

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

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|---------------------------|---|----------------|
| RICHARD TODD SMITH |) | |
| Claimant |) | AP-00-0469-792 |
| V. |) | CS-00-0150-530 |
| |) | |
| CITY OF MANHATTAN |) | AP-00-0469-812 |
| Self-Insured Respondent |) | CS-00-0150-730 |

ORDER

Claimant requests review of the August 18, 2022, motion hearing Order entered by Administrative Law Judge (ALJ) Bruce E. Moore.

APPEARANCES

Bruce Alan Brumley appeared for claimant. Kip A. Kubin appeared for self-insured Respondent. Due to a conflict, Board Member Rebecca Sanders recused herself from this appeal. Mark Kolich has been appointed as a Board Member Pro Tem in this case. The matter was placed on the Board's summary calendar for ruling without oral argument.

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 August 16, 2022, with exhibits attached; the transcript of the Evidentiary Deposition of Robert W. Barnett, Ph.D., from March 12, 2021, with exhibits attached; the transcript of the Evidentiary Deposition of Pedro A. Murati, M.D., from June 8, 2021, with exhibits attached; and the documents of record filed with the Division.

ISSUES

The issues for the Board's review are:

1. Did Claimant provide good cause pursuant to K.S.A. 44-523(f)?
2. Did the ALJ properly consider all facts and law in dismissing this case?
3. Did Claimant timely file his motions for extension pursuant to K.S.A. 44-523(f)?

4. Was Claimant reasonable under due process or judicial equity in relying on the September 28, 2012, Court Order granting his motion for extension?

5. Should the Board consider Claimant's request for a change in ALJ if the order is reversed?

FINDINGS OF FACT

In No. CS-00-0150-530, Claimant filed an Application for Hearing on September 15, 2009, alleging injuries to both shoulders while working for Respondent on May 3, 2007. A Prehearing Settlement Conference (PHSC) was held on March 20, 2012, resulting in an independent medical evaluation (IME) with Dr. Pratt. Dr. Pratt's IME report dated July 16, 2012, found Claimant was at maximum medical improvement (MMI) and provided a rating. Claimant subsequently sought additional medical care for psychological injuries related to the accident.

Claimant filed a Motion for Extension Pursuant to K.S.A. 44-523(f) on September 13, 2012, reflecting he reached MMI for his physical injuries but continued seeking psychiatric treatment. That same day, ALJ Rebecca Sanders notified the parties and requested any written responses or requests for conference call be done prior to September 24, 2012. She also wrote, "If either party fails to do so, the Court will rule on the pleading."¹ Neither party filed a written response. ALJ Sanders granted Claimant's motion for extension in an Order dated September 28, 2012. The Order did not specify a deadline to proceed to regular hearing.

On November 8, 2013, the parties filed an Agreed Order for Authorized Care with Dr. Kathleen Keenan for psychological treatment. Following a preliminary hearing, ALJ Sanders designated Dr. William Logan as the authorized treating physician for psychological treatment on February 19, 2014. Claimant later sought a change of physician to one closer to his home. Following a preliminary hearing held July 8, 2014, Christina Lenon, L.P.C., was authorized to provide psychological care

Claimant filed an Application for Preliminary Hearing on December 30, 2014, seeking additional treatment for his shoulders, which was authorized on April 15, 2015. Claimant filed additional Applications for Preliminary Hearing on April 29 and May 7, 2015, seeking medication for depression. On August 12, 2015, an IME was ordered with Dr. Douglas Sheafor, who declined to assess Claimant. Dr. James Eyman was designated as the authorized treating physician for psychological counseling on September 21, 2015. Respondent objected to the appointment of Dr. Eyman because he was a psychologist, not a psychiatrist, and unable to prescribe prescription medications.

¹ ALJ File Archive (CS-00-0150-530) at 231.

On October 26, 2015, the ALJ appointed Dr. Michael Pronko to evaluate whether Claimant required medication to treat his psychological conditions and ordered continued counseling with Ms. Lenon. There is no evidence in the record relating to Dr. Pronko evaluating or taking over Claimant's medical care. Ms. Lenon, whose name was changed to McLewin, continued to see Claimant through August 2022.

On February 8, 2016, Dr. Stechschulte generated a report indicating consideration of a TENS unit trial and acupuncture trial for Claimant's shoulder injuries. He did not find Claimant to be a surgical candidate. Dr. Stechschulte indicated Claimant wished to continue working full-duty but was unsure how much longer he could manage.

This case was reassigned to ALJ Bruce Moore by an Order dated September 14, 2016.

On May 5, 2017, in No. CS-00-0150-730, Claimant filed an Application for Hearing related to an injury sustained while climbing down a ladder on or about March 24, 2015, involving Claimant's right shoulder, right arm, neck and back. Claimant filed a motion to extend pursuant to K.S.A. 44-523(f) on May 25, 2017. No hearing was held on Claimant's motion.

Because Claimant's alleged physical and mental injuries were similar to those in CS-00-0150-150, these claims were consolidated at Claimant's request. In his certification for PHSC filed August 21, 2017, Claimant indicated he received an impairment rating and his medical condition stabilized. A PHSC was held September 20, 2018, and on January 14, 2020, at which time both claims were cleared for regular hearing.

A regular hearing was scheduled on both claims for February 5, 2021, but was continued by Claimant. Respondent filed an Application for Dismissal on February 8, 2021, in both claims.

Claimant underwent a vocational rehabilitation consultation on March 18, 2021. He sent a Notice of Intent to Respondent requesting payment of prescription costs on January 20, 2022. On August 11, 2022, Claimant sent another Notice of Intent to Respondent regarding unpaid medical bills, continuation of care, and unpaid costs of prescriptions.

Claimant continued treatment with Ms. McLewin from 2014 until August 11, 2022, when she placed Claimant at MMI as related to psychological counseling. In a letter dated August 15, 2022, Ms. McLewin indicated Claimant should continue his psychotropic medication and suggested medical be left open should counseling again be required.

Respondent's Motion to Dismiss was heard August 16, 2022. The ALJ determined Claimant failed to show good cause for the delay in proceeding to regular hearing,

settlement hearing, or agreed award in either claim and granted Respondent's motion. The ALJ wrote:

It is exceedingly difficult to find that the claimant has demonstrated diligence in prosecuting either of his claims. The claimant represented that CS-00-0150-530 was ready for hearing five years ago. Four years ago, in September, 2018, we had a PHSC on both claims, at the claimant's request, and both matters were cleared for Regular Hearing. Yet no Regular Hearing was scheduled. Claimant has been in regular counseling with Ms. McLewin since 2014, yet that ongoing counseling was never seen by the claimant as a limitation on proceeding to Regular Hearing. Claimant does not suggest that Regular Hearing was deferred until MMI was achieved on the psychological claim, only that the convenient "release" of August 15, [2022] provides him the good faith he needs to avoid dismissal. The court does not agree.²

PRINCIPLES OF LAW AND ANALYSIS

Claimant contends the ALJ's Order should be vacated and remanded to allow him to proceed to regular hearing. Claimant argues he timely filed his motion for extension in CS-00-0150-530, and his motion was granted finding good cause existed. Regarding CS-00-0150-730, Claimant argues both claims should be tried together, and he was not yet ready to proceed on the first claim. Claimant states he was not declared at MMI until August 2022 and did not abandon either claim. Further, should this matter be remanded, Claimant requests an alternate ALJ.

Respondent maintains the ALJ's Order should be affirmed. Respondent argues Claimant certified he was at MMI on August 21, 2017, and both claims were deemed ready for regular hearing by January 14, 2020.

AP-00-0469-792 / CS-00-0150-530

K.S.A. 2006 Supp. 44-532(f) states:

Any claim that has not proceeded to final hearing, a settlement hearing, or an agreed award under the workers compensation act within five years from the date of filing an application for hearing pursuant to K.S.A. 44-534, and amendments thereto, shall be dismissed by the administrative law judge for lack of prosecution. 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 five year limitation provided for herein. This section shall not affect any future

² ALJ Order (Aug. 18, 2022) at 5.

benefits which have been left open upon proper application by an award or settlement.

Claimant filed an application for Hearing on September 15, 2009, alleging a date of injury on May 3, 2007. Claimant filed a Motion to Extend Benefits within five years as required by K.S.A. 2006 Supp. 44-523(f). On September 13, 2012, ALJ Sanders wrote a letter to the parties advising them written responses to the Motion should be filed prior to September 24, 2012, and if either party failed to provide a written response, she would rule based upon the pleadings. No response was filed by either party. ALJ Sanders granted the motion to extend without limitation on September 28, 2012. Neither party appealed the Order granting the motion.

There is nothing in K.S.A. 2006 Supp. 44-523(f) allowing a case to be dismissed once a motion to extend has been granted. There is no provision for reconsideration in the Kansas Workers Compensation Act.³ ALJ Moore's concern about the amount of time since ALJ Sanders' open-ended extension of time and Claimant not proceeding to regular hearing within a reasonable amount of time is misplaced. The ALJ, in his Order, wrote "claimant still has to demonstrate good faith for a delay beyond the statutory limits."⁴ This recitation by the ALJ cannot be found in the statute. There is nothing in K.S.A. 2006 Supp. 44-523(f) limiting the amount of time in which a claimant must proceed to regular hearing after a motion to extend has been granted.

The ALJ did not have statutory authority to set aside the prior order for extension of time. Accordingly, the Order of Dismissal in CS-00-0150-530/AP-00-0469-792 is reversed.

AP-00-0469-812 / CS-00-0150-730

K.S.A. 2014 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

³ See *Vogel v. Salem Home*, No. 1,062,509, 2017 WL 1330453 (Kan. WCAB Mar. 24, 2017).

⁴ ALJ Order (Aug. 18, 2022) at 3.

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.

Claimant filed an Application for Hearing on May 5, 2017, alleging a date of injury on March 24, 2015. Under K.S.A. 44-523(f), a claimant must proceed to regular hearing, a settlement, or an agreed award within three years from the date the application for hearing is filed. In the alternative, Claimant must file a motion to extend the deadline prior to the expiration of the three-year time limitation. Claimant filed a motion to extend pursuant to K.S.A. 44-523(f) on May 25, 2017, in compliance with K.S.A. 523(f)(1).

Claimant has the burden of proving good cause why the claim should not be dismissed for lack of prosecution. Claimant proffered the deposition testimony of Drs. Barnett and Murati. Dr. Barnett opined Claimant would benefit from continued psychotherapy and antidepressant medications. Dr. Barnett testified Claimant would benefit from continued psychotherapy and use of psychotropic medications. Ms. McLewin's records show Claimant received psychological counseling on a regular basis through August 11, 2022. Ms. McLewin did not declare Claimant to be at MMI until August 11, 2022.

Claimant reached MMI five days prior to the hearing on Respondent's Application for Dismissal. Five days prior to the hearing, a presumption of good cause would have existed because claimant had not reached MMI. Five days is an insufficient amount of time to expect Claimant to prepare for a final hearing on the merits of his case.

The Board finds Claimant has shown good cause for the delay in proceeding to regular hearing, settlement hearing, or agreed award. Therefore, the Order dismissing CS-00-0150-730/AP-00-0469-812 is reversed.

RECUSAL

In the conclusion of his brief to the Board, Claimant asks the Board to reassign the case to a different ALJ.

K.S.A. 44-523(e) states:

(1) If a party or a party's attorney believes that the administrative law judge to whom a case is assigned cannot afford that party a fair hearing in the case, the party or attorney may file a motion for change of administrative law judge. A party or a party's attorney shall not file more than one motion for change of administrative law

judge in a case. The administrative law judge shall promptly hear the motion informally upon reasonable notice to all parties who have appeared in the case. Notwithstanding the provisions of K.S.A. 44-552, and amendments thereto, the administrative law judge shall decide, in the administrative law judge's discretion, whether or not the hearing of such motion shall be taken down by a certified shorthand reporter. If the administrative law judge disqualifies the administrative law judge's self, the case shall be assigned to another administrative law judge by the director. If the administrative law judge refuses to disqualify the administrative law judge's self, the party seeking a change of administrative law judge may, within 10 days of the refusal, file an appeal with the workers compensation [appeals] board.

(2) The party or a party's attorney shall file with the workers compensation [appeals] board an affidavit alleging one or more of the grounds specified in subsection (e)[(4)].

(3) If a majority of the workers compensation [appeals] board finds legally sufficient grounds, it shall direct the director to assign the case to another administrative law judge.

(4) Grounds which may be alleged as provided in subsection (e)(2) for change of administrative law judge are that:

(A) The administrative law judge has been engaged as counsel in the case prior to the appointment as administrative law judge.

(B) The administrative law judge is otherwise interested in the case.

(C) The administrative law judge is related to either party in the case.

(D) The administrative law judge is a material witness in the case.

(E) The party or party's attorney filing the affidavit has cause to believe and does believe that on account of the personal bias, prejudice or interest of the administrative law judge such party cannot obtain a fair and impartial hearing. Such affidavit shall state the facts and the reasons for the belief that bias, prejudice or an interest exists.

(5) In any affidavit filed pursuant to subsection (e)(2), the recital of previous rulings or decisions by the administrative law judge on legal issues or concerning prior motions for change of administrative law judge filed by counsel or such counsel's law firm, pursuant to this subsection, shall not be deemed legally sufficient for any belief that bias or prejudice exists.

(6) Notwithstanding the provisions of K.S.A. 44-556, and amendments thereto, no interlocutory appeal to the court of appeals of the workers compensation appeals board's decision regarding recusal shall be allowed while the resolution of the claim

for compensation is pending before an administrative law judge or the workers compensation appeals board.

Pursuant to K.S.A. 44-523(e), Claimant must file a motion to recuse before the ALJ and follow the procedure set forth in the statute. No such motion was filed and no affidavit was presented to the ALJ. As the issue was not raised before the ALJ and there is no order on the recusal issue, the Board is without authority to rule on Claimant’s request.

DECISION

WHEREFORE, it is the finding, decision and order of the Board the Order of ALJ Bruce E. Moore, dated August 18, 2022, is reversed. ALJ Sander’s order extending time in CS-00-0150-530 / AP-00-0469-792 is reinstated. Claimant’s motion to extend time in CS-00-0150-730 / AP-00-0469-812 is granted. Claimant’s request for recusal of the ALJ is dismissed.

IT IS SO ORDERED.

Dated this _____ day of December, 2022.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Via OSCAR

Bruce Alan Brumley, Attorney for Claimant
Kip A. Kubin, Attorney for Self-Insured Respondent
Hon. Bruce E. Moore, Administrative Law Judge