

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

ARDIS J. STARK)
Claimant)
V.)
ATWOOD GOOD SAMARITAN CENTER)
Respondent)
AND)
SENTRY INSURANCE COMPANY)
Insurance Carrier)

Docket No. 1,060,656

ORDER

Claimant requested review of Administrative Law Judge Pamela J. Fuller's July 18, 2014 Award. The Board heard oral argument on November 4, 2014.

APPEARANCES

Melinda G. Young, of Hutchinson, appeared for claimant. Brandon A. Lawson, of Kansas City, Missouri, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the Award's stipulations.

ISSUES

The judge found claimant did not suffer any permanent impairment and is not permanently totally disabled as a result of her work injury.

Claimant requests the Award be reversed, arguing the judge erred in relying upon Dr. Hendler's opinion because it was the most recent opinion. Claimant argues Dr. Hendler's findings, which included claimant having loss of range of motion in her cervical spine, supports a Category II impairment rating. Claimant asserts the evidence proves her accidental injury resulted in permanent impairment which caused her inability to engage in substantial and gainful employment.

Respondent maintains the Award should be affirmed. Respondent initially denied that claimant sustained personal injury by accident arising out of and in the course of her employment, but admitted at the regular hearing that claimant was injured at work with the caveat that claimant's accident was not the prevailing factor in her permanent impairment and disability.

The issue is: What is the nature and extent of claimant's disability, if any, including whether her accident was the prevailing factor in her injury, medical condition, impairment and disability?

FINDINGS OF FACT

Claimant asserts a September 30, 2011 accidental injury. She currently is 66 years old and lives in Atwood, in Rawlins County. She graduated high school and has associate of science degrees in psychology and social work, in addition to CNA and CMA certificates.

In February or March 2011, claimant began working as a CNA for respondent. She worked at least 32 hours per week. Her job duties included walking residents with a gait belt, pushing them in wheelchairs, helping them get dressed, assisting others with lifting or transferring residents, providing perineal and dental care, assisting with nutrition, passing towels and wash cloths and general cleaning.

On June 21, 2011, claimant underwent a cervical fusion at C4-5 and C5-6 by Dr. Badejo. The surgery, which was not related to a work injury, was performed to relieve eye and headache issues she had suffered since 2010, as well as numbness in her arms and other extremities. Following surgery, claimant attended perhaps two or three physical therapy sessions a week. She was off work for a couple of weeks and then returned to light duty consisting of no pushing/pulling and no lifting over 5 pounds. Claimant initially started working a few hours a day, but gradually increased her hours until she was back working her regular schedule in September 2011. She attended physical therapy once a week and was released to push a cart with towels and wash cloths.

On September 30, 2011, claimant was doing office work and other light duty activities. Respondent was shorthanded and claimant's supervisor asked her to answer a call light. Claimant went to the room. The rooms had a bathroom between them. When she arrived, a resident was leaving the bathroom. Claimant went to the resident's room. The resident started falling backward when she got to her room. Claimant caught the resident and kept her from falling. Claimant hollered for help. Another worker came and took the resident. Claimant testified she was numb all over after this incident. She testified that when she left the room, her shoulders and arms began spasming and she had a lot of pain. Claimant denied having muscle spasms "like that" before the accident.¹ She went to the emergency room and had to be given muscle relaxers to control the spasming so x-rays could be taken. Claimant was off work a couple of days. Thereafter, she returned to work as a CNA and nutrition assistant. She performed light duty and clerical work. Shortly thereafter, her job was re-evaluated and some of her tasks taken away.

¹ R.H. Trans. at 12.

Claimant testified she was still undergoing physical therapy as a result of her neck fusion at the time of her accident, but it was less frequent compared to just after her surgery. She testified she was recovering from her neck surgery before her accident. Claimant testified her symptoms increased following her accident. She began having pain in “areas [she] hadn’t had pain in,”² including her arms, upper back and shoulder area which was “totally different” than the pain she had after her neck surgery.³ She also experienced muscle spasms and shooting pains going down her back from her shoulders. Her physical therapy was increased to three times a week.

According to claimant, Dr. Badejo released her in November 2011, and told her that her ongoing “issues” were not connected to her surgery.⁴

After her work injury, claimant’s hours were reduced. She testified:

I was off work a couple days with the injury and right after that we immediately re-evaluated and my doctor . . . got with Good Sam and they decided what all I could do. . . . So it was immediate with some of that. And then in the fall it stepped down - - that was in the summer it stepped down even further. My full-time hours were taken away.

. . .

And so I was working about 20 hours a week.

. . .

And so I lost my insurance. And then it just kind of cutting my hours more and more. And finally in December of 2012 I was not able to assist the residents with their nutrition because of the - - because of my arms and the positions I needed to have to assist them and the length of time I needed to . . . help them and stuff. And so I went into the activities department and have been working in the activities department since then.⁵

In the activities department, claimant only worked five hours in January 2014, five hours in February 2014, two hours in March 2014 and was scheduled for eight hours in April 2014. It appears her main job is calling Bingo numbers.

² *Id.* at 15.

³ *Id.*

⁴ *Id.*

⁵ *Id.* at 17-18.

When asked if she had depression after her accident, claimant testified it is “really tough”⁶ sometimes. She testified her injury made her unable to fix her hair, make her bed, vacuum, sweep, push a grocery cart, lift or drive longer than 30 minutes. In contrasting her limitations following her work accident from her neck surgery, claimant stated:

Any activity involving my - - my arms, my shoulders, you know, those . . . things. Even resting my arm on the chair for a length of time, you know, it creates pain and stuff. But that is definitely different because those - - I was doing those things before and now I can't.⁷

Claimant admitted having problems with her upper extremities, including bilateral shoulder numbness, prior to her work injury. Following her neck surgery, claimant indicated the numbness was better and she was not having a lot of pain, but she now has a lot of pain and spasms. Claimant also acknowledged having a 20 pound lifting restriction due to her low back. Such restriction predated her neck surgery.

Claimant acknowledged taking citalopram (a generic form of Celexa), an antidepressant, since 2004, and attending two or three therapy sessions around the time her husband died in 2004. She denied being in mental health therapy at the time of her work accident. In describing how her mental state has changed since the accident, claimant testified she now has anger and frustration. She further testified:

I've always been pretty independent and now I have to rely on my daughter to drive me places. She has to take off work and leave her family. My doctors appointments makes me feel guilty. I live in a rural area. 30 minutes driving get me to the next town, doesn't get me back home. It just - - sometimes I wonder if it's worth it, you know, and because of the frustration and it makes me angry that I can't do the things that I used to do. I can't garden anymore, because I can't pull weeds and things like that. It very - - it has very limited my ability to go and do and enjoy and it - - it is frustrating.⁸

On July 3, 2012, claimant was seen at her attorney's request by Pedro Murati, M.D., who is board certified in physical medicine and rehabilitation, electrodiagnosis and independent medical evaluations. Dr. Murati reviewed medical records, took a history and performed a physical examination. During the examination, claimant complained of neck pain, upper back pain, loss of arm strength and lost range of motion in her arms. She reported having difficulty turning her head and difficulty with daily living, including putting on and taking off her clothes. She also reported not being able to drive longer than 30 minutes nor do isometric exercises.

⁶ *Id.* at 18.

⁷ *Id.* at 21.

⁸ *Id.* at 26-27.

Among various findings, Dr. Murati's physical examination of claimant's upper extremities revealed normal reflexes, loss of sensation at C4-5 and bilateral C6 dermatomes, as well as bilateral shoulder weakness. Shoulder exam revealed a negative right rotator cuff exam, positive Hawkins examination bilaterally, no crepitus and full range of motion. Neck examination revealed limited range of motion and trigger points of the bilateral shoulder girdles extending into the cervical and thoracic paraspinals.

Dr. Murati diagnosed claimant with a preexisting cervical fusion, myofascial pain syndrome of both shoulder girdles extending into the cervical and thoracic paraspinals, and bilateral shoulder sprains. Dr. Murati acknowledged claimant had tenderness to her bilateral trapezius muscles before her accident, but no preexisting weakness in the upper extremities. Dr. Murati concluded claimant's diagnoses, other than the cervical fusion, were a direct result of her September 30, 2011 work-related injury. When respondent took Dr. Murati's deposition, he stated, "it is under all medical reasonable certainty that the prevailing factor in the thoracic injury is the accident at work."⁹

Dr. Murati assigned a 10% whole person impairment based upon the *AMA Guides*¹⁰ (hereafter *Guides*), which represented a 5% whole body impairment for the neck and a 5% whole body impairment for the upper back. Dr. Murati provided permanent restrictions of no climbing ladders, no crawling, no heavy grasping, no above chest level work, lifting/carrying and pushing/pulling up to 10 pounds occasionally and 5 pounds frequently, no work more than 18 inches from the body, avoid awkward positions of the neck, avoid trunk twisting and to allow claimant to rest for 15 minutes every two hours. For claimant's "kind of injury,"¹¹ Dr. Murati opined claimant was essentially and realistically unemployable and should apply for social security disability benefits. Dr. Murati testified the restrictions he gave claimant were a result of both the cervical fusion and her work injury. Dr. Murati testified he was not aware of claimant having any psychological condition except for depression, which he indicated happens with most chronic pain patients.

On November 7, 2013, claimant was seen at her attorney's request by Robert Barnett, Ph.D., a clinical psychologist with credentials as a rehabilitation counselor, rehabilitation evaluator and job placement specialist. Dr. Barnett reviewed medical records, took a history and performed a mental status examination. Claimant complained of being typically sad, crying more easily, interrupted sleep, indigestion, constipation and heartburn, and feelings of worthlessness and hopelessness.

⁹ Murati Depo., Ex. 2 at 5.

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

¹¹ Murati Depo. at 15.

Dr. Barnett acknowledged claimant took citalopram before her accident, but it was, in his non-medical opinion, a tiny dose. He testified claimant told him her use of citalopram, both before and after the accident, “didn’t seem to really be doing anything.”¹²

Dr. Barnett performed testing which showed claimant was above average in her reading skill based on the Wide Range Achievement Test - Revised. Her responses were elevated on the obsessive-compulsive and depression scales on the Brief Symptom Inventory. Her validity scales on the MMPI-2 were within normal limits. She showed no signs of malingering on the Test of Memory Malingering test.

Dr. Barnett diagnosed claimant with dysthymic disorder (a form of depression), late onset, moderate, as well as anxiety disorder. He testified claimant’s MMPI-2 results suggested she had moderate distress associated with depression and physical problems. Dr. Barnett opined claimant’s difficulties were caused by her injury, loss of employment and loss of functioning. Dr. Barnett recommended a psychiatric evaluation, as well as supportive therapy with a mental health counselor, licensed psychologist or licensed clinical social worker.

Using the *Guides*, Dr. Barnett placed claimant in Class 3 which is moderate impairment. He converted this impairment to a percentage using the *AMA Guides*, 2nd Edition, which allows a 25% to 50% impairment. Within this range, Dr. Barnett estimated claimant had a 30% impairment primarily due to deficits in affect and activities of daily living. Dr. Barnett indicated claimant’s rehabilitation or treatment potential is “good for partial restoration.”¹³

Dr. Barnett indicated claimant was working about two hours a week as a bingo caller for respondent. Regarding her employability, he testified:

Based on her age, where she’s living, her physical restrictions, it’s hard for me to imagine how she could be employed at all. I think probably - - this is just speculation, but I think probably they’re trying to be nice to her at the Good Samaritan Home and give her something that she can do.¹⁴

On cross-examination, Dr. Barnett testified the 4th Edition of the *Guides* does not include percentages of impairment for mental and behavioral disorders. He testified he used the diagnosis of dysthymic disorder because he felt it was better than any other depressive diagnosis. Dr. Barnett opined claimant’s problems are due primarily to losses associated with her physiological problems – loss of income and loss of functionality.

¹² Barnett Depo. at 25.

¹³ *Id.*, Ex. 2 at 8.

¹⁴ *Id.* at 17-18.

On January 8, 2014, claimant was seen at her attorney's request by P. Brent Koprivica, M.D., who is board certified in occupational medicine. Dr. Koprivica reviewed medical records, took a history and performed a physical examination. Claimant complained that her work injury resulted in her acute pain radiating down her left arm and the development of new, intermittent cervical and thoracic spasms, in addition to spasms in her shoulders and arms. Claimant complained she self-limits lifting, carries less than 10 pounds and has difficulties performing activities of daily living.

Dr. Koprivica did not find upper extremity atrophy, fasciculations, sensory loss or asymmetrical reflexes. Claimant had severe shoulder range of motion deficits. Dr. Koprivica stated, "I was not sure how much of that was psychologically based and how much was physically based."¹⁵ He testified the only objective finding was claimant's muscle spasms. He acknowledged he relied on claimant's truthfulness in terms of her complaints of more widespread pain, more pain and new spasms.

Dr. Koprivica's report states:

Ms. Stark's work injury of September 30, 2011, is felt to represent the direct, proximate and prevailing factor in new injury in the cervical region, which I would characterize as a chronic cervicothoracic strain/sprain injury. In my opinion, she has developed regional myofascial pain complaints associated with the strain/sprain injury in the cervicothoracic region.

Separately, Ms. Stark has developed chronic bilateral shoulder girdle pain. That shoulder girdle pain is felt to be related to myofascial pain as well.

...

I would note that with the information available from the MRI scans performed on both shoulders on October 4, 2013, revealing mild tendinitis, but no evidence of significant rotator cuff tear, it would be my opinion that Ms. Stark's presentation of deficits are greater than what one would expect based on the physical impairment in isolation.

A potential contributor to the deficits at this point would be disuse with secondary adhesive capsulitis involving both shoulder girdles, which would be a direct and natural complication of the injury of September 30, 2011.

However, separately, I would like to review the objective data on a psychological basis. The psychological expert can help validate the overwhelming impairment presentation. Further, the mental health care expert will need to quantify any appropriate impairment and apportion what contribution the resultant development of physical impairment attributable to the September 30, 2011, injury contributes to the overall psychological impairment.¹⁶

¹⁵ Koprivica Depo. at 17.

¹⁶ *Id.*, Ex. 2 at 21-22.

In addressing causation and prevailing factor, Dr. Koprivica testified:

It was my opinion that prior to the work injury of September 30th, 2011, that Ms. Stark did have impairment in the cervical region. She had had an anterior cervical discectomy and fusion at C4-5 and C5-6 for symptomatic cervical spine - - cervical stenosis in June of 2011. Even though she had that prior impairment, I felt her work injury of September 30th, 2011, was the direct, proximate, and prevailing factor in new injury in the cervical region, which I characterized as a chronic cervicothoracic strain or sprain injury or soft tissue injury with the development of regional myofascial pain in the cervicothoracic region.

I thought that her shoulder girdle pain was a secondary manifestation of that myofascial pain. I did not believe clinically that there was any significant structural injury to the rotator cuff based on the injury.¹⁷

Dr. Koprivica provided permanent restrictions that claimant can only perform sedentary physical demand activity below-chest level and limit above chest level activities. She cannot do any activities “above chest level” or “above shoulder level.”¹⁸ She is to avoid climbing. Such restrictions were due to claimant’s physical and psychological impairments attributable to the September 30, 2011 injury by accident.

As far as future medical treatment, Dr. Koprivica believed claimant would benefit from future pain management.

On January 20, 2014, Dr. Koprivica assigned a 35% whole person impairment pursuant to the *Guides*, which represented a 5% whole body cervicothoracic impairment rating for claimant’s physical injuries and 30% whole body rating for psychological impairment. Dr. Koprivica stated such impairment was distinct from the prior cervical discectomy and fusion, which was a 25% whole person cervicothoracic impairment. Out of the 13 tasks in Dr. Barnett’s report, Dr. Koprivica testified claimant is only able to perform one task for a 92% task loss.

In addressing permanent total disability, Dr. Koprivica stated:

With the validation by Dr. Barnett regarding her presentation, it is my opinion that it is probable that Ms. Stark, in fact, is permanently totally disabled based on the impairment following the September 30, 2011, injury, as I have noted.¹⁹

¹⁷ *Id.* at 20-21.

¹⁸ *Id.* at 23.

¹⁹ *Id.*, Ex. 3 at 3; see also Ex. 2 at 23.

Dr. Koprivica acknowledged 98-99% of his work is for claimants' or plaintiffs' attorneys. Dr. Koprivica admitted the *Guides* do not allow impairment for mental disorders and indicated he deferred to Dr. Barnett's opinion regarding mental impairment. While he initially indicated the restrictions he gave claimant were occasioned by her work injury, he clarified there is no way to separate claimant's restrictions from the cervical fusion and work injury because they both involved the cervicothoracic region. He also testified claimant's fusion would require her to limit overhead work, awkward positions of her head and neck, and avoidance of vibration. Dr. Koprivica acknowledged his restrictions for claimant's unrelated low back condition would impact claimant's ability to work.

Moreover, on cross-examination, Dr. Koprivica addressed whether claimant's preexisting trapezius complaints were any different after her work injury. He testified:

Well, those are musculoskeletal soft tissue complaints in that same region. I mean, one of the things - - I don't want to overstate the opinions and conclusions, but one of the important things that I look at when I question a person, I try to have them outline why it is different, and at least what she represented to me was that there was - - there was a difference - - more widespread pain, new pains, new spasms as a result of this event. Now, if you ask me is there any way I can objectify that, no. I mean, I'm relying on the truthfulness of what she's telling me.²⁰

On February 20, 2014, claimant was seen by Dr. Barnett for a wage loss assessment and to formulate a task list. Based on claimant's hours being reduced to five hours per month, Dr. Barnett opined claimant had an 88% wage loss.

On April 1, 2014, claimant was seen at respondent's request by Steven Hendler, M.D., a practicing physician who is board certified in physical medicine and rehabilitation. Dr. Hendler reviewed medical records, took a history and performed a physical examination. Claimant complained of ongoing pain and spasms in her upper back, shoulders, arms and wrists. Physical examination revealed 45° flexion, 60° extension, 60° rotation to the left and 50° rotation to the right in the neck. There was diffuse tenderness to palpation, superficial or deep, anywhere in the neck or upper back above the level of the inferior margin of the scapulae. She had normal sensation and normal manual muscle testing and reflex testing. There was decreased range of motion at both shoulders in flexion and abduction, and some tentative nature of foot movement placing some weaving on gait examination. Claimant reported using a cane since 2010, before her work accident.

Dr. Hendler diagnosed claimant with degenerative disc disease of the cervical spine, status post fusion, pain associated with a general medical condition and psychological factors along with depression, as well as unrelated personal health conditions. Dr. Hendler indicated claimant's degenerative disc disease and status post fusion are preexisting and claimant had pain both before and after the accident.

²⁰ *Id.* at 44.

When questioned whether claimant's work accident was the prevailing factor in any of claimant's medical conditions, Dr. Hendler testified, "No, not at this time."²¹ It was Dr. Hendler's opinion claimant did not sustain any permanent impairment as a result of her accident nor did the work accident result in any permanent restrictions or task loss. Dr. Hendler testified claimant's trapezius tenderness was a preexisting condition as based on medical records from August and September 2011. He testified claimant's presentation was suggestive of somatization because she had non-physiologic findings on physical examination, an increase in symptoms over time and a history of depression.

In addressing whether claimant's current symptomology was the result of her cervical fusion or the work accident, Dr. Hendler testified:

Well, in my experience the symptoms could potentially occur after either. The fact that the symptoms were present before the second event indicates in this case it's much more likely to have come from the postoperative state following her surgery as opposed to the work injury.²²

On cross-examination, Dr. Hendler testified claimant's work injury was a strain which resolved by mid-November 2011, as based on his review of medical records. This was the last record from Dr. Badejo that Dr. Hendler reviewed. Dr. Hendler acknowledged he did find loss of range of motion of the cervical spine during his exam. He testified claimant's decreased neck range of motion deficit would be more likely the result of her cervical spine fusion than her trapezius strain.

On April 1, 2014, claimant was seen at respondent's request by Patrick Hughes, M.D., a board certified and practicing psychiatrist. Almost all of Dr. Hughes workers compensation opinions are for respondents and insurance carriers. Dr. Hughes reviewed medical records and performed a mental status examination. Dr. Hughes disagreed with Dr. Barnett's diagnosis of dysthymic disorder because it related to an individual who had suffered lifelong chronic depression symptoms beginning in early adulthood at the latest. Dr. Hughes indicated claimant reported considerable sadness and depression symptoms, as well as sleep problems, following the death of her father at an early age and the unexpected and sudden death of her husband. According to claimant, she felt she was doing well psychiatrically in subsequent years. Dr. Hughes acknowledged claimant's pre-accident psychiatric history was "not particularly anything terribly pathological . . ."²³ Dr. Hughes noted claimant's pre-injury dosage of citalopram was "minimal."²⁴

²¹ Hendler Depo. at 9.

²² *Id.* at 10.

²³ Hughes Depo. at 14.

²⁴ *Id.* at 15.

In addressing prevailing factor, Dr. Hughes stated:

Based on my review of the available medical records and my psychiatric examination today of Mrs. Ardis Stark, it's my opinion that Mrs. Stark currently has No Psychiatric Diagnosis of clinically significant, medically diagnosable type. If she actually had the affective symptoms last November as asserted by Psychologist Barnett, they have certainly resolved at this point (and would not have constituted a clinically significant, medically diagnosable psychiatric condition in November 2013, either). Mrs. Stark simply reports the typical, predictable, and normal human responses of frustration and occasional anger that most humans with chronic physical pain experience, as well as the understandable normal worries about her financial state, given her limited employment status currently. It then follows that she currently has No Psychiatric Condition prevailingly caused by her September 2011 workplace injury or any other cause; needs no psychiatric treatment since she has no psychiatric condition; and has no (0%) psychiatric disability or impairment causally attributable to her September 2011 workplace injury or otherwise.²⁵

Dr. Hughes indicated claimant did not report any "meaningful psychiatric distress" at the time he evaluated her. Dr. Hughes testified, "[s]he was perfectly normal in all aspects of her interactions with me."²⁶ It was Dr. Hughes' opinion claimant did not sustain any psychological or psychiatric injury nor did she have any ongoing disability, permanent or otherwise. From a psychiatric standpoint, Dr. Hughes indicated claimant was not in need of any permanent restrictions.

On cross-examination, Dr. Hughes testified he did not perform any testing because he is a medical doctor and relies on his training, knowledge and extensive clinical interview in forming his psychiatric opinions. His report states the MMPI results from Dr. Barnett's testing showed elevations in the hypochondriasis and hysteria scale, which suggested strong somatization.

On May 6, 2014, claimant was seen at respondent's request by Terry Cordray, MS, for a vocational assessment. Mr. Cordray is a vocational rehabilitation counselor. Based upon claimant's work history, he generated a list of 13 relevant work tasks. Mr. Cordray testified claimant could not return to work as a CNA using Dr. Koprivica's restrictions, but she could still work as a communication dispatcher. Using Dr. Hendler's lack of restrictions, Mr. Cordray testified claimant could return to any of her prior jobs. Mr. Cordray testified there is nothing in Dr. Barnett's psychological examination report that would preclude work tasks or wage loss. Mr. Cordray indicated claimant is capable of employment and testified, "[s]he's not only employable, she's placeable."²⁷

²⁵ *Id.*, Ex. B at 5-6.

²⁶ *Id.* at 16.

²⁷ Cordray Depo. at 18.

Mr. Cordray acknowledged claimant earning \$9 per hour for five hours a month is not substantial and gainful employment. He noted claimant's locale might impede her ability to find work.

The July 18, 2014 Award stated, in part:

. . . The claimant admitted that prior to her neck surgery, she had some problems with her upper extremities. The surgery helped with her complaints but didn't totally resolve them. Dr. Hendler conducted the most recent physical examination. He determined that the claimant did not have any medical injury that the work accident was the prevailing factor and that she didn't have any permanent impairment as a result of the work accident. He stated that the claimant's symptoms were present before her work accident and it is much more likely to have come from the postoperative state. That the claimant is someone who is potentially at increased likelihood of have ongoing subjective symptomatology. He found that the claimant's strain injury was fully address and treated by mid November of 2011 based on the claimant seeing Dr. Badejo on November 18th and Dr. Badejo noting that there was no tenderness on palpating the cervical and trapezius muscles. Any psychological conditions or impairments predated the claimant's work accident and she didn't suffer any permanent functional disability as a result of that accident. After review of all the evidence presented, it is found that the claimant did not suffer any permanent impairment and she is not permanently totally disabled as a result of her work injury.

Thereafter, claimant filed a timely appeal.

PRINCIPLES OF LAW

An employer is liable to pay compensation to an employee incurring personal injury by accident arising out of and in the course of employment.²⁸ Claimant must prove the right to an award based on the whole record under a "more probably true than not true" standard.²⁹

K.S.A. 2011 Supp. 44-508 states, in relevant part:

(d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

²⁸ K.S.A. 2011 Supp. 44-501b(b).

²⁹ K.S.A. 2011 Supp. 44-501b(c) and K.S.A. 2011 Supp. 44-508(h).

...

(f) (1) "Personal injury" and "injury" mean any lesion 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.

...

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

...

(g) "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 case, the administrative law judge shall consider all relevant evidence submitted by the parties.

...

(u) "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 impairment, if the impairment is contained therein.

K.S.A. 2011 Supp. 44-510c(a)(2) provides:

Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Expert evidence shall be required to prove permanent total disability.

Case law indicates permanent and total disability is based on the totality of the circumstances:

[B]ased on a totality of the circumstances including [Wardlow's] serious and permanent injuries, the findings of Drs. Prostic and Redford, the extremely limited physical chores [Wardlow] can perform, his age, his lack of training, driving and transportation problems, past history of physical labor jobs, being in constant pain, and constantly having to change body positions.³⁰

The Kansas Court of Appeals held, "The trial court's finding that Wardlow is permanently and totally disabled because he is essentially and realistically unemployable is compatible with legislative intent."³¹ *Wardlow* has been followed in numerous cases.³²

K.S.A. 2011 Supp. 44-510e(a) states in part:

In case of whole body injury resulting in temporary or permanent partial general disability not covered by the schedule in K.S.A. 44-510d, and amendments thereto, the employee shall receive weekly compensation as determined in this subsection during the period of temporary or permanent partial general disability not exceeding a maximum of 415 weeks.

. . .

(2)(C) An employee may be eligible to receive permanent partial general disability compensation in excess of the percentage of functional impairment ("work disability") if:

(i) The percentage of functional impairment determined to be caused solely by the injury exceeds 7½% to the body as a whole or the overall functional impairment is equal to or exceeds 10% to the body as a whole in cases where there is preexisting functional impairment; and

(ii) the employee sustained a post-injury wage loss, as defined in subsection (a)(2)(E) of K.S.A. 44-510e, and amendments thereto, of at least 10% which is directly attributable to the work injury and not to other causes or factors.

³⁰ *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 114, 872 P.2d 299 (1993).

³¹ *Id.* at 113.

³² See *Blankley v. Russell Stover Candies, Inc.*, No. 110,014, 2014 WL 2590035 at *3 (Kansas Court of Appeals unpublished opinion filed May 30, 2014); *Loyd v. ACME Foundry, Inc.*, No. 100,695, 2009 WL 3378206 at *5 (Kansas Court of Appeals unpublished opinion filed Oct. 16, 2009); and *Lyons v. IBP, Inc.*, 33 Kan. App. 2d 369, 102 P.3d 1169 (2004).

K.S.A. 2011 Supp. 44-510h(e) states, in part:

It is presumed that the employer's obligation to provide the services of a health care provider, and such medical, surgical and hospital treatment . . . shall terminate upon the employee reaching maximum medical improvement. Such presumption may be overcome with medical evidence that it is more probably true than not that additional medical treatment will be necessary after such time as the employee reaches maximum medical improvement.

K.S.A. 2011 Supp. 44-551(i)(1) states, in part:

[T]he board shall have authority to grant or refuse compensation, or to increase or diminish any award of compensation or to remand any matter to the administrative law judge for further proceedings.

K.S.A. 2011 Supp. 44-555c(a) states, in part:

The board shall have exclusive jurisdiction to review all decisions, findings, orders and awards of compensation of administrative law judges under the workers compensation act. The review by the board shall be upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge.

To establish compensable traumatic neurosis, claimant must prove :

. . . (a) a work-related physical injury; (b) symptoms of the traumatic neurosis; and (c) that the neurosis is directly traceable to the physical injury.³³

“[G]reat care should be exercised in granting an award for [traumatic neurosis] owing to the nebulous characteristics of [such a condition].”³⁴

Board review of a judge's order is de novo on the record.³⁵ The definition of a de novo hearing is a decision of the matter anew, giving no deference to findings and conclusions previously made by the judge.³⁶ The Board, on de novo review, makes its own factual findings.³⁷

³³ *Love v. McDonald's Restaurant*, 13 Kan. App. 2d 397, Syl., 771 P.2d 557, rev. denied 245 Kan. 784 (1989).

³⁴ *Berger v. Hahner, Foreman & Cale, Inc.*, 211 Kan. 541, 550, 506 P.2d 1175 (1973).

³⁵ See *Helms v. Pendergast*, 21 Kan. App. 2d 303, 899 P.2d 501 (1995).

³⁶ See *In re Tax Appeal of Colorado Interstate Gas Co.*, 270 Kan. 303, 14 P.3d 1099 (2000).

³⁷ See *Berberich v. U.S.D. 609 S.E. Ks. Reg'l Educ. Ctr.*, No. 97,463, 169 P.3d 1147 (Kansas Court of Appeals unpublished opinion filed Nov. 9, 2007).

The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.³⁸ It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony with the testimony of claimant and any other testimony relevant to the issue of disability. The trier of fact must make the ultimate decision as to the nature and extent of injury and is not bound by the medical evidence presented.³⁹

ANALYSIS

Respondent admits claimant had an accidental injury at work, but denies it resulted in causing her any permanent impairment. There are four areas of discussion: (1) whether claimant has any functional impairment from physical injuries; (2) whether claimant has any functional impairment from psychological or psychiatric injuries (a traumatic neurosis); (3) whether claimant proved a work disability; and (4) whether claimant proved permanent total disability.

There are three opinions regarding claimant's physical impairment on account of her September 30, 2011 accidental injury. Dr. Murati gave claimant a 10% whole person impairment, consisting of a 5% whole body impairment for the neck and a 5% whole body impairment for the upper back. Dr. Koprivica assigned claimant a 5% whole body cervicothoracic impairment. Dr. Hendler opined claimant's injury resolved and she had no permanent functional impairment.

Both physicians hired by claimant found either cervicothoracic spasms or trigger points, whereas Dr. Hendler did not. The Board places no great significance in the fact that Dr. Hendler was the last physician to evaluate claimant. Of these opinions, the Board adopts Dr. Koprivica's 5% impairment rating as most accurately reflecting claimant's functional impairment on account of her September 30, 2011 accidental injury. Dr. Koprivica noted claimant's 5% rating was above and beyond the impairment associated with her cervical spine fusion.

Regarding traumatic neurosis, claimant testified things are "really tough" and the evidence shows she is sad, angry and frustrated as a result of her September 30, 2011 accidental injury. The mental health experts testified claimant's primary care physician increased her dose of citalopram following her accidental injury. Dr. Barnett opined she had dysthymic disorder and a resulting 30% whole person impairment. Dr. Hughes observed no meaningful psychiatric distress. He noted she behaved perfectly normal in their interaction. Dr. Hughes stated claimant had no rateable psychiatric injury or disability.

³⁸ *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

³⁹ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212 rev. denied 249 Kan. 778 (1991).

The burden of proof rests with claimant. Claimant was prescribed a higher dose of citalopram some time after her accidental injury, but there is no showing she ever requested or was treated for a work injury-related mental disorder, such as having counseling, and it does not appear she was evaluated by any mental health experts except those retained by the parties. We do not even know if the increase in citalopram was occasioned by claimant's accidental injury. Claimant's testimony, the facts of the case, and the differing mental health expert opinions do not convince the Board that claimant proved she has permanent impairment as a result of a traumatic neurosis.

Insofar as claimant had a 25% preexisting impairment from her neck surgery, she is not entitled to a work disability because she did not prove at least a 10% whole body functional impairment caused solely by her work injury, as required by K.S.A. 2011 Supp. 44-510e(a)(2)(C)(i). Additionally, claimant did not prove what task loss her work injury caused, as opposed to task performing ability she lost due to her prior neck surgery.

The Board is keenly aware of *Wardlow*, and the necessity of considering all factors when determining if claimant is permanently and totally disabled. Dr. Koprivica determined claimant should be limited to light duty and had a 92% task loss. That opinion was based on restrictions for *both* claimant's prior spine fusion and her work-related cervicothoracic strain. Therefore, the 92% task loss was caused by claimant's cervicothoracic strain *and* her prior cervical fusion. Both of claimant's hired experts, Drs. Koprivica and Murati, could not parse out what restrictions claimant needed for her September 30, 2011 cervicothoracic strain versus the cervical spine fusion she had in June 2011.

Claimant asserts her reduction of work hours was caused by her work injury, because her hours were decreased following her September 30, 2011 injury. She indicated her hours were reduced, in part, because of her arms and the positions she needed to assume to care for residents' nutrition needs. However, claimant did not prove that limitation was the result of restrictions occasioned by her work injury. Moreover, it is much more likely the bulk of claimant's restrictions and the reason for her reduction of hours was due to her spinal fusion and not to her cervicothoracic strain.

The Board disagrees with the dissent's assertion that claimant's post-accident mental health condition should be considered as a factor in determining if she is permanently and totally disabled. The Board determined claimant has no permanent impairment as a result of traumatic neurosis. If claimant has no permanent impairment, then her mental condition would not impair her ability to obtain gainful employment.

Claimant failed to prove she is permanently and totally disabled. While she works about five hours per month, which is not substantial and gainful employment, such fact is not dispositive in proving she is unable to engage in substantial and gainful employment on account of her injury. Rather, Dr. Hendler indicated claimant required no work restrictions on account of her work injury and Mr. Cordray opined claimant was employable and placeable in the open labor market.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board concludes claimant proved entitlement to permanent partial disability benefits based on a 5% impairment of function involving her cervicothoracic region. She is entitled to future medical treatment for such condition. She is not entitled to a work disability or benefits based on permanent total disability.

AWARD

WHEREFORE, the Board modifies the July 18, 2014 Award as set forth above.

The claimant is entitled to 20.75 weeks of permanent partial disability compensation at the rate of \$160.26 per week or \$3,325.40 for a 5% whole body functional impairment, making a total award of \$3,325.40, all of which is due and owing in one lump sum less amounts previously paid.

IT IS SO ORDERED.

Dated this _____ day of December, 2014.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

While this is a close case, this Board Member disagrees with the Board's decision. Examining the factors from *Wardlow* (age, training, previous work history, constant pain, and physical limitations), claimant is permanently and totally disabled.

Claimant's education and training do not hamper her employability, but her age does not favor her finding work in the open labor market in or around Atwood.

Regarding constant pain, claimant testified that following her accident, she had increased and more widespread pain from her cervicothoracic area into her shoulders, in addition to new muscle spasms. Neither the judge, the Board or any of the testifying experts concluded claimant's pain complaints were intentionally fabricated or labeled her a malingerer. Nor did they conclude she was untrustworthy.

Both Drs. Koprivica and Murati restricted claimant to light duty work. She cannot do the majority of the work she previously performed. Granted, claimant was working under accommodations for her neck surgery when she sustained her work accident. We do not know what permanent restrictions claimant may have been provided as a result of her neck surgery. While Drs. Koprivica and Murati could not delineate what restrictions claimant needed for her work injury as opposed to her preexisting neck fusion, claimant was working 32 hours a week at the time of her accident and she is now only working five hours a month. She is not substantially and gainfully employed. Such decrease in claimant's working hours only occurred after and because of her work injury by accident. Claimant testified her workload was decreased after respondent and her physician got together and decided what she could do.⁴⁰ She testified her hours were reduced even more because of her arms and the positions required to care for residents' nutrition needs. Contrary to the Board's decision, the evidence does not lead to the assumption that claimant's reduced hours were due to her prior cervical fusion.

For reasons noted by the Board, I do not think Dr. Barnett's impairment rating is particularly convincing. The evidence of whether claimant has a rateable mental health condition is conflicting. However, consideration of whether claimant has depression, as verified by her MMPI-2, at least according to Dr. Barnett, should be a factor the Board considers when assessing whether she is permanently and totally disabled. The Board's suggestion that claimant's mental health is not relevant to determining permanent total disability – because she failed to prove accident-related permanent impairment from a traumatic neurosis – is inconsistent with the *Wardlow* approach of looking at the totality of the circumstances.

⁴⁰ The record is not clear as to the identity of such physician.

Claimant's testimony, along with that of her hired experts, establish her accidental injury is the direct link between her having previously been able to work her regularly scheduled hours and the dramatic decrease in hours, such that she is no longer able to engage in substantial and gainful employment. Claimant, on account of her injury, is no longer able to provide nutrition to residents. Claimant's inability to perform substantial and gainful employment is, as required by K.S.A. 2011 Supp. 44-510c(a)(2), "on account of" her injury. If not her work injury, what restricts claimant's ability to work a mere handful of hours over the course of an entire month?

Claimant's expert witnesses opined claimant was permanently and totally disabled on account of the September 30, 2011 accidental injury. While respondent's experts had contrary opinions, the weight of the evidence establishes claimant's accidental injury is the reason she is no longer able to engage in substantial and gainful employment. She is thus permanently and totally disabled. Of course, any award would need to account for a reduction for preexisting impairment.

BOARD MEMBER

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