OPINION ENTERED: March 29, 2013

CLAIM NO. 200376592

CHRISTOPHER HUNT PETITIONER

VS. **APPEAL FROM HON. GRANT S. ROARK, ADMINISTRATIVE LAW JUDGE**

DAGS BRANCH COAL CO., INC. #7
and HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING IN PART, VACATING IN PART,
AND REMANDING
* * * * * *

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

STIVERS, Member. Christopher Hunt ("Hunt") appeals from the December 10, 2012, opinion and order by Hon. Grant S. Roark, Administrative Law Judge ("ALJ") in which the ALJ resolved a medical fee dispute as follows:

> This medical fee dispute is resolved in favor of the defendant employer to the extent that muscle relaxers, Neurontin and Nexium are not compensable;

> narcotics only on an as needed basis are compensable and regular doses are not compensable; either Zipsor and Celebrex are compensable, but not both; and regular office visits more than every 6 months are not compensable.

No petition for reconsideration was filed. On appeal, Hunt asserts the employer, Dags Branch Coal Co., Inc. #7 ("Dags Branch"), failed to prove the contested medical treatment is not reasonable and necessary; therefore, it was erroneous for the ALJ to find in its favor.

The Form 101 alleges on August 5, 2003, Hunt injured his back in the following manner: "I was moving a continuous miner around to a block of coal when the cable line became very tight. It took me and two other co-workers to lift it up, [sic] that's when my back gave out." On June 17, 2004, in a "Notice of Claim Acceptance," Dags Branch accepted the claim as compensable but disputed the amount of compensation owed.

By order dated April 28, 2006, Hon. Andrew F. Manno, ALJ ("ALJ Manno") awarded temporary total disability ("TTD") benefits as previously paid, permanent partial disability ("PPD") benefits, medical benefits, and vocational rehabilitation. By order dated October 4, 2006, the Board dismissed Hunt's appeal for repeated failures to timely file a brief.

On October 12, 2011, Dags Branch filed a "Motion to Reopen and Motion to Join Parties" and a Form 112 Medical Fee Dispute. In its motion to reopen, Dags Branch moved to join Dr. Ronald Mann and Best Practice Family Health Care. In the Form 112, the nature of the dispute was described as follows: "Reasonableness and necessity of the continued prescription and use of Nexium, Tizanidine, Gabapentin, Hydrocodone/APAP, Ultram ER and either Zipsor or Celebrex." Attached to the Form 112 Medical Fee Dispute is a Utilization Review Notice of Denial dated October 4, 2011, by Dr. Bart Olash. Dr. Olash determined Nexium, Tizanidine, Gabapentin, Hydrocodone/APAP, and Ultram ER were not medically necessary or appropriate for the treatment of the 2003 work injury. Regarding Zipsor or Celebrex, Dr. Olash stated one is medically necessary and appropriate but two are not.

By order dated November 2, 2011, the Chief Administrative Law Judge ("CALJ") sustained Dags Branch's motion to reopen and its motion to join Dr. Mann and Best Practice Family Health Care. By order dated February 1, 2012, the CALJ assigned the medical fee dispute to an ALJ for final adjudication. On February 22, 2012, the medical fee dispute was assigned to the ALJ.

The June 12, 2012, benefit review conference ("BRC") order lists the following contested issues: "MFD-Reasonableness/Necessity of contested treatment w/Dr. Mann."

In the December 10, 2012, opinion and order, the ALJ set forth the following findings of fact and conclusions of law and order:

> The issue in this reopening for a medical fee dispute is whether the treatment and prescriptions provided plaintiff by Dr. Mann are reasonable and necessary. The relevant medical evidence is outlined above. Having reviewed the evidence of record, the Administrative Law Judge is more persuaded by the opinions of Dr. Olash and Dr. Snider. They explained how Dr. Mann has not provided adequate explanation for the need for some of his treatments.
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> In particular, it is determined that, based on the opinion of Dr. Olash, plaintiff may take either Zipsor or Celebrex, but not both. Moreover, based on the opinions of Dr. Snider, it is determined regular use of an anti-inflammatory is appropriate and compensable but that the use of narcotics should be as as-needed and that plaintiff should be weaned off of regular use of narcotics. Further, neither Gabapentin/Neurontin nor muscle relaxers are reasonable or necessary per Dr. Snider and, as such, they are not compensable. Dr. Snider recommended a timetable for weaning from regular doses of narcotics and Neurontin, which is found reasonable and compensable.

> Based on the opinions of Dr. Snider, it is further determined that continued treatment with Dr. Mann is compensable only if limited to office visits every six (6) months, the enforcement of a narcotics contract, eKASPER monitoring, laboratory confirmation of urine drug screen results, and documentation of tangible consequences for noncompliance.
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> **ORDER**
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> IT IS HEREBY **ORDERED** AND ADJUDGED as follows:
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> 1. This medical fee dispute is resolved in favor of the defendant employer to the extent that muscle relaxers, Neurontin and Nexium are not compensable; narcotics only on an as needed basis are compensable and regular doses are not compensable; either Zipsor or Celebrex are compensable, but not both; and regular office visits more than every 6 months are not compensable.
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> 2. The defendant employer shall approve and pay for treatment to wean plaintiff from regular narcotic use and from Neurontin as described by Dr. Snider.
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> 3. Counsel shall move for approval of attorney fees within 30 days.

On appeal, Hunt takes issue with the ALJ's reliance on Dr. Olash and Dr. Gregory Snider and asserts Dr. Mann, as Hunt's treating physician, is more familiar with Hunt's "condition and progress than a one-time evaluator, or an independent medical examiner."

In a post-award medical fee dispute, the burden of proof to demonstrate the medical treatment is unreasonable or unnecessary is with the employer while the burden remains with the claimant concerning questions pertaining to work-relatedness or causation of the condition. *See* KRS 342.020; Mitee Enterprises vs. Yates, 865 S.W.2d 654 (Ky. 1993); Addington Resources, Inc. v. Perkins, 947 S.W.2d 421 (Ky. App. 1997). As Dags Branch was the party with the burden of proof and was successful before the ALJ, the sole issue in this appeal is whether substantial evidence supported the ALJ's conclusion. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986). Substantial evidence has been defined as some evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable people. Smyzer v. B.F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971). Although a party may note evidence that would have supported a conclusion that is contrary to the ALJ's decision, such evidence is not an adequate basis for reversal on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974).

As fact-finder, the ALJ determines the quality, character, and substance of all the evidence and is the sole judge of the weight and inferences to be drawn from

the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993); Miller v. East Ky. Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997). He may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it was presented by the same witness or the same party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). Additionally, in the case *sub judice*, no petition for reconsideration was filed. Therefore, on questions of fact, the Board is limited to a determination of whether there is substantial evidence contained in the record to support the ALJ's conclusion. Stated differently, 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 that supports the ultimate conclusion. Eaton Axle Corp. v. Nally, 688 S.W.2d 334 (Ky. 1985).

The ALJ relied upon the opinions of Drs. Snider and Olash. Dr. Olash's opinions are set forth in a "Physician Review Report" dated October 3, 2011, a "Utilization Review Notice of Denial" dated October 4, 2011, and a deposition dated March 28, 2012. In the October 3, 2011, report, Dr. Olash opined as follows:

> First, the gentleman is on Nexium. In reviewing notes over the past few years from Dr. Mann, there is no

Documentation [sic] of any GI problems due to the nonsteroidal anti-Inflammatory [sic] agents; hence, I do not believe the Nexium can be considered medically necessary for treatment of the work injury. There is a notice from 2007 in which Dr. Mann notes Prilosec was being prescribed at that time for GI upset secondary to other medications but without more up to date information, I do not believe we can consider Nexium an appropriate medicine.

I do not believe tizanidine [sic] is an appropriate medication. There is no documentation of any muscle spasms. Without muscle spasms, there is no need for a muscle relaxer.

The gentleman is on two nonsteroidal anti-inflammatory agents Zipsor and Celebrex. One of these agents is appropriate, two are not. An anti-inflammatory agent will be effective both for its analgesic and for anti-inflammatory properties. I do not believe there is ever a reason to simultaneously use two different nonsteriodal anti-inflammatory agents at the same time in the same patient. This would result in an unacceptable rise in possible side effects.

The gentleman is on gabapentin [sic]. There is no documentation of any neuropathic problems due to the distant work injury; hence, the gabapentin [sic] is not indicated.

Finally, the patient is on hydrocodone/APAP and Ultram ER. Hydrocodone/APAP is a narcotic combined with acetaminophen. Ultram ER is an analgesic, which reacts with narcotic receptor sites. The hydrocodone/APAP [sic] is habituating and prone to

> abuse. The Ultram ER is also prone to abuse. In reading the chart, it is obvious this gentleman has psychiatric problems. There is also documentation that past urine drug screens have not been consistent with appropriate use of narcotic medications. In reading Dr. Mann's notes, there is not even mention of narcotic medications. There is not documentation of appropriate monitoring for these medications. Hence, I do not believe there is appropriate documentation or rationale to support the use of either of these medications. Based on information available to me, these medications should be weaned and discontinued over a 10-week period.
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> Recommendations:
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> 1. Celebrex or Zipsor is medically necessary and appropriate for the work injury of 8/5/2003, but not both. I find no documentation suggesting that gabapentin [sic], tizanidine [sic], or Nexium are medically necessary or appropriate for the 2003 work injury. I find no documentation suggesting that the continued use of the analgesic medications hydrocodone/APAP [sic] or Ultram ER are indicated at this time for the 2003 work injury.

Dags Branch introduced the March 22, 2011, independent medical examination ("IME") report and March 28, 2012, deposition of Dr. Snider. As set forth in the March 22, 2011, IME report, Dr. Snider's recommendations are as follows:

> In my opinion, Dr. Mann's documentation of assessment and treatment is suboptimal. He does not make a regular

> or thorough listing of medications and doses in his office notes. In my opinion, Mr. Hunt should be using an anti-inflammatory on a regular basis. Narcotics should be reserved for as-needed use. I do not see any documentation of neuropathy for which Neurontin [Gabapentin] would be indicated. I do not see any indication for muscle relaxers. (Mr. Hunt could be weaned from regular doses of narcotics over a 10-week period; he could be weaned from Neurontin over a 4-week period; he could be taken off muscle relaxers immediately.) In my opinion, monthly follow-up visits are neither reasonable nor necessary; Mr. Hunt's condition is stable enough that he could be assessed on an every-six-month basis. I recommend that Dr. Mann enforce a narcotics contract, perform eKASPER monitoring, confirm urine drug screen results in a laboratory, and document tangible consequences for noncompliance. I do not see any indication for additional imaging studies. If Mr. Hunt's symptoms change dramatically and these symptoms are accompanied by a documented objective neurologic deficit then additional imaging studies might be necessary in the future.

The opinions of Drs. Olash and Snider comprise substantial evidence which support the ALJ's conclusions as set forth in the December 10, 2012, opinion and order. While there may be contrary evidence in the record by Dr. Mann, this is not an adequate basis for reversal. *See* McCloud v. Beth-Elkhorn Corp., supra.

Additionally, the ALJ has the discretion to choose which medical opinions upon which he will rely. If "the physicians in a case genuinely express medically sound, but differing, opinions as to the severity of a claimant's injury, the ALJ has the discretion to choose which physician's opinion to believe." Jones v. Brasch-Barry General Contractors, 189 S.W.3d 149, 153 (Ky. App. 2006). The fact Dr. Mann is Hunt's treating physician and Drs. Olash and Snider are not is not relevant to the ALJ's exercise of this discretion. At most, this fact goes to the weight and credibility of Drs. Olash and Snider's opinions not admissibility. The ALJ, as fact-finder, has the sole authority to determine the weight of the evidence and the credibility of testimony in the record. *See* Square D Co. v. Tipton, supra.

That said, we vacate the ALJ's determination office visits with Dr. Mann are compensable if limited to visits every six months, as this issue was not raised by Dags Branch in its Form 112 medical fee dispute. The Form 112 characterizes the nature of the dispute as follows: "Reasonableness and necessity of the continued prescription and use of Nexium, Tizanidine, Gabapentin, Hydrocodone/APAP, Ultram ER and either Zipsor or Celebrex." Thus, as the compensability of office visits with Dr. Mann

was not a part of the medical fee dispute, the ALJ should not have ruled on this issue.

Accordingly, as it pertains to the medications in dispute, the December 10, 2012, opinion and order is **AFFIRMED**. However, as it pertains to the frequency and compensability of Hunt's office visits with Dr. Mann the ALJ's decision is **VACATED**. This claim is **REMANDED** to the ALJ for entry of an amended opinion and order in conformity with the views expressed herein.

ALVEY, CHAIRMAN, CONCURS.

SMITH, MEMBER, NOT SITTING.

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