

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

JANE E. HELLER)
Claimant)
)
V.)
)
STATE OF KANSAS)
Respondent) Docket No. 1,052,628
)
AND)
)
STATE SELF-INSURANCE FUND)
Insurance Carrier)

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the March 10, 2015, Award entered by Administrative Law Judge (ALJ) Pamela J. Fuller. The Board heard oral argument on August 11, 2015. Lawrence M. Gurney of Wichita, Kansas, appeared for claimant. Jeffery R. Brewer of Wichita, Kansas, appeared for respondent.

Based on Dr. Flutter’s opinion, the ALJ found claimant sustained a 70.7 percent task loss as a result of her June 14, 2010, work-related injury to the right hip and low back. Claimant has a preexisting left hip condition. The ALJ explained, “[Dr. Flutter] could not separate the task loss between the right and left hip, therefore it is presumed that each task that was eliminated based on hip restrictions would have been eliminated if only one hip was injured.”¹ Claimant’s wage loss varied over time. The ALJ determined claimant suffered: a 100 percent wage loss from August 28, 2010, through October 31, 2010, for a 85.35 percent work disability; a 63 percent wage loss from November 1, 2010, through December 31, 2010, for an 81.5 percent work disability; a 34 percent wage loss from January 1, 2011, through December 31, 2011, for a 52.35 work disability; a 20 percent wage loss from January 1, 2012, through December 31, 2012, for a 45.35 percent work disability; a 17 percent wage loss from January 1, 2013, through December 31, 2013, for a 43.85 percent work disability; and a 15 percent wage loss from January 1, 2014, through December 31, 2014, for a 42.95 percent work disability. Further, the ALJ found claimant entitled to future medical treatment upon proper application to the Division.

¹ ALJ Award (Mar. 10, 2015) at 4.

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument, the parties agreed claimant suffers an average wage loss of 38 percent as a result of her injuries.

ISSUES

Respondent argues claimant has the same degree of task loss as before her right hip injury based on the ALJ's reasoning; therefore, her current injury did not increase her inability to perform job tasks. Respondent maintains claimant's current task loss should be 29 percent, attributed only to her low back injury, resulting in a 33.5 percent work disability.

Claimant contends the ALJ's Award should be affirmed. Claimant argues there is no legal basis to reduce her task loss due to a preexisting condition.

The issue for the Board's review is: what is the nature and extent of claimant's disability?

FINDINGS OF FACT

Claimant was employed by respondent in a clerical position as a revenue customer representative specialist. Claimant also assisted in seizure collections, which required travel. On June 14, 2010, claimant fell in the office and injured her right hip. Claimant testified she initially thought she bruised her hip, but it progressively worsened over time.

Claimant has a preexisting left hip condition, a result of a 2008 work-related fall. Claimant underwent left hip replacement surgery on September 11, 2008. Claimant's recovery was slow, and she was still undergoing rehabilitation at the time of her second fall. Claimant testified she told orthopedic surgeon Dr. Robert Cusick of her right hip injury during a follow-up appointment related to her left hip on September 10, 2010. Claimant said Dr. Cusick noted a physical change to the right hip and told her a replacement was necessary.

By agreement of the parties, neurosurgeon Dr. Paul Stein examined claimant on March 17, 2011. Claimant complained of some pain in the left hip and constant pain in the right hip/groin area. After reviewing claimant's history, medical records, and performing a physical examination, Dr. Stein determined claimant was at maximum medical improvement (MMI) for her left hip. He imposed the following restrictions:

The following permanent work restrictions are recommended in regard to the left hip; 1. Avoid repetitive stair climbing. 2. Avoid walking more than four blocks at a time and that only twice in a given day at most. 3. Avoid squatting.²

Dr. Stein indicated claimant has considerable arthritis and substantial pain in the right hip and was not yet at MMI. He noted claimant would require a right total hip arthroplasty and wrote, "To the extent that her right hip pain was increased by falling in June 2010 there may be a relationship with the current symptoms. However, she was symptomatic prior to that date and total hip replacement on the right was inevitable."³

Claimant underwent a right hip replacement on August 16, 2011. Claimant testified she began to develop low back pain following surgery and began treatment for sacroiliitis.

Dr. George Fluter, a licensed physician, examined claimant on April 28, 2014, at her counsel's request. Claimant complained of pain in both hips with numbness along her thighs and pain in her back. Dr. Fluter reviewed claimant's medical records, history, and performed a physical examination. He assessed claimant:

1. Status post work-related injury; 03/31/08.
2. Left hip pain.
3. Aggravation of left hip arthritis.
4. Status post left total hip replacement surgery; 09/11/08.
5. Status post work-related injury; 06/15/10.
6. Aggravation of right hip arthritis.
7. Status post right total hip replacement surgery; 08/16/11.
8. Low back pain.
9. Probable sacroiliac dysfunction.⁴

Dr. Fluter determined there is a causal relationship between claimant's current condition and her work-related injuries, and the prevailing factor for her injuries, need for medical treatment and resulting disability is the work-related accident.

Using Table 65, Rating Hip Replacement Results, of the *AMA Guides*,⁵ Dr. Fluter opined claimant sustained a 20 percent whole body impairment related to her left hip, a 20 percent whole body impairment related to her right hip, a 5 percent whole body impairment related to her lumbar spine, and a 1 percent whole body impairment for right-sided

² Stein Depo., Ex. 2 at 7.

³ *Id.*

⁴ Fluter Depo., Ex. 2 at 7.

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.

sacroiliac joint dysfunction, for a combined whole body impairment of 40 percent. Dr. Fluter explained 25 percent of his rating relates to claimant's June 2010 injury.

Dr. Fluter restricted claimant to a sedentary level of physical demand. He recommended she restrict bending, stooping, crouching, twisting, stair climbing, squatting, kneeling, crawling, high-impact activities with the lower extremities, prolonged sitting, standing, and walking, and also alternate activities and positions periodically. Dr. Fluter indicated claimant would need physical therapy, pain management and/or surgery, and prescription medication.

Claimant met with vocational expert Paul Hardin at her counsel's request. Together, claimant and Mr. Hardin generated a list of job tasks claimant performed in the 15 years preceding June 14, 2010. Dr. Fluter reviewed Mr. Hardin's task list. Of the 41 unduplicated tasks on the list, Dr. Fluter opined claimant could no longer perform 29, for a 70.7 percent task loss. Dr. Fluter agreed he could not separate the left hip versus the right hip when determining task loss. Regarding only claimant's back, Dr. Fluter determined she could no longer perform 12 tasks, resulting in a 29 percent task loss.

Claimant began working as an administrative assistant for Garden City Presbyterian Church in November 2010, after leaving respondent for health reasons on August 9, 2010. Claimant performs clerical duties, working 37.5 hours per week and earning a base salary with health insurance. The church accommodates claimant's restrictions. Claimant testified she continues to have weakness and pain.

PRINCIPLES OF LAW

K.S.A. 2009 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. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

K.S.A. 2009 Supp. 44-501(a) states, in part:

In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2009 Supp. 44-508(g) states:

"Burden of proof" means the burden of a party to persuade the trier of facts 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.

ANALYSIS

The parties agreed at oral argument that claimant suffers an average 38 percent wage loss as a result of her injuries. The primary issue is the extent of claimant's task loss, if any. Respondent argues claimant's task loss should be reduced by the amount of task loss found to be preexisting, or related to her prior left hip injury.

The Board has held on prior occasions that Kansas law does not provide an offset for preexisting task loss.⁶ Kansas law only allows an award to be reduced by preexisting functional impairment. When a workers compensation statute is plain and unambiguous, this court must give effect to its express language rather than determine what the law should or should not be. The court will not speculate on legislative intent and will not read the statute to add something not readily found in it. If the statutory language is clear, no need exists to resort to statutory construction.⁷

The ALJ found claimant sustained a 70.7 percent task loss as a result of her June 14, 2011, work-related injury to the right hip and low back. The Board agrees. Dr. Fluter's analysis of each hip, using Table 65 of the *AMA Guides*, results in virtually identical findings for both the right and left hips. The only difference between the two hips in Dr.

⁶ See *Cessna v. Acme Foundry, Inc.*, No. 1,041,787, 2013 WL 485692 (Kan. WCAB Jan. 4, 2013); *Carver v. Missouri Gas Energy*, No. 195,270, 1997 WL 569511 (Kan. WCAB Jul. 31, 1997); *Deming v. Total Petroleum, Inc.*, No. 206,402, 1998 WL 381537 (Kan. WCAB Jun. 26, 1998); *Oberzan v. Calibrated Forms Co., Inc.*, No. 261,781, 2005 WL 2181214 (Kan. WCAB Aug. 17, 2005) ("There is no credit or offset for preexisting restrictions or work disability. The statute is clear that all work tasks claimant performed during the 15-year period preceding the accident are to be considered in determining task loss."), *aff'd*, No. 95,227, 142 P.3d 338 (Kansas Court of Appeals unpublished opinion filed Sept. 15, 2006), *rev. denied* 283 Kan. 931 (2007); *Nibarger v. Boeing Company*, No. 268,671, 2007 WL 1390688 (Kan. WCAB Apr. 27, 2007).

⁷ See *Bergstrom v. Spears Mfg. Co.*, 289 Kan. 605, 607-08, 214 P.3d 676, 678 (2009), citing *Graham v. Dokter Trucking Group*, 284 Kan. 547, 554, 161 P.3d 695 (2007).

Fluter's analysis is he gave zero points for flexion in the right hip and one point for flexion in the left hip. The difference had no effect on the impairment ratings for each hip, which was 50 percent for each extremity.

The Board agrees with the ALJ's conclusion that the task loss resulting from the right hip injury would be the same as the task loss based upon both hip injuries. The fact the physical findings in each hip were virtually identical supports the ALJ's conclusion that the restrictions for each hip would be the same, and tasks eliminated based on bilateral hip restrictions would have also been eliminated if only the right hip was considered.

It is also significant claimant was working at her regular job until she suffered the right hip injury. Based upon Dr. Fluter's task loss analysis of claimant's job with respondent, 5 of the 14 tasks claimant can no longer perform related to her hip injury. The most significant task losses related to claimant's hip injury involved not being able to sit more than 20 minutes.

The ALJ was correct in including the right hip task loss. Claimant suffers a 70.7 percent task loss as a result of her June 14, 2011, work-related injury to the right hip and low back. The parties agreed to a 38 percent wage loss. The result is a 54 percent work disability.

CONCLUSION

Claimant suffers a 70.7 percent task loss and a 38 percent wage loss as a result of her June 14, 2011, work-related injury to the right hip and low back, resulting in a 54 percent work disability.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Pamela J. Fuller dated March 10, 2015, is affirmed in part and modified in part to reflect a 38 percent wage loss.

The claimant is entitled to 9.00 weeks of temporary total disability compensation at the rate of \$546.00 per week or \$4,914.00, followed by permanent partial disability compensation at the rate of \$546.00 per week not to exceed \$100,000.00, for a 54 percent work disability.

As of November 16, 2015, there would be due and owing to the claimant 9.00 weeks of temporary total disability compensation at the rate of \$546.00 per week in the sum of \$4,914.00 not to exceed \$100,000.00, for a total due and owing of \$100,000.00, which is ordered paid in one lump sum less amounts previously paid.

IT IS SO ORDERED.

Dated this _____ day of November, 2015.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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Pamela J. Fuller, Administrative Law Judge