STATE OF VERMONT
DEPARTMENT OF LABOR

Linda Souligny

v.

PB&J, Inc.

Opinion No. 07-19WC

By: Beth A. DeBernardi, Esq.
Administrative Law Judge

For: Lindsay H. Kurrle
Commissioner

State File No. DD-55680

OPINION AND ORDER

Hearing held in Montpelier on January 7, 2019
Record closed on March 7, 2019

APPEARANCES:

Christopher McVeigh, Esq., for Claimant
David A. Berman, Esq., for Defendant

ISSUES PRESENTED:

1. Is Claimant permanently and totally disabled as a consequence of her February 28, 2008 and October 17, 2011 compensable work injuries?

2. To what amounts, if any, is Claimant entitled as mileage reimbursement for her travel to and from a swimming pool for exercise related to her accepted low back injuries?

EXHIBITS:

Joint Exhibit I:	Medical records
Joint Exhibit II:	Vocational rehabilitation records
Claimant's Exhibit 1:	Claimant's calendars

CLAIM:

Permanent total disability benefits pursuant to 21 V.S.A. § 645
Mileage reimbursement pursuant to Workers' Compensation Rule 4.1300
Interest, costs and attorney fees pursuant to 21 V.S.A. §§ 664 and 678

FINDINGS OF FACT:

1. At all times relevant to these proceedings, Claimant was an employee and Defendant was her employer as those terms are defined in the Vermont Workers' Compensation Act.

2. I take judicial notice of all relevant forms contained in the Department's file relating to this claim.

Procedural History

3. In January 2015 Claimant requested a hearing on her claim for permanent total disability benefits. The Department commenced the hearing on September 2, 2015, but she subsequently withdrew her request, and no determination was made.

4. In 2017 the Commissioner found after hearing that Claimant's ongoing chiropractic care constituted a reasonable medical treatment for her compensable work injury. *Souligny v. PB&J, Inc*., Opinion No. 02-17WC (February 6, 2017) ("*Souligny I*").

5. In 2018 Defendant sought a determination that Claimant's self-directed use of a swimming pool was not "medical treatment" for purposes of the mileage reimbursement provisions of the Workers' Compensation Rules. The Commissioner denied Defendant's motion on the grounds that genuine issues of material fact precluded summary judgment. *Souligny v. PB&J, Inc*., Opinion No. 12A-18WC (September 27, 2018) ("*Souligny II*").

Claimant's Low Back Injuries and Subsequent Medical Course

6. Claimant is a 70-year-old woman who resides in Northfield. She completed high school in Minnesota and has worked in farming, retail and early childhood education. Around 2007 she began working for Defendant as a certified preschool teacher. Her job activities included lifting children into their cribs, moving classroom furniture, and other physical tasks involving stooping, bending and squatting.

7. On February 28, 2008, Claimant was lifting a child into his crib when her "back just went out." She saw her primary care provider and briefly tried physical therapy before settling on a course of ongoing chiropractic treatment. Her condition improved, and she returned to work after six weeks. She was unable to perform some of her more physical job tasks, but another teacher handled those tasks for her.

8. On October 17, 2011, Claimant leaned over to wipe a table with a dishrag at work and had difficulty straightening up. She underwent a two-month course of aquatic therapy and continued her chiropractic treatments. Claimant returned to work several weeks after her injury but found the more physical demands of her job difficult to perform. She stopped working for Defendant in September 2012 and has not worked since.[1]

9. Claimant's medical treatment has remained largely the same for years. She takes a prescription pain medication and receives chiropractic treatment from Shawn McDermott, D.C., every two weeks, or more often if her pain flares up. For the past year, Dr. McDermott has also performed a low-level laser treatment. This treatment has improved her stamina and allows her to recover more quickly from any temporary

[1] Claimant was unsure of the month she stopped working, but the Commissioner previously found that she stopped work in September 2012. *Souligny I,* Finding of Fact No. 8.

setbacks. She is also able to engage in more physical activities, although she no longer accompanies her grandchildren on strenuous field trips and has curtailed her outdoor gardening.

Functional Capacity Evaluations

10. Occupational therapist Charles Alexander performed three functional capacity evaluations of Claimant at her attorney's request. Mr. Alexander graduated from Utica College with a Bachelor of Science degree in occupational therapy and is a certified work capacity evaluator. He has been performing functional capacity evaluations since 2005; he performs about fifty evaluations per year.

11. Claimant made a high level of physical effort in each of her functional capacity evaluations. Mr. Alexander acknowledged her reports of fatigue and soreness after the evaluations but noted that subjects are often tired or sore post-evaluation. The purpose of an evaluation is to determine what level of work a subject can safely sustain over a 40-hour work week. Mr. Alexander credibly explained that, in order to determine that capacity, he must push the subject beyond his or her limitations. For example, by having someone lift 20 pounds, he might determine that the person's sustainable lifting capacity is ten pounds. Thus, soreness after an evaluation is not an indication that the subject would be sore after working at his or her assessed work capacity.

12. Mr. Alexander performed his first evaluation of Claimant in June 2013. He found that she had a work capacity in the modified light duty range, with no lifting above ten pounds from floor level and no repetitive low-level work below her knees. Although Claimant reported to him that she did not plan on returning to regular work, Mr. Alexander concluded that her employability should be evaluated by a vocational rehabilitation professional to determine what jobs were available to her within her assessed work capacity. *Joint Exhibit I* at 523, 527.

13. Claimant underwent her second evaluation in March 2015. Mr. Alexander again found her work capacity in the modified light duty range, with no lifting above ten pounds from floor level and no low-level work. She had a frequent standing tolerance of 90 minutes, and her ability to walk had actually improved since 2013. He recorded Claimant's statement of her work-related goals at that time as follows: "I just had a meeting with Tammy Parker (voc rehab) but I can't really do anything until they settle this. Tammy told me that I am not employable at this point." *Joint Exhibit I* at 638.[2]

14. In June 2018 Claimant underwent her third evaluation. Mr. Alexander found that her demonstrated work capacity then was a "carbon copy" of her abilities as determined in his prior evaluations. *Joint Exhibit I* at 875. He noted that she has the ability to perform frequent standing, occasional sitting, and materials handling at a full sedentary level. She also has some abilities into the light duty level for lifting above her waist, carrying, pushing and pulling. He further found that her cardiovascular

[2] Vocational rehabilitation counselor Tammy Parker met with Claimant shortly before her 2015 functional capacity evaluation. Ms. Parker credibly testified that she never told Claimant that she was unemployable. In fact, she offered Claimant a variety of vocational services at that meeting. *See* Finding of Fact No. 29 *infra*; *Joint Exhibit II* at 44.

capacity is at a light duty level, indicating that she has the endurance to work a full day. In his opinion there is no limit on the number of hours she can work at an appropriate job. Mr. Alexander concluded that Claimant has a work capacity and that her employability should be evaluated by a vocational rehabilitation professional.

15. Claimant reported her work-related goals to Mr. Alexander in 2018 as follows: "I really have no plans to work or volunteer at this point." *Joint Exhibit I* at 878. She continued: "I am 69-years-old and am ready for retirement. I would like to get this closed out at this point so that it is not hanging over me all the time." *Id.* at 879.

16. Based on Mr. Alexander's uncontested findings and his substantial experience in performing functional capacity evaluations, I find that Claimant has a full-time work capacity in the sedentary to light duty range, with some restrictions on lifting and low-level work as outlined in Mr. Alexander's most recent report. *Joint Exhibit I* at 876.

Expert Medical Opinions

Shawn McDermott, DC

17. Claimant presented testimony from her treating chiropractor, Shawn McDermott, DC. Dr. McDermott earned a Doctor of Chiropractic degree from Logan College and maintains an office in Randolph. His practice includes the treatment of musculoskeletal conditions using manual joint manipulation, lumbar traction and low-level laser technology.

18. Dr. McDermott testified that, in his opinion, returning to work would continually exacerbate Claimant's low back condition. His biggest concern was not whether she could work on a given day, but whether the cumulative effects of working would destabilize her condition over time. Dr. McDermott's opinion was based on her difficulty performing certain tasks when she returned to work for Defendant in 2011 and on her increased pain levels following her functional capacity evaluations.

19. Nevertheless, Dr. McDermott testified that he would "defer" to the functional capacity evaluations establishing Claimant's work capacity, as those evaluations are more "in depth" than what he does. He is thus "open to the possibility" of Claimant returning to work if she can find the right job; he has just not "seen anything that fits the bill."[3] He testified: "It would have to be an appropriate job that is not going to exacerbate her."

20. In forming his opinion, Dr. McDermott overlooked the demanding physical nature of Claimant's job with Defendant and extrapolated from her difficulty returning to that job that she cannot return to work. I find this generalization unconvincing. Further, as Mr. Alexander credibly explained, soreness after a functional capacity evaluation is not an indication that Claimant would be sore after working within her assessed work capacity. *See* Finding of Fact No. 11 *supra*. Given these weaknesses, as well as Dr. McDermott's concession that he would defer to the functional capacity evaluation

[3] Dr. McDermott did not review any job descriptions on Claimant's behalf.

findings as more comprehensive than his own, I find his opinion of Claimant's work capacity unpersuasive.

Nancy Binter, MD

21. Defendant presented expert testimony from Nancy Binter, MD, a retired neurosurgeon, as to Claimant's functional capacity. Dr. Binter graduated from Rutgers Medical School and completed a neurosurgical residency at the University of Vermont Medical Center. She is board certified in neurological surgery and certified by the American Board of Independent Medical Examiners. As a practicing neurosurgeon, Dr. Binter's area of specialty was spine surgery.

22. Defendant hired Dr. Binter to perform independent medical examinations of Claimant in 2012, 2015 and 2018. Dr. Binter's examination process included reviewing a report from George White, MD,[4] and Mr. Alexander's functional capacity evaluation reports.

23. Dr. Binter explained that she cannot perform a functional capacity evaluation during an office visit. Thus, she examines patients for anatomical changes, asks them about their most challenging activities, and considers whether their reported activities are consistent with the medical records, her own findings, and any functional capacity evaluations that have been performed.

24. In 2012 Dr. Binter found Claimant's functional capacity to be what she was actually demonstrating through her work for Defendant at that time: full-time, full-duty work with some restrictions. In 2015 and 2018, Dr. Binter found that Claimant's work capacity was sedentary to light duty with some restrictions consistent with Mr. Alexander's functional capacity evaluation reports. Dr. Binter based her conclusions on Claimant's report that she could walk around a shopping mall two times, lift ten pounds, handle groceries, and drive her grandchild to school. She found "remarkable consistency" between the functional capacity evaluation findings, Claimant's description of her activities, and her own examination findings.

25. Because Dr. Binter's office examination is necessarily less comprehensive than a functional capacity evaluation, I find Mr. Alexander's opinions of Claimant's work capacity the most persuasive. However, Dr. Binter's opinion corroborates his conclusion that Claimant has demonstrated a current work capacity.

Vocational Rehabilitation Efforts

26. Claimant received vocational rehabilitation services from January 2013 through February 2017.

[4] Dr. White is a Vermont occupational medicine doctor. He performed an independent medical examination of Claimant in December 2012 at her attorney's request. In Dr. White's opinion, Claimant's work limitations are a function of her symptom tolerance and therefore are subjective. Dr. White reported that Claimant told him that she did not plan to return to work for Defendant and was "retired." *Joint Exhibit I* at 479. Nevertheless, in his opinion, she "likely has a tolerable work capacity in the light category, with limitations on lifting, bending and twisting." He recommended a position that would allow her "to stand, sit and walk as tolerated." *Joint Exhibit I* at 484.

January 2013 – February 2016: Tammy Parker, M.S., CRC

27. In January 2013 certified rehabilitation counselor Tammy Parker performed an entitlement assessment finding that Claimant was eligible for vocational rehabilitation services. Ms. Parker earned a master's degree in rehabilitation psychology from the University of Connecticut in 1995 and has worked for VRS Disability Management for eight years.

28. The starting point for vocational rehabilitation services is the patient's documented work capacity. Dr. Binter, Dr. White and Mr. Alexander all found that Claimant had a work capacity. However, her chiropractor stated that she should not work. Ms. Parker therefore needed to clarify Claimant's work capacity before she could provide services. She suspended services multiple times as she sought clarifying information.

29. In January 2015 Ms. Parker reviewed Claimant's file again and obtained updated records. She met with Claimant on February 13, 2015 to discuss her interest in vocational rehabilitation services despite the conflicting physical capacity information. Ms. Parker explained to Claimant that services could include assistance in obtaining a volunteer position if her chiropractor approved, as well as exploration of vocational goals and resumé development. Claimant indicated that she would "give the matter some thought." *Joint Exhibit II* at 044. When Ms. Parker followed up on February 25, 2015, Claimant "stated that she prefers a suspension of vocational rehabilitation services." *Id.* Accordingly, services were suspended at Claimant's request.

30. Claimant testified that she did not recall asking Ms. Parker to suspend services in February 2015. Instead, she testified that Ms. Parker told her that there were no jobs for her in her geographic region. I do not find Claimant's testimony on this issue credible. Whether she recalls asking Ms. Parker to suspend services or not, Ms. Parker's records clearly document that she did so. Further, Ms. Parker credibly denied ever telling Claimant that there were no jobs for her in her geographic region or that she was unemployable.

May 2016 – February 2017: Donna Curtin, M.S., CRC

31. In May 2016 Claimant filed a *Notice of Intent to Change Vocational Rehabilitation Provider* (VR Form 8), resulting in the transfer of her file to certified rehabilitation counselor Donna Curtin. Ms. Curtin has a master's degree in rehabilitation counseling from Northeastern University and twenty years' experience in the vocational rehabilitation field.

32. Ms. Curtin began working with Claimant to develop a Return to Work Plan based on Claimant's sedentary to light work capacity.[5] Ms. Curtin completed interest and aptitude testing, and Claimant indicated that she was only interested in part-time work

[5] Before Ms. Curtin began work, Dr. McDermott agreed that Claimant could work at a sedentary to light duty level, thereby resolving the conflicting work capacity opinions that prevented Ms. Parker from providing services. *See Joint Exhibit II* at 055.

to supplement her social security benefits. They agreed that a clerical position as an administrative assistant was an appropriate job goal, taking into consideration the labor market, a suitable wage and Claimant's work capacity. Ms. Curtin's exploration of the labor market determined that such jobs existed in Claimant's desired geographical region spanning Waterbury, Montpelier, Randolph and Northfield.

33. During this time Claimant learned about an organization called Vermont Associates that helps mature workers find and maintain employment. Vermont Associates builds partnerships with various employers and matches mature workers with job opportunities offered by those employers. Claimant brought the organization to Ms. Curtin's attention, and they decided to explore what it had to offer.

34. In September 2016 Claimant went to an orientation session, and then she and Ms. Curtin met with Wayne Piper of Vermont Associates to discuss Claimant's interests, background, functional limitations and skills. Mr. Piper conveyed an offer to Claimant for a part-time clerical job at the Northfield Public Library. Claimant declined the library job, indicating that she preferred to work in a health care setting. Accordingly, in October 2016, Vermont Associates focused its efforts on finding Claimant a clerical position in a health care setting, including reaching out to the People's Health & Wellness Clinic in Barre. Claimant raised no objection to working in Barre at that time.

35. In January 2017 Mr. Smedley of Vermont Associates secured a part-time clerical job opportunity for Claimant at the People's Health & Wellness Clinic. On January 26, 2017, he told Ms. Curtin about the offer, anticipating that Claimant would have her work schedule within a week. Ms. Curtin testified that she and Claimant had been working with Vermont Associates for months to find a clerical job within Claimant's work restrictions, and she was confident that the position offered was appropriate. I find this testimony credible.

36. Dr. McDermott testified that Claimant called him to discuss the job opportunity at the People's Health & Wellness Clinic. He recalled that she indicated some concern about starting work on short notice. Dr. McDermott offered to review a job description for her, but she did not mention it again. I find this testimony credible.

37. Ms. Curtin understood that Mr. Smedley had conveyed the job offer to Claimant, and she expected to hear from Claimant about her work schedule. When she did not hear from Claimant by January 31, 2017, Ms. Curtin called and left her a telephone message referencing the job offer and inquiring about her work schedule.

38. The next day, February 1, 2017, Claimant called Ms. Curtin back and left her a voice mail message. Ms. Curtin transcribed the voice mail into her progress report:

> I came to a decision that's good for me. Since I moved, I've regained a good baseline. Comes and goes still, but I've decided not to do rehab anymore. I know you've worked hard for me and I appreciate it. I just don't want to take a risk anymore. I feel good about that decision and Chris thought that was fair.

Joint Exhibit II at 079.

39. Claimant denies that she was offered a job at the People's Health & Wellness Clinic. She testified that she just woke up on the morning of February 1, 2017 and decided that she was done with vocational rehabilitation. In light of Ms. Curtin's January 31, 2017 telephone message, Claimant's return message on February 1st, and Dr. McDermott's testimony that Claimant told him about the job offer, I do not find her testimony credible. Further Claimant testified at her deposition that she did not want the job because it was in Barre, thereby contradicting her testimony that she did not know about it. Accordingly, I find that she received the job offer and declined it.

40. On February 3, 2017, Ms. Curtin spoke with Claimant's attorney to confirm his client's intention to close vocational rehabilitation services. She then filed a vocational rehabilitation closure report on February 9, 2017, using closure code 8, indicating that Claimant declined further services. *Joint Exhibit II* at 081.

41. Ms. Curtin testified that, if Claimant had wished to continue her participation in vocational rehabilitation services after declining the Barre job offer, she would have continued providing those services. I find this testimony credible.

Mileage Reimbursement for Trips to the Pool

42. Claimant seeks mileage reimbursement from 2013 through 2017 for driving to and from a swimming pool, where she performed exercises to benefit her low back.

Claimant's Use of a Pool for Exercise

43. Claimant was referred to physical therapy for her low back symptoms in December 2011. *Joint Exhibit I* at 349. After working with a pool therapist for six to eight weeks, she was discharged to an independent pool exercise program on February 3, 2012. *Joint Exhibit I* at 386. She then engaged in self-directed pool exercises at the Central Vermont Medical Center pool in Berlin for three years, after which she switched to the Vermont Technical College pool in Randolph.

44. The Department previously found that when Claimant uses the pool, she walks "fore and aft" in the water with high leg lifts, performs core muscle exercises, and hangs on a noodle. No health care provider is present when she uses the pool. She does not have a specific pool exercise schedule, nor are there formal medical records of her pool sessions. *See Souligny II*, Finding of Fact No. 3.

45. Claimant testified that she uses the pool twice a week except when it is closed for cleaning, the students are on vacation, the weather is bad, or she is experiencing joint pain. However, her own records suggest that her pool usage is far less frequent, *see* Finding of Fact No. 52 *infra*, and Dr. McDermott called her attendance "spotty."

46. Claimant credibly testified that she met with a pool therapist named Sarah twice about two years ago, for 20 to 30 minutes each time. I accordingly find that Claimant had

formal pool therapy in December 2011 and January 2012 and two sessions with a therapist two years ago. Beyond that, no medical provider of any type has monitored her pool exercises.

47. Dr. McDermott testified that Claimant benefits from doing pool exercises. In his opinion, however, a pool therapist should monitor her progress and make appropriate adjustments to her exercise routine at least every six months, based on how she is responding. He takes the same approach with his chiropractic treatments, modifying his treatments in response to her progress. I find Dr. McDermott's opinion to be well supported and credible.

48. Dr. Binter also had a practice of referring patients to a physical therapist to undertake aquatic exercise programs suited to their individual needs. She recommended rigorous programs of strength and resistance training or cardiovascular exercise. In her opinion, a therapist is key to keeping the patient motivated and ensuring that he or she receives the full benefit of the exercise program. Further, a qualified therapist is necessary to adjust the exercise program every four weeks as the patient gains more endurance. Given Dr. Binter's experience treating patients with spine conditions, I find her opinions on the appropriate rehabilitation of such patients to be well supported and persuasive.

Claimant's Documentation of Her Pool Use

49. Claimant submitted monthly calendars to document her use of a pool for exercise. *Claimant's Exhibit 1.* The calendars include her handwritten entries on a variety of matters, including pool use, doctor appointments, birthdays, car repairs and other matters. She submitted no records for part of 2013 or any of 2015.

50. Claimant testified that *after* she exercises in the pool, she writes "pool" on her calendar. However, there are multiple calendar entries where she wrote "pool" and then crossed it out, suggesting that some notations were written for planning purposes, rather than to document actual pool usage. *See, e.g., Claimant's Exhibit 1*, *January 2013*. Later calendars reveal a practice of drawing a diagonal line through each day, including some days with a "pool" notation. Further, some of those entries have the word "pool" separately crossed out and some do not. *See, e.g., Claimant's Exhibit 1*, *September 2017.* No testimony was offered to explain these various notations.

51. Claimant pays for her pool visits in cash each time she goes, but she has never requested a written receipt to document her visits. The calendars are her only record.

52. The calendars document the following "pool" entries:

DATE	**Number of "Pool" Days**
January – May 2013	30 days
June – December 2013	No records available

January – December 2014	10 days[6]
January – December 2015	No records available
January – December 2016	5 days
January – December 2017	26 days

53. For purposes of determining mileage, prior to December 2015, Claimant lived with her son on Thurston Hill Road in Roxbury. In December 2015 she moved to Northfield. From 2013 until sometime in 2015, she used the Central Vermont Medical Center pool in Berlin. Sometime in 2015, she switched to the Vermont Technical College pool in Northfield.

CONCLUSIONS OF LAW:

1. In workers' compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. *King v. Snide*, 144 Vt. 395, 399 (1984). He or she must establish by sufficient credible evidence the character and extent of the injury, *see, e.g., Burton v. Holden & Martin Lumber Co.*, 112 Vt. 17 (1941), as well as the causal connection between the injury and the employment, *Egbert v. The Book Press*, 144 Vt. 367 (1984). There must be created in the mind of the trier of fact something more than a possibility, suspicion or surmise that the incidents complained of were the cause of the injury and the resulting disability, and the inference from the facts proved must be the more probable hypothesis. *Burton*, *supra* at 19; *Morse v. John E. Russell Corp*., Opinion No. 40-92WC (May 7, 1993).

Permanent Total Disability

2. Claimant contends that her work-related low back injuries have rendered her permanently and totally disabled under the odd lot provision of 21 V.S.A. § 644(b). Defendant counters that Claimant has a work capacity and that no vocational rehabilitation professional has concluded that she is not reasonably expected to be able to return to regular, gainful employment.

3. Under Vermont's workers' compensation statute, a claimant is entitled to permanent total disability benefits if he or she suffers one of the injuries enumerated in 21 V.S.A. § 644(a), such as blindness. In addition, § 644(b) provides:

> The enumeration in subsection (a) of this section is not exclusive, and, in order to determine disability under this section, the Commissioner shall consider other specific characteristics of the claimant, including the claimant's age, experience, training, education, and mental capacity.

4. The Workers' Compensation Rules provide further guidance. The rule in effect at the time of Claimant's injuries provided in relevant part:

> Rule 11.3100 Permanent Total Disability – Odd Lot Doctrine

[6] In addition, Claimant made a notation on September 27, 2014 that states "Pool?"

> A claimant shall be permanently and totally disabled if their work injury causes a physical or mental impairment, or both, the result of which renders them unable to perform regular, gainful work. In evaluating whether or not a claimant is permanently and totally disabled, the claimant's age, experience, training, education, occupation and mental capacity shall be considered in addition to his or her physical or mental limitations and/or pain. In all claims for permanent total disability under the Odd Lot Doctrine, a Functional Capacity Evaluation (FCE) should be performed to evaluate claimant's physical capabilities and a vocational assessment should be conducted and should conclude that the claimant is not reasonably expected to be able to return to regular, gainful employment.

5. Under Workers' Compensation Rule 11.3100, therefore, Claimant must support her claim with both a functional capacity evaluation and a vocational assessment concluding that she is not reasonably expected to be able to return to regular, gainful employment.[7]

6. A finding of odd-lot permanent total disability should not be made lightly. In 2011 the Commissioner wrote:

> In a system that embraces successful return to work as the ultimate goal, and vocational rehabilitation as a critical tool for achieving it, to conclude that an injured worker's employment barriers realistically cannot be overcome means admitting defeat, acknowledging that he or she will probably never work again. As Rule 11.3100 makes clear, such a finding should not be made until first, the injured worker's functional capabilities are accurately assessed, and second, all corresponding vocational options are comprehensively considered and reasonably rejected.

Rowell v. Northeast Kingdom Community Action, Opinion No. 17-11WC (July 6, 2011), at 13.

Work Capacity

7. Claimant has undergone three functional capacity evaluations over the course of five years, all confirming that she can safely work in a sedentary to light duty capacity with some restrictions for 40 hours per week. Finding of Fact No. 16 *supra*. Dr. Binter agreed with the findings of the functional capacity evaluations, Finding of Fact No. 25 *supra*, and Dr. McDermott deferred to those findings as well. Finding of Fact No. 19 *supra*.

[7] Rule 11.3100 was amended and re-numbered as Rule 10.1700 *et seq*., effective August 1, 2015. Rule 10.1710 similarly requires that unless the extent to which an injured worker's functional limitations precludes regular gainful employment is so obvious that formal assessment is not necessary, a claim for odd-lot permanent total disability should be supported by a functional capacity evaluation and a vocational assessment.

8. I therefore conclude that Claimant has a full-time sedentary to light work capacity with some restrictions, as set forth in Mr. Alexander's reports. It is accordingly appropriate for a vocational rehabilitation professional to determine whether there is any regular, gainful work that she can perform within her functional limitations.

Vocational Rehabilitation Services

9. Claimant's claim for permanent total disability benefits must be supported by a vocational assessment concluding that she is not reasonably expected to be able to return to regular, gainful employment. *Workers' Compensation Rule 11.3100.* As the Commissioner found in *Rowell v. Northeast Kingdom Community Action*, Opinion No. 17-11WC (July 6, 2011), a finding of permanent total disability should not be made until all vocational rehabilitation options consistent with the injured worker's functional capacities are comprehensively considered and reasonably rejected. *See also Hurley v. NSK Corp.*, Opinion No. 07-09WC (March 4, 2009) (finding of permanent total disability cannot be made until vocational rehabilitation has been thoroughly explored).

10. Claimant worked with two vocational rehabilitation counselors. Ms. Parker offered her assistance with a volunteer position, exploration of her vocational goals and resume development. Claimant declined her assistance and requested that services be suspended in February 2015. Finding of Fact No. 29 *supra*. Ms. Curtin then worked with Claimant to find a suitable clerical position in her geographic area. In February 2017 Claimant decided to suspend her services as well. Finding of Fact Nos. 38, 40 *supra.* Accordingly, no vocational rehabilitation professional has concluded that Claimant is not reasonably expected to be able to return to regular, gainful employment. *See, e.g., Rowell v. Northeast Kingdom Community Action*, Opinion No. 17-11WC (July 6, 2011); *Drew v. Northeast Kingdom Human Services*, Opinion No. 23-11WC (August 31, 2011).

11. The parties hotly contest whether Claimant knew about the job offers from the Northfield Public Library and the People's Health & Wellness Clinic. I have found that she knew about the offers and declined them. *See* Finding of Fact Nos. 34, 39 *supra*. However, even if she had not known about the offers, she still voluntarily opted out of vocational rehabilitation services, twice, based on her preference to retire at this stage of her life, rather than return to work. *See* Finding of Fact Nos. 12, 15, 22 (fn. 4), 29, 38 *supra.* That is entirely her prerogative. However, it is not permanent total disability.

12. Claimant has the burden of proving that she has no reasonable prospect of finding and sustaining regular, gainful employment and that she is therefore permanently and totally disabled. *Drew v. Northeast Kingdom Human Services*, Opinion No. 23-11WC (August 31, 2011). Based on her work capacity and her decision to opt out of vocational rehabilitation services, I conclude that she has failed to sustain her burden of proving that she is permanently and totally disabled as a result of her compensable work injuries.

Mileage Reimbursement for Trips to the Pool

13. The Workers' Compensation Rules provide that "[w]hen an injured worker is required to travel for medical treatment. . . , the employer or insurance carrier shall provide. . . [m]ileage reimbursement at the current U.S. General Services Administration rate for authorized use of a privately owned vehicle[.]" *Workers' Compensation Rules 4.1300-4.1310.* The rules further provide that the injured worker is responsible for providing "reasonable documentation" for any reimbursement request. *Workers' Compensation Rule 4.1340.* For entitlement to mileage reimbursement for trips to and from the pool, therefore, Claimant must establish that her use of the pool is medical treatment and she must reasonably document her request.

Pool Exercises as Medical Treatment

14. The Department previously considered whether Claimant's unsupervised swimming pool exercises constituted "medical treatment" for purposes of the mileage reimbursement rules. The Commissioner explained that inherent in the concept of "medical treatment" is a certain level of involvement by a healthcare provider. That involvement may be indicated by the specificity of any instructions, the mandatory or permissive nature of those instructions, the frequency of follow-up concerning the exercise, and the modification of the treatment recommendations based on such follow-up. *See Souligny II.* Thus, "[t]he fundamental question in weighing such evidence is whether the unsupervised exercise could reasonably be described as part of a healthcare provider's continuing course of treatment for a work-related injury." *Id.*, citing *American Armoured Foundation, Inc. v. Lettery*, No. 1968-11-2, 2012 WL 1499604, at *2 (Va. Ct. App. May 1, 2012).

15. Dr. McDermott and Dr. Binter agree that Claimant would benefit from pool exercises. However, they also agree that such exercises should be monitored by a health care provider and modified in response to her progress. Dr. McDermott thought a pool therapist should adjust her routine every six months. Dr. Binter thought that should happen every four weeks. Claimant last participated in a formal pool therapy program in January 2012, seven years ago. Since then, she has met with a pool therapist twice, about two years ago. Accordingly, her exercise program lacks even the lower level of oversight and modification that Dr. McDermott recommended.

16. As Dr. Binter credibly testified, a pool therapist is also needed to ensure that the exercise program is rigorous and that the patient remains motivated to receive the program's full benefit. Here, Dr. McDermott characterized Claimant's pool attendance as "spotty," and her own records document that she went to the pool only ten times in 2014 and five times in 2016. This level of attendance does not constitute a rigorous program from which Claimant is motivated to receive the full benefit.

17. I therefore conclude that Claimant's use of a swimming pool for exercise is not part of a healthcare provider's continuing course of treatment for her work-related injury, as required for her pool use to constitute "medical treatment."

Reasonable Documentation for the Reimbursement Request

18. Under Workers' Compensation Rule 4.1340, Claimant is responsible for providing "reasonable documentation" supporting her reimbursement request. To meet this requirement, she has offered her monthly calendars.

19. Claimant's monthly calendars are subjective, consisting entirely of her own notations as to when she went to the pool. Further, it is unclear whether her notations document actual pool use or merely her intention to go. Finding of Fact No. 50 *supra.* Other entries, including those that are crossed out or followed by a question mark, are unclear on their face. *See* Finding of Fact Nos. 50, 52 (fn. 6) *supra*.

20. Having reviewed these records, I conclude that they do not constitute reasonable documentation to support a mileage reimbursement claim under Workers' Compensation Rule 4.1340.

21. Claimant has not met her burden of proving that her self-directed use of a swimming pool constitutes medical treatment for purposes of the mileage reimbursement rules, nor has she provided reasonable documentation of her mileage to and from the pool. For both of these reasons, her claim for mileage reimbursement under Workers' Compensation Rule 4.1300 must fail.

22. As Claimant has failed to prevail on either of her claims, she is not entitled to an award of costs and attorney fees.

ORDER:

Based on the foregoing Findings of Fact and Conclusions of Law, Claimant's claim for permanent total disability benefits is hereby **DENIED**. Further, her claim for mileage reimbursement for trips to and from a swimming pool is also **DENIED**.

DATED at Montpelier, Vermont this 9th day of April 2019.

_____
Lindsay H. Kurrle
Commissioner

Appeal:
Within 30 days after copies of this opinion have been mailed, either party may appeal questions of fact or mixed questions of law and fact to a superior court or questions of law to the Vermont Supreme Court. 21 V.S.A. §§ 670, 672.