BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. G106990

LINDA MICHAEL, EMPLOYEE	CLAIMANT
BOONEVILLE SCHOOL DISTRICT, EMPLOYER	RESPONDENT NO. 1
ARKANSAS SCHOOL BOARDS ASSN., CARRIER	RESPONDENT NO. 1
DEATH AND PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT NO. 2

OPINION FILED JANUARY 3, 2024

Upon review before the Full Commission, Little Rock, Pulaski County, Arkansas.

Claimant represented by the HONORABLE EDDIE H. WALKER, JR., Attorney at Law, Fort Smith, Arkansas.

Respondents No. 1 represented by the HONORABLE MELISSA WOOD, Attorney at Law, Little Rock, Arkansas.

Respondents No. 2 represented by the HONORABLE DAVID PAKE, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

Respondents appeal the Opinion filed April 25, 2023, by the administrative law judge ("ALJ") finding the following:

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on November 14, 2022, and contained in a Pre-hearing Order filed November 15, 2022, are hereby accepted as fact.

2. The claimant has proven by a preponderance of the evidence that she is entitled to permanent total disability benefits.

3. The claimant has proven by a preponderance of the evidence that her attorney is entitled to an attorney's fee in this matter.

In our *de novo* review, we find that the claimant has not proven by a preponderance of the credible evidence that she is entitled to permanent total disability benefits. Accordingly, claimant's attorney is not entitled to an attorney's fee in this matter.

On September 2, 2014, the parties in this matter entered an Agreed Order finding that the claimant was entitled to a permanent partial impairment rating of 14% with an additional 42% in wage loss disability. Pursuant to the Order, the claimant waived her right to seek additional wage loss disability, but she was not barred from seeking permanent total disability benefits in the event of a change in circumstances.

Prior to the entry of the Agreed Order, the parties were aware claimant had been terminated by the Booneville School District in June 2014 as they could not meet her permanent medical restrictions. The claimant was prescribed numerous pain medications as of 2014, including methocarbamol, hydrocodone, narco, morphine ER, and oxycodone. The claimant reported that these prescriptions were doubled by March 2014. By May 2014, Patricia Walz, PhD reported that the claimant cried a lot, stayed in bed, had suicidal thoughts, and woke from pain at night and was averaging four or five hours of sleep.

After 30 days of job placement assistance in June 2014, Tanya Rutherford Owen, PhD identified approximately fifteen potential job leads after assisting the claimant in developing a resume and cover letter. Dr. Owen opined that "it is often difficult to place an individual in the labor market who does not believe that she can work." In response, the claimant's Licensed Professional Counselor Loretta Gedosh wrote to Dr. Owen on August 1, 2014 stating that she "frankly did [not] understand how you feel these are viable leads," and that the claimant had been advised by her treating physician, Dr. Danny Silver, that while the claimant could manage a few hours of physical labor she would be incapacitated for days afterward. Ms. Gedosh believed that the claimant's mental and physical capacity rendered the claimant unable to work any job recommended by Dr. Owen.

On October 5, 2017, the claimant presented to Dr. Arthur Johnson with Mercy Clinic Neurosurgery in Fort Smith with complaints of low back pain. Upon reviewing an x-ray of the claimant's lumbar spine, Dr. Johnson reported that "[t]he hardware is in good alignment and position from all 3 levels with the screws at the inferior level been fractured bilaterally." An MRI of claimant's lumbar spine revealed:

> Mild disc degeneration at the L3 L4 (assuming lumbarization of the S1) level with no significant canal stenosis or neuroforaminal stenosis. No stenosis, disc herniations or neural foraminal stenosis is evident at any of the fused levels of the lumbar spine.

> Assessment:
> 1. Hardware failure of the anterior column of spine, fractured screws at S1.
> 2. Status post lumbar spinal fusion L4-5, L5-S1, S1-S2.
>
> Plan:
> I have discussed the treatment options which I believe include surgery.
> No orders of the defined types were placed in this encounter.
>
> Based on that discussion we are going to proceed with:
> Removal of hardware L3-S1. I'm very doubtful that this will improve the patient's clinical pain syndrome. She failed to respond to a 3 level lumbar fusion. She is completely fused at all 3 levels according to CT and therefore not having any movement around the areas where the fractured screws are at S1.
> No orders of the defined types were placed in this encounter.
>
> I have explained the surgery to the patient, removal of hardware L3-S1, along with the risk and benefits.

Dr. Johnson conducted surgical hardware removal on December 5, 2017, and on May 29, 2018, Dr. Johnson authored a letter opining that the claimant had reached maximum medical improvement, stating:

> The above captioned patient has been under my care and has been released from Neurosurgery as of 5/23/2018.
> The patient has now reached her Maximum Medical Improvement.
> She was given a permanent impairment disability rating according to the 4th edition of the AMA guidelines of 1% impairment for the hardware removal surgery that was done 12/5/2017.

> This is within a reasonable degree of medical certainty.

The only witnesses at the January 26, 2023 hearing were the claimant and her husband, Mr. Phillip Michael. When questioned about any changes in the claimant's condition between her first lumbar spine surgery in 2013 and the 2017 hardware removal, Mr. Michael testified that:

> Q: (By Mr. Walker) So after the first surgery, what kinds of physical activities do you recall you and your wife engaging in? That would have been in 2014, 2015.
>
> A: I mean that was a long time back, but not a whole bunch, just to be honest. I mean she usually stayed at home most of the time. She got out more than what she does. We would go to Walmart or Sam's, you know.
>
> Q: So did there come a time when whatever activities she was engaging in became more limited?
>
> A: Yeah, I mean –
>
> Q: What happened?
>
> A: She got another bolt snapped in her back and I couldn't get her to hardly do nothing then. A lot of times she just stood up and she may fall.
>
> Q: So then did she undergo a second surgery by Dr. Johnson?
>
> A: Yes, sir.
>
> Q: How did she do after that?

> A: Her limitations just went downhill bad. I can't get her to hardly do anything.
>
> Q: Compared to her physical activities after the first surgery with her physical activities after the second surgery, tell us how you would compare those activities.
>
> A: After the first one she would at least try to take a bath and clean herself up, you know, at least every other day. Now I am lucky to get her to take a bath every six days. Some days it goes 12 days before she took a bath. It is just hard to get her out of her chair to do anything.

When asked about his testimony regarding the claimant falling, Mr. Michael explained:

> Q: (By Mr. Walker) So at what point did she start falling?
>
> A: I would say whenever the second screw busted around 2016.
>
> Q: And then he [Dr. Johnson] did the surgery in 2017?
>
> A: Correct.
>
> Q: So after the surgery in 2017, did she ever appear to be as active as she was before 2017?
>
> A: No, sir. It just got worse.
>
> Q: And when you say got worse, what do you mean by that?
>
> A: She just don't do nothing. I mean to get her to do anything, I mean even to take a bath is—

> Q: Well, now, you said she doesn't do anything. I mean she has got to do something in order to get through the day. I mean she is here today, so she obviously does some walking and stuff, so be more specific when you say – when you are trying to tell us what goes on.
>
> A: She will get up to go to the restroom. I have seen her make her a sandwich or something that was pretty simple to eat. I have seen her put maybe a plate in the dishwasher. She may throw something in the washing machine if she ain't got to bend over in a basket to get it out.
>
> Q: Have you seen her lift anything that appeared to weigh more than 10 pounds since 2017?
>
> A: No, sir.

Mr. Michael testified as to what he believed the claimant's day-to-day life looked like:

> She will wake up anywhere between 7:30 and 9:00. I will get up and I will try to fix her something to eat because she is hungry. I bring her food to her. She will take her medicine and the next thing I know she is asleep again in her chair. She may wake up, you know, 11:30 or 12:00 ready for lunch. I mean it's not every day, but most of the days that is the way it goes.
>
> And then if I get her to go anywhere, it is usually between 1:00 and 5:00 if I can get her out of the house. And other than that, she may go back to bed at 6 o'clock, but it's sometimes between 6:00 and 8:30 she goes back to bed and stays in bed until the next morning.

This serves as a stark contrast to the claimant's testimony on cross-examination.

> Q: (By Ms. Wood) Okay. All right. You told me in your recent deposition that if your husband goes to the grocery store or Walmart, you try to go; is that right?
>
> A: Yes, ma'am.
>
> Q: And that you do that maybe four times a week; is that correct?
>
> A: Yes, ma'am. I just ride with him wherever he goes. I don't know how many exact times.
>
> Q: Okay. And you also told us in the deposition that you guys go to the casino sometimes; is that right?
>
> A: Yes, ma'am.
>
> Q: Choctaw and one other in the local area?
>
> A: Yes.
>
> Q: You told me that you usually go three or four times a week; is that right?
>
> A: Yes, ma'am.
>
> Q: Usually if you are hitting, you would stay three to four hours, but you have stayed five hours before if you are getting a lot of money, is that right?
>
> A: Yes, ma'am.
>
> Q: Sometimes it's shorter; is that right?

A: Yes, ma'am.

Q: You also told me you stop at garage sales every once in a while; is that correct?

A: Yes, ma'am.

Q: And at times your eight-year-old granddaughter comes to visit you guys, is that right?

A: Yes, ma'am.

Q: Is that the one that lives down in Texas?

A: Yes, ma'am.

Q: Okay. And your husband was telling us earlier that you have gone down there to visit your family; is that right?

A: Yes.

Q: At the time of your deposition, you told us that you had gone down there to visit in August of '21 when your daughter got married. You went again at Christmas and two other times in '22; is that correct?

A: I think that's all.

Q: You think what? I'm sorry.

A: I think that is all.

Q: Okay. And one of the times last year was your granddaughter's birthday in July and you said you guys went to Walmart and Claire's to get her something for her birthday; is that right?

A: Yes.

> Q: You stayed about four or five days that trip?
>
> A: Yes.

When asked what complaints led the claimant to assert that she is worse now than in 2014, she replied, ""[m]y legs draw up on me more and my joints and my hips and stuff and my back. And my knees bother me more and my legs and my feet. I sound like popcorn sometimes when I walk across the floor." Her medical records from 2017 to the date of the hearing regularly reported that the claimant's "chronic pain and related symptoms are managed to a functional level with current treatment regimen. . . She is continuing to work at meeting/ maintaining goals."

The claimant's contention that she is entitled to permanent total disability fails as the claimant cannot offer proof that she has suffered a change in physical condition since the parties entered into their September 2014 agreement. The Commission may modify a previous award at any time within six (6) months of termination of the compensation period fixed in the original compensation order or award, upon the commission's own motion or upon the application of any party in interest, on the ground of a change in physical condition or upon proof of erroneous wage rate. Ark. Code Ann. § 11-9-713(a)(2).

> Aging and the effects of aging on a compensable injury are not to be considered in determining whether there has been a change in physical condition. Nor shall aging or the

> effect of aging on a compensable injury be considered in determining permanent disability pursuant to this section or any other section in this chapter.

Ark. Code Ann. § 11-9-713(e).

"'Permanent total disability' means inability, because of compensable injury or occupational disease, to earn any meaningful wages in the same or other employment." Ark. Code Ann. § 11-9-519(e)(1). The employee bears the burden of proving the inability to earn any meaningful wage. Ark. Code Ann. § 11-9-519(e)(2). "In the absence of clear and convincing proof to the contrary, the loss of both hands, both arms, both legs, both eyes, or of any two (2) thereof shall constitute permanent total disability;" however, "[i]n all other cases, permanent total disability shall be determined in accordance with the facts." Ark. Code Ann. § 11-9-519(b)-(c). Permanent benefits may only be awarded if the compensable injury was the major cause of the disability or impairment. Ark. Code Ann. § 11-9-102(4)(F)(ii)(a). Arkansas Code Annotated § 11-9-102(4)(D) provides that a compensable injury must be established by medical evidence supported by "objective findings." An objective finding is defined as a finding that cannot come under the voluntary control of the claimant. Ark. Code Ann. § 11-9-102 (16).

The same factors that are considered when analyzing wage loss disability claims are usually considered when analyzing permanent and total disability claims. *Maulding v. Price's Util. Contractors, Inc.*, 2009 Ark. App. 776, 358 S.W.3d 915 (2009). Those factors include the claimant's age,

work experience, education, motivation, post-injury income, credibility, demeanor, and any other matters reasonably expected to affect her future earning capacity. Ark. Code Ann. § 11-9-522(b)(1); *St. Vincent Health Servs. v. Bishop*, 2010 Ark. App. 141 (2010).

Every condition alleged by the claimant to have changed since the Order dated September 2, 2014 was known and addressed by the parties at the time the parties reached the agreement outlined in the Order. By the time the agreement was reached, the claimant's permanent restrictions had been addressed by her treating physician and she had been terminated by the Booneville School District. Even though the claimant has undergone an additional surgery and received an additional rating, an additional rating of one percent (1%), does not justify an award of permanent and total disability.

Further, prior to the Agreed Order there was some debate regarding the claimant's ability to work. Tanya Rutherford Owen, PhD identified approximately fifteen potential job leads, after which the claimant's Licensed Professional Counselor Loretta Gedosh opined that she "frankly did [not] understand how you feel these are viable leads." Ms. Gedosh believed that the claimant's mental and physical capacity rendered the claimant unable to work any job recommended by Dr. Owen. This information played a role in determining the claimant's wage-loss at that time which was agreed to by the parties as evidenced by the Order dated

September 2, 2014. Since that point, the claimant has failed to prove any change in her physical condition that would warrant a finding of permanent and total disability.

By the claimant's own testimony, alongside her husband's, the claimant's complaints all result from her own self-limiting behavior. With the addition of the 1% permanent impairment rating in May of 2018, the claimant is now rated at 15% to the body as a whole. Claimant's husband describes the claimant's activity as, "[n]ow I am lucky to get her to take a bath every six days. Some days it goes 12 days before she took a bath. It is hard to get her out of the chair to do anything." Mr. Michael contends that he brings the claimant food and her medicine in her chair "and the next thing I know she is asleep again in the chair. She may wake up, you know, 11:30 or 12:00 ready for lunch. I mean it's not every day, but most of the days that is the way it goes."

The claimant's testimony, however, reflects that the claimant goes to the grocery store with her husband up to four times a week. She and Mr. Michael go to the casino three to four times a week where they might stay for five hours if they are winning. The couple occasionally shops at garage sales and has visited family in Texas four times since August of 2021 staying four or five days at a time.

Dr. Arthur M. Johnson performed hardware removal surgery on the claimant on December 5, 2017, and opined she reached maximum medical

improvement on May 23, 2018. He did not place any additional restrictions on the claimant's activities.

Without any evidence of a change in the claimant's physical condition after the September 2, 2014 Order, we find that the claimant has failed to prove the she is entitled to permanent total disability benefits. Accordingly, the Opinion of the ALJ filed on April 25, 2023, is hereby reversed.

IT IS SO ORDERED.

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SCOTTY DALE DOUTHIT, Chairman

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M. SCOTT WILLHITE, Commissioner

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MICHAEL R. MAYTON, Commissioner