

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. G605938

SYLVIA TILLERY, Employee	CLAIMANT
ALMA SCHOOL DISTRICT, Employer	RESPONDENT #1
ARKANSAS SCHOOL BOARDS ASSOC. WCT., Carrier	RESPONDENT #1
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT #2

OPINION FILED MAY 12, 2021

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

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

Respondent #1 represented by JAMES A. ARNOLD, II, Attorney, Fort Smith, Arkansas.

Respondent #2 represented by CHRISTY L. KING, Attorney, Little Rock, Arkansas; although not present at hearing.

STATEMENT OF THE CASE

On April 26, 2021, 2021, the above captioned claim came on for hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on February 24, 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 prior opinion of May 28, 2020 is final.

3. The claimant was earning an average weekly wage of \$404.25 which would entitle her to compensation at the weekly rates of \$270.00 for total disability benefits and \$202.00 for permanent partial disability benefits.

4. Respondent #1 has accepted and paid permanent partial disability benefits based on a 13% rating to the body as a whole.

Prior to the hearing the parties agreed to stipulate that claimant had reached maximum medical improvement on November 19, 2020. The parties also agreed that claimant had a prior maximum medical improvement date and was assigned an impairment rating of 13% which respondent #1 paid and that respondent #1 is entitled to a credit for those permanent partial disability benefits paid towards their statutory maximum.

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

1. Extent of claimant's wage loss disability.
2. Attorney's fee.

The claimant contends that as a result of her compensable injury she is entitled to wage loss disability greatly in excess of her impairment rating. Claimant contends her attorney is entitled to an appropriate attorney's fee.

Respondent #1 contends that the claimant is not entitled to permanent disability benefits in excess of those attributable to the impairment rating accepted by respondent #1.

Respondent #2 contends that if the claimant is found to be permanently and totally disabled, the Trust Fund stands ready to commence weekly benefits in compliance with A.C.A. §11-9-502. Therefore, the Trust Fund has not controverted the claimant's

entitlement to benefits.

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 February 24, 2021 and contained in a pre-hearing order filed that same date are hereby accepted as fact.

2. The parties' stipulation that claimant reached maximum medical improvement on November 19, 2020 is also hereby accepted as fact.

3. Claimant did not waive or refuse to participate with an offered program of rehabilitation or job placement assistance. A.C.A. §11-9-505(b)(3).

4. Claimant has suffered a loss in wage earning capacity in an amount equal to 10% to the body as a whole as a result of her compensable injury.

5. Respondent #1 has controverted claimant's entitlement to all unpaid indemnity benefits.

FACTUAL BACKGROUND

The claimant is a 64-year-old woman who suffered an admittedly compensable injury to her back on August 9, 2016. Claimant eventually came under the care of Dr. Blankenship who recommended surgery which claimant initially declined and returned to work. After her condition worsened, claimant returned to Dr. Blankenship and underwent

a lumbar fusion surgery at L4-5 and L5-S1 on June 30, 2020. Following her surgery claimant underwent physical therapy and Dr. Blankenship indicated that claimant had reached maximum medical improvement on November 19, 2020.

Respondent #1 has accepted and paid permanent partial disability benefits based upon a 13% impairment rating. Claimant has filed this claim contending that she is entitled to permanent benefits in excess of her 13% impairment rating.

ADJUDICATION

Following claimant's surgery, Dr. Blankenship ordered a functional capacities evaluation. The FCE was performed on December 9, 2020. The evaluation determined that claimant gave a reliable effort with 33 of 33 consistency measures within expected limits. The FCE determined that claimant had demonstrated the ability to perform work in the medium classification. Dr. Blankenship reviewed the FCE and in a report dated December 17, 2020 indicated that claimant was able to perform a sedentary job with a permanent weight lifting restriction of 20 pounds. He also determined that claimant could not return to her pre-injury job as a custodian for respondent #1.

Following her release by Dr. Blankenship, respondent #1 had claimant undergo a vocational rehabilitation evaluation by Heather Taylor, a vocational rehabilitation specialist. Taylor authored a report dated February 26, 2021 in which she noted that claimant did not have transferrable skills. She also noted that claimant had expressed the desire to retrain to learn how to perform an office-type job such as an office clerk, secretary, front desk assistant or administrative assistant. She further noted that claimant had minimal typing skills and had no knowledge of word processing, typing

correspondence, spread sheets, filing systems, software programs, or clerical skills in general.

Taylor determined that before claimant underwent training for formal office/clerical programs she would need to obtain basic computer skills and she recommended that claimant obtain those skills from the Adult Education Center in Ozark. Once claimant obtained those skills she could enroll in a formal training program which would begin in August during the Fall 2021 semester at Arkansas Tech University – Ozark Campus. This included potential programs such as an Office Support Specialist, a technical certificate in business technology, or an Associate of Applied Science in business technology.

Respondent #1 submitted into evidence an e-mail dated March 29, 2021 from Attorney Arnold to Attorney Walker offering to provide either of the two retraining programs recommended in Taylor's report. Also submitted into evidence are two letters from Attorney Walker to Attorney Arnold in response. The first letter is dated March 22, 2021, in which he noted that claimant did not have the basic skills necessary to enter either of those programs at that time. He further noted that claimant was in the process of improving her skills, but did not have any income and therefore was continuing to search for employment. In another letter dated March 30, 2021, Attorney Walker indicated that he had again reviewed Taylor's report and stated that claimant was not currently qualified to enter either of the proposed plans; therefore, he did not consider the offer of vocational rehabilitation to be a bona fide offer.

At the hearing, claimant testified that instead of receiving basic computer skills from the Adult Education Center in Ozark, she instead chose to enroll at the Adult Education Center in Van Buren where she is currently taking basic computer classes. In

addition to taking those computer classes, claimant also contacted the American Indian Services of Arkansas and at the time of the hearing was working at the Community Center in Mulberry where she lives. Claimant testified that she is currently working five days a week, four hours per day, and is paid \$11.00 an hour.

A.C.A. §11-9-505(b)(3) provides:

The employee shall not be required to enter any program of vocational rehabilitation against his or her consent; however, no employee who waives rehabilitation or refuses to participate in or cooperate for reasonable cause with either an offered program of rehabilitation or job placement assistance shall be entitled to permanent partial disability benefits in excess of the percentage of permanent physical impairment established by objective physical findings.

An employer relying upon the defense of A.C.A. §11-9-505(b)(3) must show that the claimant refused to participate in a program of vocational rehabilitation or job placement assistance, or, through some other affirmative action, indicating an unwillingness to cooperate in those endeavors, and that such refusal to cooperate was without any reasonable cause. *Burris v. Ellen B Moving Storage*, 83 Ark. App. 290, 123 S.W. 3d 123 (2003).

After reviewing the evidence in this case, I do not find based upon the circumstances presented that claimant refused to participate in a program of vocational rehabilitation or job placement assistance. As previously noted, Taylor recommended that claimant initially obtain some basic computer skills before undergoing additional retraining at Arkansas Tech's Ozark campus in August. Although claimant is not obtaining those basic computer skills at the Adult Education Center in Ozark, she is

obtaining those skills at the Adult Education Center in Van Buren. The proposed courses at Arkansas Tech in Ozark are not available until August. Even Taylor, who testified at the hearing, stated that she does not believe that claimant has refused a proposed program and that the only retraining available now is through the Adult Education Center which claimant is currently pursuing.

In short, I do not find under the evidence presented in this case that claimant has waived rehabilitation or refused to participate or cooperate with an offered program of rehabilitation or job placement assistance. Therefore, I do not find that she is barred from receiving benefits in excess of the percentage of her permanent physical impairment pursuant to A.C.A. §11-9-505(b)(3).

Although I do not find that claimant is barred from receiving permanent partial disability benefits in excess of the percentage of her permanent physical impairment pursuant to A.C.A. §11-9-505(b)(3), I find that her loss in wage earning capacity under the circumstances in this case are minimal. In considering claims for permanent partial disability benefits in excess of the percentage of permanent physical impairment the Commission may take into account various factors. These factors include the percentage of permanent physical impairment as well as the claimant's age, education, work experience, and all other matters reasonably expected to affect her future earning capacity. A.C.A. §11-9-522(b)(1).

As previously noted, the parties have stipulated that respondent #1 paid permanent partial disability benefits in an amount equal to 13% to the body as a whole based upon an impairment rating assigned by Dr. Blankenship. I also note that claimant is 64 years old. The claimant graduated from high school and according to the evaluation

report by Taylor claimant also completed one year of general education at Conner State College in 1975. Claimant also obtained a certificate degree in graphic design and arts from a vo-tech school, but has not performed any work with that training. Finally, the claimant also attempted to take a CAD (computer animated drafting) at Conner State but was unable to do so due to difficulty with calculus.

For the last twenty years claimant has chosen to work as a custodian for various employers. Claimant worked as a custodian for respondent for approximately ten years, and prior to that also performed those same job duties for UAFS, Warner High School, and the Creek Nation. Prior to that time the claimant worked at Corning Glass as a burn-off operator and packer. She also worked at a chicken processing plant for a short period of time and worked as a school bus driver for one year. According to the opinion of Dr. Blankenship, claimant cannot return to her prior job as a custodian.

As also previously discussed, claimant is currently taking basic computer classes at the Adult Education Center in Van Buren. In addition, claimant is performing on the job training work at the Community Center in Mulberry where she works five days per week, four hours per day, and is paid \$11.00 an hour.

The fact that claimant is currently able to work 20 hours per week at the rate of \$11.00 per hour is significant when one considers her additional testimony that she only works that number of hours because that is all she is needed and she is going to school at the same time.

Q. Is the fact that you are only working four hours a week (sic) in that job because that is all they need you?

A. Yes.

Q. It's not because you couldn't do that or some other similar type of work for eight hours a day if it was available; is that correct?

A. Yes.

Q. Okay. Is your current employment setting, is that because you are also going to school, basically, at the same time?

A. Yes.

In rebuttal, claimant noted that her current employer makes accommodations which allows her to work four hours per day. She noted that she is allowed to sit as needed and allowed to take breaks as needed. It was her opinion that she could not work eight hours a day, five days a week, because she could not stand on her feet for eight hours per day. Notably, according to the FCE, claimant demonstrated the ability to constantly sit and frequently stand during the course of an eight-hour work day. In addition, it is important to note that Dr. Blankenship did not place any restrictions on the claimant's ability to sit or stand in the performance of her employment. He only indicated that claimant was limited to sedentary type duty and a lifting restriction of 20 pounds. He placed no other restrictions on the claimant's ability to perform work.

As previously noted, Heather Taylor testified at the hearing. Taylor testified that in performing her vocational rehabilitation evaluation, she relied upon the FCE report which indicated that claimant could perform work within the medium classification. She was unaware that Dr. Blankenship subsequently indicated that claimant's work was limited to sedentary-type work. However, the jobs noted by Taylor in her report as well as those claimant identified as jobs she would be interested in performing are sedentary in nature.

These include administrative jobs such as office clerk, administrative assistant, front desk clerk, receptionist, hotel desk clerk, and customer service clerk. Taylor testified that entry level office administrative jobs are readily available.

Claimant is currently taking basic computer classes at the Adult Education Center in Van Buren and according to her she is doing good in those classes.

In short, after consideration of all of the relevant wage loss factors in this case, I find that claimant has suffered a loss in wage earning capacity in an amount equal to 10% to the body as a whole. While claimant will not be able to return to custodial-type jobs she has performed in the past, and she has been given a lifting restriction of 20 pounds by Dr. Blankenship and instructed to perform sedentary-type work, the evidence indicates that claimant is currently enrolled at the Adult Education Center in Van Buren taking basic computer classes and more importantly, she is working 20 hours per week at the rate of \$11.00 per hour. According to her testimony, she is only working 20 hours per week because that is all of the work that is available and she is taking classes. While claimant did not feel that she could perform similar type work for eight hours a day, five days a week, no restrictions on her ability to sit or stand were placed upon her by Dr. Blankenship. Furthermore, according to Taylor, administrative jobs such as those claimant is interested in are readily available. Accordingly, I find based upon the relevant wage loss factors that claimant has suffered a loss in wage earning capacity in an amount equal to 10% to the body as a whole.

AWARD

Claimant has met her burden of proving by a preponderance of the evidence that

she has suffered a loss in wage earning capacity in an amount equal to 10% to the body as a whole as a result of her compensable injury.

Pursuant to A.C.A. §11-9-715(a)(1)(B), claimant's attorney is entitled to an attorney fee in the amount of 25% of the compensation for indemnity benefits payable to the claimant. Thus, claimant's attorney is entitled to a 25% attorney fee based upon the indemnity benefits awarded. This fee is to be paid one-half by the carrier and one-half by the claimant.

All sums herein accrued are payable in a lump sum and without discount.

Respondent is responsible for paying the court reporter her charges for preparation of the hearing transcript in the amount of \$496.90.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE