Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: August 7, 2015

CLAIM NO. 200184174

GLENDA S YOUNG PETITIONER

VS. **APPEAL FROM HON. R. SCOTT BORDERS, ADMINISTRATIVE LAW JUDGE**

CUMBERLAND RIVER REGIONAL
MH/MR BOARD
HON. R. SCOTT BORDERS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
REVERSING IN PART
AND REMANDING

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

RECHTER, Member. Glenda Young ("Young") appeals from the February 3, 2015 Opinion and Order and the March 17, 2015 Order denying her petition for reconsideration rendered by Hon. R. Scott Borders, Administrative Law Judge ("ALJ"). In a reopening for a medical dispute, the ALJ determined a

proposed MRI scan, EMG/NCV testing and continued pain management treatment were neither reasonable nor necessary. Young argues the ALJ erred in addressing prescription medication, and the ALJ's decision regarding that medication is not supported by substantial evidence. For the reasons set forth herein, we reverse in part and remand.

Young sustained a lumbar strain on July 1, 2001. She settled her claim by agreement approved June 30, 2003 with medical benefits remaining open. Cumberland River Regional MH/MR Board ("Cumberland") filed a motion to reopen and Form 112 on August 25, 2014 to contest the reasonableness and necessity of a proposed MRI scan and EMG/NCV testing recommended by the Pain Treatment Center. Cumberland sought to amend its motion to challenge continued pain management treatment, though no amended Form 112 or written motion appears in the record. The ALJ sustained Cumberland's motion to amend in the January 6, 2015 benefit review conference ("BRC") order. The order reflects there was no appearance by the claimant or her counsel, although the Pain Treatment Center was represented and participated in the BRC. The order noted the parties waived the hearing and the matter was taken under submission at that time.

Cumberland supported the motion with the July 28, 2014 utilization review report of Dr. Bart Olash. Dr. Olash

recommended denial of the proposed MRI and EMG/NCV testing as not medically reasonable or necessary. He noted Young had no objective physical findings of instability, nerve root impingement or spinal stenosis. Young had three MRIs since the injury and her symptoms were the same as she had reported before the last MRI on April 25, 2013. Dr. Olash noted the EMG/NCV testing performed following the injury was normal.

On January 20, 2015, Cumberland filed the January 15, 2015 physician review report and January 16, 2015 utilization review notice of denial of Dr. John Rademaker. Dr. Rademaker opined further narcotic medication, drug testing, and treatment at the Pain Treatment Center are not reasonable or necessary treatment for the work-related condition. Dr. Rademaker indicated Young sustained only a strain as a result of the 2001 work injury and does not show any type of acute or traumatic injury.

Cumberland submitted the report of Dr. Daniel Primm who performed an independent medical evaluation on December 5, 2014. Dr. Primm reviewed medical records and test results dating from 1999 to the present. Dr. Primm diagnosed a lumbar strain as a result of the 2001 work accident. Multiple MRI scans did not show any type of acute or traumatic injury. Dr. Primm opined Young requires no

further regular pain management treatment. He stated Young needs no narcotics or muscle relaxants and there is no indication for continued MRI scans or EMG/NCV studies.

Young and the Pain Treatment Center submitted medical records documenting treatment from October 17, 2013 through November 6, 2014. Young complained of lower back pain radiating down her legs which she attributed to the 2001 injury. Her pain gradually increased over the years. She was diagnosed with chronic pain due to trauma, lumbar degenerative disc disease, myofascial pain syndrome, and a-reflexia. An MRI scan and EMG/NCV testing were ordered due to increasing complaints of pain.

The ALJ found Dr. Primm's opinion most persuasive and concluded Cumberland met its burden of proving the proposed lumbar MRI scan, EMG/NCV testing of the lower extremities and continued pain management treatment were not reasonable or necessary treatment for the work-related lumbar strain and therefore non-compensable.

Young filed a petition for reconsideration arguing the ALJ erred in addressing any question beyond the compensability of the MRI and EMG/NCV testing identified in the medical dispute. Young denied any knowledge prior to issuance of the opinion and order that pain management treatment was included in the dispute. The ALJ overruled

Young's petition, stating it requested relief beyond that afforded by KRS 342.285.

On appeal, Young argues the only medical dispute properly before the ALJ concerned the proposed MRI and EMG/NCV testing. Young notes the evidence filed with the motion to reopen and the Form 112 did not mention pain management as a subject of the dispute. Further, Cumberland did not file a motion to amend the medical dispute to include the pain management treatment. Moreover, Young argues the ALJ's determination that prescription medications are non-compensable is not supported by substantial evidence. She asserts the treatment records from The Pain Treatment Center establish she continues to have symptoms related to the work injury which necessitate the prescription medication.

The question of whether the continuing pain management treatment is reasonable and necessary was not properly before the ALJ and therefore we reverse. The inclusion of the new issue at the BRC with no opportunity for Young to present evidence or to be heard is an obvious violation of her due process rights and was an abuse of discretion. Abuse of discretion by definition "implies arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair

decision." Kentucky National Park Commission v. Russell, 187 S.W.2d 214 (Ky. 1945).

The fundamental requirement of due process of law is the opportunity to be heard at a meaningful time and in a meaningful manner. *See* U.S.C.A. Const. Amends. 5, 14; Const. § 2. In Kentucky Alcoholic Beverage Control Board v. Jacobs, 269 S.W.2d 189 (Ky. 1954), the Court held the requirements of procedural due process included a hearing, the taking and weighing of evidence, findings of facts based upon consideration of the evidence, the making of an order supported by substantial evidence, and, where the parties' constitutional rights are involved, judicial review of administrative action. *See also* Utility Regulatory Commission v. Kentucky Water Service Co., Inc., 642 S.W.2d 591 (Ky. 1982).

Here, Young was not afforded an opportunity to present evidence concerning the ongoing pain management treatment. Cumberland filed no written motion to contest the pain management treatment, nor did it file a written motion to amend the pending dispute to include that treatment. Rather, from the absence of anything in the record that indicates otherwise, it appears Cumberland made an oral motion to amend at the January 6, 2015 BRC. Significantly, the case was taken under submission at that

time with no provision for filing additional proof. Thus, Young was given no opportunity to present evidence regarding the need for continued pain management treatment. Additionally, the ALJ considered the report of Dr. Rademaker who had not performed his review, nor had the utilization review denial been issued, prior to the dispute being taken under submission.

We recognize 803 KAR 25:010 Section 13 (15) provides upon motion with good cause shown, an ALJ may order additional discovery or proof be taken between the BRC and the date of the hearing, but no regulation anticipates proof taking after the case is taken under submission. In T. J. Maxx v. Blagg, 274 S.W.3d 436 (Ky. 2008), the Supreme Court, in interpreting 803 KAR 25:010 Section 13 (15), determined an ALJ erred by ordering a university evaluation after taking the claim under submission. The Court noted the above cited regulation permitted an ALJ to order additional discovery or proof between the BRC and the hearing upon motion with good cause shown, but no regulation anticipates that additional proof will be taken after a claim has been heard, briefed, and taken under submission. Again, we note the claim *sub judice* was taken under submission at the January 6, 2015 BRC and no provision was made for the submission of additional evidence. The ALJ improperly

considered the report of Dr. Rademaker submitted after the dispute had been taken under submission.

Although we determine the ALJ could not properly consider the reasonableness and necessity of the continuing pain management treatment, in the future Cumberland is free to file a motion to reopen to contest future medical expenses on the basis of reasonableness and necessity.

In its brief to the Board, Cumberland contends the Pain Treatment Center is an indispensable party and Young's failure to name it as a respondent in her notice of appeal is fatal to her appeal. An indispensable party is one whose absence prevents the tribunal from granting complete relief among those already parties. *See* CR 19.01; CR 19.02; Braden v. Republic-Vanguard Life Ins. Co., 657 S.W.2d 241 (Ky. 1983); Milligan v. Schenley Distillers, Inc., 584 S.W.2d 751 (Ky. App. 1979). Here, the issue regarding pain management involved prospective treatment rather than treatment already rendered. The provider is not an indispensable party with regard to the question of the need for ongoing treatment or whether the pain management issue was properly before the ALJ.

Accordingly, the February 3, 2015 Opinion and Order and the March 17, 2015 Order denying her petition for reconsideration rendered by Hon. R. Scott Borders,

Administrative Law Judge, is **REVERSED IN PART** and this matter is **REMANDED** for entry of an amended Opinion and Order addressing only the MRI and EMG/NCV testing.

ALL CONCUR.

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