

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

ELIZABETH CHANCE)	
Claimant)	
V.)	
)	AP-00-0473-575
SPIRIT AEROSYSTEMS INC.)	CS-00-0455-968
Respondent)	
AND)	
)	
NEW HAMPSHIRE INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Claimant appealed the February 3, 2023 Award issued by Administrative Law Judge (ALJ) Ali Marchant. The Board heard oral arguments on June 15, 2023.

APPEARANCES

Jeff K. Cooper appeared for Claimant. Kirby A. Vernon appeared for Respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board adopted the same stipulations and considered the same record as the ALJ, the documents of record filed with the Division and the following:

1. Regular Hearing, held April 26, 2022;
2. Deposition of Elizabeth Chance, taken May 5, 2022, with exhibits;
3. Deposition of Alexander Bollinger, M.D., taken May 17, 2022, with exhibits;
4. Deposition of George G. Fluter, M.D., taken June 1, 2022, with exhibits;
5. Deposition of John P. Estivo, D.O., taken June 7, 2022, with exhibits.

ISSUES

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

FINDINGS OF FACT

Claimant is 62 years of age and worked for Respondent for 36 years as a storekeeper, records clerk. This required her to fill kits and pull parts for the shops.

On October 19, 2020, Claimant was pulling a part off the top rack when she heard and felt a pop in her left shoulder. Claimant experienced immediate, extreme pain. Due to her injury and high blood pressure, Claimant was taken by ambulance to the Via Christi St. Francis emergency room. Claimant reported left shoulder pain radiating down her arm. She did not report neck symptoms. Claimant was given a shot and directed to follow up with Spirit Medical.

Claimant reported to Spirit Medical on October 23, 2020, with left shoulder and neck complaints of pain. MRI's of the left shoulder and neck were recommended. A left shoulder MRI performed on November 2, 2020 revealed a nondisplaced subchondral fracture of the humeral head with extensive marrow edema in the proximal humerus; severe supraspinatus and infraspinatus tendonopathy; severe glenohumeral arthritis; and mild acromioclavicular degenerative changes. The neck MRI never occurred.

Claimant was referred to Alexander Bollinger, M.D., for treatment of her left shoulder on November 5, 2020. Dr. Bollinger is a board-certified orthopedic surgeon specializing in treatment of the hands and upper extremities. Claimant reported left shoulder pain and numbness and tingling from the neck radiating over the shoulder and down the left upper extremity to the hand. She also reported since her injury, her symptoms improved and the burning pain comes and goes.

Following physical exam and review of the MRI, Dr. Bollinger opined Claimant had rotator cuff tendinitis due to her October 19 work injury. He also opined Claimant was suffering from underlying shoulder osteoarthritis, which was not work related. Dr. Bollinger advised Claimant a portion of her symptoms, specifically, the neurologic symptoms of numbness and tingling of the shoulder and upper extremity, were possibly due to her cervical spine. Dr. Bollinger performed a left shoulder subacromial corticosteroid injection and prescribed physical therapy.

Claimant returned to Dr. Bollinger on December 31, 2020. He noted Claimant had not significantly improved. Claimant reported she had temporary relief from the injection, but her pain was worse, especially with overhead use and lifting. Claimant had not performed her home exercises because she had an unrelated total knee replacement in the interim. Dr. Bollinger performed a second injection on Claimant's left shoulder and referred her to physical therapy.

Claimant saw Dr. Bollinger a final time on February 11, 2021. She reported her pain had improved, but she still had some pain with overhead activity and lifting. Range of motion in Claimant's left shoulder was limited, but she had no new complaints. Dr. Bollinger placed Claimant at maximum medical improvement (MMI), stating Claimant's persistent left shoulder symptoms were the result of glenohumeral arthritis, which was unrelated to her work injury.

In his March 17, 2021 letter, Dr. Bollinger opined Claimant had 1% functional impairment to the left upper extremity, based on the *AMA Guides to the Evaluation of Permanent Impairment*, 6th edition (*Guides*, 6th ed.). He released Claimant without permanent work restrictions and opined Claimant would not need future medical treatment related to her work related injury. Dr. Bollinger opined the majority of Claimant's persistent symptoms were due to underlying degenerative change and was not included in the rating, which was for her acute pain/sprain only.

Dr. Bollinger testified:

- he had been hired by Respondent to provide treatment for Claimant's left shoulder only;
- he did not examine or treat Claimant's cervical spine because it was outside the scope of his practice;
- he did not refer Claimant for treatment to her cervical spine because he did not believe it was necessary;
- he disagreed with the radiologist's interpretation Claimant suffered a nondisplaced subchondral fracture. He believed the MRI showed degenerative-related marrow edema because Claimant's mechanism of injury was not consistent with a fracture;
- Claimant was not a surgical candidate.

At her attorney's request, Claimant was evaluated by George Fluter, M.D., board certified in physical medicine and rehabilitation and of independent medical examiners, for treatment recommendations on March 2, 2021. Claimant reported pain in her forehead, neck, upper back, left shoulder, arm and numbness in her left hand. Dr. Fluter diagnosed Claimant with:

1. Status post work-related injury.
2. Left shoulder pain/impingement/tendinitis/bursitis.
3. Possible left shoulder internal derangement.
4. Left upper extremity dysesthesia.
5. Neck pain.

6. Cervicothoracic strain/sprain.¹

Dr. Fluter opined the prevailing factor for the injury and the need for medical treatment was the October 19, 2020 work injury. He recommended additional medical treatment, including additional diagnostic studies, physical therapy, medication and possibly referrals to orthopedic surgeons for her left shoulder and cervical spine.

Respondent referred Claimant to John Estivo, M.D., a board-certified orthopedic surgeon, to provide authorized medical treatment. Claimant saw Dr. Estivo on April 13, 2021. He diagnosed Claimant with post left shoulder subchondral humeral head fracture and left shoulder rotator cuff tendinitis. Dr. Estivo opined Claimant's October 19, 2020, work-related accident was the prevailing factor causing her diagnosed conditions and need for medical treatment. Dr. Estivo opined Claimant had not reached maximum medical improvement and recommended additional medical treatment. He referred Claimant to physical therapy and gave her temporary work restrictions.

Dr. Estivo provided conservative treatment to Claimant from April 13 through June 30, 2021. During this time, Claimant was in physical therapy 2-3 times per week and was evaluated by Dr. Estivo on five separate occasions. On June 30, Claimant reported her pain level was 2 out of 10 and her symptoms were intermittent. Overhead reaching/movement continued to cause symptoms to occur. She was very happy with the range of motion improvement in her left shoulder. She denied any cervical spine pain and radiating pain/numbness in her upper extremity. Dr. Estivo placed Claimant at MMI without restrictions and opined Claimant would not require further medical treatment in relation to her October 19, 2020, work-related injuries. In a December 15, 2021 letter, Dr. Estivo opined Claimant had 10% functional impairment to the left upper extremity pursuant to the *Guides*, 6th ed.

Dr. Estivo testified:

- the insurance carrier requested he treat Claimant's left shoulder only;
- he evaluated Claimant's cervical spine at each appointment;
- Claimant denied cervical spine pain during each evaluation;
- complaints of pain by Claimant to her cervical spine would have been noted in his medical records;
- had Claimant reported discomfort to her cervical spine or upper back, he would have proceeded with treatment for whatever area he believed was affected;
- the physical therapy received by Claimant and the home exercises performed by her almost completely resolved her symptoms.

¹ Fluter Depo. Ex. 2

At her attorney's request, Claimant was evaluated by Dr. Fluter on October 25, 2021, for the purpose of assigning functional impairment, restrictions and future medical treatment. Dr. Fluter did not have Dr. Estivo's medical records. Dr. Fluter testified Claimant's condition was essentially the same as when he examined her in March. Claimant reported pain affecting her neck, upper back and left shoulder, along with tingling in the fingers and some numbness. Dr. Fluter's diagnoses remained the same, except he eliminated possible left shoulder internal derangement.

Dr Fluter provided functional impairment ratings using the *Guides*, 6th and 4th Editions. Under the 6th Edition, Dr. Fluter opined Claimant had 11% functional impairment to the whole body. This rating included impairments for Claimant's left shoulder, cervical and thoracic spine. Under the 4th Edition, Dr. Fluter opined Claimant had 13% functional impairment to the whole body. This rating included impairments for Claimant's left shoulder and cervicothoracic spine. Dr. Fluter adopted the 4th Edition functional impairment rating as the appropriate rating for Claimant's injuries. He stated:

Oh, well, I felt that looking at the different impairments and the different methods of calculating impairment ratings between the Fourth and Sixth Edition of the Guides, I felt that whole person impairment rating of 13 percent better reflected her degree of impairment. That was based on information using the same medical information, but using the Fourth Edition of the Guides. The Sixth Edition impairment rating was 11 percent, the Fourth Edition was 13 percent. A general principle for using the guides is that if there's different methods determining impairment rating, the impairment rating that -- the method that provides the higher impairment rating should be the one that's utilized. So given that circumstance, I felt that the 13 percent whole person impairment would be the more appropriate of the two.

Q. And does the 13 percent whole person impairment, Doctor, take into consideration the effects of the injury on work activities, as well a recreational and other activities of life?

A. Well, I think it does reflect that, yes.²

Dr. Fluter placed permanent restrictions on Claimant's activities and opined she would need future medical treatment. Specifically, he recommended medications, injections, a soft neck brace and a shoulder support harness.

Claimant testified:

² Fluter Depo. At 15.

- she has had neck pain since her work injury on October 19, 2020;
- she reported neck pain to Dr. Estivo each and every time she saw him;
- she could not recall if she had a cervical MRI;
- she could not recall if Dr. Estivo evaluated or examined her neck;
- her neck pain comes and goes, sometimes it hurts real bad and sometimes it does not;
- her symptoms improved with the physical therapy and home exercises provided by Dr. Estivo. She performs the home exercises daily;
- she returned to her same job work following her injury. She struggled to perform some of her job duties, such as heavy lifting and pulling parts above her shoulder;
- Claimant voluntarily retired on December 31, 2021. Claimant has not worked since leaving her employment with Respondent;
- since her accident she has trouble doing heavy lifting or lifting anything over head. Prior to her accident, she could raise her arm over her head without pain. She can not do so now;
- she has a history of arthritis.

The ALJ awarded compensation for 11% functional impairment to the left upper extremity at the shoulder level and future medical benefits. The 11% rating is based on a split of the shoulder ratings of Dr. Estivo (10%) and Dr. Flutter (12%). In finding Claimant did not sustain functional impairment to her cervical and thoracic spine, the ALJ stated:

After reviewing the record as a whole, including the opinions of the physicians and Claimant's testimony, the Court finds that Claimant has not met her burden to prove that she sustained any permanent impairment to her cervical spine or thoracic spine as a result of her October 19, 2020, work-related injury. Although Claimant had neck complaints immediately after her accident, as reflected by her medical records at Spirit Medical and with Dr. Bollinger, by the time Claimant began treatment with Dr. Estivo almost six months after her work-related accident, she no longer had cervical spine or thoracic spine complaints. Although Claimant testified that she told Dr. Estivo that she had neck symptoms, Dr. Estivo's records throughout the time he treated her consistently note that Claimant specifically denied any cervical spine complaints, and Dr. Estivo documented normal physical examinations of Claimant's cervical spine and thoracic spine at each appointment. As such, the Court finds that Claimant has not met her burden to prove that she sustained any permanent impairment as a result of her work-related cervicthoracic spine strain/sprain.

The Court further finds that Dr. Bollinger's opinions with regard to the extent of Claimant's permanent partial functional

impairment of her left shoulder as a result of her work-related injuries are not credible. Dr. Bollinger based his opinion on Claimant's condition at the time that he believed Claimant was at maximum medical improvement despite the fact that Claimant was not at maximum medical improvement and went on to have multiple months of additional treatment with Dr. Estivo.³

In awarding future medical benefits, the ALJ stated:

Given Claimant's ongoing complaints and the opinions of Dr. Fluter, the Court finds that Claimant has met her burden to prove that it is more probable than not that she will require future medical treatment related to her injuries. Future medical will be considered upon proper application.⁴

Claimant argues the ALJ erred in finding she failed to prove she suffered functional impairment to the cervical and thoracic spine, and requests the award be modified to reflect Dr. Fluter's 13% functional impairment to the whole body. Respondent maintains the Award of functional impairment should be affirmed and the award of future medical benefits reversed.

PRINCIPLES OF LAW AND ANALYSIS

1. As a result of her work injury, Claimant sustained 11% functional impairment to her left shoulder.

Dr. Fluter, Claimant's retained evaluator, was the only physician to provide an impairment rating to Claimant's cervical and thoracic spines. He did so without the benefit of having and reviewing the treatment records of Dr. Estivo.

For approximately ten weeks, from April 13 through June 30, Claimant was evaluated five times by Dr. Estivo. She also participated in physical therapy 2-3 times per week throughout the majority of this time frame. Claimant testified she reported neck symptoms to Dr. Estivo, but she could not recall if he evaluated or examined her neck and upper back. Dr. Estivo's records dispute claimant's assertion. In fact, Dr. Estivo's records reflect Claimant repeatedly denied cervical symptoms and had normal findings upon examination. The records generated by physical therapy are not a part of the record, so it is unknown if Claimant reported complaints of pain to the therapist during her treatment.

³ ALJ Award at 15.

⁴ Id. at 17.

The initial treatment records from Via Christi ER do not record neck pain or complaints. Claimant did not receive or pursue medical treatment for her cervical and thoracic spine.

Claimant further testified she has had neck pain since her work injury on October 19, 2020, but the pain comes and goes. Claimant reported to Dr. Estivo and Dr. Fluter her symptoms improved with physical therapy and home exercises. Although Claimant struggled to perform some of her job duties (heavy lifting and pulling parts above her shoulder), she was able to return to her regular job after reaching MMI.

The findings and conclusions of the ALJ are adopted by a majority of the Board. Having reviewed the record, the Board finds Claimant did not meet her burden of proving she sustained functional impairment to her cervical and thoracic spine. The Board affirms the finding Claimant's functional impairment is 11% to the left upper extremity at the shoulder level, based on a split of the shoulder ratings of Dr. Estivo (10%) and Dr. Fluter (12%).

2. Claimant is entitled to future medical benefits.

The ALJ's award of future medical benefits is well-reasoned and supported by the evidence. The Board affirms the ALJ's award of future medical benefits.

AWARD

WHEREFORE, it is the finding, decision and order of the Board the Award of Administrative Law Judge Ali Marchant, dated February 3, 2023, is affirmed.

IT IS SO ORDERED.

Dated this day of June, 2023.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

I disagree with my colleagues. Based on a more probably true than not true evidentiary standard, i.e., a preponderance, the claimant proved she sustained permanent impairment to her neck.

Within four days of her accident, the claimant reported neck complaints to the respondent's in-house medical provider, Spirit Medical. She complained of neck pain to Dr. Bollinger. Dr. Bollinger does not treat necks. Dr. Bollinger was not authorized to treat the claimant's neck. The doctor believed some of the claimant's symptoms derived from her neck. Dr. Bollinger did not refer the claimant to a neck specialist.

The claimant filed an Application for Benefits on January 20, 2021. She listed her neck as being injured.

The claimant saw Dr. Flutter on March 2, 2021. She complained about her neck.

Six weeks later, the claimant saw Dr. Estivo on April 13, 2021. Dr. Estivo's report stated the claimant denied neck complaints. The claimant disputes this. Dr. Estivo was specifically not authorized to treat the claimant's neck. Also, Dr. Estivo was not provided with Dr. Flutter's report which mentioned neck complaints.

The claimant continued to complain of neck symptoms when she returned to Dr. Fluter on October 21, 2021.

The claimant testified on May 5, 2022. Consistent with her complaints to Spirit Medical, Dr. Bollinger and Dr. Fluter, and what she alleged in her Application for Benefits, the claimant testified she had ongoing neck complaints due to her work injury. The claimant testified she told Dr. Estivo about neck complaints.

Quite simply, I do not find it realistic or more probably true than not true that the claimant would consistently voice neck complaints to anyone who would listen, yet not relay neck complaints to Dr. Estivo. I would find the claimant sustained permanent injury to her neck. The claimant's consistent and persistent neck complaints over an extended period of time show permanent neck impairment, not mere complaints.

BOARD MEMBER

BOARD MEMBER

c: (Via OSCAR)

Jeff Cooper, Attorney for Claimant
Kirby Vernon, Attorney for Respondent and its Insurance Carrier
Hon. Ali Marchant, Administrative Law Judge