

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

OBED MILCE
Claimant

v.

AP-00-0472-538
CS-00-0455-665

TYSON FRESH MEATS, INC.
Self-Insured Respondent

ORDER

Claimant requested review of the November 4, 2022, Award issued by Administrative Law Judge (ALJ) Gary K. Jones. The Appeals Board heard oral argument on April 27, 2023.

APPEARANCES

Randy S. Stalcup appeared for Claimant. Thomas G. Munsell appeared for Self-Insured Respondent.

RECORD AND STIPULATIONS

The Board adopted the same stipulations and considered the same record as the ALJ, consisting of the transcript of Regular Hearing, held August 10, 2022; the transcript of Evidentiary Deposition of Obed Milce, taken September 29, 2022; the transcript of Evidentiary Deposition of Pat Do, M.D., taken September 7, 2022, including Exhibits 1-3; the transcript of Remote Telephonic Deposition of Daniel D. Zimmerman, M.D., taken August 31, 2022, including Exhibits 1-2; the narrative report of Dr. John P. Estivo, D.O., dated December 23, 2021; and the pleadings and orders contained in the administrative file. The Board also reviewed Claimant's brief filed January 13, 2023, and Respondent's brief filed February 7, 2023.

ISSUES

1. Does the Appeals Board possess authority to consider Claimant's Application for Review or should the Application be dismissed because it was improperly filed?
2. What is the nature and extent of disability?
3. Is Claimant entitled to an award of future medical treatment?

In his Application for Review, Claimant listed average weekly wage as an issue to be reviewed by the Board. The issue was not briefed. At oral argument, Claimant's

counsel confirmed he was not seeking review of the average weekly wage finding made by ALJ Jones. Therefore, the Board will not review the average weekly wage issue because it was waived.

FINDINGS OF FACT

Claimant worked for Respondent as a chuck roller. On August 14, 2020, Claimant was walking to his work station and tripped over a hose. Claimant landed on both knees. Claimant reported the incident to Respondent and received authorized medical treatment.

Claimant received conservative treatment for both knees at Convenient Care Clinic from September 15, 2020, through November 11, 2020. An MRI of the right knee was performed on November 6, 2020. Following the MRI scan, Claimant was referred to an orthopedic specialist, Dr. Do.

Dr. Do treated Claimant from December 2, 2020, through April 1, 2021. Claimant initially reported right forearm and bilateral knee pain, but treatment was devoted to both knees. Claimant received conservative treatment, consisting of physical therapy, medication and injections to both knees. Dr. Do interpreted the MRI scan as showing swelling at the front of the right knee, frayed cartilage, and no ligament or meniscus injury. On January 7, 2021, Dr. Do diagnosed bilateral knee pain and synovitis of the right knee, and recommended surgery.

On January 25, 2021, Dr. Do performed surgery on the right knee. The frayed cartilage about the patella was removed, along with the inflamed tissue identified as synovitis on the MRI. At post-operative appointments, Claimant reported increased pain and weakness of the right knee while standing and walking. At the final appointment of April 1, 2021, Claimant reported pain and burning of the right knee and worsening left knee pain with standing and walking. Dr. Do identified no swelling or redness, full range of motion and nearly full strength on the right side, and good range of motion and strength on the left side. Dr. Do told Claimant he may require six to twelve months to reach normal. Dr. Do testified Claimant declined surgery on the left side, despite Dr. Do offering the surgery, because Claimant did not believe his symptoms were bad enough to warrant surgery. Claimant testified he declined the surgery because of the result on the right side. Dr. Do declared Claimant at maximum medical improvement, and did not impose permanent work restrictions.

On April 8, 2021, Dr. Do issued an impairment rating. Under the *AMA Guides to the Evaluation of Permanent Impairment*, Sixth Edition (*AMA Guides*), Dr. Do initially rated Claimant's impairment at 2% of the right knee, and 1% of the left knee, which combined to produce 2% impairment of the body as a whole. Dr. Do testified based on his education, training and experience, the 2% impairment of the body as a whole rating was appropriate.

Dr. Do also testified Claimant did not require permanent restrictions, and did not require future medical treatment.

Claimant testified he returned to his usual work for Respondent. Claimant worked for Respondent until November 1, 2021. Claimant resigned his employment, and began working as a chuck roller for National Beef. Claimant confirmed he performs the same job tasks as with Respondent, but Claimant only works twenty-four hours per week. Claimant believes he cannot work full time.

Claimant testified he has bilateral knee pain and numbness daily. Claimant cannot run or climb ladders, and he has problems squatting. Claimant takes over-the-counter pain medication daily.

Dr. Zimmerman evaluated Claimant on September 20, 2021. Dr. Zimmerman reviewed a report of an x-ray of the left knee performed by Convenient Care, the report of the MRI of the right knee and Dr. Do's rating report. Dr. Zimmerman did not review the actual MRI scan and did not review the operative report. Physical examination was notable for limited range of motion and moderate pain of both knees. Dr. Zimmerman diagnosed right chronic capsulitis with chondral fissuring affecting the patella, and left chronic tendinitis, parenthesis and capsulitis.

Under the *AMA Guides*, Dr. Zimmerman rated Claimant's impairment at 5% of the right knee for patellofemoral arthritis, and 3% of the left knee for strains and tendinitis. The lower extremity ratings converted to 3% functional impairment of the body as a whole. Dr. Zimmerman also rated Claimant's impairment under the *AMA Guides to the Evaluation of Permanent Impairment*, Fourth Edition, at 20% of the right leg and 3% of the left leg, which converted to 9% of the body as a whole. Dr. Zimmerman believed the rating under the Fourth Edition was more equitable because it gave greater consideration of the signs, symptoms and diagnostic studies contained in the records Dr. Zimmerman reviewed. Dr. Zimmerman recommended future medical treatment of prescription medication and physician follow-ups.

Dr. Estivo performed a Court-ordered independent medical examination on December 23, 2021. Claimant reported bilateral knee pain, which he rated as six out of ten. Prior injuries were denied. Claimant stated he was unemployed. Dr. Estivo reviewed the medical records of Convenient Care Clinic, the MRI scan, the records of Dr. Do, and Dr. Zimmerman's report.

Examination was notable for full extension of the right knee, flexion to 135 degrees, and reports of generalized discomfort. Provocative tests of the right knee were negative, and no swelling was noted. Examination of the left knee revealed full extension, flexion to 135 degrees, and reports of generalized discomfort. Provocative tests were also negative, and no swelling was noted. Dr. Estivo interpreted the MRI scan as showing a

contusion of the patellofemoral joint, grade 2 chondromalacia at the patella, and no evidence of meniscus injury, fracture or loose bodies.

Dr. Estivo diagnosed post-arthroscopy with chondroplasty of the patella and synovectomy of the right knee, and left knee contusion. Dr. Estivo confirmed the accident was the prevailing factor causing Claimant's injuries, and Claimant reached maximum medical improvement. Dr. Estivo recommended no further medical treatment, and imposed no restrictions. Under the *AMA Guides*, Dr. Estivo rated Claimant's impairment at 2% of the right knee and 1% of the left knee, which produced 2% functional impairment of the body as a whole.

On November 4, 2022, ALJ Jones issued the Award. ALJ Jones found Claimant's functional impairment was 2% of the body as a whole, based on 1% impairment of the left leg and 2% impairment of the right leg, based on the opinions of Drs. Do and Estivo. ALJ Jones denied the request for future medical based on the opinions of Drs. Do and Estivo.

On November 14, 2022, Claimant filed his Application for Review seeking review by the Appeals Board. Claimant filed the Application with ALJ Jones via OSCAR, rather than with the Appeals Board. Respondent's counsel was provided a copy of the Application for Review, and confirmed this at oral argument. On December 12, 2022, the Appeals Board sent counsel an Acknowledgment of Appeal confirming the Application for Review was filed on November 14, 2022. These proceedings follow.

PRINCIPLES OF LAW AND ANALYSIS

Claimant argues the Award issued by ALJ Jones is erroneous because Claimant should be awarded permanent partial disability compensation based on Dr. Zimmerman's rating of 9% functional impairment to the body as a whole. Claimant also argues the denial of future medical should be reversed, and Claimant should be awarded future medical. Respondent argues Claimant's Application for Review should be dismissed because Claimant did not file his Application with the Appeals Board, but with ALJ Jones's office. If the Appeals Board asserts jurisdiction to review the Award, Respondent argues the Award should be affirmed.

1. Respondent's motion for dismissal of Claimant's Application for Review is denied.

Respondent argues Claimant's Application for Review was incorrectly filed via OSCAR with ALJ Jones's office, rather than with the Board's office. Because a hard copy of the Application for Review was not received by a local adjudication office or the Board's office, or filed by facsimile transmission, under K.A.R. 51-18-2, Respondent argues the Application for Review should be dismissed.

An application for review of a final award must be made by an interested party within ten days, excluding intermediate Saturdays, Sundays and legal holidays.¹ Effective November 30, 2018, counsel are required to file workers compensation case documents through the electronic filing system of the Division of Workers Compensation.² OSCAR is the Division of Workers Compensation's electronic filing system.³ "Electronic filing" includes the process of scanning, uploading and filing paper documents with the Division, and serving documents upon parties, using OSCAR.⁴ "Each submission shall be considered filed when received by the E-filing system."⁵

The Award is dated November 4, 2022. Under K.S.A. 44-551(l)(1), Claimant's Application for Review must be filed by November 18, 2022. Because Claimant is represented by legal counsel, the Application for Review must be filed electronically via OSCAR. It is undisputed Claimant's Application for Review was filed via OSCAR, and a copy was served upon Respondent, on November 14, 2022. While the Application for Review was filed as a pleading in the underlying case assigned to ALJ Jones, rather than as a pleading in the Appeals Board's proceedings, K.A.R. 51-1-26 does not require this undertaking. Because Claimant filed his Application for Review via OSCAR within ten days from the effective date of the Award, it was timely filed and the Board possesses jurisdiction to review the Award. Respondent's motion to dismiss the Application for Review is denied.

2. The award of permanent partial disability compensation based on 2% functional impairment of the body as a whole is affirmed.

Claimant argues the Award is erroneous because it did not consider the rating issued by Dr. Zimmerman. In the Award, ALJ Jones reviewed the ratings issued by Drs. Do, Zimmerman and Estivo. ALJ Jones based his functional impairment determination on the ratings of Drs. Do and Estivo.

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

¹ See K.S.A. 44-551(l)(1).

² See K.A.R. 51-1-26, 51-17-2.

³ See K.A.R. 51-1-26(a).

⁴ See K.A.R. 51-1-26(b).

⁵ K.A.R. 51-1-26(d).

of the Act.⁶ The provisions of the Workers Compensation Act shall be applied impartially to all parties.⁷ 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.⁸

Permanent partial general disability, compensated as an injury to the body as a whole, is present in claims involving the loss of use of both lower extremities.⁹ The extent of functional impairment shall be based on competent medical evidence, using the *AMA Guides* as a starting point.¹⁰ On review of final awards, the Board has the authority to increase or to diminish any award of compensation.¹¹

Dr. Do had the opportunity to see Claimant on multiple occasions as the authorized treating surgeon, had access to all of Claimant's treatment records, and reviewed the MRI scan of the right knee. Dr. Do's rating report contains his methodology for determining Claimant's impairment under the *AMA Guides*, and Dr. Do testified he based his ultimate impairment rating on his medical education, training and experience. In like token, Dr. Estivo had access of all of Claimant's treatment records, reviewed the MRI scan and reviewed X-rays of Claimant's knees. Dr. Estivo's report also contains his methodology for determining Claimant's impairment under the *AMA Guides*. Dr. Zimmerman did not have all of Claimant's treatment records, did not review the actual MRI scan and opined basing Claimant's impairment on the *AMA Guides to the Evaluation of Permanent Impairment*, Fourth Edition, was more equitable based on the information contained in the records he reviewed.

Having reviewed the record, the Board finds the opinions of Drs. Do and Estivo more credible than the opinions of Dr. Zimmerman regarding Claimant's functional impairment. Dr. Do saw Claimant on multiple occasions, and reviewed all of Claimant's treatment records. Dr. Do reviewed the actual radiology studies. Dr. Estivo, the Court-appointed neutral physician, also reviewed all of the medical records, narrative reports and radiology studies. In contrast, Dr. Zimmerman reviewed few medical records, did not

⁶ See K.S.A. 44-501b(a).

⁷ See *id.*

⁸ See K.S.A. 44-501b(c).

⁹ See K.S.A. 44-510e(a)(2)(A)(ii).

¹⁰ See K.S.A. 44-510e(a)(2)(B); *Johnson v. U.S. Food Service*, 312 Kan. 597, 603, 478 P.3d 776 (2021).

¹¹ See K.S.A. 44-551(l)(1).

review the actual radiology studies, but stated his rating was based on the signs, symptoms and diagnostic studies based on the records he reviewed. Because Dr. Zimmerman's impairment opinion is based on limited information, it is not as credible as the opinions of Drs. Do and Estivo. The Board affirms the finding Claimant's functional impairment is 2% of the body as a whole, based on 2% impairment of the right knee and 1% impairment of the left knee.

3. The denial of future medical is reversed, and Claimant is awarded future medical treatment pursuant to K.S.A. 44-510k.

In the Award, ALJ Jones denied Claimant's request for future medical based on the opinions of Drs. Do and Estivo. Claimant argues the denial of future medical should be reversed.

It is presumed the employer's obligation to provide medical treatment terminates upon the employee's reaching maximum medical improvement. The presumption may be overcome with medical evidence it is more probably true than not additional medical treatment will be necessary after maximum medical improvement. "Medical treatment" means treatment provided or prescribed by a licensed health care provider, and not home exercises or over-the-counter medication.¹²

During his course of treating Claimant, Dr. Do recommended surgery of the left knee. Although Dr. Do testified Claimant did not require additional medical treatment, this opinion was rendered after Claimant declined to undergo left knee surgery and Dr. Do had no other treatment to offer. Dr. Zimmerman recommended future physician intervention and prescription medication. Dr. Estivo did not recommend future medical treatment.

Based on Dr. Do's prior recommendation of left knee surgery and Dr. Zimmerman's opinion Claimant would require future medication and physician monitoring, the Board finds Claimant provided medical evidence showing it is more probably true than not additional medical treatment will be necessary. Therefore, the denial of future medical treatment in the Award is reversed. Claimant is awarded future medical treatment, to be provided either by agreement or upon application and hearing pursuant to K.S.A. 44-510k.

AWARD

WHEREFORE, it is the finding, decision and order of the Appeals Board the Award issued by ALJ Gary K. Jones, dated November 4, 2022, is affirmed in part and modified in part. The award of permanent partial disability compensation based on 2% of the body as a whole, attributable to 1% functional impairment of the left leg and 2% functional

¹² See K.S.A. 44-510h(e).

impairment of the right leg, is affirmed. The denial of future medical is reversed, and Claimant is awarded future medical treatment, to be provided either by agreement or upon application and hearing pursuant to K.S.A. 44-510k. In all other respects, the Award is affirmed.

IT IS SO ORDERED.

Dated this _____ day of May, 2023.

APPEALS BOARD MEMBER

APPEALS BOARD MEMBER

APPEALS BOARD MEMBER

c: (Via OSCAR)

Randy S. Stalcup
Thomas G. Munsell
Hon. Gary K. Jones