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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2018-CA-001794-WC
AND
NO. 2018-CA-001901-WC

LARRY SCHNEIDER APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-93-32090

SPECIAL FUND;
PROGRESS PAINT MANUFACTURING;
ANDY BESHEAR, ATTORNEY GENERAL;
HON. JOHN H. MCCRACKEN, ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; COMBS AND KRAMER, JUDGES.

CLAYTON, CHIEF JUDGE: Larry Schneider petitions for review of an opinion of the Workers' Compensation Board (the "Board") affirming a decision by the

Administrative Law Judge (the "ALJ") which dismissed Schneider's motion to reopen as not being timely filed under Kentucky Revised Statutes (KRS) 342.125(3). Finding no error, we affirm.

BACKGROUND

Schneider filed a Form 101 Application for Resolution of Injury Claim ("Form 101") with the Kentucky Department of Workers' Claims on October 30, 1996, alleging a June 4, 1993, injury to his right shoulder and neck. Schneider's employer, Progress Paint Manufacturing ("Progress") and the Special Fund were listed on the Form 101 as party defendants.

On April 10, 1997, the ALJ approved a settlement agreement entered into between Schneider, Progress, and the Special Fund (the "First Settlement Agreement"). The First Settlement Agreement stated that Schneider would receive benefits for 425 weeks based upon a 20% permanent partial disability ("PPD") apportioned 75% to Progress and 25% to the Special Fund.

On June 7, 2000, Schneider filed a motion to reopen his claim asserting a worsening of his condition. In an order entered on May 14, 2001, the ALJ found that Schneider had an additional occupational impairment of 10% and directed that Progress and the Special Fund pay an added $26.00 per week to Schneider. Payments were to commence as of the date of reopening, June 7, 2000, and were to be paid by Progress for the number of weeks proportionate to its 50%

liability, after which the Special Fund was to pay all income benefits directly to Schneider for the remainder of the original compensable period.

Between July of 2004, Schneider filed two other motions to reopen requesting the payment by Progress of temporary total disability ("TTD") benefits which did not involve the Special Fund. Thereafter, on January 11, 2008, the ALJ entered an order approving a settlement agreement between Schneider and Progress (the "Second Settlement Agreement"). In the Second Settlement Agreement, the parties agreed that Progress would pay a lump sum of $16,500.00 to Schneider, and that Schneider would waive his rights to reopen for any additional income benefits or vocational rehabilitation benefits in the future. Schneider did not waive his entitlement to past or future medical benefits. The Special Fund was not a party to the Second Settlement Agreement.

No other action was taken by Schneider on his claim until he filed, on November 2, 2015, a motion to reopen medical dispute seeking steroid injections or recommended surgery. The matter was settled by Schneider and Progress on February 22, 2016, with Progress agreeing to voluntarily pay TTD benefits until Schneider obtained maximum medical improvement ("MMI") or was released to return to a job for which he was qualified. No additional permanent disability benefits were sought by Schneider and the Special Fund was not a party to this reopening. On March 8, 2016, the ALJ entered an order dismissing the medical fee

dispute as moot based on Progress's agreement to voluntarily pay TTD benefits to Schneider.

Schneider subsequently filed another motion to reopen on June 8, 2017. In said pleading, Schneider stated that his treating physician believed he needed an additional surgery for his shoulder and requested TTD benefits and/or additional PPD benefits or permanent total disability benefits. Only Progress was named in the motion. Upon oral motion of the parties, the Special Fund was joined as a party by order entered May 7, 2018.

The Special Fund moved to be dismissed as a party, arguing that it had not been ordered to pay any benefits to Schneider since the ALJ's May 14, 2001 decision. It further asserted that, even then, the additional benefits ordered were only ordered to be paid during the compensable period, which had ended in 2003.

On June 29, 2018, the ALJ entered an order dismissing Schneider's motion to reopen as to both Progress and the Special Fund. Schneider appealed the ALJ's decision to the Board, claiming that the ALJ erred in dismissing the Special Fund. The Board affirmed the ALJ in an opinion entered on November 9, 2018, concluding that Schneider's June 8, 2017 motion to reopen was filed outside the four-year statute of limitations contained in KRS 342.125(3). Specifically, the Board found that the March 8, 2016 order dismissing the medical fee dispute was

not an order "granting or denying benefits," as required under the statute, because Progress voluntarily agreed to pay TTD benefits to Schneider and were not ordered to do so by the ALJ. This appeal followed.

ANALYSIS

a. Standard of Review

Our standard of review requires us to show deference to the rulings of the Board.

> The function of further review of the [Board] in the Court of Appeals is to correct the Board only where the Court perceives the Board has overlooked or misconstrued 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).

> Although a party may note evidence which would have supported a conclusion contrary to the ALJ's decision, such evidence is not an adequate basis for reversal on appeal. The crux of the inquiry on appeal is whether the finding which was made is so unreasonable under the evidence that it must be viewed as erroneous as a matter of law.

Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48, 52 (Ky. 2000) (internal citations omitted).

The ALJ "has the sole authority to judge the weight, credibility, substance, and inferences to be drawn from the evidence." *Ak Steel Corp. v. Adkins*, 253 S.W.3d 59, 64 (Ky. 2008) (citing *Special Fund v. Francis*, 708 S.W.2d

641, 643 (Ky. 1986)). However, "[a]s a reviewing court, we are bound neither by an ALJ's decisions on questions of law or an ALJ's interpretation and application of the law to the facts. In either case, our standard of review is *de novo*." *Bowerman v. Black Equipment Co.*, 297 S.W.3d 858, 866 (Ky. App. 2009) (internal citation omitted).

b. <u>The General Assembly's 2018 Revisions to KRS 342.125(3)</u>

KRS 342.125(3) describes the applicable statute of limitations for motions to reopen in a workers' compensation claim. The version of KRS 342.125(3) in effect prior to July 14, 2018 states in pertinent part:

> no claim shall be reopened more than four (4) years following the date of the original award or order granting or denying benefits . . . [.]

In *Hall v. Hospitality Resources, Inc.*, the Kentucky Supreme Court interpreted the language "or order granting or denying benefits" in KRS 342.125(3) "to encompass orders granting benefits other than the 'original award'" and found that such language "must necessarily refer not only to the original award, but to any *subsequent* order granting or denying benefits." 276 S.W.3d 775, 784-85 (Ky. 2008) (emphasis in original).

In 2018, however, the General Assembly revised the language of KRS 342.125(3). The revised version of KRS 342.125(3) currently in effect states the following (additional language not included in the prior version is underlined):

> no claim shall be reopened more than four (4) years following the date of the original award or original order granting or denying benefits, when such an award or order becomes final and nonappealable . . . [.] Orders granting or denying benefits that are entered subsequent to an original final award or order granting or denying benefits shall not be considered to be an original order granting or denying benefits under this subsection and shall not extend the time to reopen a claim beyond four (4) years following the date of the final, nonappealable original award or original order.

The addition of the underlined language in the amended version of KRS 342.125(1) makes clear that a motion to reopen must be filed within four years of the original order granting or denying benefits and *not* within four years of any subsequent orders or awards.

c. The Amended Version of KRS 342.125(3) as it Applies to this Appeal

We find that the Board correctly affirmed the ALJ's denial of Schneider's June 8, 2017 motion to reopen his claim because Schneider's argument fails under either the pre- or post-amendment version of KRS 342.125(3).

Schneider's claim fails under the pre-amendment version of the statute because, pursuant to *Hall*, under the previously-enacted version of KRS 342.125(3), Schneider must have filed his motion to reopen within four years of any subsequent order granting or denying benefits. Schneider argues that his June

8, 2017 motion to reopen was filed within four years from the ALJ's March 8, 2016 order dismissing Schneider's November 2, 2015 motion to reopen as moot. Schneider contends that the unpublished case *Jones v. Ken Builders Supply*, No. 2011-CA-001246-WC, 2011 WL 7268627 (Ky. App. Feb. 10, 2011), is directly on point and stands for the proposition that, where an ALJ intends to resolve all pending issues and put an end to the litigation before the ALJ, such order constitutes an order denying benefits under KRS 342.125(3).

We agree with the Board, however, that the last such order granting or denying benefits was the January 11, 2008 order, in which the ALJ approved the Second Settlement Agreement, as that order was the last order which granted Schneider additional income benefits. Although Schneider filed a motion to reopen on November 2, 2015, the medical fee dispute was eventually dismissed as moot, because Progress voluntarily agreed to pay TTD benefits from the date of Schneider's surgery until the date he reached MMI or was released to return to a job. In *Hall*, the Supreme Court addressed this issue, citing to the Court of Appeal's decision in *Kendrick v. Toyota*, 145 S.W.3d 422, 425 (Ky. App. 2004) and stating:

> *Kendrick*, however, dealt only with the question of whether the *voluntary payment* of post-award TTD benefits by the employer *without a motion and order granting such benefits*, extended the four year statute of limitations under KRS 342.125(3). The Court, holding the filing of the motion to reopen untimely,

> held the "[v]oluntary payment of TTD benefits post-award is not an exception contained within the statute." *Id*. A point with which we do not disagree, since there was no order requiring payment of income benefits.

Hall, 276 S.W.3d at 783.

Pursuant to *Kendrick* and *Hall*, because the ALJ's March 8, 2016 order dismissed the medical dispute as moot without mandating the payment of income benefits, and because the ALJ's order never reached the merits of Schneider's motion but only dismissed it as moot, the four-year period described in KRS 342.125(3) was not enlarged by the order. Therefore, the November 2, 2015 motion to reopen and the subsequent dismissal of the motion to reopen had no effect on the limitation period. Because the June 8, 2017 motion to reopen was filed more than four years after the ALJ's January 11, 2008 order approving the Second Settlement Agreement, Schneider's motion was untimely.

Furthermore, if the current post-amendment version of the statute applies, Schneider's claim fails simply because any subsequent order granting or denying benefits does "not extend the time to reopen a claim beyond four (4) years following the date of the final, nonappealable original award or original order." KRS 342.125(3). Consequently, the Board did not err in affirming the ALJ's order dismissing Schneider's motion to reopen seeking additional income benefits from the Special Fund.

Taking into consideration, a panel of this Court's holding in *Holcim v. Swinford*, 2018-CA-000414-WC, 2018 WL 4261757, __ S.W.3d __ (Ky. App. Sept. 07, 2018), which is currently before the Supreme Court of Kentucky on discretionary review (Case No. 2018-SC-000627-WC), we decline to address the issue of whether the revisions to KRS 342.125(3) apply retroactively as urged by the Special Fund. Further, because we have found no grounds warranting reversal in favor of Schneider, the issue of retroactivity is moot and addressing it would be tantamount to issuing an advisory opinion. "Our courts do not function to give advisory opinions . . . unless there is an actual case in controversy." *Philpot v. Patton*, 837 S.W.2d 491, 493 (Ky. 1992).

We cannot say that "the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice." *Kelly*, 827 S.W.2d at 687-88. Therefore, we affirm.

ALL CONCUR.

BRIEF FOR APPELLANT:

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