

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board concludes the Award for a 5 percent disability should be affirmed.

Findings of Fact

1. Claimant injured her low back on April 18, 1996, while moving a patient from a dining room chair to a wheelchair. Claimant went to the emergency room for treatment on that date and has not returned to work since.
2. Claimant received treatment initially from Dr. Daryl J. Callahan. An MRI revealed a bulging disc at L2-L3. Dr. Callahan referred claimant to Dr. Badejo, a neurosurgeon; and she was seen in turn by Dr. Suleiman, a physiatrist; and, ultimately, by Dr. Chris E. Wilkinson. Claimant reported to Dr. Wilkinson that Dr. Badejo could not determine what was wrong with her.
3. Dr. Wilkinson first saw claimant on November 21, 1996. Claimant complained of back pain and pain radiating into the lateral thigh, lateral leg, and top of her foot. Dr. Wilkinson testified that claimant gave a history of tingling in a stocking distribution on her foot. Dr. Wilkinson described this symptom as an indication of possible psychological overlay and testified the symptom is one which makes you think of symptom magnification. Dr. Wilkinson also testified claimant has all the Waddell's signs indicating the back pain is of a non-physiologic cause. Dr. Wilkinson also referred claimant for a functional capacities evaluation. That evaluation showed positive on Waddell's test. The evaluation also identified claimant as a self-limiting, somatic individual. But the conclusion of the evaluation was that claimant should be limited to sedentary category of work with potential for moving to light or medium categories with rehabilitation. Dr. Wilkinson adopted the restrictions from the FCE but acknowledged that they were questionable given the inconsistencies in the results of the FCE testing. Dr. Wilkinson rated claimant's permanent impairment as 1 percent of the whole body.
4. In August 1996, Dr. Badejo released claimant to return to light duty. Based on the record as a whole, the Board finds the light duty restrictions more appropriate to claimant's injury than the restrictions recommended by Dr. Wilkinson. Respondent offered claimant accommodated work with non-ambulatory patients and no lifting. But claimant declined. Claimant continued to provide care for a 20-year-old disabled son who is confined to a wheelchair. She has assistance from her husband, a physician's assistant, and a respite worker. Claimant did laundry, vacuuming, and prolonged standing in her kitchen.
5. Claimant advised the occupational therapist who performed the FCE that she did not intend to return to work and the record contains no evidence she has looked for work since leaving her employment with respondent. Claimant did not work for approximately 11 of the 26 weeks before her accident. She requested time off to care for her son.

6. At the request of her attorney, claimant was examined and evaluated by Dr. Edward J. Prostic. Based on his review of records and physical exam, Dr. Prostic concluded claimant has a 15 to 20 percent impairment on an orthopedic basis. Dr. Prostic also ordered an MMPI test. Based in significant part on the psychological condition suggested in the results of the MMPI, Dr. Prostic concluded claimant is temporarily totally disabled. He testified claimant has a symptom magnification disorder. He distinguished symptom magnification disorder from malingering. According to Dr. Prostic, symptom magnification disorder is an unconscious symptom magnification for secondary gain. Malingering, on the other hand, is conscious symptom magnification for secondary gain. Dr. Prostic acknowledged that the MMPI report states that the possibility claimant is malingering should be evaluated. Dr. Prostic also acknowledged that he looked at everything from the claimant's point of view in reaching his conclusions.

7. Claimant regularly worked less than a 40-hour week and the parties do not dispute the finding that claimant was a part-time employee. Of the 26 weeks before the accident, claimant worked 15 weeks and has gross earnings of \$1,972.51.

8. At the outset of the regular hearing, claimant's counsel advised he would be requesting temporary total disability benefits to date and continuing. In response, the ALJ attempted to discourage claimant from proceeding with a regular hearing. But claimant's counsel insisted. In the end, the ALJ advised that he would hear the evidence and set terminal dates. At the end of the terminal dates he would consider the evidence and, if the record then showed a need for temporary total disability, he would lift the terminal dates, place claimant on temporary total disability, and wait for claimant to reach maximum medical improvement before proceeding. As the appealed Award indicates, the ALJ found claimant was not temporarily totally disabled and rendered the final Award. The Appeals Board agrees with and adopts as its own the findings of fact stated in that Award.

Conclusions of Law

1. The Board agrees with and affirms the finding that claimant has not established that she is entitled to additional and continuing temporary total disability. In so holding, the Board has admitted into evidence and considered the opinions of Dr. Prostic based on an MMPI report. Respondent objected to the report and opinions as inadmissible hearsay, citing *West v. Martin*, 11 Kan. App. 2d 55, 713 P.2d 957, rev. denied 239 Kan. 695 (1986). Claimant, on the other hand, cites *Boeing Military Airplane Co. v. Enloe*, 13 Kan. App. 2d 128, 764 P.2d 462 (1988), rev. denied 244 Kan. 736 (1989).

Neither case is directly on point. The *West* decision concerned admission of the MMPI in a civil court trial. The court there held the report to be inadmissible. But workers compensation proceedings operate under less strict evidentiary rules. *Craig v. Electrolux*, 212 Kan. 75, 510 P.2d 138 (1973). The *Enloe* decision cited by claimant relates, on the other hand, to a physician's opinion based in part on records and reports of other

physicians. The Court concluded it was not reversible error to consider opinions by a physician even where that opinion was based on records and reports from other physicians who did not testify. The present case differs because it involves the MMPI, a psychological test, not another physician's records or reports.

It is not clear whether the *Enloe* decision rests on the fact the hearsay on which the physician relied was hearsay directly within the special expertise of the physician. The MMPI requires interpretation by another expert. The Board has concluded, however, that the opinions of the physician based on the MMPI may be considered in the workers compensation proceedings. The MMPI is a well-recognized standardized test occasionally ordered by physicians to aid their diagnosis or treatment.

In this case, however, the Board is not persuaded by Dr. Prostic's opinions. He acknowledges the MMPI report leaves open, and recommends evaluation of, the possibility the claimant is simply malingering. He also acknowledges that he has, as the expert employed by claimant, construed the report in a light most favorable to claimant. The Board, on the other hand, is charged with determining what the evidence shows is more probably true than not. Based on this record, including Dr. Prostic's opinions, the Board finds claimant has not proven she has compensable psychological injury. The benefits must be based on the physical injury and claimant has not shown that her physical injury makes her totally disabled.

2. Functional impairment is 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 *AMA Guides to the Evaluation of Permanent Impairment*. K.S.A. 1996 Supp. 44-510e.

3. K.S.A. 1996 Supp. 44-510e(a) defines work disability as the average of the wage loss and task loss:

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.

4. K.S.A. 1996 Supp. 44-510e also specifies that a claimant is not entitled to disability compensation in excess of the functional impairment so long as the claimant earns a wage which is equal to 90 percent or more of the preinjury average weekly wage.

5. The wage prong of the work disability calculation is based on the actual wage loss only if claimant has shown good faith in efforts at employment after the injury. Claimant

may not, for example, refuse to accept a reasonable offer for accommodated work. If the claimant refuses to even attempt such work, the wage of the accommodated job may be imputed to the claimant in the work disability calculation. *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995). Even if no work is offered, claimant must show that he/she made a good faith effort to find employment. If the claimant does not do so, a wage will be imputed to claimant based on what claimant should be able to earn. *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d, 306, 944 P.2d 179 (1997).

6. Claimant is limited to an award of functional impairment because she rejected an offer of employment and did not demonstrate a good faith effort to find other employment. The Board finds the wage in the offered job would have been 90 percent or more of her preinjury wage. The Board also finds claimant has the ability to earn 90 percent or more in other employment.

7. The Board agrees with and affirms the finding by the ALJ that claimant has a 5 percent general body disability. This conclusion considers the opinions of both Dr. Wilkinson (1 percent) and Dr. Prostic (15 to 20 percent) but gives greater weight to the opinions of Dr. Wilkinson.

8. The Board agrees with and affirms the finding by the ALJ that claimant's average weekly wage was \$131.50. The weeks claimant did not work should not be counted. She earned \$1,972.51 during the 26 weeks preceding the accident but worked only 15 of those weeks. The total earned, \$1,972.51, divided by the 15 weeks worked, yields the \$131.50 per week wage.

9. The Board awards future medical treatment for the physical injury only upon proper application and approval by the Director. The Board concludes, as did the ALJ, that no future medical benefits should be awarded for treatment of a psychological condition because it has not been shown to be related.

10. The Board rejects the contention that the ALJ has failed to act impartially and failed to provide due process. Claimant complains of comments indicating the ALJ did not believe the claimant should proceed with a regular hearing and at the same time request temporary total benefits. The Board considers the ALJ's comments to be a reasonable attempt to have logical order to the litigation. Claimant also points to the ALJ's exclusion of the MMPI report and the physician's opinions based on that report. Although the Board has disagreed with the ALJ on this issue, the question is a quite close one and certainly nothing in that ruling suggests bias on the part of the ALJ. Finally, claimant points to a statement in the Award that the interests of the claimant have not been well served. Presumably, the ALJ thought the claimant might have developed credible evidence of a compensable psychological condition but chose to proceed, against the suggestions of the ALJ, with the regular hearing. Regardless, the Board finds nothing in the conduct of the proceedings, the rulings, or statements in the Award which would indicate the ALJ was

influenced by any improper bias or prejudice against the claimant or claimant's counsel. Likewise, the Board finds no basis for the contention that the ALJ denied claimant due process in these proceedings or the Award.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Bruce E. Moore on December 9, 1997, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of October 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Chris Miller, Lawrence, KS
James M. McVay, Great Bend, KS
Bruce E. Moore, Administrative Law Judge
Philip S. Harness, Director