

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

RONALD WILCOME)	
Claimant)	
V.)	
)	AP-00-0468-526
NATIONAL EXPRESS, LLC)	CS-00-0441-088
Respondent)	
AND)	
)	
OLD REPUBLIC INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Claimant requested review of the June 17, 2022, motion hearing Order issued by Administrative Law Judge (ALJ) Bruce E. Moore.

APPEARANCES

Scott M. Price appeared for Claimant. Kip A. Kubin appeared for Respondent and its 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 the Motion Hearing held June 16, 2022, with exhibits attached, and the documents of record filed with the Division.

ISSUE

The issue for the Board's review is: did Claimant establish good cause for not proceeding to regular hearing, settlement hearing, or agreed award in a timely fashion?

FINDINGS OF FACT

Claimant filed an Application for Benefits with the Division on February 5, 2019, alleging injuries to his head, neck, and shoulders resulting from an incident on January 24, 2019. Claimant, a bus driver, was struck on the head multiple times by a student's bag while the student exited the bus.

Claimant filed an Application for Preliminary Hearing (E-3) on March 18, 2019, seeking medical treatment recommended by the authorized physician. The preliminary hearing was scheduled for April 23, 2019, but was continued. Case notes indicate the hearing was canceled at Claimant's request because the issues had resolved.

Claimant's E-3 was again set for preliminary hearing on February 5, 2020. Claimant requested this hearing be continued because he was no longer seeking treatment through the insurance company. Claimant later filed a Motion to Extend K.S.A. 44-523(f) Limitation on June 26, 2020.

The record shows no further action until February 7, 2022, when Respondent filed an Application for Dismissal. More than three years had passed since this proceeding commenced, and the matter had not proceeded to regular hearing, agreed award, or settlement hearing pursuant to K.S.A. 44-523(f).

On June 16, 2022, a motion hearing was held regarding Respondent's Application for Dismissal. Claimant argued he was not at maximum medical improvement (MMI), and produced an MRI report dated June 14, 2022, and a report from Dr. Fluter dated August 14, 2019.

Dr. Fluter examined Claimant at his counsel's request on August 14, 2019. Claimant complained of pain in his head and neck with numbness and tingling in his upper extremities. Claimant also reported burning pain in parts of his arms and constant, aching pain in his shoulders. Dr. Fluter performed a physical examination and assessed Claimant:

1. Status post work-related injury; 01/24/19.
2. Probable concussion without loss of consciousness.
3. Probable post-concussion syndrome.
4. Neck/upper back pain.
5. Cervical thoracic strain/sprain.
6. Headaches, possibly cervicogenic versus posttraumatic versus migraine.¹

Dr. Fluter determined the prevailing factor causing Claimant's injury and need for medical treatment was the January 24, 2019, work accident. Dr. Fluter recommended additional treatment, including neuropsychological testing, further evaluations, and interventional pain management.

Dr. Wedel, Claimant's personal physician, treated Claimant for his cervical pain complaints. Dr. Wedel ordered an MRI of Claimant's cervical spine dated June 14, 2022, which was interpreted to reveal:

¹ M.H. Trans., Cl. Ex. 1 at 6.

1. No evidence for subluxation or acute fracture.
2. At the C3-C4 level there is posterior disc osteophyte complex and facet arthropathy results in moderate to marked left neuroforaminal stenosis and central spinal stenosis and mild-to-moderate right neuroforaminal stenosis. Mild increased signal within the spinal cord at this level suggestive of mild compressive myelopathy.
3. At the C4-5 level there is moderate central spinal stenosis and mild to moderate bilateral neuroforaminal stenosis.²

Dr. Wedel then referred Claimant to see an orthopedic surgeon, which was scheduled for June 22, 2022. Claimant testified he continues to experience the same problems he suffered when he was injured, stating:

I'm still having numbness in my hands, weakness in my arms and shoulders. A heavy chest sometimes. Depends on my activity. If I'm busy, or if I try doing something, say any type of gardening or anything, I can't do it because my – I just don't have the strength to do that kind of stuff.³

....

Q. And as of today, when you're testifying, you just testified that you're still having problems with numbness in your hands and problems with your neck; is that correct?

A. Yes.

Q. Are these the same problems that you were having when you were injured?

A. Yes.⁴

Claimant stated he felt he had to seek treatment on his own after Respondent denied his claim. Claimant indicated the COVID pandemic caused further delay, and he lost contact with his attorney for a period of time.

In his Order, the ALJ wrote:

[Claimant] has not applied for a Preliminary Hearing seeking medical treatment since the first Preliminary Hearing was canceled, at his request, as the issues

² M.H. Trans., Cl. Ex. 2 at 2.

³ M.H. Trans. at 13.

⁴ *Id.* at 15.

presented by his Application for Preliminary Hearing were resolved. [Claimant] has failed to present any medical evidence that he is not at MMI for the claimed work injuries of January 24, 2019. Dr. Fluter's IME report of August 14, 2019, is almost three years old, and does not reflect [Claimant's] current complaints or symptoms, and does not opine that he is **currently** in need of further evaluation or treatment for the January 14, 2019 claimed injuries. [Claimant's] decision to seek treatment outside the workers' compensation system, and to "lose contact" with his attorney, suggest an abandonment of his workers' compensation claim, rather than an effort to timely prosecute his claim to a conclusion.⁵

The ALJ granted respondent's motion to dismiss, finding Claimant failed to establish cause for not proceeding to regular hearing, settlement hearing, or agreed award in a timely fashion.

PRINCIPLES OF LAW AND ANALYSIS

Claimant argues the evidence submitted shows he is not at MMI, and good cause should be conclusively presumed, extending the time to proceed to regular, settlement hearing, or agreed award in a timely fashion.

Respondent maintains the ALJ's Order should be affirmed.

K.S.A. 2018 Supp. 44-523(f)(1) states:

In any claim that has not proceeded to a regular hearing, a settlement hearing, or an agreed award under the workers compensation act within three years from the date of filing an application for hearing pursuant to K.S.A. 44-534, and amendments thereto, the employer shall be permitted to file with the division an application for dismissal based on lack of prosecution. The matter shall be set for hearing with notice to the claimant's attorney, if the claimant is represented, or to the claimant's last known address. The administrative law judge may grant an extension for good cause shown, which shall be conclusively presumed in the event that the claimant has not reached maximum medical improvement, provided such motion to extend is filed prior to the three-year limitation provided for herein. If the claimant cannot establish good cause, the claim shall be dismissed with prejudice by the administrative law judge for lack of prosecution. Such dismissal shall be considered a final disposition at a full hearing on the claim for purposes of employer reimbursement from the fund pursuant to subsection (b) of K.S.A. 44-534a, and amendments thereto.

Under the plain language of K.S.A. 44-523(f), a claimant must proceed to regular hearing, settlement hearing, or agreed award within three years from the date the

⁵ ALJ Order (June 17, 2022) at 3.

application for hearing is filed. In the alternative, a claimant must file a motion to extend the deadline prior to the expiration of the three-year time limitation.

The Application for Benefits was filed by Claimant on February 5, 2019. Pursuant to K.S.A. 44-523(f)(a), Claimant was required to file a motion to extend benefits by February 5, 2022. Claimant filed a Motion to Extend K.S.A. 44-523(f) Limitation on June 26, 2020. To extend the three-year period, Claimant must show the ALJ good cause to extend his right to benefits. There is a conclusive presumption of good cause if Claimant has not reached MMI.

The ALJ found Claimant failed to show just cause for the delay in pursuing his claim for compensation. The ALJ also found Claimant failed to establish he was not at MMI. The Board disagrees. Claimant testified he had been seeing his personal physician, Dr. Wedel, for his neck complaints. Dr. Wedel ordered an MRI, which was taken two days before the motion hearing. Dr. Wedel referred Claimant to an orthopedic surgeon for treatment of his neck symptoms, which was scheduled for June 22, 2022, less than a week after the motion hearing. Claimant was undergoing an active treatment plan through Dr. Wedel, which is contrary to finding Claimant at MMI.

The medical evidence is limited to an MRI showing some stenosis and mild compressive myelopathy in Claimant's cervical region, and a three-year old report from Dr. Fluter identifying Claimant suffered a cervical strain, neck pain, and possible headaches, the prevailing factor for which was Claimant's work-related accident. Claimant testified his current symptoms are the same as reported to Dr. Fluter. Dr. Fluter opined the prevailing factor for Claimant's symptoms is the work-related accident.

Even though the ALJ made reference to a report from Dr. Fevurly at the hearing and in his Order, Dr. Fevurly's report is not in the record. Any reliance on Dr. Fevurly is misplaced. Dr. Fluter's opinions on causation are uncontradicted.

In *State v. Larson*,⁶ the Kansas Supreme Court discussed the meaning of a conclusive presumption:

Larson asserts that the amendment "grants the State the benefit of an evidentiary device which enables it to prove one factor by proof of another distinct factor." He cites and discusses various United States Supreme Court cases considering the constitutionality of certain presumptions. In *McCormick on Evidence*, the following pertinent definitions are stated:

"[A] presumption is a standardized practice, under which certain facts are held to call for uniform treatment with respect to their effect as proof of other facts.

⁶ *State v. Larson*, 12 Kan. App. 2d 198, 737 P.2d 880, 883 (1987).

....

“Certainly the description of a presumption as a rule that, at a minimum, shifts the burden of producing evidence is to be preferred, at least in civil cases.... In criminal cases, however, there are rules that traditionally have been labeled presumptions, even though they do not operate to shift even the burden of producing evidence. The jury is permitted but not required to accept the existence of the presumed fact even in the absence of contrary evidence.

....

“There are rules of law that are often incorrectly called presumptions that should be specifically distinguished from presumptions at this point:

“*Conclusive presumptions.* The term presumption as used above always denotes a rebuttable presumption, i.e., the party against whom the presumption operates can always introduce proof in contradiction. In the case of what is commonly called a conclusive or irrebuttable presumption, when fact B is proven, fact A must be taken as true, and the adversary is not allowed to dispute this at all. For example, if it is proven that a child is under seven years of age, the courts have stated that it is conclusively presumed that he could not have committed a felony. In so doing, the courts are not stating a presumption at all, but simply expressing the rule of law that someone under seven years old cannot legally be convicted of a felony.” McCormick on Evidence § 342, pp. 965–66 (3rd ed. 1984).⁷

Based upon Claimant’s testimony and the medical evidence in the record, the Board finds evidence to support a finding Claimant has not yet reached MMI, creating a conclusive presumption Claimant has shown good cause for an extension of the three-year period. Therefore, Claimant’s request for an extension of time to proceed to regular hearing, settlement hearing, or agreed award is granted. The order of dismissal is reversed.

AWARD

WHEREFORE, it is the finding, decision and order of the Board the Award of Administrative Law Judge Bruce E. Moore, dated June 17, 2022, is reversed.

IT IS SO ORDERED.

⁷ *Id.* at 200-01.

Dated this _____ day of August, 2022.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: (Via OSCAR)

Scott M. Price, Attorney for Claimant
Kip A. Kubin, Attorney for Respondent and its Insurance Carrier
Hon. Bruce E. Moore, Administrative Law Judge