a "Moderate" impairment within the range of 25 percent to 29 percent into a Class III impairment; from this, the Board accepted the ALJ's determination that Noe suffered a 25 percent impairment, a determination allowed by Wallen.

Dairy Queen argues that the ALJ's decision is contrary to the Supreme Court's holding in Kentucky River Enterprises, Inc. v. Elkins.¹⁰ Elkins held that both the assessment of a workers' compensation claim and the interpretation of the *Guides* are medical questions that must be resolved by a physician. But we do not find that the findings of the ALJ in this case involved an interpretation of the *Guides*. Dr. Grand went to great lengths to describe Noe's impairment as "Moderate," the definition of a Class III impairment in both the Fourth and Fifth Editions of the *Guides*. Repetitive use of this term, in

⁹ 74 S.W.3d 706, 710 (Ky. 2002).

¹⁰ 107 S.W.3d 206, 210 (Ky. 2003).

addition to careful wording in Dr. Grand's evaluation, provided sufficient evidence for the ALJ to translate Dr. Grand's evaluation of Noe's impairment into a Class III rating.

It is our opinion that the ALJ did not interpret any portion of the *Guides*; rather, the ALJ merely interpreted portions of Dr. Grand's report to reach his conclusion. Although Dr. Grand did not explicitly name the class into which he placed Noe, he offered a very clear indication of the class through both his Form 107-P and his evaluation of her condition. In this case, we are not compelled to place form over substance when both the ALJ and the Board found that Dr. Grand's report essentially gave Noe a Class III rating.

We do not believe that the ALJ went beyond his authority in the instant case; so we affirm the Board's decision that Dr. Grand's report provided substantial evidence in support of the ALJ's determination.

ALL CONCUR.

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