NOT FOR OFFICIAL PUBLICATION

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION II

LINDA MIDDLEBROOK,

Petitioner,

vs.

MULTIPLE INJURY TRUST FUND and THE OKLAHOMA WORKERS' COMPENSATION COURT,

Respondents.

Case No. 120,077

APPEAL FROM A THREE-JUDGE PANEL OF
THE WORKERS' COMPENSATION COURT OF EXISTING CLAIMS

HONORABLE L. BRAD TAYLOR, TRIAL JUDGE

AFFIRMED

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For Petitioner

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For Respondents

OPINION BY GREGORY C. BLACKWELL, JUDGE:

Linda Middlebrook appeals the rejection of her claim against the Multiple Injury Trust Fund (MITF or fund) and the finding that she was not permanently totally disabled (PTD) as a result of cumulative disability encompassing some 78 percent of her body. On review, we find the decision of the court is not against the clear weight of the evidence and affirm.

BACKGROUND

Linda has a history of adjudicated work injuries. In 2008, she was adjudicated as being physically impaired in both hands (8.8 percent total body) and both legs and feet (18.6 percent total body). She left her last employment in January 2011 and underwent shoulder surgery. In September 2013 she was adjudicated 22 percent disabled to her right shoulder and 20 percent disabled to her left shoulder. In December 2014, she suffered a change in physical condition for the worse, and her right shoulder became 31 percent disabled. The parties agree that this left her with 78.06 percent permanent partial disability to the body as a whole as of December 2014.

In January 2019, Linda filed a Form 9 with the MITF, claiming that she was PTD as a result of these combined injuries. The Court of Existing Claims found that she was not PTD. Linda appealed to a three-judge panel, which affirmed the decision.

STANDARD OF REVIEW

The standard of review applicable to a workers' compensation appeal is that which is in effect when the claim accrues, and accrual is determined by the date of injury. *Williams Companies, Inc. v. Dunkelgod,* 2012 OK 96, ¶ 18, 295 P.3d 1107, 1113. Here, the record indicates that the last date of injury was January 2011. Hence the applicable standard is as follows:

> The Supreme Court may modify, reverse, remand for rehearing, or set aside the order or award upon any of the following grounds:
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> 1. The Court acted without or in excess of its powers;
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> 2. The order or award was contrary to law;

3. The order or award was procured by fraud; or

4. The order or award was against the clear weight of the evidence.

85 O.S.Supp.2010, § 3.6(C).

ANALYSIS

We first address Linda's argument (proposition two in her brief) that the court improperly relied on the fact that she left work in the middle of her last shift in 2011 as a basis for its decision. Both parties appear to place some importance on the question of whether Linda left work the day before her 2011 dismissal because she was physically unable to continue work; because she was frustrated by a "lack of help" related to her existing lifting restrictions; or because she was frustrated by a "lack of help" in general. The court below specifically made a finding that Linda had "walked off the job," but stated neither why she did so, nor the necessity or relevance of this finding to the PTD inquiry. The relevance of this question here escapes us.[1]

The fund provides no authority for its apparent position that the reason Linda left her last shift in 2011 may help determine if she is PTD in 2021. If this fact has *any* evidentiary value at all, it is minimal, and would not, standing alone,

[1] The fund appears to argue that Linda's stated reasons for leaving work mid-shift in 2011 constitute probative evidence as to her degree of disability ten years later. We strongly doubt that, had Linda publicly announced that she was leaving mid-shift in 2011 because she was "completely disabled," the fund would find *this* contemporary statement probative of PTD in 2021. Why other contemporary statements should be regarded as relevant eludes us. The issue before us is whether Linda was able "to earn any wages in any employment for which the employee may become physically suited and reasonably fitted by education, training or experience, including vocational rehabilitation" in 2021, not 2011. *See* 85 O.S.Supp.2010, § 3(20).

constitute sufficient evidence on the question of disability. This was not the sole evidence relied upon by the court, however.

Next, Linda argues (proposition three in her brief) that the court improperly relied on the fact that certain injury claims she made were denied on the grounds that they were not work-related. However, neither this evidence, nor any question regarding Linda leaving work during a shift, are relevant on appeal if the main evidence here, in the form of physicians' reports, provides a basis for the court's decisions. As discussed below, the experts' evidence is sufficient.

Linda finally argues (propositions one and four in her brief) that the order was against the clear weight of the evidence because the medical report relied on by the fund fails to make a required finding. Pursuant to 85 O.S.Supp.2010, § 3(20): "Permanent total disability" means an "incapacity because of accidental injury or occupational disease to earn any wages in any employment for which the employee may be physically suited and reasonably fitted by education, training, or experience," including employment that a claimant may be physically or educationally suited to perform after vocational rehabilitation. An employee has the initial burden of proof to show that she has sustained disability. An employer is not under an initial duty to show the opposite. *Ealom v. Labor Ready Temp. Servs.*, 1998 OK CIV APP 192, ¶ 6, 970 P.2d 1182, 1184 (*citing Collins v. Halliburton Services*, 1990 OK 118, 804 P.2d 440).

The parties here relied largely on two conflicting medical reports. The fund submitted a report by Dr. Gillock, and Linda, a report by Dr. Trinidad. The fund did not object to Dr. Trinidad's report at trial. Linda did object to Dr. Gillock's

report on the grounds of probative value.[2] Linda notes that Dr. Trinidad's report opines:

> The additive value of [Linda's] prior disability awards is 78.06 percent permanent partial disability to the body as a whole. In my opinion, the combination of her injuries to both hands, both shoulders and both knees are such that they would give rise to a material increase in total body impairment of 15 percent to the body as a whole. Furthermore, the combination of her injuries are such that they would give rise to a material increase in total body impairment that would render her 100 percent permanently and totally disabled on an economic basis, as she is unable to earn any wages for any employment for which she is, or could become, physically suited or reasonably fitted by education, training or experience.

Dr. Trinidad's report concludes:

> After evaluating [Linda] in my office, I am of the opinion that the combination of her work-related injuries to her knees requiring surgeries, shoulders requiring surgeries and hands requiring bilateral surgeries are such that they would give rise to a material increase in total body impairment that would render her 100 percent permanently and totally disabled on an economic basis, as she is unable to earn any wages for any employment for which she is, or could become, physically suited or reasonably fitted by education, training or experience.

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[2] See Rules of the Workers' Compensation Court, Rule 27 – Objections to Evidence (Title 85 O.S. Chapter 4 – Appendix)

> C. Except as otherwise provided in Rule 20, an objection to medical testimony offered by a signed, written, verified or declared medical report, shall be interposed at the time it is offered into evidence, if on the grounds that it:
>
> 1. is based on inaccurate or incomplete history or is otherwise without probative value;
>
> or
>
> 2. does not properly evaluate claimant's impairment or disability, as the case may be, in accordance with the Workers' Compensation Code.

If this report were the only evidence on the issues, the court would have acted against the clear weight of the evidence. The fund, however, relied on the report of Dr. William Gillock. Dr. Gillock opined:

> (1) The claimant was previously determined to have a 59.8% permanent partial disability to the whole person prior to his [sic] last injury.
>
> (2) Due to the next injury, the claimant was determined to have a 18.6% partial disability to the whole person for the injury to the knees.
>
> (3) Due to the combination of the above injuries, the claimant was determined to have a 78.06% permanent partial disability to the body as a whole. In my opinion, this value represents a [sic] no material increase.[3]
>
> (4) In my opinion, the claimant is not permanently and totally disabled based on the combination of injuries.

This report, if properly admitted and considered, provides a basis for the court's decision.

Linda's probative value objection appears to be that Dr. Gillock's report does not state a necessary finding that she was unable "to earn any wages in any employment for which the employee may be physically suited" with or without vocational rehabilitation. Hence, she argues, the only probative evidence on this question was Dr. Trinidad's conclusion that she is unable to reasonably earn any wages for any employment under any allowable circumstances.

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[3] The report is poorly worded here. 78.06 percent permanent partial disability clearly is a material increase over 59.8 percent permanent partial disability. The court evidently interpreted this somewhat fractured sentence as stating that there had been no material increase *since* 2014. We find this interpretation rational.

Linda's appeal to the three-judge panel of the Court of Existing Claims argued that the determination that she was not PTD was against the clear weight of the evidence because of the extent of her adjudicated injuries. It does not appear to explicitly challenge the probative value of Dr. Gillock's report on the basis she now cites. Assuming that Linda preserved this issue,[4] however, her argument is that Dr. Gillock's finding that she "is not permanently and totally disabled" has no probative value because it does not establish that she was able to earn any wages for any employment.

However, the statutory definition of "permanently and totally disabled" *includes* an "incapacity to earn any wages in any employment for which the employee may be physically suited and reasonably fitted by education, training, or experience," either with or without vocational rehabilitation. 85 O.S.Supp.2010, § 3(20). When a qualified expert in this context testifies that a claimant is "permanently and totally disabled," the expert inherently testifies in the context of the statutory definition of this term, not some generalized understanding of what constitutes "complete disability" outside of the context of

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[4] The Workers' Compensation Court Rules require that, in an appeal of a judge's decision,

> [a] specific statement of each conclusion of law and finding of fact urged as error. General allegations of error do not suffice. The party or parties appealing to the Court en banc will be bound by the allegations of error contained in the Request for Review and will be deemed to have waived all others ....

Rule 60, (85 O.S. Chapter 4 – Appendix). If an alleged error of failure to make a required statutory finding was not raised before the court *en banc*, it is not preserved for review in this Court. *Bostick Tank Truck Service v. Nix*, 1988 OK 128, 764 P.2d 1344. For purposes of this appeal we view Linda's objection to the court's lack of specific finding regarding whether she was unable "to earn any wages in any employment for which the employee may be physically suited" with or without vocational rehabilitation as preserved.

worker's compensation. Dr. Gillock's testimony is properly interpreted as stating that, in his expert opinion, Linda was not permanently and totally disabled "as defined by to 85 O.S.Supp.2010, § 3 (20)."

As such, the court had a choice between two competent opinions that were both probative, but which reached entirely opposite conclusions. Even if we viewed the evidence as favoring Linda, because the order is based on sufficient evidence, we cannot substitute our own judgment for that of the court below.

AFFIRMED.

WISEMAN, P.J., and BARNES, J., concur.

November 14, 2022