

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

THOMAS G. LITTLE)
Claimant)
V.)
DELTA DESIGNS, LTD.)
Respondent) Docket No. 267,316
AND)
CINCINNATI INSURANCE COMPANY)
Insurance Carrier)

ORDER

Respondent and its insurance carrier (respondent) appealed the December 10, 2015, Post Award Hearing Order entered by Administrative Law Judge (ALJ) Steven Roth. The Board placed this appeal on its summary docket for disposition without oral argument.

APPEARANCES

Darin M. Conklin of Topeka, Kansas, appeared for claimant. Christopher J. McCurdy of Overland Park, Kansas, appeared for respondent.

RECORD

The Post Award Hearing Order did not state the record considered by the ALJ. The record considered by the Board is the transcript of the November 23, 2015, post-award hearing and exhibits thereto; the transcript of the October 15, 2015, post-award hearing; the transcript of the December 29, 2014, post-award hearing; the transcript of the December 10, 2012, post-award hearing and exhibit thereto; the transcript of the January 4, 2011, post-award hearing and exhibits thereto; the transcript of the September 30, 2003, preliminary hearing, excluding the exhibit; the transcript of the April 4, 2002, preliminary hearing, excluding the exhibits; the transcript of the December 3, 2001, preliminary hearing, excluding the exhibit; the transcript of the June 17, 2015, deposition of Dr. Vito J. Carabetta and exhibits thereto; the transcript of the April 23, 2015, deposition of Dr. Swapna Mamidipally and exhibits thereto; the transcript of the January 30, 2015, deposition of claimant; the transcript of the May 9, 2013, deposition of Dr. Chester Davis and exhibit thereto; the transcript of the February 20, 2004, continued deposition of

Dr. P. Brent Koprivica; the transcript of the January 16, 2004, deposition of Dr. P. Brent Koprivica and exhibits thereto; the transcript of the November 11, 2003, deposition of Michael J. Dreiling and exhibits thereto; Claimant's Supplemental Exhibit filed with the Division on December 1, 2015; the November 19, 2015, independent medical evaluation (IME) report by Dr. Terrence Pratt; the September 28, 2015, no-show IME/records review report by Dr. Terrence Pratt; the Stipulation to Admission of Medical Records filed with the Division on May 29, 2015; the Stipulation Regarding Admission of Affidavit of Chester Davis, M.D., filed with the Division on October 22, 2013; the Stipulation Regarding Admission of Prescription Costs filed with the Division on October 14, 2013; the Stipulation Regarding Admission of Evidence filed with the Division on September 16, 2013; the Stipulation for Admission of Evidence Without Further Foundation filed with the Division on April 7, 2011; and the February 11, 2011, letter by Dr. Chester R. Davis.

ISSUES

On July 28, 2004, the parties entered into an Agreed Award in this claim for a January 9, 2001, accidental injury to claimant's low back. Claimant retained the right to apply for future medical benefits.

On February 13, 2013, ALJ Brad E. Avery issued an order appointing Dr. G. Brent Sorensen to evaluate claimant for possible bariatric surgery. In a November 26, 2013, Order, ALJ Avery granted claimant's request for bariatric surgery. Claimant underwent bariatric surgery in August 2014 in an effort to cure or relieve him from the effects of his back injury. The resulting weight loss left claimant with excess skin. At the November 23, 2015, post-award hearing, claimant requested surgery to remove the excess skin. ALJ Roth granted claimant's request and respondent appeals.

Respondent asserts there is no medical evidence proving claimant needs such treatment or that such treatment is reasonable and necessary to cure and relieve claimant from the effects of his injury. Respondent also disputes that such treatment is related to claimant's injury. Respondent requests the Board reverse the Post Award Hearing Order.

Claimant submits K.S.A. 44-510k does not contain language necessitating the presentation of medical evidence or a physician's report. Claimant contends judicial precedent provides that the preponderance of the evidence is the only standard to be applied, not whether such evidence is presented in the form of an expert medical opinion. Claimant states in his brief to the Board:

It is uncontroverted that Mr. Little's affliction of deformed skin constitutes an "effect" of the injury. The bariatric surgery was undertaken as authorized treatment for the work related injury of January 9, 2001. The deformed skin clearly resulted from the bariatric surgery. No argument or evidence exists to the contrary. Accordingly, common sense dictates that the skin deformity constitutes an "effect"

of the injury. It is likewise uncontroverted that Mr. Little is adversely affected by the excessive skin deformity.¹

With regard to respondent's dispute that the skin removal is related to claimant's injury, claimant argues there is neither evidence nor speculation in the record to suggest that absent the work injury, claimant would have undergone bariatric surgery in 2014 resulting in the current medical hardship.

The issue is whether the skin-removal surgery claimant requests is necessary to cure or relieve the effects of his accidental work injury?

FINDINGS OF FACT

Claimant is 6' 2" tall. Claimant testified that at the time of his January 9, 2001, work accident, he weighed approximately 260 pounds. At that time, he was very active and bicycled 120 miles per week and ran 80 miles per week. Prior to undergoing a strict diet and August 2014 bariatric surgery, claimant's weight climbed to 440 pounds. Claimant testified at the November 23, 2015, post-award hearing that he weighs 209 pounds and is more active than prior to his bariatric surgery.

Claimant indicated that a by-product of his bariatric surgery is excess skin. He testified that he must make sure he cleans and dries his skin carefully or he can develop a skin disorder. Claimant testified the excess skin bothers him and it would be uncomfortable for him to show the extra flabby skin in public. Claimant further described how the excess skin affected him personally and socially.

Claimant acknowledged that no physician has opined the medical treatment he requests is reasonable and necessary. Claimant was not asked if or why excess-skin-removal surgery is necessary to cure or relieve the effects of his accidental injury.

At the November 23, 2015, post-award hearing, claimant introduced as exhibits a copy of the January 4, 2011, post-award hearing transcript, a December 9, 2012, letter from Dr. Glenn M. Amundson, November 13, 2012, consultation notes from Dr. Amundson, a May 7, 2002, operative report from Dr. Amundson, January 30 and May 1, 2002, office notes from Dr. Amundson and a February 25, 2013, bariatric pre-operative report from Dr. Sorensen. Those exhibits predate claimant's 2014 bariatric surgery and do not address claimant's request for surgery to remove excess skin.

¹ Claimant's Brief (filed Jan. 19, 2016) at 5.

PRINCIPLES OF LAW AND ANALYSIS

A claimant in a workers compensation proceeding has the burden of proof to establish by a preponderance of the credible evidence the right to an award of compensation and to prove the various conditions on which his or her right depends.²

K.S.A. 44-510k(a) states:

At any time after the entry of an award for compensation, the employee may make application for a hearing, in such form as the director may require for the furnishing of medical treatment. Such post-award hearing shall be held by the assigned administrative law judge, in any county designated by the administrative law judge, and the judge shall conduct the hearing as provided in K.S.A. 44-523 and amendments thereto. The administrative law judge can make an award for further medical care if the administrative law judge finds that the care is necessary to cure or relieve the effects of the accidental injury which was the subject of the underlying award. No post-award benefits shall be ordered without giving all parties to the award the opportunity to present evidence, including taking testimony on any disputed matters. A finding with regard to a disputed issue shall be subject to a full review by the board under subsection (b) of K.S.A. 44-551 and amendments thereto. Any action of the board pursuant to post-award orders shall be subject to review under K.S.A. 44-556 and amendments thereto.

Medical care under K.S.A. 44-510k must be “necessary to cure or relieve the effects of the accidental injury which was the subject of the underlying award.” It is problematic to “separate what is a reasonable medical necessity from what is dictated by convenience and/or lifestyle [because] these two categories can sometimes overlap.”³ A claimant’s “greater ease and comfort” and “all expenses associated with the accommodations that a disability may require” are not what the legislature envisioned as reasonable and necessary treatment.⁴

In *Thomas*,⁵ a post-award medical proceeding, Mr. Thomas sought medical care to cure or relieve the effects of his accidental injury that was the subject of the underlying award. The Board denied Mr. Thomas’ request, finding Mr. Thomas’ symptoms were just as likely, if not more likely, to be related to the work and other non-work activities he had performed since last receiving medical treatment in August 1999 for his work injury. In doing so, the Board stated:

² K.S.A. 44-501(a); *Perez v. IBP, Inc.*, 16 Kan. App. 2d 277, 826 P.2d 520 (1991).

³ *Butler v. Jet TV*, No. 106,194, 1998 WL 229860 (Kan. WCAB Apr. 14, 1998).

⁴ *Hedrick v. U.S.D. No. 259*, 23 Kan. App. 2d 783, 787, 935 P.2d 1083 (1997).

⁵ *Thomas v. Ernest-Spencer, Inc.*, No. 237,572, 2002 WL 31828599 (Kan. WCAB Nov. 27, 2002).

Here, the claimant argues he has satisfied his burden of proof through his testimony that his current need for medical treatment for his low back complaints is directly related to his August 7, 1998, accidental injury. Claimant acknowledges that he has presented no medical evidence that directly relates his current need for medical treatment to the August 7, 1998, accidental injury. But claimant argues expert medical testimony is not essential to establish the "existence, nature, and extent of disability" of an injured worker. (Citation omitted.)

The Board recognizes, under certain conditions, the injured worker's testimony may establish the existence, nature and extent of his disability. But the Board finds that testimony must persuade the trier of fact that the injured worker's position on that issue is more probably true than not true. Here, the ALJ found, and the Board agrees, that claimant has failed to satisfy through his testimony alone his burden of proof.

The Board reverses the Post Award Hearing Order. Claimant's testimony and the exhibits presented at the November 23, 2015, post-award hearing do not prove the requested excess-skin-removal surgery is necessary to cure or relieve the effects of his accidental work injury. Claimant was not asked if or why excess-skin-removal surgery is necessary to cure or relieve the effects of his accidental injury. He indicated the excess skin was not painful. The only medical condition the excess skin causes is a skin disorder, but only if claimant does not properly care for his skin. Moreover, claimant acknowledged no physician told him that removal of the excess skin was reasonable and necessary medical treatment. The Board notes there is nothing in the record prior to the November 23, 2015, post-award hearing pertaining to claimant's requested surgery to remove excess skin.

Claimant argues his request for surgery should be granted because excess skin is an "effect" of his accidental injury. The Board rejects such a broad interpretation. While claimant's excess skin is unattractive, inconvenient and may affect his self-esteem, insufficient evidence was presented that its removal is necessary to cure or relieve the effects of claimant's underlying accidental injury.

CONCLUSION

Claimant failed to prove the medical care he seeks, surgery to remove excess skin, is necessary to cure or relieve the effects of the accidental injury which was the subject of his underlying award.

WHEREFORE, the Board reverses the December 10, 2015, Post Award Hearing Order entered by ALJ Roth.

IT IS SO ORDERED.

Dated this ____ day of February, 2016.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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Steven Roth, Administrative Law Judge