

ISSUES

Claimant argues the only medical opinion in evidence confirms claimant's August 4, 2011, fall arose out of and in the course of her employment with respondent and was the prevailing factor in her need for medical treatment. Claimant contends "uncontradicted evidence which is not improbable or unreasonable cannot be disregarded unless it is shown to be untrustworthy; such uncontradicted evidence should ordinarily be regarded as conclusive."²

Respondent maintains the ALJ's Award should be affirmed as claimant failed to sustain her burden of proving a personal injury by accident arising out of and in the course of her employment.

The sole issue for the Board's review is: Did the ALJ err in finding claimant failed to sustain her burden of proving she suffered personal injury arising out of and in the course of her employment with respondent?

FINDINGS OF FACT

Claimant is employed with respondent as a mental health technician, a position involving the care of 30 patients. Claimant testified her work requires extensive walking on hard surfaces.

On August 4, 2011, claimant sat in an office chair to write some information for a coworker when the chair slid out from under her. Claimant fell to the floor, landing "flat on [her] back."³ Claimant testified she was unable to catch her breath. Two coworkers came to her assistance. Claimant's shift leader took her to the Larned Hospital emergency room the same day, where she complained of pain in her left shoulder, left hip, and low back. Claimant received injections for the pain and underwent CT scans of the lumbar, thoracic, and cervical spine while at the emergency room. It was recommended claimant see an orthopedist. Claimant again slipped out of or missed her office chair on August 19, 2011.

Claimant stated it was approximately two months before she was authorized to see Dr. Van Norden, who ordered physical therapy, prescribed medication, and recommended restrictions. Claimant was eventually referred to Dr. Harris, an orthopedist, because she was not "gaining any ground, permanent ground," with her treatment.⁴ Dr. Harris provided additional medication, physical therapy, trigger point injections in claimant's left shoulder,

² Claimant's Brief at 4 (filed Jan. 24, 2014); citing *Demars v. Rickel Mfg. Corp.*, 223 Kan. 374, 573 P.2d 1036 (1978).

³ R.H. Trans. at 11.

⁴ *Id.* at 13.

and a TENS unit for claimant's low back. Dr. Harris released claimant in November 2012 because he had nothing further to offer. Neither Dr. Van Norden nor Dr. Harris testified in these proceedings, and their records are not in evidence.

Claimant had a prior workers compensation claim concerning injuries to her neck and left wrist as a result of an altercation with a patient in 2008. Claimant eventually underwent a cervical spinal fusion and an open reduction of the left forearm as treatment for this injury. Claimant testified this claim was resolved prior to the August 4, 2011, accident.

Dr. C. Reiff Brown, a retired orthopedic surgeon, first examined claimant at her counsel's request on January 31, 2012, for diagnosis and treatment recommendations. Claimant presented with constant lumbosacral pain and intermittent pain in the upper trapezius and left scapular areas. She indicated to Dr. Brown her upper trapezius pain felt like "nerve pain."⁵ Dr. Brown took claimant's history, which included her treatment with Dr. Van Norden and limited information regarding her 2008 workers compensation injury. Dr. Brown testified he did not have any information regarding claimant's neck symptoms following her 2008 cervical fusion through January 31, 2012, nor did he have any records related to claimant's condition prior to August 4, 2011.

Dr. Brown reviewed Dr. Van Norden's notes and the CT scans taken August 4, 2011. After performing a physical examination, Dr. Brown diagnosed claimant with "myofascial pain syndrome involving the upper left thoracic and scapular musculature as well as acute and chronic lumbar sprain and Lumbago."⁶ He recommended claimant be referred to an orthopedist and undergo additional physical therapy, trigger point injections, and possible epidural steroid injections. Dr. Brown opined:

[T]here is a causal connection between the conditions under which work is required to be performed and the resulting accident. It is also my opinion that the accident is the prevailing factor causing the injury, her present condition, and need for additional treatment. In my opinion, she is temporarily totally disabled at this time and in need of treatment.⁷

Claimant returned to Dr. Brown on October 8, 2012, at her counsel's request, for purposes of an independent medical evaluation and rating opinion. Claimant presented with pain in the left scapula, pain in the left shoulder, and pain in the entire lumbar area extending downward to the left hip. Claimant was using a lace-up back brace which increased her ability to work. She indicated to Dr. Brown that she develops gradually

⁵ Brown Depo. at 14.

⁶ *Id.*, Ex. 3 at 3.

⁷ *Id.*

increasing pain in the low back as her workday progresses, pain in the left shoulder with movement, and left arm pain that gradually increases in severity throughout each day.

Dr. Brown performed a physical examination and took an updated history, which included records from Dr. Harris and MRI scans of the thoracic and lumbar spine dated March 8, 2012. Dr. Brown noted:

MRI scans of thoracic and lumbar spine dated March 8, 2012 reveal moderate degenerative disc disease throughout the entire lumbar area especially L3-L4 and L4-L5. There is no evidence of disc protrusion. There is no evidence of compression fracture although there is generalized arthrosis in the thoracic area.⁸

Dr. Brown conceded it was possible claimant had degenerative disc disease prior to August 4, 2011, as he did not have records prior to that date. Further, he testified claimant's August 2011 fall rendered her preexisting lumbosacral degenerative disease symptomatic.⁹

Dr. Brown reported his original diagnosis of claimant's myofascial pain syndrome involving the left scapular, upper thoracic, and upper trapezius areas was unchanged. He noted claimant continued to have degenerative disc disease in the lumbar area and mild degenerative arthrosis in the left shoulder. Dr. Brown opined claimant was at maximum medical benefit, and using the *AMA Guides*,¹⁰ rated claimant with a 10 percent permanent partial impairment of function of the body as a whole. This rating consists of a five percent impairment based on DRE Lumbosacral Category II and a five percent impairment based on claimant's myofascial pain syndrome using DRE Cervicothoracic Category II. Dr. Brown opined, "The accident is the prevailing factor in causing her injury, present medical condition, and impairment."¹¹

Dr. Brown agreed claimant has a preexisting 15 percent impairment of function to the body as a whole as a result of her previous neck injury and cervical fusion. However, he stated he believes claimant's current pain is in a different area than her previous injury, and testified that "it just wouldn't be fair to cancel out the injury that [claimant] had recently if she was having totally normal function before the new injury, so [he] think[s] she should be allowed fifteen percent, ten percent, whatever, on new injury."¹²

⁸ *Id.*, Ex. 2 at 2.

⁹ Brown Depo. at 17-19.

¹⁰ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

¹¹ Brown Depo., Ex. 2 at 2.

¹² Brown Depo. at 29.

Dr. Brown recommended claimant continue use of the TENS unit, the brace, and medications as necessary. He suggested restrictions as follows:

[Claimant] needs to permanently avoid work that involves constant walking. Lifting should be limited to 30 pounds occasionally, 20 pounds frequently. She needs to avoid work that involves frequent pushing and pulling over 30 pounds. She should avoid frequent flexion and rotation of the lumbar spine greater than 30 degrees. She should avoid frequent use of the hands above shoulder level and all lifting above shoulder level.¹³

Claimant testified she currently does not have much stamina while walking, and "extensive walking on hard surface floors makes [her] back and [her] hip hurt."¹⁴ Respondent has accommodated claimant's restrictions. Claimant continues to work for respondent.

PRINCIPLES OF LAW

K.S.A. 2011 Supp. 44-501b(c) states:

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. 2011 Supp. 44-508(f) states, in part:

(1) "Personal injury" and "injury" mean any or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

K.S.A. 2011 Supp. 44-508(g) states:

"Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given

¹³ *Id.*, Ex. 2 at 3.

¹⁴ R.H. Trans. at 14.

case, the administrative law judge shall consider all relevant evidence submitted by the parties.

K.S.A. 2011 Supp. 44-508(h) 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 unless a higher burden of proof is specifically required by this act.

ANALYSIS

Claimant has the burden of proof to establish her right to an award of compensation under the Workers Compensation Act and to prove the various conditions on which the claimant's right depends. Once the claimant has met her burden of proving a right to compensation, the employer has the burden of proving relief from that liability based upon any statutory defense or exception.¹⁵

The Board agrees with the ALJ's finding claimant failed to sustain her burden of proof that she suffered personal injury by accident arising out of and in the course of her employment with respondent and adopts the ALJ's findings of fact and conclusions of law.

The ALJ specifically found there was “no evidence that Claimant suffered a ‘lesion or change in the physical structure of the body’ as a result of the August 4, 2011, fall at work.”¹⁶ The Board agrees. The Board also agrees with the ALJ's conclusion that the only medical evidence in the record shows claimant suffered an accidental injury that made a preexisting condition symptomatic.

Dr. Brown assessed a functional impairment for myofascial pain syndrome involving the left scapular, upper thoracic and trapezius musculature. When asked about claimant's history prior to the August 4, 2011, injury and symptoms following her cervical fusion, Dr. Brown stated:

. . . she had improved but she was continuing to have pain in the low back, lumbosacral area, and that was increased by prolonged sitting, standing, car riding, lifting and bending. She told me *she also had some pain in the upper trapezius and left scapular areas*, which was intermittent. [Emphasis added.]¹⁷

¹⁵ See *Messner v. Continental Plastic Containers*, 48 Kan. App. 2d 731, 751, 298 P.3d 371, rev. denied 297 Kan. 1246 (2013).

¹⁶ ALJ Award (Aug. 16, 2013) at 7.

¹⁷ Brown Depo. at 14.

Dr. Brown agreed he did not have enough information to determine if claimant's thoracic and cervical symptoms were related to her August 4, 2011, injury or her prior cervical fusion. On this issue, Dr. Brown testified:

Q: [Mr. Shepard] So, *it's fair to assume that you don't have enough information* in front of you in order to determine, within a reasonable degree of medical probability, whether or not the cervical neck and upper thoracic back symptoms that she had are related to the injury on October 4, 2011 or are related to the prior injury for which she had a cervical fusion? [Emphasis added.]

A: [Dr. Brown] I believe it is.¹⁸

Dr. Brown also agreed that the August 4, 2011, injury rendered the preexisting degenerative disc disease in the lumbosacral spine symptomatic.¹⁹ Contrary to his initial diagnosis of chronic lumbar sprain and lumbago,²⁰ Dr. Brown agreed that there was no other diagnosis for the lumbosacral spine related to the August 4, 2011, accident, other than arthrosis made symptomatic by the accident.²¹

In addition to the foregoing admissions during cross-examination, Dr. Brown also admitted he did not review any of claimant's medical records for treatment provided prior to August 4, 2011. In this instance, without any prior medical records to compare with claimant's current condition, Dr. Brown's opinions claimant suffered a new injury and additional functional impairment from the August 4, 2011, accident are without foundation.

On redirect examination, Dr. Brown reiterated his initial impression that the August 4, 2011, fall is the prevailing factor for claimant's lumbosacral and cervicothoracic spine impairment. However, this opinion does not negate the fact claimant's injury rendered symptomatic a preexisting condition or she failed to prove personal injury, i.e., a lesion or change in the physical structure of the body.

Claimant contends Dr. Brown's opinions regarding a new injury are uncontradicted evidence. Even though Dr. Brown was the only physician to provide evidence, his opinions are contradicted. Dr. Brown contradicts himself by writing and testifying claimant has functional impairments related to the August 4, 2011, accident, and then later testifying he cannot state within a reasonable degree of medical certainty the thoracic and trapezius

¹⁸ *Id.* at 15-16.

¹⁹ *Id.* at 17.

²⁰ *Id.* Ex. 3 at 3.

²¹ Brown Depo. at 19.

condition is related to the accident, and the low back condition was simply a preexisting condition made symptomatic by the accident.

The weight of the evidence does not support a finding that claimant suffered a new injury resulting in an impairment related to the accident on August 4, 2011.

CONCLUSION

Claimant failed to sustain her burden of proving she suffered personal injury arising out of and in the course of her employment with respondent.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bruce E. Moore dated August 16, 2013, is affirmed in all respects.

IT IS SO ORDERED.

Dated this _____ day of March 2014.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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