The Full Board, at its meeting on November 16, 2021, considered the above captioned case for Mandatory Full Board Review of the Board Panel Memorandum of Decision filed July 16, 2021.

ISSUE

The issue presented for Mandatory Full Board Review is whether the record supports a finding that claimant sustained a compensable occupational disease.

The Workers' Compensation Law Judge (WCLJ) established the claim as an occupational disease for injuries to claimant's neck, back, and right shoulder.

The Board Panel majority reversed the WCLJ decision and disallowed the claim.

The dissenting Board Panel member would affirm the WCLJ decision.

The claimant filed an application for Mandatory Full Board Review on August 11, 2021, arguing that the record supports the WCLJ decision establishing this claim.

The carrier filed a rebuttal on September 7, 2021, requesting that the Full Board adopt the decision of the Board Panel majority.

Upon review, the Full Board votes to adopt the following findings and conclusions.

FACTS

Claimant, a home attendant, filed a C-3 (Employee Claim) on November 11, 2019, alleging that she sustained injuries to her neck, back, and right shoulder as the result of “[r]epetitive lifting, carrying and pushing for 10 years at work.” The carrier controverted the claim.
On November 25, 2019, the Board received a statement signed by claimant and dated July 18, 2019, which is on the letterhead of claimant's employer, stating:

I, [claimant], certified that I filled out a disability form stating my sickness was work related. I did not understand the question.

I come to make a change because my sickness is not work related.

Attached to the statement is a summary of disability benefits received by the claimant from July 16, 2019, through August 19, 2019. In response to the statement, the Board issued an administrative decision dated April 9, 2020, indicating that claimant had withdrawn the claim. However, claimant's attorney objected to the administrative decision, stating:

Please cancel AD filed 4/9/20. Contents of claimant's 7/18/19 correspondence were sent in error. Claimant used and relied on google translate. Claimant maintains that her condition IS work related.

Based on the objection of claimant's attorney the Board withdrew the April 9, 2020, administrative decision.

The record also contains a copy of an application for disability benefits signed by claimant and dated July 16, 2019, indicating that claimant was suffering from migraine headaches, neck pain, and anxiety.

In a December 12, 2019, report, claimant's treating physician, Dr. Boginsky, stated:

*2 Patient has worked as a HHA for 10y. During this (sic) years she had to work with heavy clients, bedridden patients, she had to lift them, turn them multiple times a day. Gradually she developed neck, back and right shoulder pain. She was unable to go to doctor or physical therapy because she had insurance with high co-payment or no insurance for a long time. In 2019 she got insurance and in February she went to her PMD with c/o neck, mid and low back pain and right shoulder pain. She has courses of PT w/o improvement. In 9/2019 she had MRI's. Due to inability to perform her work duties she stopped working in July.

In her December 12, 2019, report, Dr. Boginsky diagnosed: neck pain secondary to cervical spine injury (to rule out cervical disk displacement); pain going down arm, paresthesia in upper extremities secondary to cervical spine injury (to rule out cervical radiculopathy); thoracic back pain; lower back pain secondary to lumbar spine injury (to rule out lumbar disk displacement); and right shoulder sprain (to rule out internal derangement). Dr. Boginsky found that claimant had a 100% temporary impairment and opined that her injuries were causally related to her employment.

In a decision filed May 26, 2020, the WCLJ found prima facie medical evidence for injuries to the neck, back, and right shoulder based on Dr. Boginsky's December 12, 2019, report.

Dr. Boginsky was deposed on July 6, 2020, and testified on cross-examination that she examined claimant for the first time on December 12, 2019, and has treated her three times in total. Claimant had previously treated with Dr. Tovbina and Dr. Riskevich. Claimant began treating for her injuries in February 2019, when she obtained health insurance. Dr. Boginsky based her opinion that claimant's injuries were causally related to her job on the history provided by claimant of having worked as a home health aide for 10 years, taking care of bedridden clients and lifting, turning and washing patients (Deposition Transcript, 7/6/20, p. 9). When asked whether it would change her opinion on causal relationship if claimant had previously applied for disability benefits indicating that her injuries were not work related, Dr. Boginsky responded:

I mean from my experience, I have treated a lot of patients who work as a home health aide and during the years of working they do develop this problem, so from my opinion she can develop all this problem from her employment, but if the patient feels it's not work-related, then what can I do. It's not work-related then.
On redirect, Dr. Boginsky testified that when she spoke to claimant, claimant had told her that she had developed her neck, back, and right shoulder injuries “during her work activities and my physical exam, it looks like she did develop it from her work activity, that's what I think” (p. 12).

Claimant was examined by the carrier's consultant, Dr. Kiernan, on July 31, 2020. In his report, Dr. Kiernan stated that claimant “did not have a specific incident but developed pain in her neck, back, and right shoulder over the course of several years of work” as a home health aide. Dr. Kiernan diagnosed cervical, lumbar, and right shoulder sprain and found that those “injuries are causally related to the nature of the work performed by the claimant as stated.”

*3 At a hearing on November 13, 2020, claimant testified via a Russian language interpreter that she last worked on July 7-8, 2019. She had worked as a home attendant for ten years and developed severe pain in her neck, spine, and right shoulder and hand. She saw a doctor in February 2019 because she could not bear the pain. When asked what her job duties were between February and July of 2019, claimant responded: “Yes. So at this point I helped client cleaning, cooking, to do the laundry, groceries and some other daily, just activities” (Hearing Transcript, 11/30/20, p. 8). Carrying groceries and supporting the client while he walked caused her pain. During that time, she worked four days per week as a live-in caregiver. She had to lift her client to help him sit on a walker, and lift heavy bags of groceries.

On cross-examination, claimant testified that she had previously worked three days per week, but in December 2018 her employer increased her workload to four days per week. She was reluctant to increase her workload because of her pain, but her employer advised that she had to work an additional day per week if she wanted to continue working. She told her employer in 2018 about her pain symptoms. She began treating with her primary physician, Dr. Tovbina, in November 2017. Dr. Tovbina sent claimant to physical therapy for her back and neck in 2017. She started working for the employer in June 2018. Initially it was “not a permanent job, [and she worked] sometimes once a week, twice a week, like that” (p. 19). She had previously worked for Caring Professionals from 2010 to 2018. She told Dr. Tovbina in 2017 that her injuries were work related, but Dr. Tovbina never noted that her problems were related to her work.

By a decision filed November 18, 2020, the WCLJ directed claimant to submit a HIPAA release and the records of Dr. Tovbina and continued the case.

In a decision filed December 17, 2020, the WCLJ stated: “The parties have determined that claimant has treated with additional providers in the past, namely Dr. Tovbina, Dr. Riskevich and Dr. Edward Rosner. The parties are directed to submit medical records from these providers. Claimant to supply HIPPA forms.” The case was continued.

The record reflects that claimant provided HIPAA authorizations to the carrier to obtain the records of Dr. Tovbina, Dr. Riskevich and Dr. Rosner, and that the carrier requested those records from the providers on January 12, 2021 (doc. #350880396).

In a decision filed February 5, 2021, the WCLJ stated:

Case is on calendar for status of additional medical provider records. Medical records of prior treating Drs. Tovbina, Riskevich and Rosner were directed. Both sides have submitted requests/subpoenas for those medical records but the providers have not yet supplied any records. Claimant is directed to try to obtain those records herself from the providers. SIF and claimant's attorney are directed to continue efforts to obtain records including follow up calls and sending out an investigator. The case is continued.... .

*4 On March 15, 2021, reports of Dr. Tovbina, Dr. Riskevich, and Dr. Rosner were filed with the Board.

At a hearing on March 15, 2021, claimant's attorney stated that she had provided the Board with the records of Dr. Rosner and that the carrier had provided the Board with records of Dr. Tovbina and Dr. Riskevich. The WCLJ stated that “we did all take a look” at those records and asked that the parties state their arguments (Hearing Transcript, 3/15/21, p. 4). Claimant's
counsel argued that the claim should be established as an occupational disease for injuries to the neck, back, and right shoulder based on the undisputed medical evidence that those conditions are causally related to claimant's employment. Counsel for the carrier stated that because “the medical documentation, a lot of it was just uploaded today, we don't feel that we have sufficient opportunity to evaluate it for Section 28 issues or anything else. So at this time we would simply maintain issues of controversy, rest on the record in that regard. And we would also protectively raise pre-existing conditions as well” (p. 5-6). The WCLJ established the claim as an occupational disease for injuries to claimant's neck, back, and right shoulder and set the date of disablement as July 9, 2019, the date claimant stopped working. The average weekly wage was set tentatively at $600.00, awards were made, and a fee of $3,000.00 to claimant's attorney was approved. The carrier noted exceptions “to establishing the claim to the date of disablement and also to award after, well to all awards” (p. 22).

The findings and awards made at the March 15, 2021, hearing are reflected in a decision filed March 18, 2021.

The carrier requested administrative review, arguing that “Dr. Boginsky was wholly unaware of the nature or extent of claimant's work activities, and her statements regarding causal relationship were therefore purely speculative.” The carrier requested that the claim be disallowed based on lack of medical evidence of causation, or, in the alternative, that the WCLJ decision establishing the claim be rescinded and “the case remanded to the hearing part for review of claimant's medical evidence and development of the record on Section 28.”

In rebuttal, claimant argued that the record supported the establishment of the claim, that the carrier had sufficient time to review all the medical records submitted and thus there is no reason to continue the case to develop the record on the issue of timely claim filing, and that the carrier's application for review was defective and should not be considered pursuant to 12 NYCRR 300.13.

LEGAL ANALYSIS

Occupational Disease/Causal Relationship

To support a claim for an occupational disease, the claimant must demonstrate “a recognizable link between his or her condition and a distinctive feature of his or her employment” (Matter of Camby v System Frgt., Inc., 105 AD3d 1237 [[2013] [internal quotation marks and citation omitted]; see Matter of Bates v Marine Midland Bank, 256 AD2d 948 [1998]; (Matter of Jones v Consolidated Edison Co. of N.Y., Inc., 130 AD3d 1106 [2015]).

*5 When the “medical opinion of claimant's treating physician [is] neither speculative nor a general expression of possibility and it ‘signif[ies] a probability as to the underlying cause of the claimant's injury which is supported by a rational basis’ (Matter of Mayette v Village of Massena Fire Dept., 49 AD3d 920 [2008]),” and when there is no conflicting medical evidence, the Board may not reject the treating physician's uncontroverted medical opinion on causation (Matter of Maye v Alton Mfg., Inc., 90 AD3d 1177 [[2011] [additional internal citations omitted]). However, “[w]hile as a general rule the Board may not reject the unanimous opinion of experts and arrive at its own conclusion on the issue of causation (see Matter of Van Patten v Quandt's Wholesale Distribs., 198 AD2d 539; Matter of Doersam v Oswego County Dept. of Social Servs., 171 AD2d 934, 936, affd 80 NY2d 775), the Board is entitled to disregard an expert opinion when it is based upon an assumption that lacks evidentiary support in the record providing a rational basis (see Matter of Freitag v New York Times, 260 AD2d 748, 749-750)” (Matter of Marks v County of Tompkins, 274 AD2d 764 [2000]).

Here, claimant testified that she had worked as a home health aide for approximately ten years, and worked for her last employer, against whom she brought this claim, from June 2018 until she stopped working in July 2019. Claimant's testimony regarding her specific work duties as a home attendant was limited. When asked what her job duties were between February and July of 2019, claimant responded that she helped her client with cleaning, cooking, laundry, groceries, “and some other daily, just activities.” Claimant, still testifying concerning her work duties during early 2019, stated that carrying groceries and supporting her client while he walked caused her pain, and that she had to lift her client to help him sit on a walker, and carry heavy bags...
of groceries. At no point was claimant asked, nor did she testify, regarding her specific work duties during any other period that she worked as a home attendant.

The carrier's consultant, Dr. Kiernan, found that claimant's back, neck, and right shoulder injuries were “causally related to the nature of the work” claimant performed as a home attendant over a period of years. Dr. Kiernan did not describe the duties claimant performed as a home attendant, but it is reasonable to infer that Dr. Kiernan was aware of what those duties were.

Claimant's treating physician, Dr. Boginsky, stated in her December 12, 2019, report that claimant had worked for 10 years as a home attendant and gradually developed neck, back, and right shoulder pain due to her employment, which required “work with heavy clients, bedridden patients, she had to lift them, turn them multiple times a day.” Dr. Boginsky testified that she based her opinion that claimant's injuries were causally related to her job on the history provided by claimant of having worked as a home health aide for 10 years, taking care of bedridden clients and lifting, turning, and washing patients. Dr. Boginsky testified that she had treated a lot of patients who worked as home health aides and developed similar problems.

It is clear that claimant was testifying about her specific duties during a very specific period of time, February through July of 2019, while Dr. Boginsky based her causal relationship opinion on claimant's duties during the entire 10 years she worked as a home health aide. Although claimant testified that her last client was not bedridden, there is nothing in the record suggesting that claimant was never responsible for a bedridden client during her ten years as a home attendant. Thus, the alleged discrepancies concerning claimant's specific work duties between claimant's testimony and the reports and testimony of Dr. Boginsky are insufficient to undermine the opinion of Dr. Kiernan and Dr. Boginsky that claimant's injuries were caused by her job duties as a home attendant.

The record supports a finding that the injuries to claimant's neck, back, and right shoulder were caused by a distinctive feature of her employment: the heavy physical labor performed by a home attendant in caring for patients who cannot care for themselves. Claimant credibly testified that while working for the employer of record she continued to perform heavy physical work, including lifting heavy grocery bags, holding her client up while he walked, and lifting her client to help him sit on a walker. The record reflects that claimant developed these injuries over time, during the many years she worked as a home attendant, including the time she worked for the employer of record, who was the “employer who last employed the employee in the employment to the nature of which the disease was due and in which it was contracted.” (WCL § 44).

Neither the application for disability benefits nor the July 18, 2019, statement cited by the carrier undermine the credibility of this claim. Both were drafted well before Dr. Boginsky's December 12, 2019, report, which is the first medical evidence that claimant's conditions were work-related. Moreover, the disability benefits application lists migraine headaches and anxiety, and makes no mention of claimant's back or right shoulder injuries. The only condition mentioned in the disability benefits application which claimant later asserted was work-related was her neck injury. In addition, the July 18, 2019, statement signed by claimant states that “my sickness is not work related,” without specifying the conditions to which the claimant was referring.

Thus, the Full Board finds that the record supports a finding that claimant sustained an occupational disease involving injuries to her neck, back, and right shoulder.

Date of Disablement (WCL § 28)

In a claim for an occupational disease, the claimant has “two years ‘after the disablement or after [he or she] knew or should have known that the disease is due to the nature of the employment, whichever is the later date’ (WCL § 45) to give notice to the employer)” (Matter of Currier v Manpower, Inc. of N.Y., 280 AD2d 790 [2001]).

Pursuant to WCL § 28, the right to claim compensation for an occupational disease is not time barred if the claim is filed no more than two years after the date of disablement and after the claimant knew or should have known that the disease was caused by the employment (Matter of Patterson v Long Is. Jewish Med. Ctr., 296 AD2d 774 [2002]). Therefore, to determine
the applicability of WCL § 28 to an occupational disease claim, three pieces of information generally are necessary: (1) the date of disablement, (2) the date on which the claimant knew or should have known that the condition was related to employment, and (3) the date on which the claim was filed.

The Board has been affirmed when it has selected as the date of disablement the date of first medical treatment (Matter of Fredenburg v Emerson Power Transmission, 2 AD3d 1129 [2003]), the date that a physician “definitively concluded” that a condition was work related (see Hastings, 274 AD2d 660 [[2000]]), the date of claimant's first causally related lost time (see Matter of Glasheen v New York State Dept. of State, 239 AD2d 792 [1997]), and the date claimant permanently ceased working for the employer, even though he had previously had causally related lost time (see Matter of Cummings v Tenneco Chems. Div., Am. Plastics, 53 AD2d 944 [1976]). According to the Appellate Division, it is within “the power of the Board to fix any date of disablement supported by the evidence where the spirit and purpose of the occupational disease provisions of the Workmen's Compensation Law would thereby be furthered” (id.).

Here, the Full Board finds that a date of disablement of July 9, 2019, the date claimant stopped working due to her disability, is clearly supported by the evidence in the record. Nothing in any of the reports of Dr. Tovbina, Dr. Riskевич, or Dr. Rosner supports a different date of disablement. As claimant filed this claim well within two years from the date of disablement, this claim is clearly timely.

CONCLUSION

ACCORDINGLY, the WCLJ decision filed March 18, 2021, is AFFIRMED. No further action is planned by the Board at this time.

Clarissa Rodriguez
Chair

2021 WL 5982441 (N.Y.Work.Comp.Bd.)