

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

PHILIP ANTHONY HULSEY)	
Claimant)	
VS.)	
)	
STATE OF KANSAS)	Docket No. 1,048,616
Respondent)	
AND)	
)	
STATE SELF-INSURANCE FUND)	
Insurance Carrier)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance fund (respondent) appealed the April 23, 2013 preliminary hearing Order entered by Administrative Law Judge (ALJ) Thomas Klein. This is an appeal from a post-award preliminary hearing proceeding for medical benefits. Consequently, this claim has been placed on the summary docket for disposition without oral argument and will be decided by one Board Member. Charles W. Hess of Wichita, Kansas, appeared for claimant. Jeffery R. Brewer of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

The record on appeal is the same as that considered by the ALJ and consists of the January 27, 2011, settlement hearing transcript with attachments; the April 22, 2013, Post Award Hearing¹ transcript with exhibits; and all pleadings contained in the administrative file.

ISSUES

The ALJ ordered respondent to provide medical treatment, tests, referrals for gastric bypass, lap band or weight loss program which are necessary to cure and relieve claimant from the effects of his work injury.

The respondent requests review of whether the ALJ erred in awarding claimant medical treatment for gastric bypass or lap band surgery to help claimant reduce his weight in order to decrease his back pain and allow him to be more active.

¹ This proceeding was held as a preliminary hearing on post-award medical benefits.

Claimant argues the ALJ's preliminary hearing Order should be affirmed.

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

Claimant was employed as a corrections specialist or officer with the Hutchinson Correctional Facility through the state of Kansas. On August 1, 2009, claimant sustained a slip and fall accident. He describe it as follows:

I was moving around heavy ME property, and I had a slip and fall accident where I fell and landed on my lower back and buttocks.²

In May 2010, claimant had low back surgery. Dr. Theo Mellion performed spinal fusion of the L5-S1 vertebrae which included rods and screws. After recovery, claimant returned to work for respondent for approximately 10 months.

On January 27, 2011, claimant entered into a settlement agreement with the right to future medical treatment as well as the right to review and modification remaining open. Claimant sustained a 20% whole body functional impairment.

Claimant left state employment in June 2011 due to missing a lot of work because of his low back injury. He became employed in the office for Good Samaritan Center thinking that it would be easier on his back. Claimant worked for Good Samaritan Center until May 2012. He testified that his back pain was gradually increasing and it was harder for him to do the job. Normal activities caused him pain.

At the preliminary hearing, claimant testified to the following:

I have constant pain in my lower back, numbness and tingling down the right side of my leg still and, of course, due to the inactivity, I've gained weight and been unable to do a lot of normal stuff I have normally done.³

Claimant used a cane in order to ambulate into the courtroom because:

[A]nytime where I go out and do any kind of great distance walking, I have to have it, there is no telling when like my leg will give out, sometimes the numbing will go

² P.H. Trans. at 9.

³ *Id.* at 12.

down past the knee and it will give out and I don't have any signs, you know, so if I don't have the cane, I will fall, you know.⁴

On March 14, 2011, claimant filed an Application for Post Award Medical with the Division requesting medical treatment for pain management. An Application for Review and Modification was filed by claimant on June 1, 2011, indicating that his functional impairment or work disability had increased.

On June 6, 2012, an Application for Preliminary Hearing was filed requesting temporary total disability (TTD) benefits commencing May 15, 2012, due to claimant being taken off work. Claimant filed another Application for Preliminary Hearing on July 30, 2012.

The parties proposed an Agreed Order⁵ for Judge Klein's signature. On August 30, 2012, Judge Klein signed the Order authorizing Dr. Fan to provide conservative medical treatment. Claimant was entitled to TTD compensation at the weekly rate of \$434.45 until having reached maximum medical improvement (MMI) or returned to work earning a comparable wage.

Dr. John Fan opined in a letter dated December 7, 2012, as follows:

Mr. Hulsey has severe low back pain from injury at work. He was treated with strong opiate medication, Percocet, for severe pain. He has severe pain-induced depression. I referred the patient for a psychiatric evaluation and treatment. Based upon available information, his depression is directly related to his work-related injury with severe low back pain.⁶

At the April 22, 2013 hearing, claimant testified that he weighed approximately 290-295 pounds at the time of the accident, but now weighs approximately 392 pounds. Claimant attributes the 100-pound weight gain due to inactivity because of his low back pain. He testified that the weight gain has also increased his back pain.

Dr. Alexander Bailey, a board certified orthopedic surgeon, performed an independent medical examination on December 20, 2012, at the request of respondent's counsel. The doctor reviewed claimant's medical records, took a history and also performed a physical examination. Dr. Bailey diagnosed claimant with the following: (1) low back and leg pain; (2) discal injury to lumbar spine at L5-S1; and, (3) posterior lumbar interbody fusion at L5-S1. The doctor opined regarding causation as follows:

⁴ *Ibid.*

⁵ *Id.*, Cl. Ex. 1.

⁶ ALJ correspondence file.

[A]s of this time right now with available information I do not find his ongoing symptomatology to be related to 08/01/2009, nor his surgical intervention. The prevailing factor for need for medical and/or surgical attention appears to be an ongoing progressive difficulty of a personal medical condition of his lumbar spinal condition unless proven otherwise with objective studies.⁷

Dr. Bailey recommended additional testing such as an MRI of the lumbar spine, a CT myelography of the lumbar spine and an EMG and nerve conduction study of his bilateral lower extremities.

On March 5, 2013, claimant returned to see Dr. Bailey regarding the test results. The doctor reviewed the MRI and CT results with claimant. Dr. Bailey opined that surgical intervention is not needed because the interbody hardware is in good position and solidly fused. He could not find any evidence of complications or significant problems.

Claimant filed another Application for Post Award Medical on March 15, 2013, and an Application for Preliminary Hearing on March 20, 2013. The April 22, 2013, hearing transcript is entitled "Post Award Hearing." However, at the hearing ALJ Klein stated, "We're here on what I guess I'm going to call a preliminary hearing in a post award matter."⁸ Neither party disputed ALJ Klein's statement. ALJ Klein did not set terminal dates and issued his Order on April 23, 2013.

PRINCIPLES OF LAW AND ANALYSIS

This Board Member finds the parties elected to proceed to a preliminary hearing utilizing the procedure under K.S.A. 2012 Supp. 44-534a, instead of the preferred procedure for litigating post-award medical provided in K.S.A. 2012 Supp. 44-510k. Therefore, this appeal is not an appeal from a final order. Accordingly, this appeal will be heard and decided by a single Board Member as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.⁹

⁷ P.H. Trans., Cl. Ex. 2 at 14.

⁸ *Id.* at 4.

⁹ *Siler v. U.S.D. No. 512*, 45 Kan. App. 2d 586, 251 P.3d 92, 93 (2011), *rev. denied* 293 Kan. ____ (2012), and *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, 1150 (2008), allow the use of preliminary hearing procedure in post-award proceedings. Pursuant to K.S.A. 44-556, Board decisions stemming from preliminary hearing orders are not subject to judicial review.

The specific post-award medical statute, K.S.A. 44-510k, enacted on July 1, 2000, treats a judge's post-award medical order as a final decision that is subject to review by the full Board. The Board's decision is thereafter subject to judicial review under K.S.A. 44-556.

In respondent's Request for Board Review and Docketing Statement, the sole issue listed was:

Did ALJ Klein err in awarding claimant post award medical benefits for "weight loss referrals, gastric bypass or lap band" surgery on this disputed issue by finding such treatment is necessary to cure or relieve the effects of the accidental injury which was the subject of the underlying Award?¹⁰

Respondent's brief it states, in pertinent part:

In summary respondent submits the post award medical order by ALJ Klein authorizing Dr. Fan for weight loss treatment and referrals, gastric bypass or lap band was not in compliance with the requirements of the statute K.S.A. 44-510k (a) as being treatment either to "cure" or "relieve" claimant from the "effects of the accidental injury which was the subject of the underlying award" and must be vacated and set aside.¹¹

Respondent argued claimant was morbidly obese before and after the accident that gave rise to this claim. Respondent goes on to assert that claimant's work injury did not cause his morbid obesity, nor was it a consequence of his injury. Claimant asserts that the injury caused him to become inactive and gain weight. This does not change the fact, as stated in respondent's brief, that the issue before the Board is whether the medical treatment ordered by ALJ Klein was necessary to cure or relieve claimant from the effects of his accidental injury.

As stated above, this is not an appeal from a post-award medical award under K.S.A. 2012 Supp. 44-551(i)(2)(A), but rather is an appeal from a preliminary hearing pursuant to K.S.A. 2012 Supp. 44-534a. The Board has jurisdiction under K.S.A. 2012

Bryant v. U.S.D. No. 259, 26 Kan. App. 2d 435, 992 P.2d 808 (1999), indicates that post-award preliminary hearing orders for medical treatment should be considered final, and thus subject to judicial review, where such order is subsequent to a final order and there is no indication that a full hearing will be scheduled. Page 880 of *Quandt* notes that the hearing in *Bryant* "ended the matter," there was no need for further hearings, and no disputed issues remained, such that the ruling was final and subject to judicial review.

Therefore, there are two approved methods to address post-award medical issues: (1) the post-award medical statute, K.S.A. 44-510k, and (2) the preliminary hearing statute, K.S.A. 44-534a. A ruling from the Board following a K.S.A. 44-510k proceeding is subject to judicial review, while a Board's ruling stemming from a K.S.A. 44-534a post-award proceeding is not subject to judicial review, under *Siler* and *Quandt*, but is subject to judicial review under *Bryant*, depending on whether the hearing was meant to result in a final order. The differing case law and alternate methodologies to pursue post-award medical benefits create obvious problems in terms of an aggrieved party obtaining judicial review.

¹⁰ Application for Review at 1.

¹¹ Resp. Brief at 5 (filed May 8, 2013).

Supp. 44-551(i)(2)(A) to review decisions from a preliminary hearing in those cases where one of the parties has alleged the ALJ exceeded his or her jurisdiction. In addition K.S.A. 2012 Supp. 44-534a (a)(2) limits the jurisdiction of the Board to the specific jurisdictional issues identified. A contention that the ALJ has erred in his finding that the evidence showed medical treatment was necessary to cure and relieve the effects of an injury is not an argument the Board has jurisdiction to consider. K.S.A. 2012 Supp. 44-534a grants authority to an ALJ to decide issues concerning the furnishing of medical treatment, the payment of medical compensation and the payment of temporary total disability compensation.

When the record reveals a lack of jurisdiction, the Board's authority extends no further than to dismiss the action.¹² Accordingly, respondent's appeal is dismissed.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.¹³ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.¹⁴

WHEREFORE, it is the decision of the Board that respondent's appeal is dismissed for lack of jurisdiction.

IT IS SO ORDERED.

Dated this ____ day of July, 2013.

HONORABLE THOMAS D. ARNHOLD
BOARD MEMBER

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¹² See *State v. Rios*, 19 Kan. App. 2d 350, Syl. ¶ 1, 869 P.2d 755 (1994).

¹³ K.S.A. 44-534a.

¹⁴ K.S.A. 2010 Supp. 44-555c(k).