

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

INOCENTE SOTO)
Claimant)
V.)
NATIONAL BEEF PACKING CO LLC) AP-00-0472-166
Respondent) CS-00-0206-121
AND)
AMERICAN ZURICH INSURANCE CO)
Insurance Carrier)

ORDER

The claimant, through Stanley Ausemus, requested review of Administrative Law Judge (ALJ) Kenneth Hursh's Award dated November 17, 2022. D. Shane Bangerter appeared for the respondent and its insurance carrier (respondent). The Board heard oral argument on March 23, 2023.

RECORD AND STIPULATIONS

The Board considered the same record as the ALJ, consisting of the: (1) independent medical evaluation report of Dr. Terrence Pratt, dated April 15, 2021; (2) deposition transcript of Dr. George Flutter, taken September 1, 2022; (3) deposition transcript of Dr. Terrence Pratt, taken October 3, 2022; (4) regular hearing transcript, held October 6, 2022; (5) all exhibits attached to enumerated items 2-4; (6) Stipulation, filed in OSCAR on October 6, 2022; (7) documents of record filed with the Division; and (8) the parties' briefs.

ISSUES

1. What is the nature and extent of the claimant's disability?
2. Can the Board address the issue of future medical treatment when the Award does not address future medical treatment?

FINDINGS OF FACT

The claimant worked for the respondent for 20 years. He initially worked at the respondent's meat packing plant in a "cutting" position. The claimant injured his right shoulder and underwent surgery in 2008. That claim was settled for 18% impairment to the right upper extremity in 2010.

Following his right shoulder injury, the claimant returned to work for the respondent. His job was changed to pushing boxes, which was within his permanent restrictions. He gradually developed pain in his shoulders. On April 13, 2017, the claimant alleged injury by repetitive trauma to his shoulders. He ultimately underwent bilateral shoulder surgery. The respondent admitted the repetitive trauma was the prevailing factor causing the claimant's injury, medical condition, and resulting disability or impairment.

At the respondent's request, the claimant saw Dr. David Hufford on July 9, 2020, for an independent medical examination (IME). The claimant complained of pain throughout his upper extremities, as well as paresthesias, except to his hands. Dr. Hufford noted the claimant had a prior right shoulder injury. The doctor's impression was repetitious occupational activities with serial injuries to the shoulders.

Using the *AMA Guides to the Evaluation of Permanent Impairment*, 6th ed. (*Guides*, 6th ed.), Dr. Hufford assigned the claimant a combined 5% whole person impairment. Using the *AMA Guides to the Evaluation of Permanent Impairment*, 4th ed. (*Guides*, 4th ed.), the doctor assigned a 5% left upper extremity impairment for range of motion deficits. Dr. Hufford further stated, "there is no means to rate his right shoulder pathology in the setting of prior injury requiring operative intervention, invalid physical examination findings and the chronic pre-existing impairment including severe degenerative glenohumeral arthritis and chronic retracted rotator cuff tear."¹

Dr. Hufford opined the claimant required no new or additional restrictions for his right shoulder and felt he was not in need of any restrictions for his left shoulder.

At his attorney's request, the claimant saw Dr. George Fluter on October 6, 2020, for an IME. The doctor is board certified in physical medicine and rehabilitation. Dr. Fluter noted the claimant reported no prior injuries or problems with the affected areas, but the medical records reflected a prior right shoulder injury.

The claimant complained of pain affecting his shoulders and numbness and dysesthesias in his upper extremities. Dr. Fluter diagnosed the claimant with: (1) bilateral shoulder pain, impingement, tendonitis and bursitis; (2) bilateral shoulder internal derangement; (3) status post right shoulder arthroscopy; and (4) status post left shoulder arthroscopy.

Using the *Guides*, 6th ed., Dr. Fluter assigned the claimant a combined 14% impairment rating. The doctor assigned a combined 15% impairment rating under the *Guides*, 4th ed., which he believed should be used since the *Guides*, 6th ed., basically

¹ Stipulation (filed Oct. 6, 2022) at 4.

states, “[I]f there’s more than one method of determining an impairment rating, then you should use the method that results in the higher impairment rating.”²

Dr. Fluter did not have the claimant’s prior medical records regarding surgery and prior impairment ratings. The doctor admitted a prior impairment could have an impact on the claimant’s right shoulder impairment rating.

Dr. Fluter opined the claimant will require future medical treatment, including follow-up appointments, diagnostic and therapeutic interventions and testing, prescription medications, physical therapy, interventional pain management procedures and/or surgery.

On April 15, 2021, the claimant saw Dr. Terrence Pratt for a court-ordered IME. The doctor is board certified in physical medicine and rehabilitation. The claimant complained of discomfort and weakness in his shoulders and numbness of his fingers and thumbs. Symptoms were exacerbated with activities and palliated with use of Tylenol. Dr. Pratt diagnosed the claimant with: (1) right shoulder syndrome with history of remote apparent debridement, open rotator cuff repair and biceps tenodesis; (2) recent findings suggesting a SLAP tear; and (3) history of left rotator cuff tear, subacromial impingement, biceps tendinopathy, and status post arthroscopic debridement. The doctor concluded the claimant suffered a labral tear, which was a new injury.

Using both the *Guides*, 6th ed. and 4th ed., Dr. Pratt assigned the claimant a 5% right upper extremity rating, or 3% whole person impairment rating for the right shoulder, above and in addition to the prior impairment assigned for the 2008 injury. The doctor assigned a 12% left upper extremity rating, or 7% whole person impairment rating for the left shoulder. Using the combined values chart, Dr. Pratt assigned the claimant a 10% whole person impairment rating for the 2017 accident.

Dr. Pratt opined the claimant will not require future medical treatment. He testified any future treatment on the right shoulder would be due to the 2008 work accident.

The claimant currently experiences difficulty lifting his right arm and sleeping on his side. Any type of movement causes pain in his shoulders. He rated the pain in his right shoulder as an 8 and a 7 in his left shoulder on a 0-10 pain scale. He takes Tylenol for pain relief.

The ALJ stated:

The court gave some deference to Dr. Pratt’s opinion as a neutral evaluator not hired by either party, and his rough split of the other, relatively close ratings seemed

² Fluter Depo. at 26.

quite reasonable. The court adopts Dr. Pratt's ratings. The claimant's permanent partial disability from the April 13, 2017 repetitive injury was 10% to the body as a whole.

...

1. The respondent and insurance carrier shall pay all authorized medical expenses related to treatment of the claimant's injuries subject to the Kansas workers compensation schedule of medical fees. All known medical expenses to date, totaling \$15,925.17, have been paid.
2. The respondent and insurance carrier shall pay 41.5 weeks of permanent partial disability benefits at the rate of \$468.22 per week for a 10% impairment to the body as a whole. As of the date of this award, all weeks of permanent partial benefits, a total of \$19,431.14, are due and owing.

The Award did not address future medical treatment. The Regular Hearing transcript indicated future medical treatment was being pursued by the claimant.³ At oral argument, the parties agreed the Board could address the issue of future medical treatment without any need to remand the matter to the ALJ for an initial ruling.

PRINCIPLES OF LAW AND ANALYSIS

The claimant argues he is entitled to permanent partial disability benefits based on a 15% whole body impairment rating. The claimant asserts his medical expert's opinion more accurately reflects the extent of his injuries. The respondent maintains the Award should be affirmed.

An employer is liable to pay compensation to an employee incurring personal injury by accident arising out of and in the course of employment.⁴ The Workers Compensation Act is liberally construed only for the purpose of bringing employers and employees within the provisions of the Act.⁵ The provisions of the Workers Compensation Act are applied impartially to all parties.⁶ The employee has the burden of proof to establish the right to an award of compensation, including the various conditions upon which the right to

³ See R.H. Trans., at 4.

⁴ See K.S.A. 44-501b(b).

⁵ See K.S.A. 44-501b(a).

⁶ See *id.*

compensation depends.⁷ The trier of fact considers the whole record in determining if a claimant satisfied the burden of proof.⁸

The Board's review of an order is de novo on the record.⁹ A de novo hearing is a decision of the matter anew, giving no deference to findings and conclusions previously made by the judge.¹⁰ On de novo review, the Board makes its own factual findings.¹¹

1. The claimant sustained a 10% impairment of function to the body as a whole as a result of his current claim.

The Board affirms the ALJ's determination regarding the claimant's impairment of function. The ALJ adopted the opinion of the court-ordered evaluator, Dr. Pratt. The ALJ noted Dr. Pratt's rating was an approximate split of the other physicians' ratings. When the ratings are averaged between the three opinions, the split is 10% to the body as a whole. Dr. Pratt's neutral opinion is supported by the *Guides* and explanation. The Board, like the ALJ, finds Dr. Pratt's opinion most credible and concludes the claimant sustained a 10% impairment of function to the body as a whole for his repetitive injuries with a date of injury of April 13, 2017.

2. The Board may not address the issue of future medical treatment when the Award does not address future medical treatment.

"Administrative agencies are creatures of statute and their power is dependent upon authorizing statutes, therefore any exercise of authority claimed by the agency must come from within the statutes."¹² In *Bergstrom*, the Kansas Supreme Court held:

When a workers compensation statute is plain and unambiguous, this court must give effect to its express language rather than determine what the law should or should not be. The court will not speculate on legislative intent and will not read

⁷ See K.S.A. 44-501b(c).

⁸ See *id.*

⁹ See *Helms v. Pendergast*, 21 Kan. App. 2d 303, 899 P.2d 501 (1995).

¹⁰ See *In re Tax Appeal of Colorado Interstate Gas Co.*, 270 Kan. 303, 14 P.3d 1099 (2000).

¹¹ See *Berberich v. U.S.D. 609 S.E. Ks. Reg'l Educ. Ctr.*, No. 97,463, 2007 WL 3341766 (Kansas Court of Appeals unpublished opinion filed Nov. 9, 2007).

¹² *Acosta v. National Beef Packing, Co., L.P.*, 273 Kan. 385, 396, 44 P.3d 330 (2002).

the statute to add something not readily found in it. If the statutory language is clear, no need exists to resort to statutory construction.¹³

K.S.A. 44-555c(a) states, “The review by the appeals board shall be upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge.” In other words, the Board's review authority is limited to issues decided by the ALJ based on the record presented to the ALJ. On review of final awards, the Board has the authority to remand any matter to the ALJ for further proceedings.¹⁴

The issue of future medical treatment was not addressed in the Award. Determination of this issue is remanded to the ALJ.

AWARD

WHEREFORE, with respect to the nature and extent of the claimant’s disability, the Board affirms the Award dated November 17, 2022. However, this matter is remanded for the ALJ’s determination regarding future medical treatment.

IT IS SO ORDERED.

Dated this _____ day of April, 2023.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: (via OSCAR)
Stanley Ausemus
D. Shane Bangerter
Hon. Kenneth Hursh

¹³ *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 607-08, 214 P.3d 676 (2009).

¹⁴ See K.S.A. 44-551(l)(1).