SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

KATHY M. HIGHLEY, **HF No. 148, 1998/99**

Claimant,

vs. **DECISION ON REMAND**

WAL-MART STORES, INC.,

Employer,

and

NATIONAL UNION FIRE INS.
OF PITTSBURGH PA,

Insurer.

This matter came before the South Dakota Department of Labor on remand pursuant to an Order entered by the Honorable Jeff Davis on March 28, 2002. In the first proceeding, the Department denied Claimant's request for permanent total disability benefits. Claimant appealed to the Seventh Judicial Circuit and filed an Application Requiring Agency to Take Additional Evidence. Judge Davis granted Claimant's motion, in part. The Order stated:

> Additional evidence will be allowed but is limited to the additional records and testimony from Dr. Mark Cook. It is further
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> ORDERED that the Employer/Insurer shall have the opportunity to rebut and/or challenge the opinions/records of Dr. Mark Cook through additional evidence of Drs. Schilling and/or Kleinman including Claimant to submit to additional examination by these physicians. It is further
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> ORDERED that this matter be remanded back to the Department of Labor for the consideration of this additional evidence.

Thereafter, the parties submitted the following post-hearing evidence:

1. Dr. Mark Cook's post-hearing records from September 20, 2000, through November 14, 2000;
2. Dr. Wayne Anderson's Follow-up Independent Medical Evaluation Report following examination of July 18, 2002;
3. Dr. Robert Kleinman's report of Independent Medical Examination conducted on August 8, 2002;

4. Dr. Charles W. Schilling's Supplemental Psychological Report following examination conducted on August 9, 2002; and
5. Deposition of Mark Cook, Ph.D., taken on July 31, 2002.

The parties also submitted briefs addressing the issue of whether Claimant is permanently and totally disabled considering the additional evidence.

Dr. Cook

The post-hearing records from Dr. Cook included notes from five sessions with Claimant. On May 19, 1999, Dr. Cook suspended Claimant's treatment "until she . . . [is] able to function in a capacity where she can benefit from therapy." Dr. Cook resumed treatment with Claimant on September 20, 2000. Dr. Cook stated, "[m]ost recently, I received a letter from Dr. Manlove, who has been her treating psychiatrist, and he felt Kathy had stabilized enough to possibly benefit from cognitive and behavioral therapy." Dr. Cook spent the session with Claimant "trying to get reacquainted with Kathy and find out what kind of pertinent interval history had transpired." Claimant indicated to Dr. Cook "that as far as her level of pain is concerned, nothing has really changed in that respect. She is still significantly depressed and her life is still not with the same quality she had enjoyed previously."

Dr. Cook next saw Claimant on October 4, 2000. Dr. Cook identified Claimant's main problems as depression and low self esteem. Dr. Cook indicated a short term goal was to increase Claimant's self esteem. Dr. Cook intended "to engage her in 6-8 weeks of individual psychotherapy," but he saw Claimant for only three more sessions.

On October 11, 2000, Claimant continued to report feeling depressed and that nothing had changed. Dr. Cook noted, "[s]he is basically getting through each day as best she can and most of her energy and focus is on her daughter and making sure that she gets off to school and that her needs are taken care of." Dr. Cook discussed with

Claimant the chronic nature of her depression. Dr. Cook wrote, "I talked to her about the differences between a major depressive episode and dysthymia. I indicated to her that I thought she was starting to move more in the category of being dysthymic, even though her symptoms are probably somewhat more severe than may be seen with dysthymia." Dr. Cook also spoke with Claimant about "the importance of beginning to treat the problems that [she] is having. They will continue to reduce the quality of her life unless she begins to make some changes."

Dr. Cook saw Claimant again on October 18, 2000. Claimant continued to report significant symptoms of depression. Dr. Cook focused on giving Claimant several tasks to accomplish. Dr. Cook stated, "[s]he is to start doing something to improve her situation." Dr. Cook next saw Claimant on October 27, 2000. Dr. Cook stated:

> I weighed in heavily today with behavioral steps that she needs to take. She is a very difficult patient to move along at any considerable speed, and most things are done with a great deal of deliberation. I have asked her repeatedly to start to make changes in her life and not wait around because she is not likely to get better by simply waiting.

(emphasis added). This was Dr. Cook's last session with Claimant. He did not see Claimant again until a year later.

On October 31, 2001, without the benefit of seeing Claimant, Dr. Cook completed a form provided by Claimant's attorney titled Medical Assessment of Ability to do Work-Related Activities (Mental). Dr. Cook indicated that Claimant's skills would be "fair" or "poor/none" in the following areas due to chronic pain and depression:

1. Follow work rules
2. Relate to coworkers
3. Deal with the public
4. Use judgment w/the public
5. Interact with supervisors
6. Deal with work stresses
7. Function independently

8. Maintain attention and concentration

Dr. Cook also indicated that Claimant would not have the capability to understand, remember and carry out complex or simple job instructions. Finally, Dr. Cook opined that due to Claimant's depression, she would not be able to "maintain personal appearance, behave in an emotionally stable manner, relate predictably in social situations and demonstrate reliability."

Dr. Cook saw Claimant for one session on November 14, 2001, over a year from her last visit. Dr. Cook saw Claimant at her attorney's request due to concerns about Claimant's emotional state. Dr. Cook stated:

> Kathy is continuing to deteriorate physically, and I believe this is a direct result of the ongoing pain working to wear her down physically.
> . . . .
> This is a patient who functioned well until the time of her injury at work. I initially agreed that returning her to work would be a benefit to her. However, when she returned to work, her pain increased and she deteriorated emotionally. She was referred to Dr. Manlove, by her nurse case manager, for antidepressant medications as a result of increased psychological distress. I supported the idea of antidepressant treatment by Dr. Manlove then, and I do so presently. I believe that her depressive symptoms are secondary to continued low back pain. In my opinion, her pain continues to directly cause her depression.
> . . . .
> I never believed that psychological counseling would, by itself, reduce her depression. I reviewed a labor department decision stating that Dr. Shilling [sic] and Dr. Klienman [sic] have provided opinions that depression is not permanent as a result of injury. I wholeheartedly disagree.
> In cases such as Kathy Highley's, when there is a continued source of pain, the patient's depression is often directly linked to increases in her pain. That is why my opinion for controlling pain with the above medication and activity modification are extremely important for helping manage her depression. A course of supportive counseling and medication management are also necessary. I can hope that supportive counseling at Dr. Manlove's office and medication management with the introduction of pain medication will improve her quality of life. However, I have no real expectation that this will return her to employment at this time.

Dr. Cook was deposed on July 31, 2002. Dr. Cook opined that Claimant's depression is permanent as a result of her work-injury. Dr. Cook explained:

Q: [Y]ou talk about your belief that you thought she was starting to move in the category of being dysthymic as opposed to depression, true?
A: Correct.
Q: And what would that shift, if that were accurate, mean? It would mean that she was improved somewhat in the depression?
A: No, it would - - I think we diagnosed her originally with major depressive episode which there hadn't been any history of. So she had a major depressive episode that could reoccur over time, remit over time, recur over time. And what a dysthymia is is something that some theorists have proposed more as ego, ego-syntonic. So like a - - like a personality disorder, once that has occurred, you're never going to get rid of if.

Dr. Cook further explained the term ego-syntonic and dysthymia:

> Some theorists believe that dysthymia which is a depressive disorder can become ego-syntonic, that it's actually a personality disorder, that once you've got it, it is never going to remit. It has synthesized into your ego. Therefore it is a part of who you are and will always be a part of who you are. The criteria to have dysthymic disorder is you have to have been depressed for more days than not, most of the time during the day for at least two years, which would suggest a more permanent disorder which is never going to leave. It is oftentimes not as severe. It's just like this low-grade gray cloud that hangs over you.

Dr. Cook opined that is it not unusual to see episodes of permanent depression.

Dr. Cook agreed that he repeatedly informed Claimant to start making changes in her life, "because she is not likely to get better by simply waiting." However, Dr. Cook testified:

> I've known her for - - since October of '98. I don't see anything that's changed during that time. I don't see that her condition has improved and I don't see any expectation of why it would improve. And the secondary emotional problems that she has, I don't see any reason why they would marginally improve.

Dr. Cook stated, "I know she has engaged in activities, engaged in trying to care for her home and trying to engage back in some of her leisure activities. And I don't think, as I can recall, any of those met with a great deal of success." Finally, Dr. Cook opined that Claimant is not fit for gainful employment due to her psychological condition.

Dr. Anderson

Dr. Anderson performed a follow-up independent medical examination of Claimant on July 18, 2002. Claimant presented with complaints of low back pain down into the tailbone and lower left extremity. Dr. Anderson diagnosed Claimant with chronic low back pain. Dr. Anderson opined:

> After examining Ms. Highley again, reviewing all of the records available to me in this case, I find that nothing has changed since my testimony at the time of the hearing. At that time, I released her to full time light work. I see no reason to change that opinion at the current time. I found nothing objective this time, just like I didn't last time. Her complaints are very similar. Her pain drawing is nonanatomic and her loss of sensation [ ] in the lower extremity is non-physiologic. I understand that her only treatment at the current time is following along with Dr. Manlove for psychiatric care and she sees him every three months. It seems appropriate to me to continue with the same course.

Dr. Kleinman

On August 8, 2002, Dr. Kleinman, psychiatrist, performed a follow-up independent psychiatric evaluation of Claimant. Dr. Kleinman is board certified in psychiatry, addiction psychiatry, forensic psychiatry and adolescent psychiatry. Dr. Kleinman performed a psychiatric interview of Claimant at his office in Denver, Colorado. Dr. Kleinman also reviewed Dr. Cook's office notes from 2000 and 2001, and Dr. Cook's deposition.

Dr. Kleinman described his mental status examination of Claimant:

> The claimant walked with a very slow gait, hunched over forward. During the interview, she sat, appearing uncomfortable. She did not get up for the first hour of the interview.
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> Her speech had a regular rate and volume. There was no whispering. She was not circumstantial, tangential or loose. There was no anger.
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> She answered questions that were asked, but frequently did not know dates, frequency or intensity. When asked to describe her feelings and tell me symptoms, she would instead tell me what the causes, triggers, and stresses were. When prompted, she identified that she felt hopeless, helpless, useless, and worthless – as it applied to pain and working. She does not feel suicidal. She did not wish to die. She felt depressed.
>
> She said that she was nervous and had anxiety attacks lasting about three minutes once a month. She ruminated about the injury, though she does not

> relive it. She does not have increased startle response. She does not have hyperreactivity. The claimant has compulsions, feeling the need to count things and trace things with her eyes.
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> There was no psychotic ideation. She did not have hallucinations, delusions, ideas of reference, thought insertions, though [sic] withdrawal, or thought broadcasting.
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> The claimant said that her memory and concentration were poor, but during the interview did not show signs of memory or concentration problems. She was not distracted during the interview.

Dr. Kleinman disagreed with Dr. Cook's opinion that Claimant's dysthymia is permanent. Dr. Kleinman explained:

> Dr. Cook has misrepresented egosyntonic and egodystonic. Personality disorders are often egosyntonic, meaning they are not subjectively experienced by the patient as foreign and distressing, in the way that neurotic symptoms are. Neurotic symptoms are Axis-I and Personality disorders are Axis-II. This should not be generalized into saying that egosyntonic illness is permanent.
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> . . . .
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> In this case, Ms. Highley accepts the dependence as egosyntonic which is consistent with her total personality. In that respect, I agree with the concept of egosyntonia - - Ms. Highley does not view her "self imposed disability" as egodystonic (alien or foreign). She views it as ego syntonic and congruent with her dependent personality. She is allowing herself to be dependent and a self-imposed invalid. Otherwise, she would try to be self reliant.

Furthermore, Dr. Kleinman stated, "[i]t is common knowledge that a majority of people with dysthymia or major depression will get better with psychotropic medication. It is also common knowledge that dysthymia is not disabling. Most people with this level of dysthymia do not miss work."

In his updated report, Dr. Kleinman wrote, "[i]n reviewing my past report, old records, new records, sitting through testimony, and reviewing some current testimony, I believe that the claimant is no longer suffering with significant anxiety or depression, but is continuing to have these complaints." Based on his evaluation, Dr. Kleinman opined that Claimant is suffering from a combination of somatoform disorder and a factitious

disorder. Dr. Kleinman also stated, "I cannot rule out with certainty the possibility of malingering." Dr. Kleinman indicated that a somatoform disorder is diagnosed when:

> [P]ain in one or more anatomical sites is the predominant focus of the clinical presentation and is of sufficient severity to warrant clinical attention. The pain causes clinically significant distress or impairment in social, occupational, or other important areas of functioning. Psychological factors are judged to have an important role in the onset, severity, exacerbation, or maintenance of the pain. The symptom or deficit is not intentionally produced or feigned (as in Factitious Disorder or Malingering).

Dr. Kleinman described factitious disorder:

> [I]s characterized by physical or psychological symptoms that are intentionally produced or feigned in order to assume that sick role. Factitious disorders are distinguished from malingering in that in malingering there is an obvious environmental circumstance to cause the patient to produce such symptoms. In assuming the sick role, in a factitious disorder there is the absence of external incentives for the behavior, such as economic gain and avoiding legal responsibility are absent.

As he previously testified, Dr. Kleinman opined that Claimant is not disabled due to depression. Dr. Kleinman stated Claimant's "level of anxiety and depression [were] never at the level that she would have been unable to work. At this time, it is improved. A panic attack lasting three minutes once a month is not disabling. It is not impairing. At her worst, she could have worked." Dr. Kleinman opined there has been no deterioration in Claimant's psychological condition since the time of her workers' compensation hearing. In fact, Dr. Kleinman opined that Claimant "seems to have improved" because her sleep has improved, she is less anxious, and her presentation was more calm, relaxed and less depressed. Dr. Kleinman opined that Claimant is "not currently permanently nor totally disabled from working due to psychiatric reasons."

Dr. Schilling

On August 9, 2002, Dr. Charles Schilling, a licensed clinical psychologist and vocational rehabilitation consultant, performed a follow-up independent psychological

evaluation of Claimant. Dr. Schilling conducted a two-hour intake interview with Claimant and administered the MMPI-2. Dr. Schilling stated, "Ms. Highley was less anxious and I thought, less depressed than she appeared two years ago. She was very courteous and cooperative and I felt we re-established a very good rapport. Therefore, I feel this is a valid representation of her current psychological status."

Dr. Schilling and Claimant spent a majority of the time discussing Claimant's functioning since the hearing in June 2000. Claimant reported that she continues to experience significant pain. However, Dr. Schilling commented that her pain reports "seemed a bit exaggerated." Dr. Schilling stated, "[t]oward the end of our two-hour interview, I was struck with the fact that Ms. Highley had a very good range of affect. By that I mean that her expressions, tone of voice, facial expressions, matched the content of her conversation. However, she was able to laugh, had a good sense of humor and was not tearful." Based on his interview, Dr. Schilling opined that Claimant "has, in many respects, improved."

Dr. Schilling stated in his Supplemental Report, "Dr. Cook has been noted to say on several occasions that if she doesn't do anything, she will continue to get worse. I believe that is reflected in my report and my opinion as well. I totally agree with Dr. Cook when he states in his deposition that the process of thinking dictates how we feel. This is consistent with cognitive behavioral theory." Dr. Schilling continued:

> I also concur with his comment that as depression increases, it is not uncommon that her physical symptoms will also increase. He states that depression, stress and anxiety need to be addressed. She needs to move on both psychologically and physically. He also states that he feels that patients often need to get out of the Workers' Compensation system before they get better. I believe that is reflected in my testimony, as well as my previous report and I totally concur.

However, Dr. Schilling disagreed with Dr. Cook's opinion that Claimant's depression was permanent. Dr. Schilling opined:

> Unfortunately, I must take some issue with Dr. Cook, more on a theoretical basis than practical basis. Everyone has a right to their opinion in all fields, including psychology. I tend to agree with Dr. Kleinman, to be reviewed below, in that Dr. Cook is somewhat peculiar in his discussion of Dysthymia. I must respectfully disagree with his discussion thereof. However, he has every right to his opinion and he states that some theorists propose that Dysthymia is ego syntonic. If this is the case, then it is more like a personality disorder and he states, "… once that has occurred, you're never going to get rid of it." With that I respectfully disagree. What a sad commentary on the state of psychology and psychotherapy when someone is chronically depressed, which is all the Dysthymia is, and cannot be cured. As Dr. Kleinman astutely points out, if she indeed has a dependent personality, that in itself could be fairly chronic and somewhat permanent. However, if this is just situational depression given the litigation and her pain disorder, I clearly disagree that she will never get "rid of it."

In his initial report, Dr. Schilling suggested the possibility that Claimant had major depression, generalized anxiety disorder and somatization disorder. After the follow-up evaluation, Dr. Schilling agreed with Dr. Kleinman that Claimant "has indeed improved in all of those areas." Dr. Schilling also agreed with Dr. Kleinman concerning a diagnosis of a factitious disorder. Dr. Schilling stated:

> I would tend to agree with [Dr. Kleinman's] overall conclusion. He feels that what was diagnosed as an adjustment reaction with anxiety and depressed mood is resolved. She does seem to continue with the pain disorder, which I think is obvious. And then he diagnoses Factitious Disorder. It is unusual to diagnose such a disorder. However, given the chronicity of this particular case, coupled with the prolonged litigation, it would appear that there is some type of Factitious Disorder bordering on malingering, taking place here. The MMPI-2 results . . . also help substantiate this potentiality. Therefore, I thoroughly agree with Dr. Kleinman's report.

Dr. Schilling stated:

> Ms. Highley, which may help us understand her brief and apparently unsuccessful treatment with Dr. Cook, views herself as physically disabled. She tends to somatize her difficulties and to seek medical solutions rather than deal with them psychologically. She seems to tolerate a high level of psychological conflict and may not be motivated to deal with her problems directly. I think this is consistent with the history of this case.

Dr. Schilling reiterated that Claimant's depression is not permanent. Dr. Schilling concluded:

> I think she will only get better once she is freed from this system. Diagnostically I think we are beginning to see a Factitious Disorder in this case. I do think that her anxiety and depression have subsided. I feel that what we are seeing here is sadly a client who has comfortably settled into the role of a patient. This is often referred to as invalidism. Her support from her father which is well intentioned but enabling, her need to tend to and nurture her daughter, her weight gain and feelings of dependence, all contribute to the fact that she seems immobilized. She has found the resources from the Welfare System to live marginally comfortably and seems quite content, in my opinion.
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> Until some of these contingencies change, her motivation to return to work may indeed be marginal. Once the litigation and the prospect of being declared permanently and totally disabled is removed, she may indeed, once again be motivated to lose weight and return to work. I totally agree with Dr. Kleinman that there is absolutely no psychological reason why she cannot return to work, as soon as possible. . . . I do not think anything has changed. If anything, Ms. Highley is better, but in somewhat of a pathological sense. She has settled into her victim's role and I do not think will change until she is freed from the system.

(emphasis added). Dr. Schilling opined that Claimant is not permanently and totally disabled. Dr. Schilling opined, "I did not feel she was permanently and totally disabled two years ago and I continue to feel strongly that she is not disabled psychologically. She could and should return to work." Dr. Schilling explained, "she definitely needs to return to work and go back to more normal functioning. If not, she may comfortably settle into this invalid role for the near term, while her daughter matures. If that be the case, it need not be under the auspices of Workers' Compensation."

ISSUE

> WHETHER CLAIMANT IS PERMANENTLY AND TOTALLY DISABLED DUE TO HER PSYCHOLOGICAL CONDITION CONSIDERING THE POST-HEARING EVIDENCE?

The post-hearing evidence presented does not alter the previous determination that Claimant failed to make a prima facie showing of permanent total disability and that

she failed to meet her burden of persuasion that she is permanently and totally disabled. There is nothing present in the post-hearing evidence and testimony to support an award of permanent total disability benefits to Claimant.

Dr. Lawlor and Dr. Anderson previously had released Claimant to return to work from a physical capacity standpoint. Dr. Anderson found no reason to change this opinion after re-examining Claimant in July 2002. Dr. Anderson stated, "I found nothing objective this time, just like I didn't last time." Dr. Anderson's opinion that Claimant can return to work from a physical capacity standpoint is credible and persuasive.

Claimant argued that she has significant limitations in her functioning as a result of her on-going depression that would prevent gainful employment. Both Dr. Schilling and Dr. Kleinman previously opined Claimant would not be harmed psychologically by returning to work and she would benefit by returning to work. Dr. Cook, as late as October 2000, expressed an expectation that Claimant could get better if she would "start to make changes in her life and not wait around." Thereafter, Dr. Cook changed his opinion in October 2001, despite the fact that he had not seen Claimant for over one year. Dr. Cook now concludes that Claimant is not fit for gainful employment due to her psychological condition and that Claimant is "not likely to improve." Dr. Cook also opined that Claimant's psychological condition is permanent.

Both Dr. Kleinman and Dr. Schilling opined Claimant's depression is not permanent. Dr. Kleinman concluded that, not only has there been no deterioration in Claimant's psychological condition since the date of the hearing, she has improved. Dr. Schilling agreed with Dr. Kleinman's opinion that Claimant's psychological condition has improved since the time of the hearing. Both Dr. Kleinman and Dr. Schilling strongly disagreed with Dr. Cook's assessment that Claimant's psychological condition is

permanent. As Dr. Schilling appropriately stated, "[w]hat a sad commentary on the state of psychology and psychotherapy when someone is chronically depressed, which is all the Dysthymia is, and cannot be cured." The opinions from Dr. Kleinman and Dr. Schilling are well-founded, consistent and credible. The opinions from Dr. Kleinman and Dr. Schilling are persuasive that Claimant's psychological condition is not permanent and that she would benefit from returning to work.

Dr. Cook's post-hearing opinions are rejected. Expert testimony is entitled to no more weight than the facts upon which it is predicated. Podio v. American Colloid Co., 162 N.W.2d 385, 387 (S.D. 1968). "The trier of fact is free to accept all of, part of, or none of, an expert's opinion." Hanson v. Penrod Constr. Co., 425 N.W.2d 396, 398 (S.D. 1988). In his deposition, Dr. Cook agreed that he had neither performed a physical examination of Claimant nor reviewed any medical reports generated during the previous two years. Dr. Cook was unaware that Dr. Anderson opined on July 18, 2002, that Claimant's physical condition had not changed in the slightest since the hearing. Dr. Cook recognized the importance of Claimant taking the initiative to make changes in her life because she would not get better if she simply waited. Dr. Cook stressed this several times in his notes. After October 2001, Dr. Cook changed his opinions without reason and without seeing Claimant. Dr. Cook's opinions are unpersuasive, especially in comparison to the well-founded and credible opinions expressed by Dr. Kleinman and Dr. Schilling.

The post-hearing evidence does not change the determination that Employer satisfied its burden of production by establishing that jobs are currently open and available with Employer within Claimant's limitations. The additional evidence does not change the determination that Claimant failed to meet her burden of persuasion that she

is permanently and totally disabled. Claimant is not entitled to receive permanent total disability benefits. Claimant's Petition for Hearing must be dismissed.

Employer shall submit Findings of Fact, Conclusions of Law and Order consistent with this Decision, and if necessary, proposed Findings and Conclusions, within ten days from the date of receipt of this Decision on Remand. Claimant shall have ten days from the date of receipt of Employer's Findings and Conclusions to submit objections thereto or to submit proposed Findings and Conclusions. The parties may stipulate to a waiver of Findings of Fact and Conclusions of Law and if they do so, Employer shall submit such Stipulation along with an Order in accordance with this Decision on Remand.

Dated this 11th day of September, 2003.

SOUTH DAKOTA DEPARTMENT OF LABOR

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Elizabeth J. Fullenkamp
Administrative Law Judge