

BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

CAROLINE SUDLER,)
)
 Employee,)
)
 v.) Hearing No. 1351206
)
 BANK OF AMERICA,)
)
 Employer.)

DECISION ON PETITIONS TO DETERMINE ADDITIONAL COMPENSATION DUE

Pursuant to due notice of time and place of hearing served on all parties in interest, the above-stated cause came before the Industrial Accident Board on December 8, 2011, in the Hearing Room of the Board, in New Castle County, Delaware.

PRESENT:

ALICE M. MITCHELL

MARILYN J. DOTO

Deborah J. Massaro, Workers' Compensation Hearing Officer, for the Board

APPEARANCES:

Vince J.X. Hedrick, II, Attorney for the Employee

John J. Macconi, Jr., Attorney for the Employer

NATURE AND STAGE OF THE PROCEEDINGS

Caroline Sudler (“Claimant”) sustained a vocal cord injury as a consequence of the cumulative detrimental effect of her work duties at Bank of America (“Employer”) manifesting itself August 19, 2009. Employer accepted the injury as compensable and Workers’ Compensation benefits have been paid by Employer including medical expenses and total and partial disability. Claimant’s average weekly wage is \$662.80, resulting in a compensation rate of \$441.86.

On April 5, 2011, Claimant filed a Petition to Determine Additional Compensation Due seeking a 16% permanent impairment due to an alleged panic disorder and generalized anxiety disorder. On June 2, 2011, Claimant filed a second Petition to Determine Additional Compensation Due seeking payment of certain medical expenses. Lastly, on July 14, 2011, Claimant filed a Petition to Determine Additional Compensation Due seeking a 15% permanent impairment due to a voice and speech impairment; a 7.5% permanent impairment of the hearing in the right ear and a 1.2% permanent impairment of the hearing in the left ear. The parties sought consolidation of these petitions on July 14, 2011, which the Department of Labor permitted. Employer does not dispute payment of the medical expenses, nor does it dispute a 15% permanency rating for Claimant’s vocal cord injury and a 7.5% permanency rating for Claimant’s hearing in the right ear. Employer maintains, however, under a legal theory that permanency benefits are not appropriate for the psychiatric claim.

A hearing was held on Claimant’s petition on December 8, 2011. This is the Board’s decision on the merits.

SUMMARY OF THE EVIDENCE

Dr. William L. Medford, a physician board certified in otolaryngology, head and neck surgery, testified at the hearing on behalf of Claimant. He reviewed the pertinent medical records and opines that Claimant sustained a 15% permanency of her vocal cords and a 7.5% permanency as a result of the hearing loss in her right ear as a consequence of her work injury.

Claimant had been treated by Dr. Witt until Dr. Witt became decertified under Workers' Compensation. Claimant then intended to rely upon Dr. Joseph I. Ramzy's DME report for her permanency opinion, but he is no longer practicing medicine.

By way of history Claimant worked in a capacity wherein she utilized phones daily for Employer from 1996 to 1999. She underwent an excision of vocal cord polyps in 1999 and subsequently she was placed on phone duty again and underwent another surgery in 2005. Dr. Witt performed both surgeries. After this she improved. Dr. Witt's records indicate that she should not be allowed to return to a phone assignment. In September of 2009 she was placed back on phone duty. She had more problems with her vocal cords and Dr. Witt recommended a third surgery which was performed on January 21, 2010. Claimant had significant improvement in her voice. She had some decrease of hearing in her right ear that seemed to develop after the surgery. Dr. Witt recommended speech therapy but Claimant says the carrier would not pay for it. Dr. Medford notes that Claimant is anxious about her voice quality and also has irritable bowel syndrome, or IBS.

Dr. Medford opines that Claimant's use of the phone at work was a substantial factor in producing her vocal cord injuries leading to her medical treatment of same. He agrees with Dr. Joseph I. Ramzy who utilized the *AMA Guides to the Evaluation of Permanent Impairment* ("the Guides"), Fifth Edition, pages 264 to 265 to opine that Claimant's vocal cord injury resulted in a

15% permanent impairment of her vocal cords. Dr. Medford places her in Class II, which ranges from 15 to 43%, and places her at the low end of the spectrum.

With regard to her hearing loss, Dr. Medford also agrees with Dr. Ramzy that Claimant sustained a 7.5% permanent impairment due to the right-sided hearing loss, associated with her work injuries. He points out that the exact etiology of her hearing loss is unknown, but it seems to have developed after her last surgery with Dr. Witt.

Dr. Joseph I. Ramzy, an otolaryngologist, testified at the hearing by deposition on behalf of Claimant (Claimant's Exhibit No. 2). He opines that Dr. Witt's treatment was reasonable, necessary and related to the polyps that developed as a result, in part, because of her phone work for Employer.

Dr. Jay Weisberg, a psychiatrist, testified at the hearing by deposition on behalf of Claimant (Claimant's Exhibit No. 3). He began treating Claimant on October 25, 2005, and reviewed the pertinent medical records. In his opinion Claimant has a 16% permanent impairment due to anxiety related to her work injury, and her medical bills with him since November of 2009, totaling approximately \$5,417.00, are reasonable, necessary and related.

Initially in 2005, Claimant was diagnosed with a panic disorder because she was having panic attacks as a generalized anxiety disorder. She had been treated successfully on a very low dose of Xanax. Over the next few years Dr. Weisberg saw her three or four times annually. The biggest change he saw in her was on November 11, 2009 when she reported to Dr. Weisberg that she had been placed back on the phones at work and she said that she was not supposed to be on the phones. This caused her anxiety. From this time on her anxiety seemed to be focused on her polyps. She had to undergo a third surgery and Dr. Witt was not sure if it was cancer or not. She was also worried about finances.

Dr. Weisberg opines that the incident at work has caused Claimant's anxiety to become worse than it was prior to 2009. Dr. Weisberg believes her anxiety is based upon the whole situation with work, not only the injury, but the inability to have accommodations to return to work.

Dr. Weisberg attributes 25% of Claimant's diagnosis to preexisting problems and 75% to her work injury. Dr. Weisberg relies upon the *AMA Guides to the Evaluation of Permanent Impairment* ("the Guides"), Fifth Edition to rate Claimant's permanent impairment related to her psychiatric condition at 16%. He determined that her psychiatric condition falls into the range of moderate impairment which fell within the Guidelines at 22% of the whole person, which Dr. Weisberg converted using a 75% figure to obtain the 16% impairment rating.

On cross-examination Dr. Weisberg agrees that in November of 2005 he diagnosed Claimant with a panic disorder and a generalized anxiety disorder. He agrees that his records reflect non-work related stressors in Claimant's life such as money issues, a cancer scare, possible MS, deaths in the family, etc. His diagnosis has not changed. He agrees that a June 5, 2008 note indicates that Claimant has experienced anxiety her whole life.

Claimant testified at the hearing on her own behalf. She is forty-eight years old and has worked for banks since 1997.

Claimant underwent polyps removal surgery in 2005 and Employer accommodated her afterward and she did fine. Then in August of 2009 Claimant was moved to a phone unit. She later saw Dr. Witt who recommended a third surgery, which she underwent in January of 2010. Claimant tried to return to work after this surgery, but Employer would not accommodate her restrictions.

Claimant saw Dr. Fenichel, employer's psychiatrist, twice for purposes of DMEs. She says that she did not tell Dr. Fenichel that her daughter's health was stressing her. She says her daughter has been sick all of her life, which has been a stressor for years and that this was not new in November of 2009. She also never told Dr. Fenichel that she smoked. She did not tell Dr. Fenichel that she wanted to take in foster children. She has a granddaughter who is two years old and lives with her.

Claimant's IBS started nine months ago, and she says it is stress related. Medicine has calmed it down. She says that she did not go to all of her speech therapy because the carrier did not pay for it.

Claimant says her vocal cords feel like a heart attack in her throat and her brain shuts down so she cannot communicate with the public or family. She says she does not live a normal life. She does not have any friends. She took medicine so she could talk to the Board. She says she was in severe pain at the hearing.

After November of 2009 when she went out of work her anxiety became worse. It prevents her from eating or thriving in life. She agrees that Claimant's Exhibit 4 is a list of her outstanding medical bills totaling \$19,607.34.

On cross-examination she agrees that she violated her doctor's orders in 1999 to work on the phones because she says she was forced to do so by Employer. She agrees she told Dr. Fenichel that she would like to perform volunteer work and enjoyed spending time with her grandchild. She denies that she said she wanted to perform volunteer work with kids.

Claimant agrees that she has been a nervous person since her surgery in 1999. She agrees that prior to this she had other things in her life that caused her anxiety and stress.

Dr. Gladys S. Fenichel, a psychiatrist, testified at the hearing by deposition on behalf of Employer (Employer's Exhibit No. 1; Exhibits to Deposition entered as Claimant's Exhibit No. 5). She examined Claimant in July of 2010 and November of 2011 and reviewed the pertinent medical records. Dr. Fenichel agrees with Dr. Weisberg's diagnoses, but disagrees as to causation.

On November 10, 2011 Claimant reported that she had been evaluated by another ENT doctor who confirmed the diagnosis regarding her vocal cords. She felt a little more at peace due to an agreement regarding her legal case related to her vocal cords. There was a lengthy discussion about her history of irritable bowel syndrome, or IBS. She said she was hospitalized in February of 2011, weighing 90 pounds upon admission to the hospital. She had now regained weight to 118 pounds. She said IBS comes with stress and she feels a lot of pressure. She has not had any hospitalizations since then. Dr. Fenichel notes that Claimant continues to smoke one or two packs of cigarettes a week which helps with her stomach.

Claimant continued to see Dr. Papa and he began to prescribe Seroquel in April of 2011. Claimant said that after the vocal cord surgery in January of 2010 she developed a problem with hearing in her right ear.

Claimant talked about her psychological treatment with Dr. Cannon and she said that Dr. Weisberg referred her to Dr. Cannon. The first appointment was on March 12, 2011 and she subsequently cancelled a lot of appointments because she is sick a lot.

Claimant alleged that she had missed speech therapy because the carrier would not pay for it. However, Dr. Fenichel reviewed the specific records and Claimant was approved for treatment from March 7, 2011 to April 6, 2011 but she did not attend any follow-up

appointments and so she was discharged from the case load because she was not attending her appointments.

As far as medications Claimant reported taking Xanax, 1 milligram two times a day; and Seroquel 25 milligrams three times a day. She said that the Seroquel helped her to try not to think negatively, but she said that she has a hard time functioning with Seroquel. She has been offered medications but she has declined due to her stomach. She did not try her prescriptions for Temazepam, a sleeping pill, Remeron, an antidepressant that increases appetite or Lexapro another antidepressant.

Claimant's complaints were IBS; a December 25, 2010 Emergency Room visit; problems and pain with her vocal cords and hearing loss. She tried Percocet and she got sick from the medicine. She takes Vicodin when the pain is severe, which she could take up to three times a day.

She also has a loss of hearing in her right ear and ringing in her right ear with headaches. She continues to struggle with depression. She is mad, upset, constantly stressed out that she cannot do the things she used to do. She has not had a sexual relationship with her husband for two years because of her pain.

When Claimant saw Dr. Medford in October of 2011 she said she had an epiphany and she will not have additional surgery for her vocal cords. She now understands that she has a chronic problem. In her opinion she cannot work anymore. She expects a settlement in January of 2012 and hopes she will be able to move forward. She took a Xanax during the examination because of the pressure in her throat. She has lost interest in previous activities. She enjoys her granddaughter. She cannot sit still to watch television and denies suicidal thoughts. Since 2004 she says she has made four visits to the ER, and she believes that three of the visits are related to

anxiety attacks. She would like to perform volunteer work, and would like to do something with children. She has considered taking in foster children.

As far as medical treatment she began treatment with Dr. Cannon in March of 2011 and she is supposed to see him twice a week. She continues to have treatment with Dr. Weisberg who prescribes Xanax. Dr. Papa prescribes Seroquel and Niaspan, which she had to stop due to her IBS. She remains in treatment with Dr. Witt for her sinuses and her vocal cords.

Dr. Fenichel notes that Claimant spoke throughout her evaluations. Her speech was goal directed and spontaneous. She described her mood as very depressed. She is mad and upset. Her affect is neutral except when she smiled as she talked about her granddaughter. She does not have any cognitive problems that affect her participation in the evaluations. She is stressed because she feels guilty that she is not bringing money in.

At the time of her second exam with Dr. Fenichel, Claimant was still taking Seroquel prescribed by Dr. Papa. She did not take Lexapro, Restoril and Remeron which had been prescribed by Dr. Weisberg. Since her first examination Claimant had undergone extensive treatment for IBS and related a new concern about her daughter's health, who has chronic health issues. She also discussed the problems with her vocal cords and pain. She continued to report anxiety and depression symptoms and difficulties with medications.

Overall, Dr. Fenichel opines that Claimant has a complete multi-axial psychiatric diagnosis. She has two major psychiatric conditions, or Axis I conditions, of generalized anxiety disorder and depression. Medically, she has chronic laryngitis, polypoid disease and inflammatory changes of the vocal cords, IBS, chronic sinusitis and allergies. Stressors include health and social issues, including her daughter's health, and occupational. She has a number of

non-work related stressors in her life. Dr. Fenichel agrees with Dr. Weisberg's diagnoses, but disagrees as to causation.

Dr. Fenichel opines that Claimant does not have a permanent impairment. She points out that Dr. Weisberg does not include the necessary testing to arrive at an impairment rating for Claimant. She refers to the Sixth Edition of the Guides which indicates that a series of tests must be administered, an impairment rating evaluation, and a doctor has to be identified as an impairment rating specialist. She believes Dr. Weisberg should have utilized the Sixth Edition at the very least. There is no impairment rating for psychiatrists in the Fifth Edition. Overall, Dr. Fenichel does not believe that Claimant's continued psychiatric condition is causally related to the work injury. Claimant is an anxious person by nature.

On cross-examination Dr. Fenichel explained that chronic does not translate into a permanent condition.

During cross-examination Claimant's counsel produced as Exhibit 1 to Dr. Fenichel's deposition an undated Agreement as to Compensation, which was not executed by anyone on Employer's side, referencing a vocal cord/anxiety injury. Dr. Fenichel had not seen this form.

Dr. Fenichel agrees that after November of 2009 there are less notes which refer to Claimant's other stressors than there are about her stress related to the work injury.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Permanent Impairment

The Delaware Workers' Compensation Act provides for proper and equitable compensation for the loss or loss of use of any member or part of the body. *See* DEL. CODE ANN. tit. 19, § 2326. While it is important to have medical testimony, it is the function of the trier of fact, and not the physician, to determine the degree of a claimant's impairment. *Turbitt v. Blue Hen Lines, Inc.*, 711 A.2d 1214, 1215 (Del. 1998); *Poor Richard Inn v. Lister*, 420 A.2d 178, 180 (Del. 1980). In this case, the Board finds that Claimant has a 15% permanent impairment related to her vocal cord injury and a 7.5% permanent impairment due to the hearing loss in her right ear. Her request for a permanency claim related to her psychiatric condition is denied.

Dr. Medford testified that Claimant's vocal cord injury resulted in a 15% permanent impairment of her vocal cords. He places her in Class II, at the low end of the spectrum. Dr. Medford also opines that Claimant sustained a 7.5% permanent impairment due to her right-sided hearing loss, associated with her work injuries. Even though the exact etiology of her hearing loss is unknown, it seems to have developed after her last surgery with Dr. Witt. Dr. Medford's testimony is undisputed and the Board finds it credible and thus, awards Claimant's request for permanent impairment benefits related to her vocal cords and hearing loss in the right ear.

Therefore, Claimant has been awarded a total of 32 weeks of benefits, based upon a scale of 0 to 75 weeks for the hearing impairment in one ear, and a scale of 0 to 175 weeks for the vocal cord impairment. *See Smagala v. City of Wilmington*, Del. IAB, Hearing No. 931496, slip op. at 6 (September 9, 1996), *aff'd in part*, Del. Super., C.A. No. 97A-01-002, Barron, J. (March 27, 1997)(ORDER)(granting motion to affirm as to vocal cord impairment).

With regard to her claim for a 16% permanent impairment due to anxiety related to her work injury, it is well established law that this is not a compensable permanent impairment. Claimant is correct that psychological illnesses are compensable, even if they are not preceded by a physical trauma, as long as a causal connection between the stressful work environment and the manifestation of that psychological illness can be shown. *State v. Cephas*, 637 A.2d 20, 21 (Del. 1994); *Battista v. Chrysler Corp.*, 517 A.2d 295, 297-98 (Del. Super. Ct. 1986), *appeal dismissed*, 515 A.2d 397 (Del. 1986). However, pursuant to well settled case law such a claim is not represented under title 19, section 2326 of the Delaware Code.

The Delaware Supreme Court has repeatedly stated that permanent impairment benefits are not available for a general psychogenic overlay. *See Ramey v. Delaware Materials Inc.*, 399 A.2d 205, 207 (Del. 1979)(psychogenic condition that does not result in skeletal-muscular disability is not entitled to impairment award); *Burton Transportation Center, Inc. v. Willoughby*, 265 A.2d 22, 23-24 (Del. 1970)(impairment must be to “some specific identifiable member or organ of the body,” not a general condition of psychosis or neurosis).

Under the Workers’ Compensation Act, while a general psychogenic overlay can be the basis for an award of total or partial disability, it is not a basis for permanent impairment. *Ramey*, 399 A.2d at 207. An award for permanent impairment is only proper if the psychogenic overlay results in a loss of use of a member or organ of the body. *Sturgill v. M. & M., Inc.*, 329 A.2d 360, 361 (Del. 1974). In other words, the psychological problem must enhance or contribute to a skeletal-muscular disability. *Ramey*, 399 A.2d at 207. Such is not the case here. The testimony of both Drs. Weisberg and Fenichel, regardless of causation, indicate that Claimant has an emotional problem. This is not a dysfunction of a part of the body. The

diagnosis is a generalized anxiety disorder, which manifests in panic attacks.¹ Therefore, following the Supreme Court precedents of *Ramey* and *Burton Transportation*, the Board finds that Claimant's psychiatric difficulties are not eligible for a permanent impairment award under title 19, section 2326 of the Delaware Code.

In conclusion, the Board agrees with Claimant's medical expert that Claimant has a 15% permanent impairment related to her vocal cord injury and a 7.5% permanent impairment due to the hearing loss in her right ear due to her work injury. Her claim for permanent impairment due to her psychiatric condition is denied.²

Medical Expenses

When an employee has suffered a compensable injury, the employer is required to pay for reasonable and necessary medical services connected with that injury. DEL. CODE ANN. tit. 19, § 2322. What constitutes "reasonable medical services" for purposes of Section 2322 is undefined by statute and left to be determined by the Board on a case-by-case basis. *See Willey v. State*, 1985 WL 189319 at *2 (Del. Super. Ct.). "Whether medical services are necessary and reasonable or whether the expenses are incurred to treat a condition causally related to an industrial accident are purely factual issues within the purview of the Board." *Bullock v. K-Mart Corporation*, 1995 WL 339025 at *3 (Del. Super. Ct.). "If a physician directs a patient to undergo treatment which turns out not to be reasonable or necessary to treat a compensable injury, . . . there is nothing in the statute which requires the employer to pay the cost. If the converse were true, the door to all sorts of abuses would be opened." *Id.* In this case, the Board finds that Claimant's uncontested medical expenses with Drs. Witt and Weisberg are

¹ In *Ramey*, the Board attempted to characterize the impairment as a "brain disability," but the Court observed that the actual complaints (severe headaches, dizziness, nervousness and occasional blackouts) were a generalized neurosis. *Ramey*, 399 A.2d at 206.

² The Board does not reach any determination regarding the issue of causation of Claimant's continued psychiatric condition.

compensable. Claimant testified that her outstanding medical bills total \$19,607.34, however, she cannot testify as to the reasonableness and necessity of her expenses. This requires medical expert testimony.

Dr. Ramzy testified that Dr. Witt's treatment has been reasonable, necessary and related, while Dr. Weisberg testified that his treatment has been reasonable, necessary and related. The parties represented at the hearing that payment of these medical expenses is uncontested. The medical bills at issue are to be paid in accordance with the fee schedule pursuant to title 19, section 2322(b) of the Delaware Code.

Attorney's Fee and Medical Witness Fees

A claimant who is awarded compensation is generally entitled to payment of a reasonable attorney's fee "in an amount not to exceed thirty percent of the award or ten times the average weekly wage in Delaware as announced by the Secretary of Labor at the time of the award, whichever is smaller." DEL. CODE ANN. tit. 19, § 2320. At the current time, the maximum based on Delaware's average weekly wage calculates to \$9,330.80. The factors that must be considered in assessing a fee are set forth in *General Motors Corp. v. Cox*, 304 A.2d 55 (Del. 1973). Less than the maximum fee may be awarded and consideration of the *Cox* factors does not prevent the granting of a nominal or minimal fee in an appropriate case, so long as some fee is awarded. See *Heil v. Nationwide Mutual Insurance Co.*, 371 A.2d 1077, 1078 (Del. 1977); *Ohrt v. Kentmere Home*, 1996 WL 527213 at *6 (De. Super. Ct.). A "reasonable" fee does not generally mean a generous fee. See *Henlopen Hotel Corp. v. Aetna Insurance Co.*, 251 F. Supp. 189, 192 (D. Del. 1966). Claimant, as the party seeking the award of the fee, bears the burden of proof in providing sufficient information to make the requisite calculation.

Claimant has achieved an award of 32 weeks of benefits for a 15% permanent impairment related to her vocal cords and a 7.5% permanent impairment of the hearing in her right ear due to the work injury. She will also receive payment of her uncontested medical expenses with Drs. Witt and Weisberg. So an attorney's fee award is appropriate in this case.

Claimant's counsel submitted an affidavit stating that he spent approximately twenty-five hours preparing for this hearing, which itself lasted approximately three hours. Claimant's counsel was admitted to the Delaware Bar in 1989, and he is experienced in workers' compensation litigation, a specialized area of the law. His or his firm's first contact with

Claimant was in April of 2010. Thus, Claimant has been represented by counsel or his firm for over a year. This case was of average complexity involving no novel issues of fact or law. Counsel does not appear to have been subject to any unusual time limitations imposed by either Claimant or the circumstances, although he naturally could not work on other cases at the same time that he was working on this litigation. There is no evidence that accepting Claimant's case precluded counsel from other employment. Counsel's fee arrangement with Claimant is on a contingency basis. There is no evidence that counsel expects a fee from any other source. There is no evidence that the employer lacks the ability to pay a fee.

Taking into consideration the fees customarily charged in this locality for such services as were rendered by Claimant's counsel and the factors set forth above, the Board finds that an attorney's fee in the amount of \$7,000.00, or thirty percent of the award, whichever is smaller, is reasonable in this case. The Board is also satisfied that this fee adequately reflects the value of any non-monetary benefit arising from this decision. *See Pugh v. Wal-Mart Stores, Inc.*, 945 A.2d 588, 591-92 (Del. 2008).

Medical witness fees for testimony on behalf of Claimant are awarded to Claimant, in accordance with title 19, section 2322(e) of the Delaware Code.

STATEMENT OF THE DETERMINATION

For the reasons set forth above, the Board finds that Claimant has met her burden of proof that she sustained a 15% permanent impairment of her vocal cords and a 7.5% permanent impairment of her hearing in the right ear attributable to her work injury. Her uncontested medical expenses with Drs. Witt and Weisberg are reasonable and necessary. Claimant is awarded a reasonable attorney's fee in the amount of \$7,000.00, or thirty percent of the award, whichever is smaller, and payment of her medical witness fees.

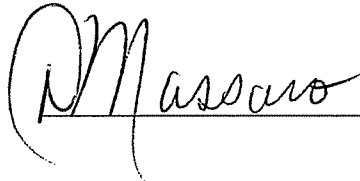
IT IS SO ORDERED THIS 15th DAY OF DECEMBER, 2011.

INDUSTRIAL ACCIDENT BOARD

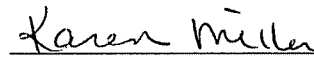

ALICE M. MITCHELL


For: MARILYN J. DOTO

I, Deborah J. Massaro, Hearing Officer, hereby certify that the foregoing is a true and correct decision of the Industrial Accident Board.



Mailed Date: 12-15-11



OWC Staff

