

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2021 MTWCC 19

WCC No. 2020-5324

AREND COLLEN

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

**ORDER GRANTING RESPONDENT'S MOTION TO DISMISS
PETITIONER'S PETITION FOR TRIAL**

Summary: Respondent moves to dismiss Petitioner's Petition for Trial. The petition asks this Court to determine: (1) that hearing aids are a prosthesis under § 39-71-704(1)(f)(ii), MCA, and/or a prosthetic device under § 39-71-704(1)(g)(ii), MCA, and, therefore, (2) that Petitioner will be entitled to hearing aid-related medical benefits after August 31, 2023, notwithstanding § 39-71-704(1)(f)(i), MCA (the 60-month rule). Respondent argues that, since it is paying all hearing aid-related benefits to which Petitioner is currently entitled and has not denied Petitioner's future hearing aid-related medical benefits, only taken the position that those benefits will terminate on August 31, 2023, under the 60-month rule, there is no dispute over benefits as required by § 39-71-2905(1), MCA, and this Court lacks subject matter jurisdiction. In the alternative, Respondent argues that since facts bearing on Petitioner's entitlement to hearing aid-related medical benefits in the future — such as whether Petitioner returns to the workforce and requires those benefits to continue to work under § 39-71-717(2), MCA — are subject to change, Petitioner's claim is not justiciable under the ripeness doctrine. Petitioner opposes Respondent's motion on both grounds.

Held: Respondent's Motion to Dismiss Petitioner's Petition for Trial is granted. This Court has subject matter jurisdiction because the parties have a dispute over workers' compensation benefits, albeit benefits to which Petitioner may be entitled in the future. However, Petitioner's claim is not ripe because Respondent has not denied Petitioner's

future hearing aid-related medical benefits, only taken the position that those benefits will terminate on August 31, 2023, under the 60-month rule, and whether Petitioner will be entitled to hearing aid-related medical benefits after that date depends on facts that are subject to change.

¶ 1 Respondent Montana State Fund (State Fund) moves to dismiss Petitioner Arend Collen's Petition for Trial.

¶ 2 Collen's petition asks this Court to determine: (1) that hearing aids are a prosthesis under § 39-71-704(1)(f)(ii), MCA, and/or a prosthetic device under § 39-71-704(1)(g)(ii), MCA, and, therefore, (2) that he will be entitled to hearing aid-related medical benefits after August 31, 2023, notwithstanding § 39-71-704(1)(f)(i), MCA (the 60-month rule).

¶ 3 State Fund argues that this Court lacks subject matter jurisdiction and, in the alternative, that Collen's claim is not justiciable under the ripeness doctrine.

¶ 4 Collen opposes State Fund's motion on both grounds.

FACTS¹ AND PROCEDURAL HISTORY

¶ 5 Collen is retired from the workforce.

¶ 6 Before his retirement, Collen suffered bilateral hearing loss while performing his work duties.

¶ 7 On July 31, 2019, Collen filed an occupational disease claim for this condition with State Fund.

¶ 8 On December 3, 2019, State Fund accepted Collen's claim and notified him that his medical benefits would terminate on August 31, 2023, pursuant to the 60-month rule.

¶ 9 In December of 2019, State Fund provided Collen with hearing aids.

¶ 10 Collen must wear the hearing aids as a direct result of his condition.

¶ 11 Hearing aids typically require total replacement every 3-5 years, and battery replacement every 4-5 days for standard batteries or once a year for rechargeable batteries.

¹ When this Court decides a motion to dismiss, it considers only the petition, and any documents it incorporates by reference, relevant. See *Cowan v. Cowan*, 2004 MT 97, ¶ 11, 321 Mont. 13, 89 P.3d 6 (citation omitted). Whether such a motion is grounded on M.R.Civ.P. 12(b)(1) or M.R.Civ.P. 12(b)(6), this Court takes the facts as stated in the petition as true. *Liberty Nw. Mut. Ins. Corp. v. State Comp. Ins. Fund*, 1998 MT 169, ¶ 7, 289 Mont. 475, 962 P.2d 1167 ("When deciding a motion to dismiss based on lack of subject matter jurisdiction, a trial court must determine whether the complaint states facts that, if true, would vest the court with subject matter jurisdiction."); *Sikorski v. Johnson*, 2006 MT 228, ¶ 8, 333 Mont. 434, 143 P.3d 161 ("A motion to dismiss a complaint for failure to state a claim upon which relief can be granted has the effect of admitting all well-pled allegations in the complaint, which are to be taken as true."). Therefore, the following facts are taken from Collen's petition.

¶ 12 On August 21, 2020, Collen’s attorney requested that State Fund rescind its assertion that Collen’s hearing aid-related medical benefits were subject to the 60-month rule.

¶ 13 In the request, Collen’s attorney argued that hearing aids were a prosthesis and/or a prosthetic device, for which certain care — repair and replacement under § 39-71-704(1)(f)(ii), MCA, and maintenance necessary to monitor its status under § 39-71-704(1)(g)(ii), MCA — was not subject to the 60-month rule.

¶ 14 By letter dated August 26, 2020, State Fund’s attorney declined to rescind its assertion, posited that hearing aids were not a prosthesis or a prosthetic device, and maintained that Collen’s medical benefits would terminate on August 31, 2023.

LAW AND ANALYSIS

¶ 15 State Fund moves, pursuant to M.R.Civ.P. 12(b)(1), to dismiss for lack of subject matter jurisdiction. State Fund argues that there is no dispute over workers’ compensation benefits as contemplated by § 39-71-2905(1), MCA, because State Fund is paying all hearing aid-related medical benefits to which Collen is currently entitled and has not denied Collen’s future hearing aid-related medical benefits, only taken the position that, unless certain facts change, Collen will not be entitled to medical benefits past August 31, 2023, pursuant to the 60-month rule set forth in § 39-71-704(1), MCA, which provides:

(f)(i) The benefits provided for in this section terminate 60 months from the date of injury or diagnosis of an occupational disease. A worker may request reopening of medical benefits that were terminated under this subsection (1)(f) as provided in 39-71-717.

In turn, § 39-71-717(2), MCA, states, in relevant part: “Medical benefits may be reopened only if the worker’s medical condition is a direct result of the compensable injury or occupational disease and requires medical treatment in order to allow the worker to continue to work or return to work.”

¶ 16 In the alternative, State Fund moves, pursuant to M.R.Civ.P. 12(b)(6), to dismiss for failure to state a claim upon which relief can be granted. State Fund argues that Collen’s claim is not ripe because the facts upon which his future entitlement to hearing aid-related medical benefits depends — such as whether Petitioner returns to the workforce and requires those benefits to continue to work under § 39-71-717(2), MCA — are subject to change. Thus, State Fund argues, the outcome or injury that Collen fears, which is that he will not receive hearing aid-related medical benefits after August 31, 2023, is not certain to occur.

¶ 17 Collen argues that this Court has subject matter jurisdiction over the issues raised in his petition because the parties have a legitimate dispute concerning workers' compensation benefits. He argues that the parties disagree over whether hearing aids are a prosthesis under § 39-71-704(1), MCA, which provides:

(f)(ii) Subsection (1)(f)(i) [the 60-month rule] does not apply to a worker who is permanently totally disabled as a result of a compensable injury or occupational disease or for the repair or replacement of a prosthesis furnished as a direct result of a compensable injury or occupational disease[.]

and/or a prosthetic device under § 39-71-704(1), MCA, which provides:

(g) Notwithstanding subsection (1)(a), the insurer may not be required to furnish, after the worker has achieved medical stability, palliative or maintenance care except:

....

(ii) when necessary to monitor the status of a prosthetic device[.]

Thus, Collen argues, the parties also disagree over whether he will be entitled to hearing aid-related medical benefits after August 31, 2023.

¶ 18 Collen also argues that the issues are ripe. First, he contends that State Fund's August 26, 2020, letter — taking the position that hearing aids were not a prosthesis or a prosthetic device and that his hearing aid-related medical benefits would terminate on August 31, 2023 — was a denial of future medical benefits. As such, he argues that it started the running of the statute of limitations set forth in § 39-71-2905(2), MCA, which provides, "A petition for a hearing before the workers' compensation judge must be filed within 2 years *after benefits are denied.*"² Collen argues that if he cannot seek relief from this Court until his medical benefits actually terminate on August 31, 2023, his claim will be time-barred. Second, Collen contends that his injury is certain to occur and that this pre-termination claim is his only opportunity for redress. Because Collen is retired, he contends that he will not have the option, post-termination, to petition the Department of Labor & Industry to have his medical benefits re-opened under § 39-71-717, MCA. And third, Collen contends that the issues presented require the interpretation of a statute, which is purely legal and well-suited for present adjudication under *Reichert v. State*.³

² Emphasis added.

³ 2012 MT 111, 365 Mont. 92, 278 P.3d 455.

¶ 19 The Workers' Compensation Court is a court of limited jurisdiction.⁴ As such, it has "only such power as is expressly conferred by statute."⁵ Section 39-71-2905(1), MCA, (2017), states that this Court has jurisdiction over disputes concerning workers' compensation benefits:

If a claimant, an insurer, an employer alleged to be an uninsured employer, or the uninsured employers' fund has a *dispute concerning any benefits* under this chapter, it may petition the workers' compensation judge for a determination of the dispute after satisfying dispute resolution requirements otherwise provided in this chapter.⁶

This Court must have subject matter jurisdiction pursuant to § 39-71-2905(1), MCA, before it can determine whether a claim is justiciable.⁷

¶ 20 The issues raised in Collen's petition are within this Court's subject matter jurisdiction because he and State Fund have a dispute concerning workers' compensation benefits, albeit benefits to which Collen may be entitled in the future. The parties have taken opposing positions as to whether hearing aids are a prosthesis under § 39-71-704(1)(f)(ii), MCA, and/or a prosthetic device under § 39-71-704(1)(g)(ii), MCA. As a result, they disagree over whether Collen will be entitled to hearing aid-related medical benefits after August 31, 2023.⁸

¶ 21 Having determined that it has subject matter jurisdiction over the parties' dispute, this Court next considers the issue of justiciability. In general, a controversy is justiciable when it is "definite and concrete, touching legal relations of parties having adverse legal interests" and "admitting of specific relief through decree of conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state

⁴ *Thompson v. State*, 2007 MT 185, ¶ 24, 338 Mont. 511, 167 P.3d 867 (citation omitted). See also *Moreau v. Transp. Ins. Co.*, 2015 MT 5, ¶ 10, 378 Mont. 10, 342 P.3d 3 ("The Workers' Compensation Court is a court with limited but exclusive jurisdiction to hear and determine disputes concerning workers' compensation benefits." (citations omitted)).

⁵ *Thompson*, ¶ 24 (citation omitted). See also *Liberty Nw. Ins. Corp.*, ¶ 11 ("The jurisdictional parameters of the Workers' Compensation Court are defined by statute as interpreted, from time to time, by the decisions of this Court.").

⁶ Emphasis added.

⁷ *Herman v. Mont. Contractors' Comp. Fund*, 2020 MTWCC 16, ¶ 59.

⁸ To the extent that State Fund cited *Robinson v. Mont. State Fund*, 2008 MTWCC 55 and *Koch v. Emp'rs Ins. Grp.*, 2012 MTWCC 14 in support of its argument that Collen failed to allege a dispute over workers' compensation benefits, this Court is not persuaded. *Robinson* is not on point because, in that case, this Court ruled that it lacked subject matter jurisdiction since the declaratory judgment sought was not within the context of the dispute over benefits, not because there was no dispute over benefits. See *Robinson*, ¶ 5. And because Collen and State Fund disagree about the meaning of the statute and its application to Collen's hearing aid-related medical benefits, this case is distinguishable from *Koch*, wherein this Court declined to rule on the issue of claimant's average weekly wage because insurer did not appear to dispute claimant's calculations. See *Koch*, ¶¶ 45-46. See also *Herman*, ¶ 52 (ruling that this Court did not have subject matter jurisdiction because the insurer agreed that the claimant was entitled to the medical benefits at issue and, therefore, that there was no "dispute concerning any benefits").

of facts, or upon an abstract proposition.”⁹ These concepts have been elaborated upon in specific doctrines — each with its “own set of substantive rules” — one of which is ripeness.¹⁰ The ripeness doctrine “is concerned with whether the suit is being brought at the proper time.”¹¹ Ripeness has a constitutional component, as to which the inquiry is “whether the issues presented are definite and concrete, not hypothetical or abstract.”¹² Ripeness also has a prudential component, which involves weighing the adequacy of the factual record for effective review and “the hardship to the parties of withholding court consideration.”¹³ “The more the question presented is purely one of law, and the less that additional facts will aid the court in its inquiry, the more likely the issue is to be ripe, and vice-versa.”¹⁴

¶ 22 In *Quigg v. Montana State Fund*, this Court ruled that a claim to determine a person’s entitlement to future benefits is not justiciable under the ripeness doctrine.¹⁵ In that case, Quigg petitioned this Court for a determination that, upon his release from prison, where he was serving a life sentence, he would be entitled to rehabilitation benefits from State Fund because of an injury he suffered performing community service while he was on parole.¹⁶ This Court granted summary judgment for State Fund, ruling that the issues presented in Quigg’s petition were not ripe.¹⁷ As this Court explained, under the Montana Workers’ Compensation Act, a person is ineligible for rehabilitation benefits during the period of their incarceration¹⁸ and, because Quigg “may in fact remain in prison for the rest of his life,” his “future entitlement to benefits is speculative.”¹⁹ This Court further explained:

⁹ *Reichert*, ¶ 53 (citation and internal quotation marks omitted).

¹⁰ *Reichert*, ¶ 54 (citation omitted).

¹¹ *Reichert*, ¶ 55 (citations and quotation marks omitted).

¹² *Reichert*, ¶ 56 (citation and internal quotation marks omitted).

¹³ *Reichert*, ¶ 56 (citations omitted).

¹⁴ *Reichert*, ¶ 56 (citation omitted).

¹⁵ 2005 MTWCC 3, ¶¶ 3-4, *aff’d* by 2005 MT 267N (unpublished opinion). *See also* *Champion Int’l Corp. v. Brennan*, 1995 MTWCC 46 (ruling that self-insured employer’s claim for a determination as to what benefits, if any, may be due claimant for past industrial accidents was unripe because there were significant factual disputes, and it was uncertain whether claimant would ever pursue any action for further benefits); *Nelson v. Mont. Schs. Grp. Ins. Auth.*, 2014 MTWCC 15, ¶ 79 (ruling that determination of insurer’s liability for payment of a certain doctor in the future for continued medical treatment was not justiciable because there was no existent request and denial for such treatment); *Loranger v. Mont. State Fund*, 2019 MTWCC 18, ¶¶ 20, 24, 28 (ruling that claim for permanent total disability benefits, which was based on pain from three separate industrial injuries, was premature where claimant presented insufficient evidence for this Court to find that he was at maximum medical improvement (MMI) for two of the three injuries).

¹⁶ *Quigg*, ¶¶ 2, 3.

¹⁷ *Quigg*, ¶¶ 1, 4.

¹⁸ *Quigg*, ¶ 4 (citation omitted).

¹⁹ *Quigg*, ¶ 4.

The ripeness doctrine . . . is a principle of law, grounded in the federal constitution as well as in judicial prudence, that requires an actual, present controversy, and therefore a court will not act when the legal issue raised is only hypothetical or the existence of a controversy merely speculative.²⁰

¶ 23 Under this Court’s application of these principles in *Quigg* and similar cases,²¹ Collen’s claim is not ripe. If this Court were to determine that hearing aids were a prosthesis and/or a prosthetic device, it could easily declare that Collen would be entitled to hearing aid-related medical benefits after August 31, 2023, under § 39-71-704(1)(f)(ii), MCA, and/or § 39-71-704(1)(g)(ii), MCA. The problem, which touches upon both the constitutional and prudential components of ripeness, however, is that if this Court were to determine that hearing aids were not a prosthesis and/or a prosthetic device, it could not declare the inverse, i.e., that Collen would not be entitled to hearing aid-related medical benefits after August 31, 2023. Resolution of that issue would depend on facts that were subject to change.

¶ 24 For example, if Collen were permanently totally disabled on August 31, 2023, he would be entitled to medical benefits thereafter.²² Or, if he were not permanently totally disabled on August 31, 2023, and his medical benefits terminated, he could still petition to re-open them if he re-entered the workforce and needed his hearing aids to continue to work.²³ As these examples illustrate, this Court cannot decide Collen’s claim at this time, because “Courts should not ‘determine matters purely speculative, enter anticipatory judgements, . . . adjudicate academic matters, . . . [or] provide for contingencies which may hereafter arise’ ”²⁴ Although this Court recognizes the possibility that, under some version of the facts, Collen could be without hearing aid-related medical benefits while he awaited court action, if such circumstances created an emergency situation for Collen, he could request an expedited trial under ARM 24.5.311.

¶ 25 Collen’s arguments as to why this Court should rule that the issues are justiciable are unavailing. First, there is no merit to his concern that waiting until August 31, 2023, to file his claim will make it untimely. Collen’s concern is predicated on his position that State Fund’s August 26, 2020, letter caused his claim to accrue, i.e., that the letter was a denial of his future hearing aid-related medical benefits, which triggered the statute of limitations in § 39-71-2905(2), MCA. While it is true that a claim’s accrual generally

²⁰ *Quigg*, ¶ 4 (citations omitted).

²¹ See, e.g., n.15 above.

²² See *Davis v. Liberty Ins. Corp.*, 2017 MTWCC 21, ¶ 63 (ruling that claimant who was permanently totally disabled under § 39-71-116(28) and (33), MCA, had the right to ongoing medical benefits under § 39-71-704(1)(f)(ii), MCA); § 39-71-704(1)(f)(ii), MCA.

²³ See § 39-71-717(2), MCA.

²⁴ See *Brennan*, 1995 MTWCC 46, at 4 (quoting *Dep’t of Nat. Res. & Conservation v. Intake Water Co.*, 171 Mont. 416, 440, 558 P.2d 1110, 1123 (1976)).

commences its limitations period,²⁵ State Fund's August 26, 2020, letter did not cause Collen's claim to accrue because it did not deny Collen's hearing aid-related medical benefits;²⁶ it merely conveyed State Fund's current position that those benefits will terminate under § 39-71-704(1)(f)(i), MCA, on August 31, 2023, based on the facts as they presently exist, including the fact that Collen is currently neither permanently totally disabled nor in the labor market.²⁷ Since those facts are subject to change, so is State Fund's position. Thus, the letter does not "firmly establish" a denial of benefits that would trigger the statute of limitations.²⁸

¶ 26 Indeed, this Court points out that if State Fund's August 26, 2020, letter were sufficient to trigger the statute of limitations, so too would be a form letter at the very beginning of a claim simply reciting or paraphrasing the statute, e.g., stating, similar to State Fund's initial letter, "Your medical benefits will terminate 60 months from the date of injury or diagnosis of an occupational disease."²⁹ As a result, a claimant would be required to preserve his or her claim for future medical benefits by filing suit for their denial before the benefits were even owed, and without knowing what, if any, medical treatments would be necessary in the future. Such illogical requirements would likely catch many litigants off guard and introduce confusion into the workers' compensation system, which is designed to "minimize reliance upon lawyers and the courts to obtain benefits and interpret liabilities."³⁰

²⁵ § 27-2-102(2), MCA (stating, in pertinent part, "Unless otherwise provided by statute, the period of limitation begins when the claim or cause of action accrues.").

²⁶ See § 27-2-102(1)(a), MCA (for statute of limitations purposes, "a claim or cause of action accrues when all elements of the claim or cause exist or have occurred, the right to maintain an action on the claim or cause is complete, and a court or other agency is authorized to accept jurisdiction of the action[.]").

²⁷ See, e.g., *Estate of Watkins v. Hedman, Hileman & Lacosta*, 2004 MT 143, 321 Mont. 419, 91 P.3d 1264 (where damages were an element of client's estate's legal malpractice claim, actual damages to client, not mere threat of future harm, were required for claim to accrue).

²⁸ See *Boyd v. Zurich Am. Ins. Co.*, 2010 MT 52, ¶¶ 19, 20, 355 Mont. 336, 227 P.3d 1026 (two-year statute of limitations in § 39-71-2905(2), MCA, began to run on the date of insurer's letter — which explicitly denied coverage for claimant's injury claims — because it was the first communication from insurer that "firmly established a denial of benefits and the existence of a dispute over liability" (internal quotation marks omitted)), *overruled on other grounds by Ford v. Sentry Cas. Co.*, 2012 MT 156, ¶¶ 44, 49, 365 Mont. 405, 282 P.3d 687.

²⁹ See § 39-71-704(1)(f)(i), MCA. This Court notes that, in its experience, insurers frequently send form letters telling claimants that benefits will terminate at some point in the future. For example, this Court has seen many form letters in which an insurer tells a claimant that it will start paying temporary total disability (TTD) benefits but that the TTD benefits will terminate when he reaches MMI. However, that is not always true, as an insurer must comply with the criteria in § 39-71-609, MCA, before terminating a claimant's TTD benefits or converting his TTD benefits to permanent partial disability benefits. *Nat'l Union Fire Ins. of Pittsburgh v. Rainey*, 2021 MTWCC 10, ¶ 57 (quoting *Ness v. Anaconda Minerals Co.*, 279 Mont. 472, 476, 929 P.2d 205, 208 (1996)) ("As stated by the Montana Supreme Court, in those claims in which the claimant reaches MMI and has a permanent physical impairment, 'Compliance with the Coles test is a mandatory prerequisite for benefit reduction or termination.'"). These form letters do not start the running of the statute of limitations in § 39-71-2905(1), MCA, because the insurer is not then denying benefits and the claimant does not know if the insurer will comply with § 39-71-609, MCA.

³⁰ See § 39-71-105(4), MCA.

¶ 27 Second, Collen's feared outcome is not certain to occur. As this Court pointed out above, if Collen were to become permanently totally disabled or re-enter the workforce and need his hearing aids to continue to work, he would be entitled to medical benefits after August 31, 2023, under § 39-71-704(1)(f)(ii), MCA, or § 39-71-717(2), MCA, respectively, and therefore, not suffer the injury about which he complains. And while his current claim is unripe, if the injury were to, in fact, occur, Collen's claim would accrue, and he would then have the opportunity to seek redress.

¶ 28 And third, although Collen is correct that, under *Reichert*, pure questions of law are more likely to be ripe than fact-dependent ones, even a pure question of law is not ripe when the main issue may never have to be decided because the facts could change.

¶ 29 For the foregoing reasons, the issues presented in Collen's Petition for Trial are not ripe. Accordingly, this Court enters the following:

ORDER

¶ 30 State Fund's Motion to Dismiss Petitioner's Petition for Trial is **granted**.

DATED this 19th day of November, 2021.

(SEAL)

/s/ DAVID M. SANDLER
JUDGE

c: Megan L. Miller
Melissa Quale

Submitted: February 8, 2021