Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: May 1, 2014

CLAIM NO. 200885913

DAVID HATFIELD PETITIONER

VS. **APPEAL FROM HON. JONATHAN R. WEATHERBY, ADMINISTRATIVE LAW JUDGE**

JAY & MARTY GRAY, INC.
DR. ROBERT HOSKINS/HOSKINS MEDICAL CENTER
SPINE & BRAIN NEUROSURGICAL CENTER
LAKE CUMBERLAND REGIONAL PAIN CENTER
LAKE CUMBERLAND NEUROSURGICAL CLINIC
HON. JAMES L. KERR, ALJ RESPONDENTS

AND

DAVID HATFIELD PETITIONER

VS.

JAY & MARTY GRAY
DR. ROBERT HOSKINS/HOSKINS MEDICAL CENTER
SPINE & BRAIN NEUROLOGICAL CENTER
LAKE CUMBERLAND REGIONAL PAIN CENTER
LAKE CUMBERLAND NEUROSURGICAL CLINIC
HON. JONATHAN R. WEATHERBY, ALJ RESPONDENTS

AND

JAY & MARTY GRAY, INC. PETITIONER

VS.

DAVID HATFIELD
DR. ROBERT HOSKINS/HOSKINS MEDICAL CENTER
LAKE CUMBERLAND NEUROSURGICAL CLINIC PSC
LAKE CUMBERLAND REGIONAL PAIN CENTER
HON. JONATHAN WEATHERBY, ALJ RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

RECHTER, Member. Jay and Marty Gray, Inc. ("Gray") appeals from the December 10, 2013 Order Upon Remand rendered by Hon. Jonathan R. Weatherby,. Administrative Law Judge ("ALJ") and from the January 15, 2014 order ruling on its petition for reconsideration. Gray argues the ALJ's decision on remand did not comply with the mandates of KRS 342.315(2) and is not supported by substantial evidence. For the reasons set forth herein, we affirm.

David Hatfield's ("Hatfield") claim for work-related injuries was adjudicated before Hon. James L. Kerr, Administrative Law Judge. During the pendency of the claim, Gray filed a medical dispute but failed to join the medical providers. ALJ Kerr issued an Opinion and Order dated May 26, 2011, awarding permanent partial disability benefits. ALJ Kerr noted there remained a disputed issue

regarding unpaid and contested medical expenses. Because no motion to join the medical providers had been filed, he determined it would be premature to resolve the issue. The ALJ ordered the providers joined and granted additional time for the parties to submit evidence in the medical fee dispute. Following ALJ Kerr's ruling on a petition for reconsideration, Hatfield appealed the May 26, 2011 Order and subsequent Order on Reconsideration. By Order of this Board dated August 31, 2011, the appeal was placed in abeyance and the claim was remanded for resolution of the medical fee dispute. The claim was subsequently reassigned to ALJ Weatherby, who adjudicated the outstanding medical fee dispute, disallowing three prescriptions, physical and occupational therapy, and referrals to an orthopedic surgeon. Upon Gray's petition for reconsideration, the ALJ amended the October 8, 2012 order to more specifically permit recommended epidural steroid injections, office visits with his treating physician, and prescriptions for Hydrocodone, Tizanidine and Ultram.

Hatfield's appeal was removed from abeyance and the Board rendered its opinion vacating and remanding on August 16, 2013. The Board affirmed ALJ Kerr's cure of the procedural defect regarding the joinder of the providers. However, the Board held remand was required for three

reasons. First, the October 8, 2012 order misstated the burden of proof, placing the burden on the defendant-employer to prove the contested medical treatment is not reasonable or necessary for the cure and relief of a work injury. Second, the Order did not set forth sufficient findings of fact to substantiate the approval of epidural injections, which were first awarded in the ALJ's Order on reconsideration dated January 24, 2013. The ALJ failed to make any express finding of fact regarding the necessity of these injections, or that he relied upon the utilization review in deeming the injections compensable. Finally, there remained inconsistencies in the award with respect to prescription medications. The Board explained as follows:

> By the January 24, 2013 Order, ALJ Weatherby clarified Gray would be responsible for "thoracic epidural steroid injections, office visits with the treating physician Dr. Hoskins and his corresponding prescriptions for Hydrocodone, Tizanidine and Ultram for the Plaintiff's back condition." However, paragraph 8 of the original Order was not amended, and that paragraph found "Tramadol, Tizanidine and Zanaflex … to be unreasonable and unnecessary." In addition to the obvious inconsistency regarding the prescription medication Tizanidine, it is further uncontested Zanaflex and Tizanidine are the same drug sold under different names. Likewise, Ultram and Tramadol are the same drug sold under different names. Upon remand, these inconsistencies should be clarified.

Gray now appeals from the Order on Remand. Significant medical proof was submitted, and we summarize only that evidence necessary to the issues currently appealed. Dr. Ray Garman performed a university evaluation on September 30, 2010. He diagnosed a right shoulder strain and thoracic injury with radiculopathy as a result of the work injury. He opined the right shoulder injury had resolved. He assessed a 5% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition, for the thoracic condition, noting Hatfield had a dermatomal distribution of pain and numbness. Dr. Garmin stated:

> From this injury standpoint, there is no indication for continued scheduled narcotics. If needed for his back discomfort, this needs to be evaluated in association with a non-occupational causality, which is not demonstrated in this instance. (from the standpoint of this occupational exposure).

Dr. Robert Hoskins began treating Hatfield for the work injury on June 16, 2008. In a February 22, 2010 note, Dr. Hoskins indicated Hatfield reported trigger point injections helped a great deal. Hatfield expressed concern that he would not be able to work full time in the future due to increasing low back and neck pain. Dr. Hoskins completed a Form 107 on April 12, 2010 following a March

30, 2010 examination. He diagnosed lumbosacral sprain/strain; lumbar radiculitis; thoracic radiculitis; shoulder strain; disc bulges of the lumbar spine; disc protrusion L4-5; disc bulging, thoracic spine; disc protrusion T7-8; slight right paracentral extrusion T7-8; disc protrusion T8-9; partial thickness tear of the distal supraspinatus tendon; supraspinatus tendinopathy; subacromial subdeltoid bursitis on the right; AC joint osteoarthritis on the right; and subacromial impingement on the right. He opined the work injury was the cause of Hatfield's complaints. On April 19, 2010, Hatfield expressed his desire to have injections in the shoulder area and trigger point injections near the spine and was "petitioning to get Work Comp to cover those charges."

In a July 15, 2010 letter to Hatfield's counsel, Dr. Hoskins stated Hatfield injured his neck, right shoulder, arm and low back at work on May 5, 2008. Dr. Hoskins continued to treat Hatfield conservatively with Hydrocodone, Zanaflex, Naprosyn and Ultram. Dr. Hoskins stated Hatfield "from time to time" would require narcotic pain medications.

Dr. David Muffly performed an independent medical evaluation ("IME") on January 8, 2009. He diagnosed a thoracic strain, resolved, due to the work injury. He

opined Hatfield's degenerative disc disease of the lumbar and thoracic spine was not related to the work injury. Dr. Muffly stated Hatfield needs no narcotic medication.

Dr. Danial D. Primm Jr. performed an IME on May 14, 2010. He diagnosed right shoulder and chest wall strain by history, resolved, and probable symptom magnification versus malingering. He opined no further treatment was reasonable or necessary.

Dr. Bart Olash performed a utilization review on August 10, 2009. He opined continued office visits at Spine & Brain Neurological were not medically necessary.

Dr. Michael Chunn performed a peer review on September 9, 2009. He recommended Hatfield be weaned from narcotic medications and transitioned to over-the-counter anti-inflammatory medication.

The ALJ rendered his Order Upon Remand on December 10, 2013 providing the following findings:

> 2. The ALJ finds that the medical evidence provided by the treating physician, Dr. Hoskins, is the most credible and convincing in this matter. Dr. Hoskins consistently saw the Plaintiff over time and is most familiar with the symptoms, condition, and treatment. In reliance upon his credible and convincing opinions, the ALJ finds that the Defendant-employer and/or its workers' compensation insurance carrier is responsible for payment of the expenses related to

> requested thoracic epidural steroid injections.
>
> 3. The ALJ found in the January 24, 2013, Order that office visits with the treating physician Dr. Hoskins and his corresponding prescriptions for Hydrocodone, Tizanidine and Ultram for the plaintiff's back condition are compensable. To clarify, the Plaintiff had been prescribed similar and in some cases identical medications by other doctors. As stated, the ALJ finds, due to the credibility of the opinions of the treating physician, that only the office visits with Dr. Hoskins and his corresponding prescriptions for Hydrocodone, Tizanidine and Ultram are deemed reasonable and necessary. To the extent that this order is in conflict with any prior opinion or order, the prior opinion or order is hereby amended.

Gray filed a petition for reconsideration raising essentially the same arguments it makes on appeal. In his January 15, 2014 order ruling on the petition for reconsideration, the ALJ again stated he found the opinion of Dr. Hoskins to be the most credible. The ALJ indicated he did not base the determination on the fact Dr. Hoskins was the treating physician but rather upon his greater familiarity with Hatfield's symptoms, treatment and condition. The ALJ stated the convincing nature of Dr. Hoskins' opinions overcame the presumptive weight afforded the university evaluation.

On appeal, Gray argues the ALJ's decision on remand did not comply with the mandates of KRS 342.315(2) and is not supported by substantial evidence. Gray contends the ALJ's reliance upon Dr. Hoskins' opinion because he was more familiar with Hatfield's symptoms, treatment and condition as a reason for rejection of the university evaluator's opinion is insufficient as a matter of law. It further contends the ALJ's mere statement that medical records were more convincing than the opinions of a university evaluator does not comply with KRS 342.315(2). Gray asserts there was no acceptable basis for giving the records of Dr. Hoskins superior weight over the report and examination of Dr. Garman, particularly in light of his superior qualifications as a specialist. Gray notes the ALJ did not explain why the contrary medical evidence from Drs. Olash, Chunn, Muffly or Primm was insufficient to overcome or outweigh the records of Dr. Hoskins. Finally, Gray argues the ALJ still has not provided sufficient findings of fact to substantiate the approval of epidural injections.

The Supreme Court in Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000), held that the term "presumptive weight" as used in KRS 342.315(2) amounts to nothing more than a rebuttable presumption that may be overcome by

countervailing evidence. Id. at 94. The presumptive weight given to a university evaluator's opinion can be rejected by the ALJ if there is a reasonable basis for doing so. Id. Where the clinical findings and opinions of the university evaluator are rebutted, KRS 342.315(2) does not restrict the authority of the fact-finder to weigh the conflicting medical evidence. However, the ALJ must specifically set out his reasons for rejecting the university evaluator's opinion in the decision. Id. at 95. The university evaluator's opinion is not controlling and can be rejected by the ALJ if there is a reasonable basis for doing so and the ALJ provides an explanation as to why he is rejecting that opinion.

Contrary to Gray's argument, we believe the countervailing evidence is a reasonable basis for rejecting the university evaluator's opinion. As stated by the Supreme Court in Magic Coal, supra, KRS 342.315(2) does not shift the burden of persuasion, nor does it abrogate the ALJ's authority to weigh the evidence. The ALJ, as fact-finder, has the sole authority to determine the weight, credibility, substance and inferences to be drawn from the evidence. Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). The ALJ's finding that the evidence from Dr. Hoskins was more credible based upon his greater

familiarity with Hatfield's symptoms, condition and treatment is a reasonable basis for rejecting Dr. Garman's opinion. We therefore find no error with the ALJ's application of the "presumptive weight" provision of KRS 342.315(2).

Nothing in Chapter 342 or the applicable regulations mandates greater weight be afforded to a treating physician's testimony. Wells v. Morris, 698 S.W.2d 321 (Ky. App. 1985); Sweeney v. King's Daughters Medical Center, 260 S.W.3d 829, 830 (Ky. 2008). However, an ALJ is not precluded from considering that a treating physician may be in a better position to evaluate the patient's condition. The ALJ on reconsideration specifically stated he did not rely on the opinion of Dr. Hoskins simply because he was a treating physician.

The ALJ may consider the qualifications of the medical witnesses, but need not give greater weight to testimony from a particular specialist over another. Yocom vs. Emerson Elec. Co., 584 S.W.2d 744 (Ky. App. 1979). The ALJ was free to pick and choose among the various medical testifiers, whether treating physicians, general practitioners, or specialists. While the ALJ was required to state his reason for rejecting the opinion of the university evaluator, he was under no obligation to explain

why he rejected the opinions of other physicians. The ALJ, as fact-finder, has the sole authority to judge the weight, credibility, substance, and inference to be drawn from the evidence. Further, the ALJ was authorized to choose to believe parts of the evidence and disbelieve other portions of the evidence whether the evidence came from the same witness or the same party's total proof. Paramount Foods, Inc. v. Burkhardt, id. Substantial evidence supports the ALJ's finding that requested epidural steroid injections and office visits with Dr. Hoskins and corresponding prescriptions for Hydrocodone, Tizanidine and Ultram are reasonable and necessary. On remand, the ALJ complied with the Board's directives, clarifying the inconsistencies regarding the prescription medications.

Accordingly, the December 10, 2013 Order Upon Remand rendered by Hon. Jonathan R. Weatherby and the January 15, 2014 order ruling on Gray's petition for reconsideration are **AFFIRMED**.

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON BARRY LEWIS
POB 800
HAZARD, KY 41702

COUNSEL FOR RESPONDENT:

HON MCKINNLEY MORGAN
921 S MAIN ST
LONDON, KY 40741

ADMINISTRATIVE LAW JUDGE:

HON JONATHAN R. WEATHERBY
657 CHAMBERLIN AVE
FRANKFORT, KY 40601