

RENDERED: SEPTEMBER 13, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000671-WC

DEIG BROS CONSTRUCTION.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-09-88270

RODNEY W. SMEATHERS; HON. J.
LANDON OVERFIELD, Chief
Administrative Law Judge; and
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

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

COMBS, JUDGE: Deig Bros Construction petitions for review of an opinion of the Workers' Compensation Board that vacated in part and remanded a decision of the Administrative Law Judge. The ALJ's decision denied Rodney Smeathers's

claim for temporary total disability benefits (TTD) covering a period of time preceding the surgery for his work-related injury. Deig Bros contends that the Board erred by concluding that Smeathers properly preserved his claim for TTD and that he was not otherwise precluded from asserting the claim. After our review, we cannot agree that the Board erred. Therefore, we affirm.

Smeathers works as a cement mason and concrete finisher. On April 24, 2009, he injured his left shoulder and bicep while operating a trowel machine for Deig Bros. He was paid TTD from May 21, 2009, through October 21, 2009. On May 27, 2010, he filed a Form 101 requesting past and future medical benefits, including compensation for proposed arthroscopic surgery to his left shoulder. Deig Bros denied his claim.

An Administrative Law Judge (ALJ) conducted a hearing and determined that Smeathers was entitled to all reasonable and necessary medical expenses incurred in connection with the injury to his left shoulder. The ALJ also determined that Smeathers was entitled to recover TTD commencing on the day of surgery and continuing until he reached maximum medical improvement. The ALJ concluded that Smeathers was not entitled to permanent partial disability benefits (PPD).

On appeal by Smeathers, the Board affirmed the award of medical expenses. However, with respect to the ALJ's decision to dismiss the claim for PPD, the Board observed as follows:

Clearly, the issue of entitlement to income benefits is not ripe for decision in the case *sub judice*, and the ALJ's dismissal of Smeathers' "claim" for permanent partial disability benefits is erroneous. A review of the October 5, 2012, benefit review conference order lists a limited number of issues, specifically injury as defined by the Act and entitlement to past and future medicals, including shoulder surgery. The administrative regulation pertaining to benefit review conferences, 803 KAR 25:010 §13(14), is unambiguous. The regulation plainly states as follows: "*Only contested issues shall be the subject of further proceedings.*" As extent and duration are not listed on the benefit review conference order, these issues were not to be addressed by the ALJ.

Further, Smeathers' brief to the ALJ, as recounted in relevant part herein, clearly stated the relief he sought. Smeathers was requesting the authorization of arthroscopic surgery and the claim be placed in abeyance until Smeathers reaches MMI. Even Smeathers' testimony at the final hearing was clear:

Q: Okay. And so that is the issue at this point, whether you get the surgery or not?

A: Yes.

We take issue with certain language contained in the ALJ's December 16, 2010, opinion, award, and order. Specifically, the ALJ states as follows: "Plaintiff is not making a claim for income benefits, as he is aware that an impairment rating of 0% WPI precludes that." This statement is only partially true. First, Smeathers was not seeking income benefits *at that time*. This was not due, however, to a lack of impairment ratings in the record. As expressed by Dr. Martin, it was due to the fact Smeathers' left shoulder condition was unstable and likely to change and required arthroscopic surgery. At the time of the hearing, Smeathers only sought certain medical treatment. Clearly, the medical evidence filed by Smeathers supports this proposition. After determining Smeathers continues to require treatment for his work-related left shoulder condition, including

arthroscopic surgery, the ALJ, *sua sponte*, should have placed the claim in abeyance until such time Smeathers reached MMI.

* * * * *

While Smeathers could have filed a pre-claim medical fee dispute to have the issue of the compensability of the proposed arthroscopic left shoulder surgery resolved, Smeathers instead filed a Form 101. This is well within his rights under the law and, as Smeathers states in his appeal brief, “[t]he ALJ appeared to have a clear understanding of the situation” based on the contested issues listed in the benefit review conference order.

Opinion of May 12, 2011, at 10-14. (Emphases original.) The Board vacated that portion of the ALJ’s award dismissing Smeathers’s claim for PPD.

Furthermore, the Board concluded that the ALJ’s award of TTD benefits was erroneous as a matter of law. It ordered that on remand the award of TTD “shall span from the date of the arthroscopic surgery to the earlier of the following two dates: the date Smeathers reaches MMI or the date Smeathers returns to his customary work or the work he was performing at the time of the injury.” Opinion at 16. The Board directed the matter be remanded to the ALJ and held in abeyance until after Smeathers’s surgery. “The ALJ shall then set a proof schedule and ***resolve all remaining issues including but not limited to Smeathers’ entitlement to income benefits.***” Opinion at 17. (Emphasis added.)

Smeathers underwent arthroscopic surgery on May 9, 2011. He was released to return to work without restrictions effective October 5, 2011.

On October 13, 2011, Deig Bros filed a motion to remove the claim from abeyance. The matter was assigned to the chief ALJ, and a benefit review conference was conducted on June 4, 2012. The only contested issue was Smeathers's entitlement to TTD.

A formal hearing was held on July 18, 2012. As the Board later observed, “(o)n two occasions during questioning, Smeathers's counsel made it clear the issue involved entitlement to TTD benefits from the date Deig terminated TTD payments until the date of surgery.” Opinion at 7. “Deig voiced no objection to the statements at the hearing. Smeathers testified he was unable to work during the pre-surgery period in question.”

Following the hearing, the chief ALJ concluded that Smeathers had waived any entitlement to TTD for the period between October 21, 2009, and May 8, 2011, and, further, that the Board's order on remand required that his claim be denied. The chief ALJ observed as follows:

Plaintiff never made a claim in the litigation specifically for TTD benefits between October 21, 2009 and May 8, 2011. The claim was litigated and submitted to the ALJ. Plaintiff, in his brief to the ALJ waved [*sic*] entitlement to TTD benefits during the time he now claims entitlement. That ALJ's opinion, although vacated and remanded, addressed the only issues presented by Plaintiff: that he had suffered an injury as defined by the Act and was entitled to the surgery recommended by Dr. Martin.

The issue of pre-surgery TTD was not addressed in Plaintiff's appeal from that opinion and the claim was remanded by the Board with instructions to render an award requiring Defendant Employer to pay what

Plaintiff asked for – the medical expenses related to the surgery and TTD benefits beginning the day of that surgery until Plaintiff had reached maximum medical improvement or had been returned to his usual employment. That opinion was not appealed. Plaintiff has waived his entitlement to the TTD benefits which he now seeks.

Opinion and Order at 7.

Smeathers filed a petition for reconsideration contending that the ALJ had misconstrued his initial claim for interlocutory relief and had misapplied the Board's opinion on remand. In an order rendered on October 19, 2012, the ALJ denied the petition. Smeathers appealed to the Board.

The Board agreed that the chief ALJ had misconstrued its prior decision and had erred by concluding that Smeathers had waived entitlement to the contested period of TTD. In an opinion rendered March 15, 2013, the Board vacated and remanded the decision to the ALJ. Deig Bros filed this petition for review.

Upon our review, we may reverse the Board only if it has overlooked or misconstrued the law or flagrantly erred in its evaluation of the evidence causing gross injustice. *Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685 (Ky. 1992). In this case, the Board did not evaluate any evidence. Instead, it focused on the nature of each phase of the proceedings before the ALJ and the legal effect of its previous order. Having reviewed the record on appeal and considered the arguments of counsel, we conclude that the Board correctly decided the issues presented and adopt its opinion, in part, as follows:

In our prior decision, we recognized Smeathers was only initially seeking medical benefits in the form of arthroscopic surgery and was not seeking income benefits at that time. Since Deig denied Smeathers' condition constituted an injury as defined by the Act, a determination of that issue was required. While Smeathers could have filed a pre-claim medical dispute or a motion for interlocutory relief, his intent was readily apparent. In essence, the claim was bifurcated for a decision on the issues of injury as defined by the Act and compensability of the recommended surgery.

The Board's prior decision vacated ALJ Justice's opinion for two reasons. First, it was premature to dismiss the partial disability claim since Smeathers had not reached MMI. Second, ALJ Justice had not properly stated the standard to be used in terminating TTD benefits following the surgery. The Board did not, and could not, address entitlement to the pre-surgery period of TTD benefits since the issue was neither before ALJ Justice or this Board. To the contrary, the Board's prior decision directed the ALJ to place the claim in abeyance, institute payment of TTD benefits, and reserve any ruling on "all remaining issues including but not limited to Smeathers' entitlement to income benefits." "Income benefits" includes TTD benefits. Thus, nothing in the Board's prior decision can be taken to mandate dismissal of Smeathers' claim for the pre-surgery period of TTD benefits.

Prior to the initial decision by ALJ Justice, nothing in the record affirmatively indicated Smeathers intended to waive other issues or entitlement to any other benefits. Smeathers correctly notes the June 4, 2012 BRC order only listed the amount of TTD benefits owed to him as a contested issue without any other qualification or reservation. Thus, the issue was properly preserved.

Opinion and Order of March 15, 2013, at 12-13.

The Board did not err by concluding that Smeathers had not waived his claim for TTD during the period prior to his surgery. Nor did it misconstrue or

overlook any relevant law. It properly concluded that its prior decision did not preclude an award of TTD during the contested period.

The opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE
SMEATHERS:

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