

OPINION ENTERED: September 4, 2012

CLAIM NO. 200997809

KENTON COUNTY AIRPORT BOARD

PETITIONER

VS.

APPEAL FROM HON. RICHARD M. JOINER,
ADMINISTRATIVE LAW JUDGE

CALVIN SHEBLEY
and HON. RICHARD M. JOINER,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

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

STIVERS, Member. Kenton County Airport Board ("Kenton County") appeals from the April 18, 2012, opinion and award of Hon. Richard M. Joiner, Administrative Law Judge ("ALJ") awarding temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits based on a 5.95% impairment rating, and medical benefits. Kenton

County filed a petition for reconsideration which was denied by order dated June 5, 2012.

The Form 101 alleges on January 29, 2009, Calvin Shebley ("Shebley"), while working as a firefighter for Kenton County, injured his left ankle and leg. Shebley attached the following statement detailing how his injury occurred and the medical care he received:

The Plaintiff, CALVIN SHEBLEY, was injured on January 29, 2009 while an employee of the Kenton County Airport board. Mr. Shebley was employed as a firefighter. On January 29, 2009, Calvin stepped off equipment onto an icy patch of roadway. Mr. Shebley suffered injuries to his left leg and left ankle.

Mr. Shebley was taken by ambulance to St. Elizabeth Medical Center Emergency Room. Upon arrival, Mr. Shebley complained of severe pain in his left ankle. X-rays were taken and revealed a fracture of the distal fibula and posterior malleolus fracture of the tibia and an alvusion fracture of the distal fibula and posterior malleolus fracture of the tibia and an alvusion fracture of the medial aspect of the tibia with dislocation of the ankle mortise. Calvin was splinted and seen by Dr. Smith of orthopedics. On January 29, 2009, Dr. Nicholas Gates of Commonwealth Orthopaedic performed an open reduction internal fixation surgery. Following surgery, he was referred to physical therapy.

On April 24, 2009, Mr. Shebley underwent a second surgery to remove one of the fixation screws. He

continued treatment with Dr. Gates and a third surgery was performed on September 11, 2009. Dr. Gates performed a release left posterior medial ankle flexor hallucis longus tendon. Following surgery, he underwent physical therapy and returned to work.

With increasing pain, Mr. Shebley returned to Dr. Gates on August 30, 2010. Upon exam, Dr. Gates stated that Calvin has developed chronic pain syndrome as a result of the injury to his ankle. Dr. Gates advised Calvin to continue to treat with a functional ankle brace.

Calvin underwent his fourth surgery on October 4, 2010. Surgery was performed by Dr. Gates and consisted of left ankle reconstruction medial collateral deltoid ligament and left ankle arthrotomy. Following surgery, Calvin was off work until January 3, 2011. On January 27, 2011, Mr. Shebley returned to Dr. Gates with complains [sic] of pain along the lateral ankle. Dr. Gates diagnosed status post left ankle deltoid ligament reconstruction and painful hardware. Mr. Shebley underwent his fifth surgery on March 15, 2011. His surgery consisted of removal of one screw in the left ankle lateral malleolus. Mr. Shebley returned to work in approximately April 2011.

On June 13, 2011 Mr. Shebley underwent an independent medical exam with Dr. Thomas Bender. Using the AMA Guides to Permanent Impairment, Dr. Bender assessed Mr. Shebley with a 7% whole person impairment.

In the record is the April 13, 2010, independent medical examination ("IME") report and Form 107 of Dr. Warren Bilkey. After examining Shebley, Dr. Bilkey set out the following assessment:

1/28/09 work injury with fractured dislocation of the left ankle. Mr. Shebley underwent closed reduction of the dislocation. He underwent subsequent open reduction internal fixation of the fractures. He had subsequent tendon release surgery. He has acquired chronic left ankle pain, limitation of motion and impairment.

Regarding an impairment rating, Dr. Bilkey stated as follows:

Mr. Shebley has acquired a permanent partial impairment caused by the 1/28/09 work injury. According to the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, the Chapter on Lower Extremity Impairments has specific means by which impairment maybe [sic] calculated. This Chapter has specific guidelines as to which of these methods may or may not then be combined. A calculation of impairment is carried out as follows. For residual weakness of the tibialis anterior muscle, according to Table 17-8, there is 5% whole person impairment. For gait abnormality, according to Table 17-5, there is 7% whole person impairment. For limitation of ankle motion into extension, according to Table 17-11, there is 3% whole person impairment. Finally, for the distal saphenous nerve injury, from Table 17-37, one can extrapolate a 2% whole person impairment rating.

According to the rules of the Guides, the nerve injury impairment with limitation of motion impairment maybe [sic] combined. None of the others maybe [sic] combined. Combining these 2 yields 5% whole person impairment. However, also according to the rules of the Guides, when there are competing appropriate impairments made, the highest is to be utilized. Consequently, Mr. Shebley has acquired 7% whole person impairment for gait impairment caused by the 1/28/09 work injury. It is pertinent to point out that one requirement of Table 17-5 for gait impairment in this case is that there is significant degenerative disease noted on diagnostic testing. This is a case where there is gait impairment; arthritis of the ankle is a certainty. The gait impairment in this case is the closest fit for the troubles Mr. Shebley continues to have with respect to his 1/28/09 work injury. It is for this reason that the 7% whole person impairment is appropriate to the 1/28/09 work injury. The entirety of the 7% whole person impairment is due to the 1/28/09 work injury.

Dr. Bilkey opined Shebley was at maximum medical improvement ("MMI").

On November 9, 2011, the medical report of Dr. Thomas A. Bender dated June 13, 2011, was filed in the record. Regarding Dr. Bilkey's impairment rating, Dr. Bender opined as follows:

I have reviewed the evaluation by Dr. Bilkey dated 4/13/10. Since the time of that evaluation, it is evident the

claimant has undergone additional hardware removal. Dr. Bilkey is entirely accurate in his report. The claimant does have 7% whole body impairment as it pertains to the left lower extremity. Dr. Bilkey is accurate that this level of impairment is easily determined using alternative methods again corresponding to good reproduction of the 7% whole body impairment determination. I agree with the 7% impairment determination. I also concur the claimant will develop tibiotalar arthritis and will likely need a tibiotalar fusion in the future.

Also filed in the record is an April 18, 2011, letter by Dr. Nicholas T. Gates which states, in part, as follows:

The patient is not in need for any immediate further medical treatment or prescription drugs. However, it is important to note that Mr. Shebley has suffered a severe ankle fracture and injury and while he is at maximum medical improvement at this point, he is certainly at an increased risk for developing a painful condition in his left ankle in the future. He is at an increased risk for developing left ankle arthritis or pain in the area of the remaining hardware. He is also at risk for developing weakening of the posterior tibial tendon. These conditions are in static situation at this point.

Dr. Gates opined Shebley reached maximum medical improvement ("MMI") on April 2, 2011.

Dr. Bender was deposed on February 23, 2012. His testimony regarding Dr. Bilkey's impairment rating is as follows:

Q: And in looking at Dr. Bilkey's report, it appears to me that he basically indicates there are three different methods by which you could rate Mr. Shebley's injury in this case, and this is pertaining to a work injury on January 28, 2009. Do you agree with Dr. Bilkey that any of these three methods are potential methods for rating Mr. Shebley?

A: There's [sic] several methods, yes.

Q: And my understanding is basically there would be a five percent if you rated him according to muscle weakness, a seven percent if he were rated according to gait derangement and a five percent if he were rated according to a combination of loss of range of motion and a nerve injury?

A: Correct. And I think there's [sic] some other determinations that could be used factoring Chapter 18.

...

Q: And, now, Dr. Bilkey basically determined that with a five percent, a seven percent and a five percent available, he would go with a seven percent for gait derangement because it's the highest of the three ratings. Is that your understanding of Dr. Bilkey's rationale?

A: Correct.

...

Q: Looking at Dr. Bilkey's report with which you agreed, Dr. Bilkey notes particularly that, he says, 'it is pertinent to point out that one requirement of Table 17-5 for gait derangement in this case is that there is significant degenerative disease noted on diagnostic testing.' And, again, that's basically just saying, we need x-ray evidence of arthritis. Is that a fair translation of that?

A: Correct. I talked to Mr. Schulte about that, if he wanted to secure sequential x-rays from Dr. Gates' office and suspend this deposition. He said he didn't believe it was necessary. And I think I agree it's not necessary based upon Dr. Gates' letter of 4/18/11.

Q: Where Dr. Gates said that Mr. Shebley is at increased risk for arthritis?

A: And based upon the fact that this was an intra-articular fracture that required surgical fixation. It's never going to be microscopically lined up.

Q: Did you take x-rays at the time of your examination?

A: I did not.

Q: And did you review any x-ray films?

A: I did not.

Q: Dr. Bilkey indicates in his report, 'initial x-ray abnormalities suggestive of arthritis are not to be expected for a few years yet.' Do you agree with that statement?

A: No, I believe that the man has arthritis and if Mr. Schulte wants to

reopen this with a new set of x-rays comparing the right ankle to the left ankle, I'd be cooperative to do so.

Q: Did you review Dr. Gates' office note of January 27, 2011, which describes findings on x-rays at that time?

A: Yes, I did.

Q: And the x-ray findings at that time state three views standing of left ankle show appropriate alignment and reduction, hardware intact without lucency. He does have a prominent distal screw in the lateral malleolus. Is there any indication there of notable arthritic changes?

A: No, ma'am.

Q: Would you expect a radiologist reporting on an x-ray that had any significant arthritic changes to identify those?

A: Well, I would expect Dr. Gates to state that but many times the physicians, after they've done fracture repair surgery, understate the deleterious effects of the surgery.

And, again, I'm willing to reopen this if Mr. Schulte wants to get his client to undergo new x-rays comparing the right ankle to the left.

...

Q: Do you agree that without x-ray evidence of arthritis it's not appropriate, according to the Fifth Edition Guides, to rate him under Table 17-5 for gait derangement?

A: No, I still believe I can based upon the fact that he has an intra-articular fracture in his fourth decade of life. I know the long-term morbidity of that fracture knowing that the joint space is never going to be back to its time it was before the date of injury on 1/29/09.

Q: Do you agree that the Fifth Edition AMA Guides direct the evaluator to assess permanent impairment at the time maximum medical improvement is achieved?

A: I'm comfortable with that, yes.

Q: So in this case that would mean his condition back in April of 2011 when he was declared at MMI?

A: Correct.

Q: And that would not mean his condition at some point down the road when arthritis develops in his ankle?

A: Correct, that's a good point. I guess as of 4/2/11 that there was no diagnosis of arthritis made at that time.

Q: And, Doctor, would you agree also that the Guides provide that whenever possible the evaluator should use a more specific method, meaning more specific than gait derangement?

A: Correct, but I'm not sure I can identify a more specific method in light of the fact that this individual's had five surgeries.

Q: You indicated previously that you agreed with Dr. Bilkey's assessment and he identified two other more specific methods, one of which was weakness of

the tibialis anterior muscle and the other which related to a nerve injury and loss of range of motion. Do you agree that those other ratings are appropriate in this case?

A: I don't like the saphenous nerve injury, I would be more likely to indicate that the paresthetic complaint into the foot and ankle is due to pain as opposed to the saphenous nerve injury.

Q: Do you agree or disagree with the rating for residual weakness of the tibialis anterior muscle?

A: My exam was not sensitive for that finding.

Q: Do you have reason to question Dr. Bilkey's five percent rating for that finding?

A: No, I believe he has loss of range of motion due to lack of symmetry of the left ankle.

Q: So would you agree then that five percent would be a more specific method of rating Mr. Shebley, more specific to his injury than gait derangement?

A: No, I still like gait derangement with chronic use of the ankle brace.

...

A: I still think a seven percent impairment is appropriate from Table 17-5. As you've already pointed out, Ms. Ross, one could even rationalize 15 percent due to the chronic use of the brace. You have to bear in mind this individual's had really three major surgeries, two minor surgeries to treat this fracture dislocation of the ankle.

Off the record, I can't believe you two are fighting over two percent. On the record.

Kenton County's Notice of Claim Denial or Acceptance, filed November 21, 2011, indicates it accepted the claim as compensable, "but there is a dispute concerning the amount of the compensation owed to the Plaintiff."

The February 9, 2012, benefit review conference ("BRC") order lists "benefits per KRS 342.730" as the sole contested issue. Under "other matters" is the following: "The employer is granted 30 days to depose Dr. Bender."

In the April 18, 2012, opinion and award, the ALJ set forth the following findings regarding the extent of Shebley's disability:

Inasmuch as Calvin Shebley does not claim to be totally disabled, I must consider whether there is a permanent partial disability. Permanent partial disability is the condition of an employee who, due to an injury, has a permanent disability rating but retains the ability to work. A permanent disability rating is the permanent impairment rating selected by an administrative law judge times the factor set forth in the table that appears at KRS 342.730 (1)(b) and a permanent impairment rating means the percentage of whole body impairment caused by the injury or the occupational disease as determined by "Guides to the Evaluation of Permanent

Impairment, American Medical Association." Calvin Shebley has an impairment rating. It is either 0% based on the report of Dr. Gates, or 7% under the report of Dr. Bilkey [sic] is supported with the report and testimony of Dr. Bender.

At present, Mr. Shebley does not have evidence of arthritis in his fractured ankle. He does use a brace on that ankle almost continuously. Section 17.2c of the fifth edition of the *AMA Guides to the Evaluation of Permanent Impairment* addresses gait derangement. This section says that an impairment rating due to a gait derangement should be supported by pathologic findings such as x-rays. In this case the medical opinions are unanimous to the effect that Mr. Shebley will have arthritis develop as a result of his fractured ankle. Mr. Shebley appears to be dependent on an assistive device in the form of a brace on his ankle. This appears to be an alternative way to apply table 17-5 in the manner that Dr. Bilkey did. I conclude that Calvin Shebley has a 7% whole body impairment in accordance with the *Guides*.

Kenton County filed a petition for reconsideration asserting the ALJ chose an impairment rating not in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment* ("AMA Guides"). Kenton County stated as follows:

It is evident the ALJ believed that the Plaintiff's purported dependence on an assistive device represents 'an

alternative way to apply table 17-5,' implying that a patient could properly qualify for a rating with use of an assistive device and in the absence of evidence of moderate to advanced arthritic changes. However, the Guides explicitly state that 'documented moderate to advanced arthritic changes' are required before any rating may be assessed under Table 17-5, and this was expressly acknowledged by Dr. Bender on deposition. Plaintiff presented no evidence to rebut that testimony.

In the June 5, 2012, order ruling on the petition for reconsideration, the ALJ stated as follows:

...

The employer's position is that because there is no present evidence of arthritis in the fractured ankle that the *Guides* cannot be used to assess an impairment in that manner. This issue is addressed in the decision. Because the medical opinions are unanimous to the effect that Mr. Shebley will have arthritis develop as a result of his fractured ankle, this appears to be an alternative way to apply Table 17-5 in the manner that Dr. Bilkey did.

I do not find patent errors appearing on the face of the Opinion and Award. On this basis, the petition for reconsideration is DENIED.

On appeal, Kenton Co. argues as follows:

Similarly, in the case *sub judice*, when asked why he had adopted the 7% rating based on gait derangement if it was not in conformity with the AMA Guides, Dr. Bender's response was that he 'wanted

to agree with Dr. Bilkey.' Both Dr. Bender and Dr. Bilkey were IME physicians retained by Shebley. Dr. Bilkey assigned the 7% rating before Shebley underwent further surgery and achieved MMI from his ankle injury. Thus, his opinion cannot constitute substantial evidence on the issue of permanent impairment. Dr. Bender impeached his own assessment of a 7% rating when he acknowledged that the findings required to rate a patient on the basis of gait derangement do not exist in this case and that he adopted the 7%, despite other more specific methods of rating Shebley, solely to agree with the other Respondent's other IME physician.

As an initial matter, we point out Kenton County failed to assert its specific objections to Dr. Bilkey and Dr. Bender's impairment ratings as contested issues on the February 9, 2012, BRC order. We do not believe the contested issue "benefits per KRS 342.730" encompasses the specific objections Kenton County has to the impairment ratings of Dr. Bilkey and Dr. Bender. 803 KAR 25:010 (13)(14) reads as follows:

(13) If at the conclusion of the benefit review conference the parties have not reached agreement on all the issues, the administrative law judge shall:

(a) Prepare a summary stipulation of all contested and uncontested issues which shall be signed by representatives of the parties and by the administrative law judge; and

(b) Schedule a final hearing.

(14) Only contested issues shall be the subject of further proceedings.

As Kenton County did not list these objections as a contested issue at the BRC, it waived its right to make such an argument in its brief to the ALJ, its petition for reconsideration, and to this Board on appeal.

Also, we note Kenton County failed to address its argument regarding Dr. Bilkey's alleged assessment of an impairment rating before Shebley reached MMI in its petition for reconsideration. By failing to allow the ALJ to correct an alleged error on a factual matter- i.e. relying on an impairment rating rendered before MMI- Kenton County waived this argument on appeal.

Despite Kenton County's failure to adequately preserve its objections to the opinions of Dr. Bilkey and Dr. Bender on appeal, we will briefly address its arguments.

Shebley, as the claimant in a workers' compensation proceeding, had the burden of proving each of the essential elements of his cause of action. See KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Shebley was successful in that burden, the question on appeal is whether there was substantial

evidence of record to support the ALJ's decision. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Substantial evidence" is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971).

In rendering a decision, KRS 342.285 grants an ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). An ALJ may draw reasonable inferences from the evidence, 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. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). An 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 adversary party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). In that regard, an ALJ is vested with broad authority to decide questions involving causation. Dravo Lime Co. v. Eakins, 156 S.W. 3d 283 (Ky. 2003). Although a party may note evidence that would have

supported a different outcome than that reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). Rather, it must be shown there was no evidence of substantial probative value to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

Dr. Bilkey's opinions and impairment rating in conjunction with the opinions of Dr. Bender and Dr. Gates constitute substantial evidence in support of the ALJ's award of PPD benefits based on a 7% impairment rating. Drs. Bilkey and Bender adequately explained the rationale behind the 7% impairment rating. Dr. Bilkey, Dr. Bender, and Dr. Gates are of the opinion Shebley will suffer from arthritis of the ankle in the future. As Dr. Bilkey stated in his April 13, 2010, report, "arthritis of the ankle is a certainty." In his deposition, Dr. Bender testified Shebley is dependent upon a brace "all the time he's at work," and Dr. Bender considers a brace an assistive device. In his report, Dr. Bilkey stated "[t]his is a case where there is gait impairment." Thus, Dr. Bilkey rendered an impairment rating pursuant to Table 17-5 for gait derangement, and Dr. Bender concurred with this impairment rating. The ALJ is free to rely upon these opinions.

In Kentucky River Enterprises, Inc. v. Elkins, 107 S.W.3d 206 (Ky. 2003), the Kentucky Supreme Court instructed that the proper interpretation of the AMA Guides is a medical question solely within the province of the medical experts. Consequently, while an ALJ may elect to consult the AMA Guides in assessing the weight and credibility to be accorded an expert's impairment assessment, as the trier of fact the ALJ is never required to do so. The ALJ, as fact-finder, is free to pick and choose whom and what to believe. The AMA Guides make it clear that its purpose is to provide objective standards for the "estimating" of permanent impairment ratings by physicians. Because Dr. Bilkey and Dr. Bender are licensed physicians, it was appropriate for the ALJ to assume their expertise in utilizing the AMA Guides was comparable or superior to any other expert medical witnesses of record. Furthermore, the ALJ, as fact-finder, has no responsibility to look beneath an impairment rating or meticulously sift through the AMA Guides to determine whether an impairment assessment harmonizes with that treatise's underlying criteria. Except under compelling circumstances where it is obvious even to a lay person that a gross misapplication of the AMA Guides has occurred, the issue of which physician's AMA rating is most credible is a matter of

discretion for the ALJ. REO Mechanical v. Barnes, 691 S.W. 2d 224 (Ky. App. 1985). The ALJ's determination in this case will not be disturbed.

Regarding Dr. Bilkey's assessment of an impairment rating before the additional hardware removal from Shebley's ankle, this goes to the weight given to Dr. Bilkey's opinions and not the admissibility.

Accordingly, the April 18, 2012, opinion and award and the June 5, 2012, order ruling on the petition for reconsideration are **AFFIRMED**.

ALL CONCUR.

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