BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

STACI D. HOFFMAN	)	
Claimant	)	
V.	)	
	)	Docket No. 1,058,645
DENTAL CENTRAL, P.A.	)	
Respondent	)	
AND	)	
	)	
ACCIDENT FUND GENERAL INSURANCE	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) request review of the March 26, 2015, Order entered by Administrative Law Judge (ALJ) Thomas Klein.

APPEARANCES

Matthew L. Bretz, of Hutchinson, Kansas, appeared for the claimant. Vince Burnett, of Wichita, Kansas, appeared for respondent. Matthew J. Schaefer, of Wichita, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The Board has adopted the same stipulations and considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing from March 24, 2015, with exhibits attached and the documents of record filed with the Division.

ISSUES

Respondent filed a motion to dismiss the claim under K.S.A. 2011 Supp. 44-523(f)(1). The ALJ found claimant established good cause to extend her time to prosecute her claim to a regular hearing, settlement hearing or agreed award under the statute and granted claimant's motion to extend. The ALJ determined claimant has not reached maximum medical improvement as a result of her injury. Respondent's motion to dismiss was denied. Dr. Do was appointed as the claimant's authorized treating physician.

Respondent appeals, arguing this claim should be dismissed for lack of prosecution. Respondent contends there can be no speculation on legislative intent of the statute. Therefore, since claimant did not proceed to regular hearing, settlement hearing or agreed award by November 22, 2014, three years after she filed her application for hearing, and because she waited until December 22, 2014, to request an extension, this matter should be dismissed with prejudice.

Claimant argues this matter should not be dismissed as there is good cause for why this claim has not proceeded to regular hearing, settlement hearing or agreed award. Claimant contends she is not yet at maximum medical improvement because respondent has repeatedly delayed treatment. Therefore, the ALJ's Order should be affirmed.

Issues on appeal:

1. Does the Board have jurisdiction to consider this matter on appeal from a preliminary hearing Order?

2. Pursuant to K.S.A. 2011 Supp. 44-523(f)(1), as a final adjudication, did claimant exceed the three year statutory limitation for proceeding to final disposition of her claim and, if so, should the claim be dismissed?

3. Did the ALJ exceed his jurisdiction by failing to dismiss this matter with prejudice?

4. Did the filing of a new Application for Hearing on April 24, 2015, restore or return this matter to timeliness, thus avoiding the dismissal provisions of K.S.A. 2011 Supp. 44-523(f)(1)?

FINDINGS OF FACT

Claimant, a dental assistant for respondent, suffered injury to her upper back on October 3, 2011, when, as she leaned over a patient, she heard a pop and felt immediate pain. Within three weeks the pain spread to her neck and right shoulder. An Application for Hearing was filed on November 22, 2011, claiming an accident date of October 6, 2011. An Amended Application for Hearing was filed on November 28, 2011, claiming an accident date of October 3, 2011.

Claimant was referred for medical treatment to Dr. Hill, who diagnosed muscle strain of the upper back with trigger points. Claimant was placed on restriction, provided pain medication and referred for physical therapy. Claimant continued to receive medical treatment, with a referral to Dr. Estivo in June 2012. Dr. Estivo found claimant to be at maximum medical improvement (MMI) on November 21, 2012 and given a 4 percent functional impairment at the level of the right shoulder, and a 0 percent functional

impairment at the level of the neck. Applications for Preliminary Hearing were filed on January 9, February 13, October 10 and November 19, all in 2014.

Claimant remained under authorized medical treatment with Pat Do., M.D., through all of 2014, undergoing shoulder surgery on May 30, 2014, involving an arthroscopic subacromial decompression with bankart repair. As of December 16, 2014, claimant continued under temporary restrictions with occasional lifting to 50 pounds, frequent lifting to 20 pounds and continuous lifting to 10 pounds.

Claimant filed "Claimant's Motion for Extension Of Time To Proceed To Regular Hearing" on December 22, 2014. Respondent then filed its "Motion To Dismiss For Lack Of Prosecution" on January 29, 2015. The matter went to hearing on March 24, 2015, which resulted in the Order of March 26, 2015, the subject of this appeal. Claimant then filed a new Application For Hearing on April 24, 2015.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2011 Supp. 44-534a states:

> (a) (1) After an application for a hearing has been filed pursuant to K.S.A. 44-534, and amendments thereto, the employee or the employer may make application for a preliminary hearing, in such form as the director may require, on the issues of the furnishing of medical treatment and the payment of temporary total or temporary partial disability compensation. At least seven days prior to filing an application for a preliminary hearing, the applicant shall give written notice to the adverse party of the intent to file such an application. Such notice of intent shall contain a specific statement of the benefit change being sought that is to be the subject of the requested preliminary hearing. If the parties do not agree to the change of benefits within the seven-day period, the party seeking a change in benefits may file an application for preliminary hearing which shall be accompanied by a copy of the notice of intent and the applicant's certification that the notice of intent was served on the adverse party or that party's attorney and that the request for a benefit change has either been denied or was not answered within seven days after service. Copies of medical reports or other evidence which the party intends to produce as exhibits supporting the change of benefits shall be included with the application. The director shall assign the application to an administrative law judge who shall set the matter for a preliminary hearing and shall give at least seven days' written notice by mail to the parties of the date set for such hearing.
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> (2) Such preliminary hearing shall be summary in nature and shall be held by an administrative law judge in any county designated by the administrative law judge, and the administrative law judge shall exercise such powers as are provided for the conduct of full hearings on claims under the workers compensation act. 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 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. If an appeal from a preliminary order is perfected under this section, such appeal shall not stay the payment of medical compensation and temporary total disability compensation from the date of the preliminary award. If temporary total compensation is awarded, such compensation may be ordered paid from the date of filing the application, except that if the administrative law judge finds from the evidence presented that there were one or more periods of temporary total disability prior to such filing date, temporary total compensation may be ordered paid for all periods of temporary total disability prior to such date of filing. The decision in such preliminary hearing shall be rendered within five days of the conclusion of such hearing. 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.
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> (b) If compensation in the form of medical benefits or temporary total disability benefits has been paid by the employer or the employer's insurance carrier either voluntarily or pursuant to an award entered under this section and, upon a full hearing on the claim, the amount of compensation to which the employee is entitled is found to be less than the amount of compensation paid or is totally disallowed, the employer and the employer's insurance carrier shall be reimbursed from the workers compensation fund established in K.S.A. 44-566a, and amendments thereto, for all amounts of compensation so paid which are in excess of the amount of compensation the employee is entitled to less any amount deducted from additional disability benefits due the employee pursuant to subsection (c) of K.S.A. 44-525, and amendments thereto, as determined in the full hearing on the claim. The director shall determine the amount of compensation paid by the employer or insurance carrier which is to be reimbursed under this subsection, and the director shall certify to the commissioner of insurance the amount so determined. Upon receipt of such certification, the commissioner of insurance shall cause payment to be made to the employer or the employer's insurance carrier in accordance therewith. No reimbursement shall be certified unless the request is made by the employer or employer's insurance carrier within one year of the final award.

The Board has jurisdiction to review decisions of administrative law judges only to the extent provided in the Workers Compensation Act (Act). The Board has jurisdiction to review preliminary hearing orders as to disputed issues of compensability as specifically set forth in K.S.A. 2011 Supp. 44-534a(a)(2). The Board also has jurisdiction to review preliminary hearing orders under K.S.A. 2011 Supp. 44-551(i)(2)(A) if it is alleged that the

ALJ exceeded his or her jurisdiction in granting or denying the relief requested at the preliminary hearing.

The Board has ruled in the past on appeals from preliminary hearing orders that motions to dismiss are interlocutory orders and not reviewable on appeal as preliminary hearing orders.[1] However, in this case the Order was from a preliminary hearing. Thus, K.S.A. 2011 Supp. 44-534a would apply.

The statute does not define the "certain defenses" which may be appealed to the Board. However, "certain defenses" have been defined as being subject to review "only if they dispute the compensability of the injury" under the Act.[2] In this instance, the limitations contained in K.S.A. 2011 Supp. 44-523(f)(1) directly effect the compensability of this claim. Therefore, the Board does have jurisdiction to consider this appeal.

K.S.A. 2011 Supp. 44-523(f)(1) states:

> (f)(1) 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 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.

The Board must next determine whether the ruling by the ALJ properly applied K.S.A. 2011 Supp. 44-523(f)(1). This section of the Act is a statute of limitations applicable to an ongoing workers compensation claim. A statute of limitations is an affirmative defense and, here, the burden of pleading and proving its applicability rests on respondent. However, the burden of proving facts sufficient to toll the statute of limitations is on claimant.

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[1] *Stupasky v. Hallmark Marketing Corp.*, No. 1,031,988, 2012 WL 1142954 (Kan. WCAB Mar. 14, 2012).

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

Respondent has presented evidence that claimant did not meet the requirements of the statute. Here, claimant filed an Application for Hearing on November 22, 2011, with an amended application filed on November 28, 2011. The matter had not proceeded to regular hearing, a settlement hearing, or an agreed award under the Workers Compensation Act within three years. Respondent filed its Application for Dismissal with the Division on February 3, 2015, after claimant filed its Motion to Extend on December 22, 2014.

The ALJ held the statute to be ambiguous as it relates to the time limitation and the rights of claimant to extend the time "for good cause shown." However, the statute is very specific in its requirement that the motion to extend be filed prior to the running of the three year limitation. Claimant did not accomplish this and is in violation of the specific language of the statute. There is nothing ambiguous about this statute. When a statute is "plain and unambiguous, the courts must give effect to its expressed language rather than determine what the law should or should not be."[3]

Claimant filed a new Application for Hearing on April 24, 2015, in an attempt to restore or return this matter to timeliness. Claimant contends the filing of the new Application tolls the statute of limitations. However, a claim once barred due to the running of a statute of limitations cannot be revived even by subsequent voluntary payments of compensation by an employer.[4] Likewise, similar logic would prohibit a claimant from reviving or tolling the statute of limitations in this matter with the filing of a new Application for Hearing, which, itself, is beyond the statute of limitations.

K.S.A. 2011 Supp. 44-551(i)(2)(A) states:

> (2)(A) 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. Such an appeal from a preliminary award may be heard and decided by a single member of the board. Members of the board shall hear such preliminary appeals on a rotating basis and the individual board member who decides the appeal shall sign each such decision. The orders of the board under this subsection shall be issued within 30 days from the date arguments were presented by the parties.

The language of K.S.A. 2011 Supp. 44-523(f)(1) is clear and unambiguous. A claimant may request an extension of the statutory time limits "provided such motion to extend is filed prior to the three year limitation provided for herein." The Order of the ALJ

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[3] *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 214 P.3d 676 (2009).

[4] *Solorio v. Wilson*, 161 Kan. 518, 169 P.2d 822 (1946).

attempts to describe the statute as ambiguous. This appears to be an attempt to avoid the legislative mandate contained in the statute. An ALJ is not empowered with the right to ignore the intent of the Legislature. To do so exceeds his jurisdiction.

The Board finds claimant failed to meet the time limits of K.S.A. 2011 Supp. 44-523(f)(1) in that more than three years had run from the date of filing of the Application for Hearing and the matter had not proceeded to a regular hearing, a settlement hearing, or an agreed award. Additionally, claimant's motion for an extension was filed after the three year statute had expired. The claim, by statute, must be dismissed with prejudice for lack of prosecution. The Order of the ALJ is reversed.

CONCLUSIONS

After reviewing the record compiled to date, the Board concludes the preliminary hearing Order should be reversed. Claimant is in violation of the time limitation set forth in K.S.A. 2011 Supp. 44-523(f)(1) and this matter should be dismissed with prejudice for lack of prosecution.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Thomas Klein dated March 26, 2015, is reversed and the matter dismissed for lack of prosecution.

IT IS SO ORDERED.

Dated this _____ day of June, 2015.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

DISSENTING OPINION

The undersigned Board Members respectfully disagree with the majority. The Board does not have jurisdiction and should dismiss respondent's application for review.

The majority seems to regard the ALJ's March 26, 2015, Order as a preliminary hearing award pursuant to K.S.A. 2011 Supp. 44-534a[5] for some purposes, but not for others. The majority concedes the Board would have no jurisdiction to review the ALJ's Order if the ALJ denied a motion to dismiss because a denial of a motion to dismiss is interlocutory, as the Board held in *Stupasky*.[6] The majority found the ALJ's Order resulted from a preliminary hearing and that K.S.A. 44-534a applies. However, by definition, preliminary hearing orders are not final because such orders are only effective "pending the conclusion of a full hearing on the claim" and preliminary findings or preliminary awards "shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts."[7]

The majority thus deprives claimant the right to contest the issue of dismissal in the regular hearing process, in which there would be a full presentation of the facts. Hence, the Board's consideration of the substance of the dismissal issue is contrary to the preliminary hearing statute.

It is apparent the majority disagrees with the ALJ's interpretation and application of K.S.A. 2011 Supp. 44-523(f)(1). But, the Board may only consider that interpretation and application if it has jurisdiction to review the substantive issue of whether claimant's application for hearing should be dismissed for lack of prosecution. The majority's characterization of the ALJ's preliminary order is incomplete. Claimant's application for preliminary hearing was a subject of the hearing before the ALJ. However, the motions of the parties filed under K.S.A. 44-523(f)(1) were scheduled for hearing at the same time. Whether a claim should be dismissed for lack of prosecution must, according to K.S.A. 44-523(f)(1), be brought before the ALJ by motion, not by preliminary hearing.

The majority, in a conclusory fashion, found the issue of whether this claim should be dismissed under K.S.A. 2011 Supp. 44-523(f)(1) is a jurisdictional issue because that issue fell within the category of "certain defenses" within the meaning of K.S.A. 44-534a(a)(2). But, there is no provision in the Act that provides the dismissal issue falls within the category of "certain defenses." The term "certain defenses" refers to defenses

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[5] The timely claim requirement was repealed in 2011 and the reference to that defense was eliminated from K.S.A. 44-534a.

[6] *Stupasky*, No. 1,031,988, 2012 WL 1142954.

[7] K.S.A. 2011 Supp. 44-534a(a)(2).

subject to review by the Workers Compensation Board only if they dispute the compensability of the injury under the Act.[8]

In *Parsons*,[9] a Board Member discussed the "certain defenses" provision of K.S.A. 44-534a:

> The Appeals Board has held in the past and continues to hold that the phrase "certain defenses is analogous to some defenses as opposed to any defenses or all defenses. The word "certain" as used in K.S.A. 44-534a is intended to limit the type and character of defenses which can be said to give rise to Appeals Board jurisdiction. For insight into the "certain defenses" contemplated by the statute, the Appeals Board looks to other issues specified in K.S.A. 44-534a, which, if disputed, are considered jurisdictional. They include whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment and whether notice is given or claim timely made. What these jurisdictional issues have in common is they all go to the compensability of the claim. For a workers compensation claim to be compensable, each and every one of the issues listed, if disputed, must be proven by claimant before he/she can recover any benefits under the Workers Compensation Act. The Appeals Board has previously held, and reaffirms herein, that the "certain defenses" contemplated by K.S.A. 44-534a are defenses which go to the compensability of the claim; such as, willful failure to use a guard or the intoxication defense.[10]

The plain language of K.S.A. 2011 Supp. 44-523(f)(1) reveals it applies to all claims in which an application for hearing has been filed. The statute makes no distinction between compensable and noncompensable claims. The subject of the provision is dismissal for lack of prosecution, not whether or not the claim is compensable. The majority refers to K.S.A. 44-523(f)(1) as an "affirmative defense" and a "statute of limitations." However, no authority is cited for either of those propositions or why such labels are material to the question of the Board's jurisdiction.

Dismissal for lack of prosecution is analogous to the dismissal allowed by K.S.A. 2011 Supp. 44-518, when a claimant refuses to submit to a medical examination while proceedings are pending. The denial of a motion to dismiss a claim pursuant to K.S.A. 44-518 is interlocutory in nature and not subject to Board review.[11] The same standard applies to a request for dismissal under K.S.A. 44-523(f)(1).

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[8] *Carpenter*, 26 Kan. App. 2d 672.

[9] *Parsons v. Attica Long Term Care Facility*, No. 196,412, 1997 WL 378663 (Kan. WCAB June 3, 1997).

[10] *Id.* at 3.

[11] See *Stingley v. Keim TS, Inc.*, No. 1,027,574, 2006 WL 2632031 (Kan. WCAB Aug. 31, 2006).

These Board Members would find the Board has no jurisdiction and dismiss the application for Board review because the ALJ's Order is interlocutory in nature and does not fall within the "certain defenses" clause of K.S.A. 44-534a(a)(2).

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BOARD MEMBER

_____
BOARD MEMBER

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