

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ORIGINALLY ENTERED: February 12, 2021
OPINION WITHDRAWN: February 22, 2021
OPINION RE-ENTERED: February 22, 2021

CLAIM NO. 201882397

TRACY SCOTT TOLER

PETITIONER

VS. APPEAL FROM HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE

OLDHAM COUNTY FISCAL COURT
and HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

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

STIVERS, Member. Tracy Scott Toler (“Toler”) appeals from the September 20, 2020, Opinion and Order and the October 14, 2020, Order of Hon. Jonathan Weatherby, Administrative Law Judge (“ALJ”). In the September 20, 2020, decision, the ALJ awarded Toler permanent partial disability (“PPD”) benefits based

upon a 4% impairment rating assessed by Dr. Christopher Brigham and medical benefits for his work-related left knee injury.

On appeal, Toler sets forth two arguments. First, he asserts Dr. Brigham is not a “physician” as defined by KRS 342.0011(32); therefore, his opinions do not constitute substantial evidence. Toler also asserts Dr. Brigham never examined Toler which, as claimed by Toler, is required by the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment (“AMA Guides”) before a physician can render a pain rating assessment. He maintains Dr. Craig Roberts is the only physician who is qualified to proffer such an opinion, as he is the only physician who conducted a physical examination of Toler.

BACKGROUND

The Form 101, filed on January 7, 2020, alleges Toler sustained work-related left knee injury while in the employ of Oldham County Fiscal Court (“Oldham County”) on January 16, 2018, in the following manner: “Collided with another officer who stopped while running during SWAT training.”

Oldham County introduced the May 6, 2020, report of Dr. Brigham, whose Physician Index Number is 802A. Dr. Brigham’s medical report reflects he is licensed to practice medicine in Hawaii, Maine, and California. The report indicates Dr. Brigham conducted a medical records review and provided the following clinical summary:

In summary, this 52-year-old police officer sustained an injury to his left knee on January 16, 2018. There is no history of prior problems.

On April 20, 2018, he underwent a partial medial and lateral meniscectomy. He had been involved in physical therapy before and after the surgery.

As of August 7, 2018, he returned to regular work with no restrictions. At that time, he was reported to be doing very well with minimal intermittent irritation over the posterior lateral aspect of the knee, and with tightness of the hamstring tendons. **The patient had a pain level of 1/10.**

On December 5, 2018, when evaluated by Craig Roberts, MD, Mr. Toler reported some changes in his activities, e.g., he used to be able to run a 7.5-minute mile and was then only able to do a 10-minute mile. **He had some knee pain, generally a 3/10.** It was mostly occasional in the anterior and was sharp. (Emphasis added).

Dr. Brigham diagnosed the following: “1. Left knee meniscal disease

a. S/p partial medial and lateral meniscectomies, April 30, 2018.” The following additional diagnoses are listed in Dr. Brigham’s report:

1. Left knee chondromalacia
2. Overweight (BMI 27.6)
3. Hypercholesterolemia
4. Migraine headaches
5. Low back pain, history of
6. S/p unrelated surgery
 - a. Vasectomy

In support of his impairment rating, Dr. Brigham opined as follows:

“According to Table 17-33, Impairment Estimates for Certain Lower Extremity Impairments (5th ed., 546-547), for partial medial and lateral meniscectomies, there is

4% whole person permanent impairment.” Regarding an additional impairment for pain, Dr. Brigham opined, in pertinent part, as follows:

In defining the ratings provided in the Fifth Edition for diagnoses, including procedures such as a partial medial and lateral meniscectomy, it is assumed that there are residual symptoms and mild interference with activities of daily living. His mild complaints of pain and mild interference with activities of daily living is not unexpected eight months following his surgery.

...

According to the records, Mr. Toler does have normal or expected pain associated with his surgical procedure. The Guides’ impairment ratings currently include allowances for the pain that individuals typically experience when they suffer from various injuries or diseases.

...

Mr. Toler does not have pain that causes suffering, dysfunction, or the need for medical intervention.

...

In this case, the subjective reports by Mr. Toler are commonly associated with someone who has undergone meniscal surgery. Therefore, the *Guides* are clear that providing additional impairment is not appropriate.

If, hypothetically, a patient had marked pain, objective documentation of interference with activities [sic] daily living, and/or significant gait disorder, then it may be reasonable to assign additional impairment, up to 3% whole person, for pain. However, none of these factors are documented in this case. It is clear that the impairment in this case is based solely on the diagnosis-based estimate, i.e. 4% whole person.

Dr. Brigham opined Toler reached maximum medical improvement (“MMI”).

Oldham County also introduced the medical records of Dr. Nicholas Kenney, Toler's treating physician. Among the records is an August 7, 2018, record in which Dr. Kenney noted Toler's pain level as "1 out of 10." Dr. Kenney returned Toler to work without restrictions.

Toler introduced Dr. Roberts' December 5, 2018, Independent Medical Evaluation report. In the "Past History" section of the report, Dr. Roberts noted as follows: "He has some knee pain and it is generally a 3/10, on a scale of 1-10 with 10 being the worst. Pain is mainly occasional in the anterior and is sharp." After conducting an examination of Toler and a medical records review, Dr. Roberts diagnosed the following: "Left knee medial-lateral meniscus tears which required left knee partial medial and lateral meniscectomies. To a reasonable degree of medical probability, this is the result of the work related injury of January 16, 2018." Dr. Roberts opined Toler achieved MMI, and assessed a 4% impairment rating for Toler's left knee partial medial and lateral meniscectomies. In assessing an impairment rating for pain, Dr. Roberts opined as follows:

In addition, I would assign a 2% WPI as per Figure 18-1, (page 574) which notes, 'If pain-related impairment appears to increase the burden of the individual's condition slightly, the Examiner may increase the percentage found in Step 1 by up to 3%. No formal assessment of pain-related impairment is required.'

Using the Combined Values Chart, Toler's whole person impairment is 6%.

Toler introduced Dr. Roberts' May 14, 2020, supplemental report. After reviewing Dr. Brigham's May 6, 2020, report, Dr. Roberts offered several opinions explaining why he is more qualified to render an opinion regarding a pain-related impairment. He opined, in part, as follows:

Reason #1

Dr. Brigham and I disagree on how the AMA Guides 5th Edition out to be interpreted. This of course is why these are termed 'Guides'. Although Dr. Brigham has quoted liberally from the Fifth Edition of the AMA Guides, I did note that he did leave out certain areas of the text which I would like to put forth: 'Thus, if an **examining** physician determines that an individual has a pain-related impairment, he or she will have the additional task of deciding whether or not that impairment has already been adequately incorporated into the rating the person has received on the basis of other chapters of the Guides.' (Section 18.3 page 570).

Reason #2

As the examiner of the examinee in this case, I think I am in the best position to render an opinion. I did examine Mr. Toler. The text quoted above (page 570) emphasizes 'examining physician.' It is my understanding Dr. Brigham did not ever see Mr. Toler or examine him.

Toler testified at a deposition and at the July 22, 2020, hearing which is irrelevant to the issues on appeal.

The July 22, 2020, Benefit Review Conference Order and Memorandum lists the following contested issues: benefits per KRS 342.730, average weekly wage, credit for salary continuation, TTD, and proper use of the AMA Guides. Under "Other," is the following: "Whether concurrent employment was as an independent contractor."

In the September 20, 2020, Opinion and Order, the ALJ set forth Findings of Fact and Conclusions of Law which are set forth in relevant part, *verbatim*:

Admissibility of Dr. Brigham Report

19. The Plaintiff has challenged the admissibility of the report of Dr. Brigham due to his being a physician licensed outside of the Commonwealth based upon the definition of "Physician" as it appears in KRS 342.0011 which provides: "Physician" means physicians and surgeons, psychologists, optometrists, dentists, podiatrists, and osteopathic and chiropractic practitioners acting within the scope of their license issued by the Commonwealth.

20. The ALJ notes that these definitions are listed with the caveat, "unless the context requires otherwise" and finds that the intent of this particular provision is not to limit the ability of otherwise qualified physicians to render opinions that may be used in Workers' Compensation jurisprudence. Additionally, Dr. Brigham possesses a Kentucky Physician Index Number on file with the Department of Workers' Claims which provides significant context to the interpretation of this definition.

21. The ALJ therefore finds that the context of the definition of the "Physician" dictates a more expansive definition of the term than that suggested by the Plaintiff and that to conclude otherwise would frustrate the aims of the Department that has provided Dr. Brigham with a Physician Index number. The ALJ thus finds that the report of Dr. Brigham is admissible herein.

Benefits Per KRS 342.730/Proper Rating Per the AMA Guides

22. Drs. Brigham and Roberts have provided opinions regarding the impairment suffered by the Plaintiff due to the work injury. Both doctors have assessed a 4% whole person impairment for the left knee; however, Dr. Roberts has added an additional 2% for pain.

23. Dr. Brigham has asserted that the additional rating for pain is improper and is contrary to the dictates of the AMA Guides, which allow for such additions in cases where the pain causes suffering, dysfunction, or the need for medical intervention. This opinion has convinced the ALJ.

24. The ALJ thus finds that the pain described by the Plaintiff and documented by the evidence of record

herein does not rise to the level of that referenced by the AMA Guides in order to support an impairment rating in excess of what is associated with the Plaintiff's meniscectomy. Accordingly, the ALJ finds that the opinion of Dr. Brigham is the more credible of the two offered herein and is consistent with the dictates of the AMA Guides.

25. The ALJ therefore finds based upon the credible opinion of Dr. Brigham that the Plaintiff has sustained a 4% whole person impairment to the left knee as a result of the January 16, 2018, work injury.

Calculation

35. The Plaintiff's permanent partial disability benefits shall therefore be calculated as follows: $\$636.31 \times 4\% \times .65 = \16.54 .

Toler filed a Petition for Reconsideration asserting the same arguments he now makes on appeal. By Order dated October 14, 2020, the ALJ overruled the Petition for Reconsideration.

ANALYSIS

Toler first asserts Dr. Brigham is not a "physician" as defined by KRS 342.0011(32), as he is not licensed in Kentucky. Consequently, Toler urges the ALJ erred by relying on Dr. Brigham's opinions and 4% impairment rating. We affirm on this issue.

KRS 342.0011(32) states, in total, as follows:

As used in this chapter, **unless the context otherwise requires:**

...

(32) 'Physician' means physicians and surgeons, psychologists, optometrists, dentists, podiatrists, and osteopathic and chiropractic practitioners acting within the scope of their license issued by the Commonwealth. (Emphasis added).

While we acknowledge KRS 342.0011(32) defines “physicians” as one of the specified practitioners acting within the scope of his or her license issued by the Commonwealth, the opening caveat – i.e. “unless the context otherwise requires” – does, as interpreted by the ALJ, seemingly afford the ALJ the discretion to look beyond the confines of the definition. Thus, we hold the ALJ’s interpretation of the caveat is harmonious with the wide discretion afforded to Administrative Law Judges in the workers’ compensation arena by both statutory and case law.

The ALJ set forth a thorough and cogent explanation why he believes the statute permits him to rely upon Dr. Brigham’s opinions despite the fact that he is not licensed to practice medicine in Kentucky. Persuasive to the ALJ is the fact that Dr. Brigham possesses a Physician Index Number on file with the Department of Workers’ Claims. The ALJ ultimately concluded that a more expansive definition of “physician” is appropriate in this context, as the objectives of the Department would be frustrated if the opinions of a physician to whom the Department issued a Physician Index Number were excluded from consideration. Indeed, we find there to be an illogical notion for the Department of Workers’ Claims to issue a Physician Index Number to a physician upon whom an ALJ could not rely.

Toler next argues Dr. Brigham was required to examine Toler in person before rendering a pain rating assessment. We disagree.

Dr. Brigham’s May 6, 2020, report, firmly demonstrates he reviewed the records of both Drs. Roberts and Kenney in detail. In his “Clinical Summary,” as set forth *verbatim* herein, Dr. Brigham noted Toler’s pain level when examined by both physicians. On August 7, 2018, when Toler was examined by his treating

physician, Dr. Kenney, Toler's pain level was a one out of ten, and Dr. Kenney returned Toler to work without any restrictions. When Toler was examined by Dr. Roberts on December 5, 2018, his pain level was a three out of ten. In the subsequent section of his report entitled "Critique and Discussion of Rating Pain," Dr. Brigham set forth his reasoning over the course of five pages, for concluding Toler is not entitled to an impairment rating for pain. Relying upon the medical records of Drs. Roberts and Kenney, Dr. Brigham concluded Toler's "subjective report of pain is minimal." Thereafter, citing to Sections 1.5, 18.3, 18.3a, and 18.3b of the AMA Guides, Dr. Brigham concluded that, with Toler's minimal reports of pain, "the *Guides* are clear that providing additional impairment is not appropriate." Dr. Brigham is fully entitled to rely upon the records of Drs. Roberts and Kenney in utilizing the AMA Guides to reach this conclusion.

We acknowledge the critique of Dr. Roberts as set forth in his May 14, 2020, supplemental report, namely that Figure 18-1 ("Algorithm for Rating Pain-Related Impairment in Conditions Associated with Conventionally Ratable Impairment") on page 574 of the AMA Guides refers to "the examiner." However, there is nothing within the AMA Guides, which directly mandates only a physician who conducts a physical examination of a claimant can formulate a pain rating assessment. Further, while the fact that Dr. Brigham did not examine Toler is something the ALJ had the discretion to find compelling, it does not render Dr. Brigham's opinions inadmissible. Rather, it merely goes to the weight the ALJ ultimately chooses to give to his opinions. Here, the ALJ chose to give weight to Dr.

Brigham’s opinions over those of Dr. Roberts, and this Board has neither the inclination nor the authority to take that discretion away.

This same reasoning applies to the alleged disparity between the credentials of Dr. Roberts and those of Dr. Brigham. In his appeal brief, Toler suggests Dr. Roberts credentials are superior to those of Dr. Brigham, making his opinions “eminently reliable, and the most accurate in this case, and the only one permissible under the Guides.” Assuming, *arguendo*, that Dr. Roberts’ credentials are, in fact, superior to those of Dr. Brigham, this once again goes to the weight the ALJ *chooses* to give to their opinions, a determination within the exclusive province of the ALJ. 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). This Board’s task on appeal does not encompass second-guessing this discretion.

Accordingly, on all issues raised by Toler on appeal, the September 20, 2020, Opinion and Order and the October 14, 2020, Order are **AFFIRMED**.

ALL CONCUR.

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