

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

EDWARD J. SMITH)	
Claimant)	
V.)	
)	AP-00-0472-056
ADVANCE AUTO PARTS DISTRIBUTION)	CS-00-0311-084
Respondent)	
AND)	
)	
INDEMNITY INSURANCE COMPANY)	
OF NORTH AMERICA)	
Insurance Carrier)	

ORDER

Claimant requested review of the November 2, 2022, Order of Dismissal entered by Administrative Law Judge (ALJ) David J Bogdan.

APPEARANCES

Edward Smith, Pro Se (Claimant), appeared on his own behalf. Carolyn McCarthy appeared for Respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Appeals Board considered the same record as the ALJ, consisting of the transcript of Motion Hearing, held November 2, 2022 and the pleadings and orders contained in the administrative file.

ISSUE

Was the Order dismissing this matter with prejudice, pursuant to K.S.A. 44-523(f)(1) erroneous because Claimant proved a good faith reason for delaying prosecution of his claim?

FINDINGS OF FACT

On July 17, 2017, Claimant suffered a hernia while lifting parts. Claimant filed an Application for Hearing on January 24, 2018. On March 12, 2019, Claimant's attorney, Jan L. Fisher filed a Motion for Extension of Time pursuant to KSA. 44-523(f). Claimant did not

request a hearing on the motion. On August 12, 2020, Jan L. Fisher's request to withdraw as Claimant's counsel was granted and an Order of Withdrawal was filed.

On April 28, 2022, George Pearson entered his appearance as Claimant's counsel of record. A settlement was reached by the parties and a settlement hearing was scheduled for August 25, 2022. On August 18, 2022, Claimant withdrew his agreement to settle his claim and cancelled the settlement hearing. George Pearson filed a Motion to Withdraw as Claimant's counsel of record. On September 13, 2022, Mr. Pearson's Motion to Withdraw as Claimant's counsel was granted and an Order of Withdrawal was filed.

Respondent filed a Motion to dismiss pursuant to K.S.A. 44-523(f)(1) on September 13, 2022. On November 3, 2022, a hearing on Respondent's Motion to Dismiss was held. Claimant appeared by phone and without counsel. Both parties were given an opportunity to be heard.

JUDGE BOGDAN: Very good. No, I understand. There are -- are like any case in -- in any practice, there are -- there are limits with regard to time and -- and moving forward with the claim. Mr. Smith, I can't tell you why it wasn't filed earlier. I can't tell you, you know, if things would change if this wasn't filed. The only question now is, you know, whether it should be dismissed. You know, if this hadn't been filed this -- this would likely continue on. I'm not sure that there would be any progress though.

THE CLAIMANT: Well, I'd like to get a chance to talk to them again and see if we could settle it.

JUDGE BOGDAN: Okay. Now -- no, I understand, and keep in mind we spoke about a month ago when we talked about a dismissal process and I do recall explaining to you that you should call Ms. McCarthy to determine whether or not anything could be done.

THE CLAIMANT: Yes, you did.

JUDGE BOGDAN: And the point is -- well, you thought you could talk to her at this hearing. This is a dismissal hearing.

THE CLAIMANT: Okay. No, I did not -- I didn't expect to talk to her. I expected to talk to you and see if we could get, you know, get together and make a right settlement. That's what I was waiting on, a right settlement. It's not that I want more or less, it's just I want it fair.

JUDGE BOGDAN: And you understand that I have no -- I'm really not a part of any settlement.

THE CLAIMANT: All right. Well, then I can talk to her if you'll continue this. I mean, they filed it. If I knew how to file it I'd have filed a continuance.

JUDGE BOGDAN: No, I understand that, and the question -- question is whether or not the continuance would be granted.

THE CLAIMANT: Okay. Well, I'm asking you now.¹

In granting Respondent's request for dismissal pursuant to K.S.A. 44-523(f)(1), the ALJ found:

More than four years have passed since the application for the hearing was filed in this claim. Although a Motion for Extension was filed on March 13, 2019, no Order was issued to confirm any extension, and the issues supporting extension were identified in 2019 as not reaching maximum medical improvement. Since the filing of the requests for dismissal, and specifically at the dismissal hearing, no evidence is presented to support medical status or good cause for extension. Claimant is presently unrepresented with no comment as to good cause at the dismissal hearing.²

On November 14, 2022 Claimant sent an email to the Appeals Board which stated,

I would like to appeal the dismissal decision for my Worker's Comp case.

I have been unable to retain counsel that could work my case until finalized. The pandemic caused many delays and there has not been sufficient aid on my behalf. I will need more time to secure representation.³

On November 26, 2022, Claimant sent a second email to the Appeals Board asking, once again, to appeal the dismissal of his case by the November 2, 2022 Order. In addition, Claimant stated prior to the November 2 hearing, he had worked diligently to reach an agreement with Respondent and he was working to secure new counsel.

PRINCIPLES OF LAW AND ANALYSIS

Claimant argues the Order is erroneous and he should be given a continuance to negotiate a fair settlement. Respondent argues the Order was decided correctly and should be affirmed.

¹ Motion Hearing Trans. (Nov. 2, 2022) at 7-9.

² ALJ Order (Nov. 3, 2022) at 2.

³ Claimant's email Application For Review (Nov. 14, 2022).

The Kansas Workers Compensation Act provides for dismissal of a claim with prejudice if the claim has not proceeded to regular hearing, settlement hearing or agreed award within three years from the date of filing an application for hearing. Respondent may file an application for dismissal, which shall be set for hearing, with notice to Claimant's attorney or to Claimant's last known address if unrepresented. The ALJ may grant an extension for good cause shown. If Claimant cannot establish good cause, the claim shall be dismissed with prejudice for lack of prosecution.⁴

In this case, Claimant filed an application for hearing on January 24, 2018. A Motion for Extension was filed on March 13, 2019, but no Order was issued granting an extension. Respondent filed its Motion for Dismissal on September 13, 2022. A hearing took place with notice given to Claimant who participated in the hearing. Under K.S.A. 44-523(f)(1), this matter must be dismissed with prejudice unless Claimant can prove good cause existed for his failure to prosecute his claim.

At the hearing, Claimant did not present any evidence of good cause which would result in the Court granting his request for an extension. Claimant's request for additional time to try and reach a settlement is not good cause for failing to prosecute his claim. The statements made at the hearing make clear Claimant made no attempt to work out a settlement of his claim between the time he backed out of the tentative settlement made and the hearing held on November 2. Prior to the November 2 hearing, the ALJ advised Claimant about a dismissal proceeding and he should contact Respondent's counsel. Claimant did not contact Respondent's counsel.

The two emails sent to the Appeals Board following the November 2, 2022 Order can not be considered as evidence of good cause. Statements by the parties are not evidence. More importantly, review by the Appeals Board is limited to questions of law and fact as presented to the Administrative Law Judge through the transcript of proceedings and the evidence presented and accepted by the ALJ.⁵ New or additional evidence which was not presented to the ALJ will not be considered by the Appeals Board.

The Board finds more than three years have passed since Claimant filed his Application for hearing on January 24, 2018, and this matter has not proceeded to regular hearing, settlement hearing or agreed award. The Board also finds Claimant failed to prove good cause for the delay in prosecution of his claim. Under K.S.A. 44-523(f)(1), this claim must be dismissed with prejudice.

DECISION

⁴ See K.S.A. 44-523(f)(1).

⁵ See K.S.A. 44-555c(a).

WHEREFORE, it is the finding, decision and order of the Appeals Board the Order of Administrative Law Judge David J. Bogdan dated November 2, 2022, is affirmed.

IT IS SO ORDERED.

Dated this ____ day of January, 2023.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Via OSCAR
Edward Smith Pro Se
Carolyn McCarthy, Attorney for Respondent and its Insurance Carrier
Hon. David J. Bogdan, Administrative Law Judge