

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: November 27, 2013

CLAIM NO. 199605413

DONALD WEBB

PETITIONER

VS.

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

MOUNTAIN CLAY COAL CO. INC./  
JAMES RIVER COAL COMPANY;  
BRETT A. SCOTT M.D.;  
NEUROSURGICAL ASSOCIATES AT CENTRAL BAPTIST;  
DEBRA RYAN, PA-C;  
MARVIN S. HORMAN CRNA;  
CENTRAL KENTUCKY ANESTHESIA;  
and HON. RONALD L. SWISHER,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION  
AFFIRMING

\* \* \* \* \*

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

**ALVEY, Chairman.** Donald Webb ("Webb") seeks review of a decision rendered June 21, 2013, by Hon. Robert L. Swisher, Administrative Law Judge ("ALJ"), resolving a medical fee

dispute in favor of Mountain Clay Coal Company, Inc. ("Mountain Clay"). Webb also appeals from the order denying his petition for reconsideration entered July 25, 2013.

On appeal, Webb argues the ALJ erred in finding noncompensable the partial lumbar hemi-laminectomy at L3-L4; L3-L4 facetectomy; and L3-L4 discectomy recommended by Dr. Brett Scott, a neurosurgeon in Lexington, Kentucky. Because the ALJ's decision regarding the medical dispute is supported by substantial evidence and a different result is not compelled, we affirm.

Webb sustained repetitive trauma injuries to multiple body parts, including the low back, while operating heavy equipment for Mountain Clay manifesting on November 27, 1995, for which no surgery was either recommended or performed. He filed a Form 101 on June 10, 1996. In an opinion and order rendered July 23, 1997, Hon. James L. Kerr, Administrative Law Judge ("ALJ Kerr") found Webb had sustained a 10% permanent partial occupational disability, for which he awarded permanent partial disability ("PPD") benefits apportioned equally between Mountain Clay and the Special Fund. ALJ Kerr also found Mountain Clay responsible for payment of medical benefits stating as follows:

The plaintiff shall further recover of the defendant-employer and/or its insurance carrier, for the cure and relief from the effects of the injury such medical, surgical and hospital treatment, including nursing, medical and surgical supplies and appliances as may reasonably be required at the time of the injury and thereafter during disability.

Subsequently, a Form 110-I settlement agreement was approved by Hon. Donna H. Terry, Administrative Law Judge on March 7, 2003, commuting the payment of the remaining PPD benefits to lump sum. The agreement reflects Webb sustained both cervical and lumbar injuries. The settlement did not include a waiver or buy out of future medical benefits.

On January 7, 2013, Mountain Clay filed a motion to reopen and a Form 112 medical fee dispute. Mountain Clay also filed a motion to join Dr. Scott and Neurosurgical Associates as parties. Mountain Clay subsequently moved to join Deborah Ryan, PA-C, Dr. Marvin Harman, and Central Kentucky Anesthesia as parties.

Mountain Clay supported the medical dispute with the November 23, 2012 utilization review report of Dr. Richard Mortara, a neurosurgeon from Lexington, Kentucky. He opined the surgery at the L3-L4 level recommended by Dr. Scott was unrelated to the 1995 work injury based upon the

acute onset of left leg pain two months before his first office visit. Mountain Clay also filed the utilization review report of Dr. Robert Kowalski dated December 7, 2012, stating the requested surgery was not necessary or appropriate for the 1995 work injury.

Mountain Clay also attached Dr. Scott's December 17, 2012 operative report indicating he performed "left L3 and L4 partial hemilaminectomies, L3-L4 medial facetectomy and L3-L4 discectomy" due to a herniated left L3-L4 herniated nucleus pulposus and left L4 radiculopathy. Additionally, notes from office visits with Dr. Scott on October 11, 2012 and November 8, 2012 were attached reflecting an acute onset of left leg pain two months previous. Dr. Scott noted Webb complained of a long history of low back pain dating back to the 1980's.

Webb filed Dr. Scott's affidavit dated January 28, 2013. The first paragraph and ensuing questions are typed. Dr. Scott's responses are handwritten. Dr. Scott diagnosed a left L3-L4 herniated nucleus pulposus, and noted Webb failed to improve with conservative treatment. The typed paragraph includes the statement, "concerning treatment of his work-related injury same which occurred on November 28, 1995." It is noted Dr. Scott at no time

mentioned any relationship between the 1995 injury, and the current treatment in his own hand writing.

Webb also filed an MRI report dated August 28, 2012. The MRI report does not identify where it was performed. Likewise the notice of filing does not indicate the name of the facility. Webb additionally filed the myelogram report from Jewish Hospital dated April 18, 2013.

A hearing was held on May 7, 2013. Webb testified he is a resident of Manchester, Kentucky, and was born on September 2, 1942. He testified he saw Dr. Scott for an acute onset of low back pain. He stated Dr. Scott performed surgery on his low back, and although he continues to take medication, he has had some improvement. He admitted he treated with Dr. Robert Nickerson subsequent to the original injury at which time his complaints consisted of neck and low back pain into the right leg. He also stated his surgery had been paid for through Medicare and his health insurance.

In the opinion and order rendered June 21, 2013, the ALJ found as follows:

In a post-award medical fee dispute, it is the employer who bears the burden of proving that the contested medical expenses are unreasonable or unnecessary. *Square D Co. v. Tipton*, 862 S.W.2d 308 (Ky. 1993); *National Pizza Company v. Curry*, 802 S.W.2d 949

(Ky. App. 1991). The plaintiff retains the burden of proof on the issue of work-relatedness. *Addington Resources, Inc. v. Perkins*, 947 S.W.2d 421 (Ky. App. 1997).

Although the parties have preserved a contested issue with respect to reasonableness and necessity, there is no evidence that the procedure performed by Dr. Scott was not medically indicated. MRI confirmed a left-sided nerve root compression at the L3-4 level from an extruded disc and the surgery was performed at that level to address that pathology. The real issue in this matter is whether the condition treated by Dr. Scott was causally related to the work injury of November 28, 1995. That remains plaintiff's burden of proof, and in order to meet that burden plaintiff has submitted medical records consisting of recent diagnostic study reports and an affidavit from the treating surgeon, Dr. Scott. The diagnostics confirmed the existence of a far lateral disc extrusion at L3-4 with impingement on the exiting nerve root on the left. The affidavit from Dr. Scott indicates that the treatment provided was to address "symptomatic L3-L4 disc herniation and intractable pain." With respect to the issue of causation, however, the form which Dr. Scott completed asked for a response as to certain questions "concerning treatment of his work-related injury same which occurred on November 28, 1995." In other words, Dr. Scott was, in essence, asked to assume that the treatment was causally related to the work injury but he was not asked that question directly and did not address it in any detail. Moreover, the reports submitted by the defendant/employer from Drs. Mortara, Kowalski and Wood specifically address

the issue of causation with those physicians opining that the surgical procedure was not necessary and appropriate (in regards to the reported injury date of November 28, 1995), with the physicians explaining that the medical records indicate that the plaintiff had the development of an acute left leg pain that started two months prior to the initial visit in October of 2012. In so finding, Dr. Mortara specifically reviewed Dr. Scott's notes, recent diagnostic studies as well as an MRI from July 26, 2006, CT lumbar scans from 1997, and a lumbar myelogram from 1997. In other words, it appears that Dr. Mortara was the only physician who had the benefit of reviewing diagnostic studies closer in time to the injury event itself so as to compare those with more recent diagnostic studies in light of the history provided by the plaintiff of a recent onset of symptoms. In this same vein, the ALJ notes that the plaintiff's initial complaints were of right leg symptoms but that the more recent medical records reflect that he had a sudden onset of primarily left leg symptoms for which Dr. Scott ultimately performed surgery. In reviewing the Opinion and Order by ALJ Kerr rendered July 23, 1997, there is no indication in the summary of medical records that plaintiff had sustained a herniated disc in his lumbar spine as a result of the work injury, but the records speak only as to degenerative changes described as mildly active spondylolysis. ALJ Kerr found that plaintiff's cumulative work activities had the effect of arousing his pre-existing degenerative changes into disabling reality as of the last date that he worked. The ALJ is not persuaded by the form completed by Dr. Scott that plaintiff has established

the requisite causal connection between his lumbar strain/sprain injury in 1997 and the acute onset of low back and left leg symptoms in August of 2012 so as to satisfy his burden of work-relatedness. The affidavit of Dr. Scott appears to address primarily reasonableness and necessity. Dr. Scott has not responded to the opinions of Drs. Mortara, Wood and Kowalski that the disc herniation is an acute condition not related to the original work injury. Considering the evidence taken as a whole, and in specific reliance upon the reports of Drs. Mortara, Wood and Kowalski, the ALJ finds that the lumbar spine surgery performed by Dr. Scott is not directly and causally related to the plaintiff's work injury of November 27, 1995, and that treatment is, not compensable. Having so found, the ALJ notes that Medicare and plaintiff's group health insurance carrier have already paid for that treatment without apparent question. This medical dispute is, therefore, resolved in favor of the defendant/employer.

In a post-award medical fee dispute, the burden of proof to determine whether 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 v. 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); and National Pizza Company v. Curry, 802 S.W.2d 949 (Ky. App. 1991).

Because Mountain Clay was successful before the ALJ in demonstrating the contested medical treatment was unrelated to the 1995 work injury, the question on appeal is whether, upon consideration of the whole record, a finding in Webb's favor is compelled. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). Compelling evidence is defined as evidence that 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).

As fact-finder, the ALJ has the sole authority to determine the quality, character, and substance of 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 and sole authority 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).

Similarly, the ALJ has the sole authority to judge the weight and inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Luttrell v. Cardinal Aluminum Co., 909 S.W.2d 334 (Ky. App. 1995). Mere evidence contrary to the ALJ's decision is not adequate to require reversal on appeal. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

An injured worker's right to medical care for a work-related injury is not unfettered. The ALJ has the right and obligation to determine the compensability of medical treatment based upon the evidence presented. In this case, the ALJ determined the surgery was unrelated to the 1995 injury, and was therefore not compensable.

The function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings made are so unreasonable under the evidence they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to weight and credibility or by noting other conclusions or reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, supra. Because

the outcome selected by the ALJ is supported by the record, we are without authority to disturb his decision on appeal. Special Fund v. Francis, supra.

The ALJ noted both the timing of the onset of left lower extremity symptoms, as well as the fact the complaints at the time of the original injury were to the right lower extremity. It is readily apparent the ALJ considered the evidence presented, as indicated above, and found the contested treatment unrelated to the work injury. It was within his discretion to do so. Although arguably conflicting evidence was presented, it was reasonable for the ALJ to arrive at the conclusions set forth in his decision. Here, the ALJ's decision is supported by substantial evidence, and a contrary result was not compelled.

Accordingly, the decision rendered June 21, 2013 by Hon. Robert L. Swisher, Administrative Law Judge, as well as the order ruling on the petition for reconsideration entered July 25, 2013, are hereby **AFFIRMED**.

ALL CONCUR.

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