

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

DIJANA PONJAVIC)	
Claimant)	
v.)	
)	AP-00-0463-214
KERRY, INC.)	CS-00-0097-907
Respondent)	
and)	
)	
ARCH INSURANCE CO.)	
Insurance Carrier)	

ORDER

Claimant requested review of the January 13, 2022, Award by Administrative Law Judge (ALJ) Julie A.N. Sample. The Board heard oral argument on June 2, 2022.

APPEARANCES

Zachary A. Kolich appeared for Claimant. Kristina Mulvany appeared for Respondent and its Insurance Carrier. Due to a conflict, Board Member William G. Belden, recused himself from this appeal. Thomas D. Arnhold was appointed as a Board Member Pro Tem.

RECORD AND STIPULATIONS

The Board adopted the same stipulations and considered the same record as the ALJ, consisting of the transcript of Regular Hearing held May 5, 2021; Continuation of regular hearing deposition of Claimant held October 22, 2021, with exhibits 1-5; Transcript of preliminary hearing held January 4, 2017; Transcript of preliminary hearing held December 20, 2017; Evidentiary deposition of Jennifer Prohaska, Ph.D, taken October 26, 2021, with exhibits 1-5; Evidentiary deposition of Terry L. Cordray, taken November 4, 2021, with exhibits 1-2; Evidentiary deposition of James S. Zarr, M.D., taken November 9, 2021, with exhibits 1-2; Evidentiary Deposition of Steven G. Charapata, M.D., taken November 10, 2021, with exhibits 1-4; Evidentiary deposition of Michael J. Dreiling, taken November 16, 2021 with exhibits 1-3; Evidentiary deposition of Allan D. Schmidt, Ph.D., taken November 30, 2021 with exhibits 1-2; Evidentiary deposition of Terrence Pratt, M.D., taken December 1, 2021 with exhibits 1-4; Joint stipulation on wage filed October 22, 2021; medical report of Terrence Pratt, M.D. dated February 22, 2021; Medical addendum report of Terrence Pratt, M.D., dated April 4, 2018; Psychological report of Allan Schmidt, Ph.D.,

dated September 11, 2018; Medical addendum report of Terrence Pratt, M.D. dated June 2, 2021; the parties briefs, and the documents of record filed with the Division.

ISSUES

1. Is the work accident the prevailing factor for the injury, medical condition, need for treatment and the resulting disability?
2. What is the nature and extent of Claimant's disability?
3. Is Claimant entitled to future medical benefits?

FINDINGS OF FACT

Claimant, an immigrant from Bosnia, began working for Respondent on February 22, 2000. With the exception of a few months in 2006, she continued to work for Respondent through May 24, 2017. Claimant worked for Respondent for three days in June 2017, but has not worked for Respondent or anyone else since. Claimant was employed in the production side of Respondent's business which, required her to perform repetitive tasks throughout her work day. Those tasks included repetitively lifting and dumping 50 pound bags into a mixer, stirring the contents, packing boxes, loading boxes onto a pallet, wrapping the pallets and moving the pallets.

On November 4, 2015, Claimant was loading 30 pound boxes onto a pallet when she felt something catch in her right shoulder and neck. Claimant reported her injury to her supervisor, but finished her work shift. Claimant initially received conservative treatment through Concentra for cervical and thoracic strains and right shoulder pain.

Claimant's care was referred to Dr. Chandra, who diagnosed Claimant with cervical and thoracic strains and myofascial shoulder pain. Dr. Chandra ordered MRIs of the cervical and thoracic spines which were performed on March 9, 2017, and found to be normal. Dr. Chandra ordered an electrodiagnostic study which was performed in May of 2016, which was found to be normal. Dr. Chandra performed two trigger point injections to alleviate Claimant's ongoing pain in her neck, upper back and right shoulder. A third injection was not performed due to Claimant's bad reaction to the second injection. Dr. Chandra released Claimant from additional medical treatment on August 10, 2016.

Due to continued complaints of pain, Claimant was referred to James S. Zarr, M.D., who specializes in physical medicine and rehabilitation. Dr. Zarr saw Claimant on January 30, 2017, and opined she suffered from myofascial neck, upper back and posterior right shoulder pain. Dr. Zarr recommended medication, temporary work restrictions and a work conditioning program for 2-3 weeks.

On March 7, 2017, Dr. Zarr noted Claimant was only able to tolerate the work conditioning program for one week due to pain. He opined Claimant was at maximum medical improvement and released her without permanent work restrictions. Dr. Zarr opined Claimant had a 5% whole body permanent impairment for her neck, upper back and right shoulder injuries based on the *Guides to Impairment*, 6th Edition (*Guides*). Dr. Zarr opined the prevailing factor for Claimant's medical condition and resulting impairment was the November 4, 2015, work-related injury. Dr. Zarr examined Claimant on November 14, 2017, and noted her symptoms were essentially the same. He did not alter his prior opinions regarding impairment of function, restrictions or prevailing factor.

Almost four years later, Dr. Zarr was provided medical records from 2010 for an alleged workers compensation injury. In short, those records reflected Claimant received conservative treatment for approximately 4½ months for injuries to her right shoulder and neck, which Claimant attributed to her production activities with Respondent. It was determined some of Claimant's symptoms were due to a right neck mass and no additional treatment was provided. Based on a review of these medical records, Dr. Zarr drafted a September 22, 2021, letter wherein he changed his prevailing factor opinion. He did not believe Claimant's work injury of November 4, 2015, was the prevailing factor causing Claimant's neck, upper back and right shoulder pains. Dr. Zarr opined the 5% whole body rating "might" be due to the 2010 injury.¹ Dr. Zarr testified Claimant was not permanently totally disabled.

Regarding the 2010 medical records, Dr. Zarr testified:

- Q. Okay. And again, if Ms. Ponjavic was released in February of 2011, had no objective testing or clinical findings to suggest some sort of permanent condition, had no subjective complaints, no personal pain experiences from 2011 until 2015, based upon what you testified to previously you would consider that case to have resolved itself; is that accurate?
- A. I don't know if she had pain complaints from 2011 to 2015. But if she did not, in your hypothetical, I would agree that that would have been a cure.²

Claimant worked in a light duty capacity throughout her treatment with Concentra and Dr. Zarr. She was released without restrictions by Dr. Zarr on March 7, 2017. Claimant testified when she was released to full duty, she continued to perform the same job duties as when she was on light duty. Claimant's co-workers performed lifting of the finished boxes onto the pallet. Claimant told the safety manager (Greg Dew) she was not

¹ See Zarr Depo. at 4.

² See *id.* at 36-37.

able to do the regular job. The safety manager instructed her to, “little bit by little bit, you need to try.”³ Claimant spoke with the plant manager (Richard Huffman) and was told “Don’t worry. Just do what you did til now. You did perfect. Don’t worry.”⁴

On May 24, 2017, Claimant was informed there was no more light duty and to go home and see her personal physician. In short, Claimant had to work full duty or not at all. To avoid accumulating points toward termination, Claimant returned to work for Respondent on the production line for three days in June 2017, just prior to her appointment with her personal physician, Dr. Terry Hilton. After her appointment, Claimant applied for and received FMLA leave based upon medical information from Dr. Hilton.

Claimant received short-term disability for six months and was approved for long-term disability, beginning December 2017. Claimant applied for social security disability benefits, but her request was denied.

At her attorney’s request, Claimant saw Steven G. Charapata, M.D., on September 27, 2017. Dr. Charapata diagnosed Claimant with bilateral greater occipital neuralgia with secondary headaches; cervicgia secondary to myofacial pain; thoracic myofascitis; lumbago, situational depression; and right shoulder pain. Dr. Charapata opined Claimant’s work accident is the prevailing factor in her medical condition, need for treatment and resulting impairment. He imposed permanent work restrictions, recommended future medical treatment and opined Claimant has a 24% impairment of function to the whole body based on the *Guides*. Dr. Charapata opined Claimant, from a medical point of view, is essentially unemployable.

Dr. Charapata reviewed Mr. Dreiling’s task report, and found Claimant could no longer perform six of the ten tasks resulting in a 60% task loss. Dr. Charapata reviewed Mr. Cordray’s task report, and found Claimant could no longer perform nine of the thirteen tasks resulting in a 69% task loss.

Dr. Charapata reviewed the 2010, medical records. He opined the 2010 injury resolved and was not related to Claimant’s 2015, accidental injuries. Dr. Charapata opined Claimant’s lumbar spine symptoms were not the result of an acute injury, but emerged as a result of Claimant’s altered body mechanics.

Terrence Pratt, M.D., evaluated Claimant for a Court-ordered IME on February 22, 2018. Dr. Pratt diagnosed Claimant with cervicothoracic and thoracolumbar syndrome, both without significant evidence of verifiable radiculopathy, history of right shoulder syndrome and lumbosacral discomfort with generalized body discomfort of undetermined

³ See Cont. R.H. Trans. By Depo. (Oct. 22, 2021) at 12.

⁴ See *id.*

etiology. Dr. Pratt recommended a right shoulder MRI, which was provided. Dr. Pratt opined the 2015 work event was a significant factor in her right shoulder, neck and upper back issues, but he had not reviewed the medical records from 2010. He stated review of those records could affect his opinion. Dr. Pratt opined the lumbosacral involvement and the generalized body symptoms were not related to her 2015 work event.

Dr. Pratt prepared an addendum report on April 4, 2018, following receipt of the MRI results. The MRI revealed minimal degenerative changes of the acromioclavicular joint, but no internal derangement of the right shoulder. He noted Claimant was at MMI and placed permanent restrictions of no lifting in excess of 25 pounds or no pushing or pulling in excess of 40 pounds. Dr. Pratt provided an impairment of function rating of 3% to the whole body using the *Guides*, 6th Ed., and 14% to the whole body using the *Guides*, 4th Ed.

More than three years later, Dr. Pratt was asked to review the 2010 medical records to determine if they changed his opinions. Review of the 2010 medical records did change Dr. Pratt's opinion which he set forth in his second addendum on June 2, 2021. He noted the records documented preexisting right shoulder and cervical involvement in 2010. A chiropractic assessment in 2014 suggested Claimant had persistent cervical involvement. Dr. Pratt opined Claimant's cervicothoracic and right shoulder involvement relate to preexisting factors as well as her vocationally related activities in 2015. He could not state with a reasonable degree of medical certainty which factor is the prevailing factor without an accurate history.

Having reviewed the 2010 medical records and utilizing his understanding of the *Johnson* decision, Dr. Pratt opined, Claimant has an impairment rating of 7%, to the whole body. He updated Claimant's work restrictions to maximum lifting of 35 pounds and maximum push/pull of 50 pounds. Dr. Pratt opined, based on Mr. Cordray's task list, Claimant lost the ability to perform 3 of the 13 tasks resulting in a loss of 23% and based on Mr. Dreiling's task list, Claimant lost the ability to perform 3 of the 10 tasks resulting in a loss of 30%. Dr. Pratt opined claimant was able to return to work.

Dr. Allen D. Schmidt, a clinical psychologist, saw Claimant on September 5, 2018, for a Court-ordered evaluation. Dr. Schmidt testified Claimant denied any significant history of psychiatric treatment other than 2007 when her father died. Dr. Schmidt opined Claimant's injury was the prevailing factor in the development of her pain and subsequent depression. Dr. Schmidt opined Claimant has a 15% impairment of function rating based on the *Guides*. He did not offer any specific psychological work restrictions for Claimant.

Jennifer A. Prohaska, Ph.D., a clinical psychologist, examined Claimant at Respondent's request on November 28, 2018. She diagnosed Claimant with adjustment disorder, with depressed mood and anxiety. She opined Claimant's "perception of impairment from the November 4, 2015, injury are the cause of her psychiatric diagnosis above. The injury itself was not the prevailing factor causing the psychiatric diagnosis. Her

irrational perception of her pain experience and her unsubstantiated limitations is the bridging factor linking the November 4, 2015, incident to her current psychiatric status.”⁵ Dr. Prohaska testified Claimant’s psychiatric condition is not directly traceable to her physical work injury. Dr. Prohaska opined Claimant has a 5% impairment of function based on the *Guides*, 6th Edition.

Terry L. Cordray, a certified vocational rehabilitation counselor, interviewed Claimant on August 12, 2019, at the request of the Respondent. Mr. Cordray noted Claimant has not worked since May 24, 2017. Mr. Cordray identified 13 non-duplicative tasks Claimant performed in the five years prior to her injury. He opined Claimant could earn wages in the open labor market within Dr. Pratt’s 25-pound lifting restriction and could expect to earn \$10.00 -15.00 per hour in those jobs. Mr. Cordray opined Claimant was employable and not permanently totally disabled. He opined Claimant could preform her pervious job with Respondent.

Michael J. Dreiling, a vocational rehabilitation specialist, interviewed Claimant at the request of her attorney on November 12, 2018. Mr. Dreiling identified ten non-duplicative work tasks Claimant performed in the five years prior to her injury. Mr. Dreiling’s opinions regarding wage earning capacity were varied based upon the medical opinions provided. He opined Claimant is not capable of returning to work for Respondent performing the same jobs she performed prior to her injury. Mr. Dreiling opined Claimant is essentially and realistically unemployable in the open labor market, and therefore, permanently totally disabled.

The ALJ found:

The Court has carefully considered each of the physicians’ report, their testimony and notes that Claimant’s physical complaints, which she attributes to her 2015 accident, are (by her report) all encompassing and involve her entire body, even though her original claim indicates she was complaining of just her cervical/thoracic and right shoulder areas. These isolated complaints to those areas are very similar to those she expressed in an earlier incident in 2010. And while those earlier complaints seemed to have resolved and she returned to work uneventfully, at least until 2015, the existence of that previous treatment history cannot be ignored. Moreover, the Court notes that Claimant’s post November 2015 objective test results (the MRIs and EMG) revealed no positive indicia of physical change to her anatomy as a result of the injury. Indeed, it appears that there is simply no objective evidence of an injury or physical change in Claimant’s physical structure stemming from the November 2015 accident. The Court is only left with Claimant’s recitation of her pain complaints and self-imposed limitations. Even Dr. Charapata’s examination revealed normal range of motion in the cervical and upper extremities. By the time Claimant sees Dr. Pratt, he is unable to assess her

⁵ See Prohaska Depo. Ex. 2 at 18.

thoracic area because Claimant indicated it was too painful. Her recitation to the Court of her current condition shows that the scope of her capacity to engage in daily activities is ever decreasing due to her perception of pain. The Court is simply not persuaded by the evidence in this record that Claimant's November 4, 2015, accident is the "prevailing factor" in her physical condition under this record.

The Court does not make this determination lightly, as it is undisputed that Claimant bears a psychological condition, and it is clearly impacting her perception of her physical condition and abilities. However, given the Court's decision that her underlying physical complaints do not meet the statutory requisites, i.e. prevailing factor, the psychological component of Claimant's complaints cannot be the basis of an award. In claims of psychological injury (commonly referred to as neurosis), the Court requires that the neurosis must be caused by a compensable physical work injury. Our Supreme Court has determined that a physical injury is a prerequisite to any recovery for a psychological injury. So, without any compensable physical injury, there is no basis to recover the psychological impairment.

Having determined there is no compensable injury, the Court makes no finding with respect to the remaining issues (work disability, future medical) posed by the parties as those issues are moot.⁶

Claimant requests review of the ALJ's denying her claim due to her failure to prove the November 4, 2015, accident is the prevailing factor causing her medical condition, medical treatment and resulting impairment. Claimant requests review of the nature and extent of her disability and future medical treatment. Respondent asks the Board to affirm the ALJ's award.

PRINCIPLES OF LAW AND ANALYSIS

1. Claimant's November 4, 2015, accident is the prevailing factor causing Claimant's injury, medical condition, need for medical treatment and resulting disability.

To be compensable, an accident must be identifiable by time and place of occurrence, produce at the time symptoms of an injury and occur during a single work shift.⁷ The accident must be the "prevailing factor" in causing the injury. "Prevailing factor"

⁶ See ALJ Award (Jan. 13, 2022) at 11-12.

⁷ See K.S.A. 44-508(d).

is defined as the primary factor compared to any other factor, based on consideration of all relevant evidence.⁸

In denying the compensability of Claimant's claim, the ALJ stated: "The Court is simply not persuaded by the evidence in this record that claimant's November 4, 2015 accident is the "prevailing factor" in her physical condition under this record."⁹ The Board disagrees.

Initially, Dr. Zarr and Dr. Pratt opined the prevailing factor for the injuries Claimant sustained to her neck, upper back and right shoulder was the November 4, 2015, accidental injury. Both physicians offered impairment of function ratings and Dr. Pratt recommended permanent restrictions. After review of the 2010 medical records, Dr. Zarr and Dr. Pratt changed their opinions. Dr. Zarr stated he could no longer say to a reasonable degree of medical certainty the November 4, 2015, was the prevailing factor in her condition. Dr. Pratt modified his impairment rating and permanent restrictions, but continued to opine they were the result of the 2015 work event. Dr. Pratt testified he was unable to determine prevailing factor "without an accurate history."¹⁰

Establishing prevailing factor is based on all relevant evidence and is not dependent on medical opinions.¹¹ Summing up the medical evidence regarding prevailing factor reveals one physician (Zarr) initially finding the November 2015, work event to be the prevailing factor, but changed his opinion to it not being the prevailing factor; one physician (Pratt) finding the November 2015, event was the prevailing factor, but later stating he did not have a prevailing factor opinion; and, one physician (Charapata) stating unequivocally, the November event was the prevailing factor.

Dr. Zarr's change of opinion from prevailing factor to not the prevailing factor is not credible in light of the evidence establishing Claimant did not receive medical treatment between February 24, 2011, and November 4, 2015, and his testimony, assuming she had no pain complaints, suggested the 2010 condition was "cured."¹²

Dr. Pratt is familiar to the Board and is often used in Court-ordered evaluations in Kansas workers compensation litigation. The goal of a Court-ordered evaluation is to

⁸ See K.S.A. 44-508(d), (g).

⁹ See ALJ Award (Jan. 13, 2022) at 12.

¹⁰ See Pratt Depo. at 32.

¹¹ See *Fish v. Mid America Nutrition Program*, No 1,075,841, 2018 WL 3740430, at 5 (Kan. WCAB Jul. 12, 2018)

¹² See Zarr Depo. at 36-37.

assist the trier of fact in sorting through disparate evidence presented by the parties. In short, provide the trier of fact with independent opinions regarding contested issues. In this case, Dr. Pratt falls short of this goal. During her only evaluation with Dr. Pratt, Claimant advised him she had a work event involving her right shoulder and neck in 2010. She advised Dr. Pratt her symptoms resolved from the 2010 event. The only evidence Claimant received any form of treatment between February 24, 2011, and November 4, 2015, is a November 22, 2014, chiropractor note from Dr. Stallbaumer. To this, Dr. Pratt testified "I cannot state specifically why she saw the chiropractor with a cervical assessment in November of 2014. It doesn't – doesn't state it."¹³ The Board is unclear why Dr. Pratt opined he had an inaccurate history from which he could provide a prevailing factor opinion. The record is unclear regarding what, if any, information Dr. Pratt deemed necessary to form his opinion. In any event, the Board notes Dr. Pratt does not have an opinion regarding prevailing factor. The Board also notes the ALJ found Dr. Pratt's non-opinion to be Claimant's November 4, 2015, accidental injury was not the prevailing factor.

The Board finds Dr. Zarr and Dr. Pratt's reliance on the 2010 medical records in changing their initial opinions regarding prevailing factor renders them not credible to the issue. The Board finds the more persuasive evidence regarding the 2010 work event is the evidence establishing Claimant returned to work, without restrictions, and performed her unchanged work duties with Respondent, for five years following the 2010 injury and treatment. The 2010 injury was minor and resolved.

The ALJ found:

Our Supreme Court has determined that a physical injury is a prerequisite to any recovery for a psychological injury. So, without any compensable physical injury, there is no basis to recover the psychological impairment.¹⁴

The Board further finds Claimant has met her burden of proving the prevailing factor of the psychological condition is the November 4, 2015, work injury. Dr. Schmidt was the Court-ordered evaluator. His opinions are found to be more credible and persuasive than those of Respondent's evaluator, Dr. Prohaska.

2 & 3. The nature and extent of Claimant's disability and is Claimant entitled to future medical benefits?

The ALJ did not make findings of fact and conclusions of law regarding the issues of nature and extent and the right to future medical benefits.

¹³ See Pratt Depo. at 51.

¹⁴ See ALJ Award (Jan. 13, 2022) at 12.

AWARD

WHEREFORE, it is the finding, decision and order of the Board the Award of Administrative Law Judge Julie A.N. Sample dated January 13, 2022, is reversed and remanded with instructions to issue an award containing her findings of fact and conclusions of law regarding nature and extent of disability and future medical benefits.

IT IS SO ORDERED.

Dated this _____ day of June 2022.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: (Via OSCAR)

Zachary Kolich, Attorney for Claimant
Kristina Mulvany, Attorney for Respondent and its Insurance Carrier
Hon. Julie A.N. Sample, Administrative Law Judge