

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: October 25, 2013

CLAIM NO. 197931491

ELDORADO COAL CO.

PETITIONER

VS.

APPEAL FROM HON. STEVEN G. BOLTON,
ADMINISTRATIVE LAW JUDGE

JACK CHAPMAN,
MEDI HOME CARE,
MEDICAL SERVICES OF AMERICA,
and HON. STEVEN G. BOLTON,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
VACATING AND REMANDING

* * * * *

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

ALVEY, Chairman. Eldorado Coal Co. ("Eldorado") seeks review of a decision rendered May 28, 2013, by Hon. Steven G. Bolton, Administrative Law Judge ("ALJ"), who found compensable contested medical treatment to Jack Chapman ("Chapman"). Eldorado also appeals from the June 21, 2013

order denying its petition for reconsideration. Because the ALJ failed to address the issue of whether the treatment was causally related to Chapman's occupational disease, and must also determine whether the bills for treatment were timely submitted, we vacate and remand.

On July 28, 1980, Chapman was awarded permanent total disability benefits by the former Workers' Compensation Board for coal worker's pneumoconiosis ("CWP") and/or silicosis, "arising out of and in the course of his employment as a coal miner." On September 17, 2012, Eldorado filed a medical dispute challenging bills submitted by Medical Services of America ("MSA") on August 15, 2012 for treatment with a nebulizer provided by Medi-Home Care ("MHC") located in Pikeville, Kentucky. Although not submitted by MSA until August 15, 2012, the dates of service were August 30, 2011; August 31, 2011; September 30, 2011 to October 29, 2011; October 30, 2011 to November 29, 2011; October 20, 2011; November 17, 2011; November 30, 2011; January 29, 2012; January 30, 2012 to February 29, 2012; February 29, 2012 to March 29, 2012; March 30, 2012 to April 29, 2012; April 30, 2012 to May 29, 2012; May 30, 2012 to June 29, 2012; June 30, 2012 to July 29, 2012 and July 30, 2012 to August 29, 2012. It is also noted

paragraph 10.A. of the billing forms indicate the treatment rendered was not related to Chapman's employment.

In addition to the Form 112 medical dispute, Eldorado filed a motion to reopen, and a motion to join MSA and MHC as parties. Chapman filed a response to the motion to reopen on September 26, 2012, and attached a one-page prescription pad note from Dr. Michael Trivette, his family physician in Pikeville, Kentucky, dated September 20, 2012. The note states, "Jack is using a Nebulizer/needs a Nebulizer for Tx of Blacklung - not controlled ____ (the remainder of the note is illegible)." On October 17, 2012, Chief Administrative Law Judge, J. Landon Overfield ("CALJ Overfield"), issued an order sustaining the motion to reopen, and joining MSA and MHC as parties. A scheduling order was subsequently issued on November 13, 2012, assigning the claim to the ALJ, and scheduling a benefit review conference ("BRC") for March 13, 2013.

In support of the medical dispute, Eldorado filed a utilization review report prepared by Dr. Bart Olash on August 29, 2012, addressing the treatment rendered. Dr. Olash noted the remote history of CWP. Dr. Olash opined there is no association between the treatment rendered and simple CWP. He noted the treatment rendered was for conditions entirely separate, distinct and unrelated to the

CWP. He further stated the services and charges are not considered part of the treatment for CWP.

No additional medical evidence was introduced. A BRC was held on March 13, 2013. The BRC order and memorandum reflect the contested issues were the reasonableness/necessity, and/or work-relatedness of services provided by MSA/MHC.

A formal hearing was held on March 16, 2013. Chapman testified he contracted CWP in the 1970's. He stated he initially paid for treatment with the Nebulizer out of his own pocket. He treats with Dr. Trivette for asthma/bronchitis, and testified, "well, I've had a doctor say that I had - - was taking COPD." He stated the Nebulizers loosen mucous, and he is able to breathe after it is "coughed up".

On May 28, 2013, the ALJ issued an opinion finding the treatment reasonable and necessary, however he failed to address the issue of causation. The ALJ cited to numerous cases allowing him to rely upon a claimant's testimony concerning extent and duration of disability, and physical condition, however none of them address the causal connection between the treatment and CWP. Specifically, the ALJ found as follows:

The opinion of Dr. Olash fails to

meet the standard required by Square D Company v. Tipton, 862 S.W.2d 308 (Ky. 1993) which requires that the Defendant/Employer must prove that the Plaintiffs[sic] medical treatment is unproductive or outside the type of treatment generally accepted in the medical community. See Crawford and Company v. Wright, 284 S.W.3d 136 (Ky. 2009) and Mitee Enterprises v. Yates, 865 S.W.2d 654 (Ky.1993). Therefore, the Defendant Employer has not met its burden of proof.

Plaintiff here has a work-related occupational disease condition that by its very definition affects the lungs and lung capacity. He may not gain a cure from the nebulizer, but by history, he does gain relief. KRS 342.020. His treating physician says he needs this medication for relief from his black lung.

The ALJ finds the opinion of Dr. Trivette and Mr. Chapman's direct testimony to be persuasive and bases judgment in reliance on that opinion and testimony, which I find to be the most persuasive evidence in the record and upon which I rely in rendering this opinion.

The ALJ further finds the treatment regimen of nebulizer and supplies to be medically reasonable and necessary for the cure and relief of the Plaintiff's work-related condition.

For those reasons, the Defendant Employer's prayer to be relieved of the duty to pay for a nebulizer and related supplies is hereby **DENIED**.

IT IS THEREFORE ORDERED that Defendant employer and/or its carrier, shall in [sic] future be liable to pay

for Plaintiff's reasonable quantity of a nebulizer and required supplies.

Eldorado filed a petition for reconsideration on June 7, 2013, arguing the ALJ misconstrued Chapman's testimony, and Dr. Trivette's hand-written note. Eldorado argued there is no explanation as to why Chapman did not need treatment for his condition until thirty years after he was found permanently totally disabled. The ALJ denied the petition for reconsideration by order entered June 21, 2013.

In a post-award medical fee dispute, it is the employer who bears the burden of going forward and of proving the contested treatment or expenses are unreasonable or unnecessary. 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). After going forward, the burden is upon the employer to prove the contested medical expenses are unreasonable or unnecessary. Square D Company v. Tipton, 862 S.W.2d 308 (Ky. 1993); National Pizza Company vs. Curry, supra. The claimant, however, bears the burden of proving work-relatedness. See

Addington Resources, Inc. v. Perkins, 947 S.W.2d 421 (Ky. App. 1997).

Pursuant to KRS 342.275 and KRS 342.285, the ALJ, as the fact-finder, 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 Company v. Tipton, supra; Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997). He or she 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).

Where an employer and/or its workers' compensation insurance carrier fails to file a motion to reopen and Form 112 Medical Dispute challenging the employee's treatment, it waives its right to object to bills which have not been paid within the statutory thirty day time limit, and is forever foreclosed from challenging them. Phillip Morris, Inc. v. Poynter, 786 S.W.2d 124, 125 (Ky. App. 1990); Westvaco Corp. v. Fondaw, 698 S.W.2d 837 (Ky. 1985). The charges continue to be automatically compensable until thirty days prior to any subsequent motion to reopen and Form 112 Medical Dispute filed by the employer and/or its workers' compensation insurance carrier

challenging the disputed treatment. See KRS 342.020(1); 803 KAR 012 § 1(6); 803 KAR 25:096 § 6(1)(a); 803 KAR 25:190 § 5(6); Phillip Morris, Inc. v. Poynter, *supra*.

The ALJ determined Eldorado properly and timely filed the medical dispute. He then determined the treatment was reasonable and necessary on the basis of Chapman's testimony he received some relief. However, the ALJ failed to make a determination regarding whether treatment with the Nebulizer was caused by his CWP. As noted above, the specific bills submitted clearly indicate the treatment was not due to Chapman's employment. Before a determination can be made regarding whether treatment is reasonable and necessary, the ALJ must determine whether it is causally related to his CWP. We therefore vacate the ALJ's decision, and remand for him to make a determination of whether the treatment is causally work-related, as well as whether it is reasonable and necessary for the cure and treatment of his occupational disease.

Finally, this Board is permitted to *sua sponte* address issues even if unpreserved. KRS 342.285(2)(c); KRS 342.285(3); George Humfleet Mobile Homes v. Christman, 125 S.W.3d 288 (Ky. 2004). Although not raised on appeal, KRS 342.285 clearly grants the Board the authority to decide questions of law regardless of whether raised by any party.

Within the Board's province on appeal is to assure orders and awards of an ALJ are in conformity with Chapter 342. In this case, the ALJ's award is not in conformity with the law.

KRS 342.020(1), in relevant part, states as follows:

The employer, insurer, or payment obligor acting on behalf of the employer, shall make all payments for services rendered to an employee directly to the provider of the services within thirty (30) days of receipt of a statement for services. The commissioner shall promulgate administrative regulations establishing conditions under which the thirty (30) day period for payment may be tolled. **The provider of medical services shall submit the statement for services within forty-five (45) days of the day treatment is initiated and every forty-five (45) days thereafter, if appropriate, as long as medical services are rendered.** (emphasis added).

In this instance, the contested billings reflect most of the treatment was administered more than forty-five days prior to the date the bills were submitted by MSA. On remand, in addition to work-relatedness/causation, and reasonableness/necessity, the ALJ shall determine whether the bills were timely submitted pursuant to KRS 342.020(1).

Accordingly, the decision rendered May 28, 2013, and the order denying Eldorado's petition for reconsideration entered June 21, 2013, by Hon. Steven G. Bolton, Administrative Law Judge, are hereby **VACATED**. This claim is **REMANDED** for further findings consistent with the views expressed in this opinion.

ALL CONCUR.

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