

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. G600552

TAMMY MILLER, EMPLOYEE	CLAIMANT
MHM SUPPORT SERVICES, EMPLOYER	RESPONDENT #1
MERCY HEALTH, INSURANCE CARRIER/TPA	RESPONDENT #1
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT #2

OPINION FILED OCTOBER 16, 2024

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

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

Respondent #1 represented by the HONORABLE RANDY P. MURPHY, Attorney, Little Rock, Arkansas.

Respondent #2 represented by the HONORABLE DAVID L. PAKE, Attorney, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Respondent appeals an opinion and order of the Administrative Law Judge filed May 29, 2024. In said order, the Administrative Law Judge made the following findings of fact and conclusions of law:

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1. The stipulations agreed to by the parties at a pre-hearing conference conducted on September 27, 2023, and contained in a pre-hearing order filed that same date are hereby accepted as fact.
2. Claimant has met her burden of proving by a preponderance of the evidence that she has suffered a permanent physical impairment rating in an amount equal to 30% to the body as a whole for her compensable left hip injury.
3. Claimant has met her burden of proving by a preponderance of the evidence that she has suffered a permanent impairment in an amount equal to 5% to the body as a whole as a result of her compensable pelvic floor dysfunction.
4. Claimant has met her burden of proving by a preponderance of the evidence that she is permanently totally disabled as a result of her compensable injury.
5. Respondent #1 has controverted Claimant's entitlement to permanent total disability benefits.

We have carefully conducted a *de novo* review of the entire record herein and it is our opinion that the Administrative Law Judge's May 29, 2024 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 made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

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All accrued benefits shall be paid in a lump sum without discount and with interest thereon at the lawful rate from the date of the Administrative Law Judge's decision in accordance with Ark. Code Ann. §11-9-809 (Repl. 2012).

For prevailing on this appeal before the Full Commission, Claimant's attorney is entitled to fees for legal services in accordance with Ark. Code Ann. §11-9-715 (Repl. 2012). For prevailing on appeal to the Full Commission, the Claimant's attorney is entitled to an additional fee of five hundred dollars (\$500), pursuant to Ark. Code Ann. §11-9-715(b) (Repl. 2012).

IT IS SO ORDERED.

SCOTTY DALE DOUTHIT, Chairman

M. SCOTT WILLHITE, Commissioner

Commissioner Mayton dissents.

DISSENTING OPINION

I must respectfully dissent from the majority's opinion finding the claimant is entitled to a thirty percent (30%) impairment rating for her left hip injury, an additional five percent (5%) impairment rating for her pelvic floor dysfunction and is permanently and totally disabled as a result of her January 22, 2016 compensable injury.

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The claimant has undergone extensive treatment and multiple surgeries resulting from that injury and reached maximum medical improvement on June 30, 2019. She received a fourteen percent (14%) whole body impairment rating at that time as a result of her injuries to her back and SI joints.

The claimant later contended that she was permanently and totally disabled or entitled to wage loss benefits in excess of her impairment rating.

A hearing was held on January 13, 2021. In an opinion dated February 25, 2021, an administrative law judge determined that the claimant was not permanently and totally disabled but awarded the claimant sixty percent (60%) wage-loss disability.

The claimant later sought additional wage-loss benefits or, alternatively, an award of permanent and total disability benefits. A hearing was held on May 8, 2024.

In an order dated May 29, 2024, an administrative law judge ruled that the claimant is entitled to an additional thirty percent (30%) impairment rating for her left hip injury and an additional five percent (5%) impairment for pelvic floor dysfunction and is permanently totally disabled.

Respondents #1 have filed an appeal alleging res judicata, arguing that the issue of wage loss disability has been fully adjudicated. In addition, respondents #1 are alleging on appeal the claimant has failed to show any material change in her condition since the February 25, 2021 Opinion and is

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not permanently and totally disabled or entitled to any additional permanent impairment.

Res judicata applies where there has been a final adjudication on the merits of the issue by a court of competent jurisdiction on all matters litigated and those matters necessarily within the issue which might have been litigated. *Beliew v. Stuttgart Rice Mill*, 64 Ark. App. 334, 987 S.W.2d 281 (1998).

The key question regarding the application of res judicata is whether the party against whom the earlier decision is being asserted had a full and fair opportunity to litigate the issue in question. *Cater v. Cater*, 311 Ark. 627, 846 S.W.2d 173 (1993). Res judicata does not apply if a claimant has sustained a change in condition or seeks benefits for a subsequent period of complications. *Rothrock v. Advanced Env'tl. Recycling*, 2018 Ark. App. 88, 544 S.W.3d 61 (2018).

Before analyzing the claim under the doctrine of res judicata, the burden of proof rests with claimant to establish whether there had been a change in his physical condition. *Id.* The issue-preclusion provision of res judicata is also referred to as collateral estoppel and will bar relitigating issues if the following requirements are met: “(1) the issue sought to be precluded must be the same as that involved in the prior litigation; (2) the issue must have been actually litigated; (3) the issue must have been determined by a valid and final judgment; and (4) the

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determination must have been essential to the judgment.” *Id.* It is well settled that res judicata applies to decisions of the Commission. *Craven v. Fulton Sanitation Serv.*, 361 Ark. 390, 206 S.W.3d 842 (2005).

Further, our Rules require that a claimant’s petition for additional benefits is barred by res judicata unless there is a significant new development to the claimant’s condition. “Res judicata applies to the Commission decisions if the merits of the issue have already been subject to a full and fair hearing, unless there is evidence of a change following the previous order.” *Shaver v. Ashley County Detention Center*, 2015 Ark. App. 151 (2015) (citing *Beliew v. Stuttgart Rice Mill*, 64 Ark. App. 334, 987 S.W.2d 281 (1998)).

In *Shaver*, the Court stated that the Commission “found that res judicata barred Shaver's claim because he had already litigated the issue of temporary-total-disability benefits and there had been no material change in his condition since the first order,” stating:

[g]iven our standard of review, the fact that Shaver had previously been released to work and found to be at maximum medical improvement, and the fact that Shaver failed to prove that his condition had changed since the previous order, we must affirm the Commission's decision that Shaver failed to prove entitlement to additional temporary-total-disability benefits. *Id.*

A new diagnosis, without a material change of worsening symptoms, does not constitute a change of condition sufficient to overcome this bar.

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See e.g. *Leonard v. Brookwood Nursing Ctr.*, 1997 Ark. App. LEXIS 744 (1997); *Pursifull v. Wilkinson Transportation, Inc.*, 1986 Ark. App. LEXIS 2357 (1986).

In this matter, the claimant reached maximum medical improvement on June 30, 2019, and received a fourteen percent (14%) whole body impairment rating. The claimant later contended that she was permanently and totally disabled or that she was entitled to wage loss benefits in excess of her impairment rating.

In an opinion dated February 25, 2021, an administrative law judge determined that the claimant was not permanently and totally disabled but awarded the claimant sixty percent (60%) in wage-loss disability.

The claimant later sought additional wage-loss benefits or, alternatively, an award of permanent and total disability benefits. These issues are res judicata, as the claimant has failed to show any material change in her condition since the February 25, 2021 order.

Dr. Terry Sites, an orthopedic surgeon, also evaluated the claimant and testified that, “based upon objective evidence I would say there’s no reason why she can’t work as an RN.”

Dr. Owen Kelly, an orthopedic surgeon, also opined that:

I see no reason that this lady cannot slowly get back to work. It is my opinion that the best thing for the lady would be to try to get back to work in a slow, progressive fashion. I see no

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objective findings that would warrant an impairment rating.

Dr. George Diemel of Arkansas Orthopedics concluded that there were no objective findings to support the claimant's ongoing complaints and Dr. Mary Francis Daut suspected "secondary gain or workman's comp as motivating factor for [claimant's] pain."

Dr. Casey Smith with Advanced Orthopedics of Tulsa evaluated the claimant and testified in a deposition that the claimant's complaints of pain were not proportionate to his findings on examination.

As recently as July 26, 2023, Dr. Daut opined that the claimant's pain is chronic:

The problem identified has been going on for years. It is chronic (expected to last one year or more) but stable (meeting treatment goals). The patient's treatment goals are to clean house, wash dishes without needing to take a break, and cook a meal without needing to sit down. For this problem, we have met treatment goals.

Further, Dr. Daut opined that the claimant:

presents for evaluation and management of chronic pain in the left hip. It has been going on for years. It is chronic (expected to last one year or more) but stable (meeting treatment goals.) Her treatment goals are to walking/exercise and Improved mobility. For this problem, we have met treatment goals.

Despite this extensive history, the majority relies on Dr. Christopher Daugherty's diagnosis of pelvic floor dysfunction, complex regional pain

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syndrome, and osteoarthritis in its ruling that the claimant is permanently and totally disabled; however, in his opinion, Dr. Dougherty indicated that physical therapy had helped claimant's condition a little, but she continued to have pain.

An April 2023 bone scan was unremarkable—there were no objective findings. Dr. Dougherty released the claimant at maximum medical improvement with a whole-body impairment rating of thirty percent (30%) on July 12, 2023, stating that the claimant's impairment rating was limited to her hip. At his deposition, Dr. Dougherty admitted that the claimant's condition has "been stable for a long time."

There has, however, been no decline in the claimant's condition since the 2021 hearing on these issues. The claimant's condition and its treatment have not changed, only the name.

By her own admission, the claimant has no upcoming appointments to continue treatment for her pelvic floor dysfunction and has reached MMI. The only changes the claimant alleges are the result of pelvic floor dysfunction and alleged increased pain.

The only evidence we have of any condition is the claimant's own self-serving complaints of pain, which many of her doctors have determined to be exaggerated and out of proportion to the objective evidence.

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Because the issue of permanency has been previously litigated in this matter, and the claimant has failed to show a material change in her physical condition, I find that these issues are barred by the doctrine of res judicata.

“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 in the same or other employment. 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 shall be awarded only upon a determination that 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 which cannot come under the voluntary control of the claimant. Ark. Code Ann. § 11-9-102(16)(A)(i).

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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 Utility Contractors*, 2009 Ark. App. 776, 358 S.W.3d 915 (2009). Those factors include the claimant's age, education, work experience, 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).

Permanent total disability as defined by our legislature makes no provision for whether employment is available in any particular geographical area, but instead provides that a claimant must prove the inability to earn any meaningful wages because of the compensable injury. See Ark. Code Ann. § 11-9-519(e)(1); *Birtcher v. Mena Water Utils.*, 2017 Ark. App. 210, 518 S.W.3d 707 (2017).

As highlighted above, the claimant is capable of working sedentary jobs. The only limitations provided by Dr. Dougherty include lifting and ambulation. Dr. Daut opined that "the patient's treatment goals are to clean house, wash dishes without needing to take a break, and cook a meal without needing to sit down. For this problem, we have met treatment goals." Despite the claimant's contentions, the evidence supports the conclusion that she can work a sedentary, seated job.

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The claimant is 51 years old and has years of employment experience that would allow for her to obtain any number of sedentary jobs. Specifically, the claimant earned a degree in nursing, has experience working for corporations such as performing demonstrations for Wal-Mart, and as a senior account manager for J.B. Hunt which was a sit-down desk job for three (3) years until she was fired for having an affair with a co-worker.

The claimant is not inhibited in her ability to earn a livelihood. She is simply motivated by the desire to not return to work as noted by Dr. Daut who suspected “secondary gain or workman’s comp as motivating factor for [claimant’s] pain.”

This claimant is a prime candidate for vocational rehabilitation. She is perfectly capable of returning to the job market as noted by many of her treating physicians. She simply chooses not to even try to return to work. There are no findings, objective or otherwise, that would support the contention that the claimant is unable to earn a meaningful wage.

Accordingly, for the reasons set forth above, I must dissent.

MICHAEL R. MAYTON, Commissioner