BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

KIM KLEINSMITH	)	
Claimant	)	
V.	)	
	)	
MONITRONICS INTERNATIONAL, INC.,	)	AP-00-0458-452
DBA BRINKS HOME SECURITY	)	CS-00-0442-604
Respondent	)	
AND	)	
	)	
SENTINEL INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

The claimant, through Jeff Cooper, requested review of Administrative Law Judge (ALJ) Bruce Moore's Award dated June 10, 2021. Bruce Wendel appeared for the respondent and its insurance carrier (respondent). The Board heard oral argument on October 7, 2021.

RECORD AND STIPULATIONS

The Board considered the same record as the ALJ, consisting of the: (1) preliminary hearing transcript dated July 3, 2019, with attached exhibits B.2 through B.6; (2) regular hearing transcript dated March 10, 2021, with attached exhibits; (3) deposition of Anne Rosenthal, M.D., dated March 23, 2021, with attached exhibits; (4) deposition of Adam Chase, M.D., dated April 14, 2021, with attached exhibits; (5) deposition of Vito Carabetta, M.D., dated April 26, 2021, with attached exhibits; and (6) the case file. Any stipulations are adopted.

ISSUE

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

FINDINGS OF FACT

The claimant, 52 years old, worked for the respondent as an executive assistant since October, 2015. On April 8, 2019, the claimant and her supervisor, Chris Johnson, were descending stairs and discussing where to hold an upcoming board meeting when she fell, injuring her right ankle. The claimant abruptly twisted her right ankle and had immediate pain.

The claimant was taken to an emergency room. X-rays showed no fracture. She was placed on crutches and provided a boot. When she failed to improve, an MRI done on April 18, 2019, revealed tears to the anterior talofibular and calcaneal fibular ligaments. The claimant was referred to Adam Chase, M.D., a board-certified orthopedic surgeon.

Dr. Chase began treating the claimant on April 29, 2019. The doctor's initial diagnosis was an inversion-type injury to the right ankle, resulting in a sprain of the calcaneofibular ligament, a sprain of the anterior talofibular ligament and a bone contusion. Dr. Chase performed an examination and reviewed the imaging findings. The doctor indicated the claimant had a "high grade ankle sprain."[1] He opined surgical treatment would not be needed and referred the claimant to physical therapy.

Dr. Chase continued to follow the claimant on essentially a monthly basis while she continued physical therapy. On June 26, 2019, the claimant exhibited signs of peroneal tendonitis, and Dr. Chase administered a peroneal corticosteroid injection. The claimant reported 90%-95% relief from the injection.

Dr. Chase noted for every appointment subsequent to August 29, 2019, when the claimant reported a pain score of 1 on the 0-10 pain scale, her ankle range of motion was within normal limits and she exhibited a normal gait. On September 26, 2019, Dr. Chase administered an intra-articular injection into the claimant's ankle joint, but it failed to provide pain relief. A second MRI showed some thickening of the posterior tibialis tendon, but no structural abnormality of the peroneal tendons. Dr. Chase acknowledged most ankle sprains do not require one MRI, let alone two.

The claimant's final visit with Dr. Chase's office was on January 23, 2020. The examination was conducted by Dr. Chase's physician assistant, Daren Badura, not by Dr. Chase. The claimant's strength was normal. The claimant still rated her pain as a 1 out of 10. She had consistent swelling throughout her ankle. Active range of motion testing showed dorsiflexion of 8°, plantar flexion of 40°, inversion of 10° and eversion of 8°. Dorsiflexion is the same thing as extension.[2] Dr. Chase did not know if Mr. Badura tested range of motion three times as required by the *Guides*. Dr. Chase felt these range of motion numbers were not "excessively restricted compared to normal"[3] and "within normal limits" compared to prior exams and "within the ballpark of kind of where she had been throughout her clinical course."[4] Dr. Chase testified different people can define "normal"

---

[1] Chase Depo. at 40.

[2] See *Guides*, p. 549.

[3] Chase Depo. at 23.

[4] *Id*. at 22-23.

differently and what is normal for one person is not normal for another person.[5] Dr. Chase acknowledged his records had no measurements for the claimant's unaffected ankle. He further agreed measuring the claimant's uninjured left ankle would give a better sense of normal range of motion. Mr. Badura released the claimant at maximum medical improvement at this final visit. However, Mr. Badura told the claimant to continue to work on her ankle range of motion, specifically for dorsiflexion. Dr. Chase testified this recommendation was based on the claimant's dorsiflexion being lower than expected.

Using the AMA *Guides to the Evaluation of Permanent Impairment*, 6th ed. (*Guides*), Dr. Chase assigned no impairment after reviewing Table 16-2, the foot and ankle Regional Grid Table, because the claimant had no significant objective abnormal findings and no clinical ankle instability. Dr. Chase testified he used his experience and expertise in arriving at his rating. However, on cross-examination, Dr. Chase testified, "I don't believe she has no impairment."[6] The doctor clarified his 0% rating was based on the *Guides*, which he "had to use . . . ."[7] Dr. Chase testified using range of motion testing delineated in the *Guides* was inappropriate based on the claimant's examination findings.

At her attorney's request, Anne Rosenthal, M.D., a board-certified orthopedic surgeon, conducted a virtual evaluation on the internet, using Zoom, of the claimant on May 21, 2020. Dr. Rosenthal stopped performing surgeries in 2014 due to an unspecified vision problem. The examination was not performed in-person due to the Covid pandemic and the CDC's recommendation to perform virtual exams. The claimant reported ankle swelling and pain, which averaged as a 1 out of 10 on the pain scale, but could be slightly higher or lower (0.5 to 2). The claimant reported standing and walking for long periods of time was bothersome, so she put most of her weight on her left foot.

Dr. Rosenthal testified she checked the claimant's active range of motion three times using a goniometer which showed plantar flexion of 10°, dorsiflexion of 5°, inversion of 20°and eversion of 10°. Dr. Rosenthal told the claimant how to position her ankle and placed the goniometer on the screen to take measurements. The doctor noted the claimant had lost about one-half of her range of motion in the right hind foot and ankle, as compared to her left side, due to her work injury. The uninjured left ankle had measurements of plantar flexion of 20°, dorsiflexion of 10°, inversion of 35°and eversion of 25°. The doctor testified she would not have performed passive range of motion testing because the *Guides* instruct an evaluator to measure active range of motion. Dr. Rosenthal also observed the claimant having a slight limp, discoloration, swelling and atrophy affecting the right ankle, specifically a 1 centimeter leg circumference differential between the right and left legs measured 10 centimeters below the patella.

---

[5] *Id*. at 31.

[6] *Id*. at 29.

[7] *Id*. at 30.

Using the *Guides*, Dr. Rosenthal assigned the claimant a 26% impairment to the right lower extremity. The rating was based on a 7% impairment for loss of extension, a 15% impairment for loss of plantar flexion, a 2% impairment for loss of inversion, and a 2% impairment for loss of eversion, using Table 16-20 and Table 16-22 on page 549 of the *Guides*. The 26% rating to the lower extremity converts to a 37% impairment to the right foot and ankle. In addition to the *Guides*, Dr. Rosenthal's rating was based on her training and experience, and the medical records.

Dr. Rosenthal testified the *Guides* state the method producing the higher rating must be used. She cited Table 2-1, point no. 12, which states, "If the *Guides* produces more than one method to rate a particular impairment or condition, the method producing the higher rating must be used." Dr. Rosenthal indicated the diagnosis-based impairment in the *Guides* did not adequately address the claimant's impairment because the claimant's impairment using the range of motion model produced a higher rating. The doctor stated the claimant's range of motion is unlikely to change. Dr. Rosenthal felt the range of motion measurements were accurate and would have been the same if she had evaluated the claimant in person.

The claimant saw Vito Carabetta, M.D., on October 14, 2020, for an in-person court-ordered independent medical evaluation. The claimant complained of a constant, deep, aching pain in her right ankle, more lateral than medial. Dr. Carabetta noted the claimant had physical therapy for eight months, but was not taking any medication for any purpose at the time of his evaluation.

Dr. Carabetta's physical examination revealed swelling and tenderness, with normal range of motion using a goniometer. The doctor measured range of motion once because it was normal. Range of motion figures are not listed in Dr. Carabetta's report. The doctor believed testing range of motion is more accurate. The doctor did not know if range of motion testing under the *Guides* should be done using active or passive testing, but he used passive testing, stating, "But my training as a physiatrist we always go with passive."[8] Dr. Carabetta testified the claimant would have no impairment under the *Guides* if based on range of motion testing. He testified he observed the claimant walking and noted a normal gait, while acknowledging the claimant will have times in the future in which her gait pattern may deviate. The doctor diagnosed the claimant as having chronic right ankle sprain or a "really bad ankle sprain."[9]

---

[8] Carabetta Depo. at 24.

[9] *Id.* at 8.

Using the *Guides*, Dr. Carabetta gave the claimant a 3% impairment to the right lower extremity based on physician judgment.[10]

All three doctors opined the claimant will not require future medical treatment. Dr. Chase did not provide work restrictions. Dr. Rosenthal indicated the claimant did not need any work restrictions. Dr. Carabetta did not comment on work restrictions.

Drs. Chase and Carabetta testified an actual physical examination is superior to the virtual examination done by Dr. Rosenthal.

The claimant testified her condition is the same as it was when she saw Dr. Carabetta. She is able to tolerate walking short distances fairly well. The claimant has pain during and after her walks and after standing for extended periods. The pain is relieved by resting. The claimant testified her ankle injury affects virtually everything she does. She continues to work for the respondent.

The ALJ ruled:

> The court has before it three opinions as to Kleinsmith's permanent impairment of function. The treating physician, Dr. Chase, applied the provisions of the 6th edition of the Guides and found that Kleinsmith did not qualify for an impairment rating, as she exhibited a normal range of motion, normal strength and normal gait pattern. Dr. Rosenthal, retained expressly for the purpose of providing an impairment rating, rated Kleinsmith at a 26% impairment of function to the right lower extremity under the Guides, but relied on a loss of range of motion, an altered gait and possible atrophy in arriving at her assessment. The findings of a loss of range of motion, altered gait and possible atrophy were based on a "virtual" examination in which she relied upon Kleinsmith to conduct the examination and report findings. Dr. Carabetta examined Kleinsmith as a court-ordered neutral examiner, five months after Dr. Rosenthal's examination. Dr. Carabetta's examination was also in person.
>
> Like Dr. Chase, Dr. Carabetta found no loss of range of motion in the ankle, normal strength and bulk, and a normal gait pattern. Under his reading of the Guides, Kleinsmith could have qualified for up to a 5% impairment of function to the lower extremity, but based on his knowledge, training and experience, Dr. Carabetta felt that 3% was a more appropriate rating.
>
> **Considering all three rating opinions, the court finds and concludes that Kleinsmith has suffered a 5% impairment of function to the right lower extremity.** The court is unable to give much credence to the findings of Dr. Rosenthal, obtained in a virtual examination, when those findings were not identified either by the authorized treating physician before Rosenthal's examination, or the court-ordered neutral physician after Rosenthal's examination, where both Drs.

[10] See *id*. at 19.

> Chase and Carabetta had the opportunity to meet, view and examine Kleinsmith in person, and Dr. Chase had the opportunity to view Kleinsmith several times over the course of several months.[11]

The claimant argues Dr. Rosenthal is more credible because she conducted a thorough exam and used the *Guides* appropriately by using active range of motion measurements. The respondent maintains the Award should be affirmed.

PRINCIPLES OF LAW AND ANALYSIS

An employer is liable to pay compensation to an employee incurring personal injury by occupational disease arising out of and in the course of employment.[12] A claimant must prove his or her right to an award based on the whole record under a "more probably true than not true" standard.[13]

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

> Loss of or loss of use of a 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, but for injuries occurring on and after 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.

The *Guides* need not be introduced into evidence and a reviewing court may take judicial notice of the *Guides* sua sponte.[14] The Board consulted the *Guides* in this decision to assess the credibility of the medical evidence.

According to pages 544-45 of the *Guides*:

- range of motion measurements should be done three times and the greatest range measured should be used;

- both extremities should be compared and the uninjured contralateral joint may serve as defining normal range of motion for the individual;

---

[11] Award at 7-8.

[12] See 44-501b(b).

[13] See K.S.A. 44-501b(c) and K.S.A. 44-508(h).

[14] See *Perez v. National Beef Packing Co.*, ___ Kan. App. 2d ___, 494 P.3d 268, 282 (2021).

- the uninjured opposite extremity is used as the baseline range of motion for the individual;

- the examiner must evaluate both active and passive range of motion;

- "*Measurements of active motion take precedence in the Guides. The actual measured goniometer readings or linear measurements* are recorded." (emphasis in original).

The determination of the extent of the injured worker's incapacity is left to the trier of fact.[15] The Board has "the obligation to weigh the evidence to determine the credibility of witnesses, including the physicians . . . as a factor in making its decision."[16] *Tovar* states, "The numbers testified to by the physicians are not absolutely controlling."[17]

In a 2013 decision, *Switzer*,[18] the Board rejected the rating opinions of two doctors, including a court-ordered physician, who used passive range of motion testing, in lieu of active range of motion testing, to assess an injured worker's knee impairment. Only the claimant's hired medical expert used the active method to measure the worker's range of motion. The active method of measuring range of motion is where the patient, without assistance, moves the joint as far as possible and the physician measures the range of motion. When the passive method is utilized, the physician moves the patient's joint and measures the range of motion.

The Board has carefully weighed the evidence. Key against Dr. Rosenthal is the lack of an in-person evaluation of the claimant. An in-person evaluation would have been better. Dr. Rosenthal also only had the claimant perform active range of motion testing. The doctor did not perform passive range of motion testing, contrary to the *Guides* directing both types of testing be performed. Still, the *Guides* state active motion measurements take precedent over passive measurements, so this error is inconsequential. Only Dr. Rosenthal listed a specific comparison of the claimant's range of motion as between the injured and unaffected ankles. Also, Dr. Rosenthal measuring range of motion by placing a goniometer on a computer screen during a Zoom evaluation does not seem to impact the measured degrees of ankle motion.

---

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

[16] *Tovar v. IBP, Inc.*, 15 Kan.App.2d 782, 785, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991) (superseded on other grounds by statute).

[17] *Id.*, Syl. ¶ 1.

[18] *Switzer v. Dillon Companies*, Docket No. 1,060,004, 2013 WL 6382910 (Kan. WCAB Nov. 8, 2013).

Dr. Carabetta did not use the claimant's active range of motion to ascertain her functional impairment. Dr. Carabetta relied on passive range of motion testing. Again, the *Guides* state active range of motion testing bests passive range of motion testing. Dr. Carabetta only measured the claimant's range of motion once, contrary to the *Guides* indicating testing should be done three times to ensure accuracy. Looking at the ankle once and summarily concluding range of motion is normal is inadequate under the *Guides*.

Dr. Chase's 0% rating was based on an evaluation done by Mr. Badura, his physician assistant. Dr. Chase's last range of motion figures were properly based on active range of motion, but were conducted by Mr. Badura. Moreover, Dr. Chase seemed to have a fluid definition of "normal" range of motion, stating what is normal for one person is not normal for another person. Whatever the definition of "normal" range of motion, it should not be compared to prior examination findings of the claimant occurring after the work injury, which is what Dr. Chase looked at. Measuring an injured ankle to the same injured ankle does not define "normal."

The ALJ gave little credence to Dr. Rosenthal's ultimate opinions because she made findings, such as decreased range of motion, altered gait and possible atrophy, which were not identified by Drs. Chase or Carabetta. To an extent, the Board disagrees. Dr. Carabetta indicated the claimant "will" have times in which she "may" limp.

Moreover, Dr. Chase's records document lost ankle range of motion. Comparing the measurements from Dr. Chase's physician assistant, Mr. Badura, with the claimant's uninjured left ankle, as recorded by Dr. Rosenthal, the claimant qualifies for permanent impairment. Table 16-20 in the Guides allows a 2% rating for 10-20° loss of inversion and a 2% lower extremity rating for 0-10° loss in eversion. Mr. Badura's range of motion figures for inversion (10°) and eversion (8°) are worse than those recorded by Dr. Rosenthal (20° and 10° respectively). Mr. Badura's number for dorsiflexion (or extension) of 8° was worse than Dr. Rosenthal's 10° figure. Either figure qualifies for a 7% lower extremity rating. Notably, the 40° plantar flexion figure from Mr. Badura is double the normal range of motion for the claimant's unaffected left ankle and four times better than the 10° figure found by Dr. Rosenthal. Despite this anomaly, the claimant would still qualify for permanent impairment for inversion (2%), eversion (2%) and extension (7%), or a total of 11% to the lower extremity, all using the physician assistant's measurements.

Dr. Rosenthal's rating is based on lost range of motion only. Her rating is not based on altered gait or possible atrophy. Dr. Rosenthal's testimony regarding her range of motion testing and use of the tables contained in the *Guides* is consistent with the requirements contained therein. The Board finds the court-ordered IME physician and the treating physician did not follow the *Guides* as well as Dr. Rosenthal.

All this said, Dr. Rosenthal's 26% rating to the leg is too high based on the entirety of the evidence. The claimant consistently indicated her pain level was minimal – only a 1 on a 0-10 scale. The claimant does not require surgery, future medical treatment, work restrictions or medication for her injury.

On the other hand, the ratings from Drs. Chase and Carabetta are too low or not in strict accordance with the *Guides*. The claimant has permanent pain and swelling years after her injury. Dr. Chase's 0% rating is not based on his own evaluation of the claimant. According to Dr. Chase's office records, the claimant has decreased ankle range of motion which would qualify for permanent impairment.

Overall, the Board concludes the claimant's impairment is somewhere between the three ratings, all of which have some flaws. The Board need not fully reject the entirety of a doctor's opinion based on some deviation from the *Guides*.[19] We have split the equally credible ratings from the three doctors, which we have rounded up to 10% impairment to the right lower leg.[20]

AWARD

WHEREFORE, the Board modifies the June 10, 2021, Award.

The claimant is entitled to 19 weeks of permanent partial disability compensation, at the rate of $641.06 per week, in the amount of $12,180.14, for a 10% loss of use of the right lower extremity.

IT IS SO ORDERED.

Dated this _____ day of October, 2021.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: (via OSCAR)
Jeff Cooper
Bruce Wendel
Hon. Bruce Moore

[19] 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).

[20] See *Dirshe v. Cargill Meat Solutions Corp.*, 53 Kan. App. 2d 118, 124, 382 P.3d 484 (2016).