

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. **H103080**

JIMMY FOSTER, Employee	CLAIMANT
BOONEVILLE HUMAN DEVELOPMENT CENTER, Employer	RESPONDENT
PUBLIC EMPLOYEE CLAIMS DIVISION, Carrier	RESPONDENT

OPINION FILED **FEBRUARY 9, 2023**

Hearing before ADMINISTRATIVE LAW JUDGE JOSEPH C. SELF in Fort Smith, Sebastian County, Arkansas.

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

Respondents represented by CHARLES H. MCLEMORE, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On December 6, 2022, the above captioned claim came on for hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on October 6, 2022 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. Emails between the parties and the Court regarding the issues at the hearing were marked as Commission Exhibit #2 and made a part of the record without objection.

At the hearing, the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The employee/employer/carrier relationship existed on July 31, 2020.
3. The compensation rates are \$329.00 for temporary total disability and \$247.00 for permanent partial disability.
4. Claimant sustained a compensable injury on or about July 31, 2020 when he contracted

Foster-H103080

COVID-19 in the course of his employment.

At the hearing, the parties agreed to litigate the following issues:

1. Whether claimant is entitled to an impairment rating for an injury or disease of his heart as a result of his compensable injury.
2. Whether claimant is entitled to an impairment rating for an injury which resulted in right ulnar nerve neuropathy.
3. Whether claimant is entitled to temporary total disability benefits from May 6, 2022 until September 26, 2022.
4. Attorney's fee.

All other issues are reserved by the parties.

The claimant's contentions as per his Amended Prehearing Questionnaire were:

"1. The claimant, Jimmy Foster, sustained compensable injuries following a COVID-19 injury on or about August 6, 2020, while working for Booneville Human Development Center in Booneville, Arkansas. Said injuries, include, but are not limited to: a respiratory disorder, sacral wound, paroxysmal atrial fibrillation, dyspnea on exertion, essential hypertension, hypertensive heart disease, left ventricular diastolic dysfunction, pulmonary hypertension, left ventricular dilation, trivial nonrheumatic mitral insufficiency trivial nonrheumatic tricuspid insufficiency, a subarachnoid hemorrhage, and hemiparesis.

2. Sara L. Roberson has taken the claimant off work indefinitely due to his severe COVID-pneumonia and subsequent deterioration of health.

3. The claimant was not found to be at MMI until September 26, 2022 by Dr. Terry Clark. The claimant remained in his healing period for both scheduled and unscheduled injuries, had not been returned to work, and thus contends he is owed temporary total disability benefits from May

Foster-H103080

17, 2022 through September 26, 2022. [Note: claimant amended the starting date for his claim for TTD during the hearing to May 6, 2022.]

4. The Claimant also contends that he is owed an impairment rating for his heart condition. Utilizing Table 12 (6/195) of the Guides to the Evaluation of Permanent Impairment, Fourth Edition, the claimant contends he has a Class 3 Cardiac Arrhythmia, entitling him to a 49% impairment to the whole person.

5. The claimant also contends that he is owed an impairment rating for his right ulnar nerve neuropathy. Utilizing Table 14 (4/148) of the Guides to the Evaluation of Permanent Impairment, Fourth Edition, the Claimant contends he is owed a 9% impairment to the whole person.

6. Due to the controversion of entitled benefits, the respondents are obligated to pay one half of the claimant's attorney's fees.

The respondents contend that "the claimant reported on August 5, 2020 that he tested positive for COVID, with his last day at work being July 31, 2020. Respondent did accept this claim as compensable pursuant to Ark. Code Ann. §11-9-601 (effective from March 11, 2020 and until May 1, 2023) and respondent has provided benefits to or on behalf of the claimant for this claim. Respondent has provided reasonable and necessary medical treatment for the claimant, including treatment with Dr. Terry Clark, Dr. Delilah Easom for wound care, and Dr. Julio Schwarz, a cardiac specialist. The claimant tested unreliably in the Sedentary classification of work at a Functional Capacity Evaluation on April 26, 2022, with 13 of 53 consistency measures. The claimant was paid his salary by his employer until January 8, 2021, at which point the claimant was paid temporary total disability benefits by the respondent from January 9, 2021 until May 6, 2022 when the claimant was released at maximum medical improvement by his treating physician, Dr. Terry Clark. The claimant was assigned a permanent anatomical impairment of 10% to the whole person which has been accepted by

Foster-H103080

respondent and permanent partial disability benefits are being paid to the claimant for this impairment rating. The claimant would not return to work and would not complete his mandatory background checks for his job. The claimant's employment ended November 30, 2021."

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 witnesses and to observe their 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 October 6, 2022 and contained in a pre-hearing order filed that same date are hereby accepted as fact.
2. Claimant has failed to prove by a preponderance of the evidence that his heart disease was the result of his compensable illness from COVID-19.
3. Claimant has failed to prove by a preponderance of the evidence that his right ulnar nerve neuropathy was the result of his compensable illness from COVID-19.
4. Claimant has met his burden of proving that he is entitled to temporary total disability benefits from May 7, 2022 through September 26, 2022.
5. Respondent has paid permanent partial disability benefits from May 7, 2022 based on the 10% impairment rating assessed by Dr. Clark. Respondent is entitled to credit for the payments it has made toward that rating.
6. Respondent has controverted claimant's entitlement to the unpaid temporary total disability benefits between May 7, 2022 through September 26, 2022.

FACTUAL BACKGROUND

Prior to taking testimony, claimant objected to a portion of respondent's surveillance exhibit (R.X. #3), which was a printout of a search on Arkansas Court Connect for information on Jimmy Foster. The objection was based on the record not sufficiently identifying claimant as the "Jimmy Foster" named in the document, as well as relevance to the issues before me. I was unable to rule on it before hearing the testimony that related to that portion of respondent's exhibit. Having heard the witness that prepared the document testify on this issue, I ruled that pages 18-21 of respondent's exhibit #3 would not be received as evidence. These were proffered by respondent and are included in the record, but were not considered as evidence in this case.

HEARING TESTIMONY

Claimant contracted COVID-19 on or about July 31, 2020. Claimant was hospitalized on August 8, 2020, and was either in the hospital or a nursing home for several weeks thereafter. As a result of being in bed for an extended period, claimant developed bed sores and was treated for that after his discharge from the nursing home.

Regarding the two conditions that claimant raised as an issue at this hearing, claimant stated that he had great difficulty with his right upper extremity, including loss of strength as well as his range of motion. Regarding his heart condition, claimant testified that he had never had heart problems before he developed COVID-19 but had been told that he had an enlarged heart, a-fibrillation, and a valve that wasn't expanding. Claimant was not taking any medications for his heart at the time of the hearing other than an aspirin a day.

After claimant rested, respondent called Julie Street, the HR director at Booneville Human Development Center, to discuss the circumstances of claimant being terminated as an employee there in November, 2021. Respondent also called two private investigators. Tonya Johnson testified about

Foster-H103080

conducting both visual surveillance and seeing claimant in several videos posted on the Apostolic Lighthouse Church Facebook page. Ms. Johnson downloaded several of the videos. Travis Williams testified as to his visual surveillance of claimant.

REVIEW OF THE EXHIBITS

Claimant submitted a series of medical records outlining his course of treatment following his COVID-19 diagnosis, including records from his hospitalization and the care of his stage IV pressure ulcer. Those conditions are not of issue in this case and those records will not be further considered.

Regarding his heart condition, Dr. Sara Roberson was claimant's primary care physician. On November 9, 2020, her APRN, Sherilyn Bennett, discussed with claimant undergoing an echocardiogram. On December 4, 2020, Dr. Roberson noted: "Awaiting cardiology referral and echo." A year later, Dr. Roberson's records for December 30, 2021, revealed that claimant had an echocardiogram in June, 2021, but there was nothing from that test entered into evidence. On February 15, 2022, the first record introduced from Mercy Clinic Cardiology, he was seen by Gayla Johnson FNP, who ordered a 72- hour Holter monitor to assess claimant's cardiac rate and rhythm. Nurse Johnson recorded "Patient is stable from the cardiology viewpoint in relation to problems. In addition, there is no dyspnea." Claimant returned to Mercy Clinic Cardiology on March 28, 2022, to see Dr. Julio Schwarz and/or April 1, 2022 (the records are unclear if there were two visits within five days). There are references to the results of the echocardiogram and the Holter monitor study. Claimant's list of cardiovascular disease problems include:

1. Paroxysmal atrial fibrillation.
2. Dyspnea on exertion. Injection factor 60%.
- 3 Essential hypertension.
4. Hypertension heart disease.
5. Left ventricular diastolic dysfunction.
6. Pulmonary hypertension.
7. Left atrial dilatation.
8. Trivial non-hematic mitral insufficiency.

Foster-H103080

9. Trivial non-hematic tricuspid insufficiency.
10. Family history of heart disease.

Claimant was treated for problems with his right upper extremity injury by Dr. Keith Bolyard on January 15, 2021. Claimant's complaints were "a snapping of the right scapula and pain and weakness of the shoulder." Claimant described similar pain but not as severe with his left shoulder. Upon physical examination, Dr. Bolyard noted "he does have a palpable snap at the inferior angle of the scapula with certain range of motions." He reviewed the x-rays and his impression was that claimant had a "right glenohumeral joint arthritis with stiffness" and a "snapping scapula syndrome right." Dr. Bolyard believed that the scapula was "probably more consistent with a dyskinesia." Claimant was given an injection of lidocaine, Marcaine and betamethasone in the right glenohumeral joint. Dr. Bolyard did not believe that the snapping scapula would require surgery but was probably more related to a muscle imbalance. He did not schedule claimant for a return visit.

On April 26, 2022, claimant underwent a functional capacity evaluation (FCE) performed by the Functional Testing Centers, Inc. The evaluator noted a self-limiting behavior and a sub-maximal effort, finding the results of the evaluation indicated that an unreliable effort was put forth. Claimant had 13 of 53 consistency measures within expected limits. Despite this, claimant was assessed with a ten percent (10%) whole person impairment based on his respiratory impairments.

The results of the FCE were provided to Dr. Terry Clark. On September 26, 2022, Dr. Clark opined that claimant had reached maximum medical improvement (MMI) and agreed with the impairment rating of ten percent to the whole person as set forth in the FCE report.

Respondent's medical exhibits largely duplicated the relevant records from claimant's exhibits and those records that were not duplicative are not pertinent for my decision in this matter.

Respondent's non-medical exhibits included letters sent from respondent Booneville Human Development Center to claimant regarding his employment, including the November 30, 2021,

Foster-H103080

correspondence that terminated his job with respondent. These records conclude with the May 17, 2022 letter from Rhonda Murphy, the assistant claims determination manager with the Arkansas Insurance Department, Public Employees Claims Division. Ms. Murphy advised claimant that a report from Rick Byrd at Functional Testing Center indicated that claimant had reached a maximum medical benefit as of April 26, 2022 and therefore claimant's permanent partial disability benefits would begin covering the dates May 7, 2022 through May 20, 2022 and continue for a total of 45 weeks of benefits.

Respondent's third exhibits were reports from the private investigators that surveilled claimant and researched social media sites for information about the claimant's condition. A thumb drive containing videos from the surveillance and social media sites was included in Respondent's #3. Before writing this opinion, I requested respondent to identify five of the 115 videos downloaded from the Facebook page of the church claimant attends as representative of the whole. Respondent designated those from August 15, 2021, September 14, 2021, September 26, 2021, October 24, 2021, and December 14, 2021 in response to my request.

ADJUDICATION

Claimant has three distinct claims. He maintains he has a permanent injury in the form of a heart condition. He also asserts he has a permanent injury to his right upper extremity. Finally, claimant seeks temporary total disability benefits (TTD) for a period of time between May 6, 2022 and September 26, 2022. These will be addressed separately below.

It is conceded that claimant had a compensable injury for contracting COVID-19 while employed by respondent, and it appears that his medical benefits for the severe respiratory illness claimant developed, as well as for the bed sores that occurred while being treated for COVID-19, were paid by respondent. Although claimant reserved a claim for any TTD that was due outside of

Foster-H103080

the stated period above, he testified that he received TTD for much of the time he was unable to work before he was released from doctor's care at maximum medical improvement for the respiratory illness. While admitting the respiratory illness and subsequent bed sores were compensable, respondent has controverted claimant's request for TTD after May 6, 2022, and has denied that the heart condition and the neuropathy in claimant's right upper extremity are compensable.

There are also several statutory provisions that seem applicable to claimant's heart condition.

To receive additional TTD benefits for the admittedly compensable COVID-19 illness, claimant must prove by a preponderance of the evidence that he remains within his healing period and that he suffers a total incapacity to earn wages. *Arkansas State Highway & Transportation Department v. Bresbears*, 272 Ark. 244, 613 S.W. 2d 392 (1981).

A. The heart condition.

A couple of statutes are applicable to this portion of claimant's request for disability for his heart condition. Arkansas Code Annotated §11-9-102(5)(A)(ii) and (iv) provides, in pertinent part, that a compensable injury is:

(ii) An injury causing internal or external physical harm to the body and arising out of and in the course of employment if it is not caused by a specific incident or is not identifiable by time and place of occurrence, if the injury is:

(iv) Heart, cardiovascular injury, accident, or disease as set out in § 11-9-114.

Arkansas Code Annotated §11-9-114 states:

(a) A cardiovascular, coronary, pulmonary, respiratory, or cerebrovascular accident or myocardial infarction causing injury, illness, or death is a compensable injury only if, in relation to other factors contributing to the physical harm, an accident is the major cause of the physical harm.

(b)(1) An injury or disease included in subsection (a) of this section shall not be deemed to be a compensable injury unless it is shown that the exertion of the work necessary to precipitate the disability or death was extraordinary and unusual in comparison to the employee's usual work in the course of the employee's regular employment or, alternately,

Foster-H103080

that some unusual and unpredicted incident occurred which is found to have been the major cause of the physical harm.

Claimant has a heart condition that was established by objective medical findings and seeks a permanent disability award for it. Claimant seems to rely on the sequence of events as proof that the heart condition was caused by COVID-19. However, the records discussed above are devoid of attribution of the heart condition to COVID-19. A claimant will not receive an award for permanent benefits unless the injury was the major cause of the disability or impairment. Ark. Code Ann. § 11-9-102(4)(F)(ii)(a). "Major cause" means more than 50 percent of the cause, which the claimant must establish by a preponderance of the evidence. Ark. Code Ann. § 11-9-102(14)(A). As none of his treating physicians determined that the compensable injury—COVID-19—was a major cause of the heart ailments, claimant failed to meet his burden of proof that he sustained a permanent injury to his heart as a result of contracting COVID-19 through his employment.

B. Right upper extremity neuropathy.

In order for claimant to meet his burden of proof to receive benefits for the neuropathy in his right upper extremity, he must show that: (1) an injury occurred that arose out of and in the course of his employment; (2) the injury caused internal or external harm to the body that required medical services or resulted in disability or death; (3) the injury is established by medical evidence supported by objective findings, which are those findings which cannot come under the voluntary control of the patient; and (4) the injury was caused by a specific incident and is identifiable by time and place of occurrence. If a claimant fails to establish by a preponderance of the evidence any of the above elements, compensation must be denied. *Mikel v. Engineered Specialty Plastics*, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

Foster-H103080

I believe that a respiratory virus did not cause claimant to have pain in his right upper extremity. Claimant believes that it happened when he was being pulled around in his bed while being treated in the hospital or nursing home for COVID-19. If he could show that was indeed what happened, he could receive benefits for injuries sustained while being treated for a compensable injury, see *Air Compressor Equipment v. Sword*, 69 Ark. App. 162, 11 S.W.3d 1 (Ark. App. 2000) and *Eagle Safe Corp. v. Egan*, 39 Ark. App. 79, 842 S.W.2d 438 (1992). However, the only records I have of treatment for the right upper extremity was that of Dr. Bolyard, who termed what he was seeing as a “right glenohumeral joint arthritis with stiffness and a snapping scapula syndrome right.” Perhaps claimant did not relate to Dr. Bolyard what he believed to be the origin of the pain in his right upper extremity and thus give the physician a reason to express an opinion as to causation. Without such, though, claimant failed to meet his burden of proof on this issue.

C. Claimant’s entitlement to TTD benefits from May 7, 2022, until September 26, 2022.

In order to be entitled to temporary total disability benefits for an unscheduled injury, the claimant must prove by a preponderance of the evidence that he remains within his healing period and that he suffers a total incapacity to earn wages. *Arkansas State Highway & Transportation Department v. Bresbears*, 272 Ark. 244, 613 S.W. 2d 392 (1981). While the videos of claimant from the last half of 2021 preaching for over 30 minutes at a time without losing his breath coupled with his reported lack of effort during the FCE might indicate he was malingering, I am not satisfied that this alone is enough to deny his claim for TTD before Dr. Clark released him. It appears Debbie Blaylock, the case manager, had predetermined when claimant would be declared at MMI: “MMI is expected to be achieved after completion of cardiology testing and follow-up and the FCE.” (CL. X 90). In the same document, though, Ms. Blaylock said “the cardiology and FCE results will be provided to Dr. Roberson when available for determination of MMI and work status.” Rather than wait for Dr.

Foster-H103080

Roberson to review those results and make the MMI determination, Ms. Blaylock wrote to claimant on May 17, 2022, advising him that Rick Byrd had indicated that claimant had reached MMI, so she was ending the TTD payments and starting the payments on the permanent partial disability rating. That was premature on her part.

On June 17, 2022, Dr. Roberson saw claimant again, and reviewed the FCE. Unlike what Ms. Blaylock anticipated, Dr. Roberson did not find claimant was at MMI for his COVID-19 condition. In a letter composed following that visit, Dr. Roberson included the respiratory issues among the health factors that she felt would keep claimant from working. It was not until claimant saw Dr. Clark on September 26, 2022 that a physician said “MMI had been reached as of today’s date.”¹ The records from this visit are clear that Dr. Clark was referring only to claimant’s respiratory failure, the subarachnoid hemorrhage (an issue that was reserved by claimant and not a part of this hearing) and the pressure ulcer (CL. X 138) in declaring that “Jimmy’s recommended work status is regular duty. The effective date for this work status is 9/26/2022.”

Given Mr. Byrd at Functional Testing Center is not a medical doctor, and considering the opinions of both Dr. Roberson and Dr. Clark, both of whom saw claimant after Mr. Byrd conducted the FCE, claimant has proven by a preponderance of the evidence that the date he was released at MMI for the COVID-19 injury was September 26, 2022. He is entitled to TTD benefits from May 7, 2022 until September 26, 2022.

At the hearing, respondent requested that if I find claimant is entitled to TTD benefits that it be given credit for the permanent partial disability payments it made from May 7, 2022. As claimant should have received TTD benefits from May 7, 2022 to September 26, 2022, respondent is credited

¹ In its contentions, respondent maintained that Dr. Clark released claimant at MMI on May 6, 2022. Dr. Clark did not see claimant on April 26, 2022; that was the date of the FCE.

Foster-H103080

with the payments toward the 10% whole person impairment rating that has already been paid to claimant.

ORDER

Claimant has failed to meet his burden of proving by a preponderance of the evidence that he sustained a compensable injury to his heart or his right upper extremity as a result of his compensable injury from contracting COVID-19 in July, 2020.

Claimant has met his burden of proving by a preponderance of the evidence that he is entitled to temporary disability benefits from May 7, 2022, through September 26, 2022.

Respondents are directed to pay benefits in accordance with the findings of fact set forth herein this Opinion.

Respondents are entitled to credit for all payments it has made toward the 10% permanent impairment rating beginning May 7, 2022.

All accrued sums shall be paid in lump sum without discount, and this award shall earn interest at the legal rate until paid, pursuant to Ark. Code Ann. § 11-9-809.

Pursuant to Ark. Code Ann. § 11-9-715, the claimant's attorney is entitled to a 25% attorney's fee on the indemnity benefits awarded herein. This fee is to be paid one-half by the carrier and one-half by the claimant.

All issues not addressed herein are expressly reserved under the Act.

Respondent is responsible for paying the court reporter her charges for preparation of the transcript in the amount of \$1,671.45.

IT IS SO ORDERED

JOSEPH C. SELF
ADMINISTRATIVE LAW JUDGE