

OPINION ENTERED: March 21, 2012

CLAIM NO. 200065916

IRENA KICINSKA

PETITIONER

VS.

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

BETTS USA, INC.
and HON. R. SCOTT BORDERS,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

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

ALVEY, Chairman. Irena Kicinska ("Kicinska"), *pro se*, seeks review of a decision rendered April 29, 2011¹, by Hon. R. Scott Borders, Administrative Law Judge ("ALJ"), in a post settlement medical dispute filed by Betts USA ("Betts"), challenging compensability of medical expenses.

¹ Re-issued April 29, 2011 because ALJ failed to sign the decision originally mailed April 21, 2011.

Kicinska also appeals from the orders ruling on the petitions for reconsideration entered May 18, 2011, June 27, 2011, and December 20, 2011. We affirm.

The ALJ originally entered a decision on May 13, 2010 resolving a medical fee dispute in favor of Betts. This Board entered an opinion vacating and remanding the decision of the ALJ on November 22, 2010, because no hearing had been held. We specifically held:

In this instance, though residing out of state and not represented by counsel, Kicinska has vigorously participated in the defense of her right to receive the medical treatment at issue since the time Betts' medical dispute was initiated in 2008. Likewise, when the final hearing was originally scheduled for February 23, 2010, Kicinska appeared at the proceeding as ordered by the ALJ and, but for the absence of the opposing party, was prepared to participate and go forward. Based on the Board's review of the record, there is absolutely no indication Kicinska at any time agreed to waive her right to a final hearing. Hence, pursuant to 803 KAR 25:010 § 13(13) and 803 KAR 25:010 § 18(8), once the order of February 23, 2010 was set aside, the ALJ's failure to reschedule a final hearing was in error and constituted a violation of Kicinska's due process rights. For that reason, the decision on the merits of the medical fee dispute must be vacated. On remand, the ALJ is instructed to reschedule the final hearing, providing adequate notice of the time and date of the proceeding to the parties. At the conclusion of the

final hearing, the medical dispute shall again be taken under submission by the ALJ, with the parties being granted a reasonable time in which to prepare and file briefs, and a new decision on the merits of the medical dispute shall be issued.

On December 6, 2010, Betts filed a motion to supplement the medical fee dispute. On January 6, 2011, the ALJ issued an order including the requests for an MRI, SI joint injection and implantation of a spinal cord stimulator as issues to be resolved in the medical fee dispute. On January 7, 2011, the ALJ entered an order scheduling a hearing for, "Tuesday, February 22, 2011 beginning at 11:00 a.m. at the Lexington Hearing site." A copy of the order was mailed to Kicinska at the following address:

Irena Kicinska
1150 Turkey Creek Ridge Road
York, South Carolina 29745²

Neither party requested the hearing be postponed, continued or canceled. On February 22, 2011, at 11:00 a.m., counsel for Betts, the ALJ, and the court reporter were present for the hearing, however Kicinska was not. On that date, the ALJ ordered concurrent briefs to be filed by March 22, 2011, when the case would stand submitted for

² This is the same address listed on the pleadings and briefs filed by Kicinska.

decision. On February 24, 2011, the ALJ entered an order which stated:

IT IS HEREBY ORDERED, the Plaintiff has ten (10) days from the date of this Order to show cause why the relief requested by the Defendant/Employer should not be granted.

The order was sent to the same address listed above.

On March 28, 2011, Betts filed a motion for the ALJ to find the contested medical expenses to be non-compensable based upon Kicinska's failure to respond to the show cause order. On March 28, 2011, Kicinska filed a document styled, "Explanation of Absence on the hearing and sincire[sic] apology." In that document, Kicinska stated her son had mistakenly entered the hearing date on his calendar as February 23, 2011 rather than February 22, 2011.

On April 21, 2011, the ALJ rendered an opinion and order on remand resolving the medical fee dispute in Betts' favor, however the decision was not signed and was reissued on April 29, 2011. In the decision, the ALJ found the contested medical expenses/treatment non-compensable. Specifically, the ALJ found as follows:

As directed by the Worker's Compensation Board in their Opinion vacating and remanding the May 13, 2010, Opinion rendered by the

undersigned Administrative Law Judge, this matter was scheduled for a Final Hearing to ensure the due process rights of the Plaintiff, Irena Kicinska. The undersigned was instructed to reschedule the Final Hearing, provide adequate notice of the time and date of the proceedings to the parties, and at the conclusion of the Final Hearing take the Medical Fee Dispute under submission with the parties being granted a reasonable time in which to prepare and file briefs. This has been done. Thereafter, a decision on the merits of Medical Dispute shall be issued.

The contested issues to be determined on reopening are the reasonableness, necessity, and relatedness of; the continued use of narcotic medications, hospital admission of February 2008, treatment from the Pain management[sic] Center for shoulder pain, charges from the emergency room physicians for treatment for hemorrhage of the rectum and anus, treatment from Piedmont Medical Center for abdominal and other alleged non-work related conditions, requests for reimbursement for prescription medications, request for reimbursement for mileage incurred for picking up her medications, a requested MRI scan, requested SI joint injections, and implantation of a spinal cord stimulator.

In the Opinion and Order entered by the undersigned Administrative Law Judge on May 13, 2010, and[sic] the undersigned adequately summarized the medical proof submitted. The proof consisted of the Plaintiff's response to the Defendant Employer's Motion to Re-open consisting of a three page document, request for mileage

reimbursement submitted by the Plaintiff, a medical report of Dr. Sung Chang the Plaintiff's pain specialist from South Carolina, the utilization review report of Dr. Bart Olash, the utilization review report of Dr. John Rademaker, and the medical report of the Piedmont Pain Center dated July 30, 2008. The summarization of this proof as set forth in the Opinion and Order of May 13, 2010, is incorporated herein by reference. Neither party has submitted any additional proof to be considered by the undersigned Administrative Law Judge in determining the submitted issues herein.

In this specific instance, the Administrative Law Judge finds the Opinions of Dr. Olash and Dr. Rademaker to be persuasive and finds the Defendant Employer has met their[sic] burden of proving that continued use of narcotic pain medication, treatment at Pain Management Center for shoulder pain and other non-work related problems, treatment at York Emergency Physicians for hemorrhages of the rectum and anus, for treatment at Piedmont Medical Center for abdominal and other non-work related conditions for submitted requests for reimbursement for prescription expenses, and mileage reimbursement, a request for an MRI scan, for proposed SI joint injections, and for proposed implantation of a spinal cord stimulator, are all found to not be reasonable, necessary, or related, to the treatment for September 26, 2007, work-related lumbar strain. While the Plaintiff has argued that in her Opinion [sic] the medical treatment is reasonable, necessary, and resulted from the September 26, 2007, lumbar strain, the medical proof simply does not substantiate her argument.

Betts filed a petition for reconsideration on April 27, 2011, asking the ALJ to vacate that portion of the opinion and order on remand requiring it to pay for:

. . . the Plaintiff to be successfully weaned off for[sic] narcotic and other medications, at the direction of a licensed physician, and once the same is achieved, shall no longer be responsible for the payment of any additional medical expenses for the treatment of the Plaintiff's lumbar strain caused as a result of the September 26, 2007, work-related injury.

On May 11, 2011, Betts filed a motion for clarification/motion to reopen and/or petition for reconsideration regarding requests for mileage reimbursement. On May 18, 2011, the ALJ entered an order sustaining Betts' petition for reconsideration. On May 31, 2011, Kicinska filed a motion to request missing correspondence, a motion to make defendant answer questions, and a response to Betts' motion filed May 11, 2011. Kicinska filed a notice of appeal on June 2, 2011. On June 6, 2011, the ALJ entered an order overruling the motions filed by Kicinska. This Board issued an order on June 8, 2011, placing the appeal in abeyance, and remanding the claim to the ALJ to rule on the outstanding petition

for reconsideration. In an order entered June 27, 2011, the ALJ overruled what he deemed to be a petition for reconsideration. On July 6, 2011, this Board removed the appeal from abeyance. On October 31, 2011, this Board again placed the appeal in abeyance, and remanded to the ALJ to:

- (1) Delineate which petition for reconsideration filed by Betts he was sustaining in his order dated May 18, 2011;
- (2) Address any other outstanding petition for reconsideration filed by Betts.

On December 20, 2011, the ALJ entered an order setting forth the following:

Therefore, in an attempt to clarify this matter the Administrative Law Judge rules that the Defendant Employer's *Petition for Reconsideration* dated April 27, 2011, requesting the Administrative Law Judge vacate that portion of his order directing them [sic] to pay for the Plaintiff's detoxification is hereby SUSTAINED. The Defendant Employer is correct that the Administrative Law Judge erred and that there are no facts and[sic] the record to show that the Plaintiff has an addiction, and that any such attempt would be untenable. The Administrative Law Judge further rules that the Defendant Employer's Motion for Clarification/Motion to Reopen and/or Petition for Reconsideration is hereby SUSTAINED. The Defendant Employer is correct that the medical bills attached thereto were submitted for mileage

reimbursement and have been addressed and found non-compensable by this undersigned Administrative Law Judge's most recent Opinion and Order. These charges are non-compensable as they were incurred for obtaining medications not found to be properly compensable.

The Administrative Law Judge further finds that there are no remaining Petitions for Reconsideration filed by the Defendant Employer, Betts USA Inc., that have not been ruled upon.

On appeal, Kicinska argues it was improper for the ALJ to find the contested medical expenses and treatment to be non-compensable. Kicinska also again argues the ALJ deprived her of due process.

In a post-award medical fee dispute, it is the employer who bears both the burden of going forward and the burden 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). The claimant, however, bears the burden of proving work-relatedness. See Addington Resources, Inc. v. Perkins, 947 S.W.2d 421 (Ky. App. 1997).

Because Betts was successful before the ALJ in demonstrating the contested medical treatment was non-compensable, the question on appeal as it applies to this issue is whether substantial evidence supports the ALJ's decision. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984).

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 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). Magic Coal v. Fox, 19 S.W.3d 88 (Ky. 2000); Halls Hardwood Floor Co. v. Stapleton, 16 S.W.3d 327 (Ky. App. 2000).

Although an opposing party may note evidence supporting a conclusion contrary to the ALJ's decision, such is not an adequate basis for reversal on appeal.

McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974);
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 contested medical treatment non-compensable. In doing so, he relied upon the opinions of Dr. Olash and Dr. Rademaker.

Dr. Olash performed a utilization review on April 4, 2008. He stated he did not believe any treatment for shoulder pain was due to the work injury. He opined any treatment for the work injury occurring September 26, 2000 to be unnecessary. Likewise, he specifically found, "I do not believe repeat radiofrequency ablation L3 to S2 is medically necessary or appropriate for pathology due to the work injury of 9/26/00." Dr. Rademaker performed a final utilization review on May 16, 2008. He stated he saw no reason to disagree with the findings of Dr. Olash rendered in his report of April 4, 2008.

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*.

We believe the ALJ's decision finding the contested treatment non-compensable is supported by substantial evidence, and no contrary result was compelled. We therefore affirm the decision rendered April 29, 2011.

As we noted in our previous opinion, it is well established in order for the requirements of due process of law to be satisfied, a litigant must be afforded procedural due process as well as substantive due process. Kentucky Alcoholic Beverage Control Board v. Jacobs, 269 S.W.2d 189 (Ky. 1954); Utility Regulatory Commission v. Kentucky Water Service Co., Inc., 642 S.W.2d 591 (Ky. 1982). We noted previously, KRS 342.270(3) expressly mandates ALJ's "shall conduct hearings." 803 KAR 25:010 § 13(13), further provides:

If at the conclusion of the benefit review conference the parties have not reached agreement on all the issues, the administrative law judge shall:

. . . .

(b) Schedule a final hearing.

Finally, 803 KAR 25:010 § 18(8), expressly states:

The parties with approval of the administrative law judge may waive a final hearing. Waiver of a final hearing shall require agreement of all parties and the administrative law judge.

We previously vacated and remanded the May 13, 2010 decision rendered by the ALJ because no hearing had been held. On remand, the ALJ was instructed to schedule a hearing, issue a briefing schedule, and issue a new decision on the merits. The ALJ scheduled a hearing and provided adequate notice to the parties, however Kicinska failed to attend. Despite allegations of failure to receive other orders and pleadings, Kicinska admitted receiving the hearing order, but placed the wrong date on her calendar. The ALJ issued a briefing schedule, and issued a new decision on the merits. The ALJ did what he was instructed to do, and we find he did not abuse his discretion.

Accordingly, the ALJ's decision rendered April 29, 2011, along with the orders issued May 18, 2011, June 27, 2011, and December 20, 2011, ruling on the petitions for reconsideration are hereby **AFFIRMED**.

ALL CONCUR.

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