Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: February 14, 2014

CLAIM NO. 200191368

CALVERT CITY CONVALESCENT CENTER, INC. PETITIONER/ CROSS-RESPONDENT

VS. **APPEAL FROM HON. ROBERT L. SWISHER, ADMINISTRATIVE LAW JUDGE**

JAMIE ELLIOTT;
LOURDES PAIN MANAGEMENT CENTER;
COMPREHENSIVE NEUROLOGICAL SERVICES;
and HON. ROBERT L. SWISHER, ADMINISTRATIVE LAW JUDGE RESPONDENTS/ CROSS-PETITIONERS

OPINION
AFFIRMING
AND ORDER

* * * * * *

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

ALVEY, Chairman. Calvert City Convalescent Care ("Calvert City") appeals from the September 6, 2013 opinion rendered by Hon. Robert L. Swisher, Administrative Law Judge ("ALJ"), finding the documentation provided by Dr. Riley Love of

Lourdes Pain Management ("Dr. Love), and Dr. William Hogancamp of Comprehensive Neurological Services ("Dr. Hogancamp") constitute valid treatment plans as required by 803 KAR 25:096 §5, for treatment rendered to Jamie Elliott ("Elliott"). Calvert City also appeals from the September 20, 2013 order denying its petition for reconsideration.

On appeal, Calvert City argues the ALJ's determination that options for review of medical services other than a regulatory-mandated treatment plan should have been utilized was error as a matter of law. Calvert City argues it was entitled to request and receive treatment plans, and it was erroneous to find otherwise. Calvert City also argues the ALJ erred in determining other options were available which should have been utilized. Because the ALJ committed no error in finding the documentation provided by Drs. Love and Hogencamp were compliant with the requirements of 803 KAR 25:096 §5, or in stating other options existed for Calvert City, we affirm.

A review of the pertinent procedural history is necessary. Elliott sustained an injury to her right shoulder while transferring a patient on April 25, 2001. At the time of the injury, she held certifications as both a nurse's assistant and as a medicine assistant. She filed a Form 101 on November 10, 2003, and attached records from

both Drs. Love and Hogancamp for treatment received beginning in 2001. The claim was eventually settled, and a Form 110-1 settlement agreement was approved by Hon. Irene Steen, Administrative Law Judge, on August 9, 2005.

On January 12, 2006, Calvert City filed a medical fee dispute, a motion to join Drs. Love and Hogancamp as parties, and a motion to reopen. The claim was reopened, and assigned to Hon. W. Bruce Cowden, Jr., Administrative Law Judge ("ALJ Cowden") for further proceedings. In a decision rendered August 25, 2006, ALJ Cowden determined Calvert City had failed in its burden of showing the treatment rendered was inappropriate. ALJ Cowden's decision was affirmed by this Board in an opinion entered March 2, 2007. In June 2008, Calvert City again filed a medical fee dispute and motion to reopen. On February 16, 2009, Hon. Richard M. Joiner, Administrative Law Judge, rendered an opinion finding treatment with an RS-TENS unit, plus transcutaneous electrical nerve stimulator, as well as an RS FBG Full Back Conductive Garment, unreasonable and unnecessary.

Elliott continued to treat with both Drs. Love and Hogancamp. At the hearing held July 26, 2013, Elliott testified she continued to treat with Dr. Love every three months with pain management consisting of injections and

pain medication. She testified she treats with Dr. Hogancamp every six months for treatment of burning in her nerves. Dr. Hogancamp performs testing which includes nerve conduction studies, and he prescribes medication.

The genesis of the most recent medical dispute filed by Calvert City on January 11, 2013 concerns treatment received by Elliott from Dr. Hogancamp on August 6, 2012, and Dr. Love on August 9, 2012. These appear to be routinely scheduled appointments based upon the treatment records tendered by both Elliott and Calvert City, and corroborated by her testimony.

Brenda Hulker ("Hulker"), a claims manager for Midwestern Insurance Alliance, the insurer for Calvert City, testified by deposition on April 18, 2013. She testified she requested treatment plans from both Drs. Love and Hogancamp subsequent to the August 2012 office visits. Dr. Hogancamp provided a brief statement on August 31, 2012, which Hulker did not deem sufficient or compliant with 803 KAR 25:096 §5. She subsequently made a second request to Dr. Hogancamp for which she received no response. Dr. Love did not respond, so a second request was made. On November 20, 2012, Dr. Love responded to Hulker, and attached copies of his office notes, which he stated contained the treatment plan. Hulker deemed this response insufficient, and again

requested a treatment plan from Dr. Love. Dr. Love responded on January 9, 2013, and again Hulker believed the response was insufficient.

Hulker testified she had continued to authorize payment for Elliott's treatment despite the lack of response from the treating physicians.

A Form 112 Medical Fee Dispute and motion to reopen were filed by Calvert City on January 11, 2013. In the Form 112, Calvert City noted no utilization review had been performed, and asserted the following for its contention one was not required:

> Presently neither bills nor specific forms of treatment are in dispute. Thus, utilization review is not required. However, the medical providers have not responded to numerous requests for treatment plans. Continued medical treatment from Lourdes Pain Management Center and Comprehensive Neurological Services is disputed pending receipt of the requisite treatment plan as contemplated by the promulgated regulations.

In the Form 112, Calvert City also requested the ALJ order Drs. Love and Hogancamp to coordinate Elliott's care. The claim was subsequently ordered reopened and assigned to the ALJ. A telephonic mediation was held on March 20, 2013, but the issues were not resolved.

A benefit review conference ("BRC") was held on June 5, 2013. The BRC memorandum reflects the contested issues preserved for decision were whether the medical providers' treatment plans are in conformity with 803 KAR 25:096 §5; compensability of the treatment if the medical providers have not provided appropriate treatment plans; and, whether the medical fee dispute was timely filed.

A hearing was held on July 26, 2013. The parties agreed to withdraw the issue regarding whether the dispute was timely filed. Elliott then testified this was not the first medical fee dispute in this claim. She testified she has treated with Dr. Love and Hogancamp continuously since 2001, and outlined the effectiveness and necessity of the treatment provided. She stated Dr. Hogancamp refused to see her for a regularly scheduled appointment in April 2013 due to the ongoing medical fee dispute.

In a decision rendered September 6, 2013, the ALJ found as follows:

> 803 AKR[sic] 25:096 §1(6) defines "treatment plan" as follows:
>
> 6) (Treatment plan) means that a written plan that:
>
> (a) may consist of copies of charts, consultation reports or other written documents maintained by the employee's designated physician discussing symptoms,

clinical findings, results of diagnostic studies, diagnosis, prognosis, and the objectives, modalities, or frequency and duration of treatment;

(b) Shall include, as appropriate, details of the course of ongoing and recommended treatment and the projected results; and

(c) May be amended, supplemented or changed as conditions warrant.

Further, §5 of the same regulation identifies triggering events requiring the preparation of a treatment plan including long-term medical care including circumstances in which long-term medical care is required as a result of a work-related injury. "Long-term medical care" is defined in the regulation to mean medical treatment or medical rehabilitation that is reasonably projected to require a regimen of medical care for a period extending beyond ninety days, medical treatment that actually continues for a period of more than ninety days or medical treatment including the recommendation that the employee not engage in the performance of his usual work for a period of more than sixty days. Considering that the plaintiff's injury occurred on April 25, 2001, and that the evidence is uncontroverted that she has continued to received[sic] medical treatment since that time as a result of that injury it is undisputed that the treatment provided by Drs. Love and Hogancamp constitute "long-term medical care" as contemplated and defined by the regulation. **As such, a treatment plan is required by the regulation.**

Although the plaintiff argues that a treatment plan is required only from the designated physician and that the defendant/employer has failed to prove that either Dr. Love or Dr. Hogancamp is the plaintiff's "designated physician" the Administrative Law Judge finds that the resolution of this medical dispute does not require that that issue be addressed. Specifically, the undersigned Administrative Law Judge is satisfied from the office records submitted by and from Dr. Love, including specifically the note of April 16, 2013, and the treatment notes and August 31, 2012, report from Dr. Hogancamp, **taken as a whole, are sufficient to satisfy the regulatory requirements regarding treatment plans generally.** In so finding, the Administrative Law Judge notes that sub-section (6)(a) of §1 of the regulation provides that a treatment plan may consist of copies of charts and other documents containing the information specified therein, i.e., that that portion of the regulation is permissive. The mandatory portion of the regulation, sub-section (b) requires that treatment plans include "as appropriate" details of a course of ongoing and recommended treatment and the projected results. The operative language in that section is "as appropriate" meaning that the necessary and appropriate information is subject to variation from patient to patient depending on the patient's condition and specific medical issues. The Administrative Law Judge notes that in this claim the plaintiff has treated consistently with Drs. Love and Hogancamp for defined diagnoses since 2001 and that the workers' compensation carrier has been well aware of the treatment provided by both of those

physicians since that time. Ms. Hulker testified at her deposition and described exactly the treatment provided by each of the joined medical providers including six prescription medications. **The Administrative Law Judge, having reviewed the records and reports of Drs. Love and Hogancamp find that each have appropriately detailed the course of ongoing and recommended treatment.** The Administrative Law Judge further finds that it is obvious that the "projected results" of the plaintiff's ongoing treatment, in light of her multiple work-related medical conditions including RSD, chronic headaches, neck pain and upper extremity pain that the goal of treatment is the relief of symptoms, i.e., that the treatment provided is palliative and not curative. Further, the Administrative Law Judge finds the carrier's interest and emphasis on investigating the coordination of treatment is at best questionable in light of the carrier's awareness that both Drs. Hogancamp and Love have been treating the plaintiff since 2001 and in light of the mention in the medical records from each of those physicians that the plaintiff was treating with the other simultaneously. **Dr. Hogancamp specifically listed in his August 6, 2012, office note that the plaintiff continued to see Dr. Love and he set forth in detail all of the prescription medications plaintiff was taking <u>including</u> those prescribed by Dr. Love. Dr. Love, for his part, indicated not only that he was aware that plaintiff treated with Dr. Hogancamp but that she should continue with that care and treatment and that she required a "multidisciplinary" approach to her complex pain issues.** The sudden concern over "coordination of care" seems less than genuine to the

undersigned. Certainly, if the carrier were concerned as to whether the treatment provided by Drs. Love and Hogancamp taken in concert was medically reasonable and necessary it had other options to address that issue outside the context of a treatment plan including an independent medical evaluation and, more appropriately, the utilization review process. While the carrier insists that it has continued to pay for all the treatment provided to the plaintiff by Drs. Love and Hogancamp, the Administrative Law Judge notes that the present medical dispute, which is at least the third to the undersigned's calculation since this matter was settled eight years ago, has resulted in Dr. Hogancamp's decision not to treat the plaintiff any further thereby leaving her in the precarious position of not being able to obtain a complete measure of treatment.

Having carefully considered the records from Drs. Love and Hogancamp as filed by both parties, the Administrative Law Judge finds that both physicians have submitted regulation-compliant treatment plans detailing the course of ongoing and recommended treatment, as well as including clinical findings, diagnosis, prognosis and the modalities of treatment. It is further clear to the Administrative Law Judge that the "duration of treatment" is, at this point, not time-limited as plaintiff will continue to treat for her permanent medical condition. Moreover, the Administrative Law Judge finds, that the records from Drs. Love and Hogancamp viewed as a whole support a finding that the "projected results" of treatment provided is the relief of the plaintiff's significant and severe

> physical and emotional work-related symptoms.
>
> Having found that the records and reports of Drs. Love and Hogancamp constitute legally sufficient "treatment plans" it is not necessary to address the remaining issues in this medical dispute regarding compensability of ongoing treatment had those plans have been found insufficient. This medical dispute is, therefore, resolved in its entirety in favor of the plaintiff.
> (Emphasis added.)

Calvert City filed a petition for reconsideration on September 20, 2013. It argued the ALJ erred in finding the medical payment obligor, "has been well aware of the treatment provided by both of those physicians." Calvert City also argued the ALJ erred in determining options other than requesting a treatment plan were available and should have been utilized. It argues while utilization review may have been appropriate, it would have been ineffective without the reviewer being provided the information sought by Hulker. Finally, Calvert City argued the ALJ erred in not allowing it to assert a medical fee dispute, and the determination Dr. Hogancamp refused to treat Elliott due to the medical fee dispute was not supported by the record. The petition for reconsideration was overruled as a re-

argument and a request to re-weigh the evidence submitted in the record.

On appeal, Calvert City contends the ALJ abused his discretion in finding the documentation submitted by the medical providers satisfied the requirement of 803 KAR 25:096 §5.

As noted by the ALJ, 803 KAR 25:096 § 1(6) defines “treatment plan” as follows:

> (6) ‘Treatment plan’ means a written plan that:
>
> (a) May consist of copies of charts, consultation reports or other written documents maintained by the employee's designated physician discussing symptoms, clinical findings, results of diagnostic studies, diagnosis, prognosis, and the objectives, modalities, frequency, and duration of treatment;
>
> (b) Shall include, as appropriate, details of the course of ongoing and recommended treatment and the projected results; and
>
> (c) May be amended, supplemented or changed as conditions warrant.

With reference to when a treatment plan is necessary, 803 KAR 25:096 §5 provides:

> (1) A treatment plan shall be prepared if:
>
> (a) Long-term medical care is required as a result of a work-related injury or occupational disease;

(b) The employee has received treatment with passive modalities, including electronic stimulation, heat or cold packs, massage, ultrasound, diathermy, whirlpool, or similar procedures for a period exceeding sixty (60) days. The treatment plan shall detail the need for the passive treatment, the benefits, if any, derived from the treatment, the risks attendant with termination of the treatment, and the projected period of future treatment; or

(c) An elective surgical procedure or placement into a resident work hardening, pain management, or medical rehabilitation program is recommended. The treatment plan shall set forth specific and measurable performance goals for the employee through the surgery, work hardening, or medical rehabilitation program.

(2) The designated physician shall provide a copy of the treatment plan to the medical payment obligor seven (7) days in advance of an elective surgical procedure or placement into a resident work hardening, pain management, or medical rehabilitation program. In all other instances when a treatment plan is required, a copy of the treatment plan shall be provided within fifteen (15) days following a request by the medical payment obligor. An amendment, supplement, or change to a treatment plan shall be furnished within fifteen (15) days following a request.

(3) Preparation of a treatment plan shall be a necessary part of the care to be rendered and shall be an integral part of the fee authorized in the medical fee schedule for the underlying services. An additional fee shall not

> be charged for the preparation of a treatment plan or progress report, except for the reasonable cost of photocopying and mailing the records.

In this instance, Calvert City paid for treatment provided to Elliott by Drs. Love and Hogancamp for several years following the occurrence of the work-related injury. A review of the records submitted does not demonstrate any change of frequency, or of the type of treatment rendered for years prior to the initiation of this dispute. On appeal, Calvert City argues it is entitled to a treatment plan.

The ALJ painstakingly outlined Hulker's request, and how it was satisfied by the medical providers. We note the Form 112 specifically addressed the requested treatment plans and coordination of care. The ALJ explained the information provided, when taken as a whole, constituted valid, compliant treatment plans as contemplated by the regulation. He likewise explained it was evident the treating physicians were cognizant of the treatment each provided, and found an admonition for further coordination was not required.

Calvert City's argument it is entitled to a treatment plan is disingenuous in that the ALJ outlined not only was it entitled to make the request, he also found the

medical providers had complied with it. Our review of the language of the applicable regulations, in concert with the information provided, reveals the ALJ did not err in finding the requested treatment plan was provided.

Given the undisputed facts, we believe the ALJ could reasonably conclude Dr. Love and Hogancamp were at all times compliant with the regulatory requirements of 803 KAR 25:096 concerning the required treatment plan. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984); REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985). Hence, we find no error.

In a post-award medical fee dispute, the employer bears both the burden of going forward and the burden of proving entitlement to the relief sought, except that the claimant bears the burden of proving work-relatedness. National Pizza Company vs. Curry, 802 S.W.2d 949 (Ky. App. 1991); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979); Addington Resources, Inc. v. Perkins, 947 S.W.2d 421 (Ky. App. 1997); Mitee Enterprises vs. Yates, 865 S.W.2d 654 (Ky. 1993); Square D Company v. Tipton, 862 S.W.2d 308 (Ky. 1993), Addington Resources, Inc. v. Perkins, 947 S.W.2d 421 (Ky. App. 1997). Despite Hulker's belief the information supplied by Elliott's treating physicians was not compliant, her lay interpretations do not compel a contrary

result. Compelling evidence is defined as evidence so overwhelming no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985). The ALJ, not Hulker, is the arbiter of what constitutes sufficient compliance.

We likewise find the ALJ did not err in suggesting Calvert City could exercise its option for utilization review, if necessary, and if it desires to contest the reasonableness and necessity of treatment rendered to Elliott by either treating physician. Based upon the foregoing, we do not believe the ALJ erred in either his interpretations or conclusions.

Next, Elliott requested costs and attorney fees be awarded for responding to a frivolous appeal. While we deem the issues raised by Calvert City on appeal have little merit, the request for such sanctions is **DENIED**. However, Calvert City is cautioned appeals without the likelihood of success are frowned upon, and any such additional filings in the future may indeed result in an award of such costs.

Finally, Elliott requested an oral argument. After having reviewed the record, it is determined an oral argument is unnecessary in arriving at a decision, and therefore **IT IS HEREBY ORDERED** the request is **DENIED**.

Accordingly, the opinion and order rendered by Hon. Robert L. Swisher, Administrative Law Judge, on September 6, 2013 and the order on reconsideration issued October 29, 2013 are hereby **AFFIRMED.**

ALL CONCUR.

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MICHAEL W. ALVEY, CHAIRMAN
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