

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

STEPHANIE HINES
Claimant

v.

J.C. PENNEY CO., INC.
Respondent

AP-00-0469-904
CS-00-0454-377

and

NEW HAMPSHIRE INSURANCE COMPANY
Insurance Carrier

ORDER

Claimant requested review of the August 15, 2022, Award issued by Administrative Law Judge (ALJ) Kenneth J. Hursh. The Board heard oral argument on January 5, 2023.

APPEARANCES

Claimant appeared *pro se*. Christopher J. McCurdy appeared for Respondent and Insurance Carrier.

RECORD AND STIPULATIONS

The Board adopted the same stipulations and considered the same record as the ALJ, consisting of the Transcript of Preliminary Hearing Taken via Videoconference, held February 3, 2021, including Exhibits 6-8 and excluding Exhibits 1-5; Transcript of Videoconference Preliminary Hearing, held June 23, 2021, excluding the exhibits; Transcript of Videoconference Regular Hearing, held March 31, 2022; Transcript of Motion to Withdraw Hearing, held June 1, 2022; transcript of Deposition of Michael Poppa, D.O., taken April 8, 2022, including Exhibits 1-2 and excluding Exhibits 3-15, after sustaining the objection made on Page 30; transcript of Evidentiary Deposition of Theodore Koreckij, M.D., taken July 20, 2022, including Exhibits 1-3; transcript of Evidentiary Deposition of Stanley A. Bowling, M.D., taken July 27, 2022, after sustaining the objection made on Page 22, including Exhibits 1-3; and the pleadings and orders contained in the administrative file. The Board also reviewed the parties' briefs.

ISSUES

1. Does the Appeals Board possess jurisdiction to consider an issue pertaining to future medical treatment at this time?
2. If the Appeals Board possesses jurisdiction to consider an issue pertaining to future medical treatment, may Claimant select the authorized treating physician?
3. Did Claimant prove she sustained a compensable psychological or psychiatric injury?
4. Is Claimant permanently and totally disabled?

FINDINGS OF FACT

Claimant worked for Respondent filling orders in Respondent's warehouse for approximately one year. On November 11, 2020, Claimant slipped and fell forward in Respondent's parking lot on her way to work, and landed on her hands and knees. Claimant initially alleged she sustained injuries to both knees, and developed low back symptoms approximately one week after the accident. Claimant reported the accident to Respondent.

Claimant received occupational medicine treatment through Dr. Garrett. Dr. Garrett's records are not in evidence and he did not testify. Claimant testified she was placed on light duty, and she reported knee and low back symptoms to Dr. Garrett. An MRI of the left knee was performed on December 4, 2020, and indicated a possible meniscus tear. Claimant was referred to Dr. Bowling for further treatment of the left knee.

Dr. Bowling saw Claimant on December 21, 2020, for the left knee. Claimant also reported pain and numbness running to both feet. Dr. Bowling diagnosed left knee pain with a suspected medial meniscus tear from the accident. Dr. Bowling also thought Claimant displayed radicular symptoms, and recommended a specialist evaluate her low back and hip.

Following a preliminary hearing, Dr. Santos was authorized to treat Claimant's low back and hip. Dr. Santos' treatment records are not in evidence and he did not testify.

On February 15, 2021, Claimant returned to Dr. Bowling, and complained of bilateral knee pain and foot numbness. An x-ray of the right knee indicated arthritis, which Dr. Bowling thought was preexisting. Dr. Bowling's diagnosis for the left knee was unchanged. Dr. Bowling thought Claimant's right knee pain came from favoring the left side. Dr.

Bowling also noted symptom magnification was present. Surgery for the left knee was recommended to address Claimant's medial knee pain.

Claimant's left knee surgery was scheduled twice, and Claimant canceled the surgery on both occasions due to concerns about other health conditions. Ultimately, Claimant opted not to proceed with surgery on the left knee.

Dr. Bowling declared Claimant at maximum medical improvement on September 20, 2021, noting Claimant was treating her knee pain with over-the-counter pain medication. Dr. Bowling released Claimant to return to work full duty, and thought Claimant could do her normal work without risk of causing additional damage. Dr. Bowling rated Claimant's impairment at 1% of the left knee based on the *AMA Guides to the Evaluation of Permanent Impairment*, 6th edition (*AMA Guides*). No additional impairment was assessed based on competent medical evidence.

Dr. Santos apparently referred Claimant to Dr. Koreckij, an orthopedic spine specialist, for further treatment. Dr. Koreckij performed an initial evaluation of Claimant on March 17, 2021. Examination was notable for breakway weakness, rather than continuous weakness consistent with a neurologic component. Reports of knee pain during resisted hip flexion unrelated to the spine was also noted. Dr. Koreckij diagnosed pain all over Claimant's body and degenerative disc disease of the lumbar spine. MRI scans of the thoracic and cervical spines were ordered.

Pursuant to a preliminary order, the MRIs were completed, and were interpreted by Dr. Koreckij as showing degenerative changes of the thoracic and cervical spines unrelated to the work-related accident. On September 8, 2021, Claimant returned to Dr. Koreckij, and reported she was pain-free after undergoing hydro-physical therapy. Dr. Koreckij declared Claimant at maximum medical improvement for soft-tissue injuries to the cervical and thoracic spines, and a lumbar strain. Claimant was released to perform full-duty work. Dr. Koreckij rated Claimant's impairment at 2% of the body as a whole under the *AMA Guides*, with no additional impairment assessed based on competent medical evidence.

Dr. Poppa evaluated Claimant at her prior counsel's request on December 7, 2021. Claimant reported injuries to the left hip, back and knees from a slip and fall at work. Claimant's course of medical treatment, including treatment Claimant received on her own from her primary care physician, was reviewed. The MRI scans were reviewed. Claimant also reported feeling emotionally disturbed because she could not work, and his report stated Claimant felt depressed, tense and anxious due to her pain. Examination was notable for multiple complaints of pain.

Dr. Poppa diagnosed bulges and protrusions at C3-T1, injuries at T4-5 and T10-11 with myofasciitis, a lumbar strain with injuries at L4-5 and L5-S1, a labral tear at the left hip with chronic pain, a strain/sprain of the left knee with a tear at the posterior horn of the

medial meniscus and Baker's cyst, and a strain/sprain and contusion of the right knee. Dr. Poppa believed the work-related fall caused all of the medical conditions. Dr. Poppa issued an impairment rating using the *AMA Guides*, as a starting point and considering the injuries' impact on Claimants activities. Dr. Poppa assessed 15% impairment for the cervical spine, 10% impairment for the thoracic and lumbar spines, 6% impairment for the left hip, 4% impairment for the right knee, 6% impairment for the left knee, 1% impairment based on the burden of treatment and 1% impairment for Claimant's pain, which produced 37% total impairment to the body as a whole. Dr. Poppa thought Claimant could work with permanent work restrictions. Future medical was recommended.

On cross-examination, Dr. Poppa conceded Claimant did not report cervical or thoracic pain on the pain diagram she completed, and Dr. Poppa assessed 15% impairment to the cervical spine based on the medical treatment Claimant received. Dr. Poppa also disputed the accuracy of Dr. Koreckij's record of Claimant reporting no pain during the last appointment, and testified Claimant was having a good day when she saw Dr. Koreckij.

Although Respondent provided Claimant accommodated work while she was receiving medical treatment, Claimant testified at a preliminary hearing she had difficulty performing her accommodated work, particularly with sitting. Claimant resigned her employment with Respondent and last worked on January 6, 2021. Claimant did not testify at the regular hearing held on March 31, 2022, and Claimant's prior counsel confirmed Claimant was seeking permanent partial disability compensation based on functional impairment considerations. Claimant noted her current symptoms and problems in her briefs and during oral argument, but there is no record of Claimant's current symptoms or activities.

Claimant's prior counsel withdrew as Claimant's attorney after the regular hearing and before the Award was issued by ALJ Hursh. Claimant is currently unrepresented by legal counsel.

On August 15, 2022, ALJ Hursh issued the Award. ALJ Hursh noted no evidence supporting a claim for temporary total disability compensation was admitted, and the request for additional temporary total disability compensation was denied. ALJ Hursh found Claimant sustained compensable injuries to both knees, left hip and lumbar spine from the work-related slip and fall of November 11, 2020. ALJ Hursh found Claimant sustained 0% impairment of the right knee, 1% impairment of the left knee based on Dr. Bowling's rating, 7.5% impairment of the left hip based on Dr. Poppa's rating and 3% impairment attributable to the low back, producing 11.5% total impairment of the body as a whole. Claimant was awarded permanent partial disability compensation based on 11.5% functional impairment of the body as a whole. Future medical was also awarded.

These review proceedings follow. According to OSCAR, no post-award proceedings have taken place.

PRINCIPLES OF LAW AND ANALYSIS

In her application for review, Claimant seeks an order from the Appeals Board permitting her to select her own physician to provide future medical treatment. Claimant also alleges she sustained a psychological or psychiatric injury. In her briefs and during oral argument, Claimant argued she is completely disabled, and wants additional medical treatment by the physician of her choice. Respondent argues the Award should be affirmed, as there is no evidence indicating Claimant sustained a psychological or psychiatric injury, or is permanently and totally disabled. Respondent also argues medical treatment was provided by Respondent in response to Claimant's request for future medical and Respondent retains the right to select the authorized treating physician.

Generally, it is the intent of the Legislature the Workers Compensation Act be liberally construed only for the purpose of bringing employers and employees within the provisions of the Act.¹ The provisions of the Workers Compensation Act shall be applied impartially to all parties.² The burden of proof shall be on the employee to establish the right to an award of compensation, and to prove the various conditions on which the right to compensation depends.³ "Burden of proof" generally means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence the party's position on an issue is more probably true than not on the basis of the whole record.⁴

1. The Appeals Board does not possess jurisdiction to consider Claimant's request for future medical treatment or the request to select the authorized physician because those issues have not been addressed by the ALJ.

"All final orders, awards, modifications of awards, or preliminary awards under K.S.A. 44-534a, and amendments thereto, made by an administrative law judge shall be subject to review by the workers compensation appeals board upon written request of any interested party within 10 days."⁵ "The review by the appeals board shall be upon

¹ See K.S.A. 44-501b(a).

² See *id.*

³ See K.S.A. 44-501b(c).

⁴ See K.S.A. 44-508(h).

⁵ See K.S.A. 44-551(l)(1).

questions of law and fact as presented, had and introduced before the administrative law judge.”⁶

Claimant does not dispute the provision for future medical in the Award. Instead, Claimant seeks an order from the Appeals Board permitting her to select the authorized treating physician. Respondent contests Claimant’s request. There is no record ALJ Hursh addressed this matter in a post-award medical hearing. In the absence of a post-award medical award or a record of proceedings before ALJ Hursh, the Board has no award to review. The Appeals Board does not possess authority to issue advisory opinions under the plain language of K.S.A. 44-555c. Therefore, the portion of Claimant’s application for review seeking an order permitting Claimant to select the authorized treating physician is dismissed.

Pursuant to K.S.A. 44-510k, this issue may be presented to ALJ Hursh in post-award proceedings. The Board refrains from commenting on the merits of Claimant’s arguments at this time.

2. Claimant did not prove she sustained a compensable psychological or psychiatric injury.

The Board next addresses Claimant’s argument she sustained a compensable psychological or psychiatric injury. To prove a compensable psychiatric or psychological injury, the employee must prove: (1) a work-related physical injury, (2) symptoms of a traumatic neurosis, (3) the neurosis is directly traceable to the physical injury, and (4) the accident was the prevailing factor causing the psychological injury.⁷ “Prevailing factor” is the primary factor, in relation to any other factor, based on consideration of all relevant evidence submitted by the parties.⁸

Claimant did not prove all the elements of a compensable psychological or psychiatric injury. Claimant sustained work-related physical injuries. The records of the treating physicians do not document symptoms of a traumatic neurosis, but the report of Dr. Poppa notes complaints of depression, tension and anxiety, which are arguably symptoms of a traumatic neurosis. There is no evidence, however, Claimant suffers from a psychological or psychiatric pathology or condition, the condition was directly traceable to the physical injuries versus unrelated medical conditions, or the accident was the

⁶ See K.S.A. 44-555c(a).

⁷ See, e.g., *Heyen v. City of Wichita*, No. 1,064,079, 2013 WL 2455722, at *2 (Kan. WCAB May 29, 2013)(citing *Love v. McDonald’s Restaurant*, 13 Kan. App. 2d 397, 771 P.2d 557 (1989); K.S.A. 44-508(d)).

⁸ See K.S.A. 44-508(g).

prevailing factor causing the condition. Therefore, the claim for compensation for a compensable psychological or psychiatric injury must be denied.

3. Claimant did not prove she was rendered permanently and totally disabled on account of the November 11, 2020, accident.

Finally, the Board addresses the claim for permanent total disability compensation. Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment, and expert evidence shall be required to prove permanent total disability.⁹

Review of the record indicates Claimant failed to prove she is entitled to permanent total disability compensation. Claimant, through her prior counsel, announced she was seeking permanent partial disability compensation at the regular hearing, and there is no evidence in the record concerning Claimant's condition at the time of the regular hearing. At oral argument, Claimant advised she underwent an evaluation for Social Security Disability, but evidence of the evaluation is not in the record. The record contains no opinions from vocational experts. The testifying physicians thought Claimant was permanently partially disabled. The treating physicians thought Claimant was capable of working full duty, and Claimant's rating physician thought Claimant could work within permanent restrictions. Based on the record, Claimant did not meet her burden of proving she was permanently and totally disabled on account of the injuries sustained on November 11, 2020.

CONCLUSION

Claimant's request to designate an authorized treating physician for future medical treatment is dismissed because the issue was not presented or ruled upon by ALJ Hursh. Claimant did not meet her burden of proving she sustained a compensable psychological or psychiatric injury, and Claimant did not prove she was permanently and totally disabled. The Award is affirmed. Pursuant to K.S.A. 44-556(a), this is a final order, and any party may seek review by the Court of Appeals by filing an appeal with the Court of Appeals within thirty (30) days of the date of this order.

AWARD

WHEREFORE, it is the finding, decision and order of the Appeals Board the Award issued by ALJ Kenneth J. Hursh, dated August 15, 2022, is affirmed. Claimant's application for review is dismissed in part with regard to the future medical issue.

⁹ See K.S.A. 44-510c(a)(2).

IT IS SO ORDERED.

Dated this _____ day of February, 2023.

APPEALS BOARD MEMBER

APPEALS BOARD MEMBER

APPEALS BOARD MEMBER

c: (Via OSCAR)

Stephanie Hines, *pro se*
Christopher J. McCurdy
Hon. Kenneth J. Hursh