OPINION ENTERED: December 28, 2012

CLAIM NO. 200495463

ENTERPRISE MINING COMPANY, LLC PETITIONER

VS. **APPEAL FROM HON. EDWARD D. HAYS, ADMINISTRATIVE LAW JUDGE**

DAVID LITTLE;
SAI GUTTI, M.D./PAIN MANAGEMENT CENTER;
and HON. EDWARD D. HAYS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING IN PART,
VACATING IN PART,
AND REMANDING

* * * * * *

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

ALVEY, Chairman. Enterprise Mining Company, LLC ("Enterprise") seeks review of a decision rendered June 4, 2012, by Hon. Edward D. Hays, Administrative Law Judge ("ALJ"), finding medications prescribed to David Little

("Little"), by Sai Gutti, M.D./Pain Management Center ("Gutti") to be compensable. Enterprise also appeals from the July 24, 2012 order denying its petition for reconsideration.

On appeal, Enterprise argues the ALJ erred by holding it responsible for payment of Sertraline (Zoloft) which Little admittedly takes for depression. Enterprise argues treatment with Sertraline (Zoloft) is unrelated to the work injury, and even if it is related, was waived by Little in the settlement agreement. Enterprise also argues treatment with Ambien-CR and Protonix should be held non-compensable. We affirm in part, vacate in part, and remand.

Little sustained a work-related right foot injury on February 14, 2004. At the time of the injury, he was using a cutting torch to remove a piece of metal from a coal chute. The metal fell and pierced his right foot. Little has experienced right foot pain since the accident.

On September 23, 2005, Little filed a Form 101 alleging an injury date of February 14, 2004, for injuries to his right foot, as well as a repetitive trauma injury to his spine and limbs, with "psychological consequences".

A Form 110-I settlement agreement was approved by Hon. Donna H. Terry, Administrative Law Judge, on March 15,

2006. In the agreement, the parties agreed to settle the claim pursuant to the following terms:

> Monetary terms of settlement: $60,000.00, to be paid as follow:
>
> $60,000.00 lump sum from Defendant-Employer and/or its insurer, and $___ lump sum from the Special Fund, ___ weekly for ___ weeks, $___ by annuity, ___ other
>
> Total settlement amount: $60,000.00
>
> Percent of permanent disability: Disputed
>
> Settlement computation: $56,000.00 for right foot injury; $1,000.00 for waiver of disputed cumulative trauma injury; **$1,000.00 for waiver of disputed psychological claim**; $1,000.00 for waiver of reopening; $1,000.00 for waiver of vocational rehabilitation
>
> Does the settlement amount include waiver or buyout of ___ past or ___ future medical expenses: ___ yes __x No.
>
> (Emphasis added)
>
> In the "Other Information" section, the agreement states the following:
>
> This settlement agreement is inclusive of interest, TTD, waiver of vocational rehabilitation, waiver of reopening, waiver of disputed psychological claim, waiver of disputed cumulative trauma claim, and attorney's fees.
>
> The plaintiff alleged a psychological condition in this claim, which has been disputed by the defendant-employer.

> Plaintiff hereby waives the disputed psychological claim, and relinquishes his right to any medical, his right for vocational rehabilitation and his right to reopen said claim. The defendant-employer is not liable for any medical benefits in regard to the plaintiff's alleged psychological condition. One Thousand Dollars ($1,000.00) of the above settlement amount represents consideration for plaintiff's waiver of his disputed psychological claim.

On October 23, 2007, Enterprise filed a motion to reopen and a medical fee dispute to contest the reasonableness and necessity of lumbar sympathetic blocks proposed by Dr. Gutti. In a decision rendered August 20, 2008, Hon. Lawrence F. Smith, Administrative Law Judge, found Enterprise responsible for payment of the lumbar sympathetic blocks.

On July 26, 2011, Enterprise again moved to reopen the claim to challenge the compensability of certain medications including Protonix, Naprelan, Sertraline (Zoloft), Lortab and Ambien-CR, based upon medical necessity and relatedness to the 2004 work injury. Enterprise also filed a motion to join Dr. Gutti as a party. Enterprise did not mention the previous waiver of compensability of the psychological component of the claim or treatment for such condition set forth in the settlement agreement.

On August 10, 2011, Hon. J. Landon Overfield, Chief Administrative Law Judge, entered an order reopening the claim, joining Dr. Gutti as a party, and directing the claim be assigned to an administrative law judge for final adjudication. On September 20, 2011, a notice was issued by the Kentucky Department of Workers' Claims assigning the claim to the ALJ.

In support of the medical fee dispute, Enterprise filed the June 28, 2011 report of Dr. William Nemeth, an orthopedic surgeon and addiction medicine physician from Austin, Texas. Dr. Nemeth's report was based upon a review of Dr. Gutti's treatment records, along with records from other treating physicians and medical facilities. Dr. Nemeth opined, "The appropriate medications at this point would be Neurontin as prescribed as an anti-neuropathic medication and potentially an over-the-counter NSAID or acetaminophen." He further stated opiates are not indicated for chronic pain. Dr. Nemeth likewise stated the use of Protonix is not medically indicated. He stated the use of Ambien is inappropriate. Finally, he stated Sertraline (Zoloft) is prescribed for a condition unrelated to the work injury.

Enterprise later filed Dr. Nemeth's January 24, 2012 report, in which he again opined treatment with

Sertraline (Zoloft) is not due to a work-related condition. He stated treatment with Neurontin, in addition to treatment with Lortab at a dose rate of no more than two tablets per day as has been prescribed, would be appropriate. He again stated treatment with Ambien is inappropriate. Dr. Nemeth then provided a synopsis of his qualifications enabling him to provide an opinion regarding pain management treatment.

Little filed records from Dr. Gutti documenting seventy-four dates of treatment from 2006 through December 21, 2011, including notes for sympathetic block procedures, and an undated letter written to Diana Eades, R.N. with OMCA (Occupational Managed Care Alliance, Inc.). In the undated letter, Dr. Gutti disagreed with Dr. Nemeth, specifically noting Little's activities of daily living and functionality have improved with the medication treatment regimen. He believed Dr. Nemeth is unqualified to provide an opinion regarding the treatment provided.

Dr. Gutti prescribed Sertraline (Zoloft) throughout Little's course of treatment. In the first treatment note of May 11, 2006 filed of record, Dr. Gutti noted Little was depressed and he prescribed Sertraline (Zoloft). On September 3, 2009, Dr. Gutti noted Little felt depressed, and noted "Zoloft, he is taking for

depression and still having problems." On June 30, 2009, he noted Little was depressed. In the remainder of the records, Dr. Gutti noted Little's psychiatric condition was unchanged from the previous examination.

No additional medical records or reports were filed by either party.

Little testified at the hearing held April 5, 2012. He stated the original injury occurred on February 14, 2004 when he was replacing metal in a coal chute. As he was burning off the old welds, the piece he was cutting fell and penetrated his foot. He maintains he has had continued right foot pain since that time, and the only relief he receives is from the medication. He stated Protonix is prescribed for treatment of his upset stomach or heartburn which is a side-effect of his pain medication. He further testified Lortab is for treatment of his pain, and Neurontin is for treatment of the nerves in his foot. Finally, he testified Sertraline (Zoloft) is for treatment of his depression and anxiety.

In the opinion rendered June 4 2012, the ALJ found as follows:

ANALYSIS, FINDINGS OF FACT, AND CONCLUSIONS OF LAW

> The claimant, David Little, now 61 years of age, sustained a severe,

traumatic injury to his right foot when a piece of metal fell and pierced his foot. The metal reportedly passed all the way through the foot and Mr. Little has been diagnosed with reflex sympathetic dystrophy (RSD) and complex regional pain syndrome (CRPS). Mr. Little has complained of severe pain and has undergone regular pain treatment for his injury ever since the date of the accident on February 13, 2004. This claim was settled by agreement, supported by permanent impairment ratings to the body as a whole of 7%, 19%, and 20%. The claimant settled for a lump sum amount of $60,000.00 and future medical expenses were left open. The Plaintiff did not waive his right to future medical treatment pursuant to KRS 342.020.

Mr. Little testified at the formal hearing held on April 15, 2012, before the undersigned ALJ. The ALJ found Mr. Little to be credible, consistent, and reasonable in his description of his injuries and the treatment which he has received from Dr. Gutti for the past approximate six years. This was a serious injury with serious permanent effects.

In post-decree medical fee disputes, the claimant continues to bear the burden of proof on questions of causation and work-relatedness; however, the defendant-employer shares the burden of proof on questions of reasonableness and necessity. National Pizza Co. v. Curry, 802 S.W.2d 949 (Ky. App. 1991). In the case at hand, the issue is one of reasonableness and necessity. Clearly, the regimen of pain treatment administered by Dr. Gutti over the past 5 or 6 years is related to the traumatic injury

sustained by Mr. Little on February 13, 2004. The only real question in this case is whether or not Dr. Gutti's treatment and selection of medications are reasonable and necessary. The Plaintiff testified convincingly that each of the lumbar sympathetic blocks yielded positive results and he testified that his pain is reduced approximately by ½. Thus, the ALJ must conclude that Dr. Gutti's regimen of treatment has produced significant positive results and has substantially alleviated Mr. Little's severe pain. Although Dr. William Nemeth performed a records review and has disagreed with Dr. Gutti's treatment and medication choices, he does not deny that Mr. Little suffered from a chronic cold foot and other painful symptoms as a result of the injury. As claimant's counsel has pointed out, Dr. Nemeth has done only a records review. He has never met David Little and has never examined him.

The ALJ has reviewed the evidence in the record of this claim and has compared the opinions of Dr. Gutti and Dr. Nemeth. The ALJ is inclined to be persuaded by the evidence from the treating physician who has established a lengthy relationship with the claimant and is aware of the intimate details of Mr. Little's life based on his personal examinations and observations. In any event, the defendant-employer has failed to sustain its burden of proof on the questions of the reasonableness and the necessity of the treatment which has been afforded by Dr. Gutti. The ALJ is simply not convinced that Dr. Nemeth's recommended regimen of medical treatment is any better than that which has been provided by Dr. Gutti.

Enterprise filed a petition for reconsideration arguing Little is no longer being prescribed Naprelan, and has no objection to it being found non-compensable. Enterprise argued not only is Sertraline (Zoloft) unrelated to the work injury, as opined by Dr. Nemeth, but also Little waived the psychiatric component of his claim in consideration of the lump sum payment of one-thousand dollars. Enterprise also argued Protonix should be found non-compensable due to the lack of medical documentation by Dr. Gutti supporting its use.

In his order dated July 24, 2012, the ALJ denied the petition for reconsideration, with the exception of Naprelan being deleted from Little's treatment regimen. The ALJ opined further, "this does not preclude at some point in the future the appropriateness of said medication." The ALJ did not specifically address the issue of the compensability of treatment with Sertraline (Zoloft).

On appeal, Enterprise argues the ALJ erred in finding it responsible for payment of Sertraline (Zoloft) because it is unrelated to his work injury and further because Little waived the psychiatric portion of his claim in the settlement agreement, for which he received

consideration. Enterprise also argues treatment with Ambien CR and Protonix should be found non-compensable.

In a post-award medical fee dispute, the employer bears both the burden of going forward and the burden of proving the contested treatment or expenses are unreasonable or unnecessary. National Pizza Company v. 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 v. 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 v. 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).

In this instance, Enterprise was the party with the burden of going forward, and had the burden of proof in establishing whether treatment was reasonable and necessary. Enterprise was unsuccessful before the ALJ, and therefore the issue on appeal is whether the evidence compels a different result. 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).

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). Although an opposing party may note evidence supporting a conclusion 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). 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).

In National Pizza v. Curry, supra, the Kentucky Court of Appeals held:

> We are convinced that our legislature by using the conjunctive "and" did not intend that only one who has sustained a "curable" work-related injury or disease should be entitled to medical benefits for relief therefrom. Accordingly, we hold that the words in KRS 342.020(1) "cure and relief" should be construed as "cure and/or relief." See KRS 446.080 and Firestone Textile Company Division, Firestone Tire and Rubber Company v. Meadows, Ky., 666 S.W.2d 730 (1984), which states that "[a]ll presumptions will be indulged in favor of those for whose protection the enactment [the Workers' Compensation Act] was made." *Id*. at 732. Thus KRS 342.020(1) requires the employer of one determined to have incurred a work-related disability to pay for any reasonable and necessary medical treatment for relief whether or not the treatment has any curative effect.

The ALJ acted within the scope of his discretion in finding compensable the treatment with Protonix and Ambien-CR, and the evidence does not compel a contrary result. However, treatment with Sertraline (Zoloft) is a different matter. In the settlement agreement approved by ALJ Terry on March 15, 2006, Little specifically waived his psychological claim, including medical treatment for that condition, in exchange for a payment of one thousand dollars. The settlement agreement signed by Little further states the following:

> The plaintiff, David Little, acknowledges that he has read this Settlement Agreement, that his document has been reviewed by his attorney, that he has consulted his attorney prior to executing this Agreement, and that he understands its legal effect and binding nature and further acknowledges that he is acting voluntarily and of his own free will in executing this Agreement as to Compensation.

Settlement agreements are addressed by the Workers' Compensation Act at KRS 342.265, which states in pertinent part:

> (1) If the employee and employer and special fund or any of them reach an agreement conforming to the provisions of this chapter in regard to compensation, a memorandum of the agreement signed by the parties or their representatives shall be filed with the commissioner, and, if approved by an administrative law judge, shall be enforceable pursuant to KRS 342.305.

The purpose of the statute is to give the fact-finder an opportunity to pass upon the terms of compensation agreements and protect the interests of the worker. Skaggs v. Wood Mosaic Corp., 428 S.W.2d 617 (Ky. 1968).

The law is well established that when the parties agree to settle a workers' compensation claim, the agreement constitutes a contract which once approved, has the force and effect of an award. Newberg v. Weaver, 866

S.W.2d 435 (Ky. 1993); Whittaker v. Pollard, 25 S.W.3d 466 (Ky. 2000); Golden Oak Mining Co. v. Kentucky Coal Workers' Pneumoconiosis Fund, 19 S.W.3d 99 (Ky. 2000). Whether a settlement contemplates periodic payments or a lump sum, settlements are encouraged; are consistent with public policy; and, once approved by an ALJ, are specifically authorized by the Act. *See* KRS 342.265 and KRS 342.125(7). Thus, a settlement agreement, like an adjudicated award, may be reopened if one or more of the stated grounds contained in KRS 342.125(1) are met. Nonetheless, a reopening may be "precluded by the terms of the underlying agreement[.]" Whittaker v. Pollard, supra.

In Huff Contracting v. Sark, 12 S.W.3d 794 (Ky. App. 2000), an injured worker settled a knee injury based on a lump sum settlement of 3% and the agreement included a provision that the settlement was "inclusive of all attorney fees and also includes all future medical expenses beyond that already paid. . . ." *Id*. at 705. The Court ultimately determined in order for the claimant to have forfeited his right to receive future medical benefits, he must have received some consideration, and beyond the lump sum payment of income benefits, there was no substantial evidence to support a finding of consideration. The Court stated:

> [T]he term 'consideration' is thus defined: 'A benefit to the party promising, or a loss or detriment to the party to whom the promise is made. 'Benefit,' as thus employed, means that the promisor has, in return for his promise, acquired some legal right to which he would not otherwise have been entitled. And 'detriment' means that the promisee has, in return for the promise, forborne some legal right which he otherwise would have been entitled to exercise.' (Citations omitted.)
>
> *Id*. at 707.

In the case *sub judice*, the settlement agreement reflects Little clearly agreed to waive his claim for any psychiatric condition, or "psychological consequences", first alluded to in the Form 101, for a lump sum payment of one-thousand dollars. This is specifically enumerated in the settlement agreement, and Little acknowledged the terms of the agreement had been explained to him by his attorney.

We believe the proper course is to remand this matter to the ALJ to specifically address whether the prescription for Sertraline (Zoloft) is for treatment of a psychological condition, and if so, whether it is compensable pursuant to the terms of the settlement agreement.

In his brief, Little requested sanctions be levied pursuant to CR 73.02(4). After having reviewed the

record, we determine there is no basis for the imposition of sanctions, therefore the request is **DENIED**.

Accordingly, the decision rendered June 14, 2012, and the order ruling on the petition for reconsideration rendered July 24, 2012, by Hon. Edward D. Hays, Administrative Law Judge, are hereby **AFFIRMED IN PART, VACATED IN PART, AND REMANDED** to the ALJ for a determination of the compensability of prescriptions for Sertraline (Zoloft). The ALJ shall take any steps necessary to render a decision consistent with the directions set forth above.

STIVER, MEMBER, CONCURS.

SMITH, MEMBER, NOT SITTING.

_____
MICHAEL W. ALVEY, CHAIRMAN
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