

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

BRENDA WILLMING
Claimant

v.

ATCHISON HOSPITAL
Respondent

AP-00-0460-733
CS-00-0443-834

and

KHA WORKERS COMPENSATION FUND, INC.
Insurance Carrier

ORDER

Claimant requested review of the August 24, 2021, Award issued by Administrative Law Judge (ALJ) Julie A.N. Sample. The Board heard oral argument on January 6, 2022.

APPEARANCES

Bradley E. Avery appeared for Claimant. P. Kelly Donley appeared for Respondent and Insurance Carrier.

RECORD AND STIPULATIONS

The Board adopted the stipulations and considered the same record as the ALJ, consisting of the Transcript of Regular Hearing, held March 31, 2021; the Transcript of Discovery Deposition via Telephone Conference Call of Brenda Willming, taken April 14, 2020; the Transcript of Evidentiary Deposition via Telephone Conference Call of Brenda Willming, taken October 2, 2020, including Exhibits 1-7; the Transcript of Evidentiary Deposition of Anne Rosenthal, M.D., taken January 22, 2020, including Exhibits 1-6; the Transcript of Evidentiary Deposition of Jarron Tilghman, M.D., taken July 19, 2021, including Exhibits 1-4 and A; the Transcript of Evidentiary Deposition of Jill Wenger, taken July 30, 2021, including Exhibits 1-3; the Transcript of Evidentiary Deposition of Karen Terrill, taken November 26, 2019, including Exhibits 1-2; the Transcript of Evidentiary Deposition of Karen Terrill, taken August 11, 2020, including Exhibits 3-5; the Transcript of Evidentiary Deposition of Steve Benjamin, taken July 19, 2021, including Exhibits 1-2; the Joint Stipulation, dated April 21, 2021, with attachment; the Joint Stipulation, dated

June 22, 2021, with attachment; the Joint Stipulation, dated August 18, 2021; the narrative reports of Dr. Tilghman, dated May 22, 2020, and November 3, 2020, concerning his Court-ordered independent medical examination; and the pleadings and orders contained in the administrative file. The Appeals Board considered the parties' briefs, but did not consider the attachments to Claimant's brief.

ISSUES

1. Should the attachments to Claimant's brief be considered part of the record?
2. Did the Administrative Law Judge err in failing to rule on the objections raised during the deposition of Mr. Benjamin?
3. Did the Administrative Law Judge apply the Social Security retirement offset provision contained in K.S.A. 44-501(f) in an unconstitutional manner?
4. What is the nature and extent of Claimant's disability, including whether Claimant is permanently and totally disabled?
5. Should an offset for Social Security retirement benefits paid to Claimant be applied, pursuant to K.S.A. 44-501(f)?
6. If a Social Security retirement offset is applicable under K.S.A. 44-501(f), what is the value of the offset and when does the offset take effect?
7. Is Claimant entitled to an award of future medical treatment?

FINDINGS OF FACT

Claimant initially worked for Respondent in the housekeeping department. Claimant's work in the housekeeping department required repetitive use of both upper extremities. Over time, Claimant experienced pain in both hands, as well as numbness and dropping things. Claimant reported her symptoms to management, and she was referred to Advanced Health Services for treatment. Claimant's average weekly wage was \$538.54 on the date of accident or injury, which is July 21, 2017.

At Advanced Health Services, Claimant received treatment from Dr. Wilkinson, who performed carpal tunnel release surgery on the left side in November 2017. Claimant was taken off work for four weeks, and returned to work in the housekeeping department. Claimant performed the same duties as before, and Claimant's symptoms remained the same. Claimant returned to Dr. Wilkinson for additional treatment. Dr. Wilkinson prescribed Gabapentin, and ordered an EMG study. Claimant could not tolerate the

Gabapentin due to side effects. Claimant was referred to Dr. Nassab for additional treatment.

Claimant saw Dr. Nassab after she underwent the repeat EMG study. At that time, Claimant had pain and numbness in both hands, and dropped things. Dr. Nassab performed a second surgery on the left wrist. Claimant returned to work in the housekeeping department. Claimant developed symptoms on the right side, and her left side worsened while working. Dr. Nassab did not recommend Claimant undergo surgery on the right side due to the result Claimant had on the left side. Dr. Nassab declared Claimant at maximum medical improvement and restricted Claimant from performing repetitive tasks. Dr. Nassab rated Claimant's functional impairment at 3% of the right wrist and 10% of the left wrist based on the *AMA Guides to the Evaluation of Permanent Impairment*, 6th Edition (*AMA Guides*). Dr. Nassab did not prepare a whole-body rating.

In August 2018, after Claimant was declared at maximum medical improvement, she was placed in Respondent's dietary department. The job description of Claimant's work in the dietary department was reviewed with a workers compensation nurse to modify or to eliminate injurious tasks. Claimant worked in the cafeteria using tongs and dippers to serve food. Claimant also delivered trays of food to patients in their rooms. Claimant described the work as repetitive.

Claimant's hands became painful while she was working in the dietary department. Claimant wrote a letter to management reporting her symptoms, and requesting different work. No additional accommodations were made. Claimant continued working in the dietary department for nine months. During this time, Claimant's hands remained painful and symptomatic. Claimant told management she was continuing to have problems with her hands and asked for additional accommodations. No further accommodations were made. Ultimately, Claimant resigned because of her hand symptoms and Respondent's refusal to make changes to Claimant's work. Claimant's last day worked was May 16, 2019. Effective May 17, 2019, Claimant's average weekly wage increased to \$542.17.

Claimant has not worked since May 16, 2019. Claimant has not looked for work.

Before working for Respondent, Claimant was a long-time employee at the Veterans Administration hospital in Leavenworth. Claimant retired from the Veterans Administration, and began receiving federal civil service retirement benefits before working for Respondent. Claimant receives \$2,908.00 per month in federal civil service retirement benefits. In November 2019, Claimant began receiving Social Security retirement benefits, which were reduced because of her federal civil service pension. The parties stipulated Claimant received Social Security retirement totaling \$2,070.20 in 2020, which is \$39.81 per week. The parties also stipulated Claimant receives \$175.90 per month in Social Security retirement benefits, or \$40.59 per week, starting December 2020, before the Medicare premium was deducted.

Ms. Wenger, Respondent's Chief Human Resources Officer, confirmed Claimant initially worked in Respondent's housekeeping department and was placed in the dietary department to accommodate the restrictions imposed due to the work-related injuries. Ms. Wenger confirmed Claimant continued to report having pain in her hands while performing the accommodated work, although Claimant did not state her work violated her work restrictions. Ms. Wenger believed the work in the dietary department was not repetitive, and the work restrictions imposed by Dr. Tilghman could have been accommodated. Ms. Wenger confirmed Claimant sent Respondent a letter stating she was resigning, in part, because of her ongoing pain.

Dr. Rosenthal evaluated Claimant at her attorney's request on August 17, 2019. Claimant reported she could not use her left hand due to pain, and had tremors in the right hand and arm. Physical examination was notable for reduced strength on the left side compared to the right, temperature changes on the left hand and mottled skin on the left hand compared to the right. Dr. Rosenthal diagnosed repetitive-trauma injuries to both upper extremities from Claimant's work for Respondent, and recommended additional treatment for right-sided carpal tunnel syndrome and left-sided complex regional pain syndrome. Dr. Rosenthal also indicated Claimant was at maximum medical improvement if additional treatment was denied. Activity restrictions were imposed.

Claimant did not receive additional treatment. On October 21, 2019, Dr. Rosenthal issued a supplemental report without reevaluating Claimant. Dr. Rosenthal rated Claimant's functional impairment at 5% of the body as a whole for right-sided carpal tunnel syndrome and 48% of the body as a whole for left-sided complex regional pain syndrome, for a combined rating of 51% of the body as a whole under the *AMA Guides*. Dr. Rosenthal adopted Dr. Nassab's restrictions, with additional restrictions of no repetitive activities or lifting over five pounds with the left hand and use of a splint on the right side. Dr. Rosenthal subsequently reviewed Ms. Terrill's task list and thought Claimant sustained 100% task loss.

Dr. Tilghman performed a Court-ordered independent medical examination of Claimant on May 22, 2020, and issued two reports. Claimant's course of treatment was reviewed. Examination was notable for symmetric strength in both upper extremities, no tenderness to the hands and wrists, reduced grip strength on the left side, full range of motion bilaterally and reduced sensation of the C6 and C8 dermatomes on the left side. With regard to the left upper extremity, Dr. Tilghman noted Claimant could tolerate light touch, no edema, no skin discoloration and no temperature changes. Dr. Tilghman diagnosed bilateral carpal tunnel syndrome, with neuralgia, neuritis and Type II complex regional pain syndrome on the left side. Dr. Tilghman rated Claimant's impairment at 3% of the right upper extremity and 11% of the left upper extremity, or 9% functional impairment of the body as a whole under the *AMA Guides*. Dr. Tilghman did not assess impairment attributable to complex regional pain syndrome because Claimant presented no objective findings supporting the diagnosis.

Dr. Tilghman recommended future medical treatment in the form of over-the-counter medication, home exercises and avoiding activities which were known triggers. Dr. Tilghman defined “known triggers” as activities reproducing pain. Dr. Tilghman testified prescription medication could be indicated for complex regional pain syndrome if beneficial. Dr. Tilghman restricted Claimant from lifting, pulling or pushing greater than ten pounds. Based on Mr. Benjamin’s task list, Dr. Tilghman thought Claimant’s task loss was 37.5%, and based on Ms. Terrill’s task list, Claimant’s task loss was 58%. Dr. Tilghman thought Claimant could perform the work she previously performed at a casino before working for Respondent.

At the request of Claimant’s counsel, Karen Terrill performed a vocational evaluation of Claimant on October 7, 2019, via telephone. Ms. Terrill noted Claimant was not working, chose not to look for work and was receiving Social Security retirement benefits based on age. Claimant’s education and training was notable for a lapsed CNA certification and a linen and laundry certification. Ms. Terrill noted Claimant had not used computers since leaving the Veterans Administration. Ms. Terrill reviewed the reports of Dr. Rosenthal and Dr. Bishop, and opined Claimant could not return to her prior work because of the restrictions against repetitive activities. Ms. Terrill conceded she did not review Dr. Nassab’s restrictions. Ms. Terrill believed Claimant had no transferrable job skills, would have difficulty acquiring new skills due to her age, and would have to return to the same type of work she previously performed with a new employer. Ms. Terrill prepared a list of essential job tasks. Ms. Terrill concluded Claimant had no wage-earning capacity, and sustained 100% wage loss.

Ms. Terrill subsequently reviewed Dr. Tilghman’s report, and thought her prior task list was unchanged. Ms. Terrill thought Dr. Tilghman’s statement Claimant should avoid known triggers essentially limited Claimant to performing sedentary work. Ms. Terrill later testified Claimant was only capable of sedentary work, regardless of whether Claimant should avoid known triggers. Ms. Terrill believed Claimant continued to demonstrate no wage-earning capacity because Claimant could not return to her prior work and had no transferrable job skills. Ms. Terrill conceded her opinion Claimant had no wage-earning capacity would not change if Dr. Tilghman’s statement Claimant should avoid known triggers was not considered.

Mr. Benjamin conducted a vocational evaluation of Claimant at Respondent’s request on May 14, 2021. Mr. Benjamin met with Claimant via telephone and generated a task list. Mr. Benjamin’s task list was based on Claimant’s descriptions and the Dictionary of Occupational Titles. Mr. Benjamin reviewed the records of Drs. Tilghman, Rosenthal, Bishop, Nassab and Murati. Mr. Benjamin reviewed Claimant’s prior employment for transferrable skills and performed a review of the current labor market. Based on Dr. Tilghman’s restrictions, Mr. Benjamin thought Claimant was capable of substantial, gainful employment. Mr. Benjamin believed Claimant could perform her prior work at the casino and could earn \$366.00 per week, which would produce a wage loss

of 32.5%. Mr. Benjamin did not believe Dr. Tilghman's proviso to avoid triggering activities constituted a medical restriction.

With regard to Claimant's federal civil service retirement and Social Security retirement, Mr. Benjamin testified Claimant's Social Security benefit was offset by her federal civil service retirement. According to Mr. Benjamin, the Social Security benefit Claimant would otherwise receive was reduced by two-thirds on account of her federal civil service retirement.

On August 24, 2021, ALJ Sample issued the Award. ALJ Sample concluded Claimant sustained bilateral carpal tunnel syndrome necessitating surgery on the left side, which was caused by repetitive work for Respondent, as well as complex regional pain syndrome. ALJ Sample adopted Dr. Tilghman's rating, as the Court-ordered physician, and found Claimant's functional impairment was 9% to the body as a whole. ALJ Sample found Claimant resigned her employment due to ongoing pain from the work-related injuries, and concluded Claimant was eligible to receive work disability benefits. ALJ Sample did not believe Claimant was permanently and totally disabled. Claimant was awarded permanent partial disability compensation based on 35% work disability, which was based on Mr. Benjamin's 32.5% wage loss opinion and 37.5% task loss based on Dr. Tilghman's task loss opinion using Mr. Benjamin's task list. Future medical was awarded. Finally, ALJ Sample ruled Claimant's compensation should be reduced by \$488.13 per week for Social Security retirement imputed to Claimant based on Mr. Benjamin's testimony. These review proceedings follow.

PRINCIPLES OF LAW AND ANALYSIS

Claimant alleges ALJ Sample erred in failing to rule on objections raised during Mr. Benjamin's deposition, and asks the Board to consider several attachments to her brief as evidence. Claimant also argues the Award is erroneous because the Social Security offset under K.S.A. 44-501(f) was applied in an unconstitutional manner. Claimant maintains the Social Security offset was incorrectly applied because retirement benefits should not be imputed to her. With regard to nature and extent, Claimant argues she is permanently and totally disabled.

Respondent argues the Social Security retirement offset was correctly decided. Respondent also argues Claimant is not eligible to receive work disability compensation, and is not permanently and totally disabled. Instead, Respondent maintains Claimant should receive an award of permanent partial disability compensation limited to 9% functional impairment of the body as a whole. Respondent also argues future medical should not be awarded to Claimant.

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

1. THE ATTACHMENTS TO CLAIMANT'S BRIEF WILL NOT BE CONSIDERED AS PART OF THE ADMINISTRATIVE RECORD BY THE APPEALS BOARD.

Claimant asks the Board to consider three attachments to her brief. The attachments are a letter from the Social Security Administration regarding Claimant's current benefits, a document purporting to explain Claimant's federal civil service retirement benefit, and a document purporting to explain how Social Security retirement benefits are paid to federal employees. These documents were not offered as evidence or exhibits in any of the hearings or depositions.

Claimant argues the records could not be offered as evidence during the underlying litigation because the Social Security offset issue was not raised until the deposition of Mr. Benjamin was taken. Claimant also argues the Board can take judicial notice of the records. Respondent objected to the records being considered by the Board now, and points out the Social Security offset issue was identified as an issue at the prehearing settlement conference.

The Board's *de novo* review is limited to consideration of issues addressed by the ALJ based on the evidence presented to the ALJ.⁴ The records attached to Claimant's brief were not presented to ALJ Sample. The Social Security offset issue was identified during the prehearing settlement conference, and Claimant could have offered the records when she was presenting her evidence. Even if discussing the Social Security offset issue during Mr. Benjamin's deposition was a surprise to Claimant, there is no evidence Claimant attempted to suspend terminal dates for the submission of additional evidence or offer the records into evidence. Claimant cannot offer the records into evidence at this late date. Claimant's request is denied.

¹ See K.S.A. 44-501b(a).

² See *id.*

³ See K.S.A. 44-501b(c).

⁴ See K.S.A. 44-555c(a).

2. ALJ SAMPLE DID NOT FAIL TO RULE ON THE OBJECTIONS RAISED DURING THE DEPOSITION OF MR. BENJAMIN.

Claimant argues ALJ Sample erred in failing to rule on the objections raised by Claimant's counsel during the deposition of Mr. Benjamin. In the section listing the record, the Award states, "[a]ll objections are overruled unless specifically stated otherwise[.]"⁵ ALJ Sample overruled Claimant's objections. The error alleged by Claimant did not occur.

3. THE APPEALS BOARD DOES NOT POSSESS AUTHORITY TO RULE ON THE CONSTITUTIONAL ISSUE RAISED BY CLAIMANT, AND RESERVES THE ISSUE FOR THE APPELLATE COURTS.

Claimant next argues the Award is erroneous because it applied the Social Security retirement offset provision of K.S.A. 44-501(f) in an unconstitutional manner. The Appeals Board does not possess the authority to review the constitutionality of provisions of the Kansas Workers Compensation Act.⁶ The Board cannot address Claimant's constitutional argument, and reserves the issue for a court of competent jurisdiction.

4. NATURE AND EXTENT

The parties raised several issues pertaining to nature and extent. Claimant argues her functional impairment should take Dr. Rosenthal's rating into account. Respondent argues Claimant is not eligible to receive work disability benefits. Claimant also argues she is permanently and totally disabled, which Respondent denies.

A. CLAIMANT'S FUNCTIONAL IMPAIRMENT IS 9% OF THE BODY AS A WHOLE BASED ON THE RATING OF DR. TILGHMAN.

It is undisputed Claimant sustained compensable bilateral carpal tunnel syndrome necessitating surgery on the left side. Claimant also developed complex regional pain syndrome on the left side. Injuries to both upper extremities are compensated as a whole-body injury.⁷ The extent of functional impairment for whole-body injuries is determined by competent medical evidence, using the *AMA Guides* as a starting point.⁸

⁵ ALJ Award (Aug. 24, 2021) at 1.

⁶ See, e.g., *Pardo v. United Parcel Service*, 56 Kan. App. 2d 1, 10, 422 P.3d 1185 (2018).

⁷ See K.S.A. 44-510e(a)(2)(A)(i).

⁸ See K.S.A. 44-510e(a)(2)(B); *Johnson v. U.S. Food Service*, 312 Kan. 597, 603, 478 P.3d 776 (2021).

Here, Claimant continued to experience pain and numbness of the left upper extremity after undergoing two carpal tunnel release surgeries. Claimant also developed complex regional pain syndrome. Claimant did not have surgery on the right side due to the complications she had on the left side. Dr. Nassab permanently restricted Claimant from performing repetitive tasks. Dr. Nassab issued an impairment rating, but not at the whole-body level. Claimant was placed in an accommodated position, but continued to experience pain in her hands and wrists. Claimant continued working for nine months, and resigned due to pain. Claimant began receiving Social Security retirement, and has not looked for work. The extent of Claimant's current symptoms is unknown.

Dr. Rosenthal rated Claimant's impairment at 51% of the body as a whole for right-sided carpal tunnel syndrome and left-sided complex regional pain syndrome. Dr. Rosenthal imposed permanent work restrictions in excess of those imposed by Dr. Nassab. Initially, Dr. Rosenthal recommended additional medical treatment, but later provided an impairment rating without reevaluation. Claimant did not undergo additional medical treatment, and Dr. Rosenthal conceded Claimant's condition could have improved with additional medical treatment.

Dr. Tilghman was appointed by the Court to perform a neutral evaluation. Dr. Tilghman's evaluation took place nine months after Dr. Rosenthal's evaluation. Dr. Tilghman noted residual symptoms consistent with bilateral carpal tunnel syndrome, but recorded no residual symptoms of complex regional pain syndrome. Dr. Tilghman diagnosed bilateral carpal tunnel syndrome, and neuralgia, neuritis and complex regional pain syndrome, Type II, on the left side. Dr. Tilghman rated Claimant's impairment at 9% of the body as a whole under the *AMA Guides*, and noted no objective evidence of impairment attributable to complex regional pain syndrome. Dr. Tilghman also imposed permanent restrictions.

Having considered the record as a whole, the Board finds the opinions of Dr. Tilghman more credible on the extent of Claimant's functional impairment. Arguably, Dr. Rosenthal's rating was premature if additional medical treatment was recommended. Dr. Tilghman noted fewer residual symptoms than Dr. Rosenthal, which is consistent with further medical improvement. The current state of Claimant's symptoms are unknown. Dr. Tilghman was appointed by the Court to serve as a neutral examining physician. The Board concludes Claimant sustained permanent functional impairment of 9% of the body as a whole attributable to bilateral carpal tunnel syndrome and left-sided complex regional pain syndrome.

Apart from missing approximately twenty weeks of work, Claimant continued working for Respondent without loss in wages, until she resigned her employment effective May 17, 2019. Claimant is eligible to receive permanent partial disability compensation based on 9% functional impairment to the body as a whole, attributable to both forearms, prior to May 17, 2019.

B. CLAIMANT IS ELIGIBLE TO RECEIVE PERMANENT PARTIAL GENERAL DISABILITY COMPENSATION BASED ON 57% WORK DISABILITY.

Both parties dispute the award of work disability contained in the Award. Where an employee sustains an injury to the body as a whole resulting in functional impairment in excess of 7.5% solely from the present injury, or in excess of 10% where there is preexisting functional impairment, and the employee sustains at least a 10% wage loss as defined in K.S.A. 44-510e(a)(2)(E), the employee may receive work disability compensation in excess of the percentage of functional impairment.⁹ In such cases, work disability is determined by averaging the post-injury task loss caused by the injury with the post-injury wage loss caused by the injury.¹⁰

Here, Claimant sustained 9% functional impairment of the body as a whole. If Claimant sustained a wage loss of 10% or more on account of the injury, and not due to other causes or factors, she is eligible to receive work disability compensation in excess of her functional impairment. "Wage loss caused by voluntary resignation or termination for cause shall in no way be construed to be caused by the injury."¹¹ Claimant resigned her employment because she continued to experience pain and Respondent did not provide additional accommodations. Respondent conceded Claimant continued to report pain while working in the dietary department.

"If an employee cannot perform a job due to chronic pain, then that employee may be physically incapable of performing the job. If an employee quits a job because he or she is physically incapable of performing that job, then his or her resignation is arguably not voluntary."¹² The Board finds Claimant's resignation was not voluntary. Claimant resigned her employment because her work in the dietary department, which arguably violated Dr. Nassab's restrictions, continued to produce pain. Although Respondent was aware of Claimant's problems, no further accommodations were provided. Claimant's behavior does not constitute a voluntary resignation. Claimant is not barred from receiving work disability benefits under K.S.A. 44-510e(a)(2)(E)(i).

The extent of work disability is determined by averaging the percentage of post-injury task loss and the percentage of post-injury wage loss.¹³ "Task loss" is the

⁹ See K.S.A. 44-510e(a)(2)(C).

¹⁰ See *id.*

¹¹ K.S.A. 44-510e(a)(2)(E)(i).

¹² *Eder v. Hendrick Toyota*, 2016 WL 7324454, at *11 (Unpublished Kan. App. Dec. 16, 2016).

¹³ See K.S.A. 44-510e(a)(2)(C).

percentage to which the employee, in the opinion of a licensed physician, lost the ability to perform the work tasks the employee performed in any substantial gainful employment during the five-year period preceding the injury.¹⁴ “Wage loss” is the difference between the average weekly wage the employee was earning at the time of the injury and the average weekly wage the employee is capable of earning after the injury. In determining wage loss, the Court is required to impute an appropriate post-injury wage based on the employee’s age, physical capabilities, education and training, prior experience, the availability of jobs in the open labor market, and other relevant factors.¹⁵

Here, the greater weight of the evidence proves Claimant’s task loss is 47.75%. Dr. Rosenthal believed Claimant’s task loss was 100% based on Dr. Rosenthal’s restrictions and Ms. Terrill’s task list. Dr. Rosenthal’s restrictions were based on Claimant’s condition when additional medical treatment was recommended. Dr. Tilghman believed Claimant’s task loss, based on his restrictions and Ms. Terrill’s task list, was 58%. Dr. Tilghman also testified Claimant’s task loss, based on his restrictions and Mr. Benjamin’s task list, was 37.5%. The average of Dr. Tilghman’s task loss opinions is 47.75%. Dr. Tilghman’s opinions are based on a more recent evaluation, and are found more credible.

The greater weight of the credible evidence proves Claimant’s wage loss is 66.25%. Ms. Terrill, based on her review of the restrictions of Drs. Rosenthal, Bishop and Tilghman, believed Claimant had no earning capacity. Ms. Terrill did not review the restrictions of Dr. Nassab, and acknowledged Claimant was not looking for work and was receiving Social Security retirement based on her age. Mr. Benjamin reviewed the restrictions of Drs. Rosenthal, Bishop, Murati, Nassab and Tilghman, and performed a current labor market review. Mr. Benjamin believed Claimant was capable of earning \$366.00 per week because her prior work in a casino complied with Dr. Tilghman’s restrictions, which produced a wage loss of 32.5%. Notably, neither Ms. Terrill, nor Mr. Benjamin, indicated Dr. Tilghman’s statement Claimant should avoid triggering activities affected their opinions. The Board finds both opinions equally credible, and finds Claimant’s wage loss is the average of the two opinions, or 66.25%.

Claimant is eligible to receive work disability compensation based on the average of her 47.75% task loss and her 66.25% wage loss. The average is 57%. Therefore, Claimant is entitled to award of permanent partial disability compensation based on 57% work disability effective May 17, 2019, if she is not eligible to receive permanent total disability compensation.

¹⁴ See K.S.A. 44-510e(a)(2)(D).

¹⁵ See K.S.A. 44-510e(a)(2)(E).

C. CLAIMANT FAILED TO PROVE SHE IS PERMANENTLY AND TOTALLY DISABLED.

Claimant alleges she should receive an award of permanent total disability compensation. 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, and expert evidence shall be required to prove permanent total disability.¹⁶

Here, Claimant continued working for Respondent for nine months, albeit in pain, following her completion of medical treatment. After resigning her employment, Claimant began receiving Social Security retirement benefits based on her age, as well as the federal civil service retirement benefits she was receiving when she worked for Respondent. Claimant's current symptoms, and their impact on her current activities, is unknown. Ms. Terrill thought Claimant had no transferrable job skills and was incapable of earning wages, based on the restrictions of Drs. Tilghman, Rosenthal and Bishop. Ms. Terrill thought Dr. Tilghman's restrictions restricted her to sedentary work, which eliminated Claimant's prior jobs. In contrast, Mr. Benjamin, who reviewed the medical records from all the physicians who evaluated or treated Claimant, believed jobs were available Claimant could perform within Dr. Tilghman's restrictions. In particular, Mr. Benjamin believed Claimant could return to her prior employment as a cage cashier for the casino where she worked before working for Respondent. Mr. Benjamin thought Claimant had transferrable job skills and her age was not a fatal obstacle in obtaining work in the current job market.

The Board finds the opinions of Mr. Benjamin more credible than those of Ms. Terrill. Mr. Benjamin had access to all of Claimant's medical records, performed a review of actual jobs available in Claimant's geographic area, and considered the tasks in all of Claimant's pre-injury employment in assessing her job skills. The current effects of Claimant's injuries are unknown. While Claimant's injuries produced permanent partial disability, they did not render Claimant permanently and totally incapable of engaging in any substantial and gainful employment. Claimant failed to prove entitlement to permanent total disability compensation.

5. THE AWARD OF COMPENSATION IS SUBJECT TO AN OFFSET FOR THE SOCIAL SECURITY RETIREMENT BENEFITS CLAIMANT ACTUALLY RECEIVED.

In the Award, Claimant's work disability award was offset by \$488.13 per week. This sum represented the Social Security retirement benefits Claimant was actually receiving, as well as a portion of Claimant's federal civil service retirement benefits attributed to

¹⁶ See K.S.A. 44-510c(a)(2).

Social Security contributions made by the Veterans Administration. In other words, some of the offset was based on Social Security retirement benefits not actually received by Claimant, but imputed to her.

According to the Workers Compensation Act:

If the employee receives, whether periodically or by lump sum, retirement benefits under the federal social security act or retirement benefits from any other retirement system, program, policy or plan which is provided by the employer against which the claim is being made, any compensation benefit payments which the employee is eligible to receive under the workers compensation act for such claim shall be reduced by the weekly equivalent amount of the total amount of all such retirement benefits, less any portion of any such retirement benefit, other than retirement benefits under the federal social security act, that is attributable to payments or contributions made by the employee, but in no event shall the workers compensation benefit be less than the workers compensation benefit payable for the employee's percentage of functional impairment.¹⁷

When a workers compensation statute is plain and unambiguous, a court must give effect to its express language, rather than determine what the law should or should not be.¹⁸

In this case, Claimant began receiving Social Security retirement benefits in November 2019. In 2020, Claimant actually received Social Security retirement totaling \$2,070.20, or \$39.81 per week. Starting December 2020, Claimant received Social Security retirement in the amount of \$175.90, per month, or \$40.59 per week. The sums Claimant received from her federal civil service retirement are not included in the offset provision of K.S.A. 44-501(f), because this claim was not made against the Veterans Administration. In like token, the Social Security retirement benefits Claimant was not paid because of her federal civil service retirement benefits are not included in the offset provision of K.S.A. 44-501(f), because they were not received by Claimant. Therefore, the \$488.13 weekly offset contained in the Award should be modified because it includes sums Claimant did not receive. Instead, Claimant's work disability compensation should be offset by \$39.81 per week from November 1, 2019, through November 30, 2020, followed by \$40.59 per week from December 1, 2020, to the present.

¹⁷ K.S.A. 44-501(f).

¹⁸ See *Bergstrom v. Spears Mfg. Co.*, 289 Kan. 605, 607-08, 214 P.3d 676 (2009).

6. THE AWARD OF FUTURE MEDICAL IS AFFIRMED.

The employer's liability to pay compensation attaches when an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment.¹⁹ It is presumed the employer's obligation to provide medical treatment terminates upon the employee's reaching maximum medical improvement. The presumption may be overcome with medical evidence it is more probably true than not additional medical treatment will be necessary after maximum medical improvement. "Medical treatment" means treatment provided or prescribed by a licensed health care provider and not home exercises or over-the-counter medication.²⁰

Here, Dr. Rosenthal recommended additional treatment to cure or relieve Claimant's work-related injuries, which includes complex regional pain syndrome. In particular, Dr. Rosenthal recommended pain management modalities and right-sided carpal tunnel surgery. Dr. Tilghman initially recommended over-the-counter medication, home exercises, and avoiding activities causing symptoms. In his deposition, Dr. Tilghman conceded prescription medication would be indicated for Claimant's complex regional pain syndrome if beneficial. These opinions satisfy K.S.A. 44-510h(e). Accordingly, the award of future medical contained in the Award should be affirmed.

CONCLUSION

Claimant's request the attachments to her brief be considered by the Board is denied. ALJ Sample ruled on the objections raised in Mr. Benjamin's deposition. The Board does not possess authority to address the constitutional issue raised by Claimant, and the issue is reserved for the appellate courts. Claimant's functional impairment is 9% of the body as a whole, attributable to bilateral forearms for bilateral carpal tunnel syndrome and left-sided complex regional pain syndrome. Claimant is entitled to permanent partial disability compensation based on 9% functional impairment, followed by an award based on 57% work disability. Claimant's award is subject to an offset, pursuant to K.S.A. 44-501(f), for the Social Security retirement benefits Claimant actually received. The award of future medical is affirmed.

AWARD

WHEREFORE, it is the finding, decision and order of the Appeals Board the Award of ALJ Julie A.N. Sample, dated August 24, 2021, is modified.

¹⁹ See K.S.A. 44-501b(b).

²⁰ See K.S.A. 44-510h(e).

AN AWARD OF COMPENSATION IS HEREIN ENTERED IN FAVOR OF Claimant, Brenda Willming, and against Respondent, Atchison Hospital, and its Insurance Carrier, KHA Workers Compensation Fund, Inc. Claimant is entitled to 20.31 weeks of temporary total disability compensation, paid at \$359.04 per week, totaling \$7,292.10; followed by 36.87 weeks of permanent partial disability compensation based on 9% functional impairment of the body as a whole attributable to both forearms, paid at \$359.04 per week, totaling \$13,237.80; followed by 24 weeks of permanent partial general disability compensation based on 57% work disability, paid at \$361.46 per week, totaling \$8,675.04; followed by 56.57 weeks of permanent partial general disability compensation based on 57% work disability, paid at \$321.65 per week, totaling \$18,195.74; followed by 116.08 weeks of permanent partial general disability compensation based on 57% work disability, paid at \$320.87 per week, totaling \$37,246.59; making a total award of \$84,647.27.

As of March 31, 2022, there is due and owing 20.31 weeks of temporary total disability compensation, paid at \$359.04 per week, totaling \$7,292.10; followed by 36.87 weeks of permanent partial disability compensation, paid at \$359.04 per week, totaling \$13,237.80; followed by 24 weeks of permanent partial general disability compensation, paid at \$361.46 per week, totaling \$8,675.04; followed by 56.57 weeks of permanent partial general disability compensation, paid at \$321.65 per week, totaling \$18,195.74; followed by 69.43 weeks of permanent partial general disability, paid at \$320.87 per week, totaling \$22,278.00; for a total due and owing of \$69,678.68, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance of \$14,968.59 shall be paid at \$320.87 per week for 44.65 weeks until paid in full or until further order of the Director.

Respondent and Insurance Carrier are also ordered to pay all valid, authorized and related medical expenses, pursuant to the Kansas Workers Compensation Medical Fee Schedule. Unauthorized medical expenses of \$500.00 are awarded to Claimant, and left open if not already paid. The award of future medical treatment to cure or to relieve the effects of the work-related injuries, and approval of Claimant's counsel's attorney's fees and expenses are affirmed.

IT IS SO ORDERED.

Dated this _____ day of April, 2022.

BRENDA WILLMING

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AP-00-0460-733
CS-00-0443-834

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: (Via OSCAR)

Bradley E. Avery
P. Kelly Donley
Hon. Julie A.N. Sample