

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

PAMELA DEMUTH)	
Claimant)	
V.)	
)	AP-00-0470-364
NINNESCAH VALLEY HEALTH SYSTEMS, INC.)	CS-00-0029-987
Respondent)	
AND)	
)	
KHA WORKERS COMPENSATION FUND, INC.)	
Insurance Carrier)	

ORDER

Claimant appealed the September 8, 2022, Post-Award Medical Order issued by Administrative Law Judge (ALJ) Gary K. Jones.

APPEARANCES

Phillip Slape appeared for Claimant. P. Kelly Donley appeared for Respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board adopted the same stipulations and considered the same record as the ALJ, consisting of the Evidentiary Deposition of Baoluan Nguyen, M.D., taken July 21, 2021, with exhibits attached; Evidentiary Deposition of Xavier Ng, M.D., taken January 3, 2022; Transcript of the Post-Award Hearing, taken May 16, 2022, with exhibits attached; Evidentiary Deposition of Pamela Demuth, taken June 7, 2022, with exhibits attached; Evidentiary Deposition of Daniel Prohaska, M.D., taken August 18, 2022, with exhibits attached; and the documents of record filed with the Division.

ISSUES

1. Did the ALJ err in finding Claimant was not entitled to continued medical treatment for the right shoulder?
2. Should Claimant's authorized medical treatment be changed from Dr. Ng to another doctor?

FINDINGS OF FACT

On April 5, 2011, Claimant was injured, while working for King County Hospital. Claimant settled her workers compensation claim on January 29, 2015, for injuries to her neck, right shoulder and right arm. As a result of the settlement future medical treatment was authorized for Claimant's neck, right shoulder and any injuries to the right arm causally related to the accident except carpal tunnel syndrome.

In an agreed Post Award Order dated April 22, 2016, Dr. Xavier Ng was authorized to provide pain management treatment for Claimant's neck, right shoulder and right arm(elbow) complaints.

Claimant first saw Dr. Ng on June 2, 2016. Dr. Ng has been providing pain management treatment to Claimant ever since. Adjustments were made to Claimant's medications to effectively treat her pain and symptoms. Home exercises were implemented to treat Claimant's symptoms. After six years of treatment with Dr. Ng, Claimant is able to work 40 hours a week and her range of motion is better.

Claimant testified without medication, she is unable to move her neck and head, her shoulder tightens, her elbow will be stiff, she cannot straighten her arm or turn her hand and her hand contracts. Her pain level is an 8 out of 10 on the pain scale. When she is taking medication as prescribed by Dr. Ng Claimant is able to perform her job duties, function in a normal manner and her pain level is either at a 3 or 4.

Claimant's current medication schedule is at 7:30 a.m. Claimant takes acetaminophen, an immediate release morphine and two Duloxetine; at lunch, which is 2:00 p.m. or so Claimant takes another immediate release morphine, Tizanidine and another acetaminophen; and in the evening at dinner time, Claimant takes another acetaminophen, a long-acting morphine, Colace, two Duloxetine, another Tizanidine and a Seroquel. Claimant is able to sleep at night when she takes Seroquel.

Since December 5, 2020, Claimant has had monthly tele-medicine visits with Dr. Ng. Some of these visits have occurred on holidays or weekends due to Claimant's schedule. Claimant is willing to schedule in-person visits with Dr. Ng if necessary. Claimant does not recall the last time she had a drug screen. However, she believes Dr. Ng monitors her medication refills closely. The last tele-medicine visit Claimant had with Dr. Ng was in May 2022.

Claimant wants to continue treatment with Dr. Ng. She trusts him and his treatment plan has enabled her to work full time.

Claimant does not want additional surgery because her pain is under control and her mobility is satisfactory.

From June 2, 2016, to October 31, 2019, Dr. Ng met with Claimant monthly and had regular urine drug screening. During the course of Claimant's treatment, Dr. Ng made adjustments to her medication. The last time he adjusted Claimant's medication was on October 13, 2021. He makes adjustments based on benefit to the patient and to avoid and to minimize addiction and tolerance. Part of Claimant's treatment plan is prescribing morphine, both extended release and immediate release. Claimant's morphine doses are well under the dosage of the Center For Disease Control guidelines. As of May 15, 2022, Claimant was doing well. Dr. Ng feels Claimant's treatment with him has provided a good outcome and sees no reason to change physicians.

The last drug screen Dr. Ng administered for Claimant was November 2018. He has not ordered a drug screen for Claimant in some time due to difficult logistics with the pandemic and tele-medicine. He finds Claimant to be honest and trustful over the years and he is not concerned about her. Dr. Ng declines to use a third party to do the drugs screens because he does not find those results reliable. He monitors the medications he prescribes by pill count. If a patient asks for a refill before they should, this is an indicator medications may be abused. He has not found any indication of medication abuse by Claimant. Dr. Ng regularly monitors Claimant on K-TRACS, the prescription drug monitoring program.

Claimant met with Dr. Daniel Prohaska on August 20, 2019, at Respondent's request. She presented with right shoulder pain. Claimant underwent surgery with Dr. Do to repair the right rotator cuff. Since the injury, Claimant complains of weakness, stiffness, loss of motion and catching, intermittent tingling and numbness in her hand. She rated the pain at 5 out of 10 and described it as sharp and aching in the anterior, posterior and elbow. Claimant's symptoms are aggravated by lifting, overhead reaching, lying on the shoulder, working and bringing the arm down from a raised position. Claimant was under pain management with Dr. Ng.

Dr. Prohaska ordered an MRI of Claimant's right shoulder and after reviewing it, confirmed his diagnosis of primary osteoarthritis in the right shoulder. He opined not all the issues with Claimant's shoulder are related to Claimant's work-related rotator cuff repair, specifically the degenerative changes in the glenohumeral joint. Claimant's current symptoms were related to degenerative arthritis and any further treatment is not related to conditions related to the work accident. Dr. Prohaska noted Claimant's glenohumeral joint showed degenerative changes at the time of the 2011 operation.

Claimant met with Dr. Baoluan Nguyen on December 27, 2021, at Respondent's request, for an assessment. Claimant presented with chronic pain in her neck, right shoulder, right elbow and right hand. Claimant was receiving treatment for her right shoulder pain. Because Claimant was taking narcotic medication, Dr. Nguyen felt Claimant should be seen in person monthly for drug screening and random confirmatory urine drug screenings. He agreed to reassess Claimant, if allowed, with the intention of adjusting her

medication and to provide more hands-on monitoring of her medication use. Dr. Nguyen opined possible treatment would included tapering off the morphine use if appropriate. He found Claimant's overall treatment regimen appropriate. Claimant expressed concern about tapering off the morphine and taking Tylenol.

Claimant acknowledged she saw Dr. Nguyen at Respondent's request. Claimant understood his treatment plan was to take Claimant off all medications and put her on a course of Prednisone. Claimant was concerned about taking Prednisone because she is diabetic. Claimant's current treatment was working well for her and she wanted to continue her treatment with Dr. Ng.

At the Post Award Hearing on March 16, 2022, the parties stipulated the application filed originally by Claimant for payment of medical bills was changed to Respondent's application to change medical benefits.¹ Respondent requested a change of physician.

At the hearing of May 16, 2022, the following statements were made:

THE COURT: All right. Thank you Mr. Slape. Mr. Donley, anything else you'd like to address as far as the post award medical application for a change of physician or to—you are wanting to change the physician from Dr. Ng to Dr. Nguyen, is that right Mr. Donley?

MR. DONLEY: That's correct, Your Honor.

THE COURT: All right. Anything else you'd like to talk about right now on that subject?

MR. DONLEY: No, your Honor.²

There was no mention at the hearing of Dr. Prohaska or his report and findings.

Dr. Prohaska's deposition was taken on August 18, 2022.

The ALJ denied Respondent's request to terminate medical treatment with Dr. Ng and continued Dr. Ng's authorization as treating physician for pain management of the neck and right elbow complaints. He discontinued authorization for pain management for the right shoulder.

¹ P.A.H. Trans. (May 16, 2022) at 3.

² *Id.* at 12.

PRINCIPLES OF LAW AND ANALYSIS

Claimant argues the Board should reinstate Claimant's pain management treatment for the right shoulder with Dr. Ng because the ALJ exceeded his jurisdiction in considering Respondent's untimely request for termination of benefits under proper applications of the law. Claimant argues she remains entitled to pain management of the right shoulder to relieve the effects of the April 2011 work injury. Claimant requests the rest of the Order be affirmed.

Respondent argues the ALJ's Post-Award Order should be modified to remove Dr. Ng as Claimant's treating physician for the neck and right elbow and authorize an alternative pain management provider, preferably Dr. Nguyen, to address Claimant neck and right elbow issues. Respondent contends the treatment provided to Claimant since the onset of the pandemic decreased precipitously and due to Claimant's prescribed narcotic medication, she should be more closely monitored. Respondent contends Claimant is no longer in need of treatment for the right shoulder and it should be discontinued, as ordered by the ALJ.

Claimant's work accident occurred prior to the changes to the workers compensations laws on May 15, 2011, and thus the laws in place prior to May 15, 2011, control this claim.

K.S.A. 2010 Supp. 44-508(h) states:

"Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.

The ALJ erred in ruling Claimant was not entitled to continued medical treatment for the right shoulder.

K.S.A 2010 Supp. 44-510k(a) states:

At any time after the entry of an award for compensation, the employee may make application for a hearing, in such form as the director may require for the furnishing of medical treatment. Such post-award hearing shall be held by the assigned administrative law judge, in any county designated by the administrative law judge, and the judge shall conduct the hearing as provided in K.S.A. 44-523 and amendments thereto. The administrative law judge can make an award for further medical care if the administrative law judge finds that the care is necessary to cure and relieve the effects of the accidental injury which was the subject of the underlying award. No post-award benefits shall be ordered without giving all parties to the award the opportunity to present evidence, including taking testimony on any disputed matters. A finding with regard to a disputed issue shall be subject to a full

review by the board under subsection(b) of K.S.A. 44-551 and amendments thereto. Any action of the board pursuant to post-award orders shall be subject to review under K.S.A. 44-556 and amendments thereto.

There are two errors in terminating treatment to the right shoulder. As stated in K.S.A. 44-510k(a), medical care can be awarded to cure and relieve the effects of the accidental injury. Claimant's right shoulder was a subject of the underlying award. Claimant continues to have pain in her right shoulder, as well as weakness, stiffness, loss of motion, catching and intermittent numbness in her hand. Claimant had rotator cuff surgery on her right shoulder. Claimant is entitled to ongoing medical treatment of her right shoulder to cure and relieve the effects of her accidental injury.

The termination of the treatment of the right shoulder was ordered without giving the parties an opportunity to present evidence on this issue. At the post-award hearing, the focus of Respondent's application was not authorizing Claimant's treatment with Dr. Ng. There was no suggestion of terminating any treatment for any of Claimant's injuries. There were no statements at the hearing about following Dr. Prohaska's recommendation of termination of treatment to Claimant's right shoulder. Respondent did not bring up terminating treatment for the right shoulder until they filed their brief. Respondent has known of Dr. Prohaska's opinion since August 2019. If Respondent wished to terminate treatment for Claimant's right shoulder, a proper application should have been made to give Claimant an opportunity to rebut such evidence.

The ALJ's order not authorizing continued treatment for Claimant's right shoulder is reversed.

Claimant's authorized medical treatment with Dr. Ng shall be continued with Dr. Ng.

Under Dr. Ng's treatment, Claimant's pain was controlled to the extent Claimant could continue to work full time and function in her daily life. Claimant is satisfied with her current medical treatment with Dr. Ng and fears if it is changed to another doctor her treatment will be disrupted and will result in her not functioning as well.

Respondent's expert, Dr. Nguyen, acknowledged Claimant's current treatment with Dr. Ng is appropriate. Respondent's primary concern is lack of timely records from Dr. Ng and Dr. Ng not seeing Claimant in person and monitoring Claimant's medication use with laboratory testing. Such concerns can be easily remedied without going to a drastic measure like changing treatment from a doctor who enables Claimant to function. A change of physician is not warranted.

AWARD

WHEREFORE, it is the finding, decision and order of the Board the Post-Award Medical Order of Administrative Law Judge Gary K. Jones dated September 8, 2022, is modified. Claimant's medical treatment with Dr. Ng continues to be authorized. Medical treatment for Claimant's right shoulder continues to be authorized.

IT IS SO ORDERED.

Dated this _____ day of November, 2022.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: (Via OSCAR)

Phillip Slape, Attorney for Claimant
P. Kelly Donley, Attorney for Respondent and its Insurance Carrier
Hon. Gary K. Jones, Administrative Law Judge