Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: February 13, 2015

CLAIM NO. 201393514

KEITH A. JORDAN PETITIONER

VS. **APPEAL FROM HON. OTTO DANIEL WOLFF, IV, ADMINISTRATIVE LAW JUDGE**

FIRST CLASS SERVICES, INC.
HON. OTTO DANIEL WOLFF, IV,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
VACATING IN PART AND REMANDING

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BEFORE: ALVEY, Chairman, STIVERS and RECHTER, Members.

RECHTER, Member. Keith Jordan ("Jordan") appeals from the September 19, 2014 Opinion, Order and Award and the November 3, 2014 Order denying his petition for reconsideration rendered by Hon. Otto Daniel Wolff, IV, Administrative Law Judge ("ALJ"). The ALJ determined Jordan had a 2% impairment rating related to a wrist fracture, but had no

impairment rating related to a femur fracture. On appeal, Jordan argues the ALJ did not properly consider and misunderstood the evidence from Dr. Rudy Rodriguez regarding his lower extremity impairment. Because we are not convinced the ALJ properly understood the evidence from Dr. Rodriguez, we vacate and remand.

Because the issue on appeal is limited to questions concerning permanent impairment ratings, a detailed recitation of the evidence is unnecessary. Jordan sustained a left femur fracture and a distal radius fracture in his right arm in a February 9, 2013 accident while driving a truck for First Class Services Inc. Surgery for the femur fracture included placement of a rod in Jordan's left leg. It is uncontroverted his femur fracture healed with normal alignment.

Dr. Rodriguez examined Jordan on November 20, 2013 and noted the left femur fracture had healed without any mal-alignment. The right distal radius fracture healed with 10 degrees of volar angulation, which is within normal parameters. Hip motion was unremarkable. Dr. Rodriguez diagnosed a healed left femur fracture, left calcaneus fracture with development of posttraumatic subtaler osteoarthritis, right distal radius fracture which healed with right hand weakness, and weakness of the left lower

extremity, posttraumatic. Dr. Rodriguez assigned a 41% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides") for the lower extremity explaining as follows:

> Weakness of left hip flexion, extension, abduction (rating 2, 7, 10 respectively whole person impairment based on table 17.8 of the AMA 5th edition of the guide to the evaluation of permanent impairment).
>
> Left ankle Weakness of ankle flexion, extension, inversion and eversion (rating 10, 5, 2, 2 respectively whole person impairment based on table 17.8 of the AMA 5th edition of the guide to the evaluation of permanent impairment).
>
> Combining these two values with the "combined values chart page 604 gives the value of 34.
>
> Subtalar joint arthritis impairment (xrays show no subtalar space left, severe arthritis) Whole person impairment based on table 17-31 is 10. Combining this value with the ankle and hip weakness combined value of 34. Utilizing the combined values chart from page 604 one arrives at the value of 41 for whole person impairment based on his left lower extremity.

In a January 6, 2014 addendum, Dr. Rodriguez noted he had been informed Jordan's calcaneus injury was not related to the February 9, 2013 work injury. Dr. Rodriguez provided a new impairment rating "related to his left femur

fracture, right distal radius fracture as well as related to this new injury, hip motor weakness as well as weakness of his left ankle." He explained his new rating as follows:

> Combining the weakness of the left hip flexion, extension, abduction, whole person impairment with the left ankle weakness of ankle flexion, extension, inversion and eversion utilizing the chart on page 604 of the AMA Guide to Impairment Rating one arrives at a value of 34.

Dr. Thomas O'Brien performed an independent medical evaluation on March 10, 2014. On examination, Dr. O'Brien found full range of motion of the hip and 5/5 strength of the hip girdle muscles, iliopsoas, quadriceps, hamstrings, hip abductors, and hip adductors. Dr. O'Brien opined Jordan reached maximum medical improvement for the femur fracture nine months after the injury. He noted the femur fracture healed with no angulation. Using table 17-33 of the AMA Guides, he determined Jordan would not have an impairment related to the healed, anatomically aligned femoral shaft fracture. Jordan had normal strength of the quadriceps muscle, the muscle that would be involved in a femur fracture. Jordan did not have an injury to his hip or knee. Because he had normal strength and motion of the hip and knee, there is no impairment related to the femoral

shaft fracture. Dr. O'Brien assessed a 21% pre-existing impairment related to the calcaneal fractures.

The ALJ's findings regarding left lower extremity impairment are as follows:

> Dr. Rodriguez' January 6, 2014 addendum to his November 20, 2013 report indicates Plaintiff had a 42% WPI; of this percentage 34% was attributable to Plaintiff's left lower extremity symptoms. When making his left lower extremity impairment assessment, Dr. Rodriguez evaluated Plaintiff's "left femur fracture, right distal radius fracture as well is related to his new injury, with motor weakness as well as weakness of his left ankle. Combining the weakness of the left hip flexion, extension, abduction, whole person impairment with the left ankle weakness of ankle flexion, extension, inversion and eversion utilizing the chart on page 604 of the AMA Guides to Impairment Rating one arrives at the value of 34."
>
> As previously noted, the compensable injuries resulting from Plaintiff's February 9, 2013 work incident do not include injuries to his left ankle or left hip. **It would seem that an injured worker who went through two surgical procedures to repair a work-related femur fracture would incur some type of permanent impairment, but, unfortunately, at least for Plaintiff, Dr. Rodriguez does not break down the specific percentages he combined to reach a total impairment rating for Plaintiff's leg.** Consequently, based upon Dr. Rodriguez' input, it is impossible to determine his impairment rating for Plaintiff's left femur fracture; and, therefore, Dr. Rodriguez' 34% impairment rating cannot be utilized

> when attempting to determine Plaintiff's WPI.
>
> With Dr. Rodriguez' impairment rating for Plaintiff's left lower extremity discarded, the only remaining WPI rating is the 0% given by Defendant's IME physician, Dr. O'Brien. Consequently it is determined Plaintiff sustained a 0% impairment rating for the work-related left leg injury sustained in the February 9, 2013 work incident. (Emphasis added).

Jordan filed a petition for reconsideration raising essentially the same arguments he raises on appeal. By order dated November 3, 2014, the ALJ denied Jordan's petition, noting Jordan did not request correction of a patent error, but instead continued to argue an issue already decided in the Opinion and Award.

On appeal, Jordan argues the ALJ misunderstood the impairment rating assessed by Dr. Rodriguez for the lower extremity. Jordan notes the ALJ only considered the 34% rating and ignored an 18% impairment rating that could have been drawn from Dr. Rodriguez's report after unrelated impairments were excluded. He contends the ALJ is incorrect in stating Dr. Rodriguez does not break down the specific percentages he combined to reach the total impairment rating for the left leg. Furthermore, Jordan argues the AMA Guides permit an impairment rating for a fracture based upon the effect the injury has on muscle strength as measured at an

accompanying joint. Dr. Rodriguez used table 17-8 "Impairment Due to Lower Extremity Weakness" to arrive at his rating. He provided individual whole person impairment ratings related to weakness in flexion, extension and abduction of the hip. Pursuant to the combined values chart, these ratings equal an 18% whole person impairment rating. To support this method of calculation, Jordon points to an example provided in the AMA Guides, which considers a tibia fracture based upon the effect on the ankle joint even though there was no trauma to the ankle itself. Thus, the ALJ was not constrained to choose between a 34% and 0% rating for the lower extremity and may have considered an 18% rating.

All parties to a workers' compensation dispute are entitled to findings of fact based upon a correct understanding of the evidence submitted during adjudication of the claim. Where it is demonstrated the fact-finder may have held an erroneous understanding of relevant evidence in reaching a decision, the courts have authorized remand to the ALJ for further findings. *See* Cook v. Paducah Recapping Service, 694 S.W.2d 684 (Ky. 1985); Whitaker v. Peabody Coal Co., 788 S.W.2d 269 (Ky. 1990). We are not convinced that the ALJ properly understood Dr. Rodriguez' opinion concerning the lower extremity impairment rating and

therefore find it necessary to vacate and remand for additional fact finding.

The ALJ indicated he had not found a hip or ankle injury. However, Dr. Rodriguez never diagnosed a hip or ankle injury. Rather, he used the resulting muscle weakness measured at the ankle and hip joints that was produced by the fracture to assign the rating. The hip weakness was not viewed as a separate injury but rather an effect of the femur injury. When Dr. Rodriguez initially assigned his rating for the lower extremity, he included an impairment rating for the arthritis caused by the calcaneal injuries. At no point did he assign any impairment for muscle weakness to the prior injury. Once informed that the calcaneal injury was a prior injury, he continued to assign the loss of muscle strength to the new injury, i.e. the femur fracture. Section 17.2 of the AMA Guides at page 525 provides for thirteen methods of assessment of lower extremity impairment, including muscle weakness. It further provides the method may be used "when anatomic changes are difficult to categorize or when functional implications have been documented."

We agree the ALJ could properly exclude any impairment rating for a condition unrelated to the work injury and use the combined values chart to award benefits

based upon a rating less than the 34% Dr. Rodriguez assigned for the lower extremity. Generally, the ALJ's authority to use the AMA Guides is limited to essentially mechanical applications. An ALJ is authorized to use the combined values chart, *see* Thomas v. UPS, 58 S.W. 3d 455 (Ky. 2001); select an impairment rating within a class of impairment stated by a physician, *see* Knott County Nursing Home v. Wallen, 74 S.W.3d 706 (Ky. 2002); or use the AMA Guides in other instances where medical expertise is not required.

In the November 20, 2013 report, Dr. Rodriguez gave specific whole person impairment ratings pursuant to Table 17.8 of the AMA Guides for each type of muscle weakness he found on examination of the hip and ankle. Based on this evidence, the ALJ could have arrived at several different conclusions regarding impairment. Although we are vacating and remanding this matter for additional findings, we are not compelling any particular result. After performing his analysis and demonstrating a proper understanding of the evidence, the ALJ is not precluded from reaching the same conclusion as he reached in the original decision regarding the lower extremity impairment. Because Dr. O'Brien found no muscle weakness on examination, on remand the ALJ is permitted to find Dr. O'Brien's opinion more persuasive and again determine Jordan

has no lower extremity impairment rating. However, if the ALJ believes Jordan has muscle weakness at the ankle and hip as found by Dr. Rodriguez, he is authorized to adopt the entire 34% lower extremity impairment. If he believes Jordan does not have ankle weakness or it is not related to the femur injury, but does have hip weakness related to the femur injury, the ALJ may accept the individual whole person impairment ratings (2, 7, and 10) assigned for each type of hip weakness specified by Dr. Rodriguez in the November 20, 2013 report and use the combined values chart to arrive at an 18% impairment rating. This is essentially a mechanical function within the ALJ's authority requiring no particular expertise. Again, we are remanding this matter not to compel a particular result, but to provide the opportunity to the ALJ to articulate his comprehensive understanding of the evidence submitted.

Accordingly, those portions of the Sept 19, 2014 Opinion, Order and Award and the November 3, 2014 Order on Reconsideration relating to the finding regarding Jordan's lower extremity impairment rating and the award of permanent partial disability benefits are **VACATED,** and the claim is **REMANDED** for further findings consistent with the views expressed herein and the appropriate award of permanent partial disability and medical benefits.

STIVERS, MEMBER, CONCURS.

ALVEY, CHAIRMAN, DISSENTS AND FILES A SEPARATE OPINION.

I respectfully dissent. The majority is directing the ALJ to engage in assessing an impairment rating pursuant to the AMA Guides rather than merely determining whether such rating was appropriate, which he cannot do. It was incumbent upon Jordan to present the appropriate evidence for which the ALJ could arrive at his decision, not require him to make the calculation. As noted by First Class Services, the proper assessment of an impairment rating is a medical question which requires medical testimony. Kentucky River Enterprises, Inc. v. Elkins, 107 S.W.3d 206, 210 (Ky. 2003); Lanter v. Kentucky State Police, 171 S.W.3d 45 (Ky. 2005).

The ALJ clearly may consult the AMA Guides to determine whether an impairment rating is appropriate, or to arrive at a whole person impairment utilizing the combined values chart. While an ALJ may consult the AMA Guides in such fashion pursuant to Caldwell Tanks v. Roark, 104 S.W.3rd 753 (Ky. 2003), actually making the assessment of an impairment rating is altogether different. An ALJ is not authorized to arrive at an impairment rating by

independently interpreting the AMA Guides. George Humfleet Mobile Homes v. Christman, 125 S.W.3d 288 (Ky. 2004).

As argued by First Class Services, the ALJ may not undertake the role of physician to make an independent determination of an impairment rating. Evidence from a medical professional was required to establish whether impairment existed for the injury alleged, and to be presented in such fashion the ALJ could reach his determination. Based upon the evidence presented, the ALJ exercised his discretion. I would affirm the ALJ's decision.

COUNSEL FOR PETITIONER:

HON DAVID C TROUTMAN
PO BOX 1837
PADUCAH, KY 42002

HON MARK EDWARDS
PO BOX 1837
PADUCAH, KY 42002

COUNSEL FOR RESPONDENT:

HON R CHRISTION HUTSON
PO BOX 995
PADUCAH, KY 42002

ADMINISTRATIVE LAW JUDGE:

HON. OTTO DANIEL WOLFF, IV
PREVENTION PARK
657 CHAMBERLIN AVE
FRANKFORT, KY 40601