

impairment or disability. The ALJ accordingly awarded no permanent disability benefits. The award did not address the issue of future medical treatment.

Claimant contends the ALJ erred in determining the nature and extent of her disability and in not finding she is entitled to future medical treatment.

Respondent argues the ALJ's Award should be affirmed.

The issues for Board determination are:

1. What is the nature and extent of claimant's disability?
2. Is claimant entitled to future medical treatment?

FINDINGS OF FACT

Having reviewed the evidentiary record, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings:

Claimant's job duties as a CMA/CNA included keeping count of narcotic medication, doing insulin checks, providing medicine to residents, performing blood glucose checks, dressing and undressing residents and doing basic household functions.

On July 14, 2010, claimant bent over to ask a resident a question when she was struck in the area of her left buttocks and posterior left hip with a skillet by Joseph Monsorn,¹ respondent's owner/operator. Claimant testified that after the assault, she experienced a sharp burning pain in her left hip. She grabbed Mr. Monsorn's arm, told him she was experiencing pain, punched him and shoved him into a wall. Claimant denied she was laughing after the incident. Later in the day, claimant called the floor supervisor, A. J. Monsorn (son of Joseph Monsorn), and told him what happened. Claimant last worked for respondent on July 14, 2010.

Claimant testified Joseph Monsorn was known for being a prankster, but claimant did not regard the frying pan incident as a prank or joke. Claimant testified she had the following symptoms after her accidental injury: (1) pain radiating up and down her left leg; (2) numbness in the left hip; (3) numbness in the toes of her left foot; and (4) lower back pain.

Claimant filed a police report. She was taken to Allen County Hospital, where a physical examination was conducted and photographs were taken. Neither the exam nor the photographs revealed any visible indication of trauma. Dr. Larry Buck, a chiropractor,

¹ There are a number of spellings of "Monsorn" in the record, including "Mansorn" and "Monsour."

treated claimant on one occasion, July 16, 2010. Claimant also sought treatment at some point from her personal physician, Dr. Wesley Stone. Claimant believed her left kidney was injured in the accident, but no medical evidence supported that notion. Photographs taken by claimant's daughter-in-law less than 10 hours after the accident showed no markings or bruising.

Joseph Monsorn is a licensed care home operator who respondent hired to operate its Fountain Villa facility in Iola, Kansas. He testified:

Q. So you are coming down the hall with the frying pan in your hand?

A. Yes.

Q. What did you see?

A. I saw Debbie [claimant], and she was standing at the, at the table facing towards our front doorway, her back to me, and like I said, we play practical jokes on each other all the time. She taped fish heads to my door, she has come up behind and shove you or poke you, she's pulled my son's pony tail. I mean, stupid horseplay that probably people shouldn't do.

And like today, I want to apologize, like I have already to you, I have to the police, and to this Court. I had a lapse in, what I should say good judgment, and I saw her from behind, and I had a grin on my face.²

Joseph Monsorn testified he was approximately 12 to 18 inches from claimant when the pan made contact with her left buttocks. He did not intend to cause injury. According to him, claimant did not tell him she was injured.

Meredith Rogers, respondent's assistant operator, witnessed the incident between Joseph Monsorn and claimant. She testified as follows:

Q. He [Mr. Monsorn] was walking up from the back towards the front door, which would also include towards the kitchen?

A. Exactly, yes.

Q. With the frying pain in his hand?

A. Yes.

Q. Coming up from behind Ms. Smith?

² P.H. Trans. at 40-41.

A. Yes.

Q. What happened then?

A. I looked up and right as he got behind Deborah he just kind of popped her on the bottom and everybody started laughing, including Deborah.³

Ms. Rogers thought that the distance between Joseph Mansorn's hand holding the frying pan and claimant's buttock was about a foot when he began to swing. Ms. Rogers testified she heard no noise as the frying pan struck claimant's buttocks.

After leaving the kitchen area, claimant went to Ms. Rogers' office and sat down. Claimant asked Ms. Rogers if she had witnessed Mr. Monsorn striking her with the frying pan. Ms. Rogers responded that she had. According to Ms. Rogers, claimant was not crying nor did she otherwise appear upset.

Claimant told A.J. Monsorn by telephone on the afternoon of July 14th that she would not again set foot on respondent's property. Ms. Rogers was present with A.J. Monsorn when the telephone conversation occurred and she heard claimant make that statement. Ms. Rogers further testified:

A. She [claimant] said that she was going to file charges, assault charges against Mr. [Joseph] Monsorn and that she had been hurt. And I can't remember what else she might have said. It was about probably a good 10 minute conversation maybe.⁴

Ms. Rogers testified claimant said nothing to her about being injured before leaving the facility.

Following a preliminary hearing, the ALJ entered an order authorizing Dr. Pat Do as claimant's authorized treating physician. Dr. Do initially evaluated claimant on November 4, 2010, and recommended diagnostic testing. Plain x-rays of the pelvis and lumbar spine were negative. An MRI of the pelvis was negative. An MRI of the lumbar spine revealed degenerative disc disease at L3-4 and L4-5 but showed no focal disk herniation and no spinal or foraminal stenosis. The doctor prescribed steroids, anti-inflammatory medication and physical therapy. Dr. Do released claimant from treatment in April 2011. No permanent work restrictions were imposed.

³ Rogers Depo. at 7-8.

⁴ *Id.* at 13.

In response to respondent's rating request, Dr. Do placed claimant in DRE Lumbosacral Category I of the *AMA Guides*,⁵ and found claimant sustained no permanent functional impairment. Dr. Do opined claimant should have had some bruising, red marks or other sign of exterior trauma at claimant's initial hospital visit. Since there were no indications of trauma, Dr. Do felt claimant's incident with the frying pan was of questionable severity. Dr. Do testified:

Q. Now, tell me why you think that she does not fit in the Category II impairment?

A. The rating would have been done closer to a time that I released her, so that might be a little bit more accurate. But if she is having, if somebody else saw her and she's having muscle guarding and muscle pain today, she could have up to five percent impairment for Category II. It's just what we found at that point in time.

Q. The category says the findings may include and it talks about the guarding and also uniform loss of range of motion or non verifiable radicular complaints. Category II doesn't say those are the only qualifications for impairment, does it?

A. No.⁶

. . . .

Q. Did you find any objective basis to support the radicular symptoms that she was presenting to you?

A. I did not.⁷

Dr. Do reviewed a list of claimant's previous work tasks prepared by vocational rehabilitation counselor Dick Santner and concluded claimant could perform all of the 19 tasks for a 0% task loss.

Dr. Peter Bieri, a fellow of the American Academy of Disability Evaluating Physicians, evaluated claimant on October 25, 2011, at the request of her counsel. The doctor reviewed medical records, took a history and performed a physical examination. Dr. Bieri found claimant had slight tenderness to palpation of the lumbar spine, radiating into the left hip. Dr. Bieri found reduced lumbar range of motion in a non-uniform fashion. Claimant's left hip had slight tenderness to palpation at the greater trochanter with decreased range of motion and decreased sensation along the lateral aspect of the fourth

⁵ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

⁶ Do Depo. at 23.

⁷ *Id.* at 35.

and fifth toes of the left foot. The doctor diagnosed a contusion to the left low back, buttocks and left hip. At the time of the evaluation, the doctor found claimant to be at maximum medical improvement. Dr. Bieri imposed no permanent restrictions.

Based upon the *AMA Guides*, Dr. Bieri determined that claimant had a 5% permanent functional impairment to the whole person due to her lumbar spine and a 5% left leg impairment due to loss of sensation. The 5% impairment to the left leg converts to a 2% whole person impairment. Using the *AMA Guides Combined Values Chart*, the aggregate whole person impairment was 7% to the whole body, caused by claimant's accidental injury on July 14, 2010. Dr. Bieri testified the basis for claimant's permanent impairment was her complaints of pain. The doctor testified that persistent and chronic pain may be an indication of permanent impairment.

Dr. Bieri reviewed the list of claimant's previous work tasks prepared by vocational rehabilitation counselor Dick Santner and concluded claimant could no longer perform 3 of the 19 tasks for a 16% task loss.

Mr. Santner interviewed claimant on August 22, 2012, at the request of claimant's counsel. He prepared a task list of 19 nonduplicative work tasks claimant performed in the 15 years before her injury. Claimant was not working at the time of the interview and was receiving social security disability benefits that commenced effective July 14, 2010.

The ALJ ordered an independent medical examination by Dr. Vito Carabetta, a board certified specialist in physical medicine and rehabilitation. The doctor reviewed claimant's medical records, took a history and performed a physical examination. The examination occurred on January 23, 2013. Dr. Carabetta testified:

Q. Is the results you find in this case with Mrs. Smith, between the straight leg seated and straight leg supine, inconsistent?

A. Correct.

Q. Okay. What does that tell you as a physician?

A. It tells me perhaps that she's trying to impress upon me that she's very hurt.

Q. You then did something called Lasegue's maneuver?

A. Correct.

Q. And that was also negative or normal bilaterally?

A. Correct.⁸

Dr. Carabetta performed a pinprick test to see if claimant's areas of left lower extremity numbness were consistent with a specific nerve root distribution. He found no nerve dysfunction or atrophy to the lower extremities.

Dr. Carabetta further testified:

Q. Okay. Were there any objective findings that you could be able to find during the course of that examination to support her subjective complaints of pain or injury?

A. No.

Q. And the primary complaint of pain that she presented to you was the diffuse pain?

A. Correct.

Q. As well as the give-way symptoms during the muscle manual testing of the left leg?

A. Correct.

Q. And if that was truthful -- if that truly reflected her condition of her left leg, would she be able to walk on it?

A. Not at all.

Q. And was she able to walk on it?

A. Absolutely.

Q. And also, the results of the supine left leg raising test, was that consistent or inconsistent with the rest of your findings?

A. It was consistent with the unreliable findings.⁹

Dr. Carabetta diagnosed low back pain and left buttock pain with evidence of inconsistencies in claimant's presentation. Based upon the *AMA Guides*, Dr. Carabetta placed claimant in DRE Lumbosacral Category I for a 0% permanent functional

⁸ Carabetta Depo. at 20.

⁹ *Id.* at 28-29.

impairment. Dr. Carabetta suggested that the ALJ consider “perhaps a 3% whole body impairment rating under the circumstances.”¹⁰

Dr. Carabetta opined that claimant fit within DRE Category I and not DRE Category II because she had significant subjective complaints that lacked support from an objective standpoint. Dr. Carabetta testified:

Q. Okay. With that objection in mind, Doctor, using the definition as set out in Exhibit A, where would she not fit into Category II?

A. When we look at the guides in general -- and give me a little latitude on the answer on this one -- physician judgment is supposed to be executed in any and all of these. And from my perspective, I want to see some objectivity to get us into a Category II.

Q. Okay.

A. Your client presented with nonobjective findings. I cut you some slack; I gave her some latitude and suggested to the Court something between a Category I and a Category II. I think you should accept that. You're not going to get this patient to fit in with somebody who has objective findings on examination that are clearly reproducible.¹¹

Claimant testified she was unable to work because she was in too much pain. She indicated that pushing heavy items was stressful on her left leg. Claimant claimed she cannot lift anything greater than 40-50 pounds because it hurts her left hip. She has not applied for any jobs since leaving respondent's employ. At the time of the regular hearing, claimant was receiving social security disability benefits. Claimant testified she based her claim for social security on “severe pain in the left hip with numbness radiating down to the two little toes.”

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.¹²

¹⁰ *Id.*, Ex. 2 at 3.

¹¹ *Id.* at 46-47.

¹² K.S.A. 2010 Supp. 44-501 and K.S.A. 2010 Supp. 44-508(g).

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.¹³

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.¹⁴

K.S.A. 2010 Supp. 44-510e(a) states in part:

Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. . . . Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

The Board, as a trier of fact, must decide which testimony is more accurate and/or more credible and must adjust the medical testimony along with the testimony of the claimant and any other testimony that might be relevant to the question of disability.¹⁵

The Board agrees with the ALJ that claimant's accidental injury of July 14, 2010, resulted in no permanent injury, impairment or disability. Claimant is accordingly entitled to no permanent disability benefits. The opinions of Dr. Do and the neutral physician appointed by the ALJ, Dr. Carabetta, support this finding, as does the preponderance of the other credible evidence in the record.

Photographs taken by claimant's daughter-in-law and at Allen County Hospital revealed no markings, bruises, or any other evidence of trauma. Claimant's complaints of pain and numbness were subjective in nature and were inconsistent with the objective findings on physical examination, as detailed in Dr. Carabetta's testimony. Claimant's complaints are also at odds with the results of diagnostic testing. Plain x-rays of claimant's pelvis and lumbar spine were negative, as was the pelvic MRI scan. The lumbar MRI scan revealed no indication of traumatic injury, only degenerative disk disease without herniation or stenosis.

¹³ K.S.A. 2010 Supp. 44-501(a).

¹⁴ *Carter v. Koch Engineering*, 12 Kan. App. 2d 74, 76, 735 P.2d 247, *rev. denied* 241 Kan. 838 (1987).

¹⁵ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

Claimant's testimony regarding her physical complaints is of questionable credibility in view of the lack of objective evidence to support her claimed symptoms and the lack of consistency between claimant's subjective complaints and the physical findings and testing results.

The findings of the ALJ regarding the nature and extent of claimant's disability are amply based on a preponderance of the credible evidence and are adopted by the Board, as supplemented by the findings in this Order.

The issue of future medical treatment was raised before the ALJ, but was not specifically addressed in the award. Previous Board decisions regard a claimant's entitlement to future medical treatment under these circumstances are not entirely consistent.¹⁶ However, claimant was found to have sustained a compensable accidental injury and that finding has not been raised as an issue before the Board. This claim has not been fully and finally concluded by settlement. Accordingly, claimant's right to future medical treatment has not been extinguished.

The finding adopted by the Board that claimant has not proven she sustained permanent injury, impairment or disability does not mean claimant's right to seek future medical treatment should be completely denied. It is conceivable, however unlikely it may be, claimant might require future treatment necessary as a consequence of the compensable accidental injury. Claimant is therefore entitled to future medical treatment, but only upon proper application to and approval by the ALJ or as the parties may agree. The Award is modified only to that extent.

CONCLUSIONS OF LAW

The Board finds that the ALJ's Award should be modified regarding future medical treatment as detailed above, but is otherwise affirmed.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.¹⁷ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

¹⁶ *Cf., e.g., Warsame v. Tyson Fresh Meats*, No. 1,050,779 (Kansas Court of Appeals unpublished opinion filed April 18, 2014) (no permanent functional impairment, future medical denied) and *Dang v. Farmland Foods*, No. 208,199 1998 WL 165827 (Kan. WCAB Mar. 12, 1998) (no permanent functional impairment, future medical left open on application).

¹⁷ K.S.A. 2010 Supp. 44-555c(k).

AWARD

WHEREFORE, it is the Board's decision that the Award of ALJ Bruce Moore dated August 29, 2013, is modified as above noted but is otherwise affirmed.

IT IS SO ORDERED.

Dated this _____ day of June, 2014.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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Honorable Bruce Moore, ALJ