

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. G501910

MICHAEL GUNNETT, EMPLOYEE	CLAIMANT
ARKANSAS STATE POLICE, EMPLOYER	RESPONDENT
PUBLIC EMPLOYEE CLAIMS DIVISION, INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED OCTOBER 20, 2022

Upon review before the FULL COMMISSION in Little Rock, Pulaski County, Arkansas.

Claimant represented by the HONORABLE GARY DAVIS, Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE CHARLES H. MCLEMORE, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Respondents appeal an opinion and order of the Administrative Law Judge filed April 26, 2022. In said order, the Administrative Law Judge made the following findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. That an employer/employee relationship existed on October 14, 2014, when the claimant sustained a compensable work-related injury to his right shoulder.

3. That at the time of the injury, the claimant was earning an average weekly wage of \$1,129.94, entitling him to temporary total disability and permanent partial disability rates of \$617.00/\$463.00, respectively.
4. The respondents accepted the claim, paid medical, and accepted a twenty-seven percent (27%) permanent partial disability (PPD) impairment rating to the body as a whole.
5. The claimant was found, by Dr. David Moore, to be at maximum medical improvement (MMI) on July 7, 2017.
6. That page 18 of the medical records submitted by the respondents and specifically the report provided by Rick Byrd, a Certified Senior Disability Analyst, was found to be admissible.
7. That the claimant has satisfied the required burden of proof, by a preponderance of the evidence, for a permanent partial disability (PPD) impairment rating of fifty percent (50%) to the body as a whole.
8. That the claimant and his attorney are entitled to the appropriate attorney fees pursuant to Ark. Code Ann. §11-9-715, based on the difference between the twenty-seven percent (27%) PPD rating that was accepted by the respondents and the fifty percent (50%) PPD rating that was awarded.
9. If not already paid, the respondents are ordered to pay for the cost of the transcript forthwith.

We have carefully conducted a *de novo* review of the entire record herein and it is our opinion that the Administrative Law Judge's April 26, 2022 decision is supported by a preponderance of the credible evidence, correctly applies the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings made by the

Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

We therefore affirm the decision of the Administrative Law Judge, including all findings of fact and conclusions of law therein, and adopt the opinion as the decision of the Full Commission on appeal.

All accrued benefits shall be paid in a lump sum without discount and with interest thereon at the lawful rate from the date of the Administrative Law Judge's decision in accordance with Ark. Code Ann. §11-9-809 (Repl. 2012).

For prevailing on this appeal before the Full Commission, claimant's attorney is entitled to fees for legal services in accordance with Ark. Code Ann. §11-9-715(Repl. 2012). For prevailing on appeal to the Full Commission, the claimant's attorney is entitled to an additional fee of five hundred dollars (\$500), pursuant to Ark. Code Ann. §11-9-715(b)(Repl. 2012).

IT IS SO ORDERED.

SCOTTY DALE DOUTHIT, Chairman

M. SCOTT WILLHITE, Commissioner

Commissioner Palmer dissents

DISSENTING OPINION

I respectfully dissent from the majority finding that the claimant is entitled to a 50% permanent-impairment rating to the body as a whole for his admittedly-compensable injury. The sole issue at the hearing, and now on appeal, is whether the appropriate rating is 50% as Claimant contends or 27% as Respondent contends. I have conducted a *de novo* review of the entire record and find, as more fully set out below, that Claimant is entitled to a 27% impairment rating to the body as whole based on the objective criteria outlined in the Guides and consistent with our opinion in *Eldridge v. Pace Indus., LLC*, 2021 Ark. App. 245, at 5-6, 625 S.W.3d 734, 737-38.

The medical records contain the opinions of three experts: Dr. David Greenwood, Dr. Barry Baskin, and Mr. Rick Byrd. All three of these experts referred to Table 8 on page 162 of the Fourth Edition of the American Medical Association's Guide for the Evaluation of Permanent Impairment (*the Guide*).

The Guides set out a method of evaluating Claimant's permanent respiratory impairment called simple spirometry. Much about this method is irrelevant to the issue before us because no one disputes the accuracy of

the results. Still, in order to fully understand and resolve the issue before the Full Commission, it is necessary to discuss some terminology.

FVC is forced vital capacity. FEV₁ is the amount of air exhausted in the first second. D_{CO} is the diffusing capacity of carbon monoxide and provides information on the efficiency of gas transfer across the lung. The evaluation produces quantitative measurements for FVC, FEV₁, and D_{CO}, each of which are then compared to the “predicted” normal value (the value of the average healthy person of the same age and height). The evaluation results then fall within one of four classes as shown in the chart below:

To fall within Class 3, one of three criteria must be met: (1) the person’s FVC is between 51% and 59% of the predicted normal range; (2) the person’s FEV₁ is between 41% and 59% of the predicted normal range; or (3) the D_{CO} is between 41% and 59% of the predicted normal range.

Guides to the Evaluation of Permanent Impairment

Table 8. Classes of Respiratory Impairment.*

	Class 1: 0%, no impairment of the whole person	Class 2: 10-25%, mild impairment of the whole person	Class 3: 26-50%, moderate impairment of the whole person	Class 4: 51-100%, severe impairment of the whole person
FVC FEV ₁ FEV ₁ /FVC (%) D _{CO}	FVC ≥ 80% of predicted; and FEV ₁ ≥ 80% of predicted; and FEV ₁ /FVC ≥ 70%; and D _{CO} ≥ 70% of predicted.	FVC between 60% and 79% of predicted; or FEV ₁ between 60% and 79% of predicted; or D _{CO} between 60% and 69% of predicted.	FVC between 51% and 59% of predicted; or FEV ₁ between 41% and 59% of predicted; or D _{CO} between 41% and 59% of predicted.	FVC ≤ 50% of predicted; or FEV ₁ ≤ 40% of predicted; or D _{CO} ≤ 40% of predicted.
ṠO ₂ Max	or > 25 mL/(kg·min); or > 7.1 METS	or Between 20 and 25 mL/(kg·min); or 5.7-7.1 METS	or Between 15 and 20 mL/(kg·min); or 4.3-5.7 METS	or < 15 mL/(kg·min); or < 1.05 L/min; or < 4.3 METS

*FVC = forced vital capacity, FEV₁ = forced expiratory volume in the first second, D_{CO} = diffusing capacity of carbon monoxide. The D_{CO} is primarily of value for persons with restrictive lung disease. In classes 2 and 3, if the FVC, FEV₁ and FEV₁/FVC ratio are normal and the D_{CO} is between 41% and 79%, then an exercise test is required.

ṠO₂ Max, or measured exercise capacity, is useful in assessing whether a person’s complaint of dyspnea (see Table 1) is a result of respiratory or other conditions. A person’s cardiac and conditioning status must be considered in performing the test and in interpreting the results.

According to Dr. Greenwood's most recent assessment of Claimant's permanent partial impairment rating, Claimant's FEV₁ is 58% of the predicted normal value. Based on this, all three medical experts who opined on this issue correctly placed Claimant in Class 3. Class 3 has an impairment range of 26% to 50% to the body as a whole. Dr. Greenwood initially stated that Claimant's permanent impairment rating was between 26% and 50%. Ultimately, however, Dr. Greenwood settled on the highest end of this range, 50%. Dr. Baskin and Mr. Byrd are both of the opinion that Claimant's impairment rating is 27%.

The Commission has the authority to accept or reject a medical opinion and the authority to determine its probative value. *Greene v. Cockram Concrete Co.*, 2012 Ark. App. 691. When the Commission weighs medical evidence and the evidence is conflicting, its resolution is a question of fact for the Commission. *Medic One, LLC v. Colbert*, 2011 Ark. App. 555, at 7, 386 S.W.3d 58.

Our workers' compensation law provides that "[a]ny determination of the existence or extent of physical impairment shall be supported by objective and measurable physical or mental findings." Ark. Code Ann. §11-9-704(c)(1)(B). "Objective findings" are defined as "those findings which cannot come under the voluntary control of the patient." Ark. Code Ann. § 11-9-102(16)(A)(i). Further, the statutes provide that "[w]hen determining

physical or anatomical impairment, neither a physician, any other medical provider, an administrative law judge, the Workers' Compensation Commission, nor the courts may consider complaints of pain.” Ark. Code Ann. §11-9-102(16)(A)(ii)(a).

Dr. Greenwood’s assessment of 50% is within Class 3, so it is not *per se* in contravention of *the Guides*. Respondents argue, however, that Dr. Greenwood’s assessment arbitrarily fell at the upper end of that range and that the more precise method of ascertaining where within that range Claimant’s impairment rests puts him at 27%.

Claimant asserts that Dr. Greenwood deserves greater credibility because he was Claimant’s treating physician and is a pulmonary specialist. Claimant also points out that Mr. Byrd is not a physician, and that Dr. Baskin is neither Claimant’s treating physician nor a pulmonology specialist. These facts, Claimant asserts, make Dr. Greenwood’s opinion more credible. Thus, the issue before us is whether there are any facts in the record to justify an impairment rating at the high end of Class 3’s range, despite Claimant’s test results falling at the low end.

I cannot find any evidence in the record to support Dr. Greenwood’s rating and would therefore assign Claimant an impairment rating consistent with his test results, which puts him at the low end of the impairment range within Class 3. Therefore, I would find Claimant is entitled to a 27%

impairment rating consistent with his test results. Accordingly, for the reasons set forth above, I must dissent.

CHRISTOPHER L. PALMER, Commissioner