

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F002839

VIRGIL CODY, EMPLOYEE	CLAIMANT
FARMERS CO-OP, EMPLOYER	RESPONDENT
OKLAHOMA PROPERTY & CASUALTY, INSURANCE CARRIER	RESPONDENT

OPINION FILED AUGUST 5, 2003

Upon review before the FULL COMMISSION, Little Rock, Pulaski County, Arkansas.

Claimant represented by HONORABLE JAY TOLLEY, Attorney at Law, Fayetteville, Arkansas.

Respondent represented by HONORABLE DAVID WALL, Attorney at Law, Fayetteville, Arkansas.

Decision of Administrative Law Judge: Reversed in part and Affirmed in part

OPINION AND ORDER

The respondent appeals and the claimant cross-appeals a decision by the Administrative Law Judge finding that the claimant failed to prove by a preponderance of the evidence that he was temporarily totally disabled for the period beginning July 11, 2000, through a date yet to be determined and finding that the claimant proved by a preponderance of the evidence that he had a permanent partial disability rating of 25% to the body as a whole, including a 9% permanent impairment rating and a 16% wage-loss rating. Based upon our de novo review of the record,

we affirm the decision of the Administrative Law Judge finding that the claimant is not entitled to any temporary total disability benefits. However, we reverse the decision of the Administrative Law Judge ordering the 9% permanent impairment rating and the 16% in wage-loss disability benefits. We find that the claimant has failed to meet his burden of proof.

The claimant is 60 years old and has worked for the respondent-employer since May of 1999. The claimant's job required him to handle feed, which included sacking it and hauling it by truck.

The claimant sustained an admittedly compensable injury to his back on February 28, 2000. Immediately following this incident, the claimant testified that he felt burning and hurting in his left lower back. Two or three weeks later, the claimant began having numbness in the inner portion of his left thigh. After that, the claimant testified that he began having a burning sensation on the top of his right foot.

The claimant was initially seen by Dr. Charles Chalfant. Dr. Chalfant ordered a lumbar spine x-ray which revealed multilevel degenerative changes. The claimant underwent an MRI on March 13, 2000, which indicated the following findings:

IMPRESSION:

1. Small left lateral disc protrusions at L2-3, L3-4.
2. Diffuse moderate disc bulge at L4-5 which may have a minimal central protruding component. Minimal diffuse disc bulge at L5-S1.

The claimant was sent to Dr. Joseph W. Queeney, a neurosurgeon, on April 24, 2000, who made the following recommendations:

RECOMMENDATIONS: I had a very long discussion with the patient and his wife regarding his findings. I demonstrated the pathology to them on the MRI scan. I tried to explain to both of them that he does have some arthritic changes in his low back and I am not surprised because of the patient's age, his size and the fact that he does heavy manual labor. Unfortunately I am unable to localize the pathological segment based on his history or examination. At this point I would not recommend any surgical intervention. I would recommend that we go ahead and treat this conservatively with nonsteroidal anti-inflammatory medications as well as physical therapy. The patient is wanting to go back to work and we will go ahead and send him back with some restrictions. I will plan on seeing him back in about six weeks and we will judge his progress at that time. If he has not had any improvement, we will either have him proceed with some epidurals or even do a myelogram to see if we can localize any pathological segment.

After therapy and medications, the claimant was sent to Dr. Arthur Johnson, a neurosurgeon, on June 14, 2000, who recommended a discogram to determine the claimant's pain

generator. On July 6, 2000, the claimant's discogram revealed no reproduction of his pain syndrome at any level from L2 through S1. The discogram findings were also consistent with claudication and vascular pain syndrome. Arteriography was then recommended.

When the claimant returned to Dr. Johnson, he believed that the claimant had some form of peripheral neuropathy. Dr. Johnson discharged the claimant from his care and referred him to the VA clinic for a neurology evaluation.

The claimant saw Dr. William Griggs, a neurologist, on July 18, 2000. Dr. Griggs ordered a nerve conduction velocity test, which revealed "mixed motor and sensory polyneuropathy of unknown etiology." Dr. Griggs prescribed Thiamine and multivitamins for treatment.

Thereafter, Dr. Griggs periodically checked the claimant's nerve conduction velocities, which showed some improvement. On February 21, 2002, the claimant reported to Dr. Griggs with symptoms of his right leg giving away. Dr. Griggs ordered another lumbar MRI, and then referred the claimant to Dr. Landherr, another neurosurgeon.

On March 4, 2002, Dr. Landherr diagnosed the claimant with degenerative disc disease of the lumbar spine, and possible arterial blockage. Dr. Landherr recommended an arterial Doppler study. On March 5, 2002, the claimant's

doppler study revealed moderate ischemia bilaterally secondary to aortoiliac occlusive disease. At the time of the hearing, Dr. Griggs was scheduled to see the claimant again to discuss the results of the doppler study. The claimant testified that he continued to get worse.

Temporary disability is determined by the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. An injured employee is entitled to temporary total disability compensation during the period of time that she is within her healing period and totally incapacitated to earn wages. Arkansas State Highway & Transportation Dept. V. Breshears, 272 Ark. 244, 613 S.W.2d (1981). An injured employee is entitled to temporary partial disability compensation during the period that she is within her healing period and suffers only a decrease in her capacity to earn the wages that she was receiving at the time of the injury. Id. The "healing period" is defined as the period necessary for the healing of an injury resulting from an accident. Ark. Code Ann. § 11-9-102(12) (Repl. 2002). The healing period continues until the employee is as far restored as the permanent character of her injury will permit. When the underlying condition causing the disability becomes stable and when nothing further will improve that condition, the healing period has ended, and the claimant is no longer entitled to receive temporary

total disability compensation or temporary partial disability compensation, regardless of her physical capabilities. Moreover, the persistence of pain is not sufficient in itself to extend the healing period or to find that the claimant is totally incapacitated from earning wages. Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982).

The medical evidence presented fails to show that any medical treatment was required or provided for the claimant's compensable back injury after July 10, 2000. Although extensive medical treatment was provided the claimant after that date, this treatment was rendered for and necessitated by conditions which have not been shown to be related to the compensable injury to the claimant's back or lumbar spine. In fact, the medical records do not note continuing significant complaints or symptoms involving the claimant's actual lower back or lumbar spine, nor were such symptoms prominently mentioned by the claimant at the hearing. Instead, the claimant's primary complaints appeared to have shifted to his lower extremities, and any complaints involving his lower back appear to have resolved or substantially improved.

After consideration of the evidence presented, it is our opinion that the claimant has failed to prove that he continued within his healing period from the effects of his

compensable lower back or lumbar spine after July 10, 2000. Thus, he has failed to prove the first essential elements for his entitlement to temporary total disability benefits from July 11, 2000, through the present date.

We likewise find that the claimant is not entitled to the 9% permanent impairment rating due to his injury he sustained on February 28, 2000. The Administrative Law Judge erred in assigning that impairment rating. Ark. Code Ann. § 11-9-102(16)(A)(ii)(Repl. 2002) states:

When determining physical or anatomical impairment, neither a physician, any other medical provider, an Administrative Law Judge, the Workers' Compensation Commission, nor the Courts may consider complaints of pain; for purpose of making physical or anatomical impairment ratings to the spine, straight leg raising tests or range of motion tests shall not be considered objective findings.

Objective findings are defined as "those findings which cannot come under the voluntary control of the patient."

Ark. Code Ann. § 11-9-102(16)(A)(1)(Repl. 2002).

Furthermore, Ark. Code Ann. § 11-9-522(g)(Repl. 2002) provides that the Commission shall adopt an impairment rating guide to be used in the assessment of anatomical impairment and specifically provides the guide shall not include pain as a basis for the impairment. In compliance with this statutory mandate, the Commission adopted The AMA Guides to the Evaluation of Permanent Impairment, Fourth

Edition with the enactment of Commission Rule 34. Rule 34 specifically states:

That The Guides are adopted "exclusive at any section which refer to pain and exclusive of straight leg raising tests or range of motion tests when making physical or anatomical impairment ratings to the spine."

The Commission has adopted The Guides and to the extent that The Guides allow the use of subjective criteria for the establishment of an impairment rating, The Guides must give way to the statutory definition of objective findings as defined by the General Assembly. The portions of The Guides which are based upon subjective criteria cannot supersede the statutory definition established by the General Assembly. Therefore, to the extent that there is a conflict, the statutory definition as established by the General Assembly takes precedence over any subjective criteria set forth in The Guides. However, there is no medical evidence in the record that the claimant has any permanent impairment. No medical provider has ever assessed the claimant with a 9% permanent impairment rating, much less any impairment rating at all.

The Administrative Law Judge concluded that the claimant's disc protrusions were the result of the compensable injury. However, there is no medical evidence in the record that the disc bulges or protrusions are the result of specific trauma. In order to find that they are,

requires us to resort to conjecture and speculation. Conjecture and speculation, even if plausible, cannot take the place of proof. Ark. Dept. of Correction v. Glover, 35 Ark. App. 32, 812 S.W.2d 692 (1991). Dena Construction Co. v. Herndon, 264 Ark. 791, 575 S.W.2d 155 (1970). Arkansas Methodist Hospital v. Adams, 43 Ark. App. 1, 858 S.W.2d 125 (1993).

The only evidence in support of the permanent impairment rating is the claimant's testimony that he did not have any back problems prior to the injury of February 28, 2000. The claimant is a very credible witness. However, his testimony does not rise to the level of proof necessary to prove by a preponderance of the evidence that the disc protrusions were caused by his compensable injury. There is no permanent impairment of the claimant's injury that is supported by objective and measurable physical findings as required by Ark. Code Ann. § 11-9-704(c) (Repl. 2002). Objective findings are defined as "those which cannot come under the voluntary control of the patient." Ark. Code Ann. § 11-9-102(16) (Repl. 2002); see University of Ark. Med. Sciences v. Hart, 60 Ark. App. 13, 958 S.W.2d 546 (1997). Objective findings are based upon observable criteria perceived by someone other than a claimant. Keller v. L.A. Darling Fixtures, 40 Ark. App. 94, 845 S.W.2d 15 (1992). Therefore, the claimant's pain may not be

considered for the purpose of awarding disability benefits. See Duke v. Regis Hairstylists, 55 Ark. App. 327, 935 S.W.2d 600 (1996). Although the Commission is not limited strictly to the medical evidence, the only evidence is the claimant's testimony, which does not prove that the claimant's injury was the major cause of his permanent impairment. Accordingly, we reverse the decision of the Administrative Law Judge.

The wage loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. The Commission is charged with the duty of determining disability. Cross v. Crawford County Memorial Hosp., 54 Ark. App. 130, 923 S.W.2d 886 (1996). In determining wage loss disability, the Commission may take into consideration the workers' age, education, work experience, medical evidence and any other matters which may reasonably be expected to affect the workers' future earning power. Such other matters are motivation, post-injury income, credibility, demeanor, and a multitude of other factors. Glass v. Edens, 233 Ark. 786, 346 S.W.2d 685 (1961); City of Fayetteville v. Guess, 10 Ark. App. 313, 663 S.W.2d 946 (1984). Curry v. Franklin Electric, 32 Ark. App. 168, 798 S.W.2d 130 (1990). A claimant's lack of interest in pursuing employment with his/her employer and negative attitude in looking for work are impediments to our full assessment of wage loss.

In order to receive wage-loss, the claimant must prove that he has permanent impairment. Because we find that the claimant cannot prove that he sustained any permanent impairment as a result of his compensable injury, we find that he is not entitled to any wage-loss disability benefits. Therefore, we hereby reverse the decision of the Administrative Law Judge. This claim is denied and dismissed.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

JOE E. YATES, Commissioner

Commissioner Turner dissents.