

NOT FOR PUBLICATION IN WEST'S HAWAI'I REPORTS AND PACIFIC REPORTER

NO. 26904

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I

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STATE OF HAWAI'I

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FILED

BRYON ALLEN, Claimant-Appellant,
v.
LAHAINA YACHT CLUB, and FIREMAN'S FUND INSURANCE CO.,
Employer/Insurance Carrier-Appellee

APPEAL FROM THE LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD
(CASE NO. AB 2001-323(M) (7-97-01046))

SUMMARY DISPOSITION ORDER

(By: Lim, Presiding Judge, Nakamura, and Fujise, JJ.)

In this workers' compensation case, Claimant-Appellant Bryon Allen (Allen) appeals from the Decision and Order of the Labor and Industrial Relations Appeals Board (LIRAB) filed on September 22, 2004. In its decision, the LIRAB concluded that: 1) Allen was not entitled to temporary total disability (TTD) benefits after March 21, 2001, for his February 3, 1997, work injury; 2) based on evidence that Allen could perform sedentary work and other factors, Allen was not permanently and totally disabled (PTD), either medically or on an odd-lot basis; and 3) Allen sustained a 40% permanent partial disability (PPD) of the whole person as a result of his work injury. The LIRAB decision modified the July 16, 2001, amended decision of the Director of the Department and Labor and Industrial Relations (Director) by increasing Allen's PPD rating from 20% PPD of the left leg to 40%

PPD of the whole person, but otherwise affirmed the Director's amended decision.

On appeal, Allen argues the LIRAB erred in: 1) finding that he failed to make a *prima facie* showing that he fell within the odd-lot category for PTD and concluding that he was not PTD, either medically or on an odd-lot basis; and 2) failing to credit the PPD impairment ratings made by Dr. Thomas Rogers, which if accepted would have resulted in a 77% PPD, and instead concluding that Allen only sustained a 40% PPD.

After a careful review of the record and the briefs submitted by the parties, we affirm the LIRAB's Decision and Order. We resolve Allen's arguments on appeal as follows:

1. The LIRAB did not clearly err in finding that the evidence in the instant case did not place Allen *prima facie* within the odd-lot category. See Yarnell v. City Roofing, Inc., 72 Haw. 272, 276, 813 P.2d 1386, 1389 (1991) (stating that it is a question of fact as to whether a person falls within the odd-lot category); Atchley v. Bank of Hawai'i, 80 Hawai'i 239, 245, 909 P.2d 567, 573 (1996); see also Boley v. State, Indus. Special Indem. Fund, 939 P.2d 854, 857-59 (Idaho 1997). There is substantial evidence in the record to support the LIRAB's finding, including evidence that Allen may perform sedentary work and that he was able to obtain a bachelor's degree in education and perform student teaching after his work injury. There is also substantial evidence in the record to support the LIRAB's determination that Allen was not PTD, either medically or on an

odd-lot basis. See Atchley, 80 Hawai'i at 244-45, 909 P.2d 572-73; Boley, 939 P.2d at 856-59.

2. The LIRAB did not err in failing to credit Dr. Rogers' PPD impairment ratings and instead concluding that Allen only sustained a 40% PPD. "It is well established that courts decline to consider the weight of the evidence to ascertain whether it weighs in favor of the administrative findings, or to review the agency's findings of fact by passing upon the credibility of witnesses or conflicts in testimony, especially the findings of an expert agency dealing with a specialized field." Igawa v. Koa House Rest., 97 Hawai'i 402, 409-10, 38 P.2d 570, 577-78 (2001) (block quote format omitted). In addition, "an appellate court will not pass upon issues dependent upon the credibility of witnesses and the weight of the evidence." Steinberg v. Hoshijo, 88 Hawai'i 10, 18, 960 P.2d 1218, 1226 (1998).

The LIRAB did not credit Dr. Rogers' impairment ratings because it found that Dr. Rogers misapplied the American Medical Association Guides to the Evaluation of Permanent Impairment (AMA Guides) in arriving at his PPD impairment ratings. We conclude that the LIRAB's interpretation of the 5th Edition of the AMA Guides was reasonable and that the LIRAB did not err in applying the 5th Edition of the AMA Guides to determine Allen's PPD impairment rating. The LIRAB's determination that Allen had sustained a 40% PPD was not arbitrary and is supported by

substantial evidence in the record. See Igawa, 97 Hawai'i at 407-10, 38 P.2d at 575-78.

IT IS HEREBY ORDERED that the LIRAB's September 22, 2004, Decision and Order is affirmed.

DATED: Honolulu, Hawai'i, April 27, 2007.

On the briefs:

Kevin H.S. Yuen
for Claimant-Appellant

Kurt A. Gronau
(Gray & Prouty)
for Employer/Insurance Carrier-
Appellee



Presiding Judge

Craig H. Nakamura
Associate Judge

Alexandra M. Jinn
Associate Judge