

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. H008920

JOHN KUNKEL,
EMPLOYEE

CLAIMANT

LEAFFILTER NORTH LLC,
EMPLOYER

RESPONDENT

ARCH INSURANCE COMPANY,
INSURANCE CARRIER/TPA

RESPONDENT

OPINION FILED AUGUST 29, 2023

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

Claimant represented by the HONORABLE ANDY L. CALDWELL, Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE LEE J. MULDROW, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The claimant appeals an administrative law judge's order filed May 17, 2023. The administrative law judge found that the claimant "should be compelled" to undergo a Functional Capacity Evaluation. After reviewing the entire record *de novo*, the Full Commission reverses and vacates the administrative law judge's opinion.

I. HISTORY

The parties stipulated that the claimant "sustained a compensable injury to his left lower extremity" on November 2, 2020. The parties

stipulated that the respondents “have accepted this claim as compensable, and paid both medical and some indemnity benefits.”

The record indicates that Dr. Gregory Ardoin examined the claimant at OrthoArkansas on November 14, 2022:

Left foot and ankle exam reveal intact skin. Mild edema noted. There is no ecchymosis or erythema....He is able to perform single-leg heel raise bilaterally. He has good range of motion of the ankle and hindfoot. He has some tenderness and swelling of the anterior ankle.

Assessment/Plan

Imaging: Three-view standing left ankle x-ray was ordered, obtained and interpreted findings include interval joint space of 1.8 mm with mild degenerative changes noted.

Impression: Left ankle work-related injury with resulted pain and developing arthritis.

Plan: At this point I think he is at MMI. He will need to be seen once or twice a year. At some point he may require an ankle fusion or total ankle replacement. He has arthritis in the ankle. I recommend anti-inflammatories.

His work restrictions will include avoid uneven ground, no stooping or squatting and avoid ladder climbing.

Patient deserves impairment according to the Guides to the Evaluation of Permanent Impairment, fourth edition page 83 table 62 for ankle joint space narrowing of 1.8 mm, 8% whole person, 20% left lower extremity and 28% left foot.

Follow-up in 6 months.

Dr. Ardoin diagnosed “1. Pain of left ankle joint” and “2. Traumatic arthropathy-ankle.”

Dr. Ardoin signed a Return to Work/School note on November 14, 2022: “Please excuse John for 11/14/2022. John may return to work/school on 11/14/2022. Activity is restricted as follows: no working on

uneven ground, stooping, ladder climbing, crawling. No pushing, pulling, or lifting more than 15 pounds.”

On April 12, 2023, the respondents e-mailed a MOTION TO COMPEL FUNCTIONAL CAPACITY EVALUATION. The MOTION stated in part:

3. The claim was initially accepted and both medical and TTD benefits were paid. Orthopedic surgeon, Dr. Phillip Smith, treated claimant between November 2020 and March 2, 2021, at which time he ordered a functional capacity evaluation.
4. A functional capacity evaluation was done on March 12, 2021, and was determined to be unreliable. Thereupon, on April 6, 2021, Dr. Smith released the patient as having reached MMI.
5. Pursuant to a change of physician request claimant’s care was assumed by Dr. Gregory Ardoin who ultimately performed arthroscopic surgery on February 1, 2022.
6. Continuing care included cortisone injections followed with Dr. Ardoin releasing the patient at MMI on November 14, 2022. Dr. Ardoin outlined activity restrictions.
7. Claimant is requesting benefits under §505.
8. Respondents have repeatedly requested that claimant make himself available for a functional capacity evaluation to objectively assess and validate recommended physical restrictions.
9. Claimant has adamantly refused respondents’ request for a post-surgery functional capacity evaluation.

The respondents moved “for an order compelling a functional capacity evaluation at respondents’ expense.”

The claimant responded on April 14, 2023 and stated in part:

2. Respondents have failed to cite any rule, case or other law in support of their Motion.
3. Respondents’ Motion is not supported by facts or law.

4. The Requested Functional Capacity Evaluation has not been recommended by the Claimant's authorized treating physician, Dr. Troy Ardoin....
6. The Respondents are requesting a functional capacity evaluation. Again, Respondents have cited no legal or factual basis for same. The undersigned is not aware of any specific statutory authority or rule allowing for the Respondents to obtain such an evaluation. Ark. Code Ann. §11-9-511 allows for an examination by a physician but only if it is reasonable and necessary. Respondents are not requesting an Independent Medical Examination.
7. There has been no request for an FCE by the Claimant's authorized treating physician....

The claimant requested "that the Respondents' Motion to Compel Functional Capacity Evaluation be denied and for any and all other relief to which he may be entitled, including attorney's fees."

A pre-hearing order was filed on April 18, 2023. According to the pre-hearing order, the parties agreed to litigate the following issues:

1. Whether the claimant must submit himself for and undergo a Functional Capacity Evaluation (FCE) at the respondents' request for the purposes of determining his physical limitations and restrictions, if any; the extent of his permanent anatomical impairment, if any, and any and all other issue(s) relevant to this claim which fall within the expertise of the FCE examiner/evaluator.
2. The parties specifically reserve any and all other issues for future litigation and/or determination.

The case was submitted on the record. An administrative law judge filed an OPINION AND ORDER GRANTING RESPONDENTS' MOTION TO COMPEL FUNCTIONAL CAPACITY EVALUATION (FCE) FILED MAY 17, 2023. The administrative law judge found:

1. The parties' stipulations contained in the prehearing order filed April 18, 2023, hereby are accepted as facts.
2. The respondents' motion requesting the claimant should be compelled to submit himself for a current FCE at the respondents' expense should be and hereby is GRANTED.
3. The claimant's and respondents' attorneys shall confer and cooperate in scheduling and ensuring that the claimant attends an FCE with Mr. Rick Byrd, of Functional Testing Centers, Inc., at their earliest possible convenience.

The claimant appeals to the Full Commission.

II. ADJUDICATION

The parties stipulated that the claimant sustained a compensable injury to his left lower extremity on November 2, 2020. The parties stipulated that the respondents provided medical treatment and some indemnity benefits. Dr. Ardoin opined on November 14, 2022 that the claimant had reached maximum medical improvement. Dr. Ardoin assigned an 8% whole-person impairment rating and released the claimant to restricted work.

On April 12, 2023, the respondents e-mailed a motion to "compel" the claimant to participate in a Functional Capacity Evaluation. The respondents stated that they "have repeatedly requested that claimant make himself available for a functional capacity evaluation to objectively assess and validate recommended physical restrictions." However, the Full Commission notes that the treating physician of record, Dr. Ardoin, has not

recommended that the claimant undergo a Functional Capacity Evaluation. We also note that there is limited medical evidence before the Commission and there has been no testimony of record. In addition, there has not been an adjudication of record, award, or denial of benefits by an administrative law judge or the Full Commission. There are no pleadings from either party other than the two opposing motions. Nor has the claimant filed a request for additional medical treatment or indemnity benefits. Neither case cited by the administrative law judge, *North Hills Surgery Center v. Otis*, 2021 Ark. App. 468, 638 S.W.3d 323, and *Eldridge v. Pace Industries, LLC*, 2021 Ark. App. 245, 625 S.W.3d 734, can be interpreted as appellate authority supporting a finding that the claimant in the present matter should be coerced into undergoing a Functional Capacity Evaluation.

Based on the current record before us, the Full Commission reverses and vacates the administrative law judge's order compelling the claimant to participate in a Functional Capacity Evaluation at Functional Testing Centers, Inc.

IT IS SO ORDERED.

SCOTTY DALE DOUTHIT, Chairman

M. SCOTT WILLHITE, Commissioner

Commissioner Mayton dissents.

DISSENTING OPINION

I must respectfully dissent from the Majority's determination that the claimant should not be compelled to undergo a Functional Capacity Evaluation.

The Act provides and "[a]n injured employee claiming to be entitled to compensation shall submit to such physical examination and treatment by another qualified physician, designated or approved by the Workers' Compensation Commission, as the commission may require from time to time if reasonable and necessary." Ark. Code Ann. §11-9-511(a). "Such physician as the employee, employer or insurance carrier may select and pay for may participate in the examination if the employee, employer, or insurance carrier so requests." Ark. Code Ann. §11-9-511(c). It is well settled under our rules that a Functional Capacity Exam (FCE) constitutes "treatment" under the Act. *Gansky v. Hi-Tech Eng'g*, 325 Ark. 163, 924 S.W.2d 790 (1966); *Sanders v. Backus Paint & Body Shop*, 2006 Ark. App. LEXIS 783 (2006). This is especially relevant for questions of "additional testing, physical therapy, work hardening, and/or a change to the impairment rating." *S. Tel. Const. Co. v Harris*, No. CA06-921, 2007 Ark. App. LEXIS 228 (2007).

In the present case, the respondent has made it clear that its purpose for compelling an FCE is to assist the Commission in determining

the relevancy of vocational rehabilitation and the full extent of the claimant's impairment. These purposes are strictly within the purview of the Commission, and the Commission, therefore, has the authority to direct the claimant to submit to an FCE at the respondents' expense. I, therefore, agree with the ALJ's findings that the claimant should be compelled to undergo a Functional Capacity Evaluation.

For the reasons stated above, I respectfully dissent.

MICHAEL R. MAYTON, Commissioner