BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

THERESA GUTIERREZ	)	
Claimant	)	
VS.	)	
	)	Docket No. 244,077
USD 259	)	
Respondent,	)	
Self-Insured	)	

ORDER

Respondent appealed the December 27, 2002 Award entered by Administrative Law Judge Nelsonna Potts Barnes. The Board heard oral argument on May 16, 2003. Stacy Parkinson of Olathe, Kansas, participated in this appeal as Board Member Pro Tem.

APPEARANCES

Joseph Seiwert of Wichita, Kansas, appeared for claimant. Gary K. Albin of Wichita, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

In the December 27, 2002 Award, Judge Barnes granted claimant benefits for a 51 percent permanent partial general disability for a September 1, 1998 accident. In reaching that conclusion, the Judge combined a 45 percent whole body functional impairment for psychological impairment with an 11 percent whole body functional impairment for injuries to the right upper extremity.

Respondent contends Judge Barnes erred. Respondent does not contest that claimant sustained a work-related injury but respondent does contest that the accident

either caused or aggravated claimant's psychological problems. Instead, respondent argues claimant's psychological problems stem from both preexisting depression and a preexisting somatoform disorder, neither of which were aggravated by the accident. Accordingly, respondent requests that claimant's permanent disability be modified to a three percent functional impairment to the right upper extremity, which is Dr. John P. Estivo's rating for claimant's right lateral epicondylitis.

Conversely, claimant argues the greater weight of the evidence establishes that claimant sustained a 45 percent whole body functional impairment for psychological impairment and a 15 percent whole body functional impairment for injuries to the right upper and right lower extremities. Nonetheless, at oral argument before the Board, claimant requested the Board to affirm the December 27, 2002 Award.

The only issues before the Board on this appeal are:

1. Are the medical records that were introduced at the various preliminary hearings considered part of the record for purposes of determining claimant's final award?

2. What is the nature and extent of claimant's injuries and disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

Claimant began working for respondent, a school district, on approximately August 24, 1998. Before commencing work for respondent, claimant had been off work following a 1996 car accident and resulting back surgery. After recovering from the back surgery, claimant attempted to return to her former employer, the Red Cross, where she had worked for approximately 11 years. But the Red Cross had lost some funding and, consequently, the organization did not permit claimant to return to work.

On September 1, 1998, claimant fell and injured herself while entering a school where she worked for respondent as a parent involvement coordinator. Claimant was immediately taken to an emergency room where she complained of right elbow pain, right ankle sprain and right thigh pain. The parties agreed that claimant's accident arose out of and in the course of her employment with respondent.

After receiving conservative medical treatment from another doctor or doctors, in December 1998 claimant began seeing orthopedic surgeon Dr. John P. Estivo. As earlier x-rays and an MRI of the right elbow were unremarkable, Dr. Estivo diagnosed right lateral

epicondylitis. The doctor injected claimant's right elbow. When claimant's elbow pain continued, the doctor ordered nerve conduction tests, which came back negative. Claimant also had an MRI of the cervical spine that Dr. Estivo read as negative. Dr. Estivo injected the right elbow a second time. But the second injection also failed to provide significant relief. Consequently, on March 9, 1999, the doctor released claimant from treatment with restrictions against doing more than 120 repetitions in a two-hour period with the right upper extremity. The diagnosis remained right lateral epicondylitis. Claimant returned to Dr. Estivo on either March 19 (per both the doctor's testimony and his February 19, 2002 report) or May 19 (per the doctor's notes), 1999, and was again released.

While receiving treatment from Dr. Estivo, claimant continued to work for respondent in her position as a parent involvement coordinator. Although the record is not entirely clear, it appears claimant completed the 1998-1999 school year, working through June 7, 1999, performing her regular job duties. According to claimant, who speaks both English and Spanish, her regular job duties included checking in tardy students, translating for the school social worker and school nurse, assisting with teacher-parent conferences, taking students home who misbehaved or who were inappropriately dressed, and translating during telephone conversations.

Shortly before the end of the 1998-1999 school year, at her attorney's request claimant saw Dr. Pedro A. Murati to be evaluated for purposes of this claim. Dr. Murati examined claimant on June 3, 1999, and several days later ran nerve conduction studies, which the doctor determined were consistent with his diagnoses of right posterior interosseous nerve entrapment, right carpal tunnel syndrome and right ulnar cubital syndrome. In his June 3, 1999 report, the doctor noted that claimant initially experienced pain in her back, ankle and thigh following the September 1998 accident but those symptoms lasted only for a short time. As a result of the June 1999 evaluation and nerve conduction studies, Dr. Murati recommended a course of physical therapy, including phonophoresis in the area of the right extensor muscles, and pain medications.

In August 1999, claimant saw Dr. Jane K. Drazek who initially diagnosed right lateral epicondylitis. But when the doctor saw claimant in December 1999, the doctor believed that there might have been a cervical component in claimant's symptoms. According to the doctor, claimant was experiencing neck pain that may have developed because claimant was holding her arm and, therefore, not moving her neck in a normal manner. And in an August 23, 1999 letter from Dr. Drazek to respondent's attorney, the doctor diagnosed claimant as having chronic right upper extremity pain with strong clinical evidence for right lateral epicondylitis, electrodiagnostic evidence of mild right carpal tunnel syndrome, right ulnar cubital syndrome and posterior interosseous nerve entrapment.

Claimant appeared at an October 14, 1999 preliminary hearing requesting temporary total disability benefits from August 23, 1999, which was the first date that she

had seen Dr. Drazek. At the time of the hearing, claimant had not worked since the end of the 1998-1999 school year. Claimant testified that she did not return to work for respondent in August 1999 for the 1999-2000 school year due to her right upper extremity problems.

Again, the record is not entirely clear, but sometime after the October 1999 preliminary hearing claimant returned to work for respondent and was assigned to work at the school district's resource center where she primarily stuffed envelopes. Respondent's attorney represents that claimant returned to work for respondent in that accommodated position in November 1999.

In late December 1999, at her attorney's request, claimant saw a psychologist, Dr. Thomas M. Ruby, for an evaluation. Based upon that evaluation, Dr. Ruby determined that claimant displayed many of the classic symptoms of depression such as poor sleep, weight loss, fearfulness around people, spontaneous tearfulness, hypersensitivity and irritability. The doctor concluded that claimant's depression, or dysthymia, was a likely reaction to the September 1998 accident and that claimant would benefit from treatment. In short, the doctor believed the accident aggravated claimant's dysthymia.

As the issue of claimant's psychological condition arose, respondent referred claimant for evaluation by clinical psychologist Dr. Marc A. Quillen. Dr. Quillen saw claimant on January 31, 2000, and conducted psychological testing, the results of which the doctor determined were invalid and not subject to being interpreted. But on the basis of the interview, claimant's history and review of claimant's records, Dr. Quillen determined claimant had longstanding depression that grew out of her dependent, somatocizing personality. Moreover, the doctor concluded that there was no causal relationship between claimant's pain and disability and the September 1998 accident. In his February 18, 2000 report, Dr. Quillen wrote, in part:

> The injury at work appears to be an organizing event which Ms. Gutierrez has used to explain life *[sic]* difficulties. There is no causal relationship between Ms. Gutierrez' current pain and disability complaints and the work injury. In addition, her willingness to both deliberately and "subconsciously" exaggerate her pain is related to her premorbid personality structure, and not the work injury. There is no present psychological disturbance that can be traced to the work injury, and the pain complaints appear to be grossly exaggerated.

In March 2000, claimant had another preliminary hearing in which she requested psychological counseling. At that hearing the parties presented the contrasting opinions from Dr. Ruby and Dr. Quillen. The Judge then ordered an independent evaluation by psychiatrist Dr. Elsie E. Steelberg. After Dr. Steelberg reported back to the Judge, by order dated June 20, 2000, the Judge authorized claimant to receive therapy from Dr. Ruby.

Nonetheless, claimant worked the accommodated job provided by respondent at the resource center until approximately April 28, 2000, when she was placed on a medical leave of absence. The leave of absence followed an April 26, 2000 note from Dr. Drazek stating that claimant was unable to use her right upper extremity and that claimant was totally disabled.

After being placed on that medical leave, claimant was without income and eventually was evicted from her home and lost her car. Claimant lived at a local lake and lived with friends and relatives until early August 2000 when she moved to Enid, Oklahoma. Consequently, claimant saw Dr. Ruby on June 28, July 11 and August 1, 2000, before leaving for Oklahoma. According to Dr. Ruby's records, claimant was suffering from depression and anxiety and was unable to work at that point in time. Moreover, according to Dr. Ruby, claimant's psychotherapy progress was substantially hindered as she was in a survival mode and was reduced to seeking food and shelter.

In October 2000, claimant appeared at another preliminary hearing requesting temporary total disability benefits from the date that she began treating with Dr. Ruby. At that time, claimant was homeless and without any financial resources. Claimant had been denied both unemployment benefits and Social Security disability benefits and had contacted charities for help. Claimant testified that she had neither worked nor looked for work since Dr. Ruby had taken her off work in late June 2000.

In January 2001, despite continuing to live in Oklahoma, claimant recommenced treatment with Dr. Ruby. In February 2001, claimant moved back to Kansas, living in a Wichita motel. The doctor then provided psychotherapy through July 23, 2001 when, according to the doctor, the Judge discontinued claimant's treatment. The administrative file confirms that on August 6, 2001, the Judge discontinued Dr. Ruby's authorization.

At respondent's request, claimant underwent evaluation in late February 2001 by clinical psychologist Dr. Mitchel A. Woltersdorf. As written in his March 1, 2001 report, the doctor then concluded that claimant was not depressed before the September 1998 accident but she had developed depression sometime after the accident. Moreover, Dr. Woltersdorf concluded that claimant had a psychological profile that was aggravated either by her accident or the treatment that she had received. The doctor opined that claimant was "definitely not" hysterical, somatocizing or malingering. Dr. Woltersdorf's March 1, 2001 report read, in part:

> If we look back at her profile and the interpretations that came from the literature on her profile it is abundantly clear that her chronic profile, that has been aggravated either by the accident or her treatment to date, has a tendency to misperceive bodily signals. I went back and added italics to portions of passages that make this very point. Simply put, depressed people, some of them, will begin

> to feel physically more ill when they are depressed then *[sic]* when they are not and if they have Ms. Gutierrez's tendency to over-report body signals, they will have the appearance of the hysterical or malingerers when they are not.
>
> So does she over report symptoms? Definitely. Can she be believed when she reports symptoms? Definitely not. Is she hysterical, somatocizing, or malingering? Definitely not.
>
> I ruled out the issue of a previous head injury from our time together. Dr. Doerr's *[sic]* "report" is essentially correct in that Ms. Gutierrez is not a somatoform patient but fails to say what she is.

In November 2001, at her attorney's request, claimant returned to Dr. Murati for further evaluation. Based upon that evaluation, Dr. Murati diagnosed right carpal tunnel syndrome, right ulnar cubital syndrome and right ankle pain with crepitus. The doctor rated claimant as having an 11 percent whole body functional impairment due to the right upper extremity injury and a four percent whole body functional impairment due to the right ankle injury.

Claimant again saw Dr. Woltersdorf in late January 2002. Because of information that the doctor learned at a recent seminar, the doctor changed his opinion whether claimant had a somatoform disorder. As of the doctor's February 1, 2002 report, the doctor concluded that claimant definitely had a somatoform disorder. In the February 1, 2002 report, the doctor also changed his opinion whether claimant was depressed before the accident. As of February 2002, the doctor believed it was likely that claimant was somewhat depressed before the accident. And contrary to Dr. Estivo's observations as set forth below, according to Dr. Woltersdorf claimant did not look or act depressed at their January 31, 2002 meeting. In his February 1, 2002 report, Dr. Woltersdorf wrote, in part:

> . . . the regularity with which depression and Somatoform Disorders appears in the literature, the test base, and in the clinic leads me to suspect, though not prove, that Ms. Gutierrez was likely somewhat depressed prior to her accident. Additionally, remember that Ms. Gutierrez is "faking good" and thus is denying emotional harm from the accident. The fact that depression still appears on the exam while Ms. Gutierrez is denying emotional problems supports the notion that it is not accident related but likely premorbid. In essence, she is saying to us "look at my physical problems, my pain, not my mind or head."
>
> When answering this we must combine test results with clinical presentation. Ms. Gutierrez does not look nor act depressed. Therefore, whatever depression is present is not debilitating or impairing. It is likely so because Ms. Gutierrez has lived with it for so long.

> If the accident did cause the depression there obviously was no aggravation. If the depression was already present at the time of the accident, the aggravation has been minimal. In the end we have a woman who is denying emotional problems but cannot keep from showing them on exam.

On February 19, 2002, at respondent's request, claimant returned to Dr. Estivo for a final evaluation. At the February 2002 examination, claimant was very emotional and, according to Dr. Estivo, clearly suffered from depression. Based upon the examination, the doctor again diagnosed right lateral epicondylitis. The examination revealed that claimant had no sensory or motor deficits and no muscle wasting in the upper extremities. Contrary to Dr. Murati, Dr. Estivo found no evidence of either carpal tunnel syndrome or cubital tunnel syndrome. Moreover, claimant had no right lower extremity complaints. According to Dr. Estivo, claimant, at most, had sustained a three percent right upper extremity impairment. Because of claimant's subjective pain complaints, the doctor concluded that claimant should be restricted to no more than 120 repetitions in a two-hour period and task rotation.

Fortunately, when claimant testified at her May 2002 regular hearing, her fortunes and psychological condition had significantly improved. Rather than being homeless or living in a motel, in March 2002 claimant had moved into an apartment. Although she continued to experience symptoms consistent with depression, claimant's crying spells had decreased, she had reestablished relationships with family, and she had returned to work with another employer.

1. Are the medical records that were introduced at the preliminary hearings part of the record for determining the final award?

At oral argument before the Board, claimant challenged whether the medical records that had been introduced at the various preliminary hearings were part of the record for determining claimant's final award. The issue specifically arose over Dr. Quillen's February 18, 2000 report, which was introduced at the March 14, 2000 preliminary hearing at which claimant was requesting psychological counseling.

The general rule, as set forth by K.S.A. 44-519, is that except at preliminary hearings medical reports are not admissible and should not be considered as part of the record for final award purposes unless the health care provider who prepared the report testifies. That statute provides:

> Except in preliminary hearings conducted under K.S.A. 44-534a and amendments thereto, no report of any examination of any employee by a health care provider, as provided for in the workers compensation act and no certificate issued or given by the health care provider making such examination, shall be competent evidence in

> any proceeding for the determining or collection of compensation unless supported by the testimony of such health care provider, if this testimony is admissible, and shall not be competent evidence in any case where testimony of such health care provider is not admissible.

The general rule is further clarified by administrative regulation, which provides that medical reports may be considered for purposes of determining a final award, if the parties agree.

> Medical reports or any other records or statements shall be considered by the administrative law judge at the preliminary hearing. However, the reports shall not be considered as evidence when the administrative law judge makes a final award in the case, unless all parties stipulate to the reports, records, or statements or unless the report, record or statement is later supported by the testimony of the physician, surgeon, or other person making the report, record, or statement. . . . [1]

At the July 1, 2002 hearing before the Judge to conclude the regular hearing testimony, the parties agreed the preliminary hearing transcripts from the earlier hearings should be considered as evidence for final award purposes. But the parties did not specifically address whether the stipulation pertained to only the testimony presented or whether the stipulation also included the medical records and reports that had been introduced at those earlier hearings.

When claimant filed her submission letter with the Judge, claimant did not object to the medical records in question. Instead, claimant noted in her submission letter that the record for final award purposes included all three preliminary hearings and the exhibits that were attached to each preliminary hearing transcript.

Based upon the above, the Board concludes that claimant agreed to the admission of the preliminary hearing exhibits as evidence for purposes of determining the final award. Claimant's belated argument that those exhibits should not now be considered is contrary to her submission letter and disingenuous. Accordingly, all of the medical records and other exhibits attached to the various preliminary hearing transcripts should be considered as part of the evidence for determining claimant's final award.

2. What is the nature and extent of claimant's injury and disability.

Dr. Drazek provided claimant with the last medical treatment that she obtained for her physical injuries. According to various medical notes in the record, claimant's last visit

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[1] K.A.R. 51-3-5a.

with Dr. Drazek occurred in early April 2000. And Dr. Ruby provided claimant with the last therapy for her psychological condition, as his last visit with claimant was July 23, 2001.

The Judge determined that claimant sustained an 11 percent whole body functional impairment, which was based upon Dr. Murati's opinion that claimant had a 19 percent impairment to the right upper extremity. In this instance, the Board finds Dr. Murati's right upper extremity rating more persuasive than Dr. Estivo's. Further, Dr. Murati's diagnoses are supported by Dr. Drazek's August 23, 1999 letter to respondent's attorney. The Board agrees with the Judge that claimant failed to prove that she permanently injured her right lower extremity. Consequently, claimant is entitled to receive permanent disability benefits for the right upper extremity injury but not the alleged right lower extremity injury.

Regarding the psychological impairment, the Board affirms the Judge's finding that the depression and anxiety that claimant developed after the September 1998 accident are a natural and direct consequence of the accident. The Board is persuaded by the opinions of claimant's treating psychologist, Dr. Ruby, that the accident aggravated a preexisting dysthymia or depression. The Board notes that Dr. Ruby's causation opinion is supported by Dr. Steelberg, the psychiatrist who was selected by the Judge for a psychiatric evaluation. Accordingly, claimant is entitled to receive workers compensation benefits for the aggravation of her depression and anxiety that stems from the September 1998 accident.

Nonetheless, the Board concludes that the record fails to establish that claimant's depression has reached a maximum level of improvement. The doctor who arguably is in the best position to assess claimant's psychological condition and improvement, Dr. Ruby, testified that claimant had not reached a maximum level of improvement when he last saw her in July 2001 and that they were at a point where claimant could have gained significant benefit. The doctor testified, in part:

> Q. (Mr. Seiwert) And would that -- when you saw her last on July 23rd had she reached the maximum level of improvement that she might have been able to reach?
>
> A. (Dr. Ruby) I didn't think so. I thought that there was still more things we could have worked on. She was making some adjustments. I think she finally found housing, which I know was a big relief for her to have one less stress, but she was still having problems even coping with a new housing arrangement. I think that she was still on the path of reconciling with her two adult children. She had a relationship with a man. I wasn't sure exactly where she was with her symptomatology. It just seemed like we were at a point where we could have -- could have continued, much to her benefit. So I guess the short answer is I did not

> think she reached maximum therapeutic benefits. There was still areas to work on and to improve for her.[2]

Moreover, Dr. Woltersdorf, who saw claimant in late January 2002, also indicated that claimant had not reached a maximum level of improvement.

Based upon the uncontradicted testimony of the psychological experts that claimant has not reached a maximum level of improvement and that she continues to need appropriate psychological treatment, the Board finds that claimant's request for permanent disability benefits for the psychological condition should be denied. Nevertheless, the Board finds that claimant should receive additional psychological treatment and therapy for her depression.

Based upon the above, the Board concludes that the December 27, 2002 Award should be modified to award claimant permanent disability benefits for a 19 percent permanent impairment to the right upper extremity. Should claimant have permanent psychological impairment after she has received appropriate treatment, the parties may request to review and modify this award.

AWARD

WHEREFORE, the Board modifies the December 27, 2002 Award and grants claimant permanent disability benefits under the scheduled injury statute, K.S.A. 1998 Supp. 44-510d, for a 19 percent permanent partial disability to the right upper extremity. The Board also orders respondent to provide claimant with psychological counseling and/or psychiatric treatment with Dr. Thomas M. Ruby or another doctor as the Judge may select.

Theresa Gutierrez is granted compensation from USD 259 for a September 1, 1998 accident and resulting disability. Based upon an average weekly wage of $400.80, Ms. Gutierrez is entitled to receive 46.47 weeks of temporary total disability benefits at $267.21 per week, or $12,417.25, plus 31.07 weeks of permanent partial disability benefits at $267.21 per week, or $8,302.21, for a 19 percent permanent partial disability, making a total award of $20,719.46, which is all due and owing less any amounts previously paid.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

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[2] Ruby Depo. (Apr. 9, 2002) at 11-12.

Dated this ____ day of July 2003.

_____
BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

c: Joseph Seiwert, Attorney for Claimant
Gary K. Albin, Attorney for Respondent
Nelsonna Potts Barnes, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director