

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

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| KARRIE CLARK TABOR |) | |
| Claimant |) | |
| V. |) | |
| STATE OF KANSAS |) | AP-00-0458-544 |
| Respondent |) | CS-00-0261-814 |
| AND |) | |
| STATE SELF INSURANCE FUND |) | |
| Insurance Carrier |) | |

ORDER

Claimant requested review of the Review and Modification Decision issued by Administrative Law Judge (ALJ) Pamela J. Fuller on June 18, 2021. The Board heard oral argument on October 7, 2021.

APPEARANCES

Randy Stalcup, appeared for Claimant. Jeffery Brewer appeared for Respondent and insurance carrier.

RECORD AND STIPULATIONS

The Board adopted the same stipulations and considered the record listed in the Review and Modification Decision, consisting of the transcript of Regular Hearing held April 8, 2021; Evidentiary Deposition of Terrance Pratt, M.D., taken May 20, 2021, with exhibits attached; Evidentiary Deposition of Daniel D. Zimmerman, M.D., taken April 26, 2021, with exhibits attached; Evidentiary Deposition of Paul Hardin, taken April 26, 2021, with exhibits attached; Evidentiary Deposition of Karen Terrill, taken May 12, 2021, with exhibits attached; and the documents of record filed with the Division.

ISSUES

1. Did Claimant sustain additional impairment or disability meriting modification of the prior award of compensation under K.S.A. 44-528, and if so, what is the nature and extent of Claimant's disability?

2. What is the date the increase in functional impairment or work disability occurred?

FINDINGS OF FACT

Claimant was injured while lifting patients on July 29, 2016. Claimant received an award of permanent partial disability based on 5% functional impairment to the body as a whole from the ALJ. The 5% functional impairment was based on the opinions of the Court-ordered examiner, Terrance Pratt, M.D. The Board affirmed the ALJ's Award on September 8, 2018.

Claimant sought medical treatment at her own expense through her personal physician beginning in the summer of 2017. She received conservative treatment periodically through October 2018. Claimant sought authorized medical care and treatment, but was denied by the ALJ on December 31, 2018. Claimant filed a request for review and modification of her Award on October 31, 2019, alleging her condition worsened since her award in 2017. An Order For Independent Medical Examination (IME) with Dr. Pratt was issued by the ALJ on April 15, 2020.

Dr. Pratt performed the Court-ordered IME on June 4, 2020. Following a physical examination and review of the medical records provided, Dr. Pratt diagnosed lumbosacral syndrome with right thigh symptoms; history reported L2-3 disc extrusion which subsequently was not identified with diagnostic testing; multilevel spondylosis; and inappropriate responses on the examination. Dr. Pratt stated:

At this time due to inappropriate responses it is difficult to correlate symptoms to diagnostic testing or the clinical examination. Because of that I would recommend electrodiagnostic testing of the right lower extremity before completing the assessment if possible. This would help in terms of future medical treatment and assessing for permanency.¹

Following review of electrodiagnostic testing, Dr. Pratt provided an addendum to his June 4, 2020 report on September 3, 2020. He found testing revealed findings suggesting chronic and ongoing right L2-L3 lumbar radiculopathy; the work accident was the prevailing factor causing Claimant's medical condition with the exception of the multilevel spondylosis; assigned permanent work restrictions; and assigned 10% impairment to the body as a whole based on the *Guides*, 6th Edition. Regarding future medical, Dr. Pratt opined if Claimant experiences progression of the lumbosacral symptoms, with corresponding diagnostic testing findings, she would be a candidate for further assessment with a spinal surgical specialist. He opined Claimant would be able to work in the open labor market within her restrictions.

¹ Pratt IME Report at 6.

On January 19, 2021, Dr. Pratt provided a second addendum in which he found Claimant to have a 55 percent task loss, having lost the ability to perform 11 out of 20 tasks.

At her attorney's request, Claimant was evaluated by Daniel Zimmerman M.D. on October 15, 2019. Dr. Zimmerman opined the prevailing factor for the diagnoses and impairment was the July 29, 2016, accident. Dr. Zimmerman found Claimant's condition stable and did not believe additional medical treatment was warranted. He did, however, opine Claimant would need additional medical treatment in the future. Dr. Zimmerman rated Claimant's functional impairment at 14 % to the body as a whole under the *Guides*, 6th Edition, and 23% impairment to the body as a whole under the *Guides*, 4th Edition. Dr. Zimmerman opined the 23% impairment was more appropriate for Claimant because it represented competent medical evidence and considered signs, symptoms, and diagnostic studies. Dr. Zimmerman's opinions regarding task loss were unclear. It appears he reviewed 16 tasks and found Claimant "able to perform 4 or maybe 5 out of those 16."² He opined Claimant was not capable of engaging in substantial, gainful employment.

Paul Hardin performed a vocational assessment at Claimant's request on October 29, 2019. Mr. Hardin prepared a job task list. Based on his review of Dr. Pratt's restrictions, he found 55% task loss, and Dr. Zimmerman's restrictions to be 75%. He found Claimant had 100% wage loss. Mr. Hardin provided an amendment to his October 2019 report on March 15, 2021. He opined Claimant was essentially and realistically unemployable and incapable of engaging in substantial and gainful employment.

Karen Terrill performed a vocational assessment at Respondent's request on December 13, 2020. Ms. Terrill did not prepare a job task list. Her assessment was limited to her opinions regarding Claimant's ability to engage in work in the open labor market and her expected earnings. Ms. Terrill found Claimant was unable to return to work as a CNA or Home Health Aide. Ms. Terrill opined, however, there was a range of light, unskilled jobs Claimant could perform under Dr. Pratt's restrictions. Those included fast food workers and hotel maids.

Claimant has not worked anywhere for wages since she last sought employment in 2018 when she applied for part-time work in convenience stores. Claimant applied for Social Security loss of income benefits in July 2019. She was approved and began receiving \$784 per month in benefits beginning January 2020. Claimant did not qualify for Social Security Disability benefits because she did not have enough work credit.

The ALJ found Claimant was entitled to modification of her award and awarded a 40 percent work disability as of June 4, 2020. In so doing, the ALJ adopted the opinions of Dr. Pratt regarding functional impairment, permanent restrictions and task loss. The ALJ imputed entry level wages for Claimant because she had not made any effort to find

² Zimmerman Depo. at 21.

employment since 2018. In so doing, the ALJ relied upon the wage information provided by Karen Terrill and found Claimant could earn \$8.38 per hour resulting in a weekly rate of \$335.52.

Claimant appeals arguing she is unemployable and therefore entitled to an award of permanent total disability effective no later than October 15, 2019. In the alternative, Claimant asserts she is entitled to an 82.5% work disability. Respondent argues the Award should be affirmed.

PRINCIPLES OF LAW AND ANALYSIS

1. Claimant met her burden of proving a change in condition meriting modification of the original award. The initial award of compensation should be modified to reflect an increase in functional impairment to 10% to the body as a whole and an award for work disability of 40%.

In finding Claimant proved a change in condition entitling her to a modification of her award, the ALJ stated:

The claimant is entitled to modification of her Award. The claimant now suffers a 10% permanent partial impairment to the body as a whole. It is further found, that she is entitled to a work disability award of 40%.

Dr. Pratt's opinion was relied upon previously. He was and is the neutral examiner, is credible and performed the most recent evaluation. He also requested and obtained additional testing for the claimant in order to make an accurate assessment of her condition. He stated the claimant was able to return to work as long as she abided by his restrictions. Dr. Pratt determined the claimant's functional impairment had increased to a 10% whole person impairment. He also reviewed a task list and determined the claimant suffers a 55% task loss.³

Respondent does not dispute Claimant's impairment increased to 10% and is entitled to work disability compensation. Respondent does not dispute the 40% work disability award issued by the ALJ and asks the Board to affirm it. The Board agrees. The ALJ's decision is well-reasoned. The greater weight of the credible evidence starts with the opinions of the Court-ordered evaluator Dr. Pratt. The Board has often, but not always, given some deference to opinions from Court-ordered and neutral evaluators. "Neutrality isn't the only marker of credibility; an expert's conclusions, to be reliable, should be based on more than speculation."⁴

³ ALJ R&M Decision (June 18, 2021) at 6-7.

⁴ *Buchanan v. JM Staffing, LLC*, 52 Kan. App. 2d 943, 379 P 3d 428 (2016).

Claimant asks the Board to adopt Dr. Zimmerman's opinions regarding functional impairment, restrictions, task loss, and ability to engage in substantial and gainful employment. In so doing, Claimant does not provide any credible rationale as to why Dr. Zimmerman's opinions should be adopted and Dr. Pratt's disregarded. The opinions of Dr. Pratt have the benefit of evaluations before and after the award being issued. Dr. Pratt had the benefit of objective, diagnostic testing helping him form his opinions regarding functional impairment and restrictions. Dr. Pratt's task loss opinion was based on the same job task list (Hardin) as the one used by Dr. Zimmerman.

Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Expert evidence shall be required to prove permanent total disability.⁵ The only evidence Claimant is permanently and totally disabled is evidence generated by Claimant's attorney through Dr. Zimmerman and Paul Hardin. This evidence, standing alone, falls short of the more credible opinions provided by Dr. Pratt and Karen Terrill.

Claimant was unemployed at the time the original Award was issued by the ALJ and affirmed by the Board in 2018. Claimant's employment status is unchanged since 2018 when she last sought employment. Claimant has not sought any form of employment since that time. Claimant failed to prove any change in her condition rendered her permanently and totally disabled.

2. What is the date the increase in functional impairment or work disability occurred?

K.S.A. 44-528(d) states "any modification of an award . . . shall be effective as of the date the increase or diminishment actually occurred." The effective date cannot be more than six months prior to the date the request for review and modification is filed. The ALJ found the date Claimant's impairment of function increased was the date Claimant saw Dr. Pratt for a Court-ordered IME, post-award, on June 4, 2020. Claimant argued the date should be April 30, 2019, when she saw Dr. Zimmerman. Claimant's argument is rejected.

Claimant's application for review and modification was filed on October 31, 2019. Claimant asserts the appropriate date for when Claimant's change in condition occurred should be April 30, 2019, but offers no argument in support of this date other than Claimant was seen by Dr. Zimmerman on October 15, 2019. The ALJ stated:

. . . "It is found that Dr. Pratt saw the claimant on 6/4/2020 to determine the Claimant's current condition. He did not make the final determination on that date due to needing

⁵ K.S.A. 44-510c(a)(2).

additional testing. So, the claimant’s impairment was increased at least by that date which will be used for computation purposes.”⁶

The Board agrees. The more credible evidence supports the ALJ’s finding of June 4, 2020, as the effective date of modification.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Pamela J. Fuller dated June 18, 2021, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of October, 2021.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: (Via OSCAR)

Randy Stalcup, Attorney for Claimant
Jeffery Brewer, Attorney for Respondent and its Insurance Carrier
Honorable Pamela J. Fuller, Administrative Law Judge

⁶ ALJ R&M Decision (June 18, 2021) at 7.