

RENDERED: JANUARY 24, 2014; 10:00 A.M.
NOT TO BE PUBLISHED

OPINION OF NOVEMBER 1, 2013, WITHDRAWN

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001878-WC

DAVETTA J. ASH-SMITH;
NORMAN E. HARNED; and
HARNED BACHERT &
McGEHEE, PSC

APPELLANTS

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-93-19835

COMMONWEALTH OF KENTUCKY -
HAZELWOOD ICF/MR; CANNON
COCHRAN MANAGEMENT SERVICES,
INC.; PHILIP HARMON, Acting Director,
Office of Workers' Claims; DR. DAVID
ROUBEN; HON. R. SCOTT BORDERS,
Administrative Law Judge; HON. JAMES
L. KERR, Administrative Law Judge; and
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, CHIEF JUDGE; COMBS AND TAYLOR, JUDGES.

COMBS, JUDGE: Davetta Ash-Smith appeals the opinion of the Workers' Compensation Board which vacated and remanded orders of the Administrative Law Judge (ALJ). After our review, we affirm.

Ash-Smith's work-related injury occurred in 1993 when she was employed by Commonwealth of Kentucky-Hazelwood ICF/MR (Hazelwood). The parties reached a settlement agreement in 2001. In 2007, Dr. David Rouben, Ash-Smith's treating physician, recommended a surgical procedure for repair of a previous surgery that had failed. He requested pre-authorization from Hazelwood, which Hazelwood denied. The parties went through a prolonged utilization review and reconsideration process. Relevant to this appeal, the claim eventually resulted in the imposition of sanctions and attorney's fees on Hazelwood in 2012.

Ash-Smith appealed to the Workers' Compensation Board. In a lengthy opinion which we have reviewed closely, the Board vacated several orders and remanded to the Administrative Law Judge (ALJ) for taking of proof and findings of fact. Ash-Smith now appeals from that opinion.

Kentucky Revised Statute[s] (KRS) 342.285 limits the Board's review of a decision of an ALJ. The Board is not permitted to substitute its judgment concerning the weight of the evidence on questions of fact. Instead, its review is confined to determining whether:

- (a) The administrative law judge acted without or in excess of his powers;
- (b) The order, decision, or award was procured by fraud;
- (c) The order, decision, or award is not in conformity to the provisions of this chapter;

(d) The order, decision, or award is clearly erroneous on the basis of the reliable, probative, and material evidence contained in the whole record; or

(e) The order, decision, or award is arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

KRS 342.285. Similarly, when reviewing decisions of the Board, this Court may correct only if it “has overlooked or construed controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice.” *Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992). The decision of the ALJ should not be disturbed if it was supported by substantial evidence in the record. *Transportation Cabinet v. Poe*, 69 S.W.3d 60, 62 (Ky. 2001).

In this case, the Board found that there was insufficient information in the record to support the ALJ’s decisions regarding the issues of sanctions and attorney’s fees. The sanctions were imposed in response to Ash-Smith’s claim that Hazelwood had not complied with the statutes and regulations which govern the utilization review and reconsideration process. The Board determined that the record failed to address questions of fact regarding the timing of several pertinent communications. Additionally, the record does not include proof of the method that the ALJ used to calculate the award of attorney’s fees. The orders of the ALJ regarding the sanctions and fees were conclusory and provided no factual findings. Therefore, the Board did not commit error by remanding for additional proof-taking and fact-finding by the ALJ.

Ash-Smith also argues that the Board did not have jurisdiction to vacate the orders that imposed sanctions, costs, and attorney's fees because Hazelwood did not appeal those issues to the Board. We disagree.

The Board has the responsibility of insuring that the ALJ has acted according to law. KRS 342.285(2)(a). The ALJ has the duty to include findings of fact with respect to awards and decisions. KRS 342.275(2); *Arnold v. Toyota Motor Manufacturing*, 375 S.W.3d 56, 61 (Ky. 2012). Our Supreme Court has expressly held that the Board has the authority, *sua sponte*, to correct awards that are erroneous as a matter of law. *Whittaker v. Reeder*, 30 S.W.3d 138, 143 (Ky. 2000). In this case, the Board found that the ALJ erred as a matter of law by not providing statutorily mandated findings of fact. The state of the record that we have received supports the analysis of the Board.

Therefore, we affirm the order of the Board remanding this case to the ALJ for findings.

ACREE, CHIEF JUDGE, CONCURS IN RESULT ONLY.

TAYLOR, JUDGE, DISSENTS.

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BRIEF FOR APPELLEE
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