

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. H100931

DUKE BRYAN, Employee	CLAIMANT
CITY OF MANSFIELD, Employer	RESPONDENT
ARKANSAS MUNICIPAL LEAGUE, Carrier	RESPONDENT

OPINION FILED APRIL 6, 2022

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Fort Smith, Sebastian County, Arkansas.

Claimant represented by JARID M. KINDER, Attorney, Ozark, Arkansas.

Respondents represented by MARY K. EDWARDS, Attorney, No. Little Rock, Arkansas.

STATEMENT OF THE CASE

On March 14, 2022, the above captioned claim came on for hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on January 26, 2022 and a pre-hearing order was filed on January 27, 2022. A copy of the pre-hearing order has been marked as Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The employee/employer/carrier relationship existed among the parties on October 26, 2020.
3. The claimant sustained a compensable injury to his right shoulder on October 26, 2020.

4. The claimant was earning an average weekly wage of \$379.31 which entitles him to compensation at the weekly rates of \$253.00 for total disability benefits and \$190.00 for permanent partial disability benefits.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Claimant's entitlement to permanent partial disability benefits.
2. Attorney's fee.

The claimant contends that as a result of his compensable shoulder injury he underwent rotator cuff repair surgery with Keith Bolyard, MD, after which he was released at maximum medical improvement. The claimant contends that pursuant to the *AMA Guides to the Evaluation of Permanent Impairment*, he is entitled to an impairment rating and subsequently permanent partial disability benefits. As rights to benefits have been controverted, the claimant is requesting the Commission award an attorney's fee in this matter.

The respondents contend that the claimant is not entitled to an impairment rating. Claimant changed physicians from Dr. Keith Bolyard to Dr. Jeffrey Evans following a Change of Physician Order entered on March 10, 2021. Dr. Evans performed right rotator cuff repair surgery on April 26, 2021. Following surgery, Dr. Evans, in a report dated October 12, 2021, placed claimant at maximum medical improvement and stated, "no impairment rating."

From a review of the record as a whole, to include medical reports, documents, and other matters properly before the Commission, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at a pre-hearing conference conducted on January 26, 2022 and contained in a pre-hearing order filed January 27, 2022 are hereby accepted as fact.

2. Claimant has failed to prove by a preponderance of the evidence that he is entitled to permanent partial disability benefits for permanent impairment

FACTUAL BACKGROUND

The parties have stipulated that claimant suffered a compensable injury to his right shoulder on October 26, 2020. Claimant's initial medical treatment was from Dr. Cheyne who diagnosed claimant with a strain of the muscles and tendons of the right shoulder. Dr. Cheyne's treatment included injections and physical therapy. Dr. Cheyne ordered an MRI scan which was performed on November 9, 2020, and was read as showing the following Impression:

Micro-metallic artifact overlaying the upper and lateral aspect of the shoulder consistent with previous surgery with single orthopedic screw in the lateral inferior humeral head/humeral neck. Arthropathy changes of the AC joint. Metal artifact does somewhat limit exam.

When claimant's condition did not improve, he was referred by Dr. Terry Clark to an orthopedic surgeon, Dr. Keith Bolyard. He indicated that the MRI scan did not show much in the way of rotator cuff pathology while claimant's exam was indicative of more significant pathology. Dr. Bolyard gave claimant an injection and work restrictions.

After two visits with Dr. Bolyard, claimant filed for and received a change of physician to Dr. Jeffery Evans, orthopedic surgeon. Claimant's initial evaluation with Dr.

Evans was on March 25, 2021, and his report of that date contains the following

Assessment:

My personal reading of X-rays of right shoulder show post surgical changes of distal clavicle and acromion and MRI of right shoulder shows supraspinatus tear and post surgical changes. Schedule right shoulder arthroscopic rotator cuff repair and arthroscopic sub-acromial decompression.

Dr. Evans performed arthroscopic surgery on claimant's right shoulder on April 26, 2021 and referred claimant for physical therapy. On October 12, 2021, Dr. Evans indicated that claimant had reached maximum medical improvement and released him to return to work without restrictions. He also stated that claimant had no permanent impairment rating.

Claimant has filed this claim contending that he is entitled to permanent partial disability benefits for permanent impairment resulting from his compensable injury.

ADJUDICATION

Permanent impairment is any functional or anatomical loss remaining after the healing period has ended. *Johnson v. General Dynamics*, 46 Ark. App. 188, 878 S.W. 2d 411 (1984). The Commission has adopted the *AMA Guides to the Evaluation of Permanent Impairment* (4th Ed. 1993) to be used in assessing anatomical impairment. A.C.A. §11-9-522(g); Commission Rule 34. The Commission is authorized to decide which portions of the medical evidence to credit and translate this medical evidence into a finding of permanent impairment through the use of the *AMA Guides*. *Polk Co. v. Jones*, 74 Ark. App. 159, 47 S.W. 3d 904 (2001). Thus, the Commission may assess its own

impairment rating rather than rely solely on the validity of ratings assigned by physicians.
Id.

Active range of motion tests come under the voluntary control of the patient and therefore do not constitute objective findings pursuant to A.C.A. §11-9-102(16)(A)(i). However, passive range of motion tests are considered to be objective since the limb is moved passively by the examiner. *Hayes v. Wal-Mart Stores*, 71 Ark. App. 207, 29 S.W. 3d 751 (2000).

In his brief to the Commission, claimant contends that only two passive range of motion examinations were conducted on the claimant. Both of those were by David Bohannon, PT at Greenwood Physical Therapy with the first on April 30, 2021, and the second on February 7, 2022. Claimant states that he is relying on the second examination since it was performed post-surgery. Based on the measurements taken on February 7, 2022, claimant contends that pursuant to the AMA Guides he is entitled to an impairment rating equal to 13% to the body as a whole.

In addition to the two examinations noted by claimant, I also note that the physical therapist performed a passive range of motion test on August 30, 2021.

The medical records of Dr. Evans indicate that he also performed passive range of motion testing on the claimant. In his report of June 24, 2021, Dr. Evans stated:

Shoulders-
Normal inspection bilateral, full passive range of motion bilateral, stability exam normal bilateral. (Emphasis added.)

Dr. Evans also noted that claimant had full range of motion in his reports of August 31, 2021, and October 12, 2021. While Dr. Evans did not specifically state whether the

range of motion studies on August 31 and October 12 were passive or active, he clearly indicated in his June 24 report that the examination was passive.

Based on his examination of the claimant, Dr. Evans in his report of October 12, 2021 stated that claimant had reached maximum medical improvement. He also indicated that claimant could return to work without restrictions and that claimant had:

No impairment rating

This was not a situation in which claimant's treating physician simply did not address impairment; rather, Dr. Evans specifically addressed impairment and determined that claimant did not have any permanent impairment as a result of his injury.

With respect to the February 7, 2022 passive range of motion examination relied upon by claimant in support of his contention that he is entitled to a rating of 13% to the body as a whole, I note that this testing was performed almost four months after claimant was released by Dr. Evans as having reached maximum medical improvement. More importantly, the physical therapist's note of February 7 indicates that claimant had returned to work until he was terminated. It was unknown when this termination occurred or whether claimant returned to work for another employer or had any other injuries to his shoulder after his release by Dr. Evans. Claimant did not appear at the hearing and thus did not testify as to his activities after his release by Dr. Evans.

As previously noted, the Commission is authorized to decide which portions of the medical evidence to credit. After my review of the evidence presented, I find that the opinion of Dr. Evans is entitled to greater weight and based upon his opinion I find that claimant has failed to prove by a preponderance of the evidence that he has any permanent impairment as a result of his compensable injury.

First and foremost, Dr. Evans is a physician while the test results relied upon by the claimant were made by a physical therapist. Not only is Dr. Evans a physician, he is also a specialist; specifically, he is an orthopedic surgeon and he performed the surgery on claimant's right shoulder. I also note that he was chosen by claimant as his authorized treating physician through a change of physician order. Dr. Evans' report of June 24, 2021 specifically states that claimant had "full passive range of motion bilaterally." Based upon his treatment of the claimant as well as his examination of the claimant following surgery which did include passive range of motion testing, Dr. Evans opined that claimant had no permanent impairment. I find that his opinion is credible and entitled to great weight.

ORDER

Claimant has failed to meet his burden of proving by a preponderance of the evidence that he is entitled to permanent partial disability benefits for permanent impairment as a result of his compensable injury. Therefore, his claim for compensation benefits is hereby denied and dismissed.

Respondents are responsible for payment of the court reporter's charges for preparation of the hearing transcript in the amount of \$528.65.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE