

IN THE SUPREME COURT OF THE STATE OF NEVADA

CLARK COUNTY SCHOOL DISTRICT,
Appellant,
vs.
ERIC MARSHALL,
Respondent.

No. 41374

FILED

APR 19 2005

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

This is an appeal from a district court order denying a petition for judicial review and affirming the appeals officer's decision awarding respondent a 10 percent permanent partial disability (PPD) award as a result of his workplace injury. Eighth Judicial District Court, Clark County; Stewart L. Bell, Judge.

Eric Marshall injured his right shoulder in a work-related injury. Clark County School District (CCSD) accepted Marshall's workers' compensation claim for his injuries. After Marshall received various medical treatments, Dr. Anthony Serfustini released Marshall to return to work, but he continued to experience pain as a result of his injury. Marshall visited Dr. Steven Thomas, who diagnosed his injury as chronic impingement syndrome with possible rotator cuff tear. On January 27, 2000, Dr. Thomas performed an arthroscopic acromioplasty and debridement¹ of the right rotator cuff tendon. During the surgery, Dr. Thomas also performed a partial resection of an osteophyte or overhang from the distal clavicle.

¹Debridement is the medical term for the removal of "devitalized tissue and foreign matter from a wound." Steadman's Medical Dictionary, 5th Unabridged Lawyer's Ed. (Anderson-Jefferson 1982).

Four months later, Dr. Kenneth H. Kline performed a disability evaluation on Marshall and noted an 8 percent impairment of his right shoulder due to limited motion. Dr. Kline attributed an additional 10 percent impairment to the resection arthroplasty of the right distal clavicle, giving Marshall a combined 17 percent right upper extremity impairment. Dr. Kline noted that in accordance with the AMA Guides to the Evaluation of Permanent Impairment, 4th Ed. (AMA Guides), a 17 percent upper extremity impairment results in 10 percent impairment on a whole person basis.

CCSD disagreed with Dr. Kline's conclusions and requested a second opinion. Dr. Richard Kudrewicz concurred with Dr. Kline's determination that under the AMA Guides Marshall qualified for a 10 percent PPD award on a whole person basis. CCSD continued to hold Marshall's PPD award in abeyance, however, because it did not believe that Marshall's surgery entitled him to the additional award for the distal clavicle resection. This time, CCSD sent Marshall's information, including the reports of Drs. Kline and Kudrewicz, to Dr. MaryAnn Shannon, an orthopedic specialist, for a records review. Dr. Shannon disagreed with the conclusions of Drs. Kline and Kudrewicz. According to Dr. Shannon, as defined by the AMA Guides, an arthroplasty distal clavicle resection is a totally different procedure than an arthroscopic resection – the former qualifying a patient for a PPD award, whereas the latter does not. In her opinion, because Marshall underwent an arthroscopic acromioplasty including a partial distal clavicle resection instead of a “classical” distal clavicle resection, Marshall only qualified for an 8 percent upper extremity impairment due to the loss of range of motion, which correlates to a 5 percent PPD impairment on a whole person basis. Based on Dr.

Shannon's recommendation, CCSD offered Marshall a 5 percent PPD award.

Marshall appealed CCSD's decision to a hearings officer. Based on the evidence, the hearings officer ruled in favor of Marshall and ordered CCSD to offer Marshall a 10 percent PPD award. CCSD appealed that decision to an appeals officer, submitting, along with Marshall's medical records, a letter from Dr. Thomas explaining that he performed "a minimal resection of the undersurface of the distal clavicle" but that he "did not perform an entire distal clavicle resection as is referred to in the AMA Guides." The appeals officer concluded that Marshall was entitled to a 10 percent PPD rating because the AMA Guides do not distinguish between a full and partial distal clavicle resection. CCSD filed a petition for judicial review. Concluding that the appeals officer's findings of fact and conclusions of law were supported by substantial evidence, the district court denied CCSD's petition. CCSD appeals the district court's order.

This court reviews administrative decisions to determine whether the agency's action was arbitrary and capricious, or otherwise characterized by an abuse of discretion.² Provided that the agency's decision is supported by substantial, reliable, and probative evidence, this court will not second-guess the agency's determination.³ Substantial evidence is evidence that one might reasonably accept as adequate to

²Rio Suite Hotel & Casino v. Gorsky, 113 Nev. 600, 603-04, 939 P.2d 1043, 1045 (1997); Tighe v. Las Vegas Metro. Police Dep't, 110 Nev. 632, 634-35, 877 P.2d 1032, 1034 (1994); see also NRS 233B.135(3).

³NRS 233B.135(3)(e); Rio Suite Hotel & Casino, 113 Nev. at 603-04, 939 P.2d at 1045 (quoting McCracken v. Fancy, 98 Nev. 30, 31, 639 P.2d 552, 553 (1982));

support the conclusion, and the burden of proof is on the party challenging the agency decision.⁴ However, a far less deferential standard of review applies when this court reviews questions of law.⁵ An agency's "conclusions of law" are necessarily closely related to its view of the facts; they are entitled to broad deference and will not be disturbed when supported by substantial evidence.⁶

The appeals officer concluded that for an upper extremity arthroplasty, the AMA Guides make no distinction between a full or partial distal clavicle resection, and, therefore, Marshall was entitled to a 10 percent PPD rating. CCSD contends, without supporting argument or citation to authority, that a determination of whether the AMA Guides permit a disability rating for an arthroscopic partial distal clavicle resection is necessarily a question of law. However, as this court has noted, "an appeals officer renders the final administrative decision on all questions of fact, including the proper percentage of PPD."⁷ While it is true that NRS sections 616C.110 and 616C.490 require a PPD rating to be conducted in accordance with the AMA Guides, that does not mean that

⁴NRS 233B.135(2); Rio Suite Hotel & Casino, 113 Nev. at 603-604, 939 P.2d at 1045; Diamond v. Swick, 117 Nev. 671, 674, 28 P.3d 1087, 1089 (2001).

⁵Diamond, 117 Nev. at 674, 28 P.3d at 1089; Tighe, 110 Nev. at 634-35, 877 P.2d at 1034.

⁶Ayala v. Caesars Palace, 119 Nev. 232, 235, 71 P.3d 490, 491 (2003).

⁷Southwest Gas v. Woods, 108 Nev. 11, 14, 823 P.2d 288, 290 (1992) (citing Georgeff v. Sahara Hotel, 103 Nev. 485, 745 P.2d 1142 (1987)); see also Maxwell v. SIIS, 109 Nev. 327, 331, 849 P.2d 267, 270 (1993).

every time rating physicians disagree, the appeals officer's decision automatically becomes a question of law.

CCSD argues that the appeals officer's determination that Dr. Thomas performed an "arthroscopic acromiosplasty, and partial distal clavicle resection" on Marshall's right shoulder was arbitrary and capricious, and not supported by substantial evidence. The appeals officer had before her the reports of four doctors. She found the reporting of two rating physicians, Dr. Kline and Dr. Kudrewicz, more credible and persuasive. While a third rating physician and the operating surgeon disagreed with the final result, we conclude that the appeals officer's decision is supported by substantial evidence in the record.⁸ For the same reasons we conclude that the appeals officer's determination that Marshall is entitled to a 10 percent PPD award is also supported by substantial evidence in the record.


Finally, we reject CCSD's argument that, pursuant to NRS 616C.490, in order to determine that Marshall qualifies for a PPD rating beyond that attributable to the loss in range of motion, evidence of physical impairment is required. The AMA Guides state that "[i]n the presence of decreased motion, motion impairments are derived separately and combined with arthroplasty impairments using the combined values chart."⁹ Consequently, we conclude that CCSD has failed to show that


⁸See McClanahan v. Raley's, Inc., 117 Nev. 921, 925-26, 34 P.3d 573, 576 (2001) (noting that when an appeals officer is faced with conflicting evidence, the judgment of the appeals officer based on his or her credibility determination will not be overturned).

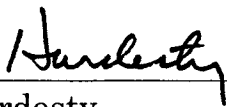
⁹AMA Guides, ch. 3, p. 62.

Drs. Kline and Kudrewicz failed to follow the AMA Guides in computing Marshall's PPD rating. Accordingly we,

ORDER the judgment of the district court AFFIRMED.


_____, J.
Rose


_____, J.
Gibbons


_____, J.
Hardesty

cc: Hon. Stewart L. Bell, District Judge
Jon M. Okazaki
Nevada Attorney for Injured Workers/Las Vegas
Clark County Clerk