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NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2006-CA-001664-WC

STEPHEN J. HICKMAN

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-04-81478

UNITED PARCEL SERVICE; HON.
JOHN J. THACKER, ADMINISTRATIVE
LAW JUDGE; AND WORKERS'
COMPENSATION BOARD

APPELLEES

OPINION
REVERSING AND REMANDING

** ** * * *

BEFORE: TAYLOR, JUDGE; ROSENBLUM,¹ SENIOR JUDGE; MILLER,²
SPECIAL JUDGE.

TAYLOR, JUDGE: Stephen J. Hickman petitions this Court to
review an opinion of the Workers' Compensation Board entered

¹ Senior Judge Paul W. Rosenblum sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

² Retired Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

July 7, 2006, affirming the decision of the Administrative Law Judge (ALJ) to limit the award of medical benefits for Hickman's work-related injury to a period from August 16, 2004, through October 17, 2004. We reverse and remand.

Hickman was employed by United Parcel Service (UPS) when he suffered a work-related injury to his left shoulder on July 20, 2004. Following the injury, Hickman returned to work on October 18, 2004. The record reveals that Hickman had suffered pain in the same shoulder prior to the work-related injury. In fact, Hickman suffered injury to his shoulder and back from five previous motor vehicle accidents occurring between 1994 and 2002.

Hickman filed a claim for workers' compensation benefits as a result of the work-related injury. The ALJ ultimately found that Hickman suffered a work-related injury during the scope and course of his employment on July 20, 2004. The ALJ, however, found that the injury constituted a temporary exacerbation of Hickman's pre-existing shoulder condition. The ALJ did not believe the work-related injury produced a permanent disability to Hickman. As such, the ALJ limited Hickman's award of income benefits to temporary total disability (TTD) for a period of August 16, 2004, through October 17, 2004. The ALJ further found UPS liable for medical expenses incurred by Hickman through the same period of August 16, 2004, through

October 17, 2004. This period represents the time Hickman was off work due to his injury. The ALJ made no findings of fact supporting his decision to terminate medical benefits on October 17, 2004. Being dissatisfied with the award, Hickman sought review with the Workers' Compensation Board (Board). On July 7, 2006, the Board entered an opinion affirming the ALJ's decision. This review follows.

Hickman contends the ALJ committed reversible error by limiting his award of medical benefits to those expenses incurred between August 16, 2004, and October 17, 2004. Specifically, Hickman claims the ALJ erroneously found that medical benefits should only be recoverable for the period of time over which TTD benefits were payable. Hickman argues that such finding was clearly erroneous and that there was no medical testimony in the record to support the ALJ's finding to limit medical benefits.

Based upon the unique circumstances of this case, we hold that the ALJ's decision to limit Hickman's award of medical benefits to the period of August 16, 2004, through October 17, 2004, must be vacated and remanded for additional findings of fact consistent with Kentucky Revised Statutes 342.020. In reaching this decision, we view as persuasive Board Member Stanley's dissenting opinion and adopt his reasoning herein:

Given the ALJ's finding that the work event of July 20, 2004 constituted an inquiry pursuant to KRS 342.0011(1), I believe the decision below to terminate medical benefits as of October 17, 2004, is arbitrary as a matter of law and "clearly erroneous on the basis of reliable, probative, and material evidence contained in the whole record." See KRS 342.285(2)(d) and (e). I further believe the matter in general has been sufficiently preserved on appeal so as to warrant action by this Board vacating that portion of the ALJ's ruling terminating medical benefits at random, with instructions on remand that the ALJ make appropriate findings of fact concerning the issue in accordance with the medical evidence of record in order to bring the award into conformity with the provisions of KRS 342.020. See KRS 342.285(2)(c).

Were it the case that "disability" for purposes of an award of medical benefits under KRS 342.020 and "disability" for purposes of an award of income benefits under KRS 342.730 were always synonymous, then I would agree that the decision of the ALJ should be affirmed. However, it is presently settled law that an employee's right to reasonable and necessary medical treatment is not contingent upon an award of income benefits, either temporary or permanent. In Combs v. Kentucky River District Health Dept., 194 S.W.3d 823 (Ky.App. 2006) The court cited to the earlier supreme court case of Cavin v. Lake Construction Co., 451 S.W.2d 159, 161-162 (Ky. 1970), as binding authority for the proposition that "it is [not] necessarily inconsistent for the board to award payment of medical expenses without finding some extent of disability. It is not impossible for a non-disabling injury to require medical attention."

The distinction between "disability" for purposes of an award of medical benefits

and "disability" for purposes of an award of income benefits was addressed in the dissenting opinion penned by this Board member in Kentucky River District Health Dept. v. Oma Combs, Claim No. 03-79326 (April 29, 2005). Rather than rephrase the position set out in that dissenting opinion, which was cited with approval by the court of appeals, expediency counsels that I simply adopt the following excerpt as my understanding of the present state of the law on this issue[.]

. . . .

The majority is correct that KRS 342.020(1) demarcates the duration of an award of medical benefits according to the period of the injured worker's "disability." However, nowhere does the Act expressly link a claimant's right to receive reasonable medical care under KRS 342.020(1) to his entitlement to an award of temporary or permanent disability income benefits. More importantly, the language of KRS 342.020 imposes no requirement that a claimant demonstrate evidence of a "permanent disability rating" as prerequisite to a permanent award of medical benefits, as does the indemnity side of the equation. For this reason, "disability," as utilized in KRS 342.020, is not, in my opinion, necessarily synonymous with the phrases "temporary total disability," "permanent partial disability," or "permanent total disability" as those terms are intended for purposes of calculating awards of income benefits pursuant to KRS 342.730. Rather, "disability," as used in KRS 342.020, is dependent on the

duration of a claimant's need for medical care, depending on the evidence of record and the particular fact findings made by the ALJ, irrespective of the presence or absence of a measurable functional impairment rating under the AMA Guides, or a permanent disability rating, or an award of income benefits. When, for purposes of KRS 342.020, the duration of an employee's disability is permanent, as was the case in Cavin, supra, and is the case here, the claimant has a right to reasonable and necessary medical treatment so long as symptoms persist and some cure and/or relief can be provided. **By contrast, where the employee's disability is determined to be temporary, as in [Robertson v. United Parcel Service, 64 S.W.3d 284 (Ky. 2001)], the right to medical treatment spans only that period of time until the employee reaches a baseline pre-injury level of improvement.** (Emphasis added.)

Kentucky River District Health Dept. v. Oma Combs, Claim No. 03-79326 (Entered April 29, 2005)(dissenting opinion).

In Robertson, supra, the administrative law judge determined that the employee had suffered only a temporary exacerbation of a pre-existing condition and no permanent disability as a result of the work injury. Thus, his award was limited to those medical expenses incurred for treatment of his temporary symptomatic flare-up. The Kentucky Supreme Court ultimately affirmed the decision of the administrative law judge, providing the following rationale:

Contrary to the claimant's assertion, we find no indication that the ALJ thought that he could not award a permanent disability for the arousal of a pre-existing condition. Instead, the evidence and the ALJ's opinion make it clear that the only harmful change that the claimant experienced as a result of the work-related incident was a temporary flare-up of symptoms of the pre-existing, nonwork-related condition. In other words, the ALJ concluded that the claimant suffered a work-related injury but that its effect was only transient. It resulted in no permanent disability or change in the claimant's pre-existing spondylolisthesis. Thus, the claimant was not entitled to income benefits for permanent, partial disability or entitled to future medical expenses, but he was entitled to be compensated for the medical expenses that were incurred in treating the temporary flare-up of symptoms that resulted from the incident.

Id. at 286.

Viewing together the courts' holdings in Robertson, supra, Cavin, supra, and Combs, supra, it now seems clear that the issue of the extent and duration of a claimant's need for appropriate medical treatment is a question of fact that is separate and distinct from any award of indemnity benefits, requiring separate findings by the ALJ that may or may not coincide with the date on which the injured worker returns to work or, for that matter, achieves maximum medical improvement ("MMI"). Moreover, the issue is a medical question. Therefore, the medical evidence of record must support any findings of fact

by the ALJ resolving the issue. That having been said, in this instance I believe additional findings of fact by the ALJ addressing the issue are essential.

In the case *sub judice*, there is substantial evidence to support the ALJ's finding that Hickman sustained only a temporary injury, and that finding is not challenged on appeal. Thus, we are dealing with a case more in line with Robertson, supra, than Cavin, supra. I, therefore, am not advocating a decision by the ALJ granting Hickman entitlement to medical benefits extending beyond the date he returned to his pre-injury baseline state of health and no longer required medical treatment for the cure and relief of the temporary work-related exacerbation of his pre-existing shoulder condition that is the subject of this case.

As pointed out by United Parcel Service ("UPS"), there is evidence in the record, in the form of Dr. Moskal's report, indicating that Hickman reached MMI and no longer required medical treatment for his work-related injury as of September 22, 2004. There is also evidence that Dr. Rennirt felt Hickman should remain off work until October 25, 2004, and that the petitioner continued to receive treatment for his work-related complaints, including an MRI, through March 9, 2005. Of course, the ALJ awarded temporary total disability ("TTD") benefits through October 17, 2004. TTD benefits are payable only until such time as the employee reaches MMI or a level of improvement that would permit a return to employment. See KRS 342.0011(11)(a). Thus, while Hickman's return to work on October 18, 2004 was an appropriate basis upon which to terminate TTD benefits, short of medical evidence proving otherwise, such a finding by the ALJ does not settle the question of when to terminate medical benefits payable under KRS 342.020.

As there is no medical evidence whatsoever establishing October 17, 2004 as an appropriate date for terminating Hickman's medical treatment, I believe it was error to select that date as a matter of law. While the majority is apparently of the opinion that the ALJ's award necessarily must be viewed as inuring to the benefit of the petitioner in this instance, I disagree. I also disagree that because there may be no outstanding unpaid medical bills, the ALJ's decision to arbitrarily terminate medical benefits as of October 17, 2004, is harmless. Assuming that the respondent did in fact pay all medical costs in this case through March 9, 2005, under the ALJ's ruling UPS is now in a position to seek reimbursement from either the petitioner or the medical provider for those expenses - whereas a ruling in line with the medical evidence provided by Dr. Rennirt might have rendered those medical charges compensable.

In sum, we hold that duration of medical benefits is a question of fact separate from the question of duration of income benefits. Where a claimant's disability is temporary, we are convinced he has a right to medical benefits until such time as he reaches a pre-injury state of health. As pointed out by the dissent, the ALJ failed to make any findings of fact concerning when Hickman reached a pre-injury state of health. The ALJ's findings of fact should be based upon probative evidence of when Hickman reached a pre-injury state of health.

On remand, the ALJ shall consider the medical evidence and make a finding of fact as to when Hickman reached a pre-injury state of health; it is at this time that medical benefits

should terminate. We also note that there is no medical evidence in the record supporting the ALJ's decision to terminate Hickman's medical benefits on October 17, 2004. As such, we consider the ALJ's decision to terminate Hickman's medical benefits on October 17, 2004, to be arbitrary and unsustained by the record as a whole.

For the foregoing reasons, the opinion of the Workers' Compensation Board is reversed and this cause remanded for proceedings not inconsistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Ched Jennings
Louisville, Kentucky

BRIEF FOR APPELLEE, UNITED
PARCEL SERVICE:

James G. Fogle
Janet K. Martin
FERRERI & FOGLE, PLLC
Louisville, Kentucky