

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001787-WC

DAVID ARVIN

APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-94-33192

DEPARTMENT OF MILITARY AFFAIRS;
HON. ROBERT L. WHITTAKER, DIRECTOR OF SPECIAL FUND;
HON. RICHARD H. CAMPBELL, ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING AND ORDER DISMISSING APPEAL
** **

BEFORE: KNOPF, KNOX, AND SCHRODER, JUDGES.

KNOPF, JUDGE: This is an appeal from an opinion and order by the Workers' Compensation Board (Board), dismissing an appeal from an Administrative Law Judge (ALJ) as untimely. The appellant urges this Court to consider the merits of his constitutional challenge to the two (2) year blackout period on motions to reopen contained in KRS 342.125(3). Finding that the Board correctly determined that the appeal was untimely, we affirm, and likewise dismiss the appeal.

The procedural history of his case is quite convoluted, but it is necessary to a proper consideration of the issues presented. The appellant, David Arvin, was employed by the Commonwealth of Kentucky, Department of Military Affairs (the Department). On August 2, 1994, Arvin sustained a work-related injury to his head, shoulder, neck, hand and wrist. Within several weeks, he began experiencing headaches which gradually became more severe. By November 1995, his headaches worsened and he had begun to suffer blackout spells to the extent that he was unable to continue working even in his light duty position. His doctors attributed the blackout spells to a cervical condition caused by the accident.

Arvin filed his claim for workers' compensation benefits and medical expenses on August 2, 1996. Eventually, ALJ James L. Kerr (ALJ Kerr) determined that Arvin's cervical condition was causally related to his work injury. ALJ Kerr found that Arvin suffered a twenty percent (20%) occupational disability, and apportioned liability equally between the Department and the Special Fund. Finally, ALJ Kerr concluded that Arvin was not entitled to temporary total disability (TTD) benefits since "it appears that plaintiff ceased employment with another employer for reasons other than his work-related injury."

On appeal to the Board, Arvin raised the issues of sufficiency of the evidence, the denial of TTD, and his average weekly wage. The Department and the Special Fund cross-appealed the calculation of his average weekly wage. In an opinion and order issued on June 27, 1997, the Board found for Arvin,

reversing and remanding ALJ Kerr's denial of TTD and his calculation of Arvin's average weekly wage.

During the pendency of the appeal, Arvin filed a motion to reopen his claim based upon fraud and/or newly discovered evidence. The motion to reopen was held in abeyance while the appeal was before the Board. On August 26, 1997, Arvin filed a "Request for issuance of Decision after Remand", seeking a ruling based upon the Board's order. On September 4, Arvin filed a "motion for further evidentiary hearing prior to decision on remand." On September 12, ALJ Kerr issued an order modifying Arvin's award in accord with the directions of the Board. On September 15, Arvin filed a motion "to reopen evidentiary record to receive affidavits of plaintiff and Dr. Gilbert," and an additional motion to reopen the evidentiary record.

On October 2, ALJ Kerr issued an order overruling the motion to reopen the record to receive additional evidence. On October 22, Arvin filed a "request for ruling on motion to reopen." In response, ALJ Kerr issued a subsequent order on November 20, advising Arvin that "all pending motions were overruled by order of October 2, 1997."

Despite this order, Arvin's motion to reopen was assigned to an arbitrator for consideration. On January 5, 1998, the arbitrator determined that his motion to reopen was premature because it had been filed less than two (2) years after the original award or order. KRS 342.125(3). Based solely upon the timing of the filing, the arbitrator overruled Arvin's motion to reopen.

Arvin sought a *de novo* review of this ruling by the ALJ, arguing that the two (2) year limitation was unconstitutional. The *de novo* review was assigned to ALJ Richard H. Campbell (ALJ Campbell), who concluded:

this "appeal" initiated through a request for a de novo review can and must be dismissed on bases other than the questioned constitutionality of the current version of KRS 342.125, to wit:

(a) Judge Kerr's November 20, 1997, order clarifying the order of October 2, 1997, overruled all pending motions; and as disclosed by a review of the file, all petitioner's motions to reopen and requests to reopen the evidentiary record were filed and pending quite sometime in advance of the October 2, 1997, order. Consequently, those orders were dispositive of all such motions; and, if he wished to challenge the appropriateness of those orders, it was incumbent upon petitioner to institute an appeal to the Workers' Compensation Board within 30 days after the date of filing of the November 20, 1997, order. As no such appeal was instituted, Judge Kerr's orders overruling the motions to reopen and requests to reopen the evidentiary record became final December 24, 1997. Therefore, at that point, there were no pending motions for Chief Arbitrator King to review or act upon; and, thus, his order of January 5, 1998, was moot and of no effect.

(b) Even if one assumes there remained a motion to reopen requiring an arbitrator's ruling, the doctrine of res judicata was applicable thereto and required such motion to be overruled on that basis, Judge Kerr's orders having overruled similar motions containing the same allegations and offering the same affidavits in support of those allegations. Kentucky Wagon Mfg. Co. v Esters, Ky., 297 S.W. 811 (1927), and Hysteam Coal Corp. v. Ingram, Ky., 141 S.W.2d 540 (1940). Thus, Chief Arbitrator King's January 5, 1998, order effected the proper disposition of the motion that was the subject matter of his ruling, albeit for the wrong reason.

ALJ Opinion and Order, March 2, 1998, pp. 6-8.

The Board affirmed the ALJ's order on appeal, agreeing with ALJ Campbell that ALJ Kerr's prior order overruling the motion to reopen was dispositive. Arvin now appeals, asking this Court to rule on the constitutionality of the statutory prohibition on reopening within two (2) years of a prior award or order. We conclude that ALJ Campbell and the Board adequately addressed the procedural issues. Therefore we decline to reach the merits of the constitutional issue.

Arvin alleges that ALJ Kerr could not have ruled on his motion to reopen because he was not aware that it was pending. There is some support in the record for this inference. ALJ Kerr's order of October 2, 1997 only overruled Arvin's motions to reopen the record to introduce additional evidence. Although these motions were related to his motion to reopen, they involved evidentiary issues and were separate from the motion to reopen. Despite ALJ Kerr's subsequent order, there is no indication that the October 2 order sought to address the motion to reopen.

In addition, the Board refers to an August 5, 1997 directive from the Department of Workers' Claims to ALJ Kerr for consideration of the remand and previously filed motion to reopen. The Board concluded that since the directive specifically mentioned the motion to reopen, ALJ Kerr was aware of the motion to reopen and intended to rule upon it on October 2. We are unable to find this directive in the record. It is inappropriate for the Board to rely upon evidence outside of the record.

Nevertheless, these issues do not change the ultimate result. A motion to reopen may be filed while the same matter is

pending on appeal to the Board. However, the ALJ does not have jurisdiction to consider the motion to reopen while the appeal is pending. Jerry's Drive In, Inc. v. Young, Ky., 335 S.W.2d 323 (1960). Upon remand by the Board, the ALJ is reinvested with jurisdiction, and may rule upon the motion to reopen.

Therefore, ALJ Kerr was acting within his authority on November 20, 1997, when he stated that he was overruling Arvin's motion to reopen.

Furthermore, even if ALJ Kerr was unaware of the specific motion to reopen at the time of his October 2 order, he was subsequently made aware of that motion and notified Arvin that he was overruling "all pending motions" in the November 20 order. Although ALJ Kerr could and should have made clearer what he was doing,¹ his order of November 20 constituted a dismissal of Arvin's motion to reopen. Since Arvin did not file his appeal within thirty (30) days from ALJ Kerr's final order, his appeal is not timely and must be dismissed.

However, this Court feels the need to address one (1) other matter regarding ALJ Kerr's denial of Arvin's motion to reopen. Both the opinion by ALJ Campbell and the opinion by the Board imply that ALJ Kerr denied Arvin's motion to reopen on its merits. Such an implication is not supported by the record. ALJ Kerr made no factual findings on the motion to reopen. Furthermore, in its response to Arvin's motion to reopen, the Department specifically urged that the motion be denied because

¹ Indeed, the Arbitrator could not immediately determine from the record that ALJ Kerr had already ruled upon the motion to reopen.

it had been filed less than two (2) years after the prior opinion and award. The Department did not address the merits of the motion. Therefore, we must presume that ALJ Kerr intended to deny Arvin's motion to reopen based upon KRS 342.125(3), and not upon substantive grounds. Consequently, the dismissal must be deemed to be without prejudice to a timely filing of a motion to reopen. To hold otherwise would be to engage in an unfair procedural shell game with workers' compensation claimants.

Accordingly, the opinion and order by the Workers' Compensation Board is affirmed, and this appeal is ordered dismissed.

ENTERED: May 21, 1999

/s/ Wm. L. Knopf
JUDGE, COURT OF APPEALS

ALL CONCUR.

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