

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

TAMRA S. JACKSON)	
Claimant)	
V.)	
)	
NETZER SALES INC.,)	
d/b/a STATE BEAUTY SUPPLY)	CS-00-0311-425
Respondent)	AP-00-0450-595
AND)	
)	
UNITED FIRE & CASUALTY CO.)	
Insurance Carrier)	

ORDER

The respondent, Netzer Sales Inc., d/b/a State Beauty Supply, and its insurance carrier, United Fire & Casualty Company (Netzer Sales), through James Biggs, appealed Administrative Law Judge Kenneth Hursh's Order dated April 16, 2020. Keith Yarwood appeared for the claimant, Tamra Jackson (Jackson). This post-award proceeding for medical benefits was placed on the summary docket for disposition without oral argument.

RECORD

The Board considered the record, consisting of the Post Award Motion Hearing transcript dated April 15, 2020, a Settlement Hearing transcript dated February 1, 2018, the corresponding Worksheet for Settlement, and the attached court-ordered report from Terrence Pratt, M.D., dated February 23, 2017. The Board also considered the Regular Hearing transcript dated October 5, 2017, along with Jackson's deposition transcript dated March 2, 2016. Finally, the Board reviewed the file contents electronically stored on the Division of Workers Compensation's Online System for Claims Administration Research/Regulation (OSCAR).

ISSUES

The parties settled this workers compensation claim. Jackson's right to future medical treatment was left open. After the settlement, Jackson did not request medical treatment within two years. Citing K.S.A. 44-510k(a)(3), Netzer Sales filed a motion to terminate Jackson's right to future medical treatment.

The judge found Dr. Pratt's opinion to be competent medical evidence rebutting the statutory presumption no further medical treatment was needed. Accordingly, the judge denied Netzer Sales' motion.

Netzer Sales argues Jackson's future medical treatment should be terminated under *Clayton*¹ because she did not receive medical treatment from an authorized treating physician within two years after the settlement. Netzer Sales asserts Dr. Pratt's report is not competent medical evidence because it does not establish future medical treatment is causally related to Jackson's work injury. Also, on June 15, 2020, Netzer Sales objected to the Board's consideration of Exhibits 1 through 4 attached to Jackson's brief.

Jackson maintains the Order should be affirmed because Dr. Pratt's court-ordered report is competent medical evidence and it must be considered under K.S.A. 44-516.

The issues are:

1. Should the Board consider Exhibits 1 through 4 appended to Jackson's brief?
2. Should future medical treatment be terminated because Jackson received no medical treatment from an authorized physician within two years after the settlement? Alternatively, did Jackson present competent medical evidence to prove she is in need of future medical treatment and overcome the statutory presumption to the contrary?

FINDINGS OF FACT

Jackson sustained a compensable left knee injury in December 2014. She had a meniscus repair on February 4, 2015. The judge appointed Dr. Pratt to conduct a court-ordered examination and asked Dr. Pratt to address: (1) Jackson's functional impairment resulting from the December 23, 2014 work-related injury and (2) whether Jackson will require additional medical treatment after reaching maximum medical improvement.

In his report dated February 23, 2017, Dr. Pratt stated:

She could not recall the surgical specialist's name but notes that she had MRI assessment and was felt to have a meniscus tear. That resulted in an arthroscopic left knee procedure. She continued to have difficulties, has had two injections for the knee and followup plain films. She was informed that she had degenerative joint disease with the need for a total knee replacement.

...

It is more probable than not that she will require additional treatment after achieving maximum medical improvement. This would include the possibility of additional therapeutic injections and an additional knee procedure on the left.²

¹ *Clayton v. Univ. of Kansas Hosp. Auth.*, 53 Kan. App. 2d 376, 388 P.3d 187 (2017).

² See S.H. Trans. Attachment at 6.

During litigation, Jackson testified she twisted her left knee at work after missing a rung on a ladder. She denied prior left knee problems. She testified walking and standing is difficult and she needs to periodically sit, her knee swells and the pain keeps her up at night. Jackson's understanding was she would eventually need a total knee replacement.

On February 1, 2018, Jackson settled her claim for a lump-sum payment of \$10,920.36, leaving open her right to future medical treatment. Attached to the settlement transcript was the aforementioned report from Dr. Pratt. The settlement was not appealed.

On March 3, 2020, Netzer Sales filed a Motion to Terminate Medical Benefits Pursuant to K.S.A. 44-510k(a)(3). Two days later, Netzer Sales filed an E-4 Application for Post Award Medical, Termination or Modification of Medical Benefits. A telephonic hearing was held on April 15, 2020. No testimony was taken. The attorneys presented argument.

THE COURT: . . . Jim, why don't you state your client's position on why medical should be terminated.

MR. BIGGS: It's our position, Your Honor, that the medical should be terminated because of the fact that this case was settled over two years ago and the injury occurred in December of 2014.

The last treatment -- actually, it was just a Court-Ordered IME in February of 2017. At that time, Dr. Pratt did a Court-Ordered IME. Dr. Pratt indicated that the claimant would be in need of future medical, but nobody has -- other than Dr. Stuckmeyer, who is the claimant's doctor, nobody has stated it's related to the work injury.

This lady suffered from significant degenerative disease/arthritis, and so it's kind of our position that we provided her with the medical treatment, surgery on her meniscus, physical therapy after the fact.

She had some ongoing pain and problems with that that they related to her knee, and based upon her osteoarthritis and arthritic condition in her knee, the doctors have indicated that she is going to need possibly a knee replacement in the future. That's the case in a nutshell.

THE COURT: Okay. Keith, what is the claimant's position on this?

MR. YARWOOD: Well, Your Honor, what Dr. Pratt said in his February 23rd, 2017, IME is that it's more likely than not that she will need additional treatment that would include therapeutic injections and an additional . . . knee procedure on her left knee.

Ms. Jackson has been seen periodically by her own physician who has cautioned her against proceeding to a knee replacement until she absolutely cannot stand the pain because of the need to need those knee replacements again subsequently 10, 11, 12 years out. Since she is relatively young she, of course, does not want to have multiple knee replacement surgeries in her lifetime.

For that reason, while she needs additional treatment, it has not been the appropriate time for her to proceed to it and so we would ask that the medical remain open.³

On April 16, 2020, the judge issued an Order denying the motion to terminate medical benefits. In particular, the two-page ruling stated:

Here, the claimant has not pursued additional medical benefits for more than two years from the February 1, 2018 settlement award which left open future medical benefits. The claimant relied on the February 2[3], 2017 report of Dr. Pratt who was a court appointed independent medical examiner. The court made Dr. Pratt's report a claimant's exhibit to the hearing.

Dr. Pratt said it was more probably true than not the claimant would require additional medical treatment including the possibility of additional therapeutic injections and additional knee procedure. The doctor's language was a bit vague, and the report is over three years old, but the court found it to minimally qualify as competent medical evidence. The medical evidence showed the claimant may still need medical treatment on the left knee, even though there has been a two year gap in treatment.

The request to terminate future medical benefits is therefore denied.

PRINCIPLES OF LAW

K.S.A. 44-510k states, in part:

(a)(1) At any time after the entry of an award for compensation wherein future medical benefits were awarded, the . . . employer or insurance carrier may make application for a hearing . . . for the . . . termination . . . of medical treatment. Such post-award hearing shall be held by the assigned administrative law judge . . . and the judge shall conduct the hearing as provided in K.S.A. 44-523, and amendments thereto.

(2) The administrative law judge can . . . (B) terminate . . . an award of current or future medical care if the administrative law judge finds that no further medical care is required, the injury . . . is not the prevailing factor in the need for further

³ P.A.H. at 3-5.

medical care, or that the care requested is not necessary to cure or relieve the effects of such injury.

(3) If the claimant has not received medical treatment . . . from an authorized health care provider within two years from the date of the award . . . , the employer shall be permitted to make application . . . for permanent termination of future medical benefits. In such case, there shall be a presumption that no further medical care is needed as a result of the underlying injury. The presumption may be overcome by competent medical evidence.

(4) No post-award benefits shall be . . . terminated without giving all parties to the award the opportunity to present evidence A finding with regard to a disputed issue shall be subject to a full review by the board under . . . [K.S.A. 44-551(b)] Any action of the board pursuant to post-award orders shall be subject to review under K.S.A. 44-556, and amendments thereto.

K.S.A. 44-516 states the report of any court-ordered neutral health care provider shall be considered by the judge in making a final determination. The Board must consider a court-ordered IME report.⁴

K.S.A. 44-519 provides:

Except in preliminary hearings . . . , no report of any examination of any employee by a health provider . . . shall be competent evidence . . . for the determining or collection of compensation unless supported by the testimony of such health care provider . . . and shall not be competent evidence in any case where testimony of such health care provider is not admissible.

“K.S.A. 44-519 is not a technical rule of evidence. Rather it is a specific legislative mandate.”⁵ Further, “The workers compensation system has been well served by requiring the opinions of experts to be based on testimony subject to cross-examination”⁶

ANALYSIS

1. Should the Board consider Exhibits 1 through 4 from Jackson’s brief?

Netzer Sales objects to the Board considering Exhibits 1 through 4 attached to Jackson’s brief. Exhibits 2 through 4 are medical reports lacking supporting testimony

⁴ See *Alaniz v. Dillon Cos., Inc.*, No. 109,784, 2014 WL 3731939, at *9 (Kansas Court of Appeals unpublished opinion filed July 25, 2014).

⁵ *Roberts v. J. C. Penney Co.*, 263 Kan. 270, 278, 949 P.2d 613 (1997).

⁶ *Id.* at 282.

under K.S.A. 44-519 and *Roberts*. Those medical reports were not considered by the judge and were not considered by the Board. However, Exhibit 1 was the judge's Order appointing Dr. Pratt. Such ruling is part of the record.

2. Future medical treatment is not terminated even though Jackson received no medical treatment from an authorized physician within two years after the settlement. Jackson presented competent medical evidence to prove she is in need of future medical treatment and overcame the statutory presumption to the contrary.

In *Clayton*, the worker settled her workers compensation claim against her employer on May 30, 2013, leaving future medical treatment open. Attached to the settlement hearing transcript was a letter from Aakash A. Shah, M.D., dated April 8, 2013. 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, on June 15, 2015, Clayton's employer filed an application to terminate future medical benefits pursuant to K.S.A. 2015 Supp. 44-510k(a)(3). The judge 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 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, 2011.⁷

Our analysis of the facts of this case and *Clayton* lead to several observations. First, the Court of Appeals did not deny future medical in *Clayton*. Even if the Board

⁷ *Clayton*, 53 Kan. App. 2d at 381-84.

agreed Jackson did not present competent medical evidence, *Clayton* seems to tell us to simply send the case back to the judge to let Jackson present evidence she could already have presented, however unusual. *Clayton* simply drags the dispute out by giving claimants more opportunity to overcome the presumption against future medical treatment.

Second, the facts of this case vary from *Clayton*. The case suggests new medical evidence may often be required, but is not absolutely necessary, to overcome the statutory presumption against additional medical treatment. The issue is decided on a case-by-case basis. Here, Jackson may need a total knee replacement or another procedure. *Clayton* noted original medical evidence may prove the future need for medical treatment, such as a claimant perhaps having a medical device requiring replacement. Jackson may need something replaced: her knee. Dr. Pratt's report establishes Jackson's need for future medical treatment, including surgery. Thus, Jackson overcame the statutory presumption to the contrary. Insofar as Jackson may need surgery, the Board declines to grant Netzer Sales' motion to terminate her future medical treatment.

Third, K.S.A. 44-516 requires the finder of fact to consider the report of the court-ordered physician in the "final determination." The judge's post-award ruling is a final determination. In consideration of the doctor's report, "Uncontradicted evidence which is not improbable or unreasonable cannot be disregarded unless shown to be untrustworthy, and is ordinarily regarded as conclusive."⁸ While Dr. Pratt's report may not be as compelling as it could have been, it is the only report in evidence and is uncontradicted. Also, the judge asked the doctor about the effects of the work injury. A judge asking a neutral doctor what treatment an injured worker may later need after reaching maximum medical improvement only makes sense in the context of the medical treatment flowing from the work injury. Little is gained by asking the doctor what unrelated treatment may be necessary.

Finally, any dispute over causation or prevailing factor may be fought another day. For Jackson to actually obtain additional medical treatment, she would need to comply with K.S.A. 44-510k.

CONCLUSIONS

1. The Board did not consider Exhibits 2 through 4 attached to Jackson's brief based on K.S.A. 44-519.

2. Future medical treatment is not terminated despite Jackson receiving no medical treatment from an authorized physician within two years after the settlement. Jackson

⁸ *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, Syl. ¶ 2, 558 P.2d 146 (1976).

presented competent medical evidence to prove she is in need of future medical treatment and overcame the statutory presumption to the contrary.

AWARD

WHEREFORE, the Board affirms the Post Award Order dated April 16, 2020.

IT IS SO ORDERED.

Dated this _____ day of June, 2020.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

Electronic copies via OSCAR to:
Keith Yarwood
James Biggs
Honorable Kenneth J. Hursh