

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

JOAN RIVERA)	
Claimant)	
V.)	AP-00-0480-640
)	CS-00-0258-804
WAL-MART ASSOCIATES, INC.)	
Respondent)	AP-00-0480-642
AND)	CS-00-0391-378
)	
NEW HAMPSHIRE INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Claimant requests review of the December 26, 2023, preliminary hearing Order entered by Administrative Law Judge (ALJ) Kenneth J. Hursh.

APPEARANCES

Claimant appeared pro se. Michael Kauphusman 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 Preliminary Hearing and Motion to Dismiss Hearing held December 20, 2023, with exhibits attached; the transcript of the Preliminary Hearing held October 19, 2023, with exhibits attached; the transcript of the Preliminary Hearing held March 31, 2022, with exhibits attached; the transcript of the Preliminary Hearing held June 2, 2021, with exhibits attached; the transcript of the Preliminary Hearing held December 16, 2020, with exhibits attached; and the documents of record filed with the Division. The Board reviewed the briefs submitted by the parties.

ISSUES

1. Does the Board have jurisdiction to review the ALJ's Order denying medical treatment?

2. Should these claims be dismissed for lack of prosecution pursuant to K.S.A. 44-523(f)?

FINDINGS OF FACT

On August 16, 2018, Claimant filed two E-1 Applications for Benefits with the Division. CS-00-0258-804 concerns injuries to Claimant's head, neck, and left eye sustained on June 12, 2018, after Claimant was struck by a falling shelf. An amended E-1 was filed June 4, 2021, amending the accident date to June 1, 2018. CS-00-0391-378 involves an injury to Claimant's left eye from debris sustained on August 3, 2018. Claimant was provided medical treatment in both claims, including vestibular therapy, speech/cognitive therapy, pain management, and occipital nerve blocks.

Three Agreed Orders for the extension of the three-year deadline contained in K.S.A. 44-523(f) were issued in both docketed claims. On May 26, 2021, the parties agreed to an extension to August 13, 2022. On June 21, 2022, the parties agreed to an extension to August 12, 2023. On July 26, 2023, the parties agreed to extend the deadline to November 12, 2023. No other orders were filed. No motions were filed by Claimant to extend the deadline to prosecute at any time.

On July 5, 2023, Claimant's counsel, Zachary Mark, filed a motion to withdraw. Keith Mark filed an entry of appearance as Claimant's counsel on July 18, 2023. The ALJ signed an Order allowing Zachary Mark to withdraw as Claimant's counsel. Keith Mark filed a motion to withdraw as Claimant's counsel on July 26, 2023, which was granted in an Order dated August 16, 2023. Claimant has not been represented by counsel since August 16, 2023.

Claimant filed an Application for Preliminary Hearing on November 9, 2023. The application for preliminary hearing was not accompanied by a motion to extend the deadline to prosecute. Respondent filed an Application for Dismissal (E-6) on November 13, 2023. The hearing on Respondent's motion to dismiss was held in conjunction with the preliminary hearing on December 20, 2023.

Although no motion to extend was filed, the ALJ treated the matter as if Claimant had filed a motion to extend and ruled on whether there was good cause to grant an extension of time. At the hearing, Claimant presented the report from Dr. Price, dated December 6, 2022, and reports from Dr. Wheeler.

As a result of the December 20, 2023, hearing, the ALJ found:

The new evidence did not change the court's previous preliminary findings. The claimant's work related injuries are at maximum medical improvement. Her request for additional medical benefits is denied.

The respondent moved for dismissal of the claims under K.S.A. 44-523(f)(1). The section provides for dismissal with prejudice if the claim has not proceeded to an award, settlement hearing, or agreed award within three years of the filing of an application for hearing. These claims are beyond the three-year limit and have been extended, by agreement, several times, the latest extension being until November 12, 2023. The section allows for either dismissal of the claims or an extension of the time limit for good cause.

The court did not see good cause for an extension. These claims are mired in requests for additional treatment that are not supported by the record and by the claimant's dissatisfaction with her attorneys and the workers compensation system. Neither of these causes for delay has a foreseeable end.

The conditions for dismissal under K.S.A. 44-523(f)(1) were satisfied. These claims are dismissed with prejudice.¹

PRINCIPLES OF LAW AND ANALYSIS

Claimant argues she requires additional treatment for her ongoing conditions. Claimant contends she has difficulty communicating due to her head trauma and requires accommodation. Further, Claimant argues she was told by a Division ombudsman she could request an extension of time from the ALJ during a preliminary hearing; she did not know she was required to submit a motion requesting an extension.

Respondent maintains the ALJ's Order should be affirmed. Additionally, Respondent argues the Board lacks jurisdiction to review a preliminary hearing Order denying additional medical treatment.

1. Does the Board have jurisdiction to review the ALJ's Order denying medical treatment?

K.S.A. 44-534a(a)(2) states, in part:

Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing on the claim, except that if the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues. A finding with regard to a disputed issue of

¹ ALJ Order (Dec. 26, 2023) at 2-3.

whether the employee suffered an accident, repetitive trauma or resulting injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board. Such review by the board shall not be subject to judicial review.... Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

K.S.A. 44-551(l)(2)(A) states, in part:

If an administrative law judge has entered a preliminary award under K.S.A. 44-534a, and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing.

The term "certain defenses" refers to defenses that dispute the compensability of the injury under the Workers Compensation Act.² Compensability was not at issue here. The issue of Claimant's entitlement to medical treatment is not one of the jurisdictional issues listed in K.S.A. 44-534a and is not subject to review at this time. Therefore, a challenge to an ALJ's denial of medical treatment is not an issue the Board has jurisdiction to review under K.S.A. 44-534a.

In the absence of legal authority to consider the denial of medical treatment, Claimant's application for review of the preliminary Order denying medical treatment is dismissed.

2. Should these claims be dismissed for lack of prosecution pursuant to K.S.A. 44-523(f)?

K.S.A. 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

² See *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

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 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.

In *Glaze v. J.K. Williams, LLC*, the Kansas Supreme Court wrote K.S.A. 44-523(f)(1):

unambiguously prohibits an ALJ from granting an extension unless a motion for extension has been filed within three years of filing the application for hearing. Any other interpretation strains the common reading of the statute's ordinary language. This conclusion is confirmed when general rules of grammar and punctuation are applied.³

Even actively prosecuted claims have been dismissed, as occurred in *Garmany v. Casey's General Stores*,⁴ where the Court of Appeals wrote:

Donna L. Garmany's workers compensation claim was dismissed by the Kansas Workers Compensation Board (Board) pursuant to K.S.A. 2011 Supp. 44-523(f)(1), because her claim had not proceeded to hearing within 3 years of filing and she had not requested an extension within that 3-year period. It was dismissed in spite of the fact that she had not been dilatory in pursuing her claim, she had not abandoned her claim, and there was no dispute that she had not reached maximum medical improvement. Unfortunately, the statute that requires this result, although inartfully drafted, is not ambiguous so we are required to uphold the Board's decision. It is up to the legislature to change the statute if it wants to avoid this clearly harsh result in the future. Accordingly, we affirm the decision of the Board dismissing Garmany's claim.

³ *Glaze v. J.K. Williams, LLC*, 309 Kan. 562, 565-66, 439 P.3d 920, 923 (2019).

⁴ *Garmany v. Casey's General Stores*, No. 116,445, 2017 WL 754305 (Kansas Court of Appeals unpublished opinion filed Feb. 24, 2017) *rev. denied* 306 Kan. ____ (2017).

Under K.S.A. 44-523(f), a motion to extend for good cause must be filed before the applicable time frame runs.⁵ No motion to extend the time to prosecute was filed in either claim. The parties agreed to extend the three-year statutory deadline to prosecute to November 12, 2023, via agreed orders. The agreed orders are not motions to extend the time to prosecute.

The fact Claimant is pro se does not eliminate the statutory requirement to file a motion to extend the time to prosecute contained in K.S.A. 44-523(f). In *Joritz v. University of Kansas*, the Kansas Court of Appeals wrote:

Joritz is not entitled to special treatment as a pro se appellant. Kansas caselaw establishes that Joritz' pro se status entitles her only to the liberal construction of arguments that are properly before us.⁶

The Board affirms the ALJ's decision to dismiss both claims. Claimant did not file a motion requesting an extension of time to prosecute. Pursuant to K.S.A. 44-523(f)(1), the Board is limited to dismissing both claims.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Members the Order of ALJ Kenneth J. Hursh, dated December 26, 2023, dismissing these matters with prejudice is affirmed. Claimant's application for review of the denial of additional medical treatment is dismissed.

IT IS SO ORDERED.

⁵ See *id.*

⁶ *Joritz v. Univ. of Kansas*, 61 Kan. App. 2d 482, 483, 505 P.3d 775, 778 (2022), *rev. denied* ___ Kan. ___ (May 26, 2022).

JOAN RIVERA

7

AP-00-0480-640
AP-00-0480-642

Dated this _____ day of March, 2024.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Via OSCAR

Joan Rivera, Pro Se Claimant
Michael Kauphusman, Attorney for Respondent and its Insurance Carrier
Hon. Kenneth J. Hursh, Administrative Law Judge