

OPINION ENTERED: OCTOBER 12, 2012

CLAIM NO. 200197324

DERRICK HOUSTON

PETITIONER

VS.

**APPEAL FROM HON. RICHARD M. JOINER,
ADMINISTRATIVE LAW JUDGE**

OUTOKUMPU COPPER FRANKLIN, INC.
and HON. RICHARD M. JOINER,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
AFFIRMING**

* * * * *

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

SMITH, Member. Derrick Houston ("Houston"), pro se, appeals from the March 13, 2012 Opinion and Order rendered by Hon. Richard M. Joiner, Administrative Law Judge ("ALJ") relieving Outokumpu Copper Franklin, Inc. ("OCF") of responsibility for certain contested medications and continuing treatment with Consultants in Pain Management ("Consultants"). On appeal, Houston argues he should be

allowed to continue treatment with Consultants and he should continue to receive Hydrocodone or Lortab and Baclofen.

Houston filed his Form 101 on June 22, 2001, alleging he sustained injury to his low back in a work-related slip and fall on November 9, 2000. Houston underwent surgery and resolved his claim by settlement approved on January 10, 2002. OCF filed a Form 112 Medical Fee Dispute on August 19, 2002 challenging medical expenses related to surgery performed on July 26, 2001. While the dispute was pending, Houston filed a motion to reopen on January 22, 2003. The parties settled the motion to reopen stipulating Houston was permanently totally disabled with future related medical benefits remaining compensable.

On July 16, 2010, OCF filed a motion to reopen contesting current medical expenses. OCF also challenged numerous medications and Houston's continuing office visits.

OCF supported its motion with the June 29, 2010 report of Dr. Naresh D. Sharma, a board-certified neurosurgeon, who performed a utilization review. Dr. Sharma diagnosed failed lumbar back surgery syndrome status post lumbar laminectomy/surgery, intractable lumbar backache with bilateral lower extremity radicular pain, and status post L4-5 posterior lumbar fusion and instrumentation in 2002. Dr. Sharma indicated Effexor and Hydrocodone were considered

appropriate, but Meperitab was not appropriate and was no longer used in chronic or acute pain therapy. He stated Carisoprodol was not considered effective on a long-term basis and should only be used for treatment of acute spasm for a period of three to four weeks. He indicated Celebrex is not appropriate since there is no documentation of acute pain or breakthrough pain development and it should not be used on an ongoing continuous basis. Dr. Sharma also recommended Rozerem be discontinued for treatment of persistent insomnia. He recommended other anti-depressant or anti-anxiety medications along with hypnotic agents instead. Finally, he indicated Viagra could be taken on an as required basis and was considered appropriate as long as the serum testosterone levels were normal and psychological/psychiatric causes of erectile dysfunction had been ruled out.

OCF filed treatment notes from Consultants reflecting that Houston was seen mostly by Deborah Gray, APRN-BC. Notes from February 12, 2009 and April 5, 2010 were also electronically signed by Dr. Gregory Ball. The notes reflect treatment for the diagnoses of low back pain/lumbago, failed back syndrome, post laminectomy syndrome, and spondylosis with myelopathy. Houston had secondary diagnoses of depression NOS, insomnia and

neurogenic bladder. On November 5, 2009, Ms. Gray prescribed MS Contin, Toradol and continued prescriptions for Lortab, Soma, Celebrex, Neurontin, Rozerem, Effexor and Viagra. She also prescribed Glycolax powder for Houston's stomach problems. On December 7, 2009, Gray increased the MS Contin dose, added Lunesta and refilled the other medications.

OCF filed reports from Dr. James P. Little, a board-certified orthopedic surgeon, who examined Houston on February 19, 2010. Dr. Little found no significant objective abnormalities. He diagnosed status post L5-S1 laminectomy, left L5-S1 fusion with hardware implantation, left L4-5 fusion and instrumentation with residual left leg radicular pain and chronic narcotic dependence pain syndrome. Dr. Little indicated a recent drug screen was negative for narcotics although Houston was prescribed MS Contin and Lortab. He indicated there presently did not appear to be any ongoing significant cord or root compression. He noted Houston was obese and severely deconditioned. Dr. Little noted present antidepressant medications were appropriate for chronic pain, sleep disorder, and affective issues related to chronic pain. He stated they should be linked to an appropriate counseling program which would assist Houston not only in pain

management but with lifestyle modification with eventual elimination of narcotic pain medications.

OCF submitted the December 28, 2010 report of Dr. Russell Travis, a board certified neurosurgeon, who performed a comprehensive medical records review on December 28, 2010. Dr. Travis diagnosed a November 9, 2000 lumbar strain and sprain superimposed on a long history of chronic low back pain dating back to November 9, 2000. Dr. Travis stated there was no indication for any of the medications prescribed by Consultants except for MS Contin. Dr. Travis opined prescribing Hydrocodone and MS Contin together conflicted with opinions in the medical literature relating to opioid dosing for chronic non-cancer pain which indicated the total daily dose for non-cancer cases should not exceed 120 mg of oral morphine equivalence. Dr. Travis noted Ms. Gray was prescribing Lortab 10/650 four times a day and MS Contin 100 mg three times a day. This is equal to 240 mg of oral morphine equivalence per day.

Dr. Travis determined MS Contin was appropriate, but not Lortab or Baclofen. He found no evidence in the medical or diagnostic imaging records of neuropathic pain. Therefore, there was no indication for Neurontin or Lyrica. He specifically found the prescription for Pristiq was not related to the November 9, 2000 work injury. Furthermore,

an appropriate physical activity program would eliminate the need for a sleep aid such as Lunesta.

Dr. Travis also indicated reducing the narcotic medication to the appropriate level would relieve constipation caused by overdosage of opioids and thus MiraLAX would not be needed. Dr. Travis found Carisoprodol was clearly contraindicated since it is extremely addictive and he found no evidence of muscle spasm. Finally, he noted Houston's erectile dysfunction is related to his prostate cancer and prostatectomy, and not to the November 9, 2000 work injury.

By order dated August 20, 2010, The ALJ joined Consultants as a party to this action. Neither Houston nor Consultants filed a response, nor did they file evidence in the dispute. Upon the OCF's motion, the matter was submitted on the record without a hearing. Neither Houston nor Consultants filed a brief before the ALJ.

The ALJ rendered his Opinion and Order on March 13, 2012, first noting:

A hearing was not held. No witnesses testified. I did not have an opportunity to observe any testimony. The evidence in this case consists of the following. No evidence has been submitted on behalf of the plaintiff. The defendant submitted evidence from Consultants In Pain Management, PC, reports from Dr. Naresh D Sharma,

records from Dr. Gregory Ball, a report from Dr. James P Little, and a report from Dr. Russell L. Travis. In addition, I feel free to refer to any evidence that has been submitted in the prior proceedings.

The ALJ summarized the evidence and found in part as follows:

Contested medical billing/Form 112

Defendant/Employer submits that the continuing pain management office visits, hydrocodone, Effexor, Celebrex, Rozerem, Meperitab, carisoprodol, Neurontin, baclofen, and Lunesta are not reasonable and necessary for the cure and/or relief of the diagnoses. This position is generally supported by the opinions of Dr. Travis, Dr. Little, and to a lesser extent, Dr. Sharma. Dr. Sharma finds that Neurontin and Lunesta may reasonably be required. There is no evidence filed by the claimant or the medical provider. Based on the evidence of record, I find that the following medicines are not reasonably required for the cure and relief of the effects of the injury of November 9, 2000: hydrocodone, Effexor, Celebrex, Rozerem, Meperitab, carisoprodol, and baclofen. Since these unnecessary medicines (at least with respect to the injury of November 9, 2000) are prescribed through Consultants in Pain Management, P.C., further visits at that facility are not reasonably required for the cure and relief of the effects of the injury of November 3, [sic] 2000.

On April 9, 2012, Houston filed a petition for reconsideration alleging he had been misled by the

insurance carrier during the proceedings and that he had always complied with the carrier's wishes when disputes arose regarding medications. Houston stated he could not secure representation due to "the fact that there is no money involved." Finding no patent errors appearing on the face of the Opinion and Order, the ALJ, by order dated April 27, 2012, denied the petition for reconsideration.

On appeal, Houston again asserts he has not been able to obtain counsel "due to the fact there is no money involved" in medical disputes. He indicates he had put his trust in the insurance carrier and feels he has been misled throughout the proceedings. He notes that, with respect to the medications in question, he discontinued Celebrex on his own. Houston notes other medications including Effexor Rozerem, Meperitab and Carisoprodol have been discontinued as of 2010 in order to comply with the wishes of OCF and/or its insurance carrier. Houston's argument on appeal is as follows:

The following is a listing of the medications that are currently being taken by the Petitioner and the purpose these medications serve in the treatment of his condition which are crucial for his wellbeing as is also the continued treatment with Consultants in Pain Management.

Petitioners pain is both mechanical (bone and muscle) and neuropathic

(lumbar radicular) in nature. Petitioner is perscribed a variety of medications to treat his pain condition including sustained release morphine for baseline pain control and hydrocodone for breakthrough pain. He is also prescribed Neurontin (an anticonvulsant for neuropathic pain relief), Baclofen (an antispasmodic for muscle spasm), Lyrica (another anticonvulsant for neuropathic pain relief), Pristiq (an antidepressant for treatment of depression due to chronic pain, as well as neuropathic pain), Lunesta (a sleep aid, for treatment of insomnia resultant to both chronic pain and depression related to pain), and Glycolax (an osmotic laxative to help prevent narcotic induced constipation, also related to the treatment of Petitioners chronic Workers Compensation pain condition). Each of these medications are medically reasonable and necessary for the Petitioners chronic pain condition, and the need for each has been brought about by Petitioners initial Worker's Compensation injury November 9, 2000.

I have read the prepared brief concerning Mr. Houston's medical treatment prepared by attorney for the respondent/employer, which controverts the medical necessity of many of these medications and their pertinence to the patient's current pain condition, or the causal relationship of the need of any of these medications to the work related injury in question. Having been treated by Consultants in Pain Management continuously for nearly eight years, and being physically examined upon each visit, it is found that his chronic pain complaints and physical findings objectifying such, continue to be related to his Worker's Compensation injury of November 9, 2000. It is

difficult for me to comprehend how opposing counsel who is not a physician, or any of the reviewing physicians on his behalf who have never had the opportunity to evaluate Mr. Houston, can be more qualified than Dr. Gregory Ball and Consultants in Pain Management to assess the medical necessity of his treatment. Some reference may be made to the ODG Guidelines with respect to medical necessity of some of these treatments and medications, but I would politely argue that these are simply guidelines, and not mandates. Notwithstanding the ODG Guidelines, clinical assessment, observation and judgment based on long term treatment of the petitioner would argue, in my view would trump opposing counsels suppositions. (Errors in the original)

In conclusion, Houston requests that the March 13, 2012 Opinion and Order be rescinded and the medical fee dispute be resolved in his favor with respect to Hydrocodone or Lortab and Baclofen and his continuing treatment at Consultants.

We recognize Houston is proceeding without benefit of counsel. For this reason, a brief explanation as it applies to the law on this subject is in order. An injured worker is entitled to reasonable and necessary treatment for the cure and relief of a work injury. KRS 342.020. However, treatment which is shown to be unproductive or outside the type of treatment generally accepted by the medical profession is non-compensable. Square D Co. v.

Tipton, 862 S.W.2d 308 (Ky. 1993). 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); R.J. Corman Railroad Construction v. Haddix, 864 S.W.2d 915, 918 (Ky. 1993); National Pizza Company vs. Curry, 802 S.W.2d 949 (Ky. App. 1991).

The OCF was successful before the ALJ in demonstrating that continuing prescriptions for Hydrocodone, Effexor, Celebrex, Rozerem, Meperitab, Carisoprodol and Baclofen are unreasonable and unnecessary, as is the continued visits to Consultants. Therefore, the question on appeal is whether the ALJ's decision is supported by substantial evidence. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). As the fact-finder, the ALJ has the sole authority to determine the weight, credibility, substance and inferences to be drawn from the evidence. Square D Company v. Tipton, 862 S.W.2d 308 (Ky. 1993); Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). Where the evidence is conflicting, the ALJ may choose whom or what to

believe. Pruitt v. Bugg Brothers, 547 S.W.2d 123 (Ky. 1977). The ALJ has the discretion to reject any testimony and believe or disbelieve parts of the evidence, regardless of whether it comes from the same witness or the same party's total proof. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977).

Conversely, since Houston, the party with the burden of proof on work-relatedness of the continuing medical treatment was unsuccessful before the ALJ, the question on appeal is whether the evidence is so overwhelming, upon consideration of the record as a whole, as to compel a finding in his favor. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). Compelling evidence is defined as evidence which is 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).

Here, the ALJ found in favor of OCF regarding whether continued treatment and medications were reasonable or necessary. In so finding, the ALJ noted the opinions of Dr. Travis and Dr. Little supported a conclusion the contested office visits and medications were not reasonable or necessary. He further noted Dr. Sharma's opinion also supported a finding the medications were unnecessary, with the exception of Neurontin and Lunesta which the ALJ ruled

were compensable. The opinions of Dr. Travis and Dr. Little are substantial evidence upon which the ALJ could rely in finding treatment with Consultants and various medications were not reasonable and necessary.

As to Houston's contention the opinion of his treating physician should be given more weight than the opinions of the evaluating physicians, the Supreme Court in Sweeney vs. King's Daughters Medical Center, 260 S.W.3d 829 (Ky. 2008), determined nothing requires the ALJ to give greater weight to a treating physician's testimony. The ALJ weighed the evidence and, as was his prerogative, found the opinions of Dr. Travis and Dr. Little more persuasive.

We understand and sympathize with Houston's difficulty in obtaining counsel because of issues concerning compensation of claimants' attorneys in medical fee disputes. However, resolution of such matters is beyond the scope of authority of the Board. Furthermore, the ALJ, on reconsideration, was constrained to consider only patent errors appearing on the face of the opinion and could not consider new matters including Houston's allegations of fraud. The proper vehicle for Houston's complaint concerning the carrier's conduct is a motion to reopen pursuant to KRS 342.125.

Accordingly the March 13, 2012 Opinion and Order rendered by Hon. Richard M. Joiner, Administrative Law Judge, is **AFFIRMED**.

ALL CONCUR.

PETITIONER:

DERRICK HOUSTON
710 WATERGAP RD
SPRING CITY, TN 37381

COUNSEL FOR RESPONDENT - OUTOKUMPU COPPER FRANKLIN, INC.:

HON W BARRY LEWIS
P O BOX 800
HAZARD, KY 41702

RESPONDENT:

CONSULTANTS IN PAIN MANAGEMENT
2000 STEIN DR
CHATTANOOGA, TN 37421

ADMINISTRATIVE LAW JUDGE:

HON. THOMAS G. POLITES
ADMINISTRATIVE LAW JUDGE
SPINDLETOP OFFICE COMPLEX
2780 RESEARCH PARK DR.
LEXINGTON, KY 40511