

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

BETZAIDA SUAREZ-CIRINO Claimant	)	
V.	)	
	)	
MENARD INC	)	AP-00-0485-683
Respondent	)	CS-00-0431-758
AND	)	
	)	
PRAETORIAN INSURANCE COMPANY	)	
Insurance Carrier	)	
BETZAIDA SUAREZ-CIRINO Claimant	)	
V.	)	
	)	
MENARD INC	)	AP-00-0485-684
Respondent	)	CS-00-0232-960
AND	)	
	)	
XL INSURANCE AMERICA INC	)	
Insurance Carrier	)	

ORDER

The claimant, through Roger Fincher, requested review of Administrative Law Judge (ALJ) Bruce Moore's Post-Award Medical Award, dated October 9, 2024. William Townsley appeared for the respondent and its insurance carriers (collectively referred to as respondent). This is a post-award proceeding for medical benefits. The case has been placed on the summary docket for disposition without oral argument.

RECORD

The Board considered the same record as the ALJ, consisting of the: (1) claimant's deposition, taken June 24, 2024; (2) deposition of Daniel Zimmerman, M.D., taken July 8, 2024, with exhibits; (3) stipulation of medical records, filed September 10, 2024; (4) documents of record filed with the Division; and (5) parties' briefs.

ISSUES

1. Is the respondent entitled to termination of medical benefits?
2. If not, is the claimant entitled to additional medical treatment?

FINDINGS OF FACT

On February 24, 2014, the claimant suffered a compensable injury to her left shoulder while lifting boxes of nails from a shopping cart. William Jones, M.D., an orthopedic surgeon, was designated as the authorized treating physician. The doctor diagnosed a left rotator cuff tear and recommended surgery; however, the claimant opted to continue with conservative treatment. Conservative treatment failed to provide relief. Dr. Jones performed left shoulder arthroscopic surgery on March 9, 2015.

Following surgery, the claimant continued to have symptoms. Dr. Jones administered several cortisone injections.

On February 24, 2016, the claimant returned to Dr. Jones, complaining of right shoulder pain. The doctor believed it was “most likely due to overuse.”¹ An MRI showed the claimant suffered a full thickness right rotator cuff tear. Dr. Jones administered several cortisone injections. As of March 23, 2016, Dr. Jones recommended against right shoulder surgery based on the claimant’s poor response to her left shoulder surgery. However, the doctor later noted the claimant’s right shoulder pain seemed to be worsening and he recommended right shoulder rotator cuff repair in his report dated November 30, 2016. The medical records also show the claimant was in Puerto Rico in December 2016 to attend to her ill father.

Right shoulder surgery was scheduled to occur on April 6, 2017. According to the claimant, Dr. Jones declined to provide any further treatment for her right shoulder because he was retiring. She also testified the respondent canceled surgery and did not want to pay the expense. Ultimately, the claimant did not have right shoulder surgery.

Dr. Jones providing a left shoulder MRI and MR-arthrogram on July 14, 2017 is the last authorized medical treatment seen in the evidentiary record.

The claimant resigned her job with the respondent on May 5, 2018.

On April 3, 2019, the ALJ issued a preliminary Order for medical treatment with Dr. Jones for both of the claimant’s shoulders. The record is not clear what occurred next.

¹ Stipulation (filed Sept. 10, 2024) at 63.

The ALJ entered an Award on September 2, 2022, based on bilateral shoulder impairment. Future medical was left open.

In February 2024, the claimant moved to Puerto Rico because of unrelated issues.

On February 19, 2024, the respondent filed an Application for Termination of Medical Benefits. At a phone conference on April 3, 2024, the ALJ set terminal dates for the parties, and indicated the case would be ready for decision thereafter.

The claimant testified she continues with bilateral shoulder, hand, wrist and neck pain. She has difficulty sleeping, and pain and tingling in her hands. She rates the pain as a 10 on a 1-10 pain scale, with the average pain being a 7. The pain has been ongoing for 10 years. She takes Naproxen and Flexeril, and she personally pays for the medicine.

On June 26, 2024, Daniel Zimmerman, M.D., had a telephone conversation with the claimant at her attorney's request. Dr. Zimmerman previously evaluated the claimant in person on February 23, 2018, and July 20, 2020, and he previously recommended the claimant would need additional medical treatment. After the phone discussion, the doctor noted the claimant complained of continuing pain and discomfort affecting her right shoulder. Dr. Zimmerman was unable to say whether the claimant's right shoulder range was worse now because he did not perform an examination. Dr. Zimmerman agreed he could not speculate regarding the claimant's current condition, and all he could do was relay the claimant's complaints to him. The doctor testified he was not instructed to inquire about the claimant's left shoulder nor did the claimant address her left shoulder during their conversation.

In his 2024 report, Dr. Zimmerman said he recommended non-steroidal anti-inflammatory medication in 2018 and 2020. He opined the claimant should have an MRI of the right shoulder and evaluation by an orthopedist in Puerto Rico. The doctor also indicated the claimant, "if permitted by a care provider," "could be treated" with steroid injections and pain modulator drugs with follow-up care.² Dr. Zimmerman opined the prevailing factor for the additional treatment would be her work-related injury events.

On July 15, 2024, the claimant filed an Application for Post-Award Medical Benefits.

The ALJ stated:

Suarez contends that Menard's Application to Terminate Medical is untimely because it was filed less than 2 years from the date of the Award in this matter. She cites **Clayton v. University of Kansas Hospital Authority**, 53 Kan.App.2d 376,

² Zimmerman Depo., Ex. 2 at 2.

388 P.3d 187 (2017). The court disagrees. **K.S.A. [44-510k](a)(3)** offers two alternative bases for filing an Application to terminate medical treatment: (1) If the claimant has not received medical treatment . . . from an authorized health care provider within two years from the date of the award, or (2) or two years having passed from the date the claimant last received medical treatment from an authorized health care provider. Menards cited the failure to obtain authorized medical treatment for more than two years as a basis for its request for relief. If the legislature intended to limit the application of **K.S.A. [44-510k](a)(3)** to two years after entry of an Award, it could have so provided. Even if it could be argued that the Application was premature, it did not come on for decision until more than two years after the Award was originally entered. This contention is without merit.

The evidence before the court establishes that Suarez did not seek or receive authorized medical care since July 17, 2017. The burden of proof shifts to Suarez. As established in *Clayton*,

From a procedural perspective, we find that K.S.A. 2015 Supp. 44–510k(a)(3) provides for a shifting burden of proof when an employer seeks permanent termination of future medical benefits. Initially, the burden of proof is on the employer to come forward with evidence that the claimant has failed to obtain treatment from a health care provider for a period of 2 years from the original award or from the last date upon which the claimant received medical treatment. Upon successfully meeting its burden, the employer is entitled to a statutory presumption “that no further medical care is needed as a result of the underlying injury.” At that point, the burden of proof shifts to the claimant to attempt to overcome the statutory presumption.

In other words, once 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. See American Heritage Dictionary 713, 1178 (5th ed. 2011). 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.

Clayton, at p. 381.

Suarez then has the burden to prove, by competent medical evidence, that she needs additional treatment, in addition to what has already been received, as a consequence of the work-related injury. Suarez’s subjective complaints as to her shoulders have not changed since she last saw Dr. Jones in 2017. While she claims

that the pain is now worse, she acknowledges that she has not sought treatment ***specifically for her shoulders*** since leaving Dr. Jones' care.

Suarez then attempts to bolster her position with the testimony of Dr. Zimmerman. Unfortunately, when Dr. Zimmerman last saw Suarez in 2020, she was at MMI, and he has no objective information that her condition has changed since that time. Without performing a physical examination, he has no way of knowing whether she is better, worse, or just the same as when he placed her at MMI.

The testimony of Suarez and Dr. Zimmerman are insufficient to overcome the statutory presumption that Suarez is no longer in need of medical treatment. Menard's Application to Terminate Medical treatment is **GRANTED**. (emphasis in original)³

ANALYSIS

The claimant argues she is entitled to future medical treatment. The claimant asserts she has met her burden of proof and the respondent is not entitled to the presumption and burden shifting framework of K.S.A. 44-510k(a)(3) because the application to terminate benefits was premature, as two years had yet to pass subsequent to the Award. Further, the claimant argues the ALJ could not justify the cessation of medical treatment based on two years having passed between the time of the Award and the issuance of the Post-Award Medical Award. The respondent requests the Board affirm the ALJ's ruling.

An employer is liable to pay compensation, including medical treatment following an award, to an employee incurring personal injury by accident or repetitive trauma arising out of and in the course of employment.⁴ The burden of proof is on the claimant.⁵

Board review of an order is de novo on the record.⁶ A de novo hearing is a decision of the matter anew, giving no deference to findings and conclusions previously made by the judge.⁷ On de novo review, the Board makes its own factual findings.⁸

³ PAM Award at 4-6.

⁴ See K.S.A. 44-501b(b).

⁵ See K.S.A. 44-501b(c).

⁶ See *Helms v. Pendergast*, 21 Kan. App. 2d 303, 899 P.2d 501 (1995).

⁷ See *In re Tax Appeal of Colorado Interstate Gas Co.*, 270 Kan. 303, 14 P.3d 1099 (2000).

⁸ See *Berberich v. U.S.D. 609 S.E. Ks. Reg'l Educ. Ctr.*, No. 97,463, 2007 WL 3341766 (Kansas Court of Appeals unpublished opinion filed Nov. 9, 2007).

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

“Prevailing” as it relates to the term “factor” means the primary factor, in relation to any other factor. In determining what constitutes the “prevailing factor” in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

K.S.A. 44-510k states:

(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. . . .

(3) The administrative law judge may: (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.

(4) If the claimant has not received medical treatment, as defined in K.S.A. 44-510h(e), 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.

(5) 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 K.S.A. 44-551(b), 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.

In *Clayton*,⁹ 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. Regarding future medical treatment,

⁹ *Clayton v. University of Kansas Hospital Authority*, 53 Kan. App. 2d 376, 388 P.3d 187 (2017).

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 ALJ 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. However, the Court of Appeals disagreed:

[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.

. . .

[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.

. . .

[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.

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. 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.

. . .

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.”

. . . [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, 2011.¹⁰

Clayton suggests new medical evidence may often be required, but is not absolutely required, 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.

Here, the claimant did not receive medical treatment from an authorized healthcare provider within two years from the date the claimant last received authorized medical treatment in 2017 by Dr. Jones. The claimant did not seek any authorized post-award medical treatment until after the respondent filed to terminate future medical benefits. The respondent did not authorize any post-award medical treatment.

K.S.A. 44-510k(a)(3) is not contingent only upon two years passing since the time of the Award. The statute also comes into play if the claimant has let at least two years pass after having last received authorized medical treatment. The ALJ correctly noted the claimant had not received authorized medical treatment after July 2017. Far more than two years went by before the claimant sought additional authorized medical treatment. Currently, the claimant has not had authorized medical treatment for about eight and one-

¹⁰ *Clayton v. Univ. of Kansas Hosp. Auth.*, 53 Kan. App. 2d 376, 382-84, 388 P.3d 187 (2017).

half years, and she did not seek additional treatment until after the respondent filed a motion to terminate medical treatment. The respondent, as found by the ALJ, was entitled to the presumption no further medical care is needed as a result of the underlying injury. However, the presumption may be overcome by the claimant with competent medical evidence.

The Board concludes the claimant did not overcome the presumption no further medical care is needed as a result of her underlying injury. Dr. Jones last treated the claimant for her work injuries in 2017. The claimant has been at maximum medical improvement since at least 2020. Dr. Zimmerman is not in a position to opine what medical treatment the claimant currently needs. No new examination occurred in 2024, not even by video conference. Basically, Dr. Zimmerman simply reiterated the claimant's complaints based on their telephonic conversation without an examination. The Board finds the doctor's suggestions regarding additional medical treatment to be speculative and unpersuasive. Dr. Zimmerman's opinion and the claimant's testimony are insufficient to overcome the statutory presumption in K.S.A. 44-510k(a)(3). The Award is affirmed. Future medical treatment is terminated.

AWARD

WHEREFORE, the Board affirms the Post-Award Medical Award.

IT IS SO ORDERED.

Dated this _____ day of December, 2024.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: (via OSCAR)

Roger Fincher
William Townsley
Hon. Bruce Moore