VIRGINIA:
IN THE WORKERS' COMPENSATION COMMISSION

Opinion by MARSHALL
Commissioner

July 29, 2019

KATHERINE CLARKE v. HUGHES CENTER, LLC
ACE AMERICAN INSURANCE COMPANY, Insurance Carrier
SEDGWICK CLAIMS MANAGEMENT SERVICES, INC, Claim Administrator
Jurisdiction Claim No. VA00000728465
Claim Administrator File No. B333101333000101331
Date of Injury January 14, 2013

Michele S. Lewane, Esquire
For the Claimant.

Joseph F. Giordano, Esquire
For the Defendants.

REVIEW on the record by Commissioner Marshall, Commissioner Newman, and Commissioner Rapaport at Richmond, Virginia.

The defendants request review of an April 9, 2019 Opinion denying the employer's application to terminate the claimant's temporary total disability Award and denying the employer's request for a change in treating physicians. We AFFIRM as MODIFIED.

I. Material Proceedings

The claimant suffered a compensable injury by accident on January 14, 2013 when she was assaulted by a patient. The Commission entered an Award Order on June 13, 2013 granting lifetime medical benefits for a cervical sprain, thoracic sprain, and lumbar sprain. The claimant was also awarded temporary total disability beginning January 15, 2013 and continuing.

On July 1, 2015, the Commission entered the Joint Stipulated Order of the parties, adding a concussion to the claimant's award. The claimant was also awarded medical benefits for post-traumatic stress syndrome as a compensable consequence of the work accident.

On November 19, 2018, the defendants filed an employer's application for hearing seeking to terminate the claimant's outstanding award on the basis that her current disability was unrelated to the accident as noted in Dr. Inad B. Atassi's November 7, 2018 report. The defendants also sought a change in treating physician.

The claimant asserted that her treating physicians and other medical providers continued to keep her out of work and opined that her ongoing disability was related to the work injury. She asserted there were no grounds for a change in treating physician.

Following an evidentiary hearing, the Deputy Commissioner issued an April 9, 2019 Opinion. She noted that with the exception of the defendants' independent medical examiner, Dr. Atassi, all of the claimant's physicians and her counselor related some of her disability to her work injury. She gave great weight to the opinions of Dr. Winikur and Ms. Giles, LPC, due to their well-reasoned opinions and lengthy history treating the claimant. The Deputy Commissioner found the claimant to be a credible witness. As the claimant testified she had improved with treatment by Dr. Winikur and Ms. Giles, the Deputy Commissioner did not find evidence that would justify a change in treating physicians.

The defendants timely filed a request for review.

II. Findings of Fact and Rulings of Law

We have reviewed the record and recite the facts only to the extent necessary to support our reasoning.

A. Entitlement to Temporary Total Disability

"Where . . . [a] causal connection between an industrial accident and disability has been established by the entry of an award, an employer has a right to apply for termination of benefits

upon an allegation that the effects of the injury have fully dissipated and the disability is the result of another cause." *Celanese Fibers Co. v. Johnson*, 229 Va. 117, 120 (1985). The employer must prove the employee's current disability does not result from the industrial accident by a preponderance of the evidence. *Rossello v. K-Mart Corp.*, 15 Va. App. 333, 335 (1992). Causation is usually proven by medical evidence. *See Reserve Life Ins. Co. v. Hosey*, 208 Va. 568, 570 (1968)). "Medical evidence is not necessarily conclusive, but is subject to the commission's consideration and weighing." *Hungerford Mech. Corp. v. Hobson*, 11 Va. App. 675, 677 (1991) (citing *Cty. of Spotsylvania v. Hart*, 218 Va. 565, 568 (1977).

The claimant is under a medical award for a cervical sprain, thoracic sprain, lumbar sprain, concussion, and post-traumatic stress syndrome. The defendants rely on a November 7, 2018 independent medical examination report from Dr. Inad B. Atassi, neurosurgeon, in support of their assertion that the claimant's disability is unrelated to her compensable injuries. Dr. Atassi diagnosed cervical spondylosis and degenerative lumbar disc disease, which he stated were pre-existing conditions unaffected by the January 14, 2013 injury. Dr. Atassi opined the claimant recovered from her January 14, 2013 injury in two to three weeks, and stated there were no objective findings to corroborate or support her continued complaints. He noted symptom magnification and opined the claimant's symptoms were unrelated to anatomical injuries. He further stated there was no clinical evidence and no history of significant injury to corroborate the diagnosis of PTSD.

Dr. Lawrence Winikur, the claimant's pain management physician since 2013, reviewed Dr. Atassi's report and completed a medical questionnaire from claimant's counsel on December 1, 2018. Dr. Winikur disagreed that the claimant magnified her symptoms, and noted that she rarely complained. He disagreed with Dr. Atassi's opinion that there was no evidence to

corroborate the claimant's PTSD diagnosis or to support her continued pain complaints. He disagreed that the claimant's pain was not based on anatomical injuries. He noted that the claimant had reached maximum medical improvement, but that this did not equate with discontinuing her care. He affirmed his prior opinion that the claimant's injury was significant enough to cause her neck injury and that her lumbar spine issues were exacerbated by the work accident. He also agreed the work accident was a reason for the claimant's PTSD treatment. On February 14, 2019, Dr. Winikur provided a note indicating the claimant had permanent restrictions of no lifting, carrying, or pushing more than twenty pounds; no climbing on ladders; no reaching; no working more than three hours a day; and no sitting for more than three hours during an eight hour shift.

Linda Giles, Licensed Professional Counselor, has treated the claimant for a number of years. She completed a medical questionnaire from claimant's counsel on July 19, 2018. She disagreed with Dr. Atassi's opinion regarding the claimant's PTSD diagnosis, and noted it was more appropriate for a mental health professional to assess the claimant's condition. Ms. Giles responded, "yes, without any doubt," when asked whether she continued to believe the claimant's PTSD was related, even to a minute degree, to the January 14, 2013 work accident.

The defendants have not met their burden of proof. Dr. Atassi failed to address all of the claimant's awarded injuries in his report. He also disagreed that the claimant suffered from PTSD, a condition for which she is under an award. Notably, Dr. Atassi failed to specifically address the claimant's work capacity other than stating the claimant would have recovered from her work injury in two to three weeks. His assertions are contradicted by the claimant's continued pain complaints and PTSD symptoms. Moreover, the claimant's current treating providers, Dr. Winikur and Ms. Giles, disagree with Dr. Atassi's assessment. Both Dr. Winikur and Ms. Giles have a lengthy

history of treating the claimant's work injuries. The claimant continued to have flashbacks and nightmares regarding the assault at work. Ms. Giles continued to relate the claimant's condition to the work accident. Dr. Winikur continued to relate the claimant's lumbar and cervical spine symptoms and treatment to the work injury. He continued to place the claimant under restrictions, and the defendants have provided no persuasive evidence that those restrictions are unrelated to her compensable injuries.

Accordingly, we affirm the Deputy Commissioner's denial of the defendants' application to terminate the claimant's temporary total disability award.

B. Change in Treating Physicians

The Commission generally considers various factors in determining if a change in treating physician is justified, including whether: 1) inadequate treatment is being rendered; 2) a specialist's treatment is needed but is not being provided; 3) a lack of improvement in the claimant's health condition is without sufficient explanation; 4) conventional methods of treatment are not being used; 5) there is not a plan of treatment in long-term disability cases; and 6) the physician fails to cooperate with discovery proceedings as ordered by the Commission. *Powers v. J. B. Constr.*, 68 OIC 208, 211 (1989). We agree with the Deputy Commissioner's finding that the defendants did not present sufficient evidence of any of these factors to justify a change in treating physician. The claimant testified she has improved under the care of Dr. Winikur and Ms. Giles, and there is no evidence that any of the other factors apply to this case.

However, the Commission has ordered a new panel of physicians to be offered when the travel distance appears excessive. *Hostetter v. Augusta Corr. Ctr./Commonwealth of Va.*, VWC File No. 138-47-80 (Sept. 16, 1998).

(citing *Carder v. Windshields America, Inc.*, VWC File No. 168-06-84 (July 31, 1996)) (distance of 320 miles justified selecting a panel of more local physicians); *Coleman v. Haynes Furniture Co., Inc.*, 75 OWC 131 (1996) (improper panel, since treatment by any of the three physicians would require employee to drive at least 50 miles each way); *Alsop v. Marriott Corp.*, 60 OIC 12 (1981) (offer of panel defective because of the great distance from the employee's residence to any of the physicians' offices).

The claimant moved from Virginia to North Carolina in 2017. (Tr. 12.) She continued to treat with Dr. Winikur and Ms. Giles in Virginia. She testified she sees Dr. Winikur every eight weeks, and sees Ms. Giles weekly. (Tr. 17.) The distance from the claimant's home to Dr. Winikur's office in Danville, Virginia is 165 miles. (Cl. Ex. 2.) The office where the claimant sees Ms. Giles is north of Danville, even farther from the claimant's home. (Tr. 15-16.) The claimant agreed that each roundtrip is approximately 322 miles. (Tr. 17.) The trip to Danville takes her two and a half to three hours one way. (Tr. 17.) The claimant submitted a mileage reimbursement request for 3,872 miles for the approximately eleven week period from October 24, 2017 to January 9, 2018. (Tr. 16.) This equates to an average of over 340 miles per week traveled to medical appointments.

"While an employee should not be forced to travel excessive distances, neither should an employer be required to pay for unreasonable mileage costs when reasonable alternatives exist." *Hostetter*, VWC File No. 138-47-80. We are persuaded that a 320-mile round trip is unreasonable. Moreover, there is no evidence that Dr. Winikur or Ms. Giles are providing specialized treatment that is unavailable closer to the claimant's residence. However, we recognize the defendants' failure to justify a change in treating physicians under the *Powers* factors. We are also mindful of the relationship of trust between the claimant and her doctor and therapist.

The Commission may exercise reasonable discretion as may be suggested by the facts of a particular case. *Hostetter*, VWC File No. 138-47-80 (citing *Eisenbaugh v. J. R. Roofing and Siding Co.*, VWC File No. 171-83-94 (Nov. 28, 1995). We find the excessive mileage warrants an offer of a panel of local pain management physicians and a panel of therapists. The claimant may choose a physician and a therapist from the panels submitted by the defendants. (Def. Ex. 3.) In the alternative, the claimant may elect to continue treatment with Dr. Winikur and Ms. Giles at her own travel expense. If she chooses to continue treatment with her current providers, the employer will be responsible for reimbursement of the mileage the claimant would have traveled if she had remained in her most recent former residence in Chatham, Virginia. We Order the claimant to choose between these alternatives within 30 days of the date of this Opinion.[1]

III. Conclusion

The April 9, 2019 Opinion is AFFIRMED as modified.

The employer's application is DENIED and the defendants are ORDERED to reinstate benefits immediately, effective November 30, 2018.

The claimant is ORDERED to, within 30 days of the date of this Opinion, to choose new treating providers from the panels provided by the defendants, or in the alternative, elect to accept reduced mileage reimbursement consistent with this Opinion.

We AWARD an attorney's fee of $1,000, in addition to the $3,568.10 the Deputy Commissioner awarded for fees and expenses in the April 9, 2019 Opinion, for a total of $4,568.10,

[1] We note the claimant's objection to this alternative on the basis that the defendants failed to propose this solution at hearing. However, we find the defendants' request for a change in treating physicians based upon unreasonable mileage sufficiently raised this issue. Furthermore, it is within the Commission's discretion to order an alternative solution based upon the facts of the case. *See Hostetter***,** VWC File No. 138-47-80.

to Michele S. Lewane, Esquire, for legal services rendered the claimant. The defendant shall deduct the payment from accrued compensation.

This matter is hereby removed from the review docket.

APPEAL

You may appeal this decision to the Court of Appeals of Virginia by filing a Notice of Appeal with the Commission and a copy of the Notice of Appeal with the Court of Appeals of Virginia within thirty (30) days of the date of this Opinion. You may obtain additional information concerning appeal requirements from the Clerks' Offices of the Commission and the Court of Appeals of Virginia.