

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000652-WC

ANNIE OGOLEY

APPELLANT

PETITION FOR REVIEW OF A DECISION
v. OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-03-76342

KROGER; HON. MARCEL SMITH,
ADMINISTRATIVE LAW JUDGE;
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** *

BEFORE: KNOPE AND TACKETT, JUDGES; ROSENBLUM, SENIOR JUDGE.¹

TACKETT, JUDGE: Annie Ogoley appeals from an order of the Workers' Compensation Board (Board) awarding her permanent partial disability benefits. The Board affirmed the decision of the Administrative Law Judge (ALJ) which assigned a three percent disability rating and declined to apply the statutory multiplier found in Kentucky Revised Statute (KRS) 342.730(1)(c)(1). Ogoley argues that the ALJ ignored medical

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

evidence that she suffered a twenty percent impairment and that she was entitled to the statutory multiplier because her injury left her unable to perform the same job duties. We disagree and affirm the Board.

At the time of her accident, Ogoley had been employed as a cashier at Kroger since 1994. On February 6, 2003, she slipped and fell while picking up a rug at work. She was taken to the hospital by ambulance and treated for a broken left ankle. The following day, she had surgery to affix a screw to hold her fractured bone in place. Three months later, she had another surgery to remove the device. Kroger voluntarily paid her medical expenses and temporary total disability benefits of \$280.18 per week. Ogoley returned to work August 18, 2003, in the Kroger pharmacy where the work was less physically demanding than in her former job as a cashier.

Ogoley filed an application for workers' compensation benefits. After various stipulations, the only issues remaining were the extent and duration of disability, whether the KRS 342.730 multiplier would apply, and the impairment rating. The ALJ found that Ogoley suffered a three percent impairment due to her broken ankle, which was reduced to 1.95% pursuant to KRS 342.730(1)(b), and declined to apply the statutory multiplier because Ogoley was paid the same or greater wages in her current job. Ogoley filed a motion for reconsideration which was

denied, and the Board affirmed the ALJ's award in all aspects. This appeal followed.

On appeal, Ogoley argues that the ALJ committed reversible error by adopting the three percent impairment rating over the twenty percent rating which was also assessed. In order to challenge the Board's decision on appeal, Ogoley must demonstrate that the evidence compelled a finding in her favor. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). Further, the ALJ has the sole authority to judge the weight and inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997). The ALJ 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 party's total proof. Magic Coal v. Fox, 19 S.W.3d 88 (Ky. 2000). There is no doubt that the evidence in this case was contradictory on the issue of Ogoley's impairment.

The ALJ reviewed evidence from three doctors, as well as Ogoley's deposition testimony. During her employment with Kroger, Ogoley had suffered several injuries. In 1994, she twisted her left ankle when she tripped over another employee who was on the floor. She tore a ligament in her left foot stepping off the stress mat in 1998. In 2000, she had two injuries, one to her left knee, the other to her left ankle. On

February 6, 2003, the day she fell and broke her ankle, Ogoley already had an appointment with Dr. Todd Hockenbury regarding her left knee, and he was still treating her for that condition at the time of her deposition. She was suffering arthritis in her knees and used a four-point cane to steady herself when reaching over her head. Ogoley testified that she worked in the pharmacy forty-two hours per week at an hourly wage of \$11.45. Her job duties included bagging up prescriptions, retrieving them for customers and acting as a cashier in the pharmacy. She stated that she suffers from numbness in two of her toes, nerve damage and swelling in her foot, and is unable to chase her granddaughter or stand for long periods of time.

Dr. S. Pearson Auerbach performed an independent evaluation of Ogoley's medical condition. He examined her on December 15, 2003, noting puffiness, diminished sensation, and some restriction of mobility in her left foot. In his opinion, it was too soon to evaluate whether Ogoley had sustained permanent nerve damage, and he did not feel she had reached maximum medical improvement. He recommended waiting until summer 2004 to assess her range of motion and sensory level in order to determine whether there was a basis to assign an impairment rating. Nevertheless, he assessed a twenty percent impairment under the American Medical Association (AMA) guide due to gait derangement. Auerbach stated that he did not have

an opportunity to re-evaluate Ogoley, and he was unaware of her preexisting knee and back problems. Significantly, he testified that gait impairment was not the preferred method for rating an injury to a specific body part because it failed to take into account factors such as atrophy, muscle strength, range of motion, and arthritic change. Auerbach admitted that he had not examined Ogoley's knee and was thus unable to assess its effect on her gait impairment.

On February 27, 2004, Hockenbury noted that Ogoley had swelling, decreased sensation, and significant pain in her left ankle. In addition, she was using a four-point cane and lace-up ankle brace. Hockenbury felt that Ogoley had reached maximum medical improvement and assigned her an impairment rating of twenty percent due to gait derangement. He stated that this was appropriate due to her routine use of a cane. According to Hockenbury, gait derangement is the only method which assigns impairment without using additional methods of assessment. He testified that, using the range of motion method, Ogoley would receive a three percent rating, plus an additional four percent for sensory deficit, leading to a maximum impairment rating of seven percent. In addition, Hockenbury could not identify any pathologic findings from Ogoley's x-rays; however, he stated that it would not be unusual for someone with a normal x-ray one year after an injury to develop significant arthritis two to

three years later as a result of cartilage damage. Hockenbury contended that his rating was not based on a future prediction, but rather on Ogoley's current use of the four-point cane and brace.

The remaining medical testimony came from Dr. Martin Schiller who had examined Ogoley on May 4, 2004, and reviewed other medical records. He noted that his examination was limited to the left ankle, but he was aware that Ogoley had back and knee problems. Her x-ray revealed an anatomically realigned fracture which had healed without signs of arthritis in the joint. He noted that Ogoley complained of pain and suffered some limitation in her range of motion. Schiller observed that she walked without a limp and noted that she liked to wear an ankle brace for support. According to Schiller, Ogoley's only impairment was a slight diminishing in her range of motion, which he assigned a three percent impairment rating. He stated that he disagreed with Auerbach's decision to use the AMA gait derangement table because it would be affected by her noncompensable back and knee problems. Schiller instead used the section of the guidelines on fractured ankles and range of motion to assess Ogoley's impairment.

In the findings of fact, the ALJ stated that Schiller's impairment rating was more persuasive and his opinion was supported by objective medical evidence. The opinion

adopted Schiller's three percent rating, which was reduced to 1.95% by operation of KRS 342.730(1)(b). Ogoley argues that the ALJ committed reversible error by ignoring uncontroverted medical evidence requiring a twenty percent impairment rating. The AMA guidelines assign a twenty percent rating to people who must use an "assisted device" to stand or walk. Ogoley argues that her use of a four-point cane to steady herself required the ALJ to accept the gait derangement rating assigned by Doctors Auerbach and Hockenbury. We disagree. The ALJ weighed the evidence given by Ogoley and all three doctors before deciding whose testimony was the most persuasive. This is exactly the function reserved to the ALJ by our state Supreme Court in Miller.

Ogoley next argues that the ALJ erred in failing to multiply the amount of her award by three as required by statute. KRS 342.730 (1)(c)(1) states, in pertinent part, as follows:

If, due to an injury, an employee does not retain the physical capacity to return to the type of work that the employee performed at the time of injury, the benefit for permanent partial disability shall be multiplied by three (3) times the amount otherwise determined under paragraph (b) of this subsection. . .

Since her injury, Ogoley has returned to work at Kroger; however, she is currently working in the pharmacy, rather than

as a cashier. She argues this is due to her inability to perform the duties of a cashier and points out that the pharmacy position is less physically demanding. Nevertheless, she has been paid the same hourly rate, or a higher one, in her pharmacy position. Because Ogoley is able to work the same number of hours as she did before the injury and make the same or greater wages, the ALJ applied KRS 342.730 (1)(c)(2) which states as follows:

If an employee returns to work at a weekly wage equal to or greater than the average weekly wage at the time of injury, the weekly benefit for permanent partial disability shall be determined under paragraph (b) of this subsection for each week during which that employment is sustained. During any period of cessation of that employment, temporary or permanent, for any reason, with or without cause, payment of weekly benefits for permanent partial disability during the period of cessation shall be two (2) times the amount otherwise payable under paragraph (b) of this subsection. This provision shall not be construed so as to extend the duration of payments.

The ALJ correctly determined that the three multiplier did not apply to Ogoley's award because she was likely to be able to continue earning wages that were equal to or higher than her pre-injury wages. Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003).

For the foregoing reasons, the Board's order is affirmed.

ROSENBLUM, JUDGE, CONCURS.

KNOFF, JUDGE, CONCURS AND FILES SEPARATE OPINION.

KNOFF, JUDGE, CONCURRING: I fully agree with the reasoning and the result of the majority opinion. I write separately to adopt the insightful discussion in the Board's opinion regarding the extent of the ALJ's discretion to use the AMA Guides in reviewing the opinions of expert witnesses:

The boundaries of an ALJ's authority to utilize the AMA Guides in reviewing the opinions of expert medical witnesses, and the extent of the fact-finder's obligation legally to do so, has been a problematical and persistent issue before this Board since passage of the December 12, 1996, amendments to the workers' compensation statute. Since that time, ALJs have been limited in their discretion to simply choose the AMA assessment from the expert medical witness in each case found to be most credible in determining partial disability awards. Although this procedure sounds straightforward, numerous questions have arisen regarding an ALJ's responsibility to look beneath a particular physician's given impairment rating in order to resolve whether it truly is in accordance with the appropriate methods of assessment as prescribed by the AMA Guides. In this respect, we have time and again recognized that regardless of experience or education, and as exposed as they may be to medical issues, ALJs are not trained in performing medical examinations. An impairment rating is a medical determination and it is not within the ALJ's discretionary authority to arrive at a separate and distinct impairment rating from that which is offered by a physician.

That having been said, this Board has also consistently held that a fact-finder is not constrained to a myopic view of the

medical evidence and is free to reference the AMA Guides in assisting in the determination of which medical opinion is entitled to more weight or credibility. However, we have never mandated that in determining which impairment rating is most credible, an ALJ is compelled to independently review the AMA Guides. Rather, any decision by the trier of fact to separately analyze the AMA Guides in deciding the proper resolution of a case is generally a matter of discretion. To that extent, differing expert opinions as to impairment ratings, even where widely divergent as in the instant claim, remain nothing more than conflicting evidence.

BRIEF FOR APPELLANT:

Ched Jennings
Louisville, Kentucky

BRIEF FOR APPELLEE, KROGER:

C. Patrick Fulton
Louisville, Kentucky