

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

APRIL HOUSTON)	
Claimant)	
)	
V.)	CS-00-0102-047
)	AP-00-0449-251
)	
JOHNSON COUNTY NURSING CENTER)	CS-00-0148-842
Respondent)	AP-00-0449-250
)	
AND)	
)	
KANSAS ASSOCIATION OF HOMES)	
FOR THE AGING INS GRP)	
Insurance Carrier)	

ORDER

STATEMENT OF THE CASE

Claimant requested review of the January 28, 2020, Award entered by Administrative Law Judge (ALJ) Kenneth J. Hursh. The Board heard oral argument on May 14, 2020. John G. O'Connor of Kansas City, Kansas, appeared for claimant. Michael L. Entz of Topeka, Kansas, appeared for respondent and its insurance carrier (respondent).

The ALJ found claimant sustained a 4.5 percent permanent partial impairment to the right shoulder. The ALJ determined claimant did not suffer any permanent head, neck, or left shoulder injury. Further, the ALJ found claimant is not entitled to future medical treatment.

The Board considered the record and adopted the stipulations listed in the Award.

ISSUES

Claimant argues she is entitled to permanent partial disability compensation and future medical benefits for post-concussion syndrome. Claimant contends the ALJ's conclusion she suffered no permanent injury due to her head injury of December 17, 2016, is contrary to the weight of the evidence.

Respondent maintains the ALJ's Award should be affirmed in all respects. Respondent argues the denial of permanent disability benefits related to claimant's head injury is supported by the evidence.

The issues for the Board's review are:

1. What is the nature and extent of claimant's work-related disability?
2. Is claimant entitled to future medical benefits?

FINDINGS OF FACT

In 2016, claimant reported two accidents while working for respondent. The first accident, Case No. CS-00-0102-047, occurred April 23, 2016, when claimant injured her right shoulder when she was pushed into a wall by a combative patient. While claimant filed a brief under both case numbers, she did not identify any issues or outline any arguments relevant to the April 2016 accident.

The second accident, Case No. CS-00-0148-842, occurred on December 17, 2016. Claimant slipped on ice and fell to the ground after exiting her vehicle in respondent's parking lot. Claimant testified she struck her right shoulder and head during her fall. Claimant stated she experienced memory loss, dizziness, headaches, ringing ears, and double vision from a concussion. After an evaluation at the emergency room, claimant treated with neurologist Dr. Michael Rippee for post-concussion issues. Claimant was prescribed special glasses and vestibular therapy for her double vision, and she wears ear plugs in loud environments. Dr. Rippee eventually released claimant at maximum medical improvement (MMI). Dr. Rippee did not testify.

Claimant continued working for respondent with no restrictions until February 2018, when she was sent home. Claimant explained her dizziness could put respondent's residents in danger, and she was told to see a doctor before returning to work. Claimant was terminated in December 2018 for lack of communication with respondent. Claimant currently works full-time as an electronic image technician at University of Kansas Hospital with no work restrictions.

Claimant testified she did not suffer these symptoms prior to the December 2016 accident. Claimant stated she has a long history of migraine headaches which she treats with over-the-counter medication. Claimant described her migraines as occurring in the front of her head, behind her eyes. When asked, claimant testified she continued to struggle with reading paragraphs, dizziness, and keeping her balance.

Dr. Daniel Zimmerman, an internist, examined claimant at her counsel's request on February 7, 2018. Claimant complained of severe dizziness and difficulty with dizziness

and disorientation when driving. Dr. Zimmerman reviewed claimant's available medical records, history, and performed a physical and behavioral health evaluation. Dr. Zimmerman diagnosed claimant with right and left shoulder impingement syndrome, cervical paraspinous myofascitis, left greater occipital nerve entrapment syndrome, and post-concussion syndrome.

Dr. Zimmerman determined claimant may benefit from an intensified program of behavioral health interventions. Dr. Zimmerman admitted he is not a mental health professional and does not currently treat post-concussion syndrome. Dr. Zimmerman further agreed his mental status examination was not a detailed mental status examination as required by the *AMA Guides*.¹

Using the *AMA Guides*, Dr. Zimmerman opined claimant sustained a 20 percent impairment to the body as a whole related to post-concussion syndrome and cognitive issues. Dr. Zimmerman based his rating on claimant's statements about her cognitive limitations as well as her poor performance on his behavioral health evaluation.

Dr. Zimmerman opined it is more probably true than not medical treatment would be necessary in the future. He recommended claimant treat with anti-inflammatory medication, such as Celebrex or Mobic. Dr. Zimmerman also suggested claimant could be treated with steroid injections.

Dr. Eden Wheeler, a physical medicine and rehabilitation specialist, examined claimant at respondent's request on March 6, 2018. Dr. Wheeler noted claimant suffered a head injury with post-concussion symptoms. Dr. Wheeler found inconsistency in the claimant's complaints. She opined claimant suffered subjective shoulder pain. Although she admitted she was not mental health professional, Dr. Wheeler diagnosed somatoform disorder, unrelated to claimant's work. Dr. Wheeler assessed a 0 percent impairment under the *AMA Guides*, Fourth and Sixth Editions, for claimant's head injury.

Dr. Thomas Samuelson provided medical treatment for claimant's April 23, 2016, injury beginning August 10, 2016. Dr. Samuelson's initial medical history noted complaints of right biceps pain, and he ordered physical therapy. Claimant was seen on a monthly basis until she was deemed to be at MMI on November 21, 2016, and was scheduled for a follow-up appointment on December 19, 2016.

At the follow-up appointment, two days after her December 17, 2016, slip and fall injury, Dr. Samuelson noted a contusion on claimant's right shoulder but found no loss of

¹ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (6th ed.). All references are based upon the sixth edition of the *Guides* unless otherwise noted.

strength and good range of motion, with only mild discomfort. Dr. Samuelson released claimant with no follow-up.

Claimant returned to Dr. Samuelson on June 30, 2017, for treatment related to the December 17, 2016, injury. Claimant complained of bilateral shoulder pain. Dr. Samuelson noted unusual behavior, including significant pain with superficial touching, and symptoms not typically associated with rotator cuff tendonitis. He described claimant's presentation as self-limiting. Dr. Samuelson did not provide an impairment rating for the December 17, 2016, injury.

Surveillance video admitted into evidence showed claimant on two separate occasions in May 2017. Claimant drove to a recreational center where she played sand volleyball. Claimant wore an adhesive strap on her left shoulder but otherwise did not appear to have any physical or mental limitations. Claimant was also filmed driving to an indoor gym to observe a girls' volleyball tournament. Claimant did not wear glasses nor any apparent ear plugs at the tournament.

In denying an award for cervical spine and left shoulder injuries, the ALJ wrote:

Based on the lack of any complaints involving the cervical spine to the authorized orthopedic specialist, Dr. Samuelson, and the video evidence, it is held the claimant suffered no cervical spine injury from either the April or December injuries. Based on the lack of any complaints to Dr. Samuelson involving the left shoulder until 6 months after the December accident, and the video evidence, it is held the claimant suffered no left shoulder injury from either the April or December injuries.²

The ALJ concluded:

The court did not think the claimant was a credible witness. Based on the court's observation of the claimant's testimony and the video evidence, it is held the claimant suffered no permanent head injury from the December injury.³

Describing claimant's physical presentation when she testified at the hearing, the ALJ wrote:

² ALJ Award (Jan. 28, 2020) at 7-8.

³ *Id.* at 7.

The court observed the claimant's halting speech and sometimes confused responses to questions. When observed first-hand, the claimant's confusion seemed feigned, especially when considering she remains employed full time as, now, an electronic image technician at University of Kansas Hospital. Based on the claimant's regular hearing performance, one could not imagine her holding down any type of job or functioning normally day to day.⁴

PRINCIPLES OF LAW

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

The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 44-508(h) states:

"Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 44-525(a) states:

Every finding or award of compensation shall be in writing, signed and acknowledged by the administrative law judge and shall specify the amount due and unpaid by the employer to the employee up to the date of the award, if any, and the amount of the payments thereafter to be paid by the employer to the employee, if any, and the length of time such payment shall continue. No award shall include the right to future medical treatment, unless it is proved by the claimant that it is more probable than not that future medical treatment, as defined in subsection (e) of K.S.A. 44-510h, and amendments thereto, will be required as a result of the work-related injury. The award of the administrative law judge shall be effective the day following the date noted in the award.

ANALYSIS

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⁴ *Id.*

Although this claim was included in claimant's notice of appeal, no issues were raised regarding the ALJ's award of a 4.5 percent impairment to the right shoulder, except the ALJ's denial of future medical treatment. The Board adopts the ALJ's findings related to this claim, except for his findings related to future medical treatment.

When Dr. Zimmerman examined claimant, he did not believe claimant required further diagnostic or therapeutic intervention at that time. His report also stated it is more probably true than not claimant would need additional medical treatment in the future in the form of nonsteroidal anti-inflammatory and steroid injections. At his deposition, Dr. Zimmerman confirmed this opinion.

Dr. Zimmerman's opinion is uncontroverted. Uncontroverted evidence may not be disregarded and is generally regarded as conclusive absent a showing it is improbable or untrustworthy.⁵ As such, the Board finds claimant is entitled to future medical treatment for her right shoulder because she presented medical evidence indicating future medical intervention will be necessary under K.S.A. 44-510h.

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The ALJ denied an award of permanent disability and future medical treatment, stating:

The court did not think the claimant was a credible witness. Based on the court's observation of the claimant's testimony and the video evidence, it is held the claimant suffered no permanent head injury from the December injury.⁶

In describing claimant's physical presentation when she testified at the hearing, the ALJ wrote:

The court observed the claimant's halting speech and sometimes confused responses to questions. When observed first-hand, the claimant's confusion seemed feigned, especially when considering she remains employed full time as, now, an electronic image technician at University of Kansas Hospital. Based on the claimant's regular hearing performance, one could not imagine her holding down any type of job or functioning normally day to day.⁷

In denying an award for cervical spine and left shoulder injuries, the ALJ wrote:

⁵ See *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146 (1976).

⁶ ALJ Award (Jan. 28, 2020) at 7.

⁷ *Id.*

Based on the lack of any complaints involving the cervical spine to the authorized orthopedic specialist, Dr. Samuelson, and the video evidence, it is held the claimant suffered no cervical spine injury from either the April or December injuries. Based on the lack of any complaints to Dr. Samuelson involving the left shoulder until 6 months after the December accident, and the video evidence, it is held the claimant suffered no left shoulder injury from either the April or December injuries.⁸

The ALJ's opinion claimant did not suffer a permanent impairment resulting from her December 17, 2016, injury by accident is consistent with the evidence. Both Drs. Samuelson and Wheeler found no permanent impairment related to the December 17, 2016, injury by accident. The ALJ's finding claimant not to be credible is consistent with Dr. Samuelson noting claimant's presentation as inconsistent.

The Board generally gives some deference to an ALJ's findings and conclusions concerning credibility where the ALJ personally observed the testimony.⁹ Appellate tribunals are ill-suited to assessing credibility determinations based in part on a witness' appearance and demeanor.¹⁰

The ALJ also properly discounted claimant's testimony related to her current symptoms and limitations. The ALJ was clear in his explanation of why he found claimant not to be credible. The video showing claimant playing sand volleyball was inconsistent with claimant's testimony and supported the ALJ's findings. Claimant showed no signs of discomfort, dizziness, or instability while enjoying her participation in the volleyball game. The Board, under these circumstances, will not second-guess the ALJ's finding regarding credibility.

Based upon the video evidence and the ALJ's findings related to claimant's credibility, the Board agrees with the ALJ. In relation to this claim, claimant failed to prove the need for future medical treatment.

CONCLUSIONS

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⁸ *Id.* at 7-8.

⁹ See *Garner v. Kitselman Construction, LLC*, No. 1,069,084, 2016 WL 3208233 (Kan. WCAB May 31, 2016).

¹⁰ See *De La Luz Guzman-Lepe v. National Beef Packing Company*, No. 103, 869, 2011 WL 1878130 (Kansas Court of Appeals unpublished opinion filed May 6, 2011).

Claimant met the burden of proving she is entitled to future medical treatment for her right shoulder, and the ALJ's Award in this matter should be modified.

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Claimant failed to prove she suffered permanent disability resulting from her December 17, 2016, injury by accident. Claimant has failed to meet the burden of proving the need for future medical treatment related to her cervical spine, concussion syndrome and left shoulder.

AWARD

Case No. CS-00-0102-047; AP-00-0449-251

WHEREFORE, it is the finding, decision and order of the Board the Award of Administrative Law Judge Kenneth J. Hursh dated January 28, 2020, is reversed in part, to reflect claimant is entitled to future medical treatment related to her right shoulder injury by accident, and is affirmed in all other respects.

Case No. CS-00-0148-842; AP-00-0449-250

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Kenneth J. Hursh dated January 28, 2020, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of June, 2020.

BOARD MEMBER

APRIL HOUSTON

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BOARD MEMBER

BOARD MEMBER

c: John G. O'Connor, Attorney for Claimant
Michael L. Entz, Attorney for Respondent and its Insurance Carrier
Hon. Kenneth J. Hursh, Administrative Law Judge