BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

SIGRID PIMENTA-STONE	)	
Claimant	)	
V.	)	CS-00-0373-186
	)	AP-00-0452-538
PARKER HANNIFIN CORPORATION	)	
Self-Insured Respondent	)	

ORDER

The claimant, through Roger Fincher, requested review of Administrative Law Judge (ALJ) Bruce Moore's Award dated August 6, 2020. Kristina Mulvany appeared for the self-insured respondent. The Board heard oral argument on December 10, 2020. At such time, the parties agreed to continue oral argument until the Kansas Supreme Court ruled on *Johnson*.[1] After *Johnson* was decided, the claimant filed a supplemental brief on January 28, 2021, and the respondent filed a supplemental brief on February 19, 2021, in response to the Board's request the parties confirm this matter was ready for decision.

RECORD AND STIPULATIONS

The Board considered the record and adopted the stipulations listed in the Award.

ISSUES

1. May the Board determine if the use of the AMA *Guides to the Evaluation of Permanent Impairment*, 6th ed. (*Guides,* 6th ed.) fairly accounts for a worker's actual impairment and provides an adequate substitute remedy?

2. Should the case be remanded to the ALJ for additional evidence?

3. What is the nature and extent of the claimant's disability, including whether she is entitled to a work disability?

4. Is the claimant entitled to future medical treatment?

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[1] *Johnson v. U.S. Food Service*, ___ Kan. ___, 478 P.3d 776 (Kan. 2021).

FINDINGS OF FACT

The claimant was hired by the respondent in 2011, as a mandral blower. Her job required repetitive lifting, pulling, bending and standing. The claimant was born in Brazil and her primary language is Portugese. The claimant also knows Italian. She can communicate in English, both verbally and in writing. She testified she obtained a degree in logistics while living in Brazil.

On September 21, 2015, the claimant injured her left shoulder and low back while spooling a hose. She reported the accident and was sent for medical treatment. She was ultimately referred to Dr. Bradley Poole, who performed left shoulder surgery on May 31, 2016. The claimant testified she returned to work in a light-duty capacity. She testified she was written-up at work for not working fast enough while on light duty. The claimant testified she would have to ice her shoulder and take frequent bathroom breaks. In her opinion, her accident caused her dysfunction in holding her urine. She testified the respondent criticized her for taking too many bathroom breaks.

The claimant testified the respondent told her she could not return to work until she was released to her regular duties, which did not happen. When asked if the respondent ever offered her a different position, she testified, "No, not in the area that I was looking for, no."[2] The claimant was terminated by the respondent on August 24, 2017, and subsequently has not worked in any capacity. Also, the claimant testified she was uncomfortable returning to work for the respondent because the respondent believed she would fake another injury.

The claimant testified she subsequently started to look for work in newspapers and on the internet. According to the claimant, after last working for the respondent, she applied for three jobs and had one job interview without obtaining work.

On March 8, 2017, the claimant saw Douglas Burton, M.D., for a court-ordered independent medical examination (IME) regarding her low back. She complained of low back pain. Dr. Burton diagnosed her with mild degenerative disc status post work injury and opined her work injury was the prevailing factor for her symptoms and need for treatment. The doctor imposed light duty restrictions and recommended additional treatment, including physical therapy for the claimant's back. The claimant was asked at the regular hearing why she did not attend such physical therapy. She responded she did not recall not doing any therapy and stated she did all the therapy she was instructed to do.

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[2] R.H. Trans. at 21.

At the regular hearing, the respondent proffered it offered the claimant work within light duty restrictions provided by Dr. Burton. The claimant contested this offer of accommodated work, indicating the respondent only wanted her to return to her "job on the floor."[3] On further questioning, the claimant acknowledged the respondent offered her a job different from her normal job, but the claimant contended she was unable to do the work due to pain.

At her attorney's request, claimant saw Daniel Zimmerman, M.D., on February 28, 2018. Dr. Zimmerman's physical examination showed the claimant's left shoulder range of motion was decreased, with forward flexion being 80°, extension 45°, abduction 70°, adduction 30°, internal rotation 50°, and external rotation 70°. Dr. Zimmerman also noted the claimant had decreased left shoulder strength. As for her low back, Dr. Zimmerman recorded pain, decreased range of motion, as well as radicular weakness and loss of sensation in her left leg. The doctor diagnosed the claimant with left shoulder rotator cuff tear, lumbar disc disease at L5-S1, and radicular pain and discomfort affecting her left lower extremity. Dr. Zimmerman opined the prevailing factor for the claimant's diagnoses was the accident on September 21, 2015.

Using the AMA *Guides to the Evaluation of Permanent Impairment*, 6th ed. (*Guides,* 6th ed.), Dr. Zimmerman assigned the claimant a 24% left upper extremity impairment (14% whole person rating) and a 9% whole person impairment for her low back. Using the combined values chart, Dr. Zimmerman assigned the claimant a 22% whole person impairment. Dr. Zimmerman's report indicated his impairment rating opinion using the *Guides*, 6th ed., was based on his reasonable medical judgment and based on reasonable medical certainty. The doctor provided the claimant a 28% whole person impairment under the AMA *Guides to the Evaluation of Permanent Impairment,* 4th ed. (*Guides,* 4th ed.) Dr. Zimmerman testified his opinions were within a reasonable degree of medical probability.

Dr. Zimmerman imposed permanent restrictions for the left upper extremity of lifting 10 pounds on an occasional basis and 5 pounds on a frequent basis, avoid work activity at shoulder height or above on the left side, avoid frequent flexion, extension, twisting, torquing, pushing, pulling, hammering, handling, holding and reaching activities. The restrictions placed on the lumbosacral spine included lifting 20 pounds on an occasional basis and 10 pounds on a frequent basis, avoid frequent flexing of the lumbosacral spine, avoid frequent bending, stooping, squatting, crawling, kneeling and twisting activities at the lumbar level. Dr. Zimmerman testified the claimant was permanently and totally disabled. Dr. Zimmerman recommended future medical treatment, including injections, medications and monitoring by her attending physician.

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[3] *Id.* at 33.

At the respondent's request, the claimant saw Chris Fevurly, M.D., on June 12, 2018. Dr. Fevurly observed the claimant enter the clinic without apparent antalgia, but after she sat for 30 minutes, she developed a severe limping-type gait. Physical examination revealed normal left shoulder strength, decreased left shoulder range of motion, and pain and decreased range of motion for the claimant's low back. For the claimant's left shoulder, she had forward flexion of 10°, extension 60°, abduction 80°, adduction 40°, internal rotation 40°, and external rotation 40°. Dr. Fevurly's measurements for the claimant's lumbar range of motion were worse than those of Dr. Zimmerman. Dr. Fevurly testified the claimant exhibited significant pain behaviors disproportionate to objective findings. His report noted inconsistencies and nonphysiologic findings leading to his impression of mild to moderate symptom magnification. Dr. Fevurly diagnosed bilateral shoulder impingement, left worse than right, and chronic back pain with nonspecific left lower extremity complaints. The doctor testified the work event caused a temporary aggravation of the claimant's preexisting left shoulder impingement.

Using the *Guides*, 6th ed., Dr. Fevurly assigned the claimant a combined 5% whole person impairment, representing a 3% whole person impairment for her left shoulder and a 2% whole person impairment for her low back. The doctor imposed permanent restrictions to occasional overhead reaching with her left arm, and avoid forceful pushing and pulling with her left arm above shoulder level, but did not give her a lifting restriction. The doctor indicated the claimant was not in need of any future medical treatment. Dr. Fevurly testified his opinions were given within a reasonable degree of medical certainty.

On August 20, 2018, the claimant saw Fermin Santos, M.D., for a court-ordered IME. On physical examination of the claimant, Dr. Santos noted no deficit in left shoulder strength (5/5 is normal) or range of motion, but observed there were signs of shoulder impingement. The claimant had full low back range of motion. The doctor diagnosed her with chronic low back pain, chronic left lumbar radiculitis, greater than right, and chronic left shoulder pain following surgery. Dr. Santos recommended a lumbar MRI, which showed no disc bulge or significant stenosis at the L5-S1 level, a posterior annual fissure with a generalized disc bulge and mild bilateral facet arthropathy, with no associated central canal or neural foraminal stenosis.

In a letter to the court dated January 7, 2019, Dr. Santos amended his prior diagnoses to chronic low back pain, degenerative lumbar disc disease and bilateral leg pain, left worse than right. He opined the degenerative changes present in the claimant's spine were likely aggravated by the work injury. The doctor noted the MRI showed no nerve root compression. Dr. Santos concluded the claimant was not at maximum medical improvement and recommended additional treatment. At that point, Dr. Santos was authorized to treat the claimant.

The claimant returned to Dr. Santos on May 28, 2019. The claimant complained of pain affecting her left low back, left leg and left shoulder. Physical examination by the

doctor indicated claimant's left shoulder strength was 4 out of 5. Further, the claimant's left shoulder range of motion was decreased to 110° for forward flexion and 90° for abduction. She still had signs of left shoulder impingement. Dr. Santos' diagnoses were left lumbar radiculitis without nerve root compression, L5-S1 annular fissure with disc bulge, and chronic left shoulder pain, now with decreased range of motion. Dr. Santos testified the decreased range of motion was a new finding. The doctor ordered a prescription for Relafen, physical therapy for the claimant's low back and recommended an injection and a second opinion on her shoulder. The claimant was scheduled to be seen by Dr. Frevert, a shoulder specialist, on November 6, 2019. At the regular hearing, the claimant denied remembering the scheduling of this appointment and denied declining to be seen by Dr. Frevert.

The claimant's final visit with Dr. Santos, after completing physical therapy, was on October 8, 2019. Dr. Santos indicated a lumbar injection would likely be of no benefit. Further, Dr. Santos had nothing to offer with respect to the claimant's left shoulder. The doctor testified the claimant's lumbar and leg complaints did not correlate with MRI findings. Dr. Santos ordered an FCE, which was invalid because the claimant did not provide full effort during the exam.

Using the *Guides*, 6th ed., Dr. Santos assigned the claimant a 0% rating for her lumbar spine and a 5% rating for her left shoulder for a combined 4% whole person impairment. The doctor testified the claimant was not in need of any permanent restrictions or future medical treatment. Dr. Santos assigned the claimant an 8% whole person impairment under the *Guides*, 4th ed. Dr. Santos testified his opinions were given within a reasonable degree of medical certainty.

At her attorney's request, Karen Terrill, a vocational rehabilitation consultant, interviewed the claimant by phone. Mr. Terrill prepared a list of 12 tasks the claimant performed in the five years before the accident. Ms. Terrill testified the claimant is capable of work and earning between $7.25 and $8.50 an hour based on her restrictions, age, education, work experience and geographical location. While Ms. Terrill noted the claimant completed two years of a four-year degree at a foreign university, she testified job placement for the claimant would be difficult based on her not having the educational equivalent of a GED in the United States, no transferable job skills and limited knowledge of computers. Out of the 12 tasks on Ms. Terrill's task list, Dr. Zimmerman opined the claimant was unable to perform 11 tasks for a 92% task loss.

At the respondent's request, Steve Benjamin, a vocational rehabilitation consultant, interviewed the claimant on January 30, 2020. Mr. Benjamin testified the claimant spoke English, Italian, Spanish and Portugese and told him she had no issues reading, writing or speaking English. Mr. Benjamin prepared a list of 16 tasks the claimant performed in the five years preceding the accident. Mr. Benjamin opined the claimant is capable of earning

between $337.50 and $638.40 per week. After reviewing Mr. Benjamin's task list, both Drs. Fevurly and Santos opined the claimant had no task loss.

The claimant continues to experience daily pain in her left shoulder and back. She has difficulty lifting her left arm to dress and prolonged sitting or standing hurts her back. She takes over-the-counter Tylenol or ibuprofen for pain relief.

The ALJ's Award states:

> Dr. Zimmerman saw Pimenta-Stone on one occasion, as did Dr. Fevurly. Their examinations were significantly different, despite being only a few months apart. Dr. Santos saw Pimenta-Stone on four occasions, both as an independent medical examiner and as an authorized treating physician. He noted disparities in her presentation, with a good range of shoulder motion on first examination, with decreased range of motion on successive visits. He also referred Pimenta-Stone for an FCE with use of a lever arm, in an effort to determine her real level of function.
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> Dr. Zimmerman used the range of motion models in rating under both the 4th and 6th editions of the AMA Guides, and accepted Pimenta-Stone's own subjective assessment of what she could lift and do when setting restrictions. Dr. Fevurly's testimony that Dr. Zimmerman's use of the range of motion model is not appropriate where the range of motion is inconsistent is not controverted in the record. Dr. Zimmerman's reliance on questionable range of motion studies and Pimenta-Stone's self-serving limitations when setting restrictions renders his opinions of questionable value. Dr. Zimmerman is the only physician to have found true radiculopathy, despite MRI evidence that there was no neural compromise. Finally, Dr. Zimmerman's rating is based on a single visit more than two years ago, before her evaluation and treatment by Dr. Santos.
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> . . .
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> The court will give greater credence to the assessment of Dr. Santos, who both served as a court-appointed neutral examiner and, later, with the concurrence of the parties, actually provided treatment and had multiple contacts with Pimenta-Stone over the course of more than a year, from August 20, 2018 through October 8, 2019. He is also the physician with the most recent contact with Pimenta-Stone. Under the provisions of the 6th edition of the **Guides**, the court finds and concludes that **Pimenta-Stone has suffered** a 5% impairment of function to the left upper extremity (3% body as a whole) and a 2% impairment of function to the body as a whole for residual lumbar complaints, for **a total impairment of 5% to the body as a whole** as a result of the September 21, 2015 work accident.[4]

[4] ALJ Award at 10-11 (bold in original).

Because the claimant's functional impairment was less than the threshold in K.S.A. 44-510e(a)(2)(C), which requires a worker to have at least a 7.5% functional impairment to qualify for a work disability award, the ALJ limited the claimant's award of permanent partial disability benefits to her permanent functional impairment.

The ALJ denied future medical, stating:

> Pimenta-Stone has not received, nor sought, any medical treatment since being released by Dr. Santos October 8, 2019. She failed to avail herself of further evaluation of her left shoulder with Dr. Frevert. She is not taking any prescription medication prescribed for her September 21, 2015 work injuries, and has not been prescribed any prescription medications since being released by Dr. Poole in 2016, more than four years ago . . . .
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> While Dr. Zimmerman's written report was more definite in its assessment that Pimenta-Stone would require future medical care, his testimony on the issue was less certain, as he focused on the types of treatment that Pimenta-Stone "could" receive in the future. Neither Dr. Fevurly nor Dr. Santos believed that future treatment for either the low back or the shoulder would be likely. Dr. Zimmerman's equivocal position on whether Pimenta-Stone would, more probably than not, require future treatment, as opposed to his discussion as to the types of treatment that she might have in the future, is insufficient to outweigh the opinions of Drs. Fevurly and Santos, and is insufficient to overcome the statutory presumption. **Pimenta-Stone has failed to sustain her burden of proof that it is more probably true than not that she will require additional medical care in the future.**[5]

The ALJ also questioned the claimant's credibility for a variety of reasons:

- the claimant testified she had a logistics degree, but told the vocational experts she only attended two years of classes in a four-year program;
- the claimant denied having prior treatment when seen by Dr. Burton, despite having left shoulder surgery and physical therapy;
- the claimant testified the respondent paid nothing toward her health insurance, when it actually paid $358.06 per week;
- the claimant's left shoulder range of motion results were inconsistent and concerning;

[5] *Id.* at 13-14.

- the claimant failed to complete physical therapy and did not satisfactorily perform at the FCE; and

- the claimant failed to tell Mr. Benjamin she performed overhead work.

The ALJ acknowledged many of these reasons, standing alone, were inconsequential, but affected her credibility in the aggregate.

On appeal, following the decision in *Johnson*, the claimant asserts the Kansas Supreme Court did not contradict the Court of Appeals' reasoning required use of the *Guides*, 6th ed., is unconstitutional and use of the *Guides*, 6th ed., does not accurately measure a worker's impairment and further does not provide an adequate substitute remedy. The claimant argues the Board should adopt Dr. Zimmerman's rating under the *Guides*, 4th ed., because his rating is best explained. Alternatively, the claimant asks the case be remanded to the ALJ for additional testimony from Dr. Zimmerman to explain his opinions consistent with *Johnson*. The claimant asserts the *Guides*, 6th ed., discourages impairment ratings from treating physicians because a treating doctor has a vested interest in showing treatment improved a patient's condition. The claimant points out the Legislature's statutory definition of functional impairment is based on the *Guides*, 4th ed. However, the claimant does not argue the Board should use such edition of the *Guides* to assess her impairment. The claimant challenges the ALJ's determination the evidence showed she had reliability and credibility problems. Further, she asserts entitlement to future medical treatment.

The respondent maintains the Award should be affirmed. According to the respondent, the ALJ correctly determined the claimant's impairment based on the court-ordered physician's impairment rating. Further, the respondent argues Dr. Zimmerman's impairment rating is invalid for a variety of reasons explained in detail below.

PRINCIPLES OF LAW

According to K.S.A. 44-501b(c) and K.S.A. 44-508(h), the burden of proof is on the worker to establish the right to an award based on a preponderance of the evidence and the trier of fact shall consider the whole record.

K.S.A. 44-508(u) states, "'Functional impairment' means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American medical association guides to the evaluation of impairment, if the impairment is contained therein."

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

> (2)(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.
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> (C) An employee may be eligible to receive permanent partial general disability compensation in excess of the percentage of functional impairment ("work disability") if:
>
> (i) The percentage of functional impairment determined to be caused solely by the injury exceeds 7½% to the body as a whole . . . .

Board review of an order is de novo on the record.[6] A de novo hearing is a decision of the matter anew, giving no deference to findings and conclusions previously made by the judge.[7] On de novo review, the Board makes its own factual findings.[8] While the Board conducts de novo review, we often opt to give some deference – although not statutorily mandated – to a judge's findings and conclusions concerning credibility where the judge was able to observe the testimony in person.[9] The Board should explain why it disagrees with a judge's firsthand assessment of witness credibility.[10]

ANALYSIS & CONCLUSIONS

1. The Board may not determine if the use of the *Guides* 6th ed., fairly accounts for a worker's actual impairment and provides an adequate substitute remedy.

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[6] See *Helms v. Pendergast*, 21 Kan. App. 2d 303, 899 P.2d 501 (1995).

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

[8] See *Berberich v. U.S.D. 609 S.E. Ks. Reg'l Educ. Ctr.*, No. 97,463, 2007 WL 3341766 (Kansas Court of Appeals unpublished opinion filed Nov. 9, 2007).

[9] *Foy v. Kansas Coachworks, LTD*, No. 1,051,265, 2014 WL 1758032 (Kan. WCAB Apr. 21, 2014) (It is "better practice" for the Board to explain why it disagrees with a judge's credibility determination.). *Rausch v. Sears Roebuck & Co.*, 46 Kan. App. 2d 338, 342, 263 P.3d 194 (2011), *rev. denied* 293 Kan. 1107 (2012).

[10] *Lake v. Jessee Trucking*, 49 Kan. App. 2d 820, Syl. ¶ 3, 316 P.3d 796 (2013), *rev. denied* 301 Kan.1046 (2015).

K.S.A. 44-510e(a)(2)(B) states impairment ratings for injuries occurring after January 1, 2015, are to be based on use of the *Guides*, 6th ed. The claimant argues the use of the *Guides*, 6th ed., fails to provide an adequate substitute remedy and does not accurately assess a worker's impairment.

Section 18 of the Kansas Constitution Bill of Rights states, "All persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law, and justice administered without delay." According to the claimant, the conclusions of the Kansas Court of Appeals in *Johnson*,[11] namely use of the *Guides*, 6th ed., denied due process to injured workers and did not provide an adequate substitute remedy, should still be good law, because the Kansas Supreme Court did not specifically address those issues.

Johnson[12] held K.S.A. 44-510e(a)(2)(B) requires functional impairment ratings must be proved by competent medical evidence and use of the *Guides*, 6th ed., is a starting point for any medical opinion. *Johnson* states "K.S.A. 2019 Supp. 44-510e(a)(2)(B) has never dictated that the functional impairment is set by guides."[13] The Kansas Supreme Court held the challenge under section 18 of the Kansas Constitution Bill of Rights necessarily failed.

The Board may not decide the constitutionality of Kansas laws.[14] The Board can not explore whether use of the *Guides*, 6th ed., provides injured workers with due process or an adequate substitute remedy. This issue is reserved for a court of competent jurisdiction.

2. The Board will not remand the case to the ALJ for additional evidence.

In part, K.S.A. 44-551(l)(1) states, "On any such review, the board shall have authority to grant or refuse compensation, or to increase or diminish any award of compensation or to remand any matter to the administrative law judge for further proceedings. The orders of the board under this subsection shall be issued within 30 days from the date arguments were presented by the parties."

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[11] *Johnson v. U.S. Food Service*., 56 Kan. App. 2d 232, 427 P.3d 996 (2018)*, reversed Johnson v. U.S. Food Service*, ___ Kan. ___, 478 P.3d 776 (Kan. 2021).

[12] *Johnson v. U.S. Food Service*, ___ Kan. ___, 478 P.3d 776 (Kan. 2021).

[13] *Id.* at 780.

[14] *Pardo v. United Parcel Serv.*, 56 Kan. App. 2d 1, 10, 422 P.3d 1185 (2018).

The claimant argues if the Board rejects Dr. Zimmerman's opinion, the case should be remanded to the ALJ to allow Dr. Zimmerman to provide additional testimony to explain his impairment rating consistent with the *Johnson* opinion. In her supplemental brief, the claimant notes Dr. Zimmerman did not explain if his rating under the *Guides*, 4th ed., is more representative of the claimant's impairment as compared to his rating under the *Guides*, 6th ed. The claimant also argues use of the *Guides*, 6th ed., is improper for a variety of reasons:

• it was a radical shift from prior editions;

• it can be used to assess impairment outside of workers compensation matters;

• it defines impairment as a deficit in performing activities of daily living, as opposed to decreased physiological capabilities and the ability to work;

• it fails to account for a variety of factors relative to impairment, such as loss of strength, range of motion and loss of sensation, instead using diagnosis based impairments;

• it generally does not allow combining impairments for the same body parts; and

• it cautions against treating physicians providing impairment ratings.

The Board concludes the record adequately explains Dr. Zimmerman's opinions as to the claimant's impairment using both the *Guides*, 6th ed., and the *Guides*, 4th ed. The claimant had the opportunity to ask Dr. Zimmerman to explain any preference for the prior edition of the *Guides* or to explain why a rating based on the *Guides*, 6th ed., does not fairly represent the residuals of her injury.

Johnson still requires use of the *Guides*, 6th ed., even if it is just a starting point to assess whole body injuries. *Johnson* does not say use of the *Guides*, 4th ed., is the law. Dr. Zimmerman provided an opinion under the *Guides*, 6th ed., and his opinion was based on reasonable medical certainty, as required by *Johnson*.

3. The Board affirms the ALJ's finding the claimant sustained a 5% whole body permanent functional impairment and she is not entitled to a work disability award.

The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.[15] *Tovar* states: "The existence, nature, and extent of

[15] *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

the disability of an injured worker is a question of fact. Medical testimony is not essential to the establishment of these facts. Thus, the district court, as the factfinder, is free to consider all of the evidence and decide for itself the percentage of disability. The numbers testified to by the physicians are not absolutely controlling."[16]

An injured worker's testimony alone may be sufficient evidence of his or her own physical condition.[17] The Board has often, but not always, given some deference to opinions from court-ordered and neutral physicians. Of course, "Neutrality isn't the only marker of credibility; an expert's conclusions, to be reliable, should be based on more than speculation."[18] The Board has also historically given some deference to treating physicians:

> It is unfortunate when the parties elect to abandon the opinions of the treating physicians, instead presenting evidence from hired independent medical examiners. A treating physician would have the opportunity to evaluate an injured worker over a lengthy period of time and could develop an opinion based upon multiple examinations, tests, and a lengthy history of associating with claimant. Independent medical examiners are reduced to reviewing records of other physicians and generally have but one opportunity to examine and evaluate the claimant. As such, it becomes difficult for the trier of facts to place greater emphasis upon one medical opinion over another when independent examiners are all that are available.[19]

The claimant asks the Board to adopt Dr. Zimmerman's opinion regarding her impairment using the *Guides*, 6th ed.

The ALJ noted Dr. Santos, as the court-ordered physician, had the most credible opinion. However, Dr. Santos opined the claimant had no lumbar impairment. It appears the ALJ placed more weight in the opinion of Dr. Fevurly regarding the claimant's low back impairment.

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[16] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, Syl. ¶ 1, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991), *superseded on other grounds by statute.*

[17] *Hanson* v. Logan U.S.D. 326, 28 Kan.App.2d 92, 95, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001).

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

[19] *Durham v. Cessna Aircraft Co.*, No.196,986 (Kan. WCAB Aug. 1996); *aff'd* 24 Kan. App. 2d 334, 945 P.2d 8 (1997), *rev. denied* 263 Kan. 885 (1997).

In *Clayton,*[20] it appeared the Kansas Court of Appeals adopted the parties' agreement the term "competent medical evidence" in the context of workers compensation would normally mean an opinion asserted by a health care provider expressed in terms of "reasonable degree of medical probability" or similar language. *Clayton*, in the context of whether future medical treatment for a worker can be foreclosed, suggests new medical evidence may often be required, but is not absolutely necessary, to overcome the statutory presumption against additional medical treatment. So, *Clayton* seems to say newer evidence is better than potentially stale evidence in some cases.

Overall, Dr. Santos provided a 4% whole person functional impairment rating, while Dr. Fevurly gave a 5% whole person rating, both using the Guides, 6th ed. Dr. Zimmerman's 22% rating is the outlier. Added to this is the claimant's inconsistent presentation on physical examination, as noted by the ALJ. Contrary to Dr. Zimmerman's opinion, the claimant does not have lumbar radiculopathy. Dr. Zimmerman's opinions the claimant has a 92% task loss and is permanently and totally disabled lack any believable support in the evidentiary record. The Board affirms the ALJ's findings regarding the claimant having a 5% whole person permanent functional impairment. Because she did not meet the threshold of at least 7.5% whole body impairment, as found in K.S.A. 44-510e(a)(2)(C)(I), she is not eligible for a work disability award.

The ALJ's determination the claimant was less than a credible witness is based on the record. The Board will not disturb that ruling.

4. The claimant is not entitled to future medical treatment.

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

> (e) It is presumed that the employer's obligation to provide the services of a health care provider . . . 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. The term "medical treatment" as used in this subsection (e) means only that treatment provided or prescribed by a licensed health care provider and shall not include home exercise programs or over-the-counter medications.

K.S.A. 44-525(a) states, in part:

> . . . No award shall include the right to future medical treatment, unless it is proved by the claimant that it is more probable than not that future medical treatment, as

[20] *Clayton v. Univ. of Kansas Hosp. Auth.*, 53 Kan. App. 2d 376, 388 P.3d 187 (2017).

defined in subsection (e) of K.S.A. 44-510h, and amendments thereto, will be required as a result of the work-related injury.

The Board agrees with the ALJ's conclusion. Dr. Zimmerman's opinions on future medical were equivocal. The claimant did not prove entitlement to future medical treatment based on the opinions of Drs. Santos and Fevurly.

CONCLUSIONS

1. The Board may not determine if the use of the *Guides,* 6th ed., fairly accounts for a worker's actual impairment and provides an adequate substitute remedy.

2. The Board will not remand the case to the ALJ for additional evidence.

3. The Board affirms the ALJ's finding the claimant sustained a 5% whole body permanent functional impairment and she is not entitled to a work disability award.

4. The claimant is not entitled to future medical treatment.

AWARD

WHEREFORE, the Board affirms the ALJ's August 6, 2020, Award.[21]

IT IS SO ORDERED.

Dated this _____ day of March, 2021.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

[21] The Board timely decided this claim within 30 days after the respondent filed a supplemental brief.

Electronic copies via OSCAR to:
Roger Fincher
Kristina Mulvany
Hon. Bruce Moore