

The Administrative Law Judge denied the respondent's Motion for Dismissal of claimant's application for vocational rehabilitation benefits. The respondent and insurance carrier request the Appeals Board review that Order. However, before the Appeals Board may address the issues that were before the Administrative Law Judge, it first must determine that the Appeals Board has jurisdiction to hear an appeal at this juncture of the proceeding.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board, for purposes of this preliminary matter, finds that it does have jurisdiction pursuant to K.S.A. 44-551(b)(2)(A) to review the preliminary order by the Administrative Law Judge. Respondent alleges the Administrative Law Judge exceeded his jurisdiction in granting claimant vocational rehabilitation benefits at the preliminary hearing. The facts relevant to a determination of this matter are as follows:

Following a preliminary hearing on August 30, 1993, the Administrative Law Judge ordered a vocational rehabilitation referral for purposes of reassessment and report regarding the claimant's need for further vocational rehabilitation. The vocational rehabilitation vendor was directed to specifically address Priority Six, that is the claimant's need for retraining. An assessment was completed and a vocational rehabilitation plan was proposed by the vocational rehabilitation vendor. An assessment/plan review was completed by Mark Conboy, Assistant Rehabilitation Administrator, on January 7, 1994. The assessment and plan were not approved for several reasons including the vendor's failure to clearly show that claimant could earn comparable wages without reaching Priority Six and the vendor's failure to seriously address a Priority Six plan. The Assistant Rehabilitation Administrator recommended that the case not proceed to mediation but that the parties instead take the case directly to the Administrative Law Judge for a determination as to whether rehabilitation should continue. If a determination was made there that rehabilitation should continue, it was his recommendation that a new vendor be appointed.

On January 19, 1994, a Form E-1 Application for Preliminary Hearing was filed on behalf of claimant to address the issues of temporary total disability compensation, vocational rehabilitation and replacement of vendor. On March 24, 1994, Administrative Law Judge James R. Ward, following a March 22, 1994, hearing on Application for Preliminary Hearing, issued an Order stating that the vendor be removed, that the respondent and insurance carrier select another vendor within fifteen (15) days to perform another assessment and for temporary total disability compensation to be paid. Respondent appeals from that Order alleging that the Administrative Law Judge did not have jurisdiction to hear the matter as the time for claimant to seek review of the Assessment/Plan Review by the Assistant Rehabilitation Administrator had passed. Hence, it is argued the claimant's Application for Preliminary Hearing was time barred by K.S.A. 1992 Supp. 44-510g(e)(2).

K.S.A. 1992 Supp. 44-510g(e)(2) provides:

"The rehabilitation administrator shall ensure the assessment and the rehabilitation plan are objective and reasonable and the rehabilitation goal is reasonably obtainable. Within 20 days after the initial review of the report, the rehabilitation administrator shall deliver copies of the report, together with

the rehabilitation administrator's recommendations and any revisions of or objections to the assessment or the rehabilitation plan, to each party, to the director and to the assigned administrative law judge, if there is one. Within 10 days after receipt of such report, any party may request a hearing before the director on any matter contained in the report or any such recommendations or revisions.”

Respondent argues that since claimant failed to request a hearing within 10 days after receipt of the Assessment/Plan Review by the Assistant Rehabilitation Administrator, that he is now precluded from doing so and that the Administrative Law Judge exceeded his jurisdiction in hearing claimant's Application for Preliminary Hearing on the issue of vocational rehabilitation.

The authority of the Administrative Law Judge to hear vocational rehabilitation issues is expressly provided in K.S.A. 1992 Supp. 44-534a. The Appeals Board does not agree that the Administrative Law Judge loses jurisdiction to hear vocational rehabilitation issues at preliminary hearings where a party fails to seek hearing within ten (10) days following receipt of an assessment or plan review by the Rehabilitation Administrator. K.S.A. 1992 Supp. 44-510g(e)(1) provides in pertinent part that:

“If the employee has remained off work for 90 days or if it is apparent to the director the employee requires vocational rehabilitation services and, in either case, if approved rehabilitation services are not voluntarily furnished to the employee by the employer, the director, on such director's own motion or upon application of any party, may refer the employee to a qualified public agency, if the employee is eligible, or to a private agency or facility, or the employer's rehabilitation service program, if qualified, for an assessment and for a report of the practicability of, need for, and kind of service, treatment, training or rehabilitation which is or may be necessary and appropriate to render such employee able to perform work in the open labor market and to earn comparable wages, as determined pursuant to subsection (a) of K.S.A. 44-510e and amendments thereto.” (Emphasis added.)

Under the facts of this case, the provisions of subparagraphs (1) and (2) of K.S.A. 1992 Supp. 44-510g(e) may be difficult to reconcile. However, we cannot agree that an Administrative Law Judge loses jurisdiction of vocational rehabilitation issues where a party fails to timely appeal following a review report by the Rehabilitation Administrator. This is particularly so where K.S.A. 1992 Supp. 44-510g(e)(1) permits the Director (read “Administrative Law Judge”) “on such director's own motion” to refer the employee for vocational rehabilitation services. Accordingly, the ten (10) days to request a hearing provided for in K.S.A. 1992 Supp. 44-510g(e)(2) may limit requests for review by the parties but not by the Administrative Law Judge. The Appeals Board finds that the Administrative Law Judge did not exceed his jurisdiction in ordering vocational rehabilitation benefits.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge James R. Ward, dated March 24, 1994, remains in full force and effect.

IT IS SO ORDERED.

Dated this ____ day of September, 1994.

BOARD MEMBER PRO TEM

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