

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

MARIA SILVIA RIVERA)
Claimant,)
)
vs.)
)
TYSON FRESH MEATS) CS-00-0372-430
Self-Insured Respondent.) AP-00-0448-731

ORDER

Claimant requested review of the January 7, 2020, Award by Administrative Law Judge (ALJ) Pamela J. Fuller.

APPEARANCES

Stanley R. Ausemus appeared for Claimant. Thomas G. Munsell appeared for Self-Insured Respondent.

RECORD AND STIPULATIONS

The Board considered the record and adopted the parties' stipulations listed in the Award. The Board also considered the pleadings and orders contained in the administrative file. The Board took judicial notice of the Combined Values Chart from the *AMA Guides to the Evaluation of Permanent Impairment*, Fourth Edition (*AMA Guides*). The Board reviewed the parties' briefs and heard oral argument on May 21, 2020.

ISSUE

What is the nature and extent of disability due to the injuries Claimant sustained from the work-related accident of September 5, 2014?

FINDINGS OF FACT

Claimant was sexually assaulted by a coworker while working for Respondent on September 5, 2014. As a result of the assault, Claimant sustained physical injuries to her low back. Respondent authorized a health care provider to treat Claimant's physical injuries. Claimant received conservative treatment from Dr. Hunsberger for her low back injuries. Claimant also underwent a surgical consultation by Dr. Moskowitz, who did not believe Claimant required surgery. Claimant returned to work while receiving treatment for her physical injuries. There is no evidence the treating health care providers imposed permanent restrictions due to the physical injuries to the low back. Claimant also sustained compensable psychological injuries, namely post-traumatic stress disorder and depression.

Claimant initially obtained psychological treatment on her own from Compass Behavioral Health in 2015.

Claimant had multiple, unrelated health conditions. Claimant stopped working due to her personal health problems. Claimant worked her normal position for Respondent until April 2016. Claimant was formally terminated by Respondent in 2017, after she was off work for one year. Claimant qualified to receive Social Security disability benefits due to her non-work-related health problems. Claimant also received treatment in the past for depression. Claimant's social history is notable for prior domestic abuse and custody issues involving her children. Approximately five weeks after the work-related assault, Claimant's son was killed in a motor vehicle accident. Claimant's daughter experienced legal issues resulting in loss of custody of her children. Two of Claimant's grandchildren currently live with Claimant. Claimant intends to seek legal custody of the grandchildren living with her.

Dr. Jones, a psychologist, performed an examination of Claimant at her attorney's request on July 23, 2015. A Spanish-English interpreter was present. Dr. Jones reviewed the details of Claimant's assault, Claimant's subsequent traumatic amnesia and current problems. Claimant's social and family history was also reviewed. Claimant reported anxiety, loss of interest in social activities, an inability to concentrate, loss of appetite and nightmares. Dr. Jones administered psychological tests: "Serial 7's" to assess attention and concentration, which Claimant was unable to complete due to an inability to concentrate; the Beck Depression Inventory, which confirmed the presence of depression; and the Post-Traumatic Stress Disorder Checklist, which demonstrated findings consistent with post-traumatic stress disorder. Based on his examination and testing, Dr. Jones diagnosed post-traumatic stress disorder and major depression disorder, primarily due to the work-related assault. Dr. Jones rated Claimant's permanent impairment at 36-60% of the body as a whole based on the *AMA Guides*. Dr. Jones also recommended Claimant continue receiving treatment at Compass Behavioral Health.

Dr. Pratt performed a Court-ordered independent medical examination of Claimant on June 2, 2016. An interpreter was present. Claimant reported low back pain. Claimant's course of physical and psychological treatment was reviewed. Dr. Pratt found tenderness to palpation of the lumbosacral region to the coccyx and limited range of motion of the lumbar spine. Giveway weakness of the hips, bilaterally, was noted. Claimant's overall strength and sensation were intact, except for the toes on the left side, and reflexes were symmetrical. Three of five Waddell's signs were found. Dr. Pratt diagnosed low back pain with sacrococcygeal discomfort without verifiable radiculopathy, as well as post-traumatic stress disorder and depression. An MRI was recommended and was performed on July 12, 2016. On July 18, 2016, Dr. Pratt issued an addendum report interpreting the MRI as showing a normal pelvis and sacrum. Dr. Pratt confirmed Claimant reached maximum medical improvement for her low back injury, and he rated Claimant's functional impairment at 5% of the body as a whole under the *AMA Guides*, based on the Diagnosis Related Estimate, Category II. Dr. Pratt did not impose permanent restrictions for

Claimant's physical injuries, and he did not comment on future medical. Dr. Pratt noted Claimant required treatment for her psychiatric condition, but he was unable to state whether it was related to Claimant's physical injuries or assault.

Dr. Ibarra, a psychiatrist, performed a Court-ordered independent medical examination of Claimant on December 8, 2016. Claimant and Dr. Ibarra communicated together in Spanish without an interpreter. Claimant described the work-related assault and the worsening of her condition due to personal events. Dr. Ibarra noted Claimant exhibited signs consistent with post-traumatic stress disorder, particularly paranoia, staying at home and exhibiting a fear of going outdoors. Claimant also reported difficulty sleeping, with her sleep disrupted by nightmares and flashbacks. Dr. Ibarra diagnosed post-traumatic stress disorder due to multiple events, including the work-related assault. Additional medical treatment was recommended.

Following Dr. Ibarra's evaluation, Respondent authorized continued psychological treatment at Compass Behavioral Health for post-traumatic stress disorder and depression.

At the regular hearing, Claimant testified she continues to experience constant back pain running down both legs. Claimant cannot bend or stand more than five to ten minutes, and Claimant's lifting is limited to five to ten pounds. Claimant takes hydrocodone for her low back symptoms. Claimant also reported ongoing psychological problems, with problems sleeping and nightmares, and difficulty being around people. Claimant closes the curtains in her home at night out of concern for her safety. Claimant experiences flashbacks. Claimant testified she felt sad about the death of her son, but denied suffering her current problems either before the assault or on account of her son's death. Claimant does volunteer work for the Salvation Army on a part-time basis, and she takes care of the two grandchildren living with her. Claimant does not see a physician for her low back problems, but she continues to see a mental health care provider for counseling and medication.

Dr. Jones reevaluated Claimant on August 31, 2018, with the assistance of an interpreter. Dr. Jones reviewed additional treatment records from Compass Behavioral Health and evaluated Claimant's mental status. Dr. Jones noted Claimant aged significantly, and remained anxious and tearful. Dr. Jones thought Claimant's memory was worse than before, and Claimant appeared depressed. Claimant reported the nightmares continued, and she was taking medication to help her sleep. Dr. Jones noted Claimant volunteered at the Salvation Army two to three times per week, inconsistently working 30-60 minutes at a time. Dr. Jones did not administer the psychological tests he administered previously. Dr. Jones thought Claimant's psychological treatment was inadequate and recommended further treatment. Dr. Jones also rated Claimant's impairment at 30-60% under the *AMA Guides*. Dr. Jones clarified his rating in his deposition, and testified Claimant's impairment was 50% without elaboration. Dr. Jones acknowledged on cross-examination communicating directly with Claimant without an interpreter would be better, and he admitted he did not review another psychologist's report before testifying.

Dr. Schmidt, a psychologist, hired by Respondent, evaluated Claimant on November 26, 2018, with the assistance of an interpreter. Claimant reviewed the assault and her personal history with Dr. Schmidt, and advised Dr. Schmidt of the medications she was taking for anxiety and depression. Treatment records from Compass Behavioral Health were reviewed. Dr. Schmidt testified the symptoms Claimant reported were similar to the symptoms Claimant described at the regular hearing. Dr. Schmidt administered a Beck Depression Inventory, which indicated mild symptoms of depression; an MCMI-IV inventory, which confirmed the presence of moderate post-traumatic stress disorder; and a Symptom Checklist 90-R, which was a list of symptoms Claimant identified as having. Claimant reported her grandchildren were her motivation for wanting to get better. Dr. Schmidt diagnosed post-traumatic stress disorder in partial remission, and major depression disorder in remission. Dr. Schmidt thought Claimant's prior psychological condition and history of domestic abuse contributed to her overall impairment, but the work-related assault was the prevailing factor causing Claimant's post-traumatic stress disorder. Dr. Schmidt rated Claimant's overall impairment at 25% of the body as a whole under the *AMA Guides*, and apportioned 15% impairment to the work-related assault and 10% impairment preexisting. Dr. Schmidt recommended Claimant continue counseling and medication for a year. After reviewing the rating reports of Drs. Jones and Ibarra, Dr. Schmidt thought the ratings indicated Claimant was demonstrating improvement. Dr. Schmidt disagreed with Dr. Jones' 50% rating, and testified an individual with post-traumatic stress disorder producing 50% impairment would be unable to leave the house and would exhibit dangerous behavior, which Claimant did not display at his evaluation. Dr. Schmidt admitted using an interpreter to communicate with a patient can be limiting, but he was not certain the interpreter added or subtracted from the context of his evaluation of Claimant.

Dr. Ibarra reevaluated Claimant on March 18, 2019. Claimant and Dr. Ibarra communicated directly without an interpreter. Dr. Ibarra noted Claimant was doing much better compared to the prior examination. Claimant was friendly and cooperative during the examination, communicated appropriately and displayed no overt signs of anxiety. Dr. Ibarra did not note disorganized thoughts, delusions or hallucinations, signs of paranoid behavior or tearfulness. No formal psychological tests were administered because, according to Dr. Ibarra, psychiatrists did not use written tests or surveys to assess mental status. Dr. Ibarra thought Claimant was functioning well, and was taking care of herself and her grandchildren while engaging in work activities. Dr. Ibarra diagnosed symptomatic post-traumatic stress disorder, which did not prevent Claimant from functioning. Dr. Ibarra found no evidence of permanent impairment, which was based on Claimant's actual presentation and his perception of Claimant's ability to function in the world, rather than based on psychological testing or the *AMA Guides*. Dr. Ibarra admitted he had access to Dr. Schmidt's test reports, but disagreed with the MCMI-IV Inventory due to possible cultural bias and Claimant's clinical presentation. On cross-examination, Dr. Ibarra testified under the *AMA Guides* Claimant may be in Class 2, which indicates mild impairment rated at 10-20% of the body as a whole, but Dr. Ibarra later testified Claimant had no permanent impairment.

ALJ Fuller issued the Award on January 7, 2020. ALJ Fuller found Claimant sustained 5% functional impairment of the body as a whole for the physical injuries to the low back based on Dr. Pratt's opinions. ALJ Fuller also found Claimant did not sustain permanent impairment due to her psychological injuries based on Dr. Ibarra's opinions. Unauthorized medical was awarded. ALJ Fuller awarded future medical for Claimant's psychological injuries, but denied future medical for the physical injuries to the low back. Claimant seeks review of the permanent partial disability portion of the Award.

ANALYSIS AND CONCLUSIONS OF LAW

Claimant argues the award of permanent partial disability compensation is erroneous because it does not account for permanent psychological impairment. Respondent argues the award of permanent partial disability compensation is correct because the Court correctly adopted the conclusions of the Court-ordered examining psychiatrist, who concluded Claimant did not sustain permanent impairment due to her psychological injuries.

It is the intent of the Legislature the Workers Compensation Act be liberally construed only for the purpose of bringing employers and employees within the provisions of the Act.¹ The provisions of the Workers Compensation Act shall be applied impartially to all parties.² The burden of proof shall be on the employee to establish the right to an award of compensation, and to prove the various conditions on which the right to compensation depends.³

Claimant seeks permanent partial disability compensation for her low back and psychological injuries. Claimant's injuries are compensated as an injury to the body as a whole.⁴ The extent of permanent partial disability Claimant is eligible to receive shall be based on the functional impairment Claimant sustained on account of the injury as established by competent medical evidence and based on the *AMA Guides to the Evaluation of Permanent Impairment*, Fourth Edition, if the impairment is contained therein.⁵

With regard to Claimant's physical injuries to the low back, the only evidence of impairment is the narrative report of Dr. Pratt. Dr. Pratt stated Claimant sustained

¹ See K.S.A. 44-501b(a).

² See *id.*

³ See Supp. 44-501b(c).

⁴ See K.S.A. 44-510e(a).

⁵ See K.S.A. 44-510e(a)(2)(b).

impairment of 5% to the body as a whole due to the low back injuries. Based on this uncontested evidence, the Board finds and concludes Claimant sustained 5% functional impairment of the body as a whole due to the low back injuries sustained in the compensable assault.

The primary issue is whether Claimant sustained permanent impairment due to her compensable psychological injuries. At the regular hearing, Claimant testified she continues to have problems sleeping, experiences flashbacks of the assault and avoids being around people. Claimant closes her curtains at night because she is afraid for her safety. Claimant, however, does maintain some level of functioning, is raising two grandchildren alone and does volunteer work on a very limited basis. Claimant can drive and can attend to her personal care.

Dr. Jones noted in his rating report symptoms in excess of those described by Claimant at the regular hearing, including an inability to concentrate and memory issues. Dr. Jones did not perform objective psychological tests as he did for the first evaluation. Dr. Jones initially expressed a wide range of impairment, 30-60%, which he later defined in his deposition as 50% without elaboration. Dr. Schmidt noted symptoms in his examination consistent with the symptoms reported by Claimant at the regular hearing. Dr. Schmidt also administered objective psychological tests to confirm his diagnoses of post-traumatic stress disorder in partial remission and major depressive disorder in remission. Dr. Schmidt rated Claimant's overall impairment at 25% of the body as a whole, with 10% due to Claimant's preexisting, personal factors, and 15% due to the work-related assault. Dr. Ibarra performed no psychological tests and testified psychiatrists did not administer such tests to evaluate mental state. Dr. Ibarra noted Claimant was doing well during his examination. Dr. Ibarra's description of Claimant's condition was different from Claimant's presentation to the other examining health care providers and Claimant's regular hearing testimony. Dr. Ibarra testified Claimant sustained no impairment based on her apparent ability to function and to work, later testified Claimant's impairment could have been rated at 10-20% of the body as a whole under the *AMA Guides*, but finally testified Claimant had no impairment.

Claimant argues the rating of Dr. Ibarra should be disregarded because his methodology differed from the *AMA Guides*' requirements. The *AMA Guides* are not part of the record and cannot be considered independently by the Appeals Board.⁶ The use of psychological testing, however, can be considered in assessing the credibility of a health care provider's opinion without consulting the *AMA Guides*. Dr. Jones' description of Claimant's symptoms is inconsistent with the presentation of the other providers and Claimant's regular hearing testimony. Moreover, Dr. Jones' ultimate impairment rating is not based on psychological testing. Dr. Ibarra's opinions suffer from the same deficiencies

⁶ See *Durham v. Cessna Aircraft Co.*, 24 Kan. App. 2d 334, 334-35, 945 P.2d 8 (1997); see also *Cruz v. Cargill Meat Solutions Corp.*, No. CS-00-0065-062, 2019 WL 7546792, at *2 (Kan. WCAB Dec. 23, 2019).

as Dr. Jones'. Dr. Schmidt's opinions are based on psychological testing, his report of Claimant's symptoms is consistent with Claimant's regular hearing testimony, and Dr. Schmidt's opinions consider the impact of Claimant's psychological and social history. The Board finds Dr. Schmidt's opinions the most credible. The Board finds and concludes Claimant sustained permanent functional impairment of 25% of the body as a whole for her psychological condition, of which 10% is due to Claimant's preexisting or personal conditions and 15% of the body as a whole is due to Claimant's work-related psychological injuries.

The remaining issue is determining Claimant's total impairment. The parties agreed the Appeals Board may use the Combined Values Chart from the *AMA Guides* to convert the separate low back and psychological ratings to a single impairment rating, if psychological impairment is present. Claimant's functional impairment for the low back injury is 5% of the body as a whole, and Claimant's functional impairment for the psychological injury is 15% of the body as a whole. Under the Combined Values Chart, Claimant's total impairment is 19% of the body as a whole.⁷ Under K.S.A. 44-510e, Claimant is entitled to an award of permanent partial disability compensation based on 19% functional impairment to the body as a whole due to the physical and psychological injuries she sustained from the work-related assault.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be modified in part. Claimant should receive an award of permanent partial disability compensation based on 19% functional impairment of the body as a whole, based on 5% functional impairment of the body as a whole for Claimant's low back injuries and 15% functional impairment of the body as a whole for post-traumatic stress syndrome and depression.

AWARD

WHEREFORE it is the finding, decision and order of the Appeals Board the Award of Administrative Law Judge Pamela J. Fuller dated January 7, 2020, is modified. Claimant is awarded permanent partial disability compensation based on 19% functional impairment to the body as a whole, based on the *AMA Guides to the Evaluation of Permanent Impairment*, Fourth Edition. This impairment rating represents 5% functional impairment to the body as a whole for physical injuries to the low back and 15% functional impairment of the body as a whole for post-traumatic stress disorder and depression. This award represents 78.85 weeks of permanent partial disability compensation paid at \$427.25 per

⁷ See *Guides to the Evaluation of Permanent Impairment*, Fourth Edition, *Combined Values Chart*, p.322.

week, making a total award of permanent partial disability compensation of \$33,688.66.

As of June 17, 2020, there are 78.85 weeks of permanent partial disability compensation at \$427.25 per week due and owing, for a total due and owing of \$33,688.66, which is ordered paid in one lump-sum by Self-Insured Respondent, less any compensation previously paid. The parties' right to review and modification remains open, as provided by statute. In all other respects, the Award dated January 7, 2020, is affirmed.

IT IS SO ORDERED.

Dated this 17th day of June 2020.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: (Via OSCAR)

Stanley R. Ausemus
Thomas G. Munsell
Hon. Pamela J. Fuller