

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

PHILLIP PEAVY

Claimant

v.

DEFFENBAUGH INDUSTRIES, INC.

Respondent

AP-00-0468-398

CS-00-0441-234

and

INDEMNITY INSURANCE COMPANY OF N.A.

Insurance Carrier

ORDER

Claimant requests review of the June 7, 2022, Order issued by Administrative Law Judge (ALJ) Troy Larson.

APPEARANCES

Claimant appeared *pro se*. Mark J. Hoffmeister appeared for Respondent and Insurance Carrier.

RECORD AND STIPULATIONS

The Board adopted the stipulations and considered the same record as the ALJ, consisting of the Transcript of Motion Hearing Taken via Teleconference, held April 5, 2022; the Transcript of Motion to Dismiss and Motion to Recuse Hearing, held May 31, 2022; and the pleadings and orders contained in the administrative file. The Board took judicial notice of the procedural history of this matter. The Board also reviewed the briefs filed by the parties. This matter was placed on the Appeals Board's summary calendar for decision without oral argument.

ISSUES

1. Did the ALJ err in denying the Motion for Recusal and Change of Administrative Law Judge?
2. Did the ALJ err in granting the Motion to Dismiss?

FINDINGS OF FACT

Claimant alleges he sustained personal injury from an accident arising out of and in the course of his employment with Respondent on November 14, 2018. On February 8, 2019, Claimant filed an Application for Benefits form with the Division, naming "Deffenbaugh Group Holdings, Inc." as Respondent. After Claimant's prior counsel withdrew, Claimant filed an Amended Application for Benefits with the Division on August 1, 2019, changing the date of accident to a series of injuries occurring from November 14, 2018, through February 14, 2019. Claimant also changed the name of Respondent to "Waste Management."

On September 17, 2019, a preliminary hearing took place before ALJ Larson. Claimant confirmed he was not seeking medical treatment or temporary total disability compensation, but he wanted monetary compensation for his injury. The preliminary hearing was continued, and Claimant was instructed to proceed to a prehearing settlement conference if he had evidence of permanent impairment, followed by a regular hearing. Claimant subsequently sought review by the Appeals Board of the order continuing the preliminary hearing, and the application for review was dismissed by the Board for lack of jurisdiction.

Claimant filed a written request for a prehearing settlement conference on November 16, 2020. On November 17, 2020, ALJ Larson's administrative assistant sent Claimant and Respondent's counsel an email listing available dates for a prehearing settlement conference, and asking counsel and Claimant to respond. Respondent's counsel responded, but Claimant did not respond. No prehearing settlement conference took place. As of the date of this decision, this matter has not proceeded to settlement hearing, regular hearing or agreed award. No application for an extension of time to proceed to settlement hearing, regular hearing or agreed award was filed.

After the Appeals Board dismissed Claimant's initial application for review, Claimant filed a Motion for Recusal and Change of Administrative Law Judge (Motion for Recusal), and attached an affidavit alleging ALJ Larson was biased. In the Affidavit, Claimant alleged ALJ Larson was biased because he changed the identity of the employer, because ALJ Larson was aware of Claimant's written request for a prehearing settlement conference setting, and because ALJ Larson introduced a new attorney for Respondent. Again, ALJ Larson's assistant sent an email to Claimant and Respondent's counsel advising of available dates to hearing the Motion for Recusal, but Claimant did not respond. A hearing on the Motion for Recusal did not take place. Claimant subsequently sought review by the Appeals Board, claiming the lack of an order from ALJ Larson constituted a denial of his Motion for Recusal. The Appeals Board dismissed the appeal for lack of jurisdiction.

On February 16, 2022, Respondent filed the Motion to Dismiss. A hearing on Respondent's Motion to Dismiss took place on April 5, 2022. An attorney from Respondent's counsel's law firm appeared for Respondent, and Claimant objected to the hearing taking place because the attorney was not Respondent's counsel of record. ALJ Larson, Claimant and Respondent's counsel discussed the identity of Respondent, and ALJ Larson attempted to advise Deffenbaugh Group Holdings and Waste Management were the same entity. Claimant also alleged he requested a hearing in writing on January 5, 2022, although there is no record of such a filing. The hearing on Respondent's Motion to Dismiss was continued, and ALJ Larson instructed Claimant to set a hearing on the Motion for Recusal so he could consider it.

On May 31, 2022, a hearing took place on Respondent's Motion to Dismiss and Claimant's Motion for Recusal. Claimant argued his written request for a prehearing settlement conference constituted a motion for an extension of time to prosecute and he was waiting for the Court to set the matter for a prehearing settlement conference. Claimant presented no additional evidence in support of the Motion for Recusal.

On June 7, 2022, ALJ Larson issued the Order denying the Motion for Recusal, and granting the Motion to Dismiss. The Court found it did not change the identity of the employer or endeavor to add additional parties or attorneys to the litigation, and Claimant failed to prove bias. Therefore, the Motion for Recusal was denied. With regard to the Motion to Dismiss, ALJ Larson found Claimant filed a request for prehearing settlement conference, did not respond to ALJ Larson's assistant's email providing dates for the conference, and the request for a prehearing settlement conference did not constitute a request for an extension. Because a motion for an extension was not filed, ALJ Larson granted the Motion to Dismiss. These review proceedings follow.

PRINCIPLES OF LAW AND ANALYSIS

It is difficult to ascertain the issues raised by Claimant, but it appears Claimant argues the Motion for Recusal was improperly denied because ALJ Larson demonstrated bias and acted jointly with Respondent's counsel in denying Claimant due process. Claimant does not present arguments concerning the Motion to Dismiss. Claimant also argued he is seeking damages, including punitive damages and injunctive relief, premised on a cause of action under 42 U.S.C. § 1983. The Appeals Board does not possess jurisdiction to address Claimant's Section 1983 claim because it is a federal cause of action. In contrast, Respondent argues the Motion for Recusal was correctly denied, and the Motion to Dismiss was correctly granted.

1. Claimant did not prove legally sufficient grounds to grant the Motion for Recusal.

The Appeals Board first addresses Claimant's Motion for Recusal. Where an administrative judge refuses to disqualify, the party seeking a change of administrative law judge may file an appeal with the Appeals Board within ten days of the refusal.¹ The party shall also file with the Appeals Board an affidavit alleging one or more of the following: (1) the administrative law judge was engaged as counsel in the case prior to his or her appointment as administrative law judge, (2) the administrative law judge is otherwise interested in the case, (3) the administrative law judge is related to either party, (4) the administrative law judge is a material witness, or (5) the party has cause to believe and does believe on account of the personal bias, prejudice or interest of the administrative law judge the party cannot receive a fair and impartial hearing. In the case of bias, prejudice or interest, the affidavit must state the facts and reasons for the belief.² If a majority of the Appeals Board finds legally sufficient grounds, it shall direct the director to assign the case to another administrative law judge.³

In this case, Claimant did not file an affidavit with the Appeals Board, as required under K.S.A. 44-523(e)(2). Arguably, the denial of the Motion for Recusal should be affirmed for failure to follow K.S.A. 44-523(e)(2). Claimant, however, attached an affidavit to the Motion for Recusal. The Appeals Board finds this affidavit serves the same purpose as an affidavit filed specifically with the Appeals Board, and addresses the merits of the Motion for Recusal.

Of the five categories from K.S.A. 44-523(e)(4), only the fifth applies here. Claimant does not allege ALJ Larson was counsel in this case prior to his appointment as an administrative law judge. There is no evidence ALJ Larson is otherwise interested in this case, or is related to either party. Claimant presented no evidence ALJ Larson is a material witness to this matter. Claimant argues he cannot obtain a fair and impartial hearing on account of bias, prejudice or interest of ALJ Larson.

In the affidavit, Claimant alleges ALJ Larson demonstrated bias by changing the proceeding to "Phillip Peavy v. Deffenbaugh," by being aware of the filing of a request for a prehearing settlement conference, and by bringing another attorney into the proceedings. The Board will address Claimant's allegations in turn.

¹ See K.S.A. 44-523(e)(1).

² See K.S.A. 44-523(e)(2),(4).

³ See K.S.A. 44-523(e)(3).

First, ALJ Larson did not change the proceedings to “Phillip Peavy v. Deffenbaugh.” The initial Application for Benefits, filed by Claimant’s prior counsel on behalf of Claimant, named “Deffenbaugh Group Holdings, Inc.” as Respondent. Respondent’s counsel confirmed the employment relationship was not at issue. There is no evidence in the record proving ALJ Larson changed or added parties to this matter.

Second, ALJ Larson did not display bias, prejudice or an interest with regard to Claimant’s request for a prehearing settlement conference. ALJ Larson instructed Claimant to set the matter for a prehearing settlement conference if he wanted a final award of compensation. In response, Claimant filed a written request for a prehearing settlement conference. ALJ Larson’s assistant, pursuant to normal operating procedure, sent Claimant and Respondent’s counsel an email advising of available dates and times for a prehearing settlement conference, and asked Claimant to confirm which date and time he wanted. Claimant did not respond. Although Claimant may not be an attorney, he is charged with following the same rules and procedures as represented parties.⁴ A prehearing settlement conference was not set because Claimant refused or neglected to do so, not because of bias or prejudice on the part of ALJ Larson.

Finally, ALJ Larson did not show bias, prejudice or interest by bringing another attorney into the proceedings. Claimant appears to argue ALJ Larson brought another attorney into the proceedings when ALJ Larson’s assistant sent an email to the legal assistant of Respondent’s counsel of record, who also does work for another attorney in Respondent’s counsel’s firm. Claimant also argues the ALJ brought another attorney into the proceedings because another attorney in Respondent’s counsel’s firm appeared at hearings. ALJ Larson is not responsible for the administrative staffing of Respondent’s counsel’s law firm. Moreover, ALJ Larson is not responsible for another attorney in Respondent’s counsel’s firm appearing on behalf of Respondent. This practice is common in legal proceedings, and does not indicate bias or prejudice. ALJ Larson did not bring another attorney into the proceedings.

In conclusion, Claimant did not prove ALJ Larson had personal bias, prejudice or interest depriving Claimant of a fair and impartial hearing. The denial of Claimant’s Motion for Recusal is affirmed.

2. ALJ Larson did not err in granting the Motion to Dismiss because no motion to extend was filed and because Claimant did not prove good cause for extending the time to prosecute.

The Board next addresses whether the Motion to Dismiss was erroneously granted. The Kansas Workers Compensation Act mandates dismissal with prejudice of a matter that

⁴ See *Mangiaracina v. Gutierrez*, 11 Kan. App. 2d 594, 595, 730 P.2d 1109 (1986).

has not proceeded to regular hearing, settlement hearing, or agreed award within three years from the date the application for hearing is filed, unless an application for extension of time to prosecute is filed and the employee shows good cause.⁵

Claimant filed his initial Application for Benefits on February 8, 2019. Claimant subsequently filed an Amended Application for Benefits on August 1, 2019, which relates back to the date the initial Application for Benefits was filed.⁶ Claimant had until February 8, 2022, to proceed to settlement hearing, regular hearing, or agreed award. No settlement hearing, regular hearing, or agreed award has taken place. Unless Claimant can prove he timely filed a motion for an extension and good cause exists for the failure to prosecute, K.S.A. 44-523(f)(1), mandates dismissal of this matter.

No application for an extension of time to prosecute was filed. Claimant argues his request for a prehearing settlement conference should constitute a request for an extension. A prehearing settlement conference setting is different from an extension of the time to prosecute. Claimant indicated he filed his request for a prehearing settlement conference with the expectation of receiving a prehearing settlement conference setting, not an extension of time to prosecute. The administrative file contains no filing indicating Claimant wanted additional time to prosecute his claim. The Board concludes Claimant did not file a request for an extension of time to prosecute before the expiration of the three-year limitation.

In addition, Claimant failed to prove good cause for the failure to proceed to settlement hearing, regular hearing, or agreed award. Claimant provided no explanation for his failure to prosecute the claim. On November 17, 2020, Claimant was provided dates and times for a prehearing settlement conference, and chose not to respond. Claimant gave no explanation for his failure to respond, apart from his belief ALJ Larson would set the matter for a prehearing settlement conference. ALJ Larson's assistant's email clearly put the onus on Claimant to respond. No other reasons were offered by Claimant. The record indicates Claimant made no affirmative effort to move his case to settlement or regular hearing. The Board finds and concludes Claimant failed to prove good cause for the failure to proceed to settlement hearing, regular hearing, or agreed award. Accordingly, this matter must be dismissed with prejudice under K.S.A. 44-523(f)(1).

⁵ See K.S.A. 44-523(f)(1).

⁶ See *Breedlove v. Richardson Hauling, Inc.*, No. 114,600, 2016 WL 5844575, at *8 (unpub. Kan. App. filed Sept. 30, 2016).

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Members the Order issued by ALJ Troy Larson, dated June 7, 2022, is affirmed. Pursuant to K.S.A. 44-523(f), this matter is dismissed with prejudice. Pursuant to K.S.A. 44-556(a), because this is a final order, any party may appeal by filing an appeal with the Court of Appeals within thirty (30) days of the date of this order.

IT IS SO ORDERED.

Dated this _____ day of September, 2022.

APPEALS BOARD MEMBER

APPEALS BOARD MEMBER

APPEALS BOARD MEMBER

c: Via OSCAR

Phillip Peavy, *pro se* Claimant
Mark J. Hoffmeister
Hon. Troy Larson