2003032729 Trial

STATE BOARD OF WORKERS' COMPENSATION

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The hearing was conducted on July 15, 2010 to determine whether or not this Employee's injury of October 20, 2003 was catastrophic under the Workers' Compensation Act. The Employee filed a WC-RIATEE on February 4, 2010 seeking an order designating this Employee's claim as catastrophic. The Employer/Insurer filed a WC-14 on February 5, 2010 requesting an evidentiary hearing on the issue, and accordingly he hearing of July 15, 2010 was scheduled.

The record closed at the conclusion of the hearing conducted on July 15, 2010. The parties were given ten days after the transcript of hearing was received by the State Board on July 28, 2010 in which to file briefs. All briefs filed prior to the issuance of this Award were read and considered.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After a careful consideration of all the admissible evidence, any stipulations of the parties, and after having observed the witnesses at the hearing, I find in fact and conclude as a matter of law as follows:

1. This Employee is 59-year-old female who worked for her Employer since 1991 as a food assistant/cook. On October 20, 2003, in Fulton County, Georgia, the Employee sustained an on-the-job injury to her low back which was accepted as compensable by her Employer who was self-insured.

2. The Employee now contends that her injury is catastrophic as defined by O.C.G.A. § 34-9-200.1(g)(6). While the Employee argued that this Employer had the burden of proof because they had earlier filed a form WC-104, I find that this Employee has the burden of proof to establish by the preponderance of evidence that her claim is catastrophic. Reid v. Georgia Building Authority, 283 Ga. App. 413 (2007). *See generally* Dasher v. City of Valdosta, 217 Ga. App. 351 (1995). The Form WC-104 filed by the Employer/Insurer simply indicates that the case has not been designated catastrophic under the Workers' Compensation Act.

3. O.C.G.A. § 34-9-200.1(g)(6) states in pertinent part that a claim is "catastrophic" if it is a "…injury of a nature and severity that prevents the employee from being able to perform his or her prior work and any work available in substantial numbers within the national economy for which such employee is otherwise qualified".

4. This Employee was initially treated at Choice Care (whose records have not been placed in evidence) and then came under the care of Dr. Christopher R. Edwards of the Atlanta Neurological & Spine Institute who became her authorized treating physician. Dr. Edwards began treating this Employee shortly after her injury and he performed surgery in October 2004, more specifically a laminectomy at L5-S1 with a one level fusion. The notes of Dr. Edwards commenced with his office note of April 15, 2005 and run through the present.

5. The Employee continued to complain and Dr. Edwards ordered an MRI which was conducted on December 4, 2008. (Defendant's Exhibit 1, p. 10). Such MRI showed a degeneration of the L3-L4 disc with mild to moderate broad-base disc bulge which resulted in mild effacement of the thecal sac and mild foraminal

narrowing. There was also mild facet hypertrophy. Such also demonstrated moderate to severe spinal stenosis at L4-5 which was a result of a moderate broad-based disc bulging superimposed on bilateral faced and ligamentous hypertrophy. The neural foramina were also narrowed bilaterally. Such also demonstrated the previous laminectomy at L5-S1 with no significant postoperative distortion.

6. After this MRI, the Employee continued to see Dr. Edwards and Dr. Edwards' diagnosis was a solid fusion at L5-S1 with continued chronic pain and possibly involvement of adjacent level at L4-5. (Defendant's Exhibit 1, p. 6).

7. Dr. Edwards issued numerous "work status physician's reports", usually at each office visit. Review of these work status reports show that up until June 2008, Dr. Edwards released the Employee to moderate work as defined on the work status report as "lifting 20 pounds maximum and frequent lifting and/or carrying of objects weighing up to ten pounds. May involve sitting with a degree of pushing and pulling of arms and legs controlled." (*See* release dates 4/15/05, 11/16/07, and 5/30/08; Defendant's Exhibit 1, p. 29, 24, 20). On June 20, 2008, Dr. Edwards increased the Employee's restrictions and stated the Employee could only do sedentary work. (Defendant's Exhibit 1, p. 16). Such being described as "lifting 10 pounds max and occasionally lifting and/or carrying of such articles as dockets, ledgers, and small tools. A certain amount of standing and walking is often necessary to carrying out job duties." This same work status was shown in work status reports of July 14, 2008, August 15, 2008, November 21, 2008, and January 28, 2009. *See* Defendant's Exhibit 1, p. 8, 12, 14, & 15. (Dr. Derron A. Jones, an associated with Dr. Edwards, issued the work status report dated January 28, 2009 assigning a sedentary work status. Dr. Jones also saw this Employee on February 11, 2009).

8. The Employee did not again see Dr. Edwards until December 14, 2009. After examination for work status, he cited "as previous", but checked "moderate work" status. (Defendant's Exhibit 1, p. 5). "Moderate work" being defined as lifting 20 pounds maximum and frequent lifting and/or carrying of objects weighing up to ten pounds. May involving sitting with a degree of pushing and pulling of arm and leg control. The Employee returned to Dr. Edwards on January 29, 2010 and March 1, 2010. (Defendant's Exhibit 4, p. 1-4). After review of an MRI and myelogram CT, Dr. Edwards felt that while the prior fusion was solid, the adjacent spinal levels had developed marked stenosis with involvement of the facet joints which in his opinion would account for the Employee's continued back and leg pain. Dr. Edwards gave the Employee the option of additional surgery which she accepted. (Defendant's Exhibit 1, p. 1). On March 1, 2010, Dr. Edwards stated the Employee's work status was "as previous." The most recent work status report of the Employee was December 14, 2009 when Dr. Edwards stated the Employee could perform "moderate work." (Defendant's Exhibit 1, p. 5).

9. The Employee has also been seen by Dr. Kamal Kabakibou of the Center for Pain Management in Atlanta, Georgia for pain management treatment. Such treatment occurred from October 2004 through April 2008. (Claimant's Exhibit 8). Dr. Kabakibou's principle diagnosis was: low back pain, failed back syndrome, insomnia, depression, hypercholesterolemia, high blood pressure, and diabetes. Dr. Kabakibou generally treated the Employee with medication and injections. Dr. Kabakibou has stated that the Employee has restrictions of no lifting more than ten pounds, no prolonged sitting, standing, or walking, no driving vehicles because of medication, no working around machines or dangerous hot stoves, and stated that she cannot do her job as cook. (Claimant's Exhibit 1, p. 14). Dr. Kabakibou has also stated that the Employee is totally disabled and unable to perform any work. (Claimant's Exhibit 1, p. 15).

10. The Employee was also admitted and treated at Emory Crawford Long Hospital (Emory Healthcare) on November 8, 2007 for low back pain. (Claimant's Exhibit 5).

11. This Employee was also treated for pain management in 2008 and 2009 by Dr. Efrim C. Moore of the Pain Management Specialists. (Claimant's Exhibit 7; Defendant's Exhibit 2). Dr. Moore's impression was (1)

lumbar disc disease; (2) lumbar paraspinal myofascial pain syndrome, and he treated this Employee with medication. Dr. Moore did not issue any work status reports.

12. The Employee was also seen on several occasions by Drs. James L. Chappuis and Rick A. Chappuis for independent medical evaluations. (Claimant's Exhibit 4). The first examination occurred on October 16, 2009. Their impression was (1) status post posterior decompression and posterior pedicle screw instrumentation at L5-S1 with probable pseudoarthrosis; (2) rule out malposition of pedicle screws at L5-S1; and (3) annular tear with disc herniations at L3-L4 and L4-L5. (Claimant's Exhibit 4, p. 3). In his report, Dr. Chappuis stated the Employee's medical condition was the direct result of her work-related injury which occurred in October 2003 and that the patient was unable to work in any capacity at this time. They also recommended a myelogram, post myelogram CT to help evaluate the Employee. Drs. Chappuis issued supplemental report on January 11, 2010. (Claimant's Exhibit 4, p. 5-6). At this time, they gave the same impression as previously given and stated that based on the MRI scan thus far, that the L4-L5 level was creating a significant amount of pain for this patient in the form of spinal stenosis. However, they again stated they could not make a final diagnosis and recommendation until the CT scan which they had previously recommended had taken place.

13. Drs. Chappuis saw Claimant on February 15, 2010 after the recommended CT scan and gave an impression of (1) lumbar herniation at L4-L5 with associated moderate-to-severs degenerative facet arthropathy causing severe spinal stenosis; (2) status post previous posterior decompression and instrumented fusion at L5-S1 with solid fusion; and (3) lumbar disc herniation at L3-4 left. He stated the Employee would require surgical decompression and stabilization at L4-5 and stated the Employee was unable to perform any meaningful work. (Claimant's Exhibit 4, p. 7).

14. Two independent medical evaluations were performed by Dr. Lee A. Kelly of the Peachtree Orthopaedic Clinic. (Defendant's Exhibit 3). The first occurred on September 24, 2008. (Defendant's Exhibit 3, p.6-15). At this time, Dr. Kelly felt that a lumbar MRI should be performed as well as an updated Functional Capacity Evaluation and that if the MRI was negative showing no changes other than the post-operative changes at L5-S1, the patient would be capable of light duty work with restrictions against repetitive bending and a limitation of 20 pounds. He further stated that he would assign a 20% whole person permanent impairment according to the AMA guidelines. (Defendant's Exhibit 3, p. 10).

15. This Employee returned to Dr. Kelly on April 19, 2010. (Defendant's Exhibit 3, p. 1-5). Dr. Kelly recites a lumbar MRI on January 4, 2010 as well as a lumbar myelogram and post-myelogram CT scan of January 28, 2010. (Defendant's Exhibit 3, p. 4-5). Dr. Kelly, in his "assessment/recommendation section" in his report, stated that there was junctional stenosis at L4-5 with development of degenerative instability at L4-5 which was related to the previous fusion at L5-S1 and therefore related to the original on-the-job injury of October 20, 2003. He went on to say that the Employee had findings which indicated surgical treatment and he recommended a wide laminectomy at L3-4 and L4-5 with an L4-5 fusion. He went on to say that the Employee did have significant pathology identified on current imaging studies which correlate with current pain symptomatology. (Defendant's Exhibit 3, p. 5). In his opinion, the Employee was capable of performing sedentary work with restrictions against repetitive bending and a 10-pound lifting limitation and would require the ability to alternate sitting and standing as needed. (Defendant's Exhibit 3, p. 5).

16. The threshold issue to be determined, I find, is the exact nature of the Employee's restrictions. The Employee contends she is totally disabled to work, as stated by Dr. Kabakibou and Drs. Chappuis. The Employer argues that this Employee can do moderate work as indicated by Dr. Edwards on December 14, 2009. This Employer agrees that the Employee's job as a cook for this Employer which he was performing when injured is medium level work and outside the Employee's restrictions. (T. p. 21).

17. As a general rule, in workers' compensation claims, all medical opinions must be considered, however acceptance of an opinion is not required. *See* Liberty Mutual Insurance Company v. Nobles, 147 Ga. App. 81 (1978). Further, the weight and credit to be given to expert testimony is a question exclusively for decision by the fact-finder, making the opinions of expert witnesses advisory and binding the fact-finder only to the extent to which credence is given to the opinion. *See* Department of Revenue v. Graham, 102 Ga. App. 756, 759 (1960). Thus, the Board may accept the testimony of one expert over the testimony of another. Further, the rejection of an expert medical opinion is within the authority of the Board, as the Board is not absolutely bound to accept such expert opinions even when uncontroverted. *See* Fulton County Board of Education v. Taylor, 262 Ga. App. 512 (2003).

18. After careful consideration of all the evidence, I find that the Employee at the maximum can only do sedentary work and cannot perform even sedentary work eight hours per day, forty hours per week. Therefore, the correct work category as defined by her physical exertion levels would be "less than sedentary". This is based upon the majority of Dr. Edwards' restrictions shown after June 20, 2008 through January 28, 2009 classifying this Employee as sedentary work levels. I find that the December 14, 2009 moderate work level is inconsistent with the previous sedentary work levels which commenced in June 2008 and the fact that the Employee had not physically improved, and she perhaps had decreased in her ability to function. Therefore, I find that the December 14, 2009 moderate work level is incorrect. The finding of less than sedentary is also based upon and supported by Dr. Kabakibou's and Drs. Chappuis' opinions that the Employee is totally disabled to work. It is also supported by Dr. Kelly's limitations that this Employee can do sedentary work with no lifting greater than ten pounds and must alternate sitting and standing. These opinions that this Employee cannot perform any work and/or only sedentary work I find, far outweighs Dr. Edwards' report of December 14, 2009 that the Employee can perform moderate work. Howard-Shephard, Inc. v. McGowan, 137 Ga. App. 408 (1976).

19. The next issue is whether or not this Employee's injury is of such a nature and severity that it prevents the Employee from being able to perform his or her prior work and any work available in substantial numbers with the national economy for which the Employee is otherwise qualified. In this regard, the reports and testimony of two vocational experts were presented. The Employee presented the testimony and report of Alice L. Carnahan (Claimant's Exhibit 1, p. 3-12), and the Employer presented the testimony and report of Lila Piechocki (Defendant's Exhibit 4).

20. The testimony of Alice Carnahan as well as her report of January 28, 2010 shows that she interviewed the Employee and also reviewed her medical history. Ms. Carnahan stated that based upon the Employee's age (59), education (high school), and work history (medium duties since 1991), and light duty prior to that, providing no transferable skills to current sedentary jobs, and current physical abilities (released only to sedentary level of demand), she is not able to work at, or otherwise qualify for, any jobs which exist in substantial numbers in the national economy and stated that her compensable work injury thus qualifies as catastrophic in nature. (Claimant's Exhibit 1, p. 12).

21. The report of Lila Piechocki reached a dissimilar opinion. Ms. Piechocki based her report on a presumption that this Employee was capable of working at sedentary and light work level categories. (Defendant's Exhibit 4, p. 4). Based on the assumptions and the job activities this Employee had performed in the past including her work history in retail sales which occurred some 20 years in the past, Ms. Piechocki generated a hypothetical list through a computer program of jobs which existed that she stated were still available and were vocational options for the Employee. (Defendant's Exhibit 4, p. 6).

22. After careful consideration of all the evidence, I find that the opinion and report of Ms. Carnahan is more persuasive than that of Ms. Piechocki. Howard-Shephard, Inc. v. McGowan, 137 Ga. App. 408 (1976). This is principally based upon the fact that Ms. Piechocki used incorrect assumptions of the physical demand level to

which this Employee was capable. Ms. Piechocki incorrectly used and considered that this Employee could do sedentary and light duty work. Many of the positions which she indicated were suitable to this Employee contained and required long periods of standing or walking, or lifting more than ten pounds which I find this employee cannot perform.

23. The Employer/Insurer argue that the report of Alice Carnahan is invalid because Ms. Carnahan "used only Social Security guidelines" to reach her decision. (Brief of the Employer/Insurer, p. 5). Ms. Carnahan did utilize Social Security Administration guidelines (Title XX of Rules of Federal Regulations) to assist in rendering her decision. (T- 55-56). However, she also went beyond the 15-year period of relevant work history, as set out in the Social Security guidelines and did look at the Employee's prior salesperson experience before 1991 when she began her employment with this Employer. After reviewing these, Ms. Carnahan determined that the employee could not perform this type of work because of the standing and walking required. (T. p. 64-65). The State Board of Workers' Compensation is not bound by Social Security Administration disability standards in order to determine catastrophic designation status. Caswell v. Spencer, 280 Ga. App. 141 (2006). Nor is a vocational rehabilitation expert precluded from using these guidelines in forming her opinion. The catastrophic statute in the Workers' Compensation Act (*see* O.C.G.A. § 34-9-200.1(g)(6)) is similar to the federal Social Security language defining disability (*see* Davis v. Carter Mechanical, 272 Ga. App. 773 (2005), and I find that the federal guidelines are valid tools which an expert may (or may not) use and such use does not disqualify an opinion rendered, but simply goes to the weight of such opinion as do many other factors surrounding the make-up of such opinion. Howard-Shephard, Inc. v. McGowan, 137 Ga. App. 408 (1976).

24. This Employer/Insurer also point to the Employee's activities of caring for her grandchildren, travel, and being active in her church, and argue that they indicate the Employee is capable of performing some type of work. After consideration of the Employee's activities and the physical demand levels discussed in this Award, I find the activities testified to by the Employee are not persuasive evidence that the Employee can perform any physical demand level work above sedentary work.

25. Drs. Chappuis and Dr. Kelley have indicated in their reports that the Employee is a candidate for additional surgery. Dr. Edwards in his March 2010 report agrees and indicates that the Employee desires such surgery. The fact that these three physicians indicate that surgery is required supports the Employee's complaints of pain and severe limitations. Additional surgery to correct the problem identified by Dr. Edwards hopefully will yield a positive result and reduce the Employee's restrictions leading to a greater potential for future employment. However, such is an issue for future determination.

AWARD

WHEREFORE, based upon the above Findings of Fact and Conclusions of Law, I find that this Employee's injury of October 20, 2003 qualifies as catastrophic under O.C.G.A. § 34-9-200.1(g)(6).

IT IS SO ORDERED, this the 12th day of August, 2010.

STATE BOARD OF WORKERS' COMPENSATION

This order is electronically signed and approved.
Steve Fain
ADMINISTRATIVE LAW JUDGE

STATE BOARD OF WORKERS' COMPENSATION

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This appeal by the Employer/Insurer is before the Appellate Division for review of an award by Judge Fain dated August 12, 2010. No cross-appeal was filed in this case. This appeal was argued orally before the Appellate Division on October 26, 2010. After a review of the record as a whole, as well as the arguments presented, the Appellate Division now finds as follows.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The issue at hearing below was the Employee's entitlement to catastrophic designation pursuant to O.C.G.A. § 34-9-200.1(g)(6). The employee is a 59 year-old with a high school education and past relevant work at a light and medium level. Both the Employee and the Employer/Self-Insurer presented vocational expert testimony. The Employer/Self-Insurer argues that the administrative law judge erred in accepting the conclusions of the Employee's vocational expert over that of its own. We agree.

The Employer/Self-Insurer argues that the administrative law judge erred in paragraph 18 of his award in finding that the Employee is limited to "less than sedentary work" and more specifically is unable to perform even sedentary work eight hours a day, forty hours per week. The award states that this finding is based upon the records of the authorized treating physician, Dr. Edwards. While Dr. Edwards' assignments of restrictions vary over the course of the Employee's treatment, we do not find in the record evidence supporting the inference that the Employee is incapable of performing a full work week. She has been at times under sedentary and at other times under light duty restrictions, and additional restrictions involving sitting and standing have at times been imposed, but these restrictions were addressed in both of the vocational experts' evaluations.

In paragraph 22 of the Award, the administrative law judge rejected the conclusions of the Employer/Self-Insurer's expert on the grounds that the expert erroneously presumed that the Employee could perform both light and sedentary work and further did not consider possible limitations in standing and walking. The record does not support this finding. Rather, that expert specifically delineated sedentary jobs that did not require standing and walking (T. p.86). Significantly, her testimony also specifically addressed and analyzed skills from the employee's previous work that were transferable to the identified jobs.

The crucial difference in the conclusions presented by the vocational experts arose, not from differing evaluations of the Employee's physical capabilities, but from very different methodologies in applying the same facts to the question of whether jobs exist in substantial numbers in the economy which the Employee is capable of performing. The definition of a catastrophic disability in the Workers' Compensation Act tracks to a degree the definition of total disability under Social Security, but the two are not identical. Under the Social Security analysis, a required step in the decision making process is application of a decision matrix commonly called the "grid rule." One provision of this rule is that a claimant who is 55 or older, has a high school education that does not provide for entry into skilled work, who cannot perform her prior work and whose prior work was either (1) unskilled or (2) skilled or semiskilled but whose skills are not transferable, is automatically deemed totally disabled. For a claimant who is 55 or older, there must be very little, if any, vocational adjustment in

terms of tools, work processes, work settings, or the industry in order for a skill to be deemed transferable. The above determination in the Social Security disability analysis is not discretionary. There is no corresponding analysis contained in the Workers' Compensation Act.

In paragraph 23 of his award, the administrative law judge notes, correctly, that "[t]he State Board of Workers' Compensation is not bound by Social Security Administration disability standards in order to determine catastrophic designation status. Caswell v. Spencer, 280 Ga. App. 141, 633 S.E.2d 449 (2006). Nor is a vocational rehabilitation expert precluded from using these guidelines in forming her opinion." The administrative law judge also found that federal guidelines for social security disability "are valid tools which an expert may (or may not) use and such use does not disqualify an opinion rendered, but simply goes to the weight of such opinion as do many other factors surrounding the make-up of such opinion."

Ironically, the issue before us on this appeal is the very same issue forming the basis of the case cited by the administrative law judge. In Caswell v. Spencer, the employee appealed the Board's denial of catastrophic designation under O.C.G.A. § 34-9-200.1(g)(6), arguing that in finding that the applicant was able to adapt to other work that was available in substantial numbers in the economy, the Board inherently failed to consider the employee's age, as is required in the Code of Federal Regulations guidelines. The Court of Appeals held that the administrative law judge had properly rejected the claimant's rehabilitation counselor's testimony precisely because "she based her opinion solely on Social Security standards…" Caswell at 142.

In the case *sub judice*, the Employee's vocational expert's testimony was deficient, not because it took into account Social Security guidelines, but because it explicitly rejected any consideration of the employee's ability to transfer or adapt skills she had acquired in past employment:

> (Employee's vocational expert testimony)
> This is Code of Federal Regulations Section 404.1568. Transferability of skills for persons of advanced age says if you are of advanced age, age 55 or older, and you have a severe impairment that limits you to sedentary or light work, we will find that you cannot make an adjustment to other work unless you have skills that you can transfer to other skilled or semi-skilled work or you have recently completed education which provides for direct entry unskilled work that you can do –
> (T. p. 65)

This expert's further testimony clearly established that, rather than merely utilizing the considerations in the Code of Federal Regulations as they may be useful in catastrophic designation under the Workers' Compensation Act, she rather supplanted the Workers' Compensation Act's definition entirely:

> Q. Okay. So this is not a matter of going out and looking or considering other jobs. This is solely based on the social security guidelines; correct? Your determination?
> A. That's correct.
> (T. p.69)

While there may be no question that the Employee would be entitled to disability benefits under the Social Security Administration analysis, that is not the criterion before us here in awarding catastrophic designation under the Workers' Compensation Act. Contrary to the findings of the administrative law judge, it was the testimony of the Employee's expert, not that of the Employer/Self-Insurer's, which was deficient. As in Caswell, it was based solely on Social Security standards, and therefore failed to reference applicable Georgia criteria.

Based upon the foregoing, we find that the preponderance of competent and credible evidence in the record does not support paragraphs 18, 21, 22 and 23 of the findings of fact and conclusions of law in the award below, and therefore, they are stricken. *See* Bankhead Enterprises v. Beavers, 267 Ga. 506, 480 S.E.2d 840 (1997); Russ v. American Telephone & Telegraph, 228 Ga. App. 858, 493 S.E.2d 46 (1997); Bennett-Murray, Inc. v. Barnes, 222 Ga. App. 137, 473 S.E.2d 166 (1996).

AWARD

Based upon the foregoing, the Appellate Division strikes the award of Judge Fain, dated August 12, 2010.

The Employee's request for catastrophic designation under O.C.G.A. § 34-9-200.1(g)(6) is denied.

IT IS SO ORDERED, this the 04th day of January, 2011.

Concurring: Presiding Judge Richard S. Thompson and Judge Stephen B. Farrow.

STATE BOARD OF WORKERS' COMPENSATION

This order is electronically signed and approved.
Warren Massey/s.
Judge
Appellate Division

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