

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

TOSHA WILLIAMS

Claimant,

v.

CS-00-0262-185

AP-00-0453-971

MERCY HEALTH SYSTEMS OF KANSAS

Self-Insured Respondent.

ORDER

Self-Insured Respondent requests review of the October 21, 2020, Post Award Order issued by Administrative Law Judge (ALJ) Steven M. Roth.

APPEARANCES

William L. Phalen appears for Claimant. Kendra M. Oakes appears for Self-Insured Respondent.

RECORD AND STIPULATIONS

The Board considered the post-award record, consisting of the transcript of Post Award Hearing held September 27, 2019; the transcript of Post-Award Deposition of Tosha Williams taken August 14, 2020; the transcript of Evidentiary Deposition of Eva Henry, M.D., taken July 7, 2020, including Deposition Exhibits 1-3 and 5; and the pleadings and orders contained in the administrative file. The Appeals Board also adopted the stipulations listed in the Post Award Order. The Appeals Board reviewed the parties' briefs. This matter was placed on the Appeals Board's summary calendar for decision without oral argument.

ISSUES

1. Was the award for reimbursement to Claimant by Respondent for CBD oil purchased by Claimant appropriate as post-award medical treatment?
2. Did ALJ Roth err in refusing to order Respondent to pay past medical expenses and suggesting the issue of Dr. Henry's bills be referred to the Medical Services Unit of the Division of Workers Compensation for resolution under K.S.A. 44-510j?
3. Does the Appeals Board have jurisdiction to consider Claimant's request for ongoing authorization of CBD oil?

FINDINGS OF FACT

Claimant sustained personal injuries from an accident arising out of and in the course of her employment with Respondent on October 28, 2013. Claimant suffers from chronic, recurrent migraine headaches as a result of the work-related accident, and requires ongoing medical treatment under the direction of Dr. Henry, a neurologist. Claimant received an award of compensation on July 3, 2018, which included open future medical treatment.

Claimant continues to see Dr. Henry, whom Respondent confirmed is the authorized treating physician, for her chronic headaches. Dr. Henry prescribed Botox injections administered every three months and other prescription medication. Claimant's condition has improved, but her migraine headaches return if Claimant does not receive the Botox injections as scheduled. When Claimant has migraine headaches, she experiences nausea, vomiting, and light sensitivity. Dr. Henry confirmed Claimant hardly has headaches since she received Botox injections, and no longer experiences significant side effects from the medication previously prescribed.

Although the Botox injections have proven effective, and Dr. Henry's authorization to provide treatment is uncontested by Respondent, disputes arose between Dr. Henry and Respondent concerning payment of Dr. Henry's bills. Claimant is required to obtain the Botox used by Dr. Henry at a pharmacy. In addition, Dr. Henry received partial payments from Respondent for the treatment she provided. Dr. Henry testified she cannot accept the partial payments made by Respondent, although Dr. Henry conceded the amounts she charged exceed the Kansas Workers Compensation Medical Fee Schedule. Claimant continues to see Dr. Henry for treatment, and Dr. Henry anticipates Claimant will require Botox injections in the future.

As the effects of Botox wear off, Claimant begins to experience symptoms of her recurrent migraine headaches. To address those symptoms, Dr. Henry prescribed the use of CBD oil she sells from her office. Claimant began using the CBD oil, and reported it helps relieve her symptoms. Respondent did not authorize the CBD oil, and Claimant incurred \$180.00 out of pocket. Dr. Henry confirmed the CBD oil she prescribed for Claimant is reasonably necessary, and she anticipates Claimant will require it indefinitely.

As a registered nurse undergoing nurse practitioner training, Claimant is subject to random drug testing, including testing for THC. If Claimant tests positive for THC, she risks expulsion from her nurse practitioner training, loss of employment and loss of her nursing license. Dr. Henry sells a particular brand of CBD oil from her office because she trusts the manufacturer's representations of potency and lack of THC. Dr. Henry confirmed the CBD oil she prescribes is not monitored by the FDA as a drug. As a result, the FDA does not regulate the potency or ingredients of CBD oil as a drug. Dr. Henry does not trust the labels of other CBD products available outside of her office accurately represent potency

or absence of THC. The CBD oil Dr. Henry sells can also be purchased by the consumer directly from the manufacturer. Dr. Henry experiences profits from the CBD oil she sells.

On September 27, 2019, a post-award medical hearing took place on the issues of payment of Dr. Henry's medical bills admitted as exhibits at Dr. Henry's deposition, reimbursement of \$180.00 for the CBD oil Claimant purchased, and post-award attorney fees. Authorization of ongoing CBD oil was not raised as an issue. Following the post-award medical hearing, ALJ Roth issued his Post Award Order on October 21, 2020. In the Post Award Order, ALJ Roth ruled the CBD oil constituted reasonably necessary medical treatment because it was specifically prescribed for Claimant's medical condition, and reimbursement of \$180.00 was awarded to Claimant. With regard to the past medical bills, ALJ Roth noted the issue was not one of authorization, but rather a fee dispute between Dr. Henry and Respondent. ALJ Roth concluded the issue of payment of past medical bills could not be addressed in a post-award medical hearing under K.S.A. 44-510k, but could be addressed in a medical fee dispute proceeding under K.S.A. 44-510j. Therefore, no provision for the payment of past medical bills was made in the Post Award Order. Finally, the issue of post-award attorney fees was reserved. These review proceedings follow.

ANALYSIS AND CONCLUSIONS OF LAW

Respondent seeks review of the Post Award Order, arguing ALJ Roth could not order reimbursement for the CBD oil because it does not constitute medical treatment. Claimant did not file a separate application for review, but argues the order for reimbursement was proper. Claimant requests the Board issue an order for payment of CBD oil dispensed in the future, and requests the Board issue an order for the payment of Dr. Henry's bills.

1. The order for reimbursement of \$180.00 for the CBD oil prescribed by Dr. Henry was appropriate under K.S.A. 44-510k.

The Appeals Board first addresses the issue of reimbursement for the CBD oil prescribed by Dr. Henry. Respondent does not argue Claimant's work-related injuries are the prevailing factor causing the need for the CBD oil. Respondent argues CBD oil does not constitute "medical treatment" because it is a food supplement and because "medical treatment" does not include over-the-counter medication under K.S.A. 44-510h(e). Respondent does not argue CBD oil is otherwise unreasonable or unnecessary treatment. Cannabidiol, i.e., CBD, is not included in the definition of "marijuana" in either the Kansas

Criminal Code,¹ or the Kansas Uniform Controlled Substances Act,² and is not an illegal substance.

At any time after the entry of an award of compensation where future medical treatment is awarded, the employee, employer or insurance carrier may make an application for hearing for the furnishing, termination, or modification of medical treatment.³ The administrative law judge can make an award for further medical care if the judge finds it is more probably true than not the injury from the underlying award is the prevailing factor in the need for further medical care, and the care requested is reasonably necessary to cure or relieve the effects of such injury.⁴ “Medical care” is not defined in K.S.A. 44-510k, except in the context of terminating future medical. In the context of terminating future medical, the definition of “medical treatment” contained in K.S.A. 44-510h is used,⁵ which states “medical treatment” does not include over-the-counter medication.⁶ Generally, the employer is obligated to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation, as may be reasonably necessary to cure and relieve the effects of the work-related injury.⁷

In this case, Dr. Henry specifically prescribed the CBD oil sold in her office to cure or relieve the effects of Claimant’s work-related injury because she was confident in its CBD potency and absence of THC. The absence of THC is of particular concern here because of the potential impact on Claimant’s education, employment, and professional license. No evidence was presented to suggest the CBD oil was not related to Claimant’s work-related injuries. No evidence was presented indicating CBD oil was not effective in reducing the effects of Claimant’s work-related injuries. According to Dr. Henry, the CBD oil she prescribed is not treated as a drug or medicine by the FDA. The plain language of K.S.A. 44-510h(a) does not exclude supplements.⁸ Arguably, CBD oil, as a supplement,

¹ See K.S.A. 21-5701(j).

² See K.S.A. 65-4111(f)(3).

³ See K.S.A. 44-510k(a)(1).

⁴ See K.S.A. 44-510k(a)(2).

⁵ See K.S.A. 44-510k(a)(3).

⁶ See K.S.A. 44-510h(e).

⁷ See K.S.A. 44-510h(a).

⁸ See *id.*

constitutes a “medical or surgical supply” under the expansive language of K.S.A. 44-510h(a).

Respondent’s arguments indicating CBD oil cannot constitute “medical treatment,” must fail in this case. Respondent first argues CBD oil is an over-the-counter medicine, which does not constitute “medical treatment” under K.S.A. 44-510h(e). According to Dr. Henry, however, the CBD oil she prescribed is not considered medicine by the FDA. CBD oil cannot be over-the-counter medicine because it is not medicine. Therefore, the potential bar under K.S.A. 44-510h(e) does not apply.

The argument CBD oil cannot constitute “medical treatment” because it is a supplement fails because the Appeal Board decision cited by Respondent is distinguishable from this case. In *Hamrick v. Arabian Horse Express*,⁹ Claimant sought reimbursement for vitamins and wine claimed to cure or relieve the effects of Claimant’s work-related injury. In *Hamrick*, the Appeals Board denied both items because there was no evidence showing the need for them was affected or increased by the work-related injury.¹⁰ In addition, the Appeals Board concluded those items did not comprise “medical treatment” in that specific instance without elaboration.¹¹ In this case, however, it is undisputed the particular CBD oil Dr. Henry prescribed was related to Claimant’s work-related migraine headaches. This matter is different from the instance in *Hamrick*. In this particular case, Claimant met her burden of proving the work-related injury was the prevailing factor causing her need for the CBD oil prescribed by Dr. Henry, and is reasonably necessary to cure or relieve the effects of the work-related injury. Accordingly, the award for reimbursement of \$180.00 for the CBD oil prescribed by Dr. Henry is affirmed.

2. The order declining to order payment of Dr. Henry’s bills under K.S.A. 44-510k and suggesting the fee dispute issue be addressed under K.S.A. 4-510j is affirmed.

Although not raised by Respondent in the Application for Review, Claimant seeks review of ALJ Roth’s refusal to award payment of medical bills under K.S.A. 44-510k, and apparent referral of the issue of Dr. Henry’s bills to the Medical Services Unit for resolution of a fee dispute under K.S.A. 44-510j. The Appeals Board possesses authority to review questions of law and fact presented to the administrative law judge.¹² Because the issue

⁹ No. 183,004, 2002 WL 230952 (Kan. WCAB Jan. 31, 2002).

¹⁰ *Id.* at *12.

¹¹ *Id.*

¹² See K.S.A. 44-555c(a).

of payment of Dr. Henry's bills was raised as an issue before ALJ Roth, and because an application for review was timely filed, the Appeals Board may consider this issue.

Generally, the employee, employer and insurer may make an application for hearing on the furnishing, termination or modification of medical treatment.¹³ In contrast, K.S.A. 44-510j contains a detailed process for resolution of fee disputes available to the employer, insurer or health care provider.¹⁴ In this case, Claimant filed an application for post-award medical treatment under K.S.A. 44-510k, and Respondent confirmed Dr. Henry was authorized to provide medical treatment, except for CBD oil. Dr. Henry is providing medical treatment to Claimant. The issue of furnishing medical treatment between Respondent and Claimant was resolved.

In contrast, the issue of payment of Dr. Henry's bills involves Respondent and Dr. Henry, and is better addressed in proceedings under K.S.A. 44-510j. Referring the fee dispute between Respondent and Dr. Henry to the Medical Services Unit also resolves a due process deficiency. Charges for medical treatment under workers compensation in excess of the Workers Compensation Fee Schedule are unlawful, void and unenforceable as a debt.¹⁵ Dr. Henry has an obvious interest in the outcome of the fee dispute with Respondent. Dr. Henry, however, was not a party to the post-award medical hearing. Under the plain language of K.S.A. 44-510k, Dr. Henry would not have standing as a party in the post-award medical hearing because she is not the employee, employer or insurer.¹⁶ Under K.S.A. 44-510j, however, Dr. Henry can participate as a party. The Appeals Board will not rule on the merits of the fee dispute between Dr. Henry and Respondent at this time, but it is possible the evidence in the current record may not support a claim for additional payment. Dr. Henry, however, has not received notice of a hearing or had the opportunity to present evidence or to be heard. This deficiency can be corrected by proceeding under K.S.A. 44-510j. Contrary to Respondent's argument, this process may be requested by Respondent, as well as by Dr. Henry.¹⁷

¹³ See K.S.A. 44-510k(a)(1).

¹⁴ See K.S.A. 44-510j.

¹⁵ See K.S.A. 44-510i(c)(3).

¹⁶ See K.S.A. 44-510k(a)(1).

¹⁷ See K.S.A. 44-510j(a)(1).

3. Claimant's request for ongoing authorization of CBD oil is denied because it was not raised before the ALJ.

Finally, Claimant requested the Appeals Board issue an order for ongoing authorization of CBD oil dispensed in the future. Claimant did not make this request at the post-award medical hearing. The Appeals Board's review authority is limited to issues of facts and law presented to the administrative law judge.¹⁸ Because the issue of ongoing authorization of CBD oil was not presented to ALJ Roth at the post-award hearing, it cannot be considered by the Appeals Board at this time.

CONCLUSION

ALJ Roth's order for reimbursement of \$180.00 for CBD oil prescribed by Dr. Henry is payable as post-award medical treatment. ALJ Roth's refusal to order payment of Dr. Henry's bills under K.S.A. 44-510k is correct and should be affirmed. Claimant's request for ongoing authorization of CBD oil is not considered because it was not raised before ALJ Roth.

AWARD

WHEREFORE, it is the decision of the Appeals Board the Post Award Order issued by Administrative Law Judge Steven M. Roth, dated October 21, 2020, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of January, 2021.

APPEALS BOARD MEMBER

APPEALS BOARD MEMBER

APPEALS BOARD MEMBER

¹⁸ See K.S.A. 44-555c(a).

TOSHA WILLIAMS

8

**CS-00-0262-185
AP-00-0453-971**

c: Via OSCAR

William L. Phalen
Kendra M. Oakes
Eva Henry, M.D.
Hon. Steven M. Roth