

OPINION ENTERED: JULY 2, 2012

CLAIM NO. 201091568

SENIOR CARE, INC,

PETITIONER

VS.

**APPEAL FROM HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE**

JANET HAYES
and HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION AFFIRMING

* * * * *

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

SMITH, Member. Senior Care, Inc. ("Senior Care") appeals from the Opinion, Order and Award rendered February 28, 2012, by Hon. William J. Rudloff, Administrative Law Judge ("ALJ"), determining Janet Hayes ("Hayes") sustained a permanent partial disability ("PPD") based on a 26% impairment rating pursuant to the American Medical Association Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides") with the application

of the 3.2 multiplier allowed by KRS 342.730(1)(c)1 and 3 for an injury occurring on March 28, 2010. Senior Care also appeals from the ALJ's March 21, 2012 order denying its petition for reconsideration. On appeal, Senior Care argues the ALJ erred in relying on a supplemental report regarding Hayes' psychological condition, which it contends was not admitted into evidence, and the ALJ improperly substituted his own impairment rating regarding the psychological condition.

Hayes filed her Application for Resolution of Injury Claim on October 7, 2011, alleging she injured her back on March 28, 2010, while attempting to restrain a patient who was about to fall. On January 11, 2012, Hayes filed a motion to amend her claim to include a psychological component and for an extension of proof time. By order dated January 13, 2012, the ALJ granted the motion to amend and gave the parties through February 18, 2012 to file evidence regarding the psychological claim.

On February 10, 2012, Hayes submitted the February 6, 2012 report of Dr. John J. Griffin, a psychiatrist who evaluated her on February 2, 2012. Concerning the issues in this appeal, Dr. Griffin stated:

Mental status reveals a woman who states she is five feet, seven inches tall and weighs 254 pounds. Her maximum weight

was 280 pounds. Her husband drove her to my office. She was casually dressed with a colorful light shirt over an underlying red top. She wore jeans and tan boots. This lady has blue eyes, had [sic] a wedding ring. Her hair was pulled back with a central part. She appeared to be in pain, had difficulty getting in and out of the chair and walking from the waiting room to my office. During the interview she stood up several times to stretch because of problems with pain. Mood was primarily one of depression, there were some elements of anxiety and frustration. She expressed thoughts of not wanting to live anymore, but did not appear to be acutely suicidal. Thought processes were well-connected, there was no evidence of psychoses in the thought content. She seems to be of average intelligence. She was well oriented, had some difficulty naming the presidents backwards or performing serial seven subtractions. She tended toward concrete interpretations of Proverbs.

Diagnostic impression: Depressive Disorder, not otherwise specified, mild.

I believe her primary problems are related to chronic pain as a result of her back injury in March of 2010. **She has some symptoms of depression as a result of the chronic pain and according to the 5th Edition, I would place these in the mild category or class II.** It would be helpful for her to her counseling in addition to taking this Cymbalta for her depression.

(Emphasis added)

On February 16, 2012, Hayes submitted a February 9, 2012 short supplemental report of Dr. Griffin which stated, "[y]ou wanted me to give you an impairment rating according to the 2nd Edition of the AMA Guides for Ms. Hayes. Her depression would warrant a Class II impairment, 25% according to the 2nd Edition."

Senior Care submitted the February 13, 2012 report of Dr. David Shraberg, who found no psychiatric impairment related specifically to the injury of March 28, 2010. He stated:

From the vantage point of any psychiatric impairment related specifically to the injury of March 28, 2010, I find none. She does have a simple lumbar sprain. She does have a fairly worrisome significant metabolic syndrome of hypertension, insulin-dependent diabetes, and obesity that should be addressed appropriately. She also smokes a half pack of cigarettes a day, which his [sic] worrisome and has an impact on her general health. She is on 40mg of Lortab which other than being potentially addictive is causing further reversible but mildly depressed mood associated with her narcotic dependency.

Ms. Hayes mentions that she was referred to Dr. John Griffin in Nashville Tennessee. He performed a mental health evaluation and I would certainly be happy to review his evaluation to see if it differs from my opinions, findings and impairments. However, I find no evidence of an active psychiatric impairment utilizing the 5th Edition AMA Guidelines (chapter 14 and 18) due to

the injury of April [sic] 28, 2010. She functions as a Class I level (table 14.1, page 363) regarding a psychiatric impairment due to that injury. This would equate to a 0% psychiatric impairment utilizing chapter 12 of the 4th Edition AMA Guidelines.

She may have anxiety and mood disorder associated with their general medical condition, particularly with her accelerating diabetes mellitis, obesity, and possible diabetic neuropathies. The medication, Cymbalta, is often indicated for these non-occupationally induced and unrelated medical conditions. However, there is no evidence, whatsoever, that she couldn't return to her usual and customary work psychiatrically as a nurse's aide. Furthermore she is actually working at her old job as a driver for the sizable Amish community that lives in her area of Kentucky. She has done this for years prior to her briefly becoming a nurse's aide and is doing the same activity subsequently arguing against any significant psychiatric or physical impairment due to the injury of March 28, 2010.

Not finding evidence of any accidental work-related psychiatric condition for impairment due to Hayes's March 28, 2010 work injury, Dr. Shraberg opined that no psychiatric or psychotropic medications were needed.

At the hearing held February 23, 2012, Senior Care objected to the introduction of Dr. Griffin's supplemental report and the following exchange took place:

Ms. Terry: Since we had - the plaintiff had asked to amend for

psychological claim and asked for an extension of time which we agreed to and then we had a corresponding extension in order to have a psych IME and submit our report which we did when received. There was no mention of it in the BRC but after the BRC we received another report that we had not had no [sic] prior notice of from the plaintiff's psychological IME that we would like to note our objection to is there was no extension to or - and no prior mention of that report.

The Court: And I am going to sustain your objection. The second report will not be admitted. The first report of Dr. Griffin will be admitted.

Mr. Lile: Judge, may I respond?

The Court: Yeah.

Mr. Lile: You gave us until the 18th of February and we filed that supplement before that.

The Court: Are you sure?

Mr. Lile: I am positive that you extended our time -

The Court: Well -

Mr. Lile: -- to February 18.

The Court: -- the problem, Mr. Lile, is that Dr. Griffin's report attempts to give an impairment rating of 25 percent.

Mr. Lile: Yes, sir.

The Court: Which is outside the Class II impairment allowed by the 2nd Edition.

Mr. Lile: Umm.

The Court: So, on that basis, it would not be admissible. I think the first report is within the 2nd Edition, Class II.

The ALJ rendered his Opinion and Order on February 28, 2012, making the following findings regarding Hayes' psychological condition:

In the present case I find more convincing the opinions of Dr. Griffin as supported by the opinion of Dr. Catlett, who has treated the plaintiff for many years. Contrary to Dr. Shraberg's argument, the record does not indicate that the plaintiff's obesity, hypertension, diabetes and fatty liver were new conditions. Moreover, the evidence indicates that the panic aspect of the plaintiff's psychological problems have [sic] resolved, while the depression and other aspects have persisted. Dr. Griffin's supplemental opinion indicated a Class II, 25% whole person impairment. The ALJ notes that the range for a Class II impairment is 10% to 20%. I therefore find that the plaintiff has sustained a 20% whole person psychological impairment.

The ALJ then determined Hayes had a 7% whole person impairment for her lumbar condition which, when combined with the 20% impairment for her psychological injury, resulted in a 26% impairment pursuant to the AMA Guides.

Senior Care filed a petition for reconsideration raising essentially the same arguments it now raises on appeal. The ALJ rendered his Opinion and Order on

reconsideration denying the petition on March 21, 2012. The ALJ made the following findings relevant to this appeal:

3. At the hearing on February 23, 2012 the Administrative Law Judge sustained the defendant's objection to Dr. Griffin's second report. What the Administrative Law Judge intended to do was to exclude Dr. Griffin's 25% psychiatric impairment, which is outside Class II as allowed by the AMA Guides to the Evaluation of Permanent Impairment, 2nd Edition. See Hearing Transcript, P. 6. Dr. Griffin's first report stated that the plaintiff has depression, placing her in Class II under the AMA Guides, 5th Edition. A Class II impairment under the 5th Edition corresponds to Class II impairment under the 2nd Edition, which mandates a 10-20% psychiatric impairment.

4. After reading the entire record, the Administrative Law Judge realized that his ruling on Dr. Griffin's second report was incorrect and in his February 28, 2012 Opinion and Order, the Administrative Law Judge corrected his misstatement, noting on Page 10 of the Opinion and Order that the range for Class II impairment is 10-20% and finding that the plaintiff has sustained a 20% whole person psychiatric impairment. I made the factual determination that Dr. Griffin's opinions that the plaintiff sustained a work-related Class II psychiatric impairment under both AMA Guides, the 5th Edition and the 2nd Edition, translate into a 20% psychiatric impairment to the whole person, and that Dr. Griffin's opinions were credible and convincing.

On appeal, Senior Care argues the ALJ erred in relying on Dr. Griffin's supplemental report which was not admitted into evidence. Senior Care further argues the ALJ improperly substituted his own impairment rating based upon that supplemental report. Senior Care also argues there was no psychiatric impairment rating contained in the evidence the ALJ could properly review and rely upon. Therefore, Senior Care concludes the Opinion and Award must be modified to exclude any impairment rating for the alleged psychiatric condition.

We begin our analysis by noting an ALJ has the authority to choose within the range allowed for a classification of psychological impairment if a class has been assigned by a physician. The Supreme Court, in Kentucky River Enterprises, Inc. v. Elkins, 107 S.W.3d 206, 210 (Ky. 2003), held the proper interpretation of the AMA Guides and the assessment of an impairment rating are medical questions that must be resolved by a competent physician. An impairment rating can only be established through expert medical testimony sufficient on its face to support a reasonable inference by the ALJ that the AMA Guides were properly utilized in assessing the impairment rating. Where the physician determines the claimant's impairment falls in a certain range or classification, the

ALJ is free to select an impairment accordingly. In Knott County Nursing Home v. Wallen, 74 S.W.3d 706 (Ky. 2002), the court stated:

The fact remains, however, that although the 4th Edition of the Guides does not provide for percentage impairments for mental injuries, it clearly recognizes that such injuries can impair an individual's ability to work. For that reason, we conclude that when a mental injury is at issue, an ALJ is authorized to translate a Class 1 through 5 AMA impairment into a percentage impairment for the purpose of determining the worker's disability rating and calculating the income benefit.

In the case *sub judice*, Dr. Griffin specifically stated in the February 6, 2012 report "according to the 5th Edition" he would place Hayes "in the mild category or Class II". Although the February 6, 2012 report does not specifically refer to the AMA Guides, Dr. Griffin's references to the "5th Edition" and placement "in the mild category or Class II" are sufficient for the ALJ to draw an inference Dr. Griffin was referring to the AMA Guides since the AMA Guides in Table 14-1 of the 5th Edition provide a Class II for mild impairment. Senior Care has not challenged the ALJ's conclusion that the reference to the class of impairment in the February 6, 2012 report was pursuant to the AMA Guides.

In Knott County Nursing Home, supra, after determining the class of the impairment for a psychological condition under the 4th Edition of the AMA Guides, the physician then reverted to the last Edition of the AMA Guides that equated the various impairments with percentages. The Supreme Court determined that the ALJ correctly permitted the doctor to make that translation. Knott County Nursing Home, supra, permits an ALJ, where a class of impairment has been given, to consult the 2nd Edition of AMA Guides for the purpose of determining the claimant's disability rating and calculating the income benefit. Thus, there was no error in the ALJ's use of the AMA Guides to determine Dr. Griffin erred in assigning a greater impairment than allowed by the AMA Guides and reducing the impairment to the maximum allowed for a Class II impairment. Substantial evidence supports the ALJ's finding that Hayes had a Class II psychiatric impairment and the ALJ was well within his role as fact-finder in determining she had a 20% functional impairment rating pursuant to the AMA Guides.

Finally, we note the ALJ indicated in his Opinion and Order on reconsideration that his intent was only to exclude the impairment rating from the supplemental report of Dr. Griffin. While the excerpt of the hearing cited by Senior Care would appear to exclude the report in its entirety, the

full discussion as set forth above indicates the ALJ clarified his initial oral ruling noting the problem with the supplemental report was that the rating was outside the range for a Class II impairment. At the hearing, the ALJ stated "on that basis, it would not be admissible". The supplemental report was filed in a timely manner and there was no other reason for its exclusion. On reconsideration, the ALJ admitted his prior ruling was misstated. The ALJ only relied upon the supplemental report as to placement in the Class II impairment category under the 2nd Edition of the AMA Guides. Even if we were to conclude such reliance was in error, it would only constitute harmless error since the earlier report of Dr. Griffin established a Class II impairment pursuant to the 5th Edition of the AMA Guides which was sufficient to allow for determination of Hayes' impairment rating.

Accordingly, the February 28, 2012 Opinion and Order and the March 21, 2012 Order denying the petition for reconsideration rendered by Hon. William J. Rudloff, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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