

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

SANDRA VALENZUELA)
Claimant)
V.)
) AP-00-0458-428
RESER'S FINE FOODS, INC.) CS-00-0160-127
Respondent)
AND)
)
SENTRY CASUALTY CO.)
Insurance Carrier)

ORDER

Claimant appeals the June 3, 2021, Award entered by Administrative Law Judge (ALJ) David J. Bogdan. The Board heard oral argument on September 23, 2021.

APPEARANCES

Jeff K. Cooper appeared for Claimant. Joseph C. McMillan appeared for Respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board adopted the same stipulations and considered the same record as the ALJ, consisting of the transcript of Regular Hearing from July 2, 2020; Evidentiary Deposition of Anne R. Rosenthal, M.D., from October 5, 2020, with exhibits attached; Evidentiary Deposition of Patrick Do, M.D., from November 11, 2020, with exhibits attached, and the documents of record filed with the Division.

ISSUE

What is the nature and extent of Claimant's disability?

FINDINGS OF FACT

The ALJ found Claimant to have 12.5 percent impairment to the body as a whole based on an average of the ratings of Dr. Do and Dr. Rosenthal. Claimant's request for future medical treatment was denied.

While working for Respondent as a packer, Claimant reported a series of injuries to her upper extremities beginning December 3, 2015. She repetitively used her upper extremities in performing her job duties as a packer. Claimant injured both wrists and elbows. Claimant's injuries were treated with three surgeries to the left upper extremity and one to the right upper extremity.

Claimant continues to have pain after surgery in her hands up to her shoulders. She experiences numbness, tingling and some swelling. Any kind of repetitive gripping activities causes Claimant pain. Claimant has difficulty gripping objects. Claimant no longer cooks or does art projects because of her pain. Claimant relieves her symptoms with heat, ice and over-the-counter ibuprofen and Tylenol.

Claimant is not currently under restrictions and is not prescribed medication to treat her symptoms.

Dr. Anne Rosenthal examined Claimant on April 20, 2017, at the request of her attorney. At the time of this visit, Claimant had undergone surgery for deQuervain's syndrome on the left wrist. She had complaints of pain in the left wrist, left elbow, forearm and pain down the left side of the body and into the chest area. Claimant described the pain as sharp aching, stabbing, throbbing and pins and needles sensation. Repetitive motion and prolonged use of her upper extremities made the symptoms worse. She reported problems with gripping due to the wrist and elbow pain. Claimant reported her pain level at a 5 out of 10 on average, at its highest 8 out of 10 and 3 out of 10 at its lowest. Claimant also reported having pain in her right hand, wrist and forearm.

Dr. Rosenthal confirmed the left medial epicondylitis and left deQuervain's tenosynovitis diagnosis. She opined Claimant's work activities with Respondent are the prevailing factor for her upper extremity complaints. Dr. Rosenthal recommended an MRI of the left elbow and left wrist. She opined Claimant should be offered a left medial epicondyle release surgery and physical therapy since conservative treatment failed.

Dr. Rosenthal examined Claimant again on August 1, 2018, for evaluation of the right upper extremity. Claimant continued to work for Respondent and reported pain in her right upper extremity at the wrist, elbow and shoulder, with numbness in her hand radiating to the elbow. Claimant reported using her right arm for everything due to the problems with her left arm. Claimant reported having right upper extremity symptoms for two years. Constant use had made the symptoms worse. Claimant reported her right wrist and elbow are the most painful. Claimant rated her pain at a 7 out of 10 at its highest, and 6 out of 10 at its lowest. Claimant described the pain as aching, burning, stabbing, throbbing and pins and needles. Repetitive motion and prolonged use made the pain worse. Claimant continues to have left upper extremity symptoms.

Dr. Rosenthal diagnosed Claimant with right carpal tunnel syndrome, right cubital tunnel syndrome and right wrist extensor tendonitis/extensor carpi ulnaris tendonitis. Dr. Rosenthal opined Claimant's work with Respondent was the prevailing factor for these complaints. She recommended an EMG/NCV of the right upper extremity to determine the extent of the carpal tunnel syndrome and ulnar nerve compression, and an MRI of the wrist to diagnose possible tendonitis of the extensors and extensor carpi ulnaris.

Dr. Rosenthal examined Claimant a third time on October 11, 2019. Claimant reported pain in both hands and arms with numbness in both hands. She described the pain as sharp and stabbing. Claimant had difficulty with repetitive motion, gripping, holding, squeezing and carrying. Her symptoms are constant and not improving. Claimant rated her pain at 7 out of 10, 10 out of 10 at its highest, and 6 out of 10 at its lowest.

Dr. Rosenthal provided an impairment rating and found Claimant to have a combined impairment of 19 percent to the body as a whole based on the *American Medical Association Guides to the Evaluation of Permanent Impairment 6th. Edition*.¹ This rating consists of: 5 percent for the right upper extremity for carpal tunnel syndrome; 7 percent impairment to the left upper extremity for left medial epicondylitis; 9 percent impairment to the left upper extremity for left cubital tunnel syndrome; 10 percent impairment for loss of range of motion of the left upper extremity; and 1 percent impairment for loss of left wrist function.

Dr. Rosenthal did not recommend future medical treatment for Claimant and did not assign any permanent restrictions.

Dr. Pat Do examined Claimant on August 23, 2017, at the request of the Court. Dr. Do was asked to evaluate Claimant's left upper extremity complaints. Claimant reported left elbow and left wrist pain. Claimant reported her pain was along the dorsum of her wrist and over the extensor carpi ulnaris tendon. Claimant had physical therapy and injections for this pain. Claimant also reported pain in the medial elbow, and numbness and tingling in her 4th and 5th fingers on the left side. Claimant was diagnosed with left elbow medial epicondylitis; left elbow cubital tunnel syndrome; left wrist extensor carpi ulnaris (ECU) tenosynovitis; and status post left wrist 1st dorsal compartment release.

Dr. Do recommended and administered an injection to the left medial elbow. Dr. Do recommended an NCT/EMG of the left upper extremity to evaluate for carpal tunnel syndrome and cubital tunnel syndrome. A ECU tenosynovectomy was recommended for the left wrist ECU tenosynovitis.

¹ Hereinafter referred to as *The Guides*.

Dr. Do opined Claimant's work activities with Respondent were the prevailing factor for these diagnoses.

An EMG of Claimant's left arm showed mild carpal tunnel syndrome and mild ulnar nerve issues at the wrist.

On December 14, 2017, Claimant met with Dr. Do for followup for left upper extremity pain. Dr. Do diagnosed left cubital tunnel syndrome, left wrist ECU tenosynovitis, left medial epicondylitis and status post left 1st dorsal compartment release. Claimant decided to proceed with left wrist ECU tenosynovectomy, left elbow medial epicondyle release and debridement and left subcutaneous nerve transposition.

On January 22, 2018, Claimant underwent left wrist ECU tenosynovectomy. Dr. Do did not perform the left elbow medial epicondyle release at this time.

On February 2, 2018, Claimant met with Dr. Do for a post-surgery visit. Claimant reported the swelling was better, but she had numbness and tingling in her left hand and medial left elbow pain radiating proximal. Claimant felt the elbow was getting worse. She understood recovery could take 1-2 years.

On March 13, 2018, Claimant met with Dr. Do for a post-surgery visit. Claimant continued to have pain, numbness and tingling radiating from the elbow down to the 4th and 5th fingers. After unsuccessful cortisone injections, Claimant decided to proceed with the subcutaneous ulnar nerve transposition and medial epicondyle release.

On May 7, 2018, Claimant underwent surgery, a medial epicondyle release and subcutaneous ulnar nerve transposition to the left elbow.

Claimant had three post-surgery examinations with Dr. Do, with the last one being on July 9, 2018. Claimant continued to show improvement, but struggled with pain and weakness.

On August 16, 2018, Claimant was released at maximum medical improvement, with no restrictions.

On October 2, 2018, Claimant met with Dr. Do for evaluation of right arm and right hand pain. Claimant reported a history of right arm pain for two years. Claimant reported the problem started on December 3, 2015, while at work for Respondent. Claimant described the pain as sharp, achy, throbbing, stabbing and numb. She rated her pain at a 6 out of 10. She reported her symptoms were getting worse and aggravated by lifting, twisting, lying in bed, bending, and anything repetitive.

AN NCT/EMG tests on Claimant's right upper extremity showed carpal tunnel syndrome, but there was no denervation in the APB muscle and no evidence of cubital tunnel syndrome or acute radiculopathy. Dr. Do diagnosed Claimant with right carpal tunnel syndrome. On January 11, 2019, Dr. Do performed a right carpal tunnel release. On March 28, 2019, Claimant was released at maximum medical improvement with no restrictions.

On August 12, 2020, Dr. Do assigned Claimant a 6 percent body as a whole impairment under *The Guides*. This rating consists of: 1 percent impairment to the body as a whole for status post right carpal tunnel release; 2 percent impairment to the left upper extremity for status post left subcutaneous ulnar nerve transposition; 4 percent impairment to the left upper extremity for status post left medial epicondyle release; 1 percent impairment to the left upper extremity for status post left wrist open ECU tenosynovectomy; and 1 percent impairment to the left upper extremity for status post left 1st dorsal compartment release. The left upper extremity ratings combine for 8 percent impairment to the left upper extremity and converts to 5 percent impairment to the body as a whole.

PRINCIPLES OF LAW AND ANALYSIS

Claimant argues her impairment should be 19 percent to the body as a whole, based on the opinion of Dr. Rosenthal because her rating is more credible having examined Claimant three times and provided a thorough explanation of her reasoning.

Respondent argues Claimant is entitled to no more than 6 percent impairment to the body as a whole, as opined by Dr. Do, the treating physician.

K.S.A. 2013 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. 2013 Supp. 44-510d(b)(23) states:

Loss of or loss of use of scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using 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, shall be determined by using the sixth edition of the American medical association guides to the evaluation of permanent impairment, if the impairment is contained therein.

Two medical opinions were presented as to the nature and extent of Claimant’s permanent impairment. Both opinions have merit. Dr. Do was the treating physician and performed three surgeries for Claimant to her upper extremities. Dr. Rosenthal saw Claimant three times and her impairment ratings take into account Claimant’s ongoing symptoms of pain, loss of grip strength and limitation in activities. Both physicians saw Claimant multiple times and are equally credible. For these reasons, it is found and concluded the ALJ’s award of 12.5 percent is correct. It is an average of the two doctor’s ratings and is a reflection of Claimant’s permanent impairment.

AWARD

WHEREFORE, it is the finding, decision and order of the Board the Award of Administrative Law Judge David J. Bogdan, dated June 3, 2021, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of October, 2021.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: (Via OSCAR)

Jeff K. Cooper, Attorney for Claimant
Joseph C. McMillan, Attorney for Respondent and its Insurance Carrier
David J. Bogdan, Administrative Law Judge