

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

GUILLERMO GUZMAN)	
Claimant)	
V.)	
)	AP-00-0483-645
POTTER'S PLUMBING INC)	CS-00-0470-315
Respondent)	
AND)	
)	
FARM BUREAU PROPERTY & CASUALTY INS CO)	
Insurance Carrier)	

ORDER

Claimant appeals the June 13, 2024, Preliminary hearing Order entered by Administrative Law Judge (ALJ) Thomas Klein. C. Albert Herdoiza appears for Claimant. Matthew Crowley appears for Respondent and its insurance carrier.

RECORD AND STIPULATIONS

There was no hearing or new evidence presented to the Board.

ISSUE

1. Does the Board have jurisdiction to review Claimant's appeal?
2. Did the ALJ err by issuing an Order for an independent medical evaluation (IME) with David Hufford, M.D.?

FINDINGS OF FACT

This is the third time the Appeals Board is asked to review this matter. On April 26, 2024, Board Member Carpinelli reversed the ALJ's March 6, 2024 Order denying Claimant's request for additional treatment (psychological evaluation and treatment). The Order states:

Dr. Zimmerman questioned if the claimant should be rated for psychiatric impairment. More importantly, the court-ordered independent medical evaluator, Dr.

Hufford, diagnosed the claimant with post-traumatic stress disorder and found the work incident was the prevailing factor for the diagnosis. Granted, Drs. Zimmerman and Hufford are not mental health experts, but Dr. Hufford, in essence, is suggesting a referral to a mental health specialist. Also, Dr. Hufford may have a different opinion if he reviewed the claimant's mental health records. This possibility could be sorted out by way of deposition

Despite the lack of mental health expertise, the evidence before the Board is the claimant has PTSD due to his work accident and the prevailing factor for the diagnosis is the work accident. It may turn out Dr. Hufford is wrong; perhaps the claimant only has an unspecified trauma or stress disorder, or some other diagnosis. A certainty in diagnosis is not required: "the name of the worker's disability is of no great importance."¹ Also, prevailing factor is based on all of the relevant evidence, not just medical evidence. The claimant linking his current mental health issues to his accidental work injury provides some proof of prevailing factor.

The claimant has preexisting mental health issues. This prior history is not a bar to compensation. There is no evidence the claimant's current mental health status is due to his preexisting condition or is merely a sole aggravation of his preexisting condition. There is no medical opinion contradicting Dr. Hufford's causation and prevailing factor opinions.

The claimant's refusal to consider his prior mental health issues as part of his condition and his being a hostile patient at Horizons in 2022 are not reasons to deny work related mental health treatment. The claimant's suffocation and being buried in a cave-in, in addition to breaking his leg, qualifies as a physical injury which could easily lead to traumatic neurosis.

The undersigned disagrees with the ALJ's ruling. The claimant proved his physical injury directly caused his current traumatic neurosis, and the accident was the prevailing factor in causing his mental injury and medical condition. The claimant is entitled to mental health treatment, including an evaluation by a psychologist or a psychiatrist.

WHEREFORE, the undersigned Board member reverses the Order dated March 6, 2024, and remands the matter for further proceedings consistent with this Order.²

¹ See *Armstrong v. City of Wichita*, 21 Kan. App. 2d 750, 756, 907 P.2d 923 (1995).

² See *Guzman v. Potter's Plumbing, Inc.*, No. AP-00-0474-168, 2023 WL 3271538, at *3 (Kan. WCAB Apr. 18, 2023).

No formal proceedings ensued. Claimant scheduled this matter for preliminary hearing on June 25, 2024. On June 13, 2024, the ALJ issued an Order for an IME with Dr. Hufford. The Order states:

The court requests an independent medical evaluation from Dr. Hufford on the issue of prevailing factor for the claimant's psychological/traumatic neurosis condition. Dr. Hufford is to be provided with claimant's available mental health records. Dr. Hufford may see the claimant again, or he may review the relevant records without another personal evaluation. Dr. Hufford may refer the claimant to the psychological expert of his choice for an evaluation and treatment recommendations.³

Upon receipt of the ALJ's June 13 Order, Claimant canceled his preliminary hearing and filed this appeal. Claimant alleges the ALJ exceeded his jurisdiction by circumventing the specific directions issued by the Board's April 26 Order. Claimant argues the issue of prevailing factor was determined by the Board in his favor and should not be a continuing issue. Claimant asks the Board to reverse the ALJ's June 13 Order and specifically direct the ALJ to issue an order for an evaluation with an impartial/neutral psychiatric or psychological expert.

Respondent argues the Board does not possess jurisdiction and should dismiss the appeal. In the alternative, Respondent argues the June 13 Order does not circumvent the Board's April 26 Order because it requires the parties to provide the mental health records to Dr. Hufford (as mentioned in the Board Order) and gives Dr. Hufford the authority to refer Claimant to a psychological expert of his choice.

PRINCIPLES OF LAW AND ANALYSIS

The burden of proof shall be on the employee to establish the right to an award of compensation, based on the entire record under a "more probably true than not" standard and to prove the various conditions on which the right to compensation depends.⁴ The Appeals Board possesses authority to review *de novo* all decisions, findings, orders and awards of compensation issued by administrative law judges.⁵ A *de novo* hearing is a

³ ALJ Order (June 13, 2024) at 1.

⁴ See K.S.A. 44-501b(c) and K.S.A. 44-508(h).

⁵ See K.S.A. 44-555c(a).

decision of the matter anew, giving no deference to findings and conclusions previously made by the administrative law judge.⁶

The Board's authority to consider appeals of preliminary orders is limited to questions of whether the employee suffered an accident, repetitive trauma or resulting injury, whether the injury arose out of and in the course of employment, whether notice was given or whether "certain defenses" apply.⁷ In general, preliminary hearing orders granting or denying medical benefits, TTD, payment of medical bills, reimbursement of medical mileage, out of pocket prescriptions, and unauthorized medical are not subject to Board review. The authority to make a determination regarding these benefits rests clearly within the authority granted to the ALJ by K.S.A. 44-534a.⁸ An order for an Independent Medical Examination is an interlocutory order within the authority of the ALJ. It is not a finding of compensability or medical treatment. The Board is without jurisdiction to review an ALJ's order for an IME or their refusal to do so.⁹

Claimant sought medical treatment for a psychological disorder at a preliminary hearing before the ALJ. In general, preliminary hearing orders granting or denying medical benefits are not subject to Board review. Requests for review of these issues are dismissed for lack of jurisdiction. Claimant argues the Board has jurisdiction to review the ALJ's June 13 Order because the ALJ exceeded his jurisdiction by circumventing the specific directions issued by the Board's April 26 Order. Claimant cites K.S.A. 44-551(i)(2)(A) in support of his position. It states:

If an administrative law judge has entered a preliminary award under K.S.A. 44-534a and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing.

Claimant relies upon a series of emails between the ALJ and Respondent's counsel to further support his argument. The emails are specifically listed in Claimant's brief and copies attached as an exhibit. These documents were not offered as evidence or exhibits in any hearing, deposition or by stipulation between the parties. The Board's *de novo* review is limited to consideration of issues addressed by the ALJ based on the evidence presented

⁶ See *Rivera v. Beef Products, Inc.*, No. 1,062,361, 2017 WL 2991555 (Kan. WCAB June 22, 2017).

⁷ See K.S.A. 44-534a(a)(2).

⁸ See *Vizcarra v. Loan Smart, LLC*, No. 1,079,548; 2017 WL 5126039 (Kan. WCAB Oct. 18, 2017).

⁹ See K.S.A. 44-534a(a)(2).

to the ALJ.¹⁰ The emails attached to Claimant's brief were not presented to the ALJ. They are not part of the evidentiary record and were not considered by this Board Member.

Claimant's argument the Board has jurisdiction because the ALJ exceeded his jurisdiction by ordering an IME with Dr. Hufford is considered and rejected. The Board's April Order found Claimant was entitled to mental health treatment and remanded the matter back to the ALJ for further proceedings consistent with the Order. The Order noted Dr. Hufford may change his prevailing factor opinion if he reviewed Claimant's mental health records. The ALJ's order requires the parties to provide Dr. Hufford with Claimant's mental health records and gives him the authority to refer Claimant to a psychological expert of his choosing. The ALJ's Order is consistent with the Board's Order and is not an attempt to circumvent any specific directions of the Board.

The ALJ's order for an IME is an interlocutory order within the authority of the ALJ and is not a finding of compensability or medical treatment. The Board is without jurisdiction to review an ALJ's order for an IME. Claimant's appeal is dismissed for lack of jurisdiction.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member, Respondent's Application for Review is dismissed, and the Order of ALJ Thomas Klein, dated June 13, 2023, remains in force and effect.

IT IS SO ORDERED.

Dated this day of August 2024.

CHRIS A. CLEMENTS
BOARD MEMBER

c: Via OSCAR

C. Albert Herdozia, Attorney for Claimant
Matthew Crowley, Attorney for Respondent and its Insurance Carrier
Hon. Thomas Klein, Administrative Law Judge

¹⁰ See K.S.A. 44-555c(a).