

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: February 20, 2015

CLAIM NO. 201301154

MARY KING

PETITIONER

VS.

APPEAL FROM HON. JANE RICE WILLIAMS,
ADMINISTRATIVE LAW JUDGE

JEWISH HOSPITAL &
ST. MARY'S HEALTHCARE, INC. and
HON. JANE RICE WILLIAMS,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING
AND ORDER

* * * * *

BEFORE: ALVEY, Chairman, STIVERS and RECHTER, Members.

ALVEY, Chairman. Mary King ("King") seeks review of the order rendered August 1, 2014 by Hon. Jane Rice Williams, Administrative Law Judge ("ALJ"), dismissing her claim for failure to comply with 803 KAR 25:010 §5 and for failure to prosecute her claim against Jewish Hospital & St. Mary's

Healthcare, Inc. ("Jewish Hospital"). No petition for reconsideration was filed.

On appeal, King argues she has not had sufficient opportunity to produce evidence and Jewish Hospital hindered her ability to comply with 803 KAR 25:010 §5. Because the ALJ did not abuse her discretion in dismissing the claim, we affirm.

This claim originated when King filed a Form 101 on July 31, 2013. King alleged on August 2, 2011, she was exposed to E.T.O.¹ gas "all over body," while working as a lab technician for Jewish Hospital. King attached a Form 104 - Employment History to the Form 101. She listed one employer, Jewish Hospital, where she worked as a lab technician, but she did not provide the period of employment. Likewise, King attached a Form 105 Medical History. Again, she listed one medical provider, Jewish Hospital, without indicating the date of treatment, nature of injury/disease, body part affected, or whether she continued to receive treatment. King did not attach any medical records or reports to the Form 101. On August 15, 2013, the claim was assigned to the ALJ, a benefit review

¹ Presumably, E.T.O. stands for ethylene oxide

conference ("BRC") was scheduled for December 3, 2013 and a proof schedule was issued.

On September 11, 2013, Jewish Hospital filed a Form 111 claim denial, a motion to dismiss, a motion to compel, and a request for production of documents. In the Form 111, Jewish Hospital denied the claim in relevant part, asserting it should be dismissed due to King's failure to file a Form 101 in conformity with 803 KAR 25:010 §5 and because she elected a civil remedy in Jefferson Circuit Court. Likewise, in its motion to dismiss, Jewish Hospital argued King did not comply with 803 KAR 25:010 §5 by failing to attach a complete Form 104 work history, a complete Form 105 medical history and, most importantly, a medical report establishing the occurrence of a work-related injury on August 2, 2011. Jewish Hospital's motion to compel requested King to provide a complete Form 105 medical history. On September 20, 2013, Jewish Hospital filed a special answer stating King's claim is barred due to her failure to file a Form 101 compliant with 803 KAR 25:010 §5 and due her election to pursue remedies in a civil action pursuant to KRS 342.610. It also alleged the Department of Workers Claims does not have jurisdiction of the claim.

On September 30, 2013, Jewish Hospital filed a second motion to dismiss pursuant to KRS 342.610. In

addition to the workers' compensation claim, Jewish Hospital stated King had filed a civil complaint against it in Jefferson Circuit Court seeking damages for the same alleged injuries due to exposure to E.T.O gas on August 2, 2011. Pursuant to KRS 342.610, Jewish Hospital argued King elected a civil remedy and is now foreclosed from pursuing a workers' compensation claim. Jewish Hospital attached a copy of the civil complaint, which it received by certified mail on July 31, 2013. In the complaint, King, along with five other employees of Jewish Hospital, alleged they were injuriously exposed to ethylene oxide gas in the workplace on August 2, 2011. The complaint alleges Jewish Hospital violated safety standards by negligently and/or recklessly failing to prevent the exposure which resulted in a deliberate, intentional attempt to cause injury. King did not respond to either of Jewish Hospital's motions to dismiss.

On September 30, 2013, the ALJ entered two orders. The ALJ first sustained Jewish Hospital's motion to compel and gave King fourteen days from the date of the order to file a full and complete Form 105 medical history. In the second order, the ALJ passed Jewish Hospital's motion to dismiss, and stated King "shall have 14 days from this ORDER to perfect this claim."

Subsequent to the expiration of the fourteen days, on October 17, 2013, King filed an unsigned Form 105 medical history. On the same date, King filed a motion to place the claim in abeyance for ninety days to ascertain the status of the civil action, or in the alternative, requested an additional sixty days continuance to perfect her claim. Jewish Hospital objected to King's motion.

The ALJ scheduled a telephonic status conference on December 10, 2013 to address King's motion to place the claim in abeyance. The December 10, 2013 telephonic status conference order reflects counsel for both parties participated by phone. The ALJ noted "Parties waiting to confirm whether Comp applies. ΔE will initiate TSC on Jan 7, 2014 @ 3:30."

The January 7, 2014 telephonic status conference order reflects "no appearance" by King or her counsel. Another telephonic status conference was scheduled for February 10, 2014, to be initiated by Jewish Hospital. Likewise, the February 10, 2014 telephonic status conference order reflects "no call" by King or her counsel. On February 13, 2014, the ALJ ordered King "is granted 10 days from the date of this order to Show Cause why this claim should not be dismissed for lack of prosecution." King filed no response to the February 13, 2014 show cause order.

On March 18, 2014, the ALJ sustained Jewish Hospital's motion to dismiss the claim pursuant to KRS 342.610(4) after noting King's failure to timely respond to the show cause order. Subsequently, on March 24, 2014, counsel for King filed a motion seeking to set a status conference. Counsel for King indicated he did not receive February 10, 2014 conference call and stated the delay in prosecuting the claim was due to the pending civil action. Counsel for King also filed a petition for reconsideration on April 2, 2014, again stating he was not contacted for the February 2014 telephonic conference. Counsel for King explained he was out of the state when the February 13, 2014 show cause order was received by his office, and he did not return until after the ten day time period to respond had expired. Counsel for King indicated progress had been made, and noted the ALJ had not addressed his motion to hold the claim in abeyance. Counsel requested the claim be reinstated.

On April 11, 2014, pursuant to King's petition for reconsideration, the ALJ ordered a telephonic status conference to be held on May 15, 2014. The May 15, 2014 telephonic status conference order indicated "no call in" for either King or her counsel. Under "Other Matters," the ALJ stated as follows, "Parties agree this claim should

remain on active docket. Proof set 60-30-15 after which either party may move for BRC."

Following the expiration of King's allotted time to file proof, Jewish Hospital renewed its motion to dismiss on July 16, 2014. Jewish Hospital argued King failed to submit a mandatory medical report establishing a causal relationship between the work-related event or the medical condition pursuant to 803 KAR 25.010 §5, failed to prosecute her claim, and failed to submit any evidence during the renewed proof schedule.

On August 1, 2014, the ALJ dismissed King's claim, stating as follows:

This matter comes before the [ALJ] pursuant to the Motion of Defendant Employer's to dismiss the above referenced claim; no response to this motion being filed and the ALJ having reviewed the record and being otherwise sufficiently advised,

IT IS HEREBY ORDERED that the Defendant Employer's Motion to Dismiss the above-reverenced claim is SUSTAINED, and this matter is hereby DISMISSED with prejudice based upon the Plaintiff's failure to comply with the mandatory provision of 80 KAR 25.010 § 5 (sic), and for the Plaintiff's failure to prosecute her claim.

On August 25, 2014, counsel for King filed a motion to set aside the August 1, 2014 order and place the claim in abeyance. Counsel stated he was on "extended

family vacation" when Jewish Hospital filed its motion to dismiss. Counsel also stated "This Order to Dismiss was entered on August 1, 2014 with the envelope stamp canceled on August 2, 2014, in Knoxville, TN, while counsel for Plaintiff was out of state." Counsel indicated he returned to Kentucky on August 11, 2014. Counsel stated this is an unusual claim dealing with exposure to toxic gas, Jewish Hospital has denied King's attempts to obtain medical treatment, and he has been forced to obtain medical records through her civil action. Counsel stated due to the unusual nature of her claim, King "cannot procure a medical report in compliance with 803 KAR 25.010 5(1)(d) at this time, and once again requests that this case be placed in abeyance" for 120 days.

Counsel for King attached approximately 180 pages of medical records to the motion set aside. On August 6, 2011, King sought treatment at Norton Healthcare. King complained of headaches, lightheadedness, sore throat, shortness of breath and diarrhea following exposure to a gas leak at work on August 2, 2011. King was diagnosed with acute dyspnea, returned to work with no restrictions, and discharged the same day with instructions to follow-up with her physician. All other medical records submitted by King predate the alleged August 2, 2011 injury.

Jewish Hospital objected to King's motion. King did not file a petition for reconsideration from the August 1, 2014 order. On September 2, 2014, King filed a notice of appeal from the August 1, 2014 order.

On appeal, King argues the ALJ erred in dismissing her claim by not placing it abeyance to allow her to develop proof in the "highly unusual circumstances of the case." In support of her argument, counsel for King states as follows:

The Board has a large degree of liberality in investigating and accepting evidence. *Standard Accident Ins. Co. v. Hinson*, 251 Ky. 287, 64 S.W.2d 574 (1933).

In this case, Plaintiff has not had sufficient opportunity to produce her evidence. *Searcy v. Three Point Coal Co.*, 280 Ky. 683, 134 S.W.2d 228 (1939).

The reason for this is that E.T.O. gas exposure and it's affects (sic) on human anatomy are unknown. Also, Jewish Hospital's refusal to acknowledge the incident, and its attempts to cover-up it's employee's gas exposure has hindered Plaintiff's ability to comply with 803 KAR 25:0105(1)(d).

However, Plaintiff has produced what documentation she has and the introduction of such evidence should be allowed. *American Rolling Mill Co. v. Stevens*, 290 Ky., 16, 160 S.W.2d 355, 145 A.L.R. 1256 (1941).

The present case should be distinguished from other cases were[sic] the dismissal of such actions had been upheld, because in this case, Plaintiff did not seek an

extension of time whereby known proof could be produced, but on abeyance to produce proof that Plaintiff was developing. The delay in[sic] part to the highly unusual circumstances of the case and Jewish Hospital's attempted cover up of these events. *Cornett v. Corbin Materials, Inc.*, 807 S.W.2d 56 (Ky. 1991).

King did not address her alleged failure to prosecute the claim. King requests the Board to set aside the August 1, 2014 order, and remand the claim with instructions to place it in abeyance pending arguments before the ALJ.

As the claimant, King bore the burden of proof and the risk of non-persuasion on all elements of her claim. See Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). In this instance, the ALJ dismissed King's claim based upon two findings. The ALJ determined King failed to comply with 803 KAR 25.010 §5 although given the opportunity to do so, and failed to prosecute her action. Our review of the ALJ's dismissal is based on the standard of whether the ALJ's decision constituted an abuse of discretion. Abuse of discretion has been defined, in relation to the exercise of judicial power, as that which "implies arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision." Kentucky Nat. Park Commission, ex rel. Comm., v. Russell, 301 Ky. 187, 191 S.W.2d 214 (Ky. 1945).

We begin by noting King did not file a petition for reconsideration from the August 1, 2014 order dismissing her claim. In the absence of a petition for reconsideration, on questions of fact, the Board is limited to a determination of whether there is any substantial evidence in the record to support the ALJ's conclusion. Stated otherwise, where no petition for reconsideration was filed prior to the Board's review, inadequate, incomplete, or even inaccurate fact-finding on the part of an ALJ will not justify reversal or remand if there is substantial evidence in the record supporting the ALJ's ultimate conclusion. Eaton Axle Corp. v. Nally, 688 S.W.2d 334 (Ky. 1985); Halls Hardwood Floor Co. v. Stapleton, 16 S.W.3d 327 (Ky. App. 2000).

We also recognize the ALJ as trier of fact is the gatekeeper and arbiter of the record both procedurally and substantively. For purposes of KRS Chapter 342, it has long been accepted the ALJ has the authority to control the taking and presentation of proof in a workers' compensation proceeding in order to facilitate the speedy resolution of the claim and to determine all disputes in a summary manner. Dravo Lime Co., Inc. v. Eakins, 156 S.W.3d 283 (Ky. 2005); Yocum v. Butcher, 551 S.W.2d 841 (Ky. App. 1977); Cornett v.

Corbin Materials, Inc., 807 S.W.2d 56 (Ky. 1991); Searcy v. Three Point Coal Co., 134 S.W.2d 228, 231 (Ky. 1939).

803 KAR 25:010 §17(1) provides discovery and the taking of depositions in workers' compensation actions shall be in accordance with the provisions of Civil Rules 26 to 37. CR 37.02 permits a court to render an order striking pleadings or parts thereof, staying further proceedings until the order is obeyed, dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.

The record is devoid of any evidence supporting a finding King perfected the filing of a Form 101 pursuant to 803 KAR 25:010 §5(1)(d). To apply for resolution of an injury claim, 803 KAR 25.010 §5(1) mandates a completed Form 104, 105 and 106 accompany the Form 101. The regulation also mandates the following:

(1) To apply for resolution of an injury claim, the applicant **shall** file Form 101 with the following completed documents . . .

(d) **One (1) medical report**, which may consist of legible, hand-written notes of the treating physician, **and which shall include** the following:

1. A description of the injury which is the basis of the claim;
2. A medical opinion establishing a causal relationship between the

work-related events or the medical condition which is the subject of the claim;
(emphasis added)

In this instance, King filed a Form 101 on July 31, 2013, along with incomplete Forms 104 and 105, and a Form 106. King did not file a medical report or records providing a description of her injury and establishing a causal relationship. On September 30, 2013, the ALJ gave King fourteen days to perfect her claim. This was never done. The claim was eventually dismissed for King's failure to prosecute in March 2014. However, the ALJ placed the claim back on the docket in May 2014 after a conference and set a "60-30-15" proof schedule. King did not produce any evidence during her sixty day time period. King did not file a motion requesting an extension of time to produce evidence nor provide any explanation for her inability to file a perfected Form 101 with the mandated medical report as required in 803 KAR 25:010 §5(1)(d). Pursuant to Jewish Hospital's renewed motion, the ALJ dismissed King's claim based in part on her failure to comply with the mandatory provisions of 803 KAR 25:010 §5(1)(d) on August 1, 2014.

The ALJ provided King ample time and opportunity, approximately a year after the initial filing of the Form

101, to perfect her claim as mandated by 803 KAR 25:010 §5(1)(d). It was not until after the second dismissal of her claim, well over three years after her alleged date of injury and over a year from filing the deficient Form 101, that King produced any documentation purportedly establishing a causal relationship between her complaints and work. It is noted this was not done until long after the time for filing a petition for reconsideration of the order had passed.

Considering the mandatory provisions of 803 KAR 25:010 §5(1)(d) alone, we find no error with the ALJ's dismissal of King's claim for failing to support the filing of the Form 101 with documentation serving to establish a causal relationship between her complaints and her work. As a matter of law, therefore, we may not disturb the ALJ's decision on appeal. See KRS 342.285(2); Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The ALJ also dismissed the claim due to King's failure to prosecute her action. Likewise, after a review of the record, it cannot be said the ALJ abused her discretion. Here the ALJ adequately afforded King the opportunity to present her claim, and even placed the claim back on the active docket after dismissing it for the first time in March 2014. Prior to the first dismissal on March

18, 2014, little action was taken by King. King filed a Form 101 with deficient supporting documentation and subsequently submitted a completed, but unsigned, Form 105. King also appeared at one conference and requested the claim be placed in abeyance. However, King did not file **any** evidence supporting her claim; file responses to Jewish Hospital's motions to dismiss or motion to compel; appear at two telephonic status conferences; or respond to the ALJ's February 13, 2014 show cause order.

Following the March 18, 2014 dismissal, the ALJ placed the claim back on the active docket subsequent to a conference call, and set a proof schedule on May 15, 2014. No action was taken by King during the allotted proof time, prompting Jewish Hospital to renew its motion to dismiss. King did not respond to Jewish Hospital's motion, and subsequently the ALJ dismissed her claim for the second time. King failed to submit **any** evidence from the time of the initial filing on July 31, 2013 through the date her claim was dismissed, approximately one year. In her appeal to the Board, King does not provide any explanation for her failure to prosecute her claim.

Given the complete failure to support the filing of the Form 101 with documentation to establish a causal relationship between her complaints and her work and failure

to produce any evidence in support of her claim, it cannot be said the ALJ abused her discretion. Although we note the ALJ's order reflects the claim was dismissed with prejudice, the dismissal has no prejudicial effect. Therefore, the ALJ's statement the claim was dismissed with prejudice is harmless error.

King requested oral argument. Having reviewed the record, we conclude oral argument is unnecessary. Consequently, **IT IS HEREBY ORDERED AND ADJUDGED** the request is **DENIED**.

Accordingly, the August 1, 2014 order by Hon. Jane Rice Williams, Administrative Law Judge, is hereby **AFFIRMED**.

ALL CONCUR.

MICHAEL W. ALVEY, CHAIRMAN
WORKERS' COMPENSATION BOARD

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