BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

RYAN D. KUGLER	)	
Claimant	)	
V.	)	AP-00-0468-051
	)	CS-00-0090-405
ARCHER DANIELS MIDLAND CO.	)	
Self-Insured Respondent	)	

ORDER

Both parties requested review of Administrative Law (ALJ) Judge Bruce Moore's Award dated June 3, 2022. Jan Fisher appeared for the claimant. P. Kelly Donley appeared for the self-insured respondent. The Board heard oral argument on September 15, 2022.

RECORD AND STIPULATIONS

The Board considered the same record as the ALJ, consisting of: (1) IME report of Terrence Pratt, M.D., dated October 8, 2021; (2) deposition transcript of Anne Rosenthal, M.D., taken February 16, 2022; (3) regular hearing transcript, held March 1, 2022; (4) deposition transcript of Daniel Prohaska, M.D., taken April 21, 2022; (5) all exhibits attached to enumerated items 2-4; and (6) documents of record filed with the Division.

ISSUES

1. What is the nature and extent of the claimant's disability?

2. Is the claimant entitled to future medical treatment?

A third issue raised was whether the Board should consider email correspondence from the ALJ referenced in the claimant's brief. The email explained how the ALJ arrived at calculating the claimant's impairment rating. However, the respondent, at oral argument, indicated this issue was irrelevant because the Board has de novo jurisdiction in assessing the claimant's impairment of function.

FINDINGS OF FACT

In 2015, the claimant began working for the respondent as a metal fabricator and welder. In April 2018, he worked at least 12 hours a day, 7 days a week, installing pipe at

the respondent's plant in Enid, Oklahoma, for two weeks. The pipes measured from 3 to 6 inches wide and 25 feet long and weighed over 200 pounds. To install pipe, a hole was cut in the roof and the pipe lowered by hand through the hole. The claimant used both arms and his entire body to move the pipe, floor by floor, to the basement of the nine-story building. The pipe was then welded in place.

After a couple of days of this work, the claimant noticed aches and sharp pains on the left side of his chest and sharp spasm pains in his left shoulder. He thought he had pulled a muscle and continued working. The claimant installed over a thousand feet of pipe each day during the two-week job.

Thereafter, the claimant returned to his regular work station in Salina. On April 23, 2018, the respondent's safety director noticed the claimant's left arm was twice the size of his right arm. The claimant was hospitalized and diagnosed with deep venous thrombosis (DVT) with Paget-Schroetter syndrome, also known as "effort thrombosis." He underwent placement of a thrombolytic catheter in the basilic and axillary veins on April 25. The next day, April 26, a followup venography showed a recurrent DVT, necessitating removal of the thrombolytic catheter and insertion of a new thrombolytic catheter in the left subclavian vein.

The blood clot recurred a third time, requiring another hospital stay from May 7 until May 10, 2018. During this time, he underwent a more extensive procedure to decompress the subclavian vein by resecting the first rib and the subscalaris muscle, and reconstructing the veins with venoplasty. The claimant was prescribed an anticoagulant and discharged home. He received outpatient physical therapy from June 25, 2018, until January 10, 2019, at which time he was released to full duty. The claimant testified physical therapy provided no benefit. The claimant also testified he discussed possible shoulder surgery with an unidentified physician, but surgery was ruled out due to the claimant's use of blood thinners.

On November 5, 2019, the claimant saw Daniel Prohaska, M.D., a board-certified orthopedic surgeon, at the respondent's request. The claimant complained of left shoulder pain, rated at an 8 on a 0-10 scale, and reported his symptoms were aggravated by all movements and activities, and the claimant was working on a regular-duty basis. Dr. Prohaska diagnosed "scapular dyskinesis," which meant his shoulder blade was not working together with his muscles, making the shoulder lean forward and causing pain in the front of his shoulder from impingement on the coracoid bone and the acromion bone. The doctor noted there was no orthopedic injury or other anatomic finding of a structural defect in the claimant's shoulder. The claimant brought MRI films dated October 28, 2019. Dr. Prohaska interpreted the films as showing the supraspinatus and infraspinatus as "intact."[1] The doctor made no mention of a left shoulder MRI performed on September 10,

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[1] Prohaska Depo., Ex. 2 at 3.

2018. Dr. Prohaska recommended a course of physical therapy to address the scapular dyskinesis. The doctor did not recommend surgery and testified, "Surgery on the diagnosis that I gave to him of secondary impingement for scapular mechanics would be 100 percent doomed to failure. It would not work."[2]

In a supplemental report dated July 29, 2020, Dr. Prohaska concluded the claimant reached maximum medical improvement and required no permanent restrictions. Using the AMA *Guides to the Evaluation of Permanent Impairment*, 6th ed. (the *Guides*), Dr. Prohaska assigned the claimant a 5% whole body impairment, using Table 9-12, page 208, which concerns "Thrombotic Disorders." The doctor testified it "would not be necessary here at all" to deviate from the *Guides* in assigning the claimant's impairment.[3] The rating of 5% is the default rating in the table used by Dr. Prohaska. The doctor's rating report indicated the claimant's shoulder required no rating above what was provided for the claimant's thrombosis.

Dr. Prohaska testified he arrived at the claimant's impairment by going through the individual steps with his knowledge and judgment. Dr. Prohaska did not ask the claimant about activities of daily living and testified the claimant was able to do all activities of daily living because he was doing heavy-duty work. The doctor acknowledged the section he used in the *Guides* did not cover effort thrombosis, but he utilized underlying conditions which lead to clotting. Dr. Prohaska opined the claimant had one episode of three clots and not three separate episodes, and stated the *Guides* do not differentiate between multiple clots in one event or clots over an extended period of time. The doctor testified all of his opinions were provided within a reasonable degree of medical probability.

At his attorney's request, Anne Rosenthal, M.D., an orthopedic surgeon, conducted a virtual independent medical examination (IME) by Zoom on June 2, 2021. The claimant complained about movement of his left arm and chest, including having a hard time lifting with his left arm. The claimant indicated difficulty or inability to perform hobbies, such as shooting, fishing, kayaking and weight lifting, in addition to recently only being able to use a sander at work for 10 minutes. He was looking for a less physical job. The claimant reported inability to sleep on his left side.

Dr. Rosenthal diagnosed acute deep vein thrombosis of the left upper extremity with occlusion of the left subclavian vein (under the clavicle), axillary vein, and thrombus extension down into the basilica vein (exertion-induced thrombosis or Paget-Schroetter syndrome) and abnormal scapulothoracic rhythm on the left due to the work injury. Dr. Rosenthal also reviewed a left shoulder MRI dated September 10, 2018. Among other findings, the doctor noted the MRI showed partial thickness tearing of the posterior

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[2] Prohaska Depo. at 8.

[3] *Id*. at 11.

supraspinatus and anterior infraspinatus. She also noted, as a matter of records review, the October 28, 2019, MRI showed low grade partial thickness tearing of the distal supraspinatus.

Using the *Guides*, Dr. Rosenthal assigned the claimant a 32% whole body impairment, using Table 4-13, on page 70. The 32% rating was the midpoint between the low of 24% and the high of 40% listed for a Class C rating for upper extremity peripheral vascular disease. Dr. Rosenthal acknowledged the claimant does not have upper extremity peripheral vascular disease, but the *Guides* do not specifically address the claimant's condition of exertion-induced thrombosis. Dr. Rosenthal testified the table used by Dr. Prohaska similarly did not really account for the claimant's condition. Had she used Table 9-12 from the *Guides*, page 208, as did Dr. Prohaska, Dr. Rosenthal explained her rating would have been in the 35-40% range based on the claimant having two or three thrombotic events.[4] The doctor observed Dr. Prohaska's rating addressed only one thrombotic event, resulting in a lower rating. Dr. Rosenthal testified her 32% rating was high enough to also account for the claimant's shoulder impairment. The doctor did not rely on shoulder range of motion to assign any impairment.

Dr. Rosenthal testified the claimant will more probably true than not require additional medical treatment, specifically physical therapy for his scapulothoracic rhythm abnormality. The doctor testified all of her opinions were provided within a reasonable degree of medical probability.

On October 8, 2021, Terrence Pratt, M.D., conducted a virtual court-ordered IME. The claimant reported near continuous throbbing and burning from his anterior left shoulder extending to his proximal anterior left chest wall, with left shoulder weakness and numbness at night in his anterior shoulder to the anterior chest wall. The claimant reported being able to return to work for the respondent for nine months and being independent in activities of daily living. Dr. Pratt noted the findings from the 2018 and 2019 left shoulder MRI studies. Dr. Pratt diagnosed left upper extremity deep venous thrombosis status post-operative intervention and left shoulder syndrome with a partial rotator cuff tear.

Dr. Pratt provided permanent restrictions and opined the claimant will require future medical treatment if there are any significant changes in his symptoms. Using the *Guides*, Dr. Pratt assigned the claimant a combined 11% whole person impairment and a combined 13% impairment under the AMA *Guides to the Evaluation of Permanent Impairment*, 4th ed., stating:

> When considering permanent partial impairment, the Sixth Edition of the Guides was utilized as the starting point. I considered table 9-12, page 208, he would be considered to have a class I abnormality with an acquired thrombotic disorder.

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[4] See Rosenthal Depo. at 19-20.

> Considering all the information he would be considered to have 9% permanent partial impairment of the whole person. For his left shoulder involvement, I considered table 15-5, page 402, partial rotator cuff tear with a class I abnormality with a mid level of 3. For the functional history table 15-7, page 406, a grade modifier 1. Physical examination table 15-8, page 408, a grade modifier 1. Clinical studies table 15-9, table 410, a grade modifier 2. The next adjustment formula 1 - 1+ 1-1+2-1 is 1. The permanency changes to grade D and 4% of the extremity which is equivalent to 2% of the whole person. Total permanency combining 9 and 2 with the combined values chart, 11% permanent partial impairment of the whole person. I considered the Fourth Edition of the Guides. The vascular assessment would not change to a reasonable degree of medical certainty. Shoulder assessment utilizing table 18, page 3/58, I would consider the involvement in relationship to the event to result in additional 6% permanency of the extremity or 4% of the whole person. This is without considering the involvement in relationship to the vascular involvement and the procedure. To a reasonable degree of medical certainty, he has a combination of 9 and 4% permanent partial impairment of the whole person or 13% permanent partial impairment of the whole person in relationship to the reported event with repetitive trauma.[5]

The claimant resides in Canada and works on a part-time basis as a painter. He testified he cannot physically perform the work he did for the respondent without pain. The claimant testified he stopped working for the respondent because he could not handle physical work. The claimant testified he did not pursue the physical therapy recommended by Dr. Prohaska because he was working in Enid, Oklahoma, at the time and financially would not be able to have therapy in Salina or Wichita. He has no medical restrictions and is not currently under the care of a doctor. The claimant testified he has pain every day, which he rates as an 8 out of 10 on a 1-10 pain scale. He takes six over-the-counter Tylenol daily for pain relief. The claimant testified he is not yet a Canadian citizen, and therefore has to pay for any medical treatment he might receive in Canada.

The ALJ stated:

> The main area of dispute among the physicians is whether the three interventions to address Kugler's blood clotting were three separate events or a single continuing event. Dr. Prohaska opined it was the single injury to the vein that caused the clotting, and each successive clot was a reclotting caused by the same injury. This would cause Kugler to fall into Class I in Table 9-12, with a default rating of 5% to the body. Dr. Rosenthal takes the position that every intervention was for a separate and distinct clot, that there were either two or three clots and, if Table 9-12 is applied, that Kugler should be placed in Class III, with a rating in the range of 35-40%. Alternatively, using the upper extremity peripheral vascular disease approach, a rating of 32% would be appropriate, and was high enough to encompass any residual shoulder complaints.

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[5] Pratt Report (filed Nov. 16, 2021) at 8.

> Dr. Pratt, by placing Kugler in Class I, appears to agree with Dr. Prohaska that Kugler's clotting issues were more akin to a single episode, rather than multiple clots.
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> It is beyond the ken of this court whether Kugler's blood clots were a single episode or should be considered as separate and distinct events. There appears to be disagreement among the medical community, and the court has received no evidence on the issue from any expert who has provided treatment for blood clots. In the absence of any such definitive evidence, the court has to entertain the possibility that ***either*** opinion ***could*** be right, so they should be entitled to equal weight. Considering all of the testimony and the opinions of the three physicians, the **court finds and concludes that the claimant has suffered a 23% impairment of function to the body as a whole**.
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> . . .
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> [Dr.] Prohaska recommended physical therapy in 2019, but Kugler declined to perform it. Dr. Rosenthal recommended a course of physical therapy, as did Dr. Prohaska, but Kugler did not pursue a request for physical therapy through a Preliminary Hearing, and did not express an interest in pursuing therapy in his Regular Hearing testimony. Dr. Pratt recommended further medical treatment only if Kugler's condition deteriorates. There is no evidence before the court that it is more probable than not that Kugler will require future medical treatment for his 2018 work injuries. **Kugler has failed to overcome the statutory presumption and has failed to establish his right to future medical treatment**.
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> Kugler has suffered a 23% permanent partial impairment of function to the body as a whole. He has failed to establish his entitlement to future medical care.[6]

The ALJ also observed the claimant did not pursue physical therapy because it was "not convenient."[7] Both parties appealed the ruling.

PRINCIPLES OF LAW AND ANALYSIS

The claimant argues Dr. Rosenthal's opinion is more credible, and he is entitled to a 32% whole body impairment. The claimant contends the ALJ failed to address deficiencies in the opinions of Drs. Pratt and Prohaska. The claimant further argues he proved he will probably require future medical treatment. The claimant contends the ALJ erred by imposing an additional criterion for the claimant to prove the proposed treatment could not have been pursued prior to an award.

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[6] ALJ Award at 8-9.

[7] *Id.* at 5.

The respondent argues the claimant failed to prove he has a work-related permanent shoulder impairment. The respondent contends the claimant should be limited to a 9% whole body impairment based on Dr. Pratt's neutral opinion. The respondent maintains the claimant failed to prove future treatment is necessary.

K.S.A. 44-501b(b) states an employer is liable to pay compensation to an employee incurring personal injury by repetitive trauma arising out of and in the course of employment. According to K.S.A. 44-501b(c), the burden of proof shall be on the claimant to establish his or her right to an award of compensation and the trier of fact shall consider the whole record.

The Board's review of a judge's order is de novo on the record.[8] A de novo hearing is a decision of the matter anew, giving no deference to the judge's findings and conclusions.[9]

1. The claimant, on account of his work-related injury, sustained a 23% permanent whole body impairment.

K.S.A. 44-510e(a) states, in part:

> (2) (A) Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d, and amendments thereto. . . .
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> (B) The extent of permanent partial general disability shall be the percentage of functional impairment the employee sustained on account of the injury as established by competent medical evidence and based on the fourth edition of the American medical association guides to the evaluation of permanent impairment, if the impairment is contained therein, until January 1, 2015, but for injuries occurring on and after January 1, 2015, based on the sixth edition of the American medical association guides to the evaluation of permanent impairment, if the impairment is contained therein.

Johnson states a claimant's percentage of functional impairment should be based on the *Guides*, as a starting point, and "competent medical evidence,"[10] a phrase not explained in statute or case law. However, medical conclusions cannot be based on conjecture and speculation.[11]

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[8] See K.S.A. 44-555c(a).

[9] See *In re Tax Appeal of Colorado Interstate Gas Co.*, 270 Kan. 303, 317, 14 P.3d 1099 (2000).

[10] *Johnson v. U.S. Food Service*, 312 Kan. 597, 603, 478 P.3d 776 (2021)

[11] See *Buchanan v. JM Staffing, LLC*, 52 Kan. App. 2d 943, 955, 379 P.3d 428 (2016).

"[S]ubjective work-related elements should be an integral part of the calculus if the ideology of the Act is to be preserved – to compensate the injured worker for the actual loss they have experienced."[12] An impairment rating must be formulated following a "comprehensive review of the worker's condition."[13]

The Kansas Court of Appeals recently stated:

> "[T]he Guides are not merely reference materials relied upon by physicians but are specifically referenced and required by the Act to be consulted when evaluating an impairment. . . . Given the Guides' incorporation into the Act, its use as a standard reference by physicians, the lack of a controversy concerning its contents, and the fact that the ALJ and Board are not strictly bound by the rules of evidence, it is "unnecessary for the AMA Guides to be introduced into evidence."[14]

A physician may use his or her judgment to address impairment not covered by the *Guides*.[15] Physicians can rate the same injury using the *Guides* and arrive at different impairment ratings.[16] The Board may discredit or disregard a rating not based on the *Guides,*[17] but we need not fully reject the entirety of a doctor's opinion based on some deviation from the *Guides*.[18]

K.S.A. 44-516 states the report of any court-ordered neutral health care provider shall be considered by the judge in making a final determination. The Board must consider a court-ordered IME report.[19]

The Board concludes the claimant, due to his work injury, sustained a 23% permanent whole body impairment. This rating is based on an average of the ratings provided by Drs. Pratt and Rosenthal. The Board discounted the opinion of Dr. Prohaska.

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[12] *Garcia v. Tyson Fresh Meats, Inc.*, 61 Kan. App. 2d 520, 530-31, 506 P.3d 283 (2022).

[13] *Id.* at 531.

[14] *Perez v. Nat'l Beef Packing Co.*, 60 Kan. App. 2d 489, 507, 494 P.3d 268 (2021).

[15] See *Smith v. Sophie's Catering & Deli Inc.*, No. 99,713, 2009 WL 596551 (Kansas Court of Appeals unpublished opinion filed Mar. 6, 2009), *publication denied* Nov. 5, 2010.

[16] See *Pierce v. L7 Corp./Wilcox Painting*, No. 103,143, 2010 WL 3732083, at *4 (Kansas Court of Appeals unpublished opinion filed Sept. 17, 2010).

[17] *Billionis v. Superior Industries*, No. 1,037,974, 2011 WL 4961951 (Kan. WCAB Sept. 15, 2011).

[18] See *Pierce*, 2010 WL 3732083, at *4.

[19] See *Alaniz v. Dillon Cos., Inc.*, No. 109,784, 2014 WL 3731939, at *9 (Kansas Court of Appeals unpublished opinion filed July 25, 2014).

Both Dr. Pratt and Dr. Rosenthal acknowledged the claimant sustained left shoulder impairment. Dr. Pratt specifically assessed shoulder impairment, while Dr. Rosenthal opined her rating was sufficient to encompass shoulder impairment. Dr. Prohaska did not fully account for the claimant having left shoulder impairment. The claimant's left shoulder problem, according to Dr. Prohaska, is scapular mechanical dysfunction. Dr. Prohaska's opinion there is no identifiable lesion in the claimant's shoulder is perplexing. Both Dr. Pratt and Dr. Rosenthal identified objective tears. Specifically, Dr. Pratt concluded the claimant sustained a partial rotator cuff tear, whereas Dr. Rosenthal identified partial thickness tearing of the claimant's posterior supraspinatus and anterior infraspinatus. Drs. Pratt and Rosenthal accounted for both MRI studies from 2018 and 2019, while Dr. Prohaska only mentioned his interpretation of the 2019 MRI, so he did not have the full picture. Dr. Prohaska's conclusion the claimant's supraspinatus and infraspinatus were "intact" is at odds with the opinions of the other two physicians.

Further, Dr. Prohaska believed the claimant was capable of full-duty work and all activities of daily living. The doctor's opinion is incorrect. While the claimant returned to his regular work, he eventually quit such employment because it was too physical. He wanted an easier job. In addition to daily pain, the claimant also has difficulty with some activities of daily living, such as sleeping, along with difficulty or inability to perform hobbies. Again, Dr. Prohaska's opinion the claimant was capable of full-duty work and all activities of daily living was misplaced. The doctor did not have a "comprehensive review" of the claimant's condition, as dictated by *Garcia*.

2. The claimant is entitled to seek future medical treatment.

K.S.A. 44-510h, states in part:

> (a) It shall be the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment . . . as may be reasonably necessary to cure and relieve the employee from the effects of the injury.
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> . . .
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> (e) It is presumed that the employer's obligation to provide [medical treatment], shall terminate upon the employee reaching maximum medical improvement. Such presumption may be overcome with medical evidence that it is more probably true than not that additional medical treatment will be necessary after such time as the employee reaches maximum medical improvement. As used in this subsection, "medical treatment" means only that treatment provided or prescribed by a licensed healthcare provider and shall not include home exercise programs or over-the-counter medications.

Both Dr. Rosenthal and Dr. Prohaska recommended physical therapy, which constitutes medical treatment. Contrary to the ALJ's opinion, the claimant did not decline

physical therapy as a matter of convenience. The claimant has scapular dyskinesis and physical therapy is warranted. The claimant is awarded the opportunity to pursue future medical treatment.

AWARD

WHEREFORE, the Board affirms in part, and reverses in part, the June 3, 2022, Award. As a result of his work-related injury, the claimant sustained a 23% permanent partial impairment to the body as a whole; this part of the Award is affirmed. The Board reverses the portion of the Award denying future medical treatment. The claimant is awarded the right to seek future medical treatment.

IT IS SO ORDERED.

Dated this _____ day of October, 2022.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: (via OSCAR)
Jan Fisher
P. Kelly Donley
Hon. Bruce Moore