

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. H100931

DUKE BRYAN, EMPLOYEE	CLAIMANT
CITY OF MANSFIELD, EMPLOYER	RESPONDENT
ARKANSAS MUNICIPAL LEAGUE INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED AUGUST 30, 2022

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

Claimant represented by the HONORABLE JARID KINDER, Attorney at Law, Ozark, Arkansas.

Respondents represented by the HONORABLE MARY K. EDWARDS, Attorney at Law, North Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Claimant appeals an opinion and order of the Administrative Law Judge filed April 6, 2022. In said order, the Administrative Law Judge made the following findings of fact and 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

We have carefully conducted a *de novo* review of the entire record herein and it is our opinion that the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings of fact made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

Therefore, we affirm and adopt the April 6, 2022 decision of the Administrative Law Judge, including all findings and conclusions therein, as the decision of the Full Commission on appeal.

IT IS SO ORDERED.

SCOTTY DALE DOUTHIT, Chairman

CHRISTOPHER L. PALMER, Commissioner

Commissioner Willhite dissents.

DISSENTING OPINION

After my *de novo* review of the record in this claim, I dissent from the majority opinion finding that the 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.

Following the claimant's October 26, 2020, work-related accident, he was initially treated by Dr. Ian Cheyne for the chief complaint "[r]ight arm pulled on a truck". Dr. Cheyne noted that the claimant had "previous rotator cuff surgery around 2013".

On November 9, 2020, the claimant underwent an MRI which revealed the following:

Findings[:] Biceps tendon is within the bicipital groove[.] Subacupularis tendon is intact
Labrum intact Micro-metallic artifact overlying 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[.] The supraspinatus tendon is intact. Possible tendinopathy distal infraspinatus tendon although not obviously torn or retracted[.] No acute marrow edema change[.]

Impression

Postoperative changes as noted including AC joint arthropathy[.] Thinning of the distal infraspinatus tendon with no broad tendon tear or retraction seen[.]

On April 26, 2021, Dr. Jefferey Evans performed a right shoulder arthroscopic rotator cuff repair and arthroscopic subacromial decompression.

The claimant's initial post-surgery physical therapy evaluation was conducted by David Bohannon, P.T., on April 30, 2021. During this visit the claimant's passive range of motion measurements were as follows:

Measurement	Right	Left
Flexion	78 Degrees	WNL Degrees
Extension	WNL Degrees	WNL Degrees
Abduction	70 Degrees	WNL Degrees
Internal Rotation	75 Degrees	WNL Degrees
External Rotation	25 Degrees	WNL Degrees

Bohannon assessed the passive range of motion of the claimant's shoulder again on August 30, 2021. The range of motion showed the following improvements:

Measurement	Right	Left
Flexion	135 Degrees	WNL Degrees
Extension	WNL Degrees	WNL Degrees
Abduction	90 Degrees	WNL Degrees
Internal Rotation	WNL Degrees	WNL Degrees
External Rotation	42 Degrees	WNL Degrees

Dr. Evans' October 12, 2021 medical record indicated the following:

Shoulders – Normal inspection bilateral, full range of motion bilateral, stability exam normal bilateral.

Dr. Evans released the claimant at MMI to return to work without restrictions effective October 13, 2021.

The claimant returned to physical therapy on February 7, 2022, with complaints of pain in his shoulder that never went away from the initial injury. The passive range of motion measurements for the claimant's right shoulder were as follows:

Flexion: 30 Degrees
Abduction: 10 Degrees
External Rotation: 0 Degrees
Internal Rotation: 90 Degrees

Injured workers bear the burden of proving by a preponderance of the evidence that they are entitled to an award for a permanent physical impairment. Moreover, it is the duty of this Commission to determine whether any permanent anatomical impairment resulted from the injury, and, if it is determined that such an impairment did occur, the Commission has a duty to determine the precise degree of anatomical loss of use. *Johnson v. General Dynamics*, 46 Ark. App. 188, 878 S.W.2d 411 (1994); *Crow v. Weyerhaeuser Co.*, 46 Ark. App. 295, 880 S.W.2d 320 (1994).

Ark. Code Ann. § 11-9-704(c)(1) (Repl. 2012) provides that “[a]ny determination of the existence or extent of physical impairment shall be supported by objective and measurable physical or mental 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) (Repl. 2012). The Commission cannot consider complaints of pain when determining physical or anatomical impairment. *Id.*

The Commission has the authority and the duty to weigh medical evidence to determine its medical soundness, and we have the authority to accept or reject medical evidence. *Mack v. Tyson Foods, Inc.*, 28 Ark. App. 299, 771 S.W.2d 794 (1989); *Wasson v. Losey*, 11 Ark. App. 302, 669 S.W.2d 516 (1984); *Farmers Insurance Co. v. Buchheit*, 21 Ark. App. 7, 727 S.W.2d 391 (1987). Likewise, the Commission is entitled to examine the basis for a physician’s opinion, like that of any other expert, in deciding the weight to which that opinion is entitled.

I first note that Dr. Evans’ August 31, 2021, medical record regarding the range of motion was identical to the October 12, 2021, when he released the claimant at MMI; yet in August his plan was to continue the claimant’s work restrictions, continue physical therapy and to follow up in 6 weeks. Dr. Evans’ assessment appears to be a general observation made without an actual measurement of the range of motion. Although Dr. Evans is a physician, I assess greater weight to the more thorough assessment performed by the claimant’s physical therapist, David Bohannan.

Based on the range of motion measurements provided by David Bohannon, I would find that the claimant is entitled to a permanent impairment rating. Figure 38 on page 3/43 of the *AMA Guides* shows Upper Extremity Impairments Due to Lack of Flexion and Extension of Shoulder. With a 30-degree flexion measurement, the claimant would have a 10% upper extremity rating.

Figure 41 on page 3/44 of the *AMA Guides* is used to determine Upper Extremity Impairments Due to Lack of Abduction and Adduction of Shoulder. Given the claimant's 10-degree abduction measurement, the claimant would have a 10% upper extremity rating.

Figure 44 on page 3/45 of the *AMA Guides* is used to determine Upper Extremity Impairments Due to Lack of Internal and External Rotation of Shoulder. Claimant's measurements of 0-degree external rotation and 90-degree internal rotation provides a 2% upper extremity rating.

In total, the claimant's right upper extremity impairment rating is 22%, which converts to a 13% body as a whole impairment rating.

Therefore, based on the aforementioned, I find that the claimant established by a preponderance of the evidence that he is entitled to an 13% permanent impairment rating to the body as a whole.

For the foregoing reason, I dissent from the majority opinion.

M. Scott Willhite, Commissioner