

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

ANITA MILLER)	
Claimant)	
V.)	
)	AP-00-0456-761
SEAMAN SCHOOL DISTRICT 345)	CS-00-0440-398
Respondent)	
AND)	
)	
UNITED WISCONSIN INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Respondent appealed the February 22, 2021, Award by Administrative Law Judge (ALJ) Steven M. Roth. The Board heard oral argument on June 10, 2021.

APPEARANCES

Jeff Cooper appeared for Claimant. Daniel Lubbering appeared for Respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board adopted the stipulations listed in the Award and considered the following record: Transcript and exhibits of Regular Hearing held on August 7, 2020; Regular Hearing Anita Miller deposition and exhibits held on November 30, 2020; Reports of Court ordered medical evaluation of David Hufford, M.D., dated July 9, 2020, and January 21, 2021; Deposition and exhibits of Howard Aks, M.D., held on October 30, 2020; Deposition and exhibits of Fermin Santos, M.D. held on December 21, 2020; Deposition and exhibits of Richard Thomas held on October 27, 2020; Deposition and exhibits of Michelle Sprecker held on December 3, 2020, and the briefs and pleadings contained in the administrative file.

ISSUE

Is Claimant permanently and totally disabled or is Claimant's permanent disability a permanent partial disability based on work disability?

FINDINGS OF FACT

The ALJ found Claimant to be permanently totally disabled. Claimant was awarded 21.96 weeks of temporary total disability benefits and found to be permanently and totally disabled. Respondent was found to be entitled to a \$57.32 credit for overpayment of temporary total disability. Claimant was awarded future medical treatment.

Claimant worked for Respondent as a paraprofessional until January 20, 2019. Her job duties included assisting children with special needs with class work or any physical needs. Claimant worked with children from kindergarten to sixth grade and some of the children were wheelchair users. She worked six hours per day, typically five days per week.

On September 29, 2017, Claimant was lifting a child from a wheelchair and had an immediate onset of burning pain on the left side of her neck. Claimant continued to hold the child in her lap and her pain increased. She reported the incident to Respondent and was sent for medical treatment. Claimant ultimately had a C5-C7 discectomy and fusion of the cervical spine surgery by Dr. Bailey.

Claimant quit her job with Respondent because she felt she could not continue to adequately perform the job with her level of pain. Claimant tried working for Respondent for a few weeks in an accommodated position, two to three hours per day two to three days per week, before she quit her job due to her pain.

Claimant currently has daily intractable burning nerve pain in her neck, radiating into her back, down her left shoulder, into her left arm and left forearm. Claimant also has muscle spasms. It takes 45 minutes to an hour of sustained activity, like sitting in one position, for the pain to increase. Activities like lifting her arm above her head, reaching out, moving her head, bending, kneeling, sitting and walking, make her pain worse.

Claimant treats her pain with ice packs, an H-wave machine and laying down, sometimes for hours. Claimant received injections, which at most have provided her with a few weeks of relief. Claimant takes prescribed medication Lyrica, and tizanidine, a muscle relaxant to treat her pain.

Due to pain and anxiety, Claimant believes she cannot work. Claimant has not looked for work since leaving her job with Respondent. If she were offered a position within her restrictions she would not take it because of her pain which makes her unreliable. Claimant seldom uses a computer due to having to maintain her neck in a captive position. Claimant does not feel she could use a computer for a sustained period of time.

Mr. Richard Thomas met with Claimant on April 29, 2020, at the request of her attorney. Mr. Thomas found Claimant performed 11 tasks in the five years preceding the work accident. At the time of the interview Claimant was 52 years old. During the interview, with Mr. Thomas Claimant got up a couple of times and did some stretching. Mr. Thomas believed Claimant appeared uncomfortable with sitting.

According to Mr. Thomas, Claimant possesses decent computer skills, but she seldom uses computers because looking down at a computer screen causes her headaches and neck pain. Mr. Thomas does not believe Claimant has the ability to perform sedentary work because of the reaching involved. He felt Claimant's need to change from sitting and standing would not allow her to do typical sedentary employment. In order to work, Claimant would need very specific accommodations. Taking into account Claimant's age, and her need to change positions frequently and unpredictable pain levels, Mr. Thomas opined Claimant incapable of being employed in the open labor market and she is permanently and totally disabled. It is Mr. Thomas' opinion if an individual requiring special accommodation you are not realistically competing in the open labor market.

Mr. Thomas indicated Claimant realistically could not perform work as a telemarketer or customer service representative because computer use requires captive positioning of the neck, no matter the height of the work surface. Performing retail sales requires assisting customers, by walking and standing, reaching and restocking and shelving merchandise also requires reaching. Security guard positions can require a lot of walking, standing and watching computer monitors. Performing duties of a hostess or receptionist can require a lot of walking and standing.

Ms. Michelle Sprecker, interviewed Claimant on September 9, 2020, at the request of Respondent. Forty minutes into the interview Claimant had to use her H-wave machine and 90 minutes into the interview Claimant had to apply an ice pack due to the pain. Ms. Sprecker found Claimant had performed 15 tasks in the five years preceding the work accident.

Based on opinions of Dr. Santos, Ms. Sprecker found Claimant would not have wage loss because she could return to a job similar to her job with Respondent. Ms. Sprecker opined, based on Dr. Hufford's opinion, Claimant has a 5 percent wage loss and based on the opinions of Dr. Aks, Claimant has a 100 wage loss. Ms. Sprecker opined Claimant can work as telemarketer, customer service representative retail sales clerk, security guard, a hostess or receptionist.

Claimant reported to Ms. Sprecker she cannot return to work due to pain. Ms. Sprecker acknowledges pain is a limiting factor in obtaining employment. Claimant's testimony of having to lay down periodically during work days could preclude Claimant from obtaining gainful employment, unless she could limit the need to lay down to non-work hours. Ms. Sprecker acknowledges most employers will not allow breaks to lay down on

an unpredictable basis during a work day. She believes Claimant was honest about her complaints.

Dr. Howard Aks, a pain management physician, examined Claimant at her attorney's request on February 27, 2019. Claimant's complaints were left facial numbness; pain in the occipital area on the left side; pain in the left neck, left shoulder girdle, down into the left hand with numbness and tingling into the 1st and 2nd digits. Claimant reported her pain worsened when looking down, bending to reach forward, sitting longer than 30 minutes or walking. Claimant reported headaches starting in the occipital and radiate frontally. Claimant relieves the pain by laying down, using ice and her H-Wave Unit and taking tizanidine.

Dr. Aks diagnosed Claimant with: chronic intractable left-sided cervical radicular pain, status post-anterior cervical fusion; occipital neuralgia; left cervical facet syndrome; chronic intractable myofascial pain. He opined within a reasonable degree of medical certainty the work-related injury on September 28, 2017, was the prevailing factor for her continued pain syndrome and disability.

Dr. Aks recommended a neurological consultation because of continued facial numbness, including an MRI of the brain. He opined it is possible Claimant's facial numbness is coming from her cervical facet syndrome. He recommended a second surgical opinion to rule out any other surgical intervention, but also opined another procedure might not be beneficial. Dr. Aks felt a CT myelogram might be warranted to give further evidence of nerve root compression.

Dr. Aks also noted it is more likely than not Claimant has cervical facet syndrome, and the only way to know for sure is with diagnostic medical branch blocks to determine how much of the pain is due to a cervical facet syndrome and whether Claimant is a candidate for radio frequency ablation (RFA). Claimant should continue to take tizanidine.

Dr. Aks assigned restrictions of no lifting more than 10 pounds; no pushing or pulling more than 10 pounds; no reaching out and working in front of the body; no sitting more than 30 minutes without getting up; and no turning the head side to side more than occasionally.

On April 8, 2020, Dr. Aks reexamined Claimant again. Claimant reported her pain at 8 out of 10 resting and 10 out of 10 with activity. Her complaints were the same as her prior examination on February 27, 2019.

Dr. Aks' diagnosis was the same as on February 27, 2019, except for the additional diagnosis of possible pseudoarthrosis.

Dr. Aks felt it was more likely than not Claimant would benefit from an epidural

steroid injection at a different interspace from her previous injection. Claimant continued to suffer from cervical facet syndrome and he recommended diagnostic medial branch blocks to determine if she was a candidate for radio frequency denervation. It is also possible Claimant will probably require a second surgery as a last resort.

Dr. Aks rated Claimant as having a permanent at 12 percent impairment to the body as a whole in accordance with the *American Medical Association Guides to the Evaluation of Permanent Impairment, 6th Edition (The Guides)*.

Dr. Aks assigned permanent restrictions of no sitting longer than 45 minutes; no walking more than 20 minutes; no lifting more than 10 pounds with the right arm infrequently or 5 pounds occasionally; no lifting greater than 5 pounds with the left arm infrequently and no lifting overhead at all with the left arm; and no pushing and pulling. Dr. Aks reviewed Mr. Thomas task list and found Claimant can perform only 2 tasks on the task list, for a task loss of 81.8 percent.

Dr. Fermin Santos examined Claimant at Respondent's request on August 26, 2019. Claimant presented with pain in the left shoulder and cervical spine starting September 27, 2017, after Claimant lifted a special needs student. She felt a pop and then immediate burning pain in her neck and shoulder radiating down to her elbow, along with numbness and tingling in her index and middle fingers. Claimant reported her pain level was an 8 out of 10. Her pain is worsened with working, walking, sitting for long periods of time, running, standing for long periods of time, and driving.

Dr. Santos diagnosed Claimant with: neck pain; status post C5-C7 anterior cervical discectomy and fusion (ACDF) from 9/12/18, with no subjective improvement of left cervical radiculitis and; cervical myofascial pain. The electrodiagnostic findings showed moderate left carpal tunnel syndrome, and no radiculopathy. Claimant has not had improvement with physical therapy, injections, or Botox.

Dr. Santos requested Claimant have a functional capacity evaluation (FCE) before determining if additional testing or restrictions were needed and the nature and extent Claimant's impairment. He did not feel Claimant would benefit from further treatment or injections. Claimant was found to be at maximum medical improvement.

Claimant was unable to complete the FCE due to pain.

On February 25, 2020, after reviewing Claimant's FCE, Dr. Santos diagnosed neck pain; cervical myofascial pain; residual cervical radiculitis; and status post 5-C7 ACDF in 2018. He did not feel any additional testing was necessary. He was not able to determine the need for medical treatment due to Claimant's invalid FCE and because conservative treatment failed to improve her symptoms. Claimant continued to be at maximum medical improvement. Dr. Santos did not recommend permanent restrictions. Although the FCE

was deemed invalid, Dr. Santos felt Claimant's symptoms stemmed from the September 27, 2017, work injury, and with treatment, have become myofascial and therefore not a permanent impairment.

Dr. Santos reviewed Ms. Sprecker's task list and opined Claimant did not have any task loss. He also reviewed Mr. Thomas' task list and thought it is possible there may be two tasks Claimant could no longer perform due to the lifting requirements. However without a valid FCE, he would not commit to that opinion. Dr. Santos opined Claimant should avoid her prior job, which is the extent of any restriction Dr. Santos was willing to assign. He opined Claimant is still able to lift 40 pounds.

Dr. David Hufford evaluated Claimant on July 9, 2020, at the request of the Court. Claimant reported significant neck pain with upper extremity pain and paresthesias. Dr. Hufford diagnosed an occupational lifting injury with a C5-C7 disc herniation and left upper extremity radiculopathy. He noted preexisting degenerative disc disease in the cervical spine, with the occupational injury causing herniations at 2 levels. Dr. Hufford determined the prevailing factor for the two-level herniation in the cervical spine was the September 29, 2017, accident.

Dr. Hufford assigned 19 percent body as whole impairment in accordance with *The Guides*, for a two-level disc herniation with asymmetry of reflexes at the appropriate level consistent with radiculopathy despite negative electrodiagnostic testing.

Dr. Hufford assigned permanent restrictions of: no lifting greater than 10 pounds with the left arm or 20 pounds in a 2-handed lift; no overhead use with the left arm and avoid any activity requiring awkward positions of the neck, including prolonged upward or downward gaze.

Dr. Hufford found Claimant at maximum medical improvement and recommended future palliative medical treatment. Claimant was instructed to continue with the prescribed medications. Since she had limited success with spinal injections, it was suggested Claimant have an occasional epidural corticosteroid injection, up to 4 times on an annual basis.

Dr. Hufford reviewed Ms. Sprecker's task list. Dr. Hufford opined Claimant has lost the ability to perform 6 out of 15 tasks for a 40 percent task loss. Dr. Hufford also reviewed Mr. Thomas task list, and found Claimant had a 27 percent task loss, having lost the ability to perform 3 out of 11 tasks. He noted his task loss opinion was dependent upon the definition of "reaching" pertaining to each given task.

PRINCIPLES OF LAW AND ANALYSIS

Respondent argues Claimant is employable in the open labor market with her restrictions and in order to reach a conclusion the Claimant is permanently and totally disabled, one would have to heavily rely on the Claimant's own personal subjective complaints rather than restrictions imposed by the physicians. Respondent contends the only credible restrictions in this case are the restrictions imposed by Dr. Hufford, and Dr. Hufford did not limit the Claimant's sitting or standing, and he did not impose the need for the Claimant to lie down as needed. Given the lack of such credible restrictions from the Court-ordered IME, the Board should find that the claimant is not permanently and totally disabled.

Claimant argues the ALJ's Award should be affirmed. Claimant contends she has met her burden of proof establishing the injury she sustained has left her permanently and totally disabled.

K.S.A. 2017 Supp. 44-508(h) states:

"Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2017 Supp. 44-510c(a)(2) states:

(2) Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Expert evidence shall be required to prove permanent total disability.

The primary dispute in this case is whether Claimant is permanently and totally disabled. Claimant had a work-related injury to her cervical spine resulting in surgery. Since the surgery and injury, Claimant suffers from chronic intractable pain in her neck and into her left upper extremity. This pain limits Claimant's ability to walk, stand and remain in a captive position for only about thirty minutes until the pain causes her to change positions. Claimant relieves the pain by an ice pack, use of an H-wave machine or laying down. Claimant's chronic pain causes her to lay down most days to relieve the pain.

Claimant's pain condition makes it difficult or impossible to use a computer for any length of time. As a result, Claimant is unable to retain any substantial sedentary employment.

None of the experts in this case disputed Claimant's honesty or credibility. The Kansas Court of Appeals has held "a claimant's testimony alone, is sufficient to prove her condition."¹ Claimant's testimony is her pain limits her ability to maintain positions, walk or stand without increasing her pain. In many instances, the only effective method of controlling this pain is to lay down.

Two vocational experts testified in this case. One expert opined Claimant is permanently and totally disabled. The other vocational expert opined Claimant is able to engage in sedentary employment. While Claimant hypothetically has vocational skills to perform some sedentary jobs such as telemarketer or customer service representative, it is her need to lay down for pain control which renders Claimant unable to engage in substantial gainful employment. Although, Ms. Sprecker opined Claimant is able to engage in sedentary substantial gainful employment, she acknowledged Claimant's testimony she has to periodically lay down almost everyday would preclude Claimant from substantial gainful employment, unless she could limit the need to lie down outside of work hours.² In Claimant's case, such an assessment is not realistic because her pain is unpredictable.

The medical evidence confirms a finding Claimant is permanently and totally disabled.

Dr. Aks' testimony confirms how limiting Claimant's pain and impairment are on Claimant's ability to work. The permanent restrictions he assigns and his task loss analysis establish Claimant is permanently and totally disabled.

Dr. Hufford's opinion of 19 percent body as a whole impairment rating and permanent restrictions limiting Claimant to sedentary work bolster Claimant's claim of permanent total disability.

Dr. Santos' opinion of zero impairment for Claimant is not credible. Claimant has had two level cervical spine fusion.

Based on the medical evidence, the vocational opinions, extensive permanent restrictions and need for pain medication, it is found and concluded Claimant is permanently and totally disabled.

Determination of permanent partial disability based on wage loss and task loss is moot due to Claimant being found permanently and totally disabled.

¹ See *Graff v. Trans World Airlines*, 267 Kan. 854, 863-64, 983 P.2d 258 (1999); see also *Buchanan v. JM Staffing, LLC*, 52 Kan. App. 2d 943, 956, 379 P.3d 428 (2016); and *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 2d 92, 95, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001).

² Sprecker Depo. at 22.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Steven M. Roth dated February 22, 2021, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of July, 2021.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: (Via OSCAR)

Jeff Cooper, Attorney for Claimant
Daniel Lubbering, Attorney for Respondent and its Insurance Carrier
Steven M. Roth, Administrative Law Judge