State of Wisconsin

Labor and Industry Review Commission

Nevzer Abasovski
Applicant

Aurora Health Care Metro, Inc.
Employer

Sentry Insurance Co.
Insurer

Claim No. 2006-037427

Worker's Compensation Decision[1]

Dated and Mailed:

May 30, 2024

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Interlocutory Order

The commission **affirms in part** and **reverses in part** the decision of the administrative law judge. Accordingly, within thirty (30) days from the date of this order, the respondent shall pay:

1. To the applicant, the sum of fifty-two thousand, eleven dollars and ninety-seven cents ($52,011.97) for benefits now due.[2] If it has not already done so, the respondent shall pay the sum of two hundred seventy-four dollars and ninety-two cents ($274.92) for out-of-pocket medical expenses; and the sum of four hundred thirty-eight dollars and eighty-six cents ($438.86) in mileage expenses.
2. To the applicant's attorney, Steven Kmiec, the sum of thirteen thousand, three dollars and ninety-nine cents ($13,003.99) for attorney fees. The commission takes into consideration the fact that the reimbursement of costs has already been made.
3. For medical treatment expenses, if it has not already done so, to UHC, the sum of forty-nine thousand, eighty-six dollars and six cents ($49,086.06).

Beginning June 1, 2024, the respondent shall pay the applicant on a monthly basis for permanent disability benefits the amount of nine hundred sixty-eight dollars and fifteen cents ($968.15); the respondent shall pay the applicant's attorney two hundred forty-two dollars and six cents ($242.06) on a monthly basis for attorney fees. The respondent shall pay these amounts until June 17, 2028. Thereafter, the respondent shall pay the

[1] **Appeal Rights**: See the yellow enclosure for the time limit and procedures for obtaining judicial review of this decision. If you seek judicial review, you **must** name the following as defendants in the summons and the complaint: the Labor and Industry Review Commission, and all other parties in the caption of this decision or order (the boxed section above). Appeal rights and answers to frequently asked questions about appealing a worker's compensation decision to circuit court are also available on the commission's website, http://lirc.wisconsin.gov.

[2] See the attached calculation sheets, which take into account all payments previously made by the respondent, including payments made since the administrative law judge's decision. Questions regarding the computations should be directed to the Department of Workforce Development.

applicant the sum of one thousand, two hundred ten dollars and twenty-one cents ($1,210.21) per month until her death.

Jurisdiction is reserved for such further findings, orders, and awards as may be necessary consistent with this order.

By the Commission:

/s/
Michael H. Gillick, Chairperson

/s/
Georgia E. Maxwell, Commissioner

/s/
Marilyn Townsend, Commissioner

Procedural Posture

The applicant filed a hearing application dated August 13, 2018, alleging that she sustained an injury on August 15, 2006, when her foot was run over by a hospital bed.[3] She noted that the foot claim was conceded with 50% permanent partial disability paid. She was now alleging that due to an altered gait, she also had sustained low back pain with radiculopathy; degenerative disc disease; a spinal cord stimulator implant; chronic regional pain syndrome (CRPS) of the left foot; and "psych issues" related to the injury. The employer and insurer (collectively, the respondent) conceded jurisdictional facts and an average weekly wage of $418.91. The respondent also conceded that the applicant sustained a compensable injury on August 15, 2006, to her left foot and toe and conceded that the applicant had CRPS as a scheduled injury to her left lower leg at the ankle. The respondent disputed whether the CRPS resulted in a non-scheduled injury to the body as a whole and denied that further payments were due. The applicant also became eligible for Social Security Disability benefits in October 2013, and the respondent claimed a retroactive offset of those benefits.

An administrative law judge for the Department of Administration, Division of Hearings and Appeals, Office of Worker's Compensation Hearings, heard the matter on January 24, 2023, and April 12, 2023, and issued a decision and interlocutory order dated July 11, 2023, finding that the applicant met her burden to establish that the 2006 work injury caused additional disability to her left lower extremity and lumbar spine from CRPS. The administrative law judge found that the accident directly caused the applicant's ongoing lumbar, CRPS, and left lower extremity complaints, but she

[3] According to the administrative law judge's decision, a hearing was held on the traumatic foot injury on March 30, 2010, and Administrative Law Judge William Phillips, Jr. issued a finding of fact order dated May 27, 2010, awarding primary compensation and medical expense benefits to the applicant. The order remained interlocutory pending additional treatment.

disagreed that the applicant sustained 5% permanent partial disability for the placement of a spinal cord stimulator into the thoracic spine and buttocks, given that the records did not support a thoracic spine injury. The administrative law judge found that the applicant sustained a 5% permanent partial disability for the lumbar pain and radiculopathy. The administrative law judge also found that the applicant met her burden to establish that the accident caused the applicant's additional mental disability. She credited the applicant's doctor, Dr. Patel, regarding the extent of the applicant's disabilities and found that the applicant sustained a 10% permanent partial disability for both the CRPS and associated depression. For the applicant's loss of earning capacity claim, the administrative law judge adopted the light duty restrictions described in the April 4, 2019, FCE; but she credited the respondent's vocational expert, Barbara Lemke, in determining the type of jobs the applicant could return to with her restrictions. The applicant's testimony was not found persuasive that she would be unable to perform certain jobs due to her mental mood changes, especially without any medical or vocational opinion that her psychological condition served as an additional job restriction. The administrative law judge found the applicant sustained a 20% loss of earning capacity (into which the functional rating of 15% permanent partial disability was merged), and awarded benefits. The respondent did not appeal the decision, but the applicant appealed the loss of earning capacity award and argues that the commission should find that she is permanently totally disabled.

The issue is the extent of the applicant's disability from the work injury, i.e., whether the applicant is permanently totally disabled as a result of the work injury. The commission has considered the petition and the positions of the parties, and it has independently reviewed the evidence. Based on its independent *de novo* review, the commission affirms in part and reverses in part the decision of the administrative law judge, and makes the following:

Findings of Fact and Conclusions of Law

The Applicant's Work History, Injury, and Medical Treatment

1. The applicant was born in Macedonia and attended school there until the 8th grade. Her first language is Albanian. In Albania, she worked on her parents' farm. She moved to the United States in 1983 with her husband. She did not take any further education when she came to the U.S., and she speaks Albanian at home. She has three children, and they help her from time to time with communication.[4]

2. After about three years in the U.S., the applicant began working for Sky Chef, where she prepared foods for airlines. There were a number of Albanian-speaking employees at Sky Chef, and Albanian was the language used most often. She worked for Sky Chef for about 20 years, until the business shut down. The applicant next worked for BD Medical for 6 months filling up syringes. Employees there spoke Albanian. The applicant left this work in 2006 to go to work for the employer for more money. The applicant worked as a transporter

[4] Transcript of Proceedings dated January 24, 2023, (Tr. I) , pp. 42-45.

for the employer, transferring wheelchairs and "big boy" beds. She had no problem performing this work 8 hours per day on her feet.[5]

3. On August 15, 2006, the applicant was injured when someone ran over her left foot with one of the heavy metal big boy beds with a patient on it.[6] The applicant sought medical treatment and eventually had two surgeries on her foot.[7] According to the applicant, before the surgeries, the pain was so bad she wanted to pull her hair off. After the surgeries, she had better control over her pain.[8] On November 16, 2007, Dr. Daniel Guehlstorf, M.D., assessed a 3% permanent partial disability at the level of the first metacarpophalangeal joint of the left foot due to pain.[9] The applicant was able to return to light duty work for 6 months, but she was then terminated because they did not have work for her.[10]

4. As is relevant to the applicant's mental ability, restrictions, and ability to work, the medical records note that the applicant treated three times with Dr. Kelly Caldwell-Chor, M.D., on July 2, 2007; February 13, 2008; and February 29, 2008. Dr. Caldwell-Chor diagnosed chest pain and tightness, noting the applicant described these symptoms as worse with anger or stress. She advised the applicant regarding counseling, deep breathing exercises, and biofeedback. The applicant also had tension headaches. By February 2008, the applicant's symptoms of anxiety were worse, and Dr. Caldwell-Chor diagnosed anxiety with depression, likely secondary to medical and legal issues. The applicant was given a prescription for clonazepam. The applicant asked for a referral to pain management for her foot pain.[11] According to the applicant, she would have hurt herself due to her depression at this time.[12]

5. On May 13, 2008, the applicant had a functional capacity evaluation (FCE) that found she was most consistent with a light physical demand level. Her job at the time of the injury was medium duty, so she was no longer able to do this.[13]

6. The applicant had psychotherapy treatment for depression in 2009.[14] The applicant also treated with Dr. Sanjay Sharma, M.D., in Advanced Pain Management in 2009. On February 26, 2009, Dr. Sharma noted that the applicant seemed clinically depressed.[15] From 2009 through 2013, the applicant treated at Advanced Pain Management with Dr. Sharma and a nurse practitioner. Dr. Sharma noted on February 26, 2009, that the applicant was depressed and felt hopeless that she would have to undergo pain throughout her life. On December 5, 2011, a nurse practitioner noted the applicant was working

[5] Tr. I, pp. 45-48.
[6] Tr. I, pp. 49-50.
[7] Transcript of Proceedings dated April 12, 2023 (Tr. II), pp. 15-16.
[8] Tr. II, p. 17.
[9] Exhibit (Ex.) N.
[10] Ex. J; Tr. I, pp. 58-59; Tr. II, p. 94.
[11] Ex. R.
[12] Tr. I, p. 61.
[13] Ex. S.
[14] Ex. T.
[15] Ex. U.

without formal restrictions, primarily seated work, and she elevated her left lower extremity as needed.[16]

7. In 2010, the applicant again worked for BD Medical through a family connection. The applicant was to sit the entire time, but she could elevate her leg to help with pain. Her coworkers would call her crazy, and she became unstable and emotional to the point where she was crying all the time. She did not want to exist anymore, and she pulled at her hair. The applicant indicated that she could not handle the job mentally, and her doctor told her to leave that job.[17] The applicant last worked for BD Medical on April 27, 2013. This was the last time she worked anywhere.[18]

8. On January 15, 2013, Dr. Victoria L. Yorke, M.D., included depression in her assessment of the applicant. Dr. Yorke noted that she talked with the applicant about her job, and the applicant indicated that it "felt like a prison."[19] On March 27, 2013, a nurse practitioner note that the applicant was working without formal restrictions, "primarily seated work and she elevates her LLE as needed. She reports that her work can't accommodate her restrictions of periodic break with left foot elevation at work and modification of left shoe with open toes to accommodate for foot swelling with prolonged standing or sitting."[20]

9. In 2013 and 2014, the applicant treated with Dr. Michael Kokat, M.D., at Advanced Foot & Ankle of Wisconsin, LLC. On April 27, 2013, Dr. Kokat performed a first metatarsophalangeal joint arthrodesis. On May 9, 2014, Dr. Kokat noted the applicant got sick after the last series of injections and did not want to do any more. She would continue physical therapy. He noted, "This patient is certainly 50% disabled secondary to her multiple surgeries on her left foot. An additional 50% can be attributed to anxiety and depression associated with the surgeries and workplace injury that was not corrected or diagnosed for many years after the injury. Dr. Yorke is seeing the patient for these particular ailments." He wanted to send the applicant for an FCE. He noted that he was waiting for a return phone call from Dr. Yorke regarding the applicant's additional 50% of possible disability secondary to anxiety and depression. On May 30, 2014, Dr. Kokat indicated that he left a message for Dr. Yorke to speak about her disability. He stated, "She certainly is 50% disabled from a foot standpoint. Additional anxiety and depression does incur additional disability and Dr. Yorke will need to determine this." He still did not have any assessment of additional disability for anxiety or depression by September and October 2014. By January 30, 2015, Dr. Kokat stated that he thought the applicant needed an FCE, and that he felt she was disabled in the lower extremity by 50%.[21] The applicant indicated that she had a conversation with Dr. Kokat, who told her

[16] Ex. KK.
[17] Tr. II, pp. 8-14.
[18] Tr. II, p. 64.
[19] Ex. 10.
[20] Ex. 7.
[21] Ex. BB.

that due to the pain and mental health, she was unable to work.[22] There is no record of a finding of permanent disability for depression by Dr. Yorke.

10. On August 21, 2018, Dr. Mary M. Papandria, Ph.D., performed a behavioral health evaluation. Dr. Papandria noted that the applicant had been diagnosed with psychological and behavioral factors associated with disorder and CRPS. The course of pain was continuous but varied in intensity. Dr. Papandria assessed the applicant with moderately severe depression and noted the applicant had suicidal ideation without a plan. Dr. Papandria assessed a pain disorder with related psychological factors. She noted the applicant was having a hard time coping with chronic toe and leg pain. She was very anxious and not adjusting to her condition. They agreed to bi-weekly sessions for anxiety, depression, and pain.[23] The applicant thereafter had psychotherapy with Dr. Papandria.

11. On May 23, 2018, Dr. Nileshkumar Patel, M.D., began treating the applicant in Advanced Pain Management for her left foot and leg pain. By July, Dr. Patel noted the lumbar sympathetic blocks helped about 60%. On October 26, 2018, Dr. Patel noted that the CRPS directly resulted from her work injury. The applicant was at the best she had been in years in terms of pain and function. He noted the applicant would need periodic sympathetic nerve blocks for her CRPS, as well as medications, and battery replacement for the spinal stimulator every 5 years. He also indicated that for her low back and radiculopathy, she would need 1-2 epidural steroid injections per year, along with stretching, nonnarcotic medications, and anti-inflammatories, muscle relaxants, and surface ointments.[24] On November 16, 2018, Dr. Patel noted the applicant had emotional distress related to the injury with poor coping skills, which was being addressed by a chronic pain psychologist. He noted that the pain from her work injury was at a healing plateau and "she should get FCE to determine if she can return to work and with what limitations. After the FCE, vocational rehabilitation is an option. **Her final work restrictions per FCE**."[25] He listed the assignment of partial disability, and then he noted, "Further as there has been severe psychological co morbidities associated with the pain condition and she has had associated depression, anxiety, which has improved tremendously with the help of Dr. Papandria in Chronic pain psychology."

12. The applicant had an FCE at Athletico Physical Therapy on April 4, 2019.[26] The FCE noted that the applicant's effort was consistent and her subjective complaints were in proportion with objective findings of discomfort. There were no significant exaggerated pain behaviors. As a result of the FCE, the applicant was found to have demonstrative capabilities and functional tolerances to function within at least the light physical demand level, with the heaviest weight

[22] Tr. II, p. 66.
[23] Exs. DD, 14.
[24] The applicant estimated that she had received 50 to 60 injections in her back and foot. Tr. II, p. 67.
[25] Exs. DD, Y; emphasis added.
[26] Ex. GG.

she should lift being 27 pounds. The overall test results were considered a valid representation of the applicant's functional abilities based on her consistent effort. Under the recommendations, the FCE noted, "At this time she does not appear to be functionally employable due to the apparent severity and irritability of her symptoms during work simulated activities as well as due to safety concerns in regards to the reported numbness and loss of control/observed instability of the involved LLE." According to the applicant, she gave her best effort "and more" for the FCE.[27] She does not feel she could perform as well now as she did on the FCE because of the pain. At the time of the FCE, she was under the influence of an injection. She agreed with the FCE that whatever she does, she needs to hold onto something, such as going up and down the stairs or other activities around the house.[28]

13. On April 29, 2019, the applicant was treated by Dr. Trang Le, D.O., for anxiety and depression. Dr. Le diagnosed a current severe episode of major depressive disorder without psychotic features, and anxiety. She was to continue her medications and look into counseling. The applicant continued to treat with Dr. Le into 2022. On May 27, 2020, Dr. Le noted the applicant's anxiety was worse because she had to stay inside due to the pandemic. She did not want to increase her medication. On May 3, 2022, Dr. Le indicated the applicant had methods she used to calm herself down when she gets upset. She did not want to increase medication, but she was going to start talk therapy.

Other Evidence of the Applicant's Abilities and Limitations

14. The applicant's daughter, Zamira Akisovska, sees the applicant daily. Prior to the work injury, the applicant was an impeccable housekeeper, keeping everything in line and in order. She was the first one up and the last one to bed, and she had a strong work ethic. They have a large extended family, and the applicant would do various activities with family members, including attending weddings and wearing high heels. The applicant had no physical limitations before the work incident.[29] After the work injury, the applicant was not the same. Her foot swells weekly, and she gets painful ingrown toenails.[30] She also gets swelling in her back. She is also irritable and very emotional. She is now the first to bed and last to rise. She still goes to weddings and does some dancing, but she has to sit down. If they go to the zoo, she uses a wheelchair and is pushed around. The applicant still limps, and she wears special shoes or sandals. Ms. Akisovska's brother and sister-in-law live with her parents and take care of the house now. According to Ms. Akisovska, she has witnessed the applicant able to walk about 15 minutes at a time without assistance.[31]

15. The respondent presented evidence of surveillance of the applicant. Exhibit 20 has several videos of times the applicant was observed outside her home and in

[27] Tr. II, p. 33.
[28] Tr. II, pp. 47, 72, 74.
[29] Tr. I, pp. 17-22, 36.
[30] Exhibits MM and NN show pictures of the applicant's swollen leg.
[31] Tr. I, pp. 27-38.

her yard. The applicant was surveilled on July 13 and 15, August 5, 7, and 13, and September 1 and 3, 2021. The total time shown as surveilled for these 7 days was less than 2 hours. The "highlights" video from the 7 days of surveillance is about 9 minutes, and it did not include any video from the surveillance in July. The highlights show the applicant walking, bending at the waist, watering plants with a hose, hosing a garbage can, briefly carrying her granddaughter, and putting the granddaughter in and taking her out of a car on two occasions, briefly shopping, and doing light yard work. According to the applicant, the videos were taken at the time when she had had injections. She also put the foot cream on to numb it so it didn't hurt as much.[32]

16. As of the date of the first hearing, the applicant indicated that she was using multiple creams and ice every day to manage her leg and back pain. She has hot patches, ice packs, Lidocaine, and sprays. She also does manual massage and uses a TENS unit.[33] At the second hearing, she indicated that she still has nerve pain every single time she puts her foot down, and her foot is cold and numb. She still has a limp, but it is not as bad as before the surgeries.[34] The spinal cord stimulator evens out the pain in her lower back and the pain that was shooting down her leg to her foot. At its highest, this pain is now 7/10. The pain in her back and foot disrupt her sleep. The nerve blocks help for about 6 months, but then she has pain again; they take care of most of the pain, and she can walk somewhat normally.[35] The most she feels she can walk is about two blocks, and she feels she can stand about 10 minutes. She can walk for about 2 hours with breaks.[36] When she gets an injection, she can walk for about 4 or 5 hours; she gets the injections three times per year. When she walks, her foot swells. Her doctor recommended that she spend as much time as possible in her garden. She has a stool there in case she needs to sit down.[37] She is not working and believes she cannot work because of the pain.[38] She has been on SSDI since October 1, 2013.[39] She testified that she had several doctors tell her that she should not return to work.[40]

The Applicant's Medical Opinions

17. The applicant submitted several WKC-16-Bs, some of which dealt only with causation regarding the applicant's foot injury.[41] The first WKC-16-Bs dealt with the applicant's injury prior to the first hearing. In a WKC-16-B from Dr. Kelly Caldwell-Chor, M.D., dated September 27, 2007, Dr. Caldwell-Chor noted that as a result of her foot injury, the applicant began experiencing increased stress and anxiety attacks, chest tightness, and shortness of breath. She opined that

[32] Tr. II, p. 77.
[33] Tr. I, pp. 66-67.
[34] Tr. II, pp. 18, 20.
[35] Tr. II, pp. 27-30.
[36] Tr. II, p. 39.
[37] Tr. II, p. 42, 45-46, 51.
[38] Tr. II, p. 44.
[39] Tr. II, p. 65.
[40] Tr. II, pp. 97-98.
[41] Exs. A, C, D.

the stress was directly caused by the work incident and was related to the original injury contributing to her anxiety symptoms. The applicant was released to return to work as of July 3, 2007, and was to try to minimize stress. No other limitations were listed. Dr. Caldwell-Chor opined that the applicant had not sustained any permanent disability as a result of her anxiety alone; she could not speak as to the disability related to the foot injury.[42] In a WKC-16-B dated June 9, 2009, Dr. Sanjay Sharma, M.D., opined as to causation for the foot injury. In referring to any work limitations, he noted "already back."[43] A similar note as to work limitations was written by Dr. Daniel Guehlstorf, M.D., in his WKC-16-B dated November 14, 2007.[44] In a WKC-16-B dated February 10, 2010, Dr. Jerome Lerner, M.D., opined the work injury caused the fracture of the left foot and CRPS of the left foot. He opined that the applicant had sustained a 5% permanent partial disability at the left ankle.[45]

18. For the alleged injuries subsequent to the first hearing, the applicant also submitted several WKC-16-Bs. In a WKC-16-B dated August 13, 2018, Dr. Michael Kokat, DPM, opined that the applicant had left-sided lumbar radiculopathy, lumbar degenerative disc disease, and CRPS that was caused by the work incident. He assessed a 50% permanent partial disability to the left foot, but deferred assessment for the back injury.[46]

19. In a WKC-16-B dated November 16, 2018, Dr. Patel diagnosed left-sided lumbar radiculopathy, lumbar degenerative disc disease, and CRPS. He noted that the applicant had developed mid and low back pain due to difficulty walking and an altered gait. He also noted that the applicant had undergone placement of a spinal cord stimulator for the CRPS. In the box to note work limitations, Dr. Patel wrote, "Not likely to return to work without vocational rehabilitation." Dr. Patel assessed 5% permanent partial disability to the body as a whole for lumbar pain and radiculopathy at L4-5 and L5-S1 (2.5% each); 10% for the CRPS and associated depression; and a **left foot rating per Dr. Kokat**. He indicated that the applicant's prognosis was guarded. Dr. Patel attached his medical notes from October 26, 2018, and November 16, 2018. In those notes, he noted that the applicant was at the best she had been in years in terms of pain and function. He noted the applicant would need periodic sympathetic nerve blocks for her CRPS, as well as medications, and battery replacement for the spinal stimulator every 5 years. He also indicated that for her low back and radiculopathy, she would need 1-2 epidural steroid injections per year, along with stretching, nonnarcotic medications, and anti-inflammatories, muscle relaxants, and surface ointments. On November 16, 2018, Dr. Patel had noted the applicant had emotional distress related to the injury with poor coping skills, which was being addressed by a chronic pain psychologist. He noted that the pain from her work injury was at a healing plateau and "she should get FCE to determine if

[42] Ex. B.
[43] Ex. C.
[44] Ex. D.
[45] Ex. E.
[46] Ex. X.

she can return to work and with what limitations. After the FCE, vocational rehabilitation is an option. **Her final work restrictions per FCE**."[47] He listed the assignment of partial disability, and then he noted, "Further as there has been severe psychological co morbidities associated with the pain condition and she has had associated depression, anxiety, which has improved tremendously with the help of Dr. Papandria in Chronic pain psychology."

20. The applicant also submitted a WKC-16-B from Dr. David Coran, M.D., dated August 15, 2018. Dr. Coran assessed a 5% permanent partial disability to the body as a whole due to the spinal cord stimulator placement in the thoracic spine and the generator in the buttocks. He indicated the applicant had temporary restrictions of lifting 5 pounds and no repetitive bending, but for permanent limitations, he stated, "Will need FCE to determine."[48]

21. In a report attached to a WKC-16-B dated July 7, 2022, Dr. Kokat opined that CRPS of the lower extremity is often treated with a spinal cord stimulator. He disagreed with Dr. O'Brien's opinions as to the necessity of the treatment. He stated, "Medicine is both an art and a science and although examinant may appear to be fit to return to work, there is no guarantee that he/she will not be injured or sustain additional injuries once he/she returns to work."[49]

The Respondent's Medical Opinions

22. The respondent also submitted several medical reports and WKC-16-Bs. In a report and WKC-16-B by Dr. Stephen E. Robbins, M.D., dated August 18, 2015, Dr. Robbins opined that the applicant did not sustain a lumbar injury when she fractured her foot.[50] Dr. Robbins later examined the applicant and prepared a report and WKC-16-B dated August 5, 2020.[51] In 2020, Dr. Robbins opined that the applicant's back condition was not related to her foot surgery. He noted that she did walk with a limp, but he opined that this would not predispose her to having back or radicular-type symptoms. Regardless of causation, Dr. Robbins opined that the applicant had no permanent disability to the spine, and that the applicant had no functional impairment and was capable of full-time work without restrictions.

23. In a report and WKC-16-B by Dr. Timothy S. O'Brien, M.D., dated March 28, 2016, Dr. O'Brien opined the applicant did not have CRPS, and he found that the foot surgeries were not necessary to treat the work injury, but were to treat a personal condition. Based on her surgeries, he opined that she sustained 50% disability at the great toe. He declined to provide an opinion as to the applicant's anxiety or depression, but he did stated that he had performed over 9,000 surgeries as a foot and ankle orthopedic surgeon for over 25 years, and none of

[47] Ex. Y; emphasis added.
[48] Ex. Z.
[49] Ex. LL.
[50] Ex. 1.
[51] Ex. 12.

them had developed anxiety or depression because of a foot condition.[52] In a supplemental report and WKC-16-B dated October 10, 2016, Dr. O'Brien opined that the applicant had sustained no further disability due to her foot injury and that she did not need any permanent restrictions. He also opined that the spinal cord stimulator was not necessary to treat the work injury, and he questioned the validity of the CRPS diagnosis. He stated that he had treated tens of thousands of patients with lower extremity injuries and he had never seen a patient develop CRPS.[53]

24. Dr. O'Brien subsequently performed an examination and prepared a report and WKC-16-B darted September 13, 2017.[54] At that time, Dr. O'Brien noted that the applicant stated she was depressed because of the work injury. She also stated her leg was swollen, cold, and blue, but Dr. O'Brien did not observe this with his examination. Dr. O'Brien continued to disagree with the assessment of 5% permanent partial disability awarded by DWD, and he asserted that the applicant was never disabled. He felt she could work with no restrictions and that there was no clinical, orthopedic, or anatomic reason to restrict her activities. Regardless of causation, he opined that she did not have any disability. He found her musculoskeletal exam was normal for her age, and he opined that the applicant required no further medical treatment as a result of the injury. On January 5, 2018, Dr. O'Brien prepared a supplemental report in which he opined that the spinal cord stimulator was not necessary to treat the work injury.[55]

25. The respondent also submitted a psychological report and WKC-16-B dated June 15, 2017, from Dr. N. Timothy Lynch, Ph.D., ABPP.[56] Dr. Lynch examined the applicant, did diagnostic testing, and reviewed her medical records. Dr. Lynch opined that the applicant did not require any additional treatment as a result of the work injury, she did not require any temporary or permanent restrictions, and she did not have any permanent partial disability beyond the 5% already assigned. Dr. Lynch did note several psychological stressors the applicant had that were unrelated to her work, including issues with her family. Dr. Lynch diagnosed adjustment reaction to multiple stressors, with nonorganic findings. He opined that her work exposure was not the cause of her psychological condition. Her severe family stress was cited, noting that it was so distressing that she once left the country for three months and improved being away from family. Dr. Lynch also opined that the applicant's work did not aggravate a preexisting condition beyond its normal progression, and he noted there was no evidence of depression/anxiety at the exam. Regardless of causation, he assigned no permanent disability for a psychological condition. He did not assign any limitations, and he noted that her treating psychologist did

[52] Ex. 2.
[53] Ex. 3.
[54] Ex. 4.
[55] Ex. 5.
[56] Ex. 18.

not either. Dr. Lynch also opined that the applicant needed no further treatment for a psychological condition.

The Vocational Expert Reports

26. The applicant submitted a Vocational Expert Report from Timothy Riley, MS, LPC, CRC, dated November 19, 2019.[57] Mr. Riley interviewed the applicant and obtained her social and work history. He also reviewed the medical opinions and the 2019 FCE. Mr. Riley noted the applicant was born in Macedonia and grew up on a family farm. She has a permanent green card, but she has been receiving SSDI benefits. He reviewed her work history, starting with working for Sky Chef as a food preparer, where she worked with several other Albanians. Most recently, the applicant had worked as a hand packager at BD Medical where she was able to sit down and elevate her foot as needed. "She described being in severe pain at work, and at times, was out on medical leave." She last worked in this position in 2013. Mr. Riley opined that her recent work was unskilled in nature, so she had no transferable skills. The work in food preparation was too remote in time to result in transferable skills. Mr. Riley considered that the applicant was a 55-year-old individual with 8 grades of education in Macedonia, with no high school degree and no transferable skills. He found that she lacked English writing and spelling skills. He determined that her preinjury earning capacity was between $13 and $15 per hour. Based on the opinion of Dr. Patel and Dr. Coran that the applicant would need an FCE to determine restrictions, and based on the findings in the FCE, which noted that she was essentially unemployable, Mr. Riley opined that the applicant was so limited as to be available for odd-lot employment only. Therefore, he concluded that the applicant had sustained a total loss of earning capacity.

27. The respondent submitted a Vocational Expert Report from Barbara K. Lemke, MS, CRC, LPC, dated October 18, 2021.[58] Ms. Lemke reviewed the applicant's medical and DVR records, and she interviewed the applicant for her personal and work history and current condition. Ms. Lemke noted the applicant was born in Macedonia and attended school through the 8th grade. She had recently started the citizenship process, but she was unable to read or write English. Ms. Lemke reviewed the applicant's work history, starting with her employment with Sky Chef in 1986. The applicant did not believe she had been assigned permanent restrictions for her mental condition. The applicant indicated that every day was different with the pain. "Some days she stays in her bedroom the entire day when she has a lot of pain." The applicant was not currently looking for work and felt incapable of working in any capacity. The applicant estimated that she could walk less than one city block before needing to stop and rest. She had difficulty climbing stairs and reported poor balance. Ms. Lemke reviewed the medical opinions as to disability and restrictions from Dr. O'Brien, Dr. Guehlstorf, Dr. Robbins, Dr. Lynch, Dr. Coran, and Dr. Patel, as well as the FCE. In reviewing the DVR records, Ms. Lemke noted that finding work for the

[57] Ex. AA.
[58] Ex. 17.

applicant was difficult because she required seated work and is unable to read English.

28. In evaluating the applicant's vocational prospects, Ms. Lemke considered that the applicant was 57 years old and had not worked since 2010. She had been receiving SSDI benefits since 2016. Ms. Lemke calculated the applicant's preinjury earning capacity as $14.63, the 2020 average hourly wage for orderlies. Ms. Lemke opined that the applicant would have no loss of earning capacity under the opinions of Dr. O'Brien, Dr. Robbins, or Dr. Lynch. Dr. Coran did provide work restrictions relative to the spinal cord stimulator, and given that the FCE found the applicant could do light duty work, her return to work options would include jobs in the service industry, such as food preparation worker, attendant, and housekeeper. Cash handling positions would also be an option, such as retail salesclerk, cashier, and parking lot attendant. The mean wage for those positions would be $12.03/hour, giving a loss of earning capacity of 18%. As a result, given the restrictions of Dr. Coran for the spinal cord stimulator and Dr. Patel relative to the lumbar spinal condition, Ms. Lemke opined that the applicant sustained a loss of earning capacity of 15% to 20%.

29. At the hearing, the applicant was asked about the jobs that Ms. Lemke indicated she could do. The applicant did not feel she could do stocker or order filling jobs because of her health now. She felt she was mentally not stable enough to be a ticket taker, and she thought she could not be a cashier anymore due to her pain and mood changes due to the pain. When she has pain in her foot, she locks herself away in her bedroom to calm down.[59]

30. The applicant can only perform those jobs so limited in quality, dependability, and quantity that a reasonably stable market does not exist, considering the factors in Wis. Admin. Code § DWD 80.34. The applicant's age, lack of ability to read or write English, her history of working where she could speak Albanian, her prior unsuccessful attempt at seeking employment through DVR, and her physical limitations and safety risks are relevant facts that show there are very limited circumstances under which the applicant can successfully work. This is regardless of any mental difficulties or limitations the applicant believes she may have in working. Accordingly, the administrative law judge's decision is reversed as to the finding of the applicant's loss of earning capacity, and the commission finds the applicant is permanently totally disabled on an odd-lot basis.[60]

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[59] Tr. II, pp. 52-54.

[60] The commission reverses the administrative law judge's decision as to the extent of the applicant's loss of earning capacity. The commission consulted with the administrative law judge who held the hearing in this case to obtain her impressions as to the credibility of the witnesses, based on their demeanor, which were a factor in her decision. *Braun v. Indus. Comm'n*, 36 Wis. 2d 48, 57, 153 N.W.2d 81 (1967); *Transamerica Ins. Co. v. DILHR*, 54 Wis. 2d 272, 282, 195 N.W.2d 656 (1972). In response, the administrative law judge indicated: "As discussed in my order, with respect to her ability to perform work, I did not find it credible that she was not capable of working at all. I found she could do more work

The applicant, who was born in Macedonia in 1964, worked as a transporter for the employer. She was injured when she was transporting a "big boy" bed with a patient on it, and her coworker ran over her foot with the bed. She sustained a fracture of her foot and eventually had two surgeries. The traumatic injury went to a hearing in 2010, and the administrative law judge at that time awarded primary compensation and medical expenses in an interlocutory order. In 2018, the applicant filed another hearing application claiming further injuries. She also claimed that as a result of the work injuries, she was permanently totally disabled. The administrative law judge found that the CRPS and lumbar spine complaints were work-related, and that the accident also caused the applicant's mental disability. She awarded 5% permanent partial disability for lumbar pain and radiculopathy, and 10% permanent partial disability for the CRPS and associated depression. She credited the respondent's expert that the applicant sustained a 20% loss of earning capacity (into which the functional rating of 15% permanent partial disability was merged). The respondent did not appeal the administrative law judge's decision. However, the applicant appealed the loss of earning capacity award and argues that the commission should find that she is permanently totally disabled.

Analysis

The issue is the extent of the applicant's disability from the work injury, i.e., whether the applicant is permanently totally disabled as a result of the work injury. The applicant has the burden of proving beyond a legitimate doubt all the facts necessary to establish a claim for compensation.[61] The commission must deny compensation if it has a legitimate doubt regarding the facts necessary to establish a claim, but not every doubt is automatically legitimate or sufficient to deny compensation.[62] Legitimate doubt must arise from contradictions and inconsistencies in the evidence, not simply from intuition.[63]

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than she testified to, especially after reviewing the surveillance showing her comfortably performing yard work after she testified that she had received an injection. Further, in the hearing itself, I did note that the applicant became very angry and had a striking change in demeanor on cross examination, especially when she was asked questions about her previous employer at the start of cross examination, her ability to perform light duty work as discussed in the FCE, and her not having any restrictions at BD medical. While her demeanor showed she would certainly be unhappy in certain types of customer service positions, in the absence of a medical opinion that her psychological condition was an additional job restriction, I did not find her excluded from those types of positions." As the commission has found, the video showed only a brief few minutes over several days that the applicant could perform some activities. The videos do not show that the applicant was capable of doing work beyond the limitations found in the FCE. The fact that she could do some work is not the only relevant factor to whether she proved her *prima facie* case that she was disabled on an odd-lot basis. In reaching its decision, the commission has not relied upon any alleged inability to work due to the mental injury. Rather, based on the applicant's physical limitations, as well as the other relevant factors of her age, education, limited training, inability to read and write English, no transferable job skills, and no computer skills, the commission has found that the applicant met her *prima facie* case to show she is employable only on an odd-lot basis; and the respondent has failed to show that there were jobs the applicant could do, given all of these relevant factors.

[61] *Leist v. LIRC,* 183 Wis. 2d 450, 457, 515 N.W.2d 268 (1994); *Erickson v. DILHR*, 49 Wis. 2d 114, 118, 181 N.W.2d 495 (1970).

[62] *Erickson, supra,* at 119*; Leist, supra*, at 457.

[63] *Erickson, supra; Richardson v. Indus. Comm'n,* 1 Wis. 2d 393, 396-97, 84 N.W.2d 98 (1957).

The Parties' Arguments

The applicant argues that several factors in Wis. Admin. Code § DWD 80.34 support a finding that she is only employable on an odd lot basis, but the administrative law judge did not consider these factors. The applicant asserts that she is 60 years old. She moved to the United States from Albania when she was 19 years old. She attended school until 8th grade in Macedonia, and her original language is Albanian. She only learned English through her work, and she believes her English skills have declined since she has not been working. Before coming to the United States, she only worked on her family farm. Her work in the U.S. involved preparing meals for Sky Chef for 20 years, where she most frequently spoke Albanian with her coworkers. Thus, her exposure to other sources of English were limited until she was 40 years old. Even at the hearing, there were a number of breakdowns in communication. Though she had additional work experience, that work experience did not provide transferable skills. Also, although she did apply for assistance with DVR, they determined it was difficult to find work for the applicant. This was consistent with the April 2019 FCE finding that she did not appear to be functionally employable due to the apparent severity and irritability of her symptoms during work activities. To the extent the respondent argues that there was no foundation for the FCE restrictions used as a basis for the loss of earning capacity claim, the applicant argues that the respondent waived its evidentiary objections when the administrative law judge's decision became final as against the respondent on that; and in any event, Dr. Patel and Dr. Coran noted that an FCE would be needed to determine the restrictions. On November 6, 2018, Dr. Patel noted that her final work restrictions were "per FCE," and that note was attached to his WKC-16-B. As a certified medical record, the FCE is considered *prima facie* evidence of the matters contained therein. The FCE was also relied upon by both vocational experts.

Moreover, the applicant notes that Dr. Patel also handwrote on his WKC-16-B that she was not likely to return to work without vocational rehabilitation. Dr. Patel did not assign different restrictions to CRPS and depression because it is impossible to do so, according to the applicant, as they are inextricably intertwined. Considering the severity of pain involved is another pertinent factor. The amount of pain it takes to cause a permanent psychological condition must be severe and disabling. Based on all of these factors, along with her physical restrictions, the applicant argues that the evidence weighs in favor of a finding of an odd lot permanent total disability. Though the respondent asserts that she failed to meet her burden to show an ascertainable disability due to the unscheduled injury, the applicant argues that Dr. Patel provided the permanency ratings applicable to her unscheduled injuries and Dr. Kokat provided the rating applicable to the scheduled foot injury. According to the applicant, the records show that there is a significant component to the unscheduled injury, including her lumbar injury, her CRPS, and depression.

The applicant further argues that the commission should credit Mr. Riley's opinions on loss of earning capacity over those of Ms. Lemke. Mr. Riley considered the psychological effect that the pain has on the applicant as well as the FCE. The applicant asserts that she has established a *prima face* case for "odd lot" disability, and the burden then shifts to the respondent to show there are jobs available for her. Though the administrative

law judge credited Ms. Lemke and assigned 20% loss of earning capacity, the applicant argues that the administrative law judge failed to consider the occasional limitations applied to standing/walking, and she did not consider the recommendations on page 1 of the FCE that the applicant did not appear employable. Ms. Lemke's report is largely based on hand-chosen physical limitations as opposed to the recommendations of the FCE evaluator, and she did not consider the severity of the applicant's pain. The applicant asserts that the jobs that Ms. Lemke said the applicant could do as a stocker or order filler were untenable as the administrative law judge disregarded those when calculating loss of earning capacity. The other jobs, such as an usher, a lobby attendant, a dressing room attendant, or a food preparation worker all require one to be on their feet throughout the day, which the applicant cannot do. The applicant has never worked as a money handler and does not have the skills to run a cash register, especially without the ability to read English well. Ms. Lemke also did not indicate the number of jobs available in the marketplace for a 60-year-old person with light duty restrictions, and she did not identify one job the applicant could do with her various disabilities. Moreover, Ms. Lemke failed to consider the prior unsuccessful job search by DVR or the applicant's self-initiated attempt to return to work.

Finally, though the administrative law judge relied on the surveillance videos, the applicant argues that the videos do not attempt to simulate actual work duties, as was done in the FCE. She does engage in gardening activities as recommended by her psychotherapist. She has good days and bad days, which is supported by the medical records showing her pain would be increased or reduced. According to the applicant, the video does not take anything away from her various serious and significant injury.

The respondent did not appeal the decision, and it argues that the administrative law judge's decision should be affirmed. The respondent does not dispute the findings, except for the finding that the April 2019 FCE had been endorsed by Dr. Patel and Dr. Coran. It argues that while both doctors recommended the applicant undergo an FCE, neither physician ever reviewed the results, nor did they issue a definitive statement indicating that the restrictions were reasonable or related to her scheduled versus unscheduled injuries. Therefore, the respondent argues, there is no credible evidence to support an award greater than 20% loss of earning capacity. Unless or until a competent medical expert endorses the proposed restrictions, they are mere recommendations by a physical therapist, and there is no competent medical support for permanent restrictions attributable to the claimed injury. Even the therapist's statement regarding the applicant's employability cannot be used to justify an award. The respondent refers to this as an evidentiary oversight that the applicant failed to remedy in over four years. She could have had Dr. Patel and Dr. Coran comment on the appropriateness of the FCE restrictions, but she did not. Even if she had medical support linking her claimed restrictions to the work injury, the respondent asserts that the applicant failed to establish that a clear and ascertainable portion of her alleged disability was attributable to the unscheduled injury. Nowhere in the FCE did the therapist indicate whether the recommended physical capabilities related to the scheduled left leg injury or her claimed lumbar injury. The commission is left to guess which injury necessitated the purported restrictions, which the commission cannot do,

and therefore, the respondent argues, it must deny the claim for permanent total disability.

The respondent also argues that the applicant's assertion that her psychological problems preclude her from work is not supported by medical evidence in the record. There is no evidence that her psychological problems served as a job impediment. Though the applicant suggests that any restrictions designed to lessen CRPS pain should be considered for her claimed psychological condition, the respondent argues that no physician has ever subscribed to this. Again, the applicant failed to submit a medical opinion from Dr. Patel or Dr. Coran imposing permanent restrictions for the claimed psychological disability. Finally, the respondent argues that the surveillance videos show that the applicant is far more functional and pain-free than she conveyed to any of her treating physicians and even the administrative law judge. The video shows that she can drive, walk, shop, stoop, and repeatedly bend at the waist. She could also carry her granddaughter with one arm without difficulty. Though the applicant asserted that these were days that she had utilized topical numbing agents that improved her functionality, this only shows that she can greatly improve her functional status and employability by simply using these topical agents. Finally, the respondent asserts that the applicant's lack of education and poor language skills never prevented her from getting unskilled employment in the past. The applicant's work at BD Medical Syringes went for four years, so it should not be considered a "failed attempt" at employment. Thus, according to the respondent, the applicant's claim that she be awarded increased compensation for loss of earning capacity due to her continuing complaints of pain, age, education, and language skills is not supported by the credible evidence in the record.

What is the extent of the applicant's disability from the work injury?

Under *Balczewski v. DILHR,* the supreme court explained that once an applicant demonstrates a *prima facie* case that he or she has been injured, and because of the applicant's injury, age, education, and capacity, the applicant is unable to secure any gainful employment, the burden then shifts to the employer to prove employability and that jobs do exist for the injured applicant.[64] In this case, the applicant presented medical opinions as to the extent of her disability, an FCE showing her work limitations, and the vocational expert report of Mr. Riley, who opined that she was so limited as to be available for odd-lot employment only and that she had sustained a total loss of earning capacity. The applicant had attempted to work with DVR, but was unable to find employment, and she also has been on Social Security Disability benefits since 2013. Based on this evidence, the commission finds that the applicant did prove a *prima facie* case for permanent total disability.

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[64] *See Balczewski v. DILHR,* 76 Wis. 2d 487, 493, 251 N.W.2d 797 (1977); *Beecher v. LIRC,* 2004 WI 88, ¶¶44, 273 Wis. 2d 136, 682 N.W.2d 29 ("If an injured employee can show that 'because of [the employee's] injury, age, education, and capacity, [the employee] is unable to secure any continuing and gainful employment,'" the employee has prima facie been placed in the odd-lot category, and "the burden shifts to the employer to show employability and the availability of jobs. …It is up to the employer under these circumstances to demonstrate that the injured employee is actually employable and that there are actual jobs available to [the employee]…").

The respondent argues that the restrictions in the FCE were not adopted by the applicant's doctors, and therefore, there is no foundation for the work restrictions, and the commission cannot rely on them to determine the applicant's loss of earning capacity. This argument is not persuasive. First, Dr. Patel did state that the applicant's permanent work restrictions were "per FCE." He affirmatively stated that the restrictions he was imposing were per the FCE the applicant was to undergo. The respondent could have cross-examined Dr. Patel as to this, but it chose not to. Second, the administrative law judge relied upon the FCE and specifically adopted its findings. The respondent's vocational expert, Ms. Lemke, also relied upon the restrictions determined by the FCE in concluding that the applicant was capable of light duty work and had sustained a 20% loss of earning capacity. The respondent did not appeal this part of the decision, and it has affirmatively asked the commission to affirm the administrative law judge's decision. Its argument that the decision should be affirmed and yet that the commission cannot rely on the FCE are inconsistent.

Third, there was no evidence that Dr. Patel disagreed with the FCE conclusions, and there is no evidence in the FCE itself that would question the conclusions. The FCE results showed the applicant made consistent effort and the test results were considered valid. The applicant credibly testified that she gave her best effort "and more" for the FCE. Despite finding the applicant was able to do light duty work, the report specifically noted that the applicant's symptoms were severe and irritable during the work simulated activities, and it noted that there were safety concerns regarding the numbness and loss of control and observed instability in the lower extremity. These are additional considerations in addition to the fact that the applicant could perform light duty work, and they are consistent with Dr. Patel's note on his WKC-16-B that the applicant was "Not likely to return to work without vocational rehabilitation." Based on Dr. Patel's opinion and statement that the applicant's restrictions were per the FCE, the fact that the FCE was considered valid, and the respondent's urging to affirm the administrative law judge's decision that relies on the FCE, the commission finds that the FCE represents the applicant's limitations and there is sufficient foundation to rely on it as evidence of the applicant's restrictions.

The respondent also argues that the applicant was capable of doing more than the limitations or what she told her doctors based on the video evidence. However, the commission finds that the videos do not undermine the findings of the applicant's limited physical abilities. The applicant was surveilled on 7 days. Over the course of those 7 days, the respondent presented less than 2 hours of video showing the applicant doing some yard work, etc. *Of all of the videos,* only 9 minutes were presented as "highlights." Nine minutes of activity over the course of 7 days is not persuasive that the applicant had greater abilities than the work restrictions. She credibly testified that she could do some more activities when she had had an injection and used creams. In addition, the videos do not show the applicant doing vigorous activities for those 9 minutes. She was primarily walking and watering plants. Even if she did this for the full 9 minutes, that would not exceed her work restrictions (and especially not over 7 days). Therefore, the commission finds that the videos do not show that the applicant is more functional and pain-free than she conveyed to any of her treating physicians and the administrative law judge.

Having met her burden to prove a *prima facie* case for permanent total disability, the burden then shifts to the respondent to prove that the applicant is employable and that jobs do exist for the applicant. While Ms. Lemke stated that there were types of jobs that the applicant could do, given her work restrictions and limitation to light duty work, Ms. Lemke did not show that jobs actually exist that the applicant could do, given her restrictions *and all of the other relevant factors.* The applicant is 60 years old and has an 8th grade education from Macedonia, and she does not read or write English. Her work history was primarily in situations where she spoke Albanian, and she has no training or transferable skills. Those are critical factors to consider *in addition to* her physical limitations. Ms. Lemke did not show that there were jobs that the applicant could do that exist in sufficient quality, dependability, or quantity that a reasonably stable market for them exists, given these significant factors. Also, the FCE pointed out that while the applicant was able to do certain things, her symptoms were severe and irritable during the work simulated activities, and there were safety concerns regarding the numbness and loss of control and observed instability in the lower extremity. The fact that there would be safety concerns with the applicant doing such activities was not considered by Ms. Lemke. As a result, the commission finds that the respondent failed to rebut the applicant's *prima facie* case for permanent total disability. The commission credits Mr. Riley rather than Ms. Lemke that the applicant is employable only on an odd-lot basis and is permanently totally disabled.

The commission finds that the applicant can only perform those jobs so limited in quality, dependability, and quantity that a reasonably stable market does not exist, considering the factors in Wis. Admin. Code § DWD 80.34.[65] The applicant's age, lack of ability to read or write English, her history of working where she could speak Albanian, her prior unsuccessful attempt at seeking employment through DVR, and her physical limitations and safety risks are relevant facts that show there are very limited circumstances under which the applicant can successfully work. This is regardless of any mental difficulties or limitations the applicant believes she may have in working. Accordingly, the administrative law judge's decision is affirmed in part, but it is reversed as to the finding of the applicant's loss of earning capacity, and the commission finds the applicant is permanently totally disabled.

cc: Atty. Steven G. Kmiec
Atty. Roland C. Cafaro

[65] This provides: (1) Any department determinations as to loss of earning capacity for injuries arising under s. 102.44 (2) and (3), Stats., shall take into account the effect of the injured employee's permanent physical and mental limitations resulting from the injury upon present and potential earnings in view of the following factors: (a) Age; (b) Education; (c) Training; (d) Previous work experience; (e) Previous earnings; (f) Present occupation and earnings; (g) Likelihood of future suitable occupational change; (h) Efforts to obtain suitable employment; (i) Willingness to make reasonable change in a residence to secure suitable employment; (j) Success of and willingness to participate in reasonable physical and vocational rehabilitation program; and (k) Other pertinent evidence.