

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

AGUSTIN CAMPOS
Claimant

v.

CAL-MAINE FOODS INC.
Respondent

AP-00-0480-345
CS-00-0266-225

and

ACE AMERICAN INSURANCE COMPANY
Insurance Carrier

ORDER

Claimant appealed the December 13, 2023, Award issued by Administrative Law Judge (ALJ) Bruce E. Moore. The Board heard oral argument on April 11, 2024.

APPEARANCES

Scott J. Mann appeared for Claimant. Timothy A. Emerson 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 Proceedings, held September 12, 2023; the transcript of Regular Hearing by Deposition by Telephone, taken October 2, 2023, including Exhibit 1; the transcript of Evidentiary Deposition via Phone of Pedro A. Murati, M.D., taken October 11, 2023, including Exhibits 1-4; the transcript of Evidentiary Deposition of Steve L. Benjamin, taken October 11, 2023, including Exhibits 1-2; and the pleadings and orders contained in the administrative file. The Board also reviewed the parties' briefs.

ISSUES

1. Is K.S.A. 44-510c(a)(3) constitutional?
2. Is Claimant entitled to an award of future medical treatment?
3. What is the nature and extent of disability?
4. If Claimant is permanently and totally disabled, is he barred from receiving permanent total disability compensation under K.S.A. 44-510c(a)(3)?

FINDINGS OF FACT

Claimant worked for Respondent, a commercial egg producer, in maintenance. Claimant was in charge of four buildings housing chickens. Claimant fed the chickens, ensured the chickens had sufficient air, monitored the temperature inside the buildings, and performed repairs. Claimant worked Monday through Saturday, and occasionally Sunday. Claimant is sixty-one years of age, resides in Great Bend, possesses no formal education, and cannot read, write or speak in English. Claimant is a legal resident of the United States.

On February 9, 2018, Claimant was in an upper level of a building checking a machine. Claimant fell approximately ten feet and landed on the concrete floor. Claimant lost consciousness and does not recall what happened. Claimant regained consciousness after he was transported to the hospital in Hutchinson. Claimant was subsequently transported to Wesley Medical Center in Wichita, where Claimant underwent cranial and back surgeries, as well as a right shoulder surgery. Claimant recovered at a rehabilitation hospital, and later received treatment from Dr. Bell for headaches. Dr. Parks also implanted a spinal cord stimulator. Claimant continues to see Dr. Parks for pain management.

Claimant did not return to work for Respondent, and Claimant denied working elsewhere after February 9, 2018. Claimant does not believe he is capable of working. Claimant has residual back pain and uses a walker due to leg numbness causing balance problems. The back pain runs from the middle of the back to Claimant's head. Claimant also reported residual headaches and memory loss due to the medication he takes. Claimant testified he developed bilateral wrist pain from using the walker. Claimant is currently receiving Social Security Disability benefits, and he applied for food stamps. Other income sources were denied.

Claimant sustained a prior work-related injury to his left foot requiring multiple surgeries on October 16, 2008, while working for another employer. Claimant did not recall receiving treatment for his back or having low back pain on account of the prior accident. Claimant used a cane, and recalled a physician telling Claimant he could not work any more. On September 22, 2012, a workers compensation award was approved. The parties stipulated Claimant was permanently totally disabled, and Claimant was entitled to an award subject to the \$125,000.00 cap in effect in 2008. The Agreed Award stated as a result of the work-related injury and the reports of Drs. Horton, Brown and Burton, Claimant was permanently and totally disabled as defined in K.S.A. 44-510c(a)(2).¹ The medical reports are not part of the record in this claim.

¹ R.H. by Depo., Ex. 1.

As a result of the prior injury, Claimant did not work from 2008 through 2014. Claimant testified in 2014, he approached Respondent, said he was disabled and asked for an accommodated position. According to Claimant, he was provided work as a laborer and supervisor. Claimant later asked to change his position to maintenance because he did not like supervising other people.

Claimant was evaluated by Dr. Murati at his counsel's request on March 20, 2023. Claimant reported low back pain, bilateral lower extremity pain and numbness, dizziness and headaches, and bilateral shoulder pain. Dr. Murati noted a CT scan indicated Claimant sustained a burst fracture at T12. Dr. Murati also noted Claimant received treatment from Dr. Razafindrabe for intractable lumbar pain, right shoulder surgery by Dr. Hildebrand and implantation of a spinal cord stimulator for failed back syndrome by Dr. Parks. Dr. Murati noted Claimant previously underwent left foot surgery, and had prior low back pain from an antalgic gait.

Examination was notable for positive rotator cuff signs at the right shoulder and tenderness at the acromioclavicular joint. Reduced sensation of the left lower extremity was noted. Tenderness at the mid-thoracic and lumbar paraspinals was noted. Claimant had difficulty ambulating.

Dr. Murati diagnosed a burst fracture at T12, a fracture at the transverse process of L1, a fusion from T10-L2, a laminotomy and spinal cord stimulator implanted at T8-9 and T9-10, post-right shoulder arthroscopy, myofascial pain syndrome from the right shoulder girdle to the neck and upper back, thoracic radiculopathy, lumbar radiculopathy different from before, complaints of dizziness and headaches and post-right occipital skull fracture. Dr. Murati related all of the medical conditions to the work-related accident of February 9, 2018. Under the methodology from *Johnson v. U.S. Foods*,² Dr. Murati rated Claimant's total functional impairment at 50% of the body as a whole. Dr. Murati also recommended future medical treatment.

Dr. Murati imposed permanent work restrictions. After reviewing the task list generated by Mr. Benjamin, Dr. Murati testified Claimant's task loss was 87%. Dr. Murati also testified Claimant was essentially and realistically unemployable.

Dr. Murati confirmed he evaluated Claimant in 2011 for the injuries sustained on October 16, 2008. Dr. Murati diagnosed post-multiple surgeries of the left foot, low back pain with radiculopathy, right sacroiliac joint dysfunction, and complex regional pain syndrome, Type I, of the left lower extremity. Dr. Murati also stated Claimant was essentially and realistically unemployable based on his examination, and recommended

² 312 Kan. 597, 478 P.3d 776 (2021).

Claimant apply for Social Security Disability. Dr. Murati provided further treatment recommendations, and did not issue an impairment rating.

When confronted with his prior opinion of unemployability, Dr. Murati stated Claimant was initially unemployable, but his condition improved and he was capable of working without restriction and was performing heavy manual work for Respondent. Dr. Murati was not aware of the prior award of permanent total disability compensation. Dr. Murati testified Claimant did not present signs of complex regional pain syndrome or right sacroiliac joint dysfunction at the second evaluation. Dr. Murati thought Claimant's medical conditions were more serious following the second accident.

Mr. Benjamin performed a vocational evaluation of Claimant at the request of Claimant's counsel on April 11, 2023. Mr. Benjamin interviewed Claimant with an interpreter, and prepared a task list. Mr. Benjamin also reviewed Dr. Murati's restrictions, Claimant's education and prior work experience, skills, age and geographic location. Mr. Benjamin testified Claimant's receipt of Social Security Disability did not factor into his opinions. Mr. Benjamin believed Dr. Murati's restrictions limited Claimant to performing sedentary work. Mr. Benjamin opined Claimant was unable to re-enter the open labor market, had 100% wage loss, and was permanently and totally disabled. Mr. Benjamin was not told Claimant received a prior permanent total disability award, and Mr. Benjamin did not review the report of Dr. Murati's prior examination.

On December 13, 2023, ALJ Moore issued the Award. ALJ Moore declined to rule on the constitutionality argument raised by Claimant. After noting Respondent conceded Claimant was entitled to future medical, ALJ Moore awarded future medical to Claimant. ALJ Moore noted the opinions of Dr. Murati and Mr. Benjamin were uncontradicted, and concluded Claimant was permanently and totally disabled on account of the injuries sustained on February 9, 2018. Due to the prior award of permanent total disability, ALJ Moore concluded Claimant was barred from receiving a second permanent total disability award under K.S.A. 44-510c(a)(3). Claimant was awarded \$130,000.00 in temporary total disability compensation, future medical treatment and unauthorized medical. Respondent was awarded reimbursement by the Fund of \$7,104.35 for an overpayment of temporary total disability compensation. These review proceedings follow.

PRINCIPLES OF LAW AND ANALYSIS

Claimant argues the Award is erroneous because Claimant did not receive a full award of permanent total disability compensation under the current version of the Act, or \$155,000.00. Therefore, Claimant did not receive a prior permanent total disability award triggering the prohibition against a second permanent total disability award under K.S.A. 44-510c(a)(3). Claimant also argues applying the bar against a second permanent total disability award would make K.S.A. 44-510c(a)(3) apply retroactively to the 2008 injuries. Finally, Claimant argues K.S.A. 44-510c(a)(3) is unconstitutional. Respondent contends

the opinions of Dr. Murati and Mr. Benjamin are not credible. Respondent also argues Claimant clearly received a prior award of permanent total disability compensation under the law in effect on 2008, and Claimant is barred from receiving a second permanent total disability award for this claim.

It is the intent of the Legislature the Workers Compensation Act be liberally construed only for the purpose of bringing employers and employees within the provisions of the Act.³ The provisions of the Workers Compensation Act shall be applied impartially to all parties.⁴ The burden of proof shall be on the employee to establish the right to an award of compensation, and to prove the various conditions on which the right to compensation depends.⁵

1. The Appeals Board does not possess legal authority to review the constitutionality of a statute, and reserves the issue for a court of competent jurisdiction.

The Board first addresses whether K.S.A. 44-510c(a)(3) is unconstitutional. The Appeals Board does not possess the authority to review independently the constitutionality of the Kansas Workers Compensation Act.⁶ Therefore, the Board cannot address the constitutionality of K.S.A. 44-510c(a)(3). The issue is reserved for the appellate courts.

2. Claimant is entitled to an award of future medical treatment.

The Board next addresses the future medical issue. In the Award, ALJ Moore found Respondent conceded future medical. Both parties agreed in their briefs and at oral argument Claimant was entitled to future medical treatment. Therefore, the issue is moot and the award of future medical treatment is affirmed.

3. Based on the uncontradicted expert testimony and other evidence in the record, Claimant was rendered permanently and totally disabled on account of the injuries sustained on February 9, 2018.

The Board next considers whether Claimant was rendered permanently and totally disabled on account of the injuries he sustained on February 9, 2018. Permanent total disability exists when the employee, on account of the injury, has been rendered

³ See K.S.A. 44-501b(a).

⁴ See *id.*

⁵ See K.S.A. 44-501b(c).

⁶ See, e.g., *Pardo v. United Parcel Service*, 56 Kan. App. 2d 1, 10, 422 P.3d 1185 (2018).

completely and permanently incapable of engaging in any type of substantial and gainful employment, and expert evidence shall be required to prove permanent total disability.⁷

Claimant sustained multiple injuries requiring extensive medical treatment. Claimant's testimony regarding his significant residual symptoms and problems was uncontradicted. Claimant did not return to work after sustaining the injuries of February 9, 2018. Claimant is not currently working. Claimant does not believe he is capable of working. Claimant is receiving Social Security Disability benefits.

Dr. Murati testified Claimant's physical condition improved before February 9, 2018, and he required sedentary work restrictions on account of his injuries. Notwithstanding the functional impairment rating, Dr. Murati did not believe Claimant was employable. Mr. Benjamin believed Claimant was incapable of reentering the open labor market based on his review of Dr. Murati's restrictions, Claimant's education, prior work experience, age, geographic location and English skills. Dr. Murati and Mr. Benjamin were not aware of the prior permanent total disability award when they evaluated Claimant. No other experts testified. Based on the uncontradicted opinions of Dr. Murati and Mr. Benjamin, as well as Claimant's testimony, the Board finds Claimant has been completely and permanently incapable of engaging in substantial and gainful employment. Claimant was rendered permanently and totally disabled on account of the injuries sustained on February 9, 2018.

4. Based on the plain language of K.S.A. 44-510c(a)(3), Claimant is barred from receiving a second award of permanent total disability compensation, and the award of compensation issued by ALJ Moore is affirmed.

The primary issue is whether Claimant is barred from receiving permanent total disability compensation under K.S.A. 44-510c(a)(3). According to the statute, "An injured worker shall not be eligible to receive more than one award of workers compensation permanent total disability in such workers' lifetime."⁸ When the plain language of a statute is clear and unambiguous, a court must apply the statute as written.⁹

Claimant received a prior award of permanent total disability compensation from the injuries he sustained on October 16, 2008. Under the terms of the Agreed Award, all parties, including Claimant, stipulated he was rendered permanently and totally disabled. Claimant received the maximum permanent total disability benefit in effect on October 16, 2008: \$125,000.00. Based on the plain language of K.S.A. 44-510c(a)(3), Claimant is

⁷ See K.S.A. 44-510c(a)(2).

⁸ K.S.A. 44-510c(a)(3).

⁹ See *Bergstrom v. Spears Mfg. Co.*, 289 Kan. 605, 607-08, 214 P.3d 676 (2009).

barred from receiving a second permanent total disability compensation award in this claim. Contrary to Claimant's argument, the statutory bar applies to the current claim, and no impermissible retroactive application of the statute to the October 16, 2008 claim occurred.

Claimant argues the prior award was not a permanent total disability award because the money awarded was less than \$155,000.00. This argument overlooks Claimant's prior stipulation, which was approved by the Division, he was permanently and totally disabled on account of the injuries sustained on October 16, 2008. Additionally, under the version of K.S.A. 44-510c in effect on October 16, 2008, an employee was permanently and totally disabled if the injury rendered the worker incapable of engaging in any substantial and gainful employment.¹⁰ The standard for permanent total disability did not reference the monetary value of the award. The Board would be required to read additional language in the statute for Claimant to prevail, which the Board is prohibited from doing.¹¹ Claimant's argument must fail. Claimant's prior permanent total disability award is actually a permanent total disability award.

Because Claimant received a prior permanent total disability award for the injuries sustained on October 16, 2008, he is barred under K.S.A. 44-510c(a)(3) from receiving a second permanent total disability award in this claim. The denial of additional permanent total disability benefits in the Award is affirmed.

AWARD

WHEREFORE, it is the finding, decision and order of the Board the Award issued by ALJ Bruce E. Moore, dated December 13, 2023, is affirmed.

¹⁰ See K.S.A. 2008 Supp. 44-510c(a)(3).

¹¹ See *Bergstrom*, 289 Kan. at 607-08.

IT IS SO ORDERED.

Dated this _____ day of May, 2024.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: (Via OSCAR)

Scott J. Mann
Timothy A. Emerson
Hon. Bruce E. Moore