

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E913515

VIVIENE CUMBIE, EMPLOYEE	CLAIMANT
BOST HUMAN DEVELOPMENT SERVICES, INC., EMPLOYER	RESPONDENT NO. 1
AIG CLAIM SERVICES, INC., CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2

OPINION FILED JULY 19, 2004

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

Claimant represented by HONORABLE MICHAEL HAMBY, Attorney at Law, Greenwood, Arkansas.

Respondent No. 1 represented by HONORABLE R. SCOTT MORGAN, Attorney at Law, Pine Bluff, Arkansas.

Respondent No. 2 represented by HONORABLE TERRY PENCE, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed.

OPINION AND ORDER

Claimant appeals from the decision of the Administrative Law Judge finding that she sustained a decrease in her wage earning capacity equal to 7% to the body as a whole. Based upon our de novo review of the entire record, and without giving the benefit of the doubt to either party, we find that the claimant sustained a decrease in her wage earning capacity equal to 7% to the body as a

whole; therefore we find that the decision of the Administrative Law Judge should be affirmed.

At the time of the hearing, the claimant was 61 years old. The claimant obtained her GED and she has a two-year Associates Degree in Education. Prior to going to work for the respondent employer, the claimant was employed with the Hartford School District as a teacher's aide for special needs children. Claimant was under contract with the school district for approximately three or four years. However, the claimant's working relationship with the school district extend for approximately eight to twelve years while the claimant worked as a substitute teacher. Prior to working for the school district, the claimant worked for Baldor hammering flanges. The claimant also has experience as an interpreter for the hearing impaired.

The claimant sustained a compensable injury on June 11, 1998, as the result of a motor vehicle accident. Despite her injury, the claimant continued to work for respondent employer until December of 1998. In January of 1999, the claimant sought employment with the Area Agency on Aging, where she worked for approximately two years. While employed with the Area Agency on Aging, the claimant

provided home care for a client. When this client was placed in a nursing home, the claimant quit her employment with the Area Agency on Aging. The claimant has not worked since that time.

The claimant testified that she hurts all the time. Dr. Swicegood has recommended a denervation procedure to help reduce the claimant's pain. This procedure has not been authorized by the respondents in light of the records of other medical providers, as well as the Functional Capacity Evaluation performed on March 7, 2002, which indicated that the claimant's subjective reports of pain and associated limitations were found to be unreliable and inaccurate. Prior to coming under Dr. Swicegood's care, the claimant was examined and treated by Dr. Anthony Capocelli, Jr. Dr. Capocelli diagnosed the claimant with lumbar facet syndrome, degenerative arthritis, sacroilitis, and possible left hip degeneration. After examining the claimant and reviewing her diagnostic films, Dr. Capocelli opined that the claimant was not a surgical candidate and he referred the claimant to Dr. Swicegood for pain management. Dr. Capocelli assessed the claimant with a 7% anatomical impairment rating on January 18, 2002, and recommended a

Functional Capacity Evaluation to assess the claimant's ability to work. The Functional Capacity Evaluation performed on March 7, 2002, found that not only were the claimant's subjective reports of pain and associated limitations unreliable and inaccurate, but that the claimant was afraid to exert herself for fear of causing pain and discomfort. The physical therapist recommended a period of work conditioning to increase the claimant's endurance, strength, and confidence so that the claimant could return to work. No limitations were placed upon the claimant as a result of the Functional Capacity Evaluation.

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 her employer and negative attitude in looking for work are impediments to our full assessment of wage loss.

After considering the claimant's compensable injury, her age, education, work experience, post injury income and all other matters properly before the Commission, we find that the claimant sustained a decrease in her wage earning capacity equal to 7% to the body as a whole. Therefore, we find that the decision of the Administrative Law Judge should be affirmed. Despite the claimant's subjective complaints of pain, the claimant sustained an injury to her body which has not required surgery. Claimant's condition has been described as degenerative in nature and she received a relatively minimal anatomical impairment rating of 7% to the body as a whole. The claimant was capable of returning to work for the respondents and she also obtained work with another employer earning the same or greater wages than she was earning at the time of her

injury. The claimant was capable of working for this other employer for over two years until the client for whom she worked went into a nursing home. The claimant quit her job rather than seek another client to provide home care for.

The claimant is fairly educated, holding an Associates Degree in Education. Moreover, the claimant has displayed the ability to train and receive certification in specialized areas of education such as interpretation for the hearing impaired. Currently, the claimant draws Social Security Disability benefits and she has been approved for Medicare benefits. In addition, the claimant testified that she is not interested in seeking or exploring vocational rehabilitation. While this may not be a complete bar to the recovery of wage loss disability benefits, the claimant's motivation in exploring rehabilitation and in returning to work are clearly factors to be considered.

After considering the multitude of wage loss factors, we find that the claimant has failed to prove that she is permanently and totally disabled. However, we find that the claimant has established a decrease in her wage earning capacity equal to 7% to the body as a whole.

Therefore, we find that the decision of the Administrative Law Judge should be affirmed.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. McKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

_____ I must respectfully dissent from the majority opinion finding that claimant is entitled to benefits for wage-loss disability in an amount equal to only 7% to the body as a whole. The Second Injury Fund is liable for these benefits because the compensable injury has combined with a preexisting condition to cause claimant a greater disability. In my opinion, the award of only 7% to the body as a whole does not come close to adequately and fairly compensating claimant for her incapacity to earn wages as a result of her preexisting condition and the subsequent compensable injury.

In determining the extent of permanent disability, the Commission may consider, in addition to the evidence of permanent anatomical impairment, claimant's general health, age, education, work experience, attitude, interest in rehabilitation, degree of pain, and any other matters reasonably expected to affect his future earning capacity. Ark. Code Ann. § 11-9-522(b) (1) (Repl. 2002); Glass v. Edens, 233 Ark. 786, 346 S.W.2d 685 (1961); Oller v. Champion Parts Rebuilders, Inc., 5 Ark. App. 307, 635 S.W.2d 276 (1982); Arkansas Wood Products v. Atchley, 21 Ark. App. 138, 729 S.W.2d 428 (1987). In order to be entitled for benefits for permanent total disability, claimant must prove by a preponderance of the evidence that she does not have the ability to earn any meaningful wages in the same or other employment. Ark. Code Ann. § 11-9-519(e) (1) (Repl. 2002). After my de novo review of the entire record, I find that claimant has met her burden of proving that she is permanently and totally disabled and the opinion of the Administrative Law Judge should be modified accordingly.

At the time of the hearing, claimant was 61 years old. She has obtained her GED, as well as a two-year Associates Degree in education. She used this degree only as

a part-time, substitute teacher for the Hartford School District for approximately 12 years. Claimant worked at Baldor for a period of time sitting at a bench hammering "flanges off of motor things." She also has some experience as an interpreter for a hearing impaired child. Claimant was a teacher and bus driver for the present employer. Further, claimant was not required to be a certified teacher but the employer now requires all teachers to be certified.

On June 11, 1998, claimant sustained an admittedly compensable lower back injury during a motor vehicle accident while transporting children. Claimant has been treated conservatively with a diagnosis of lumbar facet syndrome, sacroilitis, and piriformis. Respondent No. 1 has accepted liability for a permanent anatomical impairment of 7% to the body as a whole. Claimant has been referred to Dr. Swicegood for chronic pain management. Dr. Swicegood has currently recommended a denervation technique as an alternative to the current dosage of medications and utilization of a TENS unit. Claimant constantly experiences debilitating pain and must take narcotic pain medication on a daily basis. She has particular difficulty in sitting or standing for prolonged periods of time. Claimant testified

that she has difficulty standing for 10 minutes while she does the dishes. She occasionally experiences pain radiating down her lower extremity.

In addition to the restrictions in functioning or daily activities caused by the compensable lumbar injury, claimant suffers from a preexisting serious or severe lung condition called bronchiectasis. In 1955 and 1962, claimant underwent bilateral lobectomies, which involved removing parts of both lungs. She has also had two ribs removed as a result of this condition. Claimant suffers from chronic shortness of breath, productive cough, and wheezing. She will be on daily antibiotics for the rest of her life. She has serious problems breathing and has been able to continue working all these years because she has been able to take her time with most of the job duties. Claimant has had to adapt her daily activities to accommodate her restrictions as a result of her lung condition.

The compensable lumbar injury has also had an adverse effect on claimant's lung condition. The prescription pain medication she takes for her compensable injury causes fluid buildup in her lungs. Further, claimant had always dealt with phlegm buildup by doing certain

physical exercises. As a result of the compensable injury, claimant can no longer perform these exercises. Therefore, she appears to have more problems with her lungs as a result of the compensable injury.

Prior to the compensable injury, claimant was able to remain employed as long as she could take her time with the job duties. However, as a result of a combination of the lung and lumbar conditions, claimant can no longer be gainfully employed. In my opinion, claimant has proven by a preponderance of the evidence that the lung condition and the compensable injury have combined to render her permanently and totally disabled. Claimant certainly suffers a disability far greater than the 7% to the body as a whole awarded by the Administrative Law Judge and now the majority. Accordingly, the opinion of the Administrative Law Judge should be modified.

SHELBY W. TURNER, Commissioner