

RENDERED: JANUARY 18, 2008; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001790-WC

GREYHOUND LINES

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-04-86846

JOSEPH PIERCE;
HONORABLE MARCEL SMITH,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * **

BEFORE: DIXON, STUMBO AND WINE, JUDGES.

DIXON, JUDGE: Greyhound Lines seeks review of a decision of the Workers' Compensation Board affirming an Administrative Law Judge's order awarding temporary total disability benefits to Greyhound's former employee, Joseph Pierce. We find no error and affirm.

Pierce was born March 9, 1959. He had been employed as a bus driver for Greyhound for approximately eight years when he was injured on April 29, 2004. On that date, Pierce was assaulted by a bus passenger, and he suffered injuries to his jaw, face, head and side. Pierce's physical injuries ultimately resolved, but he also suffered from post-traumatic stress disorder. Pierce sought treatment with a psychiatrist for some period of time after the assault. Pierce returned to work at Greyhound in April 2005, and he was given a designated bus route in July 2005. Pierce, however, had behavioral problems at work and was terminated in August 2006.

A hearing was held before the ALJ to address Pierce's claim of psychiatric impairment. Pierce testified at the hearing, and the medical records of his treating psychiatrist, Dr. Deborah Quinton, were introduced. Greyhound also submitted records from a psychiatric evaluation conducted by Dr. David Shraberg. Additionally, the parties submitted the records and testimony of Dr. Andrew Cooley and agreed his opinion would be given presumptive weight. Dr. Cooley evaluated Pierce on two separate occasions and was also deposed by Greyhound.

In an opinion rendered February 26, 2007, the ALJ found Pierce had a 20% psychiatric impairment as a result of the work injury and awarded him temporary total disability benefits. The ALJ subsequently overruled the substantive allegations raised by Greyhound in its petition for reconsideration. Greyhound appealed to the Board, which affirmed the ALJ's award on August 3, 2007. This petition for review followed.

On review, this Court will reverse only if “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). After reviewing the record and considering the written arguments of the parties, we conclude the Board properly affirmed the ALJ's opinion and order.

I.

Greyhound claims that the ALJ impermissibly exceeded her role as fact-finder by reaching a medical conclusion. Specifically, Greyhound contends that Dr. Cooley's testimony regarding Pierce's impairment was merely hypothetical and speculative; therefore, the evidence did not support the ALJ's decision. As part of his analysis, Dr. Cooley evaluated Pierce's employment history both before and after the assault. Dr. Cooley considered the number of behavioral “write-ups” Pierce received prior to his termination, but Dr. Cooley acknowledged he did not have Pierce's entire employment record for 2005-2006.

The ALJ specifically found:

The parties agreed that Dr. Cooley's opinions would be given presumptive weight. Dr. Cooley assessed between 5% and 20% impairment from work related post traumatic stress disorder depending on how many [behavior] incidents, other than those in the provided reports, occurred after the injury date. Plaintiff said he had 10-12 incidents, then said on cross examination that it may be as few as 7. Considering the evidence in its entirety, I find that Plaintiff's post injury incidents were on [the] high end of the estimates based on his

testimony. Therefore, relying on Dr. Cooley's opinion, I find Plaintiff suffers from a 20% work related impairment.

The ALJ, as “fact-finder[,] has the sole discretion to determine the quality, character, and substance of evidence and to draw reasonable inferences from the evidence.” *Magic Coal Co. v. Fox*, 19 S.W.3d 88, 96 (Ky. 2000) (citations omitted). Here, it is clear that Dr. Cooley's testimony supported the ALJ's decision. While Greyhound relies on specific excerpts of the testimony presented, we must point out that the ALJ is free to “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.” *Id.* (citations omitted). Consequently, we have reviewed the record and find the Board properly affirmed the ALJ's decision.

II.

Greyhound next contends the Board misconstrued the law when it relied on *Knott County Nursing Home v. Wallen*, 74 S.W.3d 706 (Ky. 2002). In *Wallen*, the Court addressed psychiatric injuries and the corresponding impairment ratings enumerated in the AMA's *Guides to the Evaluation of Permanent Impairment*. *Id.* at 707. The Court held that, when the most recent edition of the *Guides* did not provide a percentage rating for a mental impairment, the ALJ could refer to an earlier edition of the *Guides* to determine the appropriate percentage based on the physician's classification of the injury. *Id.* at 710.

In the case at bar, the Board cited *Wallen, supra*, as follows:

The Supreme Court in *Knott County Nursing Home v. Wallen*, 74 S.W.3d 706 (Ky. 2002), specifically upheld the permissibility of the ALJ selecting an impairment rating within the range given by the medical expert in cases involving psychological claims. There the Supreme Court expressly recognized that cases involving psychological impairment claims are not precise and may involve ratings which involve a high and low range.

Greyhound argues that the Board misconstrued the holding of *Wallen*.

After careful review of the record, we find *Wallen* is not directly on point under the facts presented; however, the Board's citation to *Wallen* does not undermine its otherwise sound conclusion that the ALJ's assessment of 20% impairment was supported by the medical evidence. Contrary to Greyhound's assertion, the Board's reliance on *Wallen* was not essential to its decision. Rather, we find the following passage to be the crux of the Board's opinion:

After listening to Pierce's testimony and reviewing the testimony in the record in considerable detail, the ALJ concluded that since it was uncontradicted that Pierce had significantly more work related write-ups after he returned to work, of which Dr. Cooley was not aware, the appropriate impairment rating in this case was 20%. That was the high end of the impairment rating given by Dr. Cooley. That finding by the ALJ is not inconsistent with the evidence. It should be pointed out that Dr. Shraberg's report was introduced as evidence. Dr. Shraberg's report indicated Pierce had no impairment as a result of the April 29, 2004 incident. It appears neither party gave any weight to Dr. Shraberg's report. It is significant to note that the parties stipulated in the BRC order that Dr. Cooley's testimony would be given presumptive weight. It is also significant that it was Greyhound's counsel who elicited the testimony from Dr.

Cooley that the range of impairment based on the AMA Guidelines was from 5 to 20%. In fact, Greyhound's counsel acknowledged near the conclusion of the deposition that they now had a range of impairment. Clearly, Dr. Cooley's testimony established Pierce's impairment rating between the range of 5 and 20% based on the AMA Guidelines and reasonable medical probability. . . . Dr. Cooley testified, on direct and cross examination, that the range for the psychological impairment in this case was between 5 and 20%. It was Greyhound who introduced this evidence into the record without objection. Pierce's counsel merely clarified the testimony of Dr. Cooley.

We again point out that the ALJ has the authority to judge the weight and credibility of the evidence. *Magic Coal Co.*, 19 S.W.3d at 96. As the ALJ's decision was supported by substantial evidence, reversal was not warranted. *Special Fund v. Francis*, 708 S.W.2d 641, 644 (Ky. 1986). We conclude the Board properly affirmed the ALJ.

For the reasons stated herein, the decision of the Workers' Compensation Board is affirmed.

ALL CONCUR.

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BRIEF FOR APPELLEE:

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