BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

JOHN MURPHY	)	
Claimant	)	
V.	)	
	)	AP-00-0461-179
FOOT LOCKER RETAIL INC.	)	CS-00-0273-090
Respondent	)	
AND	)	
	)	
SAFETY NATIONAL CASUALTY CORP.	)	
Insurance Carrier	)	

ORDER

The claimant, through Jeff Cooper, requested review of Administrative Law Judge (ALJ) Bruce Moore's post-award Order dated September 9, 2021. Timothy Lutz appeared for the respondent and its insurance carrier (respondent). The case was placed on the summary docket for disposition without oral argument.

RECORD AND STIPULATIONS

The Board considered the record consisting of the transcript of the post-award hearing held September 7, 2021, with attached exhibits, and the pleadings and orders contained in the administrative file. The Board also reviewed the parties' briefs.

ISSUE

Should the claimant's award of future medical treatment be terminated?

FINDINGS OF FACT

The claimant sustained a compensable work-related injury to his right hip on November 15, 2012. As a result, the claimant underwent two arthroscopic surgeries by Scott Wingerter, M.D., in 2014 and 2015, for labral repair, psoas release and femoral osteochondroplasty. Dr. Wingerter placed the claimant at maximum medical improvement on May 11, 2016.

At his attorney's request, the claimant saw Edward Prostic, M.D., on May 27, 2016. The doctor noted no significant tenderness and good motion of the claimant's right hip, except for internal rotation. Dr. Prostic stated the claimant had continued pain and significant weakness of hip flexion. The doctor stated, ". . . John P. Murphy sustained injury to his right hip with tearing of his anterior labrum. He has been partially improved by two operations. He continues to be headed toward total hip replacement arthroplasty with timing of the arthroplasty hopefully [postponed] by his two arthroscopic procedures."[1] Dr. Prostic rated the claimant at 12% whole person.

On July 1, 2016, Dr. Wingerter rated the claimant at 5% whole person. The doctor opined the claimant would not require any additional medical treatment.

On November 3, 2016, the claimant settled his claim based on a 7% whole person impairment, reserving his right to future medical treatment.

On July 21, 2017, the claimant returned to Dr. Wingerter due to pain. X-rays showed improvement in head-neck offset. The doctor prescribed medication and stated:

> [The claimant] has progressed appropriately following repeat right hip arthroscopy. He was found to have intact previous repair as well as labral tear in the area of psoas irritation. His issues at this time do seem more muscular or scar related. We discussed the option of further physical therapy and he is comfortable doing this on his own. He just wanted to verify that his symptoms were to be expected. He was advised that he may have some soreness in his hip.[2]

Dr. Wingerter authored a letter dated August 14, 2017, stating additional medical care was not needed and the claimant's ongoing symptoms, including muscle weakness and soreness, were consistent with his original injury and surgeries.

The claimant's last authorized medical treatment was a reevaluation with Dr. Wingerter on July 24, 2018. The claimant was no longer doing physical therapy and said ibuprofen and meloxicam helped his pain. The claimant had an antalgic gait and right hip pain and tenderness. X-rays showed decreased head-neck offset consistent with cam impingement deformity. Dr. Wingerter noted the claimant's symptoms of muscular weakness and soreness were the expected result of his original injury and surgeries. The doctor stated, "I do not see any indication that he will need further surgical intervention."[3] The doctor recommended the claimant continue taking over-the-counter NSAIDs.

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[1] P.A.M. Trans., Cl. Ex. 1 at 2.

[2] *Id*., Resp. Ex. 1 at 8.

[3] *Id*., Resp. Ex . 1 at 3.

On July 23, 2021, the respondent filed an application for termination of future medical pursuant to K.S.A. 44-510k(a)(3). A hearing occurred on September 7, 2021. The claimant testified he still had right hip pain with activity, such as walking, sitting and laying down. While he is a supervisor, there are times he unloads trailers and ascends and descends ladders at work. Such work activity is bothersome, and the claimant tries to eschew such "unavoidable" activity.[4] Away from work, the claimant tries to avoid physical activity, lest he risk reinjury. The claimant testified he had an increase in pain in July 2021, probably worse than when he last saw Dr. Wingerter in 2018, and asked one of his supervisors about getting a doctor's appointment. The claimant acknowledged he had not seen a doctor since 2018, and he is not taking prescription medication.

In his order, the ALJ stated:

> Murphy relies upon the opinions expressed by Dr. Prostic in his May 27, 2016 rating report. While Dr. Prostic then opined that Murphy would eventually need a hip replacement surgery, over 5 years have passed since the issuance of that report. The report does not and could not take into account Murphy's activities and complaints, or the nature of those complaints, three and five years hence. He did not examine Murphy a second time, and he did not have the benefit of Dr. Wingerter's 2017 and 2018 examinations.
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> Dr. Prostic's 2016 report is insufficient to carry Murphy's burden. The only new evidence offered by Murphy is his testimony that, three years after his last visit with Dr. Wingerter, he was experiencing a subjective increase in pain. Unfortunately, pain is often a consequence of an injury, and where an injury has permanent consequences, one of those consequences may well be residual pain. Murphy had pain when last seen by Dr. Prostic, he had pain when seen by Dr. Wingerter in 2017 and 2018, and he has pain today. Thus far, he has successfully modulated that pain with over-the counter medications. There is no medical evidence before the court that additional medical treatment would reduce or eliminate that pain.
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> Murphy has failed to rebut the statutory presumption that no further medical care is owed. Respondent's Application to Terminate Medical is **GRANTED**.[5]

The claimant argues his medical treatment should remain open because he continues to have, at least at this point, manageable pain. He contends there is clear evidence from Dr. Prostic his hip joint will likely need to be replaced in the future. The respondent maintains the Order should be affirmed because of the statutory presumption in K.S.A. 44-510k(a)(3). The respondent also noted Dr. Wingerter stated in 2017 and 2018 the claimant did not need additional medical treatment.

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[4] *Id*. at 9.

[5] ALJ's Order at 2.

PRINCIPLES OF LAW & ANALYSIS

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 employee, employer or insurance carrier may make application for a hearing, in such form as the director may require for the furnishing, termination or modification of medical treatment.
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> . . .
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> (2) The administrative law judge can (A) make an award for further medical care if the administrative law judge finds that it is more probably true than not that the injury which was the subject of the underlying award is the prevailing factor in the need for further medical care and that the care requested is necessary to cure or relieve the effects of such injury, or (B) terminate or modify an award of current or future medical care if the administrative law judge finds that no further medical care is required, the injury which was the subject of the underlying award is not the prevailing factor in the need for further medical care, or that the care requested is not necessary to cure or relieve the effects of such injury.
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> (3) If the claimant has not received medical treatment, as defined in subsection (e) of K.S.A. 44-510h, and amendments thereto, from an authorized health care provider within two years from the date of the award or two years from the date the claimant last received medical treatment from an authorized health care provider, the employer shall be permitted to make application under this section 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.
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> (4) No post-award benefits shall be ordered, modified or terminated 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.

The Board reverses the ALJ's termination of future medical treatment. Although the claimant received no medical treatment from an authorized physician within two years after last receiving authorized treatment, the claimant presented competent medical evidence to prove he is in need of future medical treatment and overcame the statutory presumption to the contrary.

In *Clayton*,[6] the worker settled her workers compensation claim against her employer in 2013, leaving future medical treatment open. Attached to the settlement hearing transcript was a 2013 letter from Dr. Shah, M.D. 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, in 2015, Clayton's employer filed an application to terminate future medical benefits pursuant to K.S.A. 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.
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> [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.
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> [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.
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> 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.

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

> 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.
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> . . .
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> 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."
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> . . . [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]

Clayton suggests new medical evidence may be required, but is not absolutely necessary in every case, to overcome the statutory presumption against additional medical treatment. *Clayton* noted original medical evidence may prove the future need for medical treatment, such as an injured worker perhaps having a medical device requiring replacement. The issue is decided on a case-by-case basis.

The medical evidence establishes the claimant has residual right hip pain and weakness subsequent to his 2012 work-related injury. The claimant testified he still has those symptoms and he tries to avoid activity, both at work and away from work, to prevent increased symptoms.

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

Dr. Prostic's 2016 report is over five years old. Still, according to Dr. Prostic, the claimant was on the path for hip replacement surgery. The claimant does not need replacement of a "medical device," the example in *Clayton*, but he nevertheless may need something replaced: his hip. Dr. Prostic's report is competent medical evidence and establishes the claimant's need for future medical treatment, including potential surgery.

Dr. Prostic's opinion as to the claimant's potential need for hip replacement surgery is not impacted by the subsequent reports from Dr. Wingerter or the claimant's activity or complaints between 2016 and 2021. Dr. Wingerter did not think the claimant would need any additional medical treatment in 2016, but he provided treatment in 2017 and 2018, such as prescribing medication and taking imaging studies. Dr. Wingerter's records confirm the claimant has consistent hip complaints. The claimant's testimony about ongoing symptoms and avoiding activity causing increased pain does not devalue Dr. Prostic's opinion the claimant was "headed toward total hip replacement arthroplasty . . . ."

Based on facts specific to other cases, the Board has declined to terminate future medical treatment when additional surgery may be required.[8] The claimant overcame the statutory presumption contained in K.S.A. 44-510k(a)(3). The Board reverses the ALJ's order to terminate the claimant's right to pursue future medical treatment.

AWARD

WHEREFORE, the Board reverses ALJ Moore's post-award Order dated September 9, 2021. The prior award by settlement remains in full force and effect.

IT IS SO ORDERED.

Dated this _____ day of November, 2021.

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BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

c: (via OSCAR)
Jeff Cooper
Timothy Lutz
Hon. Bruce Moore

[8] See *Jackson v. Netzer Sales, Inc.*, AP-00-0450-595, 2020 WL 3631189, at *6 (Kan. WCAB June 17, 2020); *Cortez v. Hernandez*, No. 1,062,942, 2015 WL 6776995, at *3 (Kan. WCAB Oct. 20, 2015).