BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DORA ESQUIVEL,

Claimant,

vs.

GOLDEN CRISP PREMIUM FOODS,

Employer,

and

SAFETY NATIONAL

Insurance Carrier,
Defendants.

File No. 5047320

ARBITRATION

DECISION

Head Note No.: 1801, 2700

STATEMENT OF THE CASE

Claimant, Dora Esquivel, has filed a petition in arbitration and seeks workers' compensation benefits from Golden Crisp Premium Foods, employer, and Safety National, insurance carrier, defendants.

This matter was heard by Deputy Workers' Compensation Commissioner Ron Pohlman in Sioux City, Iowa. The record in the case consists of claimant's exhibits 1 through 9; defendants exhibits 101 through 112, as well as the testimony of the claimant through the interpreter Frank Gonzales; Maria Esquivel, Dean Murphy, and Phil Reinders.

ISSUES

The parties submitted the following issues for determination:

1. Whether the work injury of December 11, 2012 was the cause of any disability;

2. Whether the claimant is entitled to a running award of healing period commencing May 10, 2014;

3. The extent of entitlement to permanent partial disability benefits pursuant to Iowa Code section 85.34(2)(u);

4. The commencement date for payment of permanent partial disability benefits; and

5. Whether the claimant is entitled to alternate medical care pursuant to Iowa Code section 85.27.

FINDINGS OF FACT

The undersigned having considered the testimony and the evidence in the record finds:

The claimant at the time of the hearing was 52 years of age. She lives in Rock Valley, Iowa and was originally from El Salvador. She can understand, read, and write a little bit of English. She has a 6th grade education obtained in El Salvador. After coming to the United States, she did take some English classes and some certified nursing assistant classes, but did not take the examination to become a certified nursing assistant.

The claimant was employed at Golden Crisp from February 22, 2011 through July 5, 2013. The claimant was terminated from this employment for not reporting to work as scheduled. After this employment ended the claimant obtained unemployment insurance benefits and then began working for Northwestern College in the 2013-2014 school year in the kitchen. She did return to work the following fall of 2014.

On the date of injury, the claimant slipped and as she fell she caught herself with her right arm. The backside of her right shoulder blade made contact with the bottom of the steel legs of the beltline she was working on and she also hit her lower back on the right side. When she got up she felt pain in her right ankle as well as her low back and shoulder.

The claimant initially sought chiropractic treatment which did not relieve her shoulder and back pain.

The claimant treated with Jason Koelewyn, M.D., for a period of time and then was referred to Raymond Sherman, M.D., at CNOS. Dr. Sherman is an orthopaedic surgeon. Dr. Sherman noted on May15, 2013:

> I did see Dora Esquivel in regards to her right shoulder.
>
> She has almost 5 months history of pain in the right shoulder. There is some discrepancy between subjective and objective findings. She has diffuse global total shoulder pain. She has voluntary inhibition to passive range of movement. Her x-rays, as previously taken, were normal.

(Exhibit 1, page 1)

Dr. Sherman had the claimant undergo an MRI on May 30, 2013 of the right shoulder, which revealed tendinosis with a question of a small linear intrasubstance tear of the distal aspect of the supraspinatous tendon with an intact labrum and no evidence of contusion or occult fractures. Dr. Sherman essentially considered this a normal MRI. See Exhibit 107, page 1. The claimant had injections. She also had therapy. She returned to Dr. Sherman on December 4, 2013 complaining that the therapy had made her shoulder worse and that the injections had not helped. Dr. Sherman recommended another injection and if the claimant was not better then she would be at maximum medical improvement (MMI) and would be sent for a functional capacity evaluation (FCE). The claimant had another right shoulder injection on January 7, 2014. She reported on January 29, 2014 that there had been no improvement from the injection and since no definitive pathology had been found and no improvement with conservative treatment, she was placed at maximum medical improvement.

On March 15, 2014, she had a functional capacity evaluation which was invalid as the claimant had failed all but 13 of the 42 validity criteria. On April 10, 2014, Dr. Sherman opined:

> Please understand that I have seen Dora Esquivel for her right shoulder pain. This lady states that she had injury to her right shoulder over a year ago. She fell off an elevated platform and had a posterior shoulder injury. She was worked up with x-rays and MRI scan, which were normal. She has had significant pain and underwent an intensive physical therapy program, which made her worse. She had a subacromial cortisone injection without improvement. This was repeated in our office without improvement. She had an intra-articular cortisone injection, which made her worse. She continued to have significant subjective pain.
>
> After a year, we have failed to improve her pain with conservative management. She had a functional capacity evaluation performed on 03/13/2014, with an invalid score.
>
> This lady has persistent right shoulder pain with no anatomical diagnosis. She has had a functional capacity evaluation showing an invalid score.
>
> According to the American Medical Association Guides to the Evaluation of Permanent Impairment, Fifth Edition, she does not have a partial permanent impairment, and she is released within the temporary guidelines of her functional capacity evaluation of 03/13/2014.

(Ex. 107, p. 41)

On February 5, 2015, claimant had an independent medical evaluation with Robin Sassman, M.D., at her request. Dr. Sassman diagnosed the claimant with right shoulder impingement syndrome and adhesive capsulitis and cervical spine pain with

radiculopathy. Dr. Sassman causally connected these conditions to the claimant's work injury. Further, Dr. Sassman assigned restrictions.

> Restrictions
>
> Of note, these may change with further treatment. I would recommend that Ms. Esquivel limit lifting pushing pulling and carrying to 20 pounds rarely from floor to waist, 20 pounds occasionally from waist to shoulder, and 10 pounds rarely over shoulder height. I would recommend limiting gripping and grasping with the right upper extremity to a rare basis. I would recommend the rare use of vibratory and power tools as these may exacerbate her symptoms.

(Ex. 6, p. 7)

Dr. Sassman finally opined that the claimant had a 15 percent whole person impairment for the cervical spine and 10 percent whole person impairment for the shoulder for a combined impairment of 24 percent of the whole person all of which Dr. Sassman causally connected to the work injury.

Dr. Sherman reviewed Dr. Sassman's report and responded:

> I believe that Ms. Esquivel did sustain a right injury. She does appear to have an impingement-type syndrome but no associated rotator cuff tear. I do not believe the diagnosis of adhesive capsulitis. I disagree with the diagnosis of radiculopathy. I did not find radicular symptoms. I did not find dermatomal sensory loss. I did not find weakness to concur with the diagnosis of radiculopathy. She may have cervical spine pain, but I did not identify rigidity or lack of range of movement. She did not have an MRI scan as yet. Subjectively, she was complaining of numbness and tingling into the right hand but not in a dermatomal sensory deficit, and there was a radiation of pain from the shoulder to the neck. These 2 subjective findings may be consistent with a neck injury, however, not objectively or subjectively conclusive of a pinched nerve or radiculopathy.
>
> I do not believe that Ms. Esquivel has sustained a cervical injury as a result of her employment-related injury of December 11, 2012.
>
> I would concur with Dr. Sassman that for full disclosure and full workup that a cervical MRI scan would be reasonable to make sure that her symptoms are not coming from her neck. With the language barrier and the difficulty with her anxiety related to the injury and the pain that is generated with all the physical examinations, we should give her the benefit of the doubt and make sure that there is nothing anatomical wrong with her neck before excluding this, and I would concur that an MRI scan

and the need for an MRI scan is causally related to her work-related injury of 12/11/2012.

I do not agree with a DRE category 3 objective findings. I do not support a 15% BAW rating for her cervical condition.

It is still my opinion that Ms. Esquivel has a 0 impairment rating in regard to her right shoulder in lieu of the non-anatomical findings at the time of examination. The range of movement as measured by Dr. Sassman is not clear in the note as to whether this is active or passive range of movement. If indeed there is full passive range of movement, then the diagnosis of adhesive capsulitis cannot be made. This is not clear from the note. If this is active range of movement, then this is voluntary range of movement only and should be stipulated when doing a rating.

I believe that a cervical MRI scan for completeness could and should be done and is related to the work-related injury. The next option would be to have this MRI scan be reviewed by a spine surgeon and have Ms. Esquivel reviewed by a spine surgeon to see if there is clinical correlation. If the MRI scan is totally negative, then I am less likely to recommend a spine surgery consultation.

I would agree with Dr. Sassman's report that this lady has not reached maximum medical improvement, and therefore if this is indeed true, then no rating should be awarded at this time as the patient has not reached maximum medical improvement. Therefore any rating as far as disability should only be done once the patient is deemed to be at maximum medical improvement which the patient has not, and I would agree with Dr. Sassman that if there is further concerns as far as her neck that the patient has not reached maximum medical improvement.

I have no issue with her having a second opinion by an orthopedic surgeon. I would withhold this until the cervical MRI scan results are known and, if indicated, a spine surgery consultation. Once this is done then a second opinion with an orthopedic surgeon would be more relevant, and I would withhold that until the MRI scan is done and subsequent management as stated.

I also do not believe that any work restrictions as dictated by Dr. Sassman should be followed as this lady had a functional capacity evaluation, and therefore the work restrictions as per Dr. Sassman are simply based on usual and customary as opposed to direct testing. The functional capacity evaluation was done as direct testing, and I believe that the test was invalid, and therefore permanent work restrictions would be therefore impossible to place in lieu of this discrepancy.

> I do believe that the functional capacity evaluation of 03/13/2014 does provide an accurate description of Ms. Esquivel's true functional capabilities.
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> I did not receive the most recent Haag Memorial Health Center physical therapy records and that record therefore is not incorporated in my opinion.

(Ex. 107, pp. 47-48)

Finally, Dr. Sherman saw the claimant on March 18, 2015, the day before the hearing in follow up to an MRI which had been performed on February 26, 2015. Dr. Sherman opined that the MRI findings were not consistent with a cervical injury and essentially reiterated his opinions. Finally, he indicated that the invalid functional capacity evaluation had provided only a baseline for the claimant's restrictions.

REASONING AND CONCLUSIONS OF LAW

The first issue in this case is whether the work injury was the cause of any disability.

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

In particular, the claimant argues for a running award of temporary disability or healing period commencing May 10, 2014 through the present. The opinions of Dr. Sherman are given greater weight than those of Dr. Sassman. Dr. Sherman was

able to follow the claimant's care and response to care at the time that was closest to the injury. As a treating physician, in this case, he was in a better position to evaluate the claimant. The claimant's objective evaluations do not indicate that she has sustained any disability. The functional capacity evaluation is of no use in determining the need for restrictions as it was nearly completely invalid. The undersigned concludes that the claimant has not sustained or at least not proven that she sustained a disability as a result of her work injury.

In as much as the claimant has failed to establish entitlement to disability the next two issues are moot.

The next issue is whether the claimant is entitled to alternate medical care. The record indicates that the defendants were providing the claimant care up through the time of the hearing. The claimant acknowledged that she could return to Dr. Sherman if she needed additional care. The record does not indicate any abandonment of care. Furthermore, the record fails to indicate the care the claimant has been given has been unreasonable. The claimant has not met her burden of proving that she is entitled to alternate medical care.

ORDER

THEREFORE, IT IS ORDERED:

That claimant shall take nothing from this file.

Costs of this action are taxed to the claimant pursuant to rule 876 IAC 4.33.

Signed and filed this 26th day of August, 2015.

RON POHLMAN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be in writing and received by the commissioner's office within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.