

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: October 3, 2014

CLAIM NO. 200383401

JAMES HALCOMB
and JOHNNIE L. TURNER

PETITIONER

VS.

APPEAL FROM HON. JOHN B. COLEMAN,
ADMINISTRATIVE LAW JUDGE

AMERICAN MINING,
DR. JOSE ECHEVERRIA,
and HON. JOHN B. COLEMAN,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

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

ALVEY, Chairman. James Halcomb ("Halcomb") seeks review of the Opinion and Order rendered June 17, 2014 by Hon. John B. Coleman, Administrative Law Judge ("ALJ"). The ALJ resolved a medical dispute in favor of American Mining relieving it of the obligation to pay for contested narcotic medication

in light of several toxicology reports in which Halcomb tested positive for illicit drugs, specifically Tetrahydrocannabinol ("THC"), the actual component of marijuana. No petition for reconsideration was filed by either party.

On appeal, Halcomb argues the ALJ erred as a matter of law by using the positive drug screen results as a basis for determining he does not need ongoing pain medication for his work-related condition. Because the ALJ's decision is supported by substantial evidence, and a contrary result is not compelled, we affirm.

Halcomb filed a Form 101 on October 9, 2003 alleging he injured his back, left hip and muscles on May 21, 2003 after a coal truck he was operating rolled over on its side. Ultimately, the parties settled the claim, and a Form 110-I settlement agreement was approved by Hon. Howard E. Frasier, Jr., Administrative Law Judge, on May 2, 2006. The Form 110-I reflects Halcomb sustained a transverse process fracture at L2-3, which ultimately resolved, and he experienced symptoms at the L5-S1 level requiring a discectomy. The parties agreed Halcomb would receive a lump sum payment, and he did not waive his right to past or future medical expenses.

On January 10, 2014, American Mining filed a motion to reopen, a Form 112 medical fee dispute and a motion to join Halcomb's treating physician, Dr. Jose Echeverria, as a party. In its motion, American Mining stated Halcomb continued to treat with Dr. Echeverria following the settlement, which included regular prescriptions for narcotic pain medication. On October 1, 2012, American Mining requested Dr. Echeverria submit Halcomb to random drug screens, provide the date of the most recent KASPER review, and undertake random pill count monitoring. Dr. Echeverria complied with one of the requests, and submitted Halcomb to drug screens on October 11, 2012; April 9, 2013; and October 9, 2013, all of which were positive for opiates and THC. Two utilization reviews ("UR") were performed. Based upon the UR reports, which are discussed below, American Mining requested Dr. Echeverria be given four weeks to wean Halcomb from Lortab. American Mining requested it be absolved from any further liability for payment of any narcotic medication thereafter.

In support of its motion, American Mining filed the April 29, 2013 UR report of Dr. Ring Tsai and the December 20, 2013 UR report of Dr. William Nemeth. In his report, Dr. Tsai noted the treatment records of Dr. Echeverria reflect he maintained Halcomb on Lortab. He also

noted drug screens from October 11, 2012, April 9, 2013 and October 9, 2013 were positive for THC and opiates. Dr. Tsai then quoted the Official Disability Guidelines ("ODG"), which provides circumstances when opioids should be discontinued, and also states routine long-term opioid therapy for chronic pain is not recommended since there is little research to support such use. Dr. Tsai recommended Dr. Echeverria counsel Halcomb against the continued use of marijuana, a repeat drug screen be administered after sixty days, and an opioid agreement be discussed with and signed by Halcomb directing his urine drug screens remain negative for illegal and non-prescribed controlled substances. Dr. Tsai additionally requested, if after the sixty day period, Halcomb tests positive for THC or any other illegal substance, he be tapered off Lortab over ninety days with no additional controlled substances prescribed thereafter.

After reviewing the records of Dr. Echeverria, Dr. Nemeth opined continued pain management and prescription of narcotic medicine is unnecessary and inappropriate since Halcomb is self-medicating with THC, which is not supported by the American Society of Addiction Medicine as an appropriate pain medication. Since Halcomb is on minimal amounts of medication, Dr. Nemeth recommended he decrease

the use of Hydrocodone on a weekly basis by one tablet per week, and completely discontinue its use during week four.

American Mining also filed the treatment records of Dr. Echeverria from January 9, 2013 through October 9, 2013, and three toxicology reports from Harlan ARN Hospital in support of its motion. The October 11, 2012 toxicology report reflects Halcomb tested positive for THC and opiates. Thereafter, Halcomb treated with Dr. Echeverria on January 9, 2013, complaining of pain. Dr. Echeverria diagnosed low back pain, and refilled Halcomb's prescription medication for Lortab. He noted a drug screen was positive for opiates as prescribed, but he did not discuss the THC results. Halcomb returned again on April 9, 2013 with pain complaints. Dr. Echeverria prescribed Voltaren and a lower dosage of Lortab, and ordered a repeat drug screen. The April 9, 2013 toxicology report reflects Halcomb tested positive for THC and opiates. On July 9, 2013, Dr. Echeverria noted the drug screen was positive for opiates as prescribed, but he did not discuss the THC results, and refilled Halcomb's prescriptions for Lortab and Voltaren. On October 9, 2013, Dr. Echeverria refilled Halcomb's prescriptions and ordered a repeat drug screen. The October 9, 2013 toxicology report noted Halcomb tested positive for THC and opiates.

In an order dated February 11, 2014, the ALJ sustained American Mining's motion to reopen and joined Dr. Echeverria as a party. A telephonic conference was conducted on March 5, 2014. The parties agreed the contested issue is the reasonableness/necessity of prescribed narcotic medication in light of positive urinary drug screens for THC.

Thereafter, Halcomb filed additional toxicology results of drug screens. Both the April 9, 2014 and May 14, 2014 toxicology reports noted Halcomb tested positive for opiates, but negative for THC. He also submitted a May 9, 2014 affidavit by Dr. Echeverria, who stated he has treated Halcomb for a number of years for pain stemming from his work-related injuries. He indicated he was aware of the presence of THC upon testing, but stated there are numerous ways one can test positive for this substance even though he or she may not intentionally inhale or absorb it. He indicated he advised Halcomb to refrain from being around people who use THC in his presence. Thereafter, Dr. Echeverria ordered another drug screen on April 9, 2014, which was negative for THC. Dr. Echeverria opined "the regimen of medication that I have prescribed is appropriate and should be continued to give him some relief from his work related injuries."

In response, American Mining submitted a May 9, 2014 supplemental report from Dr. Nemeth. He explained the length of time THC remains in your system depends upon the amount ingested or inhaled, but small amounts can result in positive THC screen for six weeks or more following significant exposure. In Halcomb's case, Dr. Nemeth opined the fact there were at least three positive drug tests taken from 2012 through 2013, at least three months apart, is indicative of active use of THC as opposed to secondary exposure. Dr. Nemeth opined it is not medically probable a person would test positive for THC through a drug screen due to second hand exposure since this leads to very low doses of THC.

Because Halcomb has had at least three failed drug screens, all positive for THC, and all taken at least three months apart, Dr. Nemeth opined he would not treat Halcomb with opiates for his chronic pain syndrome. Even if Halcomb stops using THC, there are other psychiatric diagnoses which are being medicated in this particular claim and opiates are not indicated for chronic spine pain per ODG Treatment in Workers' Compensation as evidence based treatment. However, Dr. Nemeth stated if Dr. Echeverria continues to treat Halcomb with opiates, he should do quantitative analyses and pill counts. Dr. Nemeth ended by stating "with other risk

factors clearly expressed in this claim based upon his prior reviews, it would not be prudent to continue to treat Mr. Halcomb with opiate medications."

The April 22, 2014 benefit review conference order notes the parties waived a hearing and again reflects the contested issue is the reasonableness and necessity of narcotic medications.

In the June 17, 2014 Opinion and Order, the ALJ summarized the evidence of record and noted the employer carries the burden of proving contested medical treatment is not reasonable or necessary for the cure and relief of a work injury in a post award medical fee dispute. In finding the narcotic medication non-compensable pursuant to KRS 342.020, the ALJ stated as follows:

This case presents an interesting issue in regards[sic] to compensability of [sic] the defendant argues it should be relieved of the obligation for payment of narcotic medications because the plaintiff had three positive urine drug screens for the presence of THC. The treating provider has responded by explaining there are number of ways one can test positive even though one may not intentionally partake in the inhaling or absorbing of marijuana. He indicated that he had discussed with the plaintiff the importance of refraining from marijuana usage. 201 KAR 9:260 provides for the professional standards for prescribing and dispensing controlled substances. Section 5 (k) provides that drug

screens shall be utilized during the course of long-term prescribing or dispensing of controlled substances. That section provides that if the drug screen or other information available to the physician indicate that the patient is noncompliant, the physicians shall: a.) Do a controlled taper; b.) Stop prescribing or dispensing the controlled substance immediately; or c.) Refer the patient to an addiction specialist, mental health professional, pain management specialist, or drug treatment program, depending on the circumstances. In this particular case, the plaintiff has demonstrated non-compliance by testing positive for illegal drugs which were present during urine drug screening. I am convinced by the opinion of Dr. Nemeth the multiple failures on drug screening is indicative of illegal drug usage rather than being subjected to secondhand smoke as suggested and that in such instances, continued use of controlled narcotic medications must not continue. The only authority the Administrative Law Judge has is to determine the compensability of the contested treatment and to order a different course of treatment would be much like practicing medicine, which I am certainly not qualified to do. However, as the defendant has sustained its burden of showing the contested treatment to be non-compensable, the defendant is relieved of any obligation for payment of narcotic medications pursuant to KRS 342.020.

The ALJ emphasized American Mining "shall remain responsible for reasonable and necessary medical treatment for the cure and/or relief of the plaintiff's work related

injury pursuant to KRS 342.020." No petition for reconsideration was filed by either party.

On appeal, Halcomb argues the ALJ erred as a matter of law by using the trace amount of THC in his system to support a finding he does not need ongoing medical treatment. He asserts the evidence of record demonstrates his continued need of treatment for his work-related injuries, including narcotic pain medication. Halcomb asserts since the filing of the present medical dispute, he has tested negative for THC and is now compliant with his treating physician's orders. Halcomb concludes as follows:

The [ALJ] does not decide if the Petitioner needs pain medication and the Respondent/Employer only argues that the Petitioner has marijuana in his system. This is not sufficient to find that the Petitioner is not entitled to continue to receive his prescription pain medication. He only had traces of marijuana in his system in the original test. There is no evidence to indicate he was using marijuana. The [ALJ] erred as a matter of law by using the trace amount in his system to find that the Petitioner does not need ongoing medical treatment. The last three tests the Petitioner had with Dr. Echeverria were all negative and showed he had nothing in his system.

In his reply brief, Halcomb attacks the reports of Dr. Nemeth, stating it is based upon mere speculation and

not supported by the medical evidence. He also states Dr. Nemeth did not directly address whether Halcomb's use of prescription pain medication is necessary for the cure and/or relief of his work-related injuries.

In a post-award medical fee dispute, the burden of proof to determine the medical treatment is unreasonable or unnecessary is with the employer, while the burden remains with the claimant concerning questions pertaining to work-relatedness or causation of the condition. See KRS 342.020; Mitee Enterprises vs. Yates, 865 S.W.2d 654 (Ky. 1993); Addington Resources, Inc. v. Perkins, 947 S.W.2d 421 (Ky. App. 1997); R.J. Corman Railroad Construction v. Haddix, 864 S.W.2d 915, 918 (Ky. 1993); and National Pizza Company vs. Curry, 802 S.W.2d 949 (Ky. App. 1991). Because American Mining had the burden of proof on the issue of the contested medical expenses being unreasonable and unnecessary and was successful before the ALJ, the sole issue on appeal is whether substantial evidence supports the ALJ's conclusion. See Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986). Substantial evidence has been defined as some evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable people. See Smyzer v. B.F. Goodrich Chemical Co., 474 S.W. 2d 367, 369 (Ky. 1971).

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). Similarly, the ALJ has the sole authority to judge the weight and inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Luttrell v. Cardinal Aluminum Co., 909 S.W.2d 334 (Ky. App. 1995). 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). 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). Mere evidence contrary to the ALJ's decision is not adequate to require reversal on appeal. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

Furthermore, in the absence of a petition for reconsideration, on questions of fact, the Board is limited to a determination of whether there is substantial evidence

contained in the record to support the ALJ's conclusion. Stated otherwise, inadequate, and incomplete, or even inaccurate fact finding on the part of an ALJ will not justify reversal or remand if there is identifiable evidence in the record that supports the ultimate conclusion. Eaton Axle Corp. v. Nally, 688 S.W.2d 334 (Ky. 1985); Halls Hardwood Floor Co. v. Stapleton, supra.

There is admittedly scant statutory or case law addressing whether an injured worker's concurrent use of prescribed narcotic pain medication and an illicit drug for an undisputed work injury can support a finding the prescribed narcotic medication is no longer reasonable or necessary in a subsequent medical dispute. However, 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. Here the evidence of record is limited since the parties waived the right to a hearing and no petition for reconsideration was filed requesting additional findings of fact. However, we believe Dr. Echeverria's treatment records and the opinions of Dr. Nemeth constitute the requisite substantial evidence to support the ALJ's determination.

The treatment records of Dr. Echeverria support the ALJ's determination American Mining had demonstrated non-compliance by introducing the toxicology reports from October 11, 2012; April 9, 2013; and October 9, 2013 indicating Halcomb tested positive for illegal drugs, specifically THC, and opiates as prescribed for his work-related injury. The record also supports the ALJ's conclusion Halcomb engaged in illegal drug use, rather than merely being exposed to second hand smoke. As noted above, in the May 9, 2014 report, Dr. Nemeth opined the fact there were at least three positive drug tests taken from 2012 through 2013 and at least three months apart is indicative of active THC use. He also indicated " . . . generally second hand exposure leads to very low doses of THC only and is an uncommon way for a urine drug test to be positive." We also note Dr. Echeverria's opinion regarding whether Halcomb actively used marijuana during the course of treatment is equivocal at best. Dr. Echeverria's treatment records prior to the motion to reopen do not discuss the positive drug screens for THC. In addition, Dr. Echeverria did not offer a definitive opinion on this issue in his April 9, 2014 opinion. He stated as follows:

I am aware Mr. Halcomb tested positive for THC (which one may test positive from being around other persons who are

smoking marijuana. There are numbers of ways one can test positive even though he or she may not intentionally partake in inhaling the THC or absorb it through some other way." I have discussed with Mr. Halcomb to refrain from being around persons who may be known to use THC

Finally, Dr. Nemeth's opinion constitutes substantial evidence supporting the ALJ's finding the narcotic medication non-compensable pursuant to KRS 342.020.

As stated above, Dr. Nemeth opined continued prescription narcotic medicine is not necessary and appropriate since Halcomb is self-medicating with THC, which is inappropriate. He also stated he would not treat Halcomb with opiates for his chronic pain since he has had at least three failed drug screens, all positive for THC and all taken at least three months apart. Dr. Nemeth noted opiates are not indicated for chronic spine pain pursuant to the ODG as evidence based treatment. Dr. Nemeth clearly stated "with other risk factors clearly expressed in this claim based upon his prior reviews, it would not be prudent to continue to treat Mr. Halcomb with opiate medications." In addition to the reports of Dr. Nemeth, the ALJ also looked to 201 KAR 9:260, the administrative regulations pertaining to the professional standards for prescribing and dispensing controlled substances. The regulations allow for the

immediate discontinuation of a controlled substance when a drug screen indicates a patient is non-compliant.

Therefore, the ALJ properly considered the evidence of record and applied the correct legal analysis in determining the continued prescription for narcotic pain medication non-compensable. Since substantial evidence supports the ALJ's determination, and Halcomb merely points to conflicting evidence supporting his position which does not compel a contrary result, the decision will not be disturbed on appeal. The drug screens taken subsequent to the motion to reopen on April 9, 2014 and May 14, 2014 indicating Halcomb tested negative for THC do not change this result. We emphasize the ALJ's decision does not relieve American Mining from its responsibility for the payment of reasonable and necessary medical treatment, with exception of the contested narcotic medication, for the cure and/or relief of the plaintiff's work-related injury pursuant to KRS 342.020.

Accordingly, the June 17, 2014 Opinion and Order by Hon. John B. Coleman, Administrative Law Judge, is hereby **AFFIRMED.**

ALL CONCUR.

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