

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. G807139

SALVADOR E. ESTRADA, Employee	CLAIMANT
GERDAU MACSTEEL, INC., Employer	RESPONDENT
GALLAGHER BASSETT SERVICES, Carrier	RESPONDENT

OPINION FILED FEBRUARY 25, 2022

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

Claimant represented by ADRIENNE K. MURPHY, Attorney, Fayetteville, Arkansas.

Respondents represented by LAURA J. PEARCE, Attorney, Fort Smith, Arkansas.

STATEMENT OF THE CASE

On January 31, 2022, the above captioned claim came on for hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on September 15, 2021 and a pre-hearing order was filed on that same date. 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 May 1, 2018.
3. The claimant sustained a compensable injury to his low back on May 1, 2018.
4. The claimant was earning an average weekly wage of \$1,096.32 which would

entitle him to compensation at the weekly rates of \$673.00 for total disability benefits and \$505.00 for permanent partial disability benefits.

5. Respondent accepted and paid permanent partial disability benefits based on a 5% rating to the body as a whole.

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

1. Additional medical treatment subsequent to October 16, 2019.
2. Permanent partial disability for wage loss.
3. Attorney's fee.

The claimant contends "he suffered an injury to his lumbar spine on May 1, 2018. An MRI done on [date] revealed a broad-based disk protrusion eccentric to the right at L5-S1 with caudal extrusion. He subsequently received conservative treatment that did not completely alleviate his symptoms. An MRI done on August 29, 2019 revealed a broad-based disc protrusion eccentric to the right at L5-S1 with caudal extrusion. He received conservative treatment for his injury. Dr. Mangles at Oklahoma Spine & Brain Institute indicated that a laminectomy on the right at L5-S1 could help his symptoms. However, the claimant declined surgery at that point as he felt the risks outweighed the benefits. Dr. Mangles gave the claimant a 20 pound lifting restriction at that time. Claimant subsequently underwent an FCE on September 27, 2019. The examiner who administered the test determined the claimant had given an unreliable effort. At that point, Dr. Terry Clark, the occupational health doctor who had managed the claimant's conservative care, released him without restrictions due to the FCE results. The claimant was terminated from employment shortly thereafter on November 13, 2019. The claimant contends he is entitled to loss of wage earning capacity and that he was not able to work

at full duty when he was terminated. He also contends that he is entitled to additional medical treatment, particularly the surgery recommended by Dr. Mangles. Finally, claimant contends he is entitled to a controverted attorney fee and reserves his right to any and all additional benefits associated with this claim.”

The respondents contend “that while claimant’s injury was initially not accepted due to inconsistent accounts of the mechanism of injury, it was accepted as of November 5, 2018 as a medical only claim. Subsequently, respondent began paying TTD benefits and all covered medical. Claimant underwent a Functional Capacity Evaluation and based on those results, claimant received an impairment rating of 5%, which was paid by the respondents. Claimant was released at MMI on October 18, 2019, with no restrictions. Respondents contend they have paid for all necessary medical treatment and have paid all temporary or permanent disability benefits due to the claimant. To date, claimant has been paid \$21,615.62 in disability benefits and \$8,898.19 in medical benefits have been paid. As claimant was released with no restrictions as the FCE was deemed to be invalid due to unreliable effort put forth by the claimant, claimant is not entitled to wage loss benefits. As claimant’s attorney can only be awarded a fee on controverted disability benefits, and entitlement to wage loss does not exist, neither is claimant’s attorney entitled to a fee.”

From a review of the record as a whole, to include medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witness and to observe his demeanor, 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 September 15, 2021, and contained in a pre-hearing order filed that same date are hereby accepted as fact.

2. Claimant has failed to meet his burden of proving by a preponderance of the evidence that he is entitled to additional medical treatment for his compensable injury.

3. 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 wage loss as a result of his compensable injury.

FACTUAL BACKGROUND

The claimant is a 47-year-old man who began working for respondent through a temporary agency before he was hired by respondent on May 29, 2012. Claimant worked in the respondent's shipping department. The parties have stipulated that claimant suffered a compensable injury to his low back on May 1, 2018.

Following his injury, claimant underwent a CT scan on July 23, 2018 and an MRI scan on August 29, 2018, which were interpreted as showing a protrusion at the L5-S1 level. Following those scans the claimant was evaluated by Dr. Joseph Queeney, neurosurgeon, who in a report dated September 24, 2018 indicated that he would not recommend surgery for the claimant at that time. He noted that claimant was not having any radiculopathy which he could attribute to the disc protrusion at L5-S1. Instead, Dr. Queeney recommended conservative treatment from claimant's primary care physician.

Subsequent medical records indicate that claimant was evaluated by Dr. Terry

Clark on November 12, 2018 who prescribed medication and assigned work restrictions of lifting limited to 20 pounds or less and repetitive lifting limited to 10 pounds or less. In addition, claimant was instructed to limit his bending, stooping and twisting and to alternate sitting and standing. Dr. Clark removed claimant's work restrictions as of January 2, 2019. In a report dated March 15, 2019, Dr. Clark noted that claimant had undergone his second lumbar epidural steroid injection two weeks earlier with good results and was scheduled for a third injection in two weeks. He also noted that claimant was continuing to perform his regular duties at work.

In a report dated May 21, 2019, Dr. Clark noted that claimant had undergone three lumbar epidural steroid injections with brief periods of improvement but no sustained relief. As a result, Dr. Clark referred claimant to Dr. Kyle Mangels, neurosurgeon. Dr. Mangels' medical report of July 7, 2019 indicates that claimant can lift at least 20 pounds. He also noted the MRI scan revealed a disc protrusion at the L5-S1 level and indicated that a laminectomy at L5-S1 might help claimant's condition. Claimant chose not to undergo the surgical procedure recommended by Dr. Mangels, and instead returned to Dr. Clark.

Dr. Clark ordered a functional capacities evaluation which was performed on September 17, 2019. The evaluation indicates that claimant gave an unreliable effort with only 31 of 51 consistency measures within expected limits.

Following the evaluation Dr. Clark in a report dated October 16, 2019 indicated that claimant was being discharged from the clinic and released to regular duty. He also noted that claimant was at maximum medical improvement and that he had suffered no partial or permanent disability.

Claimant has filed this claim contending that he is entitled to additional medical treatment for his compensable injury. Alternatively, claimant contends that he is entitled to permanent partial disability benefits for wage loss as a result of his compensable injury.

ADJUDICATION

Initially, claimant contends that he is entitled to additional medical treatment for his compensable injury. Claimant has the burden of proving by a preponderance of the evidence that he is entitled to additional medical treatment. *Dalton v. Allen Engineering Company*, 66 Ark. App. 201, 989 S.W. 2d 543 (1999).

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that claimant has failed to meet his burden of proof.

After his injury, claimant underwent a CT scan and MRI scan which were both interpreted as showing a protrusion at the L5-S1 level. Following those scans, claimant was evaluated by Dr. Queeney, who in his report dated September 24, 2018 indicated that he would not recommend any surgery for the claimant at that point in time. Instead, Dr. Queeney was of the opinion that claimant should receive conservative care from his primary care physician.

Claimant received conservative treatment from Dr. Clark which included medication, injections, and work restrictions. When claimant's complaints continued, Dr. Clark referred claimant to Dr. Mangels, who in a report dated July 7, 2019 offered claimant surgery but claimant chose not to undergo the surgery. Dr. Mangels addressed this decision in his report of July 7, 2019, stating:

I think doing lumbar surgery is reasonable to consider for him if he wants to consider it. If he doesn't, then I will consider him at the point of maximum medical improvement and an FCE could be done. (Emphasis added.)

Thus, it was Dr. Mangels' opinion that if claimant did not wish to undergo the surgery claimant had reached maximum medical improvement. As previously noted, claimant did not want to undergo the surgery offered by Dr. Mangels. Instead, claimant returned to Dr. Clark who ordered the FCE which was performed on September 17, 2019, and was determined to be invalid due to inconsistent effort on claimant's behalf. Significant findings from the evaluation include:

It is also noted that during formal AROM testing, he demonstrated that he was not able to forward flex more than 30 degrees. However, during functional aspects of testing, he was observed repeatedly assuming a position with his torso parallel to the floor approximating full motion. It is also noted that he completed his bimanual floor to knuckle lifting test with a maximum of only 10 lbs. but was later observed repeatedly lifting a 20 lb. weight through the same range with his RUE only. He also demonstrated this ability with his LUE. This is not indicative of reliable effort.

Finally, the evaluation report contains the following notation:

Although he reported and/or demonstrated numerous functional limitations during his evaluation, he also exhibited numerous inconsistencies which invalidated his entire evaluation. (Emphasis added.)

Following the functional capacities evaluation Dr. Clark authored a report dated October 16, 2019 stating:

Given the inconsistencies and unreliable performance on the FCE, he is informed that he will be discharged from care at this clinic. He will be released to regular duty. He is considered to be at MMI. He is referred to his personal care physician for further care as needed. There is no partial or permanent disability.

This report from Dr. Clark dated October 16, 2019 was more than two years ago. Claimant has not sought any additional medical treatment for his low back complaints since that date. Significantly, claimant testified that he was terminated by the respondent in August 2019 and since that time he has performed some work for a friend of his.

Based upon the opinions of Dr. Mangels as well as Dr. Clark and the results of the functional capacities evaluation, I find that claimant has failed to prove by a preponderance of the evidence that he is entitled to additional medical treatment for his compensable injury. Claimant has not received any medical treatment for his compensable injury in more than two years since he was released by Dr. Clark as having reached maximum medical improvement.

To the extent that claimant contends that the individual performing the functional capacities evaluation spoke only English, I note that the evaluation report does not indicate that claimant had any difficulty communicating during the evaluation itself. In fact, claimant admitted on cross-examination that he more or less does understand English, having been in the United States since 2001. I also note that claimant testified that he disagrees that he gave an inconsistent effort at the evaluation and that he was only present at the evaluation for an hour or an hour and a half. However, the evaluation report indicates that claimant's evaluation lasted from 11:40 a.m. until 3:39 p.m., almost four hours. In short, I find no reason to discount the results of the functional capacities

evaluation.

Alternatively, claimant contends that he is entitled to permanent partial disability benefits for wage loss as a result of his compensable injury. The parties have stipulated that respondent paid claimant permanent partial disability benefits based upon a 5% impairment rating to the body as a whole. In assessing whether claimant is entitled to permanent partial disability benefits for wage loss, the Commission may take into account various factors. Those factors include the claimant's age, education, work experience, and all other factors reasonably expected to affect his future earning capacity. A.C.A. §11-9-522(b)(1).

After reviewing the relevant wage loss factors presented in this claim, I find that claimant has failed to meet his burden of proving by a preponderance of the evidence that he is entitled to any permanent partial disability benefits for wage loss. First, although respondent paid claimant permanent partial disability benefits based upon a 5% impairment rating, I note that Dr. Clark stated that claimant had suffered no permanent disability. Furthermore, to the extent that claimant does have a permanent physical impairment in an amount equal to 5% to the body as a whole, I find that claimant has failed to prove that he has suffered any loss in wage earning capacity. Dr. Mangels did not assign claimant any permanent work restrictions at the time of his visit on July 7, 2019. Likewise, Dr. Clark in his report of October 16, 2019 indicated that claimant had no work restrictions and was released to regular duty. Furthermore, and perhaps more importantly, claimant underwent a functional capacities evaluation which was so inconsistent that the evaluator determined that the inconsistencies invalidated the entire evaluation.

Accordingly, based upon the opinion of Dr. Clark as well as the functional capacities evaluation, I find that claimant has failed to prove by a preponderance of the evidence that he is entitled to any permanent partial disability benefits for wage loss as a result of his compensable injury.

ORDER

Claimant has failed to prove by a preponderance of the evidence that he is entitled to additional medical treatment for his compensable injury. Claimant has also failed to prove by a preponderance of the evidence that he is entitled to any permanent partial disability benefits for wage loss as a result of his compensable injury. Therefore, his claim for compensation benefits is hereby denied and dismissed.

Respondent is responsible for payment of the court reporter's charges for preparation of the hearing transcript in the amount of \$305.30.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE