

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

SAM HAMWI)	
Claimant)	
V.)	
)	AP-00-0472-681
FIRST STUDENT, INC.)	CS-00-0055-499
Respondent)	
AND)	
)	
NEW HAMPSHIRE INSURANCE COMPANY)	AP-00-0472-682
Insurance Carrier)	CS-00-0433-288
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

Claimant appeals the December 6, 2022, Order of Dismissal entered by Administrative Law Judge (ALJ) Gary K. Jones.

APPEARANCES

Sam Hamwi (Claimant) appeared Pro Se. Christopher J McCurdy appeared for Respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board adopted the same stipulations and considered the same record as the ALJ, consisting of the Preliminary Hearing transcript held on November 16, 2022, the documents of record filed with the Division and the parties' briefs.

ISSUES

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

Claimant filed an application for benefits for a date of injury of October 11, 2017 on November 21, 2017 (Case No. CS-00-0433-288). Claimant filed a motion to extend the three year deadline under this docket number on December 14, 2017. Claimant filed an application for benefits for a date of injury of December 6, 2017, on December 21, 2017 (Case No. CS-00-0055-499). Claimant filed a motion to extend the three year deadline under this docket number on January 4, 2018.

This is the second time this matter has appeared before the Appeals Board. On September 10, 2019, the Board issued an Order affirming the ALJ's Order denying Claimant's request for medical treatment for the cervical spine and authorizing medical treatment for posttraumatic headaches. Based on the medical evidence presented, the Board Member found Claimant's cervical spine symptoms and complaints were an aggravation or acceleration of a preexisting condition and therefore not compensable.

Following the Board's Order, Claimant was referred to Dr. Scott on February 20, 2020, for evaluation and treatment recommendations regarding his headaches. Dr. Scott recommended occipital injections or blocks, which Claimant declined on February 27, 2020.

Claimant sought medical treatment for his neck and temporary total disability (TTD) benefits at a preliminary hearing held on April 28, 2020. The ALJ denied Claimant's requests for neck treatment and TTD, but reiterated Claimant was authorized to seek the occipital blocks recommended by Dr. Scott.

The court file reflects Respondent filed a Certification for Mandatory Settlement Conference on August 20, 2020. Claimant filed an objection to Respondent's request for a settlement conference on August 25, 2020, alleging he was not at maximum medical improvement (MMI) and was pursuing medical treatment at his own expense. On October 14, 2020, the Court issued an Order granting Claimant's request to continue the settlement conference and extending Claimant's time to proceed to regular hearing, settlement hearing or agreed award to May 20, 2021.

No action was taken by the parties until May 27, 2021, when Claimant's counsel withdrew his representation. On June 15, 2021, Respondent filed its first Motion to Dismiss pursuant to K.S.A. 44-523(f)(1). A hearing on Respondent's Motion to Dismiss was held on August 23, 2021. Under a Nunc Pro Tunc Order, dated September 3, 2021, Respondent's Motion to Dismiss was taken under advisement, and Claimant was granted

10 days to submit additional documentation to the Court and Respondent's counsel in response to Respondent's Motion to Dismiss.

On September 24, 2021 the ALJ issued an Order denying Respondent's Motion for Dismissal because Claimant had not reached MMI. The ALJ gave Claimant until March 24, 2022 to proceed to regular hearing, settlement hearing or agreed award. The ALJ stated:

The evidence does not convince the Court that the Claimant has reached maximum medical improvement, so the Respondent's Application for Dismissal is denied.

The Court has previously denied some treatment requested by the Claimant. However, preliminary hearing orders and are subject to rehearing if additional evidence is presented. The Claimant's prior attorney noted the Claimant was proceeding to obtain treatment on his own in an Objection to Respondent's Certification for Mandatory Settlement Conference filed on August 25, 2020. The Claimant has consistently denied that he has reached maximum medical improvement for injuries from the work accidents, and Dr. Hassan's report indicates that may be the case.

Dr. Terrence Pratt's report dated March 6, 2019, says that the Claimant is a candidate for treatment for posttraumatic headaches with the use of medications and potential pain management techniques. More recently, Dr. Hassan also said that the Claimant has chronic headache. Dr. Hassan has referred the Claimant to a specialist regarding postconcussion syndrome, and the results of that referral are not yet known.

The Claimant has difficulty communicating effectively. Dr. Hassan's report states the Claimant has been recommended for psychiatric treatment and evaluation. If possible, the Claimant should obtain an attorney to represent him in these cases.

These two cases are taking longer than usual to resolve. There appear to be several factors that have likely caused that situation. But K.S.A. 44-523(f)(1) provides that it is conclusively presumed that good cause for an extension exists if a claimant has not reached maximum medical improvement.¹

No action was taken by the parties until March 29, 2022, when Respondent filed its second Motion to Dismiss pursuant to K.S.A.44-523(f)(1). A hearing was held on Respondent's motion on July 6, 2022. The ALJ allowed the parties to submit additional

¹ ALJ Order (Sept. 24, 2021) at 3.

documentation by July 18 before issuing his order. No Order was issued because the parties notified the ALJ a tentative settlement had been reached and a settlement hearing scheduled. The settlement did not take place as scheduled and a second settlement hearing was scheduled. Claimant chose not to proceed with the settlement proposed by Respondent, resulting in Respondent filing the third Motion to Dismiss.

Respondent filed its third Motion to Dismiss on August 22, 2022. On September 14, 2022, Claimant filed an Application for Preliminary Hearing seeking medical treatment. A hearing was held with notice given to Claimant, who participated in the hearing, on November 16, 2022. At the Motion to Dismiss/Preliminary Hearing, Claimant did not present new evidence the prevailing factor for the medical treatment he was pursuing for his cervical spine was either of the two accidental injuries claimed. Claimant stated he was unable to secure new counsel to represent him in these proceedings. No additional arguments or evidence of good cause to extend the time to proceed to regular hearing, settlement hearing or agreed award was offered. The Court noted Claimant had not received authorized medical treatment since February 27, 2020.

The ALJ's Order issued on December 6, 2022 denied Claimant's request for medical treatment and granted Respondent's Motion to Dismiss with prejudice. The ALJ stated:

The evidence submitted does not show that the Claimant is still receiving treatment for injuries sustained in these work injuries. The Claimant has a degenerative condition in his neck. Although the Claimant maintains that the condition is the result of the work injuries, the medical experts disagree. The Claimant had a preexisting condition in his neck. The work injuries are not the prevailing factor, or primary factor for his neck condition and present need for treatment. The Claimant should seek medical treatment using his private health insurance.

The Claimant's request for additional medical treatment is denied.

The Respondent's application for dismissal is granted. These two cases are dismissed with prejudice for lack of prosecution.²

PRINCIPLES OF LAW AND ANALYSIS

Claimant argues the Order is erroneous and he should be provided medical treatment for his medical condition. Respondent argues the Order was decided correctly and should be affirmed.

² ALJ Order (Dec. 6, 2022) at 2.

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. Good cause shall be conclusively presumed in the event Claimant has not reached maximum medical improvement. If Claimant cannot establish good cause, the claim shall be dismissed with prejudice for lack of prosecution.³

In these cases, Claimant has not proceeded to regular hearing, settlement hearing or agreed award within three years from the dates the two applications for hearing were filed. Motions to Extend were timely filed under both docket numbers.

In response to Respondent's request for a Mandatory Settlement Conference filed on August 20, 2020, Claimant filed an objection on August 25, 2020, alleging he was not at maximum medical improvement (MMI) and was pursuing medical treatment at his own expense. The Court on October 14, 2020, issued an Order granting Claimant's request to continue the settlement conference and extended Claimant's time to proceed to regular hearing, settlement hearing or agreed award to May 20, 2021.

Claimant took no action, resulting in Respondent filing its first Motion to Dismiss pursuant to K.S.A. 44-523(f)(1) on June 15, 2021. Respondent's motion was denied, because it appeared Claimant had not reached MMI. Claimant was given until March 24, 2022 to proceed to regular hearing, settlement hearing or agreed award. Again, Claimant took no additional action resulting in Respondent filing its second Motion to Dismiss. A hearing was held, but no order was issued on Respondent's second Motion to Dismiss because the ALJ was advised a tentative settlement had been reached between the parties, but not yet approved. When Claimant chose not to proceed with the settlement proposed by Respondent, the third Motion to Dismiss was filed.

Respondent filed its third Motion to Dismiss on August 22, 2022. A hearing was held with notice given to Claimant, who participated in the hearing, on November 16, 2022, almost six months past the deadline previously ordered by the ALJ and fourteen months after Respondent filed their first Motion to Dismiss.

Claimant's insistence he needs additional medical treatment does not relieve him of his obligation to prove the prevailing factor of his medical condition are the accidents he suffered while in the course of his employment. Claimant declined authorized medical

³ See K.S.A. 44-523(f)(1).

treatment for his headaches on February 27, 2020, and has not received any authorized medical treatment since this date. Claimant has not presented new evidence the prevailing factor for his medical condition is either of his two injuries. No formal requests for medical treatment have been made by Claimant between his denial for treatment requested at the April 28, 2020 preliminary hearing and his request for medical treatment on September 14, 2022. The evidence does not establish Claimant's assertion he has not reached maximum medical improvement for work-related injuries.

The evidence also does not establish any other good cause to extend the time to proceed to regular hearing, settlement hearing or agreed award. Claimant's inability to secure legal counsel is not good cause.

The overarching purpose of the hearing process lies in giving the parties a reasonable opportunity to fairly air the evidence bearing on their claim for benefits.⁴ Here, the ALJ served this purpose by granting extensions of time to Claimant to present any evidence, including medical evidence, in support of his claim. ALJs have wide latitude in controlling their dockets and they have the jurisdiction to run their courtrooms. "Generally, the Board will not interfere with judges' discretion in controlling their dockets."⁵ Claimant was given multiple opportunities and time to present evidence, including medical evidence, in support of his claim for medical treatment for his cervical injuries. He did not do so.

The Board finds more than three years have passed since Claimant filed his Applications for Hearing on November 21, 2017, and December 21, 2017, and these matters have 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 claims. Under K.S.A. 44-523(f)(1), these claims must be dismissed with prejudice.

DECISION

WHEREFORE, it is the finding, decision and order of the Appeals Board the Order of Administrative Law Judge Gary K. Jones, dated December 6, 2022, is affirmed.

IT IS SO ORDERED.

⁴ See *Goff v. Century MFG., Inc.*, No. 108,367, 2013 WL 3867840, at *3 (Kansas Court of Appeals unpublished opinion filed July 26, 2013).

⁵ See *Vargas-Jaramillo v. Marriott International, Inc.*, No. 241,554, 2001 WL 403320 (Kan.WCAB Mar. 9, 2001).

SAM HAMWI

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Dated this day of March, 2023.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Via OSCAR

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Christopher J. McCurdy, Attorney for Respondent and its Insurance Carrier
Hon. Gary K. Jones, Administrative Law Judge