Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: June 20, 2014

CLAIM NO. 199034114

HOME CARE PARTNERS, INC. PETITIONER

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

LETHA DAVIDSON
BAPTIST HOSPITAL EAST
DR. DOUGLAS MARQUESS
DR. RICHARD SWEET
and ROBERT L. SWISHER,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

ALVEY, Chairman. Home Care Partners, Inc. ("Home Care") appeals from the January 13, 2014 opinion rendered by Hon. Robert L. Swisher, Administrative Law Judge ("ALJ"), finding treatment for Letha Davidson's ("Davidson") left knee, including an MRI and proposed left knee replacement surgery

are compensable. Home Care also appeals from the February 18, 2014 order denying its petition for reconsideration.

On appeal, Home Care argues the ALJ erred in finding it bore the burden of proof regarding causation and work-relatedness of the contested treatment. Home Care next argues the ALJ erred in finding the 1989 injury aroused Davidson's pre-existing dormant osteoarthritis into disabling reality. Finally, Home Care argues the ALJ erred in ignoring the uncontradicted opinion of Dr. Robert Jacob. Because the ALJ's decision is supported by substantial evidence, we affirm.

A review of the pertinent procedural history is necessary. Davidson fell at work on August 28, 1989 and landed primarily on the right knee. She indicated she reported injuries to both knees at that time, although her treatment was primarily on the right. She later had total right knee replacement surgery in 1990. She received temporary total disability from September 6, 1989 through August 12, 1992.

Davidson timely filed a Form 101 on August 8, 1994, and the claim was held in abeyance pending the outcome of a civil action filed in the Jefferson Circuit Court stemming from the accident. After the claim was removed from abeyance, a decision was rendered by Hon. W. Bruce

Cowden, Jr., Administrative Law Judge ("ALJ Cowden"), on March 30, 2006.

In his decision, ALJ Cowden referenced Davidson's testimony which indicated she had complained of left knee problems since the work-related accident however they were not as severe as those associated with the right knee. She also noted she was required to use her left knee more to stabilize herself due to the issues with her right knee. ALJ Cowden also referenced records from Davidson's treating orthopedic surgeon, Dr. Mark Petrik. He noted Dr. Petrik's office record dated April 15, 1991 indicating Davidson's left knee pain was gradually worsening, and on examination he noted, "Trace effusion, stable ligaments, negative meniscal signs and marked crepitus over the patellofemoral joint and a positive patellar inhibition, and grinds, suggestive of patellofemoral arthrosis." ALJ Cowden also noted the April 23, 1992 office record from Dr. Petrik indicating the left knee had grown progressively worse due to pain, and x-rays showed some osteophyte formation at the superior aspect of the patella and some subchondral sclerosis. ALJ Cowden additionally cited to Dr. Petrik's September 25, 1999 office record which indicated Davidson had patellofemoral crepitus. ALJ Cowden also referenced the August 3, 2005 report of Dr. Robert Jacob who opined all of

Davidson's left knee problems were due to pre-existing chondromalacial changes. ALJ Cowden found both the left and right knee conditions were caused by the August 28, 1989 accident, and were compensable. He also approved a Form 110-I settlement agreement on March 17, 2006, wherein Davidson settled all claims she may have against the Special Fund for a lump sum of $12,000.00.

Home Care subsequently appealed ALJ Cowden's decision to this Board. The decision was affirmed in an opinion entered September 29, 2006.

On March 6, 2013, Home Care filed a Form 112 and motion to reopen to challenge payment for a December 20, 2012 left knee MRI which was recommended after Davidson experienced increased left knee pain and giving way when she got out of bed. In support of the motion to reopen, Home Care filed Dr. Jacob's September 10, 2004 report noting Davidson's daily intermittent complaints of left knee pain. In that report, Dr. Jacob also noted Davidson had normal range of motion with mild patellar femoral crepitation. The MRI report dated December 20, 2012 was also filed, and stated Davidson had degenerative changes of the left knee with a complex medial meniscus tear.

Home Care subsequently filed Dr. Jacob's March 5, 2013 report. In that report, Dr. Jacob opined the medial

meniscal tear and medial compartment arthritis in the left knee was unrelated to her patellofemoral chondromalacia and the 1989 work injury.

The claim was assigned to the ALJ by order dated March 15, 2013. On March 21, 2013 the ALJ issued an order reopening the claim.

Davidson filed letters from Dr. Richard Sweet, her treating orthopedic surgeon, dated January 22, 2013 and June 26, 2013. In the January 22, 2013 letter, Dr. Sweet noted Davidson had sustained work-related injuries to both knees over twenty years ago. He stated her left knee had deteriorated since the time of the injury, and her left knee pain had increased. Regarding the MRI, Dr. Sweet noted, "An MRI shows she had degenerative arthritis in the knee and a complex medial meniscal tear, which is often present in the face of endstage arthritis." He then noted Davidson related her left knee condition to the work injury.

In a subsequent letter to Dr. Douglas Marquess dated June 26, 2013, Dr. Sweet noted Davidson had injured her left knee at work many years ago. He noted her left knee had been chronically symptomatic, and she had a spontaneous increase in symptoms in the fall of 2012. He opined this was not a new injury. He recommended a left knee replacement.

On August 6, 2013, Home Care filed an amended motion to reopen and Form 112 medical dispute to challenge the recommended left knee replacement surgery. On August 21, 2013, the ALJ entered an order allowing the amendment to the reopening.

Home Care subsequently filed the August 7, 2013 report from Dr. Jacob. Dr. Jacob opined the current end-stage arthritis is not secondary to the 1989 left knee injury which consisted of a contusion and patellar chondromalacia. He stated her current knee complaints are independent of the 1989 injury, and are due to the normal aging process. He further noted she had an increased risk for development of the condition due to her body habitus. He further stated the condition for which surgery is recommended is neither directly nor indirectly related to the 1989 injury.

A benefit review conference ("BRC") was held on September 19, 2013. The BRC order and memorandum reflects the contested issues are work-relatedness/causation of the left knee treatment including the MRI and the recommendation for left knee replacement surgery. Subsequently, the ALJ issued an order joining Drs. Sweet and Marquess as parties. The ALJ also subsequently issued an order sustaining Davidson's motion to designate the reports of Drs. Jacob and

Petrik from the original claim, as well as the decision from ALJ Cowden, and the opinion previously entered by this Board.

Davidson testified at the Hearing held November 19, 2013. She is a resident of Louisville, Kentucky. She stated she fell on both knees on August 28, 1989 as she was going into the hospital where she worked as a nurse in the intensive care unit. She stated she was initially treated for injuries to both knees however most of her original problems with the right knee. Dr. Petrik performed surgery on the right knee, but her left knee continued to click, give out and cause pain. She stated she was unable to return to work as a critical care nurse after the accident due to her inability to administer direct patient care.

She stated her left knee continued to worsen after ALJ Cowden's decision rendered in 2006. She experienced instances where her left knee gave way. In September or October 2012, she experienced a significant increase in left knee pain when she stood up as she got out of bed. Her left knee then gave way. Despite complaints of increasing left knee pain, she made no mention of it to her family physician until November 2012. She stated she treated with him for other health conditions consisting of thyroid, high blood pressure and diverticulitis. She saw Dr. Rudy Ellis, an

orthopedic surgeon on one occasion. She later saw Dr. Marquess who referred her to Dr. Sweet.

The ALJ rendered his decision on January 13, 2014 finding the MRI and the proposed left knee replacement compensable. He stated Home Care bore the burden of proof regarding both the reasonableness and work-relatedness of the contested treatment based upon an unreported decision from the Kentucky Supreme Court, C & T Hazard v. Chantella Stallings, et al., 2012-SC-000834-WC, 2013 WL 5777077 (Ky. 2013). The ALJ further stated, regardless of which party bore the burden of proof, Davidson's left knee symptoms and complaints are work-related and the proposed left knee treatment, including MRI and left knee replacement surgery are compensable. Specifically the ALJ found as follows:

> Up until the unpublished decision of the Supreme Court in *C&T of Hazard v. Chantella Stollings, et al.,* 2012-SC-000834-WC, it was universally held that in a post-award medical fee dispute, 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). In *Stollings,* however, the Supreme Court determined that the defendant/employer, as the party filing the motion to reopen to assert a medical dispute, had the burden to prove that plaintiff's treatment was not only unreasonable but not work-related as well. Regardless, however, of which party has the burden of proof with respect to the work-relatedness of plaintiff's current left

knee symptoms and the need for total left knee replacement surgery, the ALJ is persuaded, having carefully and thoroughly considered the evidence in the record, that plaintiff's current left knee symptoms and complaints are work-related and that the proposed left knee treatment, including an MRI and total knee replacement surgery is compensable. In so finding, the ALJ notes that Judge Cowden made a factual finding in the underlying claim that plaintiff sustained an injury to her left knee which resulted in permanent functional impairment and permanent occupational disability. Even though the Special Fund was found to be liable for all the income benefits apportioned to the left knee aspect of plaintiff's injury, the defendant/employer was specifically found to be liable for all future medical benefits. That finding is entitled to *res judicata* effect in the present proceeding but still does not fully answer the question of whether plaintiff's current left knee symptoms and complaints are directly and causally related to the compensable work injury.

After careful and thorough review of the evidence including the medical records and reports submitted as well as plaintiff's own hearing testimony, the ALJ finds that plaintiff's current left knee symptoms and complaints, while attributable at least in part to the pre-existing condition of osteoarthritis, are directly and causally work-related. In so finding, the ALJ notes that in assessing liability to the Special Fund in the underlying proceeding, Judge Cowden was required implicitly, if not explicitly, to find that plaintiff had a pre-existing dormant condition in her left knee which was brought into disabling reality by virtue of the work trauma.

Although Dr. Jacob disagrees with this finding, his disagreement is of no probative value given the prior determination that plaintiff sustained a permanent arousal of a previously dormant pre-existing condition in her left knee. In other words, the arousal of the pre-existing dormant condition constituted the injury for which the defendant/employer was obligated to provide medical benefits. Moreover, plaintiff testified that she has continued to have symptoms of pain, locking and swelling in her left knee since the time of the original injury, symptoms which she attributes, at least in part, to the fact that she has had to use the left knee more extensively and place greater stress on it in light of the symptoms that she had with her right knee which was initially more symptomatic than the left knee and which required an earlier total replacement surgery. Further, in Dr. Sweet's January 22, 2013 correspondence to Dr. Marquess, he noted that plaintiff had an injury "20 years ago" to both knees that was work-related and that the left knee had deteriorated since the date of injury with increasing pain in the left knee of late. Likewise, in his subsequent report to Dr. Marquess on June 26, 2013, Dr. Sweet confirmed that plaintiff had provided a history that her left knee had been chronically symptomatic although she had had a spontaneous increase in symptoms "last fall." He indicated, however, that she "did not have a new injury." Because of the degree of disability and intensity of her symptoms, he strongly felt that knee replacement surgery is indicated based on a diagnosis of "end-stage bone-on-bone arthritis left knee." He noted that surgery would be scheduled "after she has been approved via workers' compensation." The ALJ infers from Dr.

> Sweet's prefacing the scheduling of surgery on the approval of that procedure by workers' compensation, that he is of the opinion that the need for left knee replacement surgery is causally related to the prior work injury. Only Dr. Jacob is of the opinion that plaintiff's left knee condition is completely unrelated to the work injury but due, instead, to the natural progression of her pre-existing osteoarthritis. This is essentially the same position which was rejected by Judge Cowden in the underlying Opinion and which remains no more probative nor persuasive now than it was then. Accordingly, for the reasons set forth hereinabove, the ALJ finds that the left knee total replacement surgery recommended by Dr. Sweet is directly and causally related to the work injury of August 28, 1989, and is, therefore, compensable. The defendant/employer and/or its workers' compensation carrier shall immediately pre-certify payment of the contested procedure. Further, the ALJ finds that plaintiff is entitled to reimbursement of her out-of-pocket expenses incurred with respect to treatment of her left knee as set forth in the witness list attached to the hearing transcript including charges by Baptist Hospital East in the amount of $917.29, X-ray Associates in the amount of $39.24, Baptist Medical Associates Group, Dr. Norris and Dr. Marquess in the amount of $69.43 (twice), Dr. Ellis in the amount of $182.18, and Dr. Sweet in the amounts of $107.29 and $115.30.

Home Care filed a petition for reconsideration arguing the ALJ's decision was not supported by substantial evidence, medical causation must be proven by medical testimony, and Dr. Jacob was the only physician to address a

valid opinion regarding causation, and is therefore uncontroverted. In an order issued February 18, 2014, the ALJ overruled Home Care's petition for reconsideration.

The ALJ painstakingly outlined the facts, and the basis for his decision. Based upon the facts, we believe the ALJ could reasonably conclude Davidson's MRI and proposed left knee replacement were causally related to her August 28, 1989 work-related injury, and therefore compensable. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984); REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985). Hence, we find no error.

Despite the seemingly inconsistent decision rendered by the Kentucky Supreme Court in the unreported case of C & T of Hazard v. Stallings, supra, a long line of reported decisions establish that in a post-award medical fee dispute, the employer bears both the burden of going forward and the burden of proving entitlement to the relief sought, except that the claimant bears the burden of proving work-relatedness. 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); Square D Company v.

Tipton, 862 S.W.2d 308 (Ky. 1993), Addington Resources, Inc. v. Perkins, 947 S.W.2d 421 (Ky. App. 1997).

Regardless of who bore the burden of proof, the ALJ determined the evidence established the treatment contested was compensable. The ALJ then proceeded to outline the basis for his decision regarding causation/ work-relatedness. As noted by the ALJ, the finding of a compensable work-related left knee condition is *res judicata*, based upon the 2006 decision rendered by ALJ Cowden. The issue is whether this specific medical procedure concerning the left knee is compensable. It was reasonable for the ALJ to conclude not only based upon Dr. Sweet's opinions, but also the records from Dr. Petrik from the original claim which were designated as evidence, the left knee condition for which the MRI was performed, and the surgery recommended, is compensable.

Although Dr. Jacob's opinions are acknowledged, they merely represent a contrary point of view upon which the ALJ could have relied but did not. As noted by the ALJ, Dr. Jacob's opinions regarding causation and work-relatedness do not differ greatly from his opinions considered by ALJ Cowden. Even if Home Care bore the burden of proving causation/work-relatedness, which we conclude they did not, a contrary result is not compelled.

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, supra. We conclude there was no such evidence.

The ALJ, as fact-finder, is the sole judge of the weight and inferences to be drawn from the evidence and determines the quality, character, and substance of the evidence. *See* Square D Company v. Tipton, 862 S.W.2d 308 (Ky. 1993). The ALJ may reject any testimony and believe or disbelieve various parts of the evidence. *See* Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). 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).

Accordingly, the opinion and order rendered by Hon. Robert L. Swisher, Administrative Law Judge, on January 3, 2014 and the order on reconsideration issued February 18, 2014 are hereby **AFFIRMED.**

ALL CONCUR.

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