

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

PRUDENCIO CUEVAS PEREZ)	
Claimant)	
V.)	
)	AP-00-0461-481
NATIONAL BEEF PACKING CO., LLC)	CS-00-0210-956
Respondent)	
AND)	AP-00-0461-482
)	CS-00-0284-485
AMERICAN ZURICH INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Claimant, through Conn Felix Sanchez, requested review of Administrative Law Judge (ALJ) Pamela J. Fuller's Motion Order dated August 17, 2021. Shirla R. McQueen appeared for Respondent and its insurance carrier (Respondent).

RECORD AND STIPULATIONS

The Board adopted the same stipulations and considered the same record as the ALJ, consisting of the transcript of Motion Hearing held August 17, 2021; Evidentiary Deposition of Selena Sena taken September 10, 2021; and the documents of record filed with the Division.

ISSUES

Should Claimant's right to medical treatment have been terminated pursuant to K.S.A. 44-510k(a)(1)?

FINDINGS OF FACT

Claimant sustained compensable work-related injuries to his right shoulder on August 28, 2013, and his back and left ankle on December 23, 2014. As a result, Claimant underwent two surgeries for his right shoulder by Dr. Garcia. The last surgery was performed on September 11, 2015. Dr. Garcia placed Claimant at maximum medical improvement on March 30, 2016. Medical treatment received by Claimant for his back and left ankle injury was limited to two appointments in January 2015 within Respondent's

facility, where Claimant was simply evaluated. No active treatment was provided by Respondent.

At his attorney's request, Claimant was seen for his injuries by Pedro A. Murati, M.D., on June 9, 2016, for the right shoulder and on April 3, 2018, for the back and left ankle. For the right shoulder, Dr. Murati opined Claimant would require future medical treatment:

I recommend at least yearly follow ups on his right shoulder, right elbow, neck and upper back in case of any complications that may ensue. This may include but is not limited to the appropriate physical therapy, injections, radiological studies, anti-inflammatory and pain medication(s) and probable need for surgical intervention such as a shoulder arthroplasty as a result of the injury that occurred on 08-28-13.¹

Dr. Murati also opined Claimant would require future medical treatment for his back and left ankle:

It is beyond reasonable medical certainty that this examinee will require further medical treatment as a result of this work related injury. I recommend at least yearly follow ups on his left foot, left ankle, low back and neck in case of any complications that may ensue. This may include but it not limited to the appropriate physical therapy, injections, radiological studies, anti-inflammatory and pain medication(s) and possible need for surgical intervention as a result of the injury occurred on 12-23-14.²

Pat Do, M.D., performed a Court-ordered independent medical evaluation for Claimant's right shoulder on January 25, 2017. He testified "if he continues to have pain, I don't think he had an MRI after his second surgery, so it might be necessary to do another MRI to make sure that that rotator cuff, after the second surgery, did heal."³

At Respondent's request, Terrence Pratt, M.D., performed an evaluation for Claimant's injuries to his back and left ankle on November 20, 2017. Dr. Pratt opined Claimant did not require permanent restrictions for his injuries. He also opined Claimant would not need future medical treatment.

¹ Murati IME Report (June 9, 2016) at 4.

² Murati IME Report dated (April 3, 2018) at 5.

³ Do Depo. (December 3, 2019) at 11.

Selena Sena has been employed for Respondent for thirty-one years and the workers compensation coordinator for twenty years. She is responsible for managing workers compensation claims for Respondent's employees. She is familiar with Claimant and noted he is no longer an employee. She was aware Claimant received Awards for the shoulder on February 21, 2019, and the back and left ankle on February 22, 2019. In both Awards, the right to future medical was left open. Ms. Sena testified Claimant has not sought post-award medical treatment for the shoulder, back or left ankle and no medical care has been authorized by Respondent.

The ALJ found Claimant failed to provide any current competent medical evidence to sustain his burden of proving his right to future medical treatment should not be terminated, and terminated Claimant's right to future medical treatment. Claimant's request for attorneys fees was not addressed as no affidavit of time or expenses had been filed.

Claimant appeals arguing the Board should reverse the ALJ's Motion Order and grant attorney fees.⁴ Claimant contends the ALJ is required to make a finding Respondent has met the statutory presumption set forth in K.S.A. 44-510k(a)(3) before it is required to present evidence to overcome the presumption. Claimant also argues the Board should find the medical evidence from Dr. Murati and Dr. Do, presented at the time of the Awards is sufficient to meet the rebuttable presumption.

Respondent maintains the Order should be affirmed because of the statutory presumption in K.S.A. 44-510k(a)(3). Respondent argues Claimant failed to obtain treatment from an authorized healthcare provider for a period of two years from the original award and therefore the right to continued future medical treatment should be terminated. Respondent further contends Claimant failed to present evidence to overcome the statutory presumption to maintain future medical treatment. Respondent argues the ALJ Order should be affirmed and medical treatment permanently terminated.

PRINCIPLES OF LAW AND ANALYSIS

The Board affirms the ALJ's determination of future medical treatment. Claimant received no medical treatment from an authorized physician within two years after last receiving authorized treatment. Claimant did not produce competent medical evidence to

⁴ The Board cannot decide fees until the ALJ does. The ALJ did not deny the request, only that Claimant's attorney submit his paperwork.

prove he is in need of future medical treatment to overcome the statutory presumption to the contrary.

In *Clayton*,⁵ the worker settled her workers compensation claim against her employer in 2013, leaving future medical treatment open. Attached to the settlement hearing transcript was a 2013 letter from Dr. Shah. Regarding future medical treatment, Dr. Shah stated he believed Clayton would likely need future medical treatment due to her injury, including injections and/or surgery.

More than two years later, in 2015, Clayton's employer filed an application to terminate future medical benefits pursuant to K.S.A. 44-510k(a)(3). The ALJ found Dr. Shah's letter to be competent medical evidence to overcome the presumption no further medical care was needed and denied the application. The Board affirmed this ruling.

The Court of Appeals ruled:

[T]he legislature intended to allow an employer to apply for the permanent termination of future medical benefits – when a claimant has not received treatment for 2 or more years – even if there was sufficient evidence presented at the time of the original award or settlement hearing to leave the issue of future medical benefits open.

...

[O]nce the presumption in favor of the employer comes into play, it is solely the claimant's burden to establish that "further medical care is needed as a result of the underlying injury." K.S.A. 2015 Supp. 44-510k(a)(3). The word "further" commonly means additional to what already exists, and the word "needed" commonly means necessity or required. . . . Giving the words of K.S.A. 2015 Supp. 44-510k(a)(3) their ordinary meaning, we find that a claimant must therefore prove he or she still requires medical care in addition to that which has already been received as a consequence of his or her work-related injury.

...

[T]o overcome the presumption, a claimant must establish within a reasonable degree of medical probability or likelihood that medical treatment in addition to what has already been received will be needed in the future as a consequence of the work-related injury.

We agree with the Hospital that in many instances new competent medical evidence may be required to overcome the statutory presumption that no additional

⁵ *Clayton v. University of Kansas Hospital Authority*, 53 Kan. App. 2d 376, 388 P. 3d 187 (2017).

medical treatment is needed resulting from the underlying injury. For example, an updated evaluation of the claimant by a health care provider to determine within a reasonable degree of medical probability whether the claimant needs additional medical treatment due to the work-related injury would be sufficient new evidence. We do not agree, however, that this will be necessary in every case. In some cases, the original medical evidence may be sufficient to establish within a reasonable degree of medical probability or likelihood that medical care in addition to what has already been received will be needed in the future as a result of the underlying injury. For example, a claimant may need a medical device arising out of the work-related injury that will require replacement in 5 or 10 years. Accordingly, we find that the question of whether the medical evidence is competent to overcome the statutory presumption must be determined on a case-by-case basis.

...
A review of the record reveals that the Board relied solely on the opinions stated in Dr. Shah's letter dated April 8, 2013 – based on his evaluation of Clayton in March 2012 – to conclude that she had overcome the statutory presumption that no further medical treatment was needed as a result of the underlying injury. The letter from Dr. Shah is not sworn to under oath and is based on a physical examination that was completed nearly 5 years ago. Although Dr. Shah believed at the time of the settlement hearing that it was likely that Clayton would need future medical care, the record does not reflect what his opinion might be today regarding whether there is a need for treatment in addition to what has already been received for the underlying injury. Thus, we do not find Dr. Shah's letter – in and of itself – to be sufficient to constitute competent medical evidence to overcome the statutory presumption under K.S.A. 2015 Supp. 44-510k(a)(3) that “no further medical care is needed as a result of the underlying injury.”

... [W]e believe that the appropriate remedy is to reverse the Board's decision and to remand this matter for a new hearing on the Hospital's application and motion to terminate future medical benefits. At the new hearing, the burden of proof will be on Clayton to come forward with “competent medical evidence” – as that term is defined in this opinion – to overcome the presumption that no medical treatment is needed in addition to what has already been received as a consequence of her work-related injury suffered on October 6, 2011.

Clayton suggests new medical evidence may often be required, but is not absolutely required, to overcome the statutory presumption against additional medical treatment. *Clayton* noted original medical evidence may prove the future need for medical treatment, such as an injured worker perhaps having a medical device requiring replacement. The issue is decided on a case-by-case basis.

The record reflects Claimant did not receive medical treatment from an authorized healthcare provider within two years from the date of the award or two years from the date Claimant last received authorized medical treatment. The last authorized medical treatment received by Claimant was the evaluation performed by Dr. Pratt on November 20, 2017. Claimant has not sought any authorized post-award medical treatment. Respondent has not authorized any post-award medical treatment.

Claimant did not testify or offer any evidence he is in need of current or future medical treatment for any of his injuries. Claimant did not testify or offer any evidence he is suffering from ongoing symptoms as a result of his injuries. Claimant relies solely upon medical evidence from Dr. Murati and Dr. Do, presented at the time the Awards were issued to rebut the statutory presumption.

Regarding the right shoulder, Dr. Do, the Court-ordered physician stated, "if he continues to have pain," an MRI might be warranted. Dr. Murati stated, "I recommend at least yearly follow ups on his right shoulder, right elbow, neck and upper back in case of any complications that may ensue." There is no evidence Claimant continues to have pain in his right shoulder or is suffering any residual symptoms as a result of his injury.

Regarding the back and left ankle, Dr. Pratt opined no future medical treatment was needed. Dr. Murati offered the same treatment recommendation for these injuries as he did for the right shoulder, "I recommend at least yearly follow ups on his left foot, left ankle, low back and neck in case of any complications that may ensue." Again, There is no evidence Claimant continues to have pain in his back or left ankle or is suffering any residual symptoms as a result of his injuries.

Claimant did not present competent medical evidence to overcome the statutory presumption contained in K.S.A. 44-510k(a)(3). The Board affirms the ALJ's Order terminating Claimant's right to pursue future medical treatment.

AWARD

WHEREFORE, it is the finding, decision and order of the Board the Motion Order of Administrative Law Judge Pamela J. Fuller, dated September 23, 2021, is affirmed.

PRUDENCIO CUEVAS PEREZ

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CS-00-0284-485**

IT IS SO ORDERED.

Dated this _____ day of November, 2021.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: (Via OSCAR)

Conn Feliz Sanchez, Attorney for Claimant
Shirla R. McQueen, Attorney for Respondent and its Insurance Carrier
Pamela J. Fuller, Administrative Law Judge