CASE SETTLES VIA C&R WITH PROFESSIONAL ADMINISTRATION OF MSA; WCAB SUBSEQUENTLY GRANTS APPLICANT'S REQUEST TO SELF-ADMINISTER MSA BASED ON GOOD CAUSE

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In *Villalpando*, applicant sustained three injuries while working as a laborer. His cases settled via Order Approving Compromise and Release in 2011, which included a Medicare set-aside ($513,390), funded by a structured annuity. The MSA was professionally administered by Bridge Pointe.

Subsequently, applicant requested to self-administer his MSA and the issue proceeded to trial in 2016. The Judge determined there was no evidence Bridge Pointe was inappropriately administering the MSA, and therefore, the issue of whether applicant could self-administer his MSA was moot.

Applicant then filed a Petition for Reconsideration, which the WCAB granted. The WCAB remanded the case back to the trial level for further proceedings as (1) it was premature to consider applicant's request to modify the terms of the C&R without adequate consideration of the full nature of the agreement that resulted in Bridge Pointe's administration of the MSA, (2) future contingencies of the MSA were unknown, (3) the Judge did not address whether the professional administration agreement included any provision for a change in administration if Bridge Pointe stopped operating or withdrew from the service, (4) the Judge needed to consider the nature of the agreement and determine whether there was any provision for an administration change based on either a request or a finding of good cause, and (5) applicant should prove he is able to competently self-administer the MSA.

These matters then proceeded to trial in 2017. The parties stipulated Bridge Pointe had properly administered the MSA and only Bridge Pointe could terminate the MSA based on applicant's malfeasance. Applicant testified he intended on moving to Mexico and would not return to the U.S. He also testified he had the mental capacity to self-administer the MSA.

The trial Judge determined, (1) the WCAB does not have jurisdiction to grant applicant's request to self-administer his MSA because applicant did not show fraud or extrinsic mistake as grounds to set aside the MSA within the C&R, (2) applicant's request was made beyond the five year statute under Labor Code section 5804, (3) the purpose of the MSA was not frustrated, and (4) applicant was mentally competent to self-administer the MSA but it was not in his best interest to do so because of his gambling issues and interest in monetary gain.

Applicant then filed a Petition for Reconsideration arguing, (1) the law does not prohibit changes in MSA administration, (2) the purpose of the MSA becomes frustrated when he moves to Mexico, and (3) self-administration of the MSA is in his best interest. Defendant responded to the Petition arguing, (1) there is no contractual basis for applicant to change administrators, (2) the WCAB lacks jurisdiction to alter the Award, (3) the purpose of the C&R has not been frustrated, and (4) applicant should not be allowed to self-administer the MSA.

The WCAB rescinded the Judge's findings and ruled applicant can self-administer his MSA, because the WCAB has jurisdiction to change the MSA's administrator, applicant is competent to self-administer it and Medicare's interests have been considered.

Regarding the issue of jurisdiction, pursuant to Labor Code section 5803, the WCAB has continuing jurisdiction over all its orders, decisions and awards, and the WCAB may rescind, alter or amend any order, decision or award for good cause. However, pursuant to Labor Code section 5804, no award of compensation can be rescinded, altered or amended after five years from the date of injury. As such, after five years, an award can only be set aside on the showing of fraud or mistake.

Relying on case law, the WCAB stated the Board continues to have jurisdiction after five years to enforce its awards, and any collateral changes can be made to an award, as long as an injured worker's right to benefits are not altered. In *Hodge*, the applicant was awarded total permanent disability and then he subsequently obtained a civil case judgment against an ambulance company who was partially responsible for his injury. The Court of Appeal affirmed defendant was entitled to credit beyond the five year limitation (under Labor Code section 5804) because there was no alteration of the award to the applicant. In *Garcia*, the Court of Appeal determined the injured worker's award was not altered or amended by allowing an attorney's lien after the five year period.

Villalpando's injury occurred more than five years ago with the cases settling in 2011. However, applicant's compensation/settlement is fixed, as is defendant's liability, and the change in MSA administrators would not change the amount of money funding the MSA or the amount of money paid pursuant to the MSA terms. The MSA does not address the issue of changing administrators. Therefore, the issue is whether allowing applicant to self-administer the MSA results in alteration of the award. Relying on case law, the WCAB stated, changing administration of an award does not change the award itself as it is considered a "ministerial function," and the Board has authority to modify an administrator (*Khodavandi*, *Gomez* en banc, *Sherman Loehr Custom Tile Works*, and *Gomez*).

In *Villalpando*, the WCAB opined, allowing applicant to self-administer his MSA would not change defendant's obligations. The C&R included establishment of the MSA, funded by defendant via a purchased structured annuity. Defendant was released from liability and the release would remain unchanged with a change in MSA administrators. Therefore, changing the administrator to applicant is a ministerial act and his request is not barred by Labor Code section 5804, as the Board has jurisdiction to grant the change under Labor Code section 5803. The WCAB also opined applicant showed good cause for his request because Medicare will not cover his medical expenses in Mexico.

Regarding the issue of applicant's competency, CMS allows self-administration of the MSA as long as the applicant is able to submit the annual self-attestations. The Board previously defined incompetency as, "not insanity, but rather inability to properly manage or take care of oneself or property without assistance." Substantial medical evidence is required to establish incompetency. Based on Villalpando's trial testimony, and physician letters he submitted into evidence, he is competent and able to manage his financial affairs. The WCAB further opined the trial Judge should not have considered applicant's best interests because it has no bearing on determining competency.

Regarding the issue of consideration of Medicare's interests, the MSA was approved by CMS and the C&R funded the MSA via a structured annuity purchased by defendant. The C&R released defendant from liability and this release remains unchanged with a ministerial change in the administration of the MSA. CMS allows for self-administration of an MSA. Therefore, Medicare's interests were considered at the time of settlement.

The WCAB granted applicant's request to self-administer his MSA and recommended the trial Judge confirm with applicant, (1) he understands his obligations and duties to self-administer the MSA, (2) he understands the consequences of his failure to adhere to CMS's rules and (3) he understands defendant's full release of liability.