

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

JAMES MOSS
Claimant

v.

AP-00-0475-367
CS-00-0472-301

HME, INC.
Respondent

and

HORIZON MIDWEST CASUALTY CO.
Insurance Carrier

ORDER

Claimant requested review of the May 1, 2023, Preliminary Order issued by Administrative Law Judge (ALJ) Steven M. Roth.

APPEARANCES

George H. Pearson, III, appeared for Claimant. David P. Mosh and John E. Ryan, Jr., appeared for Respondent and 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 Preliminary Hearing, held April 6, 2023, including Claimant's Exhibits A1-7 and Respondent's Exhibits B1-4; and the pleadings and orders contained in the administrative file. The Board also reviewed the parties' briefs.

ISSUES

1. Does the Appeals Board possess legal authority to consider Claimant's application for review at this time?
2. If the Appeals Board possesses legal authority to consider the application for review, is the denial of additional medical treatment erroneous?

FINDINGS OF FACT

On April 5, 2022, Claimant was performing his usual work for Respondent. Claimant testified he weighed 380 pounds at the time, and is six feet, seven inches tall. As Claimant

was climbing down the side of a crane, the heel of his right boot caught on a piece of asphalt. Claimant hyperextended his right knee.

Respondent referred Claimant to authorized health providers. Treatment records dated April 19, 2022, state Claimant weighed 425 pounds. Claimant was ultimately referred to Dr. Gillen. Claimant sustained multiple injuries of the right knee. On July 7, 2022, Dr. Gillen performed an arthroscopic posterior horn medial meniscus tear debridement and repair, posterior horn lateral meniscus tear and body debridement, notchplasty to alleviate MCL impingement down to bleeding bone, and abrasion chondroplasty of the patella and trochlear groove of the femur.

Claimant saw Dr. Gillen for follow-up appointments. Claimant returned to light-duty work for Respondent in September 2022.

Claimant was evaluated by Dr. Zimmerman on December 27, 2022, at the request of his attorney. Claimant reported he could bend his right knee and stoop without severe pain, but performing deep knee bends was problematic. Dr. Zimmerman did not measure Claimant's weight. Dr. Zimmerman diagnosed a complex tear of the posterior horn of the medial meniscus and a tear of the posterior horn of the lateral meniscus. Dr. Zimmerman did not believe Claimant reached maximum medical improvement, and recommended physician monitoring of continued Celebrex usage, steroid and anesthetic injections, viscosupplementation, and a total knee replacement. Dr. Zimmerman also stated bariatric surgery would reduce stress on the right knee.

On January 9, 2023, Dr. Gillen noted Claimant walked with a limp and reported medial and lateral knee pain. Dr. Gillen declared Claimant at maximum medical improvement. Dr. Gillen imposed permanent restrictions of no ladder use. Dr. Gillen stated he was willing to see Claimant on an as-needed basis. Dr. Gillen subsequently declined to comment on whether bariatric surgery and resulting weight loss would cure or relieve the effects of the work-related injuries.

On February 13, 2023, Dr. Bowling performed an independent medical examination at Respondent's request. Dr. Bowling reviewed Claimant's course of medical treatment and current symptoms. Dr. Bowling diagnosed a medial meniscus tear, lateral meniscus tear and MCL sprain as a result of the April 5, 2022, accident. Dr. Bowling also thought Claimant had preexisting arthritis of the patellofemoral joint and medial compartment, and early arthritis at the lateral compartment. Dr. Bowling recommended corticosteroid injections, viscosupplementation, a total knee replacement and bariatric surgery to cure or relieve Claimant's arthritis, but did not believe the treatment was indicated for Claimant's work-related injuries.

Claimant continues to work in a permanent accommodated position for Respondent after Dr. Gillen released him. Claimant testified his current right knee pain is worse than

before the surgery, with swelling and a feeling the knee is giving way. Claimant reported a severe limp while walking. Claimant also testified he can no longer walk for exercise as a result of the knee injury, and currently weighs 475 pounds. Claimant attempted to see Dr. Gillen for additional treatment, but further appointments were not authorized. Claimant wanted the bariatric surgery Dr. Zimmerman recommended.

On April 6, 2023, a preliminary hearing was held on Claimant's request for authorization of the bariatric surgery. Following the hearing and briefing by counsel, ALJ Roth issued the Preliminary Order, dated May 1, 2023. First, ALJ Roth ruled Claimant sustained a compensable right knee injury from an accident arising out of and in the course of his employment with Respondent on April 5, 2022. Second, ALJ Roth denied Claimant's request for authorization of the bariatric surgery, noting Claimant completed treatment with Dr. Gillen and concluding Claimant did not prove the surgery would cure or relieve the effects of the work-related knee injury. These review proceedings follow.

PRINCIPLES OF LAW AND ANALYSIS

Claimant seeks review of the denial of authorization of the bariatric surgery. Claimant argues ALJ Roth abused his discretion by denying authorization of the surgery using a different legal standard than the one in K.S.A. 44-510h(a). Claimant maintains ALJ Roth incorrectly applied the "prevailing factor" standard in denying Claimant's request for the bariatric surgery. Respondent argues ALJ Roth performed the correct legal analysis and the preliminary decision should be affirmed. Neither party seeks review of ALJ Roth's determination Claimant sustained a compensable right knee injury.

Before addressing the merits of Claimant's request for review, the Appeals Board must have legal authority to review the Preliminary Order. The Board possesses the authority to review preliminary orders on disputed issues of whether the employee suffered an accident, repetitive trauma or resulting injury; whether the injury arose out of and in the course of employment; whether notice was given; or whether certain defenses apply.¹ "Certain defenses" are issues concerning the compensability of the injury under the Workers Compensation Act.² If jurisdiction under K.S.A. 44-534a is not present, it is appropriate to dismiss the appeal.³

Claimant seeks review of a preliminary order denying his request for additional medical treatment. The issue of additional medical treatment is not one of the jurisdictional bases enumerated in K.S.A. 44-534a. The Board does not possess authority to review

¹ See K.S.A. 44-534a(a)(2).

² See *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 675, 994 P.2d 641 (1999).

³ See *id.* at 676.

preliminary orders denying requests for additional medical treatment.⁴ Because the Board does not possess authority to consider Claimant's application for review at this time, Claimant's application should be dismissed without commenting on the merits of Claimant's request for additional medical treatment.

AWARD

WHEREFORE, it is the finding, decision and order of the Appeals Board Claimant's application for review is dismissed. The Preliminary Order issued by ALJ Roth, dated May 1, 2023, remains in full force and effect.

IT IS SO ORDERED.

Dated this _____ day of July, 2023.

WILLIAM G. BELDEN
APPEALS BOARD MEMBER

c: (Via OSCAR)

George H. Pearson, III
David P. Mosh
John E. Ryan, Jr.
Hon. Steven M. Roth

⁴ See, e.g., *Rose v. Modern Mfg., Inc.*, AP-00-0473-997, CS-00-0464-515, 2023 WL 3814536, at *2 (Kan. WCAB May 16, 2023).