BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DORA ESQUIVEL,

Claimant,

vs.

GOLDEN CRISP PREMIUM FOODS,

Employer,

and

SAFETY NATIONAL

Insurance Carrier,
Defendants.

File No. 5047320

APPEAL

DECISION

This is an appeal by claimant, Dora Esquivel, from an arbitration decision filed on August 26, 2015, wherein the presiding deputy commissioner determined that claimant failed to prove her case-in-chief and therefore was not entitled to benefits. As a result of that finding claimant has appealed the conclusions of the presiding deputy commissioner.

On January 9, 2017, this case was delegated to the undersigned.

The record, including the transcript of the hearing before the deputy and all exhibits admitted into the record, has been reviewed de novo on appeal.

ISSUE ON APPEAL

1. Did the deputy err in holding that claimant did not sustain or at least did not prove that she sustained a disability as a result of her work injury.

FINDINGS OF FACT

The findings of facts of the arbitration decision are incorporated herein. The dispute is largely over the expert opinions of Raymond Sherman, M.D. and Robin Sassman, M.D.

On December 11, 2012, claimant was working along the line for the defendant employer. She passed for a break and when she stepped away, her leg gave out. She

threw her right arm out and back in an attempt to catch herself and when she landed she struck her right shoulder region.

She reported this injury to her employer and initially sought chiropractic treatment with Dr. Anderson. On April 22, 2013, she was seen by Jason Koelewyn, M.D. (Exhibit 105) He initially sent her to physical therapy. (Ex. 105, page 2)

Eventually she was referred to Raymond Sherman, M.D. During the initial examination, claimant exhibited active range of motion in the right shoulder with global tenderness focused on the right front shoulder with moderate tenderness over the acromioclavicular joint. (Ex. 2, p. 2) He believed that she may have created a subacromial pinch or bursitis and ordered an MRI. (Ex. 2, p. 3) Dr. Sherman also noted that there was some discrepancy between her subjective and objective findings. (Ex. 107, p. 11)

The MRI showed some signal changes to the distal supraspinatus tendon along with some tendinitis. (Ex. 106; Ex. 3, p. 2) Dr. Sherman elected to treat claimant's pain and discomfort conservatively with injections.

Claimant continued to work but struggled and testified that her job duties irritated her shoulder and neck area. She attempted to take personal vacation time but was eventually terminated from employment around July 5, 2013, for not reporting to work as scheduled.

Claimant testified that her pain continued despite Dr. Sherman's treatment which consisted primarily of cortisone injections and physical therapy. Claimant testified that these treatments did little to improve her condition, and perhaps even worsened it.

On December 4, 2013, claimant was seen again by Dr. Sherman who noted "currently she may have some intra-articular source of pathology. I cannot rule this out and I think that, due to the fact that she has pain with all provocative testing, it is difficult to know." (Ex. 4, p. 1) He proceeded with the fluoroscopically-directed intra-articular cortisone injection for both treatment and diagnostic purposes. (Ex. 4, p. 1)

On January 29, 2014, claimant was seen by Reed McGill, PA, who noted that no definitive pathology was discovered. Because the claimant had not had any improvement with conservative treatment, he felt that she was at maximum medical improvement and sent her for functional capacity evaluation. (Ex. 107, p. 25)

Functional capacity evaluation took place on March 13, 2014. The results placed claimant in the restricted sedentary physical demand level, however, her findings were invalid. (Ex. 109) She had a significant presence of nonorganic findings. She passed only 13 of 42 validity criteria indicating very poor effort. The invalid test results appeared to represent a minimal level of functional ability. (Ex. 109, p. 1)

The functional capacity evaluator placed claimant in the light physical demand level based upon "significant improvement in movement patterns/functional strength

noted with distraction during the FCE, in addition to non-overload AcuLift data obtained during the Occasional Material Handling test module." (Ex. 109, p. 1) In essence, the functional capacity evaluator did not find that the claimant's objective findings met her subjective reports. (Ex. 109, p. 1)

Test results showed that claimant had overreactions, as well as inconsistent end range of motions, even including her left upper extremity which was uninjured. (Ex. 109, p. 5) She exhibited difficulty merely opening her hand or flexing her wrist. (Ex. 109, p. 5) She was able to flex her right elbow with greater range of motion than the left. (Ex. 109, p. 6) She exhibited pain with squatting and refused to undertake one test because of anxiety towards increased right knee pain. (Ex. 109, p. 5)

After claimant reported that the injection actually made her worse, Dr. Sherman ruled out a shoulder joint injury. (Ex. 4, p. 1) She continued to have subjective pain. On examination, she was only able to move her right shoulder 45 degrees actively but passively he could get her to 90 degrees. (Ex. 107, p. 3) He deemed here to be a maximum medical improvement as of March 26, 2014. He did not recommend surgery, likely because she was nonresponsive to any injection therapy. He believed that she should use the functional capacity evaluation performed on March 13, 2014, as the entrance to work level but because the FCE was invalid, he did not interpret this as a permanent condition. (Ex. 107, p. 3)

Dr. Sherman saw her again on November 12, 2014. (Ex. 107, p. 43) Dr. Sherman maintained that claimant had reached maximum medical improvement. She continued to report subjective complaints of pain. Given her lack of positive response to the conservative as well as the lack of objective findings, Dr. Sherman again feared that surgery would only worsen claimant's condition. He recommended that she try anti-inflammatory prescriptions and possibly undergo work hardening physical therapy. (Ex. 107, p. 43)

Claimant was then sent to physical therapy on November 24, 2014. The therapist was unable to complete strength testing due to the claimant's resistance. (Ex. 108, p. 3) The therapist wrote, "overall the patient demonstrates an empty end feel for all range of motion as she does not seem to have any capsular restrictions but is primarily limited by pain and fear." (Ex. 108, p. 3) Claimant continued to exhibit significant pain during the physical therapy sessions which limited the ability of the physical therapist to aid her. Eventually she was discharged on December 22, 2014. (Ex. 108, p. 11) "She made some progress but continued to make slow progress to report significant pain, stating she did not understand why she continued to have this pain. At times it seemed that the patient was demonstrating excessive hypersensitivity to touch and movement; therefore I did question the potential for chronic regional pain syndrome, and she would have some swelling in her hands in the morning. Overall she has had two years of limited activity and movement of the right arm, and I feel that if she continues with her home exercise program independently that she may continue to improve her function with her right arm." (Ex. 108, p. 12)

On February 5, 2015, claimant underwent an independent medical examination with Robin Sassman, M.D. (Ex. 6) Dr. Sassman's physical examination recorded reduced range of motion on the right, particularly upon flexion and abduction. (Ex. 6) Dr. Sassman found her elbow strength, wrist strength, as well as range of motion in both, to be normal. (Ex. 6, p. 5) Dr. Sassman felt that there were positive Sperling's and impingement signs on the right along with decreased sensation in the right upper extremity and loss of strength. (Ex. 6, p. 6) Because of these findings, Dr. Sassman concluded the claimant sustained cervical radiculopathy in addition to a shoulder injury arising out of the work injury. It was recommended the claimant be provided an MRI of the cervical spine as well as a pain management specialist for consideration of an epidural steroid injection in the C-spine. She also recommended an orthopedic specialist evaluation for second opinion. (Ex. 6, p. 6)

Dr. Sassman did not believe the claimant was at maximum medical improvement, but if the treatment recommendations were not approved, the MMI date would be February 5, 2015, which was the date of the examination by Dr. Sassman and that claimant would have sustained a 24 percent person impairment for the neck and shoulder injury.

Further, restrictions were recommended including limited lifting, pushing, pulling and carrying 20 pounds rarely from floor to waist, 20 pounds occasionally from waist to shoulder, and 10 pounds rarely over shoulder height. (Ex. 6, p. 7) There is no mention of the functional capacity evaluation. (Ex. 6)

Dr. Sherman also penned a letter on February 19, 2015, in response to inquiry from the defendant's counsel. He opined that claimant did sustain a right shoulder injury and that she appeared to have some impingement type syndromes but no objective rotator cuff tear. He did not believe that she had adhesive capsulitis nor did he find any radicular symptoms. (Ex. 107, p. 47) There is no evidence of dermatomal sensory loss or any weakness. (Ex. 107, p. 47) At most, she complained of numbness and tingling in the right hand, no sensory deficit, radiation of pain from the shoulder to neck, cervical and shoulder pain. None of these subjective complaints were buttressed by objective findings. (Ex. 107, p. 47) He did not believe that she sustained any cervical injury nor did she have any impairment rating regarding her right shoulder "in lieu of the non-anatomical findings at the time of the examination." (Ex. 107, p. 47) He took issue with the fact that Dr. Sassman's notes did not make clear whether she was measuring active or passive range of motion. (Ex. 107, p. 47) Dr. Sherman opined that claimant could undergo a second opinion despite his belief that there were no symptoms that warranted a cervical spine second opinion. (Ex. 111, p. 2) He also maintained that she had reached maximum medical improvement, that the functional capacity evaluation was invalid and therefore not permanent, and that there were no objective findings to support any connection between a cervical injury and claimant's work. (Ex. 111)

CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.14(6).

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).

As mentioned previously, this is primarily a dispute between experts. The presiding deputy concluded that the opinions of Dr. Sherman should be given more weight than the opinion of Dr. Sassman. I concur.

Dr. Sassman's report does not take into account the invalid functional capacity evaluation nor does it address differences between active and passive range of motion. This is important in the present case as the claimant's presentation differed when she underwent passive range of motion testing or when she was distracted during the functional capacity evaluation.

Dr. Sassman failed to address the many inconsistent test results of the functional capacity evaluation including pain upon squatting, pain with elbow, wrist and hand range of motion, particularly when Dr. Sassman's own test results showed no evidence of reduced range of motion or functional limitations other than some reduced weakness in the right hand.

While Dr. Sherman did write that he would go along with the recommendation for a second opinion, he did not believe that it was necessary given the lack of objective findings. Claimant treated with Dr. Sherman for over a year and Dr. Sherman provided treatment in the form of injection therapy and physical therapy, neither of which claimant responded positively to. Claimant's physical therapist also had doubts about the claimant's injury response.

Therefore, I arrive at the same conclusion of the presiding Deputy that the claimant failed to meet her burden of proof as it relates to an ongoing permanent impairment arising out of her work injury.

As it relates to the claimant's neck, the medical records do not support a finding of any cervical related injury. Her initial appointment with Dr. Sherman did include neck

pain. (Ex. 2, p. 2) However, during her medical visits to Dr. Sherman, and during her physical therapy visits, her neck was not an issue. The neck did not become an issue until claimant was seen by Dr. Sassman. Therefore, it is determined that claimant did not sustain a cervical injury as a result of her work.

Claimant also sought alternative medical care including a referral for a second opinion as it relates to both her cervical spine and her shoulder. Given that claimant did not sustain a cervical spine injury as a result of the work, the defendants would not be required to furnish medical treatment for claimant's neck complaints.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975).

By challenging the employer's choice of treatment – and seeking alternate care – claimant assumes the burden of proving the authorized care is unreasonable. See Iowa R. App. P. 14(f)(5); Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995). Determining what care is reasonable under the statute is a question of fact. Id. The employer's obligation turns on the question of reasonable necessity, not desirability. Id. Harned v. Farmland Foods, Inc., 331 N.W. 2d 98 (Iowa 1983). In Pirelli-Armstrong Tire Co. v. Reynolds, 562 N.W.2d 433 (Iowa 1997), the court approvingly quoted Bowles v. Los Lunas Schools, 109 N.M. 100, 781 P.2d 1178 (App. 1989):

> [T]he words "reasonable" and "adequate" appear to describe the same standard.
>
> [The New Mexico rule] requires the employer to provide a certain standard of care and excuses the employer from any obligation to provide other services only if that standard is met. We construe the terms "reasonable" and "adequate" as describing care that is both appropriate to the injury and sufficient to bring the worker to maximum recovery.

The commissioner is justified in ordering alternate care when employer-authorized care has not been effective and evidence shows that such care is "inferior or less extensive" than other available care requested by the employee. Long, 528 N.W.2d at 124; Pirelli-Armstrong Tire Co., 562 N.W.2d at 437.

As for second opinion regarding claimant's shoulder, the claimant has not proved that Dr. Sherman's care is unreasonable. Dr. Sherman provided injections and physical therapy for over a year even though he had some doubts as to whether claimant had

sustained an ongoing injury. Given her lack of response to treatment, Dr. Sherman would not recommend surgery particularly in light of her lack of objective findings.

Claimant complained that the injections actually worsened her condition. Physical therapy was extensive including aquatic exercise, electrical stimulation, and therapeutic activity. (Ex. 108, p. 11) The aquatic therapy had to be discontinued because claimant did not like the pool. (Ex. 108, p. 11)

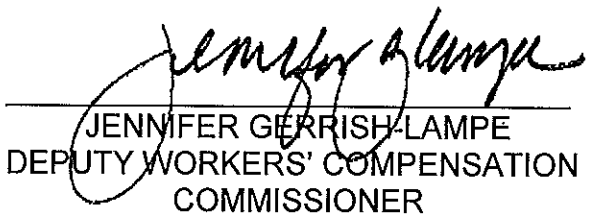
Claimant's response to nearly all treatment has been negative. In the present case, claimant has failed to show that the existing care authorized is not reasonable or adequate or inferior or less extensive. In fact, she has not shown that different care would have a different result.

Having performed a de novo review of the evidentiary record and the detailed arguments of the parties, pursuant to Iowa Code sections 86.24 and 17A.15, I affirm and adopt as the final agency decision the proposed arbitration decision filed in this matter on August 26, 2015.

ORDER

IT IS THEREFORE ORDERED that the decision of the presiding deputy is AFFIRMED.

Signed and filed this 1st day of May, 2017.



JENNIFER GERRISH-LAMPE
DEPUTY WORKERS' COMPENSATION
COMMISSIONER

Copies To:

Brian K. Van Engen
Attorney at Law
32 6th St. NW
Sioux Center, IA 51250
bengen@sc-law.com

Timothy Clausen
Attorney at Law
Mayfair Center, Upper Level
4280 Sergeant Rd, Ste 290
Sioux City, IA 51106
clausen@klasslaw.com