RENDERED: FEBRUARY 14, 2020; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-001568-WC

TOYOTETSU AMERICA, INC. APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-04-00460

FARMER ERP;
DR. IONUT STEFANESCU-STURTZ;
HONORABLE JANE RICE WILLIAMS,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: DIXON AND KRAMER, JUDGES; BUCKINGHAM,[1] SPECIAL JUDGE.

BUCKINGHAM, SPECIAL JUDGE: Toyotetsu America, Inc., petitions for review of an opinion of the Workers' Compensation Board (Board) vacating and

[1] Retired Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

remanding an order by an administrative law judge (ALJ) in a medical fee dispute. We reverse and remand.

The appellee, Farmer Erp, was employed by the appellant, Toyotetsu America, Inc., on May 22, 2003, when he suffered a work-related injury to his neck and upper extremities. Thereafter an award was made wherein the ALJ allowed for reasonable, necessary, and related care attributable to Erp's cervical spine condition. No appeal was taken from that decision.

In January 2018, Toyotetsu filed a motion to reopen the claim to contest the work-relatedness, reasonableness, and necessity of the prescriptions for Kadian, Neurontin, and Robaxin which were prescribed to Erp by Dr. Ionut Stefanescu-Sturtz, a pain management physician at Kentucky Pain Management Services. The motion to reopen was granted, as was a motion to amend the medical fee dispute to address the failure of Dr. Stefanescu-Sturtz to provide a treatment plan pursuant to 803 KAR[2] 25:096 §5.

In an opinion and order on October 8, 2018, an ALJ determined that the prescription medications were work-related, reasonable, and necessary, and that Dr. Stefanescu-Sturtz "shall" provide a treatment plan within 30 days of that date. Toyotetsu filed a petition for reconsideration, and in an order entered on November 5, 2018, the ALJ affirmed her original opinion and order. Significantly,

[2] Kentucky Administrative Regulations.

Erp did not appeal from the portion of the opinion and order that directed Dr. Stefanescu-Sturtz to file a treatment plan within 30 days. That portion of the opinion and order was in response to the doctor having previously filed three treatment notes that had been determined by the ALJ to have been insufficient.

When Dr. Stefanescu-Sturtz had not filed a treatment plan by late December 2018, Toyotetsu filed a motion requesting that the doctor be compelled to show cause why a treatment plan had not been filed. The chief administrative law judge (CALJ) entered an order on January 7, 2019, directing Toyotetsu to instead file a new motion to reopen, which it did. The motion to reopen disputed the compensability of Erp's treatment with Dr. Stefanescu-Sturtz due to the doctor's failure to submit a treatment plan pursuant to statutes, regulations, and the order of October 8, 2018. A new ALJ was assigned the claim, and the motion to reopen was granted.

Dr. Stefanescu-Sturtz sent a correspondence to the ALJ's office, and it was filed on March 11, 2019. In an order dated March 12, 2019, the ALJ advised that due to "a clerical error in uploading the correspondence," she was striking the order entered the previous day. Immediately thereafter and on the same day, the ALJ entered a new order filing the correspondence from Dr. Stefanescu-Sturtz without the clerical error. Attached to the March 12, 2019, order was a "Progress

Note" from the doctor dated March 4, 2019, and stamped as received by "worker's claims" on March 11, 2019.

Toyotetsu filed a response to the filing, arguing that it did not meet the requirements of 803 KAR 25:096 §5 and that the "Progress Note" was nothing more than a treatment note. In support of that response, Toyotetsu filed copies of earlier Progress Notes from the doctor, all of which were nearly identical to the March 4, 2019 note. Toyotetsu subsequently filed a motion to amend the medical fee dispute to include a dispute regarding the compensability of Erp's referral to physical therapy.

In an opinion and order dated May 13, 2019, ALJ Williams found in favor of Toyotetsu and ordered that Erp's treatment with the doctor be "suspended until such time as he complies with the order to provide a treatment plan." The ALJ also ruled that Toyotetsu had met its burden of proving that Erp's referral for physical therapy was not reasonable or necessary medical treatment.

Erp did not file a petition for reconsideration, but he did file a notice of appeal to the Board. Toyotetsu responded by arguing that the ALJ did not err in ordering that the doctor must comply with 803 KAR 25:096 §5 and the order entered by the first ALJ on October 8, 2018. On September 20, 2019, the Board entered an opinion vacating and remanding. Therein, the Board ruled that the ALJ abused her discretion because she improperly struck the Progress Note completely

from the record and abused her discretion because she did not find that the Progress Note constituted a treatment plan.

We have reviewed the previous opinions and orders of the two ALJs and the Board. We have also considered the petition for review filed on behalf of Toyotetsu. No brief or other response was filed on Erp's behalf.

Erp's failure to file a brief leaves us with three options. We may "(i) accept the appellant's statement of the facts and issues as correct; (ii) reverse the judgment if appellant's brief reasonably appears to sustain such action; or (iii) regard the appellee's failure as a confession of error and reverse the judgment without considering the merits of the case." CR[3] 76.12(8)(c). We choose to accept the appellant's statement of facts and issues as correct.

BOARD MISTAKEN REGARDING PROGRESS NOTE

Toyotetsu first contends the Board erred by basing its opinion on a misunderstanding of the record. In its opinion vacating and remanding, the Board stated that the ALJ struck the Progress Note "without explanation" and had no grounds to do so. The Board stated that such action "casts an impression the ALJ's decision is unreasonable and unfair."

We agree with Toyotetsu that the Board was mistaken in this determination. The record demonstrates that the ALJ struck the Progress Note due

[3] Kentucky Rules of Civil Procedure.

to clerical error and then placed it back in the record the same day with a subsequent order.

PROGRESS NOTE WAS NOT A TREATMENT PLAN

Toyotetsu next contends that the Board erred by substituting its judgment for that of the ALJ in determining that the March 4, 2019 Progress Note constituted a treatment plan. "The board shall not substitute its judgment for that of the administrative law judge as to the weight of evidence on questions of fact[.]" KRS[4] 342.285(2). For the Board to reverse the decision of the ALJ, it must be shown that the ALJ's decision was not supported by substantial evidence. *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986).

Toyotetsu argues that the Board's misunderstanding that the ALJ had completely stricken the Progress Note from the record "colored the remainder of their Opinion." Toyotetsu asserts that it is understandable that the Board would want to vacate the ALJ's order because it believed the ALJ had acted "unreasonably," "unfairly," and "arbitrarily" and it wanted to restore a sense of trust in the workers' compensation process.

Earlier Progress Notes had been submitted to the previous ALJ and had been rejected as treatment plans. That ALJ ordered Dr. Stefanescu-Sturtz to

[4] Kentucky Revised Statutes.

file a treatment plan within 30 days. Neither a petition for reconsideration nor an appeal was filed from that portion of the October 8, 2018 opinion and order.

Thereafter, when the doctor continued to persist in not filing an acceptable treatment plan, Toyotetsu, pursuant to the CALJ's instructions, filed a new motion to reopen. Therein, Toyotetsu disputed the compensability of Erp's treatment with the doctor due to the doctor's failure to submit a treatment plan as required by statutes and regulations. That motion was filed on January 11, 2019.

Dr. Stefanescu-Sturtz eventually sent a Progress Note which was filed on March 12, 2019. Toyotetsu filed a response, arguing that the Progress Note was insufficient to meet the requirements of 803 KAR 25:096 §5 and that the filing was no more than a treatment note. In support of that argument, Toyotetsu filed three previous treatment notes that were nearly identical to the March 4, 2019 note.

In an opinion and order dated May 13, 2019, ALJ Williams found in favor of Toyotetsu and determined that due to the failure of the doctor to file a legitimate treatment plan, Erp's treatment "is suspended until such time that he complies with the Order to provide a treatment plan."

First, the Board found it significant that the Department of Workers' Claims had not created a template for a treatment plan. The Board also concluded that the Progress Note "unquestionably provided some version of a treatment plan." Further, the Board stated that the "ALJ should have reviewed the last

portion of Dr. Stefanescu-Sturtz's March 4, 2019, report to determine whether it contained a plan as contemplated by 803 KAR 25:096 §5."

We agree with Toyotetsu that the Board gave much emphasis to its belief that the ALJ had abused her discretion in striking the Progress Note from Dr. Stefanescu-Sturtz. And we agree with Toyotetsu that such belief by the Board was mistaken. While it is understandable that the ALJ would be frustrated by the doctor's failure to provide what she believed to be a proper treatment plan, it is now for this Court to determine whether the Board improperly substituted its opinion for that of the ALJ on whether the Progress Note should have been accepted as a treatment plan.

803 KAR 25:096 §1(6) states that a "'[t]reatment plan' means a written plan that . . . (b) Shall include, as appropriate, details of the course of ongoing and recommended treatment and the projected results[.]" At the bottom of the second page of the two-page report submitted by the doctor, there was a short "PLAN." The Board said that the ALJ erred in not reviewing that plan to determine if it complied with the regulation. As we believe the Progress Note was in the record and was not improperly stricken by the ALJ, we have no reason to believe she did not review it.

The Board further held that if the ALJ had determined that the Progress Note did not comply with the regulation, then "she should have set forth

the deficiencies in the plan and given Dr. Stefanescu-Sturtz an opportunity to file an amended treatment plan conforming to the requirements of 803 KAR 25:096 §5." Finally, the Board held that any failure by the doctor to file a treatment plan "should not prevent Erp from receiving the treatment ALJ Kinney found, a mere six months earlier, was reasonable and necessary."

The ALJ determined that Dr. Stefanescu-Sturtz "has failed to cooperate with the Order regarding the treatment plan." In reviewing the PLAN at the bottom of the second page of the Progress Note, the doctor gives little information except to say that he will continue to prescribe Erp the medications and "will reevaluate the treatment plan in 84 days and adjust accordingly." It is understandable that the ALJ found this plan unacceptable and felt it necessary to find such treatment noncompensable until such time as the doctor provided an approved plan.

Under these circumstances, we cannot say that the evidence was "so overwhelming as to compel a finding in [Erp's] favor[.]" *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418, 419 (Ky. 1985). So long as the ALJ's determination is supported by any evidence of substance, it cannot be said that the evidence compels a different result and the Board may not reverse. *Francis*, 708 S.W.2d at 643.

The Board's opinion vacating and remanding is reversed, and the matter is remanded for further proceedings consistent herewith.

ALL CONCUR.

BRIEF FOR APPELLANT:

Ronald Pohl
Lexington, Kentucky

Carolyn A. Allen
Lexington, Kentucky

NO BRIEF FOR APPELLEE.