

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

BRETT M. McQUITTY)	
Claimant)	
)	
v.)	
)	
CITY OF GARDEN CITY)	AP-00-0457-972
Respondent)	CS-00-0383-830
)	
and)	
)	
KANSAS MUNICIPAL INSURANCE TRUST)	
Insurance Carrier)	

ORDER

Claimant requests review of Administrative Law Judge (ALJ) Pamela J. Fuller's Post-Award Order, dated May 8, 2021. Lawrence M. Gurney appeared for Claimant. Ronald J. Laskowski appeared for Respondent and its Insurance Carrier. The case was placed on the summary docket for disposition without oral argument.

RECORD AND STIPULATIONS

The Board considered the post-award record consisting of the transcript of the Motion Hearing held on May 6, 2021, with exhibit A1, Dr. Desirae Friend's April 5, 2019, report and Exhibit B1, the Affidavit of Gene Miller; and the pleadings and orders contained in the administrative file. The Board also reviewed the parties' briefs.

ISSUE

Did Claimant sustain his burden of proof, by competent medical evidence, to overcome the presumption no further medical care is needed and treatment should be terminated?

Findings of Facts

Claimant suffered a compensable injury to his back on December 17, 2011. As a result of Claimant's injury, an L5-S1 microdiscectomy was performed by Dr. Matthew Henry on April 2, 2012. Claimant settled his claim, reserving his right to future medical treatment, on October 23, 2013. The last authorized medical care and treatment was provided to Claimant on August 15, 2017. Claimant saw Dr. Abay, who indicated no surgical

intervention was needed. At his own expense, Claimant sought medical treatment on April 5, 2019. Dr. Desirae Friend recommended a trial of epidural injections for his low back pain.

On February 26, 2021, Respondent filed a motion to terminate Claimant's medical care and treatment pursuant to K.S.A. 44-510k(a)(3). On March 19, 2021, Claimant filed an application for post-award medical benefits. Respondent's motion to terminate benefits was held, via telephone, on May 6, 2021. The ALJ granted Respondent's motion to terminate medical care and treatment.

Claimant argues the post award Order is erroneous because he presented sufficient competent medical evidence to rebut the statutory presumption no further medical treatment is needed. Respondent argues the post-award Order should be affirmed.

PRINCIPLES OF LAW AND ANALYSIS

Claimant sustained his burden of proof, by competent medical evidence, to overcome the presumption no further medical care is needed and treatment should be terminated.

Under K.S.A. 44-510k(a)(3), Respondent has the burden of proving the claimant failed to obtain medical treatment for a period of two years from the date of the original award or from the last date the Claimant received authorized medical treatment. Upon successfully meeting its burden of proof, Respondent is entitled to a statutory presumption "that no further medical treatment is needed as a result of the underlying injury." The burden of proof shifts to the Claimant to present sufficient "competent medical evidence" to overcome the presumption.

Here, there is no dispute Respondent met its burden of proof to establish the statutory presumption "that no further medical treatment is needed as a result of the underlying injury." The burden of proof is now upon Claimant to provide sufficient "competent medical evidence" to overcome the presumption.

In *Clayton v. University of Kansas Hosp. Auth.*,¹ the Kansas Court of Appeals stated:

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 ... 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 probability or likelihood that medical care in addition to what has already been received will be needed in the future as a result

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

of the underlying injury ... 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.²

The only new medical evidence presented by Claimant is Dr. Friend's April 5, 2019, report recommending a trial of epidural injections for low back pain. When viewed in light of Claimant's medical history, however, it is sufficient competent medical evidence.

Claimant underwent an L5-S1 microdiscectomy by Dr. Henry on April 3, 2012, a significant medical procedure. At his final appointment with Dr. Henry, Claimant reported ongoing pain affected his lifestyle. Claimant last received authorized medical care with Dr. Abay on August 15, 2017. Dr. Abay stated no surgical intervention was needed at this time. This authorized care clearly demonstrates Claimant was continuing to experience symptoms significant enough to pursue medical treatment, including additional surgery, more than five years after his surgery. More than nineteen months later, Claimant, at his own expense, sought medical treatment through Dr. Friend on April 5, 2019. Again, this demonstrates Claimant was experiencing ongoing pain and discomfort in his low back, almost seven years to the day of his back surgery.

It should be noted Respondent's counsel, in its brief to the Board, asks the Court to disregard any references made by Claimant's counsel at the motion hearing regarding Dr. Henry and Dr. Abay. The Board disagrees. An objection was made by Respondent's counsel to the admission of Dr. Friend's report and overruled. No objections were made by Respondent Counsel to the statements and arguments made by Claimant's counsel at the motion hearing regarding the two physicians. The Board does not address issues raised for the first time on appeal.³

The Kansas Court of Appeals in *Clayton*⁴ noted "the legislature has expressed its intent to bring finality to the process in cases in which treatment from a health care provider is no longer needed." Such is not the case here. Claimant has had, and continues to have back symptoms which require medical treatment from a health care provider. Dr. Friend's report, viewed in light of Claimant's medical history, is sufficient competent medical evidence to overcome the statutory presumption no further medical treatment is needed as a result of the underlying injury.

² See *id.*

³ See *Miller v. General Motors Corporation*, Nos.1,048,350, 1,048,351, 2013 WL 1384377 (Kan. WCAB Mar. 13, 2013)

⁴ See *Clayton v. University of Kansas Hosp. Auth.*, 53 Kan. App. 2d 376, 388 P. 3d 187 (2017).

AWARD

WHEREFORE, it is the decision of the Board the Order of Administrative Law Judge Pamela J. Fuller dated May 8, 2021, is reversed. Respondent's motion to terminate medical care and treatment is denied.

IT IS SO ORDERED.

Dated this _____ day of July, 2021.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

CC: VIA OSCAR

Lawrence M. Gurney, Attorney for Claimant
Ronald J. Laskowski, Attorney for Respondent and its Insurance Carrier
Hon. Pamela J. Fuller, Administrative Law Judge