BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

MARIA DIAZ
Claimant

v.

J.C. PENNEY OPCO LLC
Respondent

AP-00-0480-857
CS-00-0461-767

and

AIU INSURANCE CO (NATIONAL UNION FIRE OF PITTS PA)
Insurance Carrier

ORDER

Respondent and Insurance Carrier (Respondent) appealed the January 9, 2024, Award issued by Administrative Law Judge (ALJ) Kenneth J. Hursh. The Board heard oral argument on May 9, 2024.

APPEARANCES

Jeff K. Cooper appeared for Claimant. Christopher J. McCurdy appeared for 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 14, 2023; the transcript of Continuation of Regular Hearing by Evidentiary Deposition via Videoconference, taken October 9, 2023, including Exhibit 1; the transcript of Evidentiary Deposition via Videoconference of Howard Aks, M.D., taken September 22, 2023, including Exhibits 1-3 the transcript of Evidentiary Deposition of Michael J. Khadavi, M.D., taken December 22, 2023, including Exhibits 1-2; and the pleadings and orders contained in the administrative file. The Board also reviewed the parties' briefs.

ISSUE

Is Claimant entitled to an award of future medical treatment?

FINDINGS OF FACT

Claimant worked as a Packer at Respondent's warehouse and distribution center. On September 22, 2021, Claimant was walking down stairs and fell. Claimant sustained injuries to her left ankle and low back.

Dr. Aks, a pain management specialist, evaluated Claimant at her attorney's request on November 22, 2021. Claimant reported left foot pain, left ankle swelling and left hip pain. Dr. Aks diagnosed injuries to the left foot and ankle, left sacroiliitis and trochanteric bursitis. Additional treatment was recommended.

Claimant was evaluated by Dr. Jones, who referred Claimant to Dr. Khadavi for treatment. Dr. Khadavi specializes in physical medical and rehabilitation and sports medicine. Dr. Khadavi initially evaluated Claimant on June 21, 2022. Claimant presented with left buttock, left hip and left leg pain. Dr. Khadavi denied Claimant reported left ankle pain. Dr. Khadavi suspected lumbosacral radiculitis or femoral acetabular impingement. An MRI scan and physical therapy were ordered. The MRI was subsequently reviewed by Dr. Khadavi, who ruled out radiculitis. Claimant was diagnosed with femoral acetabular impingement. Treatment focused on Claimant's left hip.

On September 28, 2022, Dr. Khadavi administered an injection at the left hip under ultrasound guidance. Physical therapy was ordered. Claimant returned to Dr. Khadavi approximately one month later, and reported she was almost pain free. Dr. Khadavi testified at a return appointment on December 7, 2022, Claimant reported her symptoms improved by 80%.

Dr. Khadavi last evaluated Claimant on February 14, 2023. Dr. Khadavi noted Claimant's inflammation decreased and physical therapy improved her biomechanics. Claimant reported occasional tingling in the left lower extremity, which Dr. Khadavi expected due to Claimant's diagnosis. Dr. Khadavi thought Claimant reached maximum medical improvement, and she was released from treatment. No permanent restrictions were imposed. Dr. Khadavi rated Claimant's functional impairment at 3% of the body as a whole attributable to the left hip.

Dr. Khadavi testified it was more probably true than not future medical treatment would not be required. Dr. Khadavi also testified he waited approximately five months between administration of the left hip injection and declaring Claimant at maximum medical improvement to ensure her reduced symptoms were not caused by residual effects of the medication injected into the hip. Although Dr. Khadavi admitted it was possible Claimant may require another injection if she developed additional symptoms in her hip, Dr. Khadavi thought it was more likely Claimant's symptoms would not return. Dr. Khadavi has not seen Claimant since February 2023. Dr. Khadavi did not know whether Claimant contacted his office seeking additional medical treatment.

Claimant returned to Dr. Aks on May 22, 2023, at her attorney's request. Claimant reported continuing pain at the left ankle and left buttock area. Examination was notable for tenderness to the left sacroiliac joint, and limitations to the left ankle were also noted. Claimant was diagnosed with left foot and ankle pain due to ligament and soft-tissue damage, a possible peripheral nerve injury and left sacroiliitis. Dr. Aks rated Claimant's functional impairment at 5% of the body as a whole. Dr. Aks thought Claimant would require future injections at the sacroiliac joint and anti-inflammatory and pain medication to address nerve pain at the left ankle. Dr. Aks was not aware if Claimant treated elsewhere.

Claimant no longer works for Respondent, and is currently working at Wal-Mart. Claimant confirmed she is not working under medical restrictions. Claimant testified she was happy with the medical care she received from Dr. Khadavi. Claimant reported occasional left foot swelling. Claimant's primary problem was residual low back pain, which worsens with standing. Claimant cannot exercise like she did before the accident. Claimant takes over-the-counter ibuprofen or acetaminophen for pain.

On January 9, 2024, ALJ Hursh issued the Award. ALJ determined Claimant's average weekly wage was $842.95, and Claimant was awarded permanent partial disability compensation based on 4% functional impairment of the body as a whole, which was an average of the two impairment ratings. Citing the plain language of K.S.A. 44-510h, which ALJ Hursh believed did not require a weighing of the medical evidence, future medical treatment was awarded based on Dr. Aks' opinion. These review proceedings follow.

PRINCIPLES OF LAW AND ANALYSIS

Respondent argues the award of future medical is erroneous because Claimant failed to rebut the presumption no future medical treatment should be awarded based on a preponderance of the evidence. Respondent argues ALJ Hursh incorrectly interpreted K.S.A. 44-510h(e) by awarding future medical based on Dr. Aks' opinion. Respondent contends the opinion of Dr. Khadavi is more credible because he saw Claimant multiple times as the authorized treating physician. Claimant argues she is entitled to future medical treatment, regardless of the evidentiary standard imposed by K.S.A. 44-510h(e).

K.S.A. 44-508(h) states:

> "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

Thus, the claimant's burden of proof only differs from a preponderance of the evidence using a more probably true than not true standard if the Act specifically requires otherwise.

K.S.A. 44-510h(e) states:

> It is presumed that the employer's obligation to provide [medical treatment] shall terminate upon the employee reaching maximum medical improvement. Such presumption may be overcome with medical evidence that it is more probably true than not that additional medical treatment will be necessary after such time as the employee reaches maximum medical improvement. As used in this subsection, "medical treatment" means only that treatment provided or prescribed by a licensed healthcare provider and shall not include home exercise programs or over-the-counter medications.

K.S.A. 44-510h(e) imposes a rebuttable presumption against future medical treatment after an injured worker reaches maximum medical improvement. K.S.A. 44-501b(c) places the burden of proof on the claimant to establish the claimant's right to an award of compensation, and to prove the various conditions on which the right to compensation depends. The statutes states, "In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record." K.S.A. 44-508(h), which defines burden of proof, is based on a more probably true than not true standard on the basis of the whole record.

K.S.A. 44-510h(e) shows a legislative intent for a presumption against a claimant being awarded future medical treatment unless the claimant overcomes the presumption with medical proof it is more probably true than not that additional medical treatment will be necessary after such time as the employee reaches maximum medical improvement. The intent of the language of K.S.A. 44-510h(e) is reinforced by K.S.A. 44-525(a), which states, in part, "No award shall include the right to future medical treatment, unless it is proved by the claimant that it is more probable than not that future medical treatment, as defined in subsection (e) of K.S.A. 44-510h, and amendments thereto, will be required as a result of the work-related injury."

The concurring opinion states K.S.A. 44-510h(e) does not require a weighing of the evidence based on a preponderance of the evidence. The ALJ stated the statute does not require a weighing of evidence. This position is inaccurate. Determination of this issue is important because the claimant argued K.S.A. 44-510h(e) does not state entitlement to future medical treatment is proven by a greater weight of the evidence. The claimant went so far as saying a worker presenting "any" evidence it is more probably true than not additional medical treatment will be necessary is entitled to an award of future medical

treatment.[1] Nothing in K.S.A. 44-510h(e) or K.S.A. 44-525(a) shows a legislative intent to make it easier for a claimant to obtain future medical treatment. The statutes have the opposite intent to preclude future medical if the claimant fails to prove entitlement to the same by a more probably true than not standard.

Contrary to the concurring opinion, the ALJ's opinion and the argument of the claimant's counsel, K.S.A. 44-510h(e) plainly requires weighing of the evidence by asking what evidence is more true than not true. The statute, at face value, does not impose a higher burden of proof than is contained in K.S.A. 44-508(h). Therefore, the burden of proof is based on a preponderance of the evidence using a more probably true than not standard, as stated in K.S.A. 44-508(h).

Moreover, a "preponderance of the evidence" is the equivalent of a "more probably true than not true" standard.[2] The terms are synonymous. By saying a "more probably true than not true" standard applies to K.S.A. 44-510h(e), the statute means the standard is based on a "preponderance of the evidence."

In this case, Claimant reported she continues to have low back and left foot symptoms. Claimant takes medication to relieve her residual symptoms. Dr. Aks recommended future medical treatment, while Dr. Khadavi did not. Based on a preponderance of the medical evidence, namely Dr. Aks' opinion, Claimant proved she is entitled to future medical treatment under K.S.A. 44-510h(e). Therefore, the award of future medical treatment is affirmed.

AWARD

WHEREFORE, it is the finding, decision and order of the Board the Award issued by ALJ Kenneth J. Hursh, dated January 9, 2024, is affirmed.

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[1] Claimant's Brief at 4.

[2] See *State v. Jesse*, No. 15,826, 2024 WL 08399 (Kansas Court of Appeals unpublished opinion filed Jan. 9, 2024) ("A preponderance of the evidence is established when the evidence demonstrates a fact is more probably true than not true."); *Nauheim v. City of Topeka*, 309 Kan. 145, 152-53, 432 P.3d 647 (2019), *vacated sub nom. Kansas Fire & Safety Equip. v. City of Topeka*, 317 Kan. 418, 531 P.3d 504 (2023) ("[A] 'preponderance of the evidence' means that evidence which shows a fact is more probably true than not true."); *Vanderpool v. Fisher*, No. 125,097, 2023 WL 6324271 (Kansas Court of Appeals unpublished opinion filed Sept. 29, 2023); *Matter of Est. of Moore*, 310 Kan. 557, 565, 448 P.3d 425, 432 (2019) ("[A] 'preponderance of the evidence' means that evidence which shows a fact is more probably true than not true." *Gannon v. State*, 298 Kan. 1107, 1124, 319 P.3d 1196 (2014) (Under the preponderance of the evidence standard, "the plaintiffs' evidence must show that 'a fact is more probably true than not true.'"); and *In re B.D.-Y.*, 286 Kan. 686, 691, 187 P.3d 594 (2008) ("[A] 'preponderance of the evidence' means that evidence which shows a fact is more probably true than not true.").

IT IS SO ORDERED.

Dated this _____ day of June, 2024.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

CONCURRING OPINION

The undersigned agrees with affirming the award of future medical treatment. The undersigned, however, disagrees with the majority's analysis.

The employer's liability to pay compensation attaches when an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment.[3] The employer's liability for compensation includes the duty to provide medical treatment as may be reasonably necessary to cure or to relieve the effects of the injury.[4] It is presumed the employer's obligation to provide medical treatment terminates upon the employee's reaching maximum medical improvement. The presumption may be overcome with medical evidence it is more probably true than not additional medical treatment will be necessary after maximum medical improvement. "Medical treatment" means treatment provided or prescribed by a licensed health care provider and not home exercises or over-the-counter medication.[5]

[3] *See* K.S.A. 44-501b(b).

[4] *See* K.S.A. 44-510h(a).

[5] *See* K.S.A. 44-510h(e).

When the plain language of a statute is clear and unambiguous, a court must apply the statute as written.[6] According to the statute, an employee need only present medical evidence stating it is more probably true additional medical treatment will be necessary. The statute does not state the employee must prove entitlement to future medical treatment by a greater weight of the medical evidence, or based on the employee's course of treatment or residual problems.

The majority's analysis does not follow the plain language of K.S.A. 44-510h(e). In awarding future medical, the majority first engages in quasi-judicial blacksmithing. According to the majority, K.S.A. 44-510h(e) states the presumption the employer's duty to provide medical treatment is terminated unless the employee proves, "by a preponderance of the evidence in the whole record it is more probably true additional medical treatment will be necessary." The words "preponderance of the evidence in the whole record" do not appear in K.S.A. 44-510h(e) or K.S.A. 44-525(a). The majority's interpretation violates the prohibition against inserting language into plainly-worded statutes.

Second, the majority concluded Claimant was entitled to future medical based on a preponderance of the medical evidence. The record contains two medical opinions. The majority adopted the conclusions of one physician, Dr. Aks. Arguably, a decision based on 50% of the medical evidence is not a "preponderance."

Dr. Khadavi did not believe Claimant would require future medical care. Dr. Aks, however, thought Claimant would require future medical care notwithstanding Claimant's reaching maximum medical improvement. Dr. Aks' opinion is medical evidence it is more probably true than not additional medical treatment will be required. Claimant satisfied the particular burden of proof in K.S.A. 44-510h(e). Claimant should be awarded future medical, to be provided either by agreement or upon application and hearing as provided in K.S.A. 44-510k, for the reasons contained in ALJ Hursh's Award.

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WILLIAM G. BELDEN
APPEALS BOARD MEMBER

c: (Via OSCAR)

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

Jeff K. Cooper
Christopher J. McCurdy
Hon. Kenneth J. Hursh