

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: September 23, 2016

CLAIM NO. 199407153

JERRY DREXAL MOORE

PETITIONER

VS.

APPEAL FROM HON. JANE RICE WILLIAMS,
ADMINISTRATIVE LAW JUDGE

UNITED PARCEL SERVICE
DR. KAREN SAYLOR
HON. JANE RICE WILLIAMS,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

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

RECHTER, Member. Jerry Drexel Moore ("Moore") appeals from the March 11, 2016 Medical Fee Opinion and Order and the April 19, 2016 Order rendered by Hon. Jane Rice Williams, Administrative Law Judge ("ALJ") finding contested medical expenses were not work-related, reasonable or necessary. On appeal, Moore argues the ALJ failed to apply *res judicata* to issues previously decided and failed to

consider all evidence of record, thereby depriving him of due process. For the reasons set forth herein, we affirm.

Moore sustained an injury to his cervical spine on October 11, 1993 and an injury to his right shoulder on September 8, 1995. He settled his claim by agreement approved April 8, 1997, retaining his right to ongoing medical benefits. United Parcel Service ("UPS") previously filed a medical fee dispute to challenge the compensability of physical therapy sessions recommended by Dr. Amr O. El-Naggar for Moore's cervical condition. ALJ Allison Emerson Jones ruled on December 7, 2012 that the recommended physical therapy sessions were reasonable and necessary, and therefore compensable.

UPS filed a second medical dispute on December 2, 2013 to contest the reasonableness and necessity of prescriptions for Skelaxin, Ultram, Percocet, Ambien and Valium, for treatment of Moore's cervical condition. By Opinion and Order rendered May 9, 2014, ALJ John B. Coleman determined UPS failed to prove the contested medications were unreasonable or unnecessary for the cure and/or relief of the work-related injury, and therefore they were compensable.

UPS filed a third motion to reopen to contest a request for a thoracic CT scan. By Opinion and Order rendered January 13, 2015, ALJ Coleman determined that the CT scan was reasonable, necessary and related to the work injury because Moore had complained of and was treated for thoracic pain at the time of the injury. Further, while the settlement agreement did not clearly define the thoracic spine as part of the work injury, the parties agreed UPS would pay for all reasonable and necessary medical treatment related to the injury. However, on reconsideration, ALJ Coleman reversed this ruling. Citing Ramsey v. Sayre Christian Village Nursing Home, 239 S.W.3d 56 (Ky. 2007), he determined the expenses for the thoracic condition were not compensable because Moore had not previously claimed the thoracic injury during litigation of the claim.

UPS filed the current motion to reopen for medical dispute on November 13, 2015, challenging the reasonableness and/or necessity of Oxycodone/acetaminophen, Tramadol, Diazepam, Zolpidem Tartrate, and Metaxalone prescribed by Dr. Karen Saylor.

In support of the medical dispute, UPS submitted the November 2, 2015 peer review report of Dr. Paul

Loubser, who conducted a medical records review. Dr. Loubser opined Oxycodone/Acetaminophen and Tramadol were not medically necessary and should be discontinued. Noting the lack of documentation of their efficacy, Dr. Loubser opined Diazepam and Zolpidem Tartrate were not medically necessary. He further noted the medications are not recommended for extended use. Further, the clinical documentation did not demonstrate any substantial functional improvement with use of these medications. Dr. Loubser indicated muscle relaxers are appropriate for short term use only; chronic use of muscle relaxers is not recommended by current evidence based guidelines. Importantly, there was no indication of any recent exacerbation of chronic pain or a recent acute injury. Thus, Metaxalone was not medically necessary.

Moore submitted a January 29, 2016 letter from Dr. Bachar Kassem of the Commonwealth Cancer Center. Moore treated at the clinic since 2000. Dr. Kassem noted Moore was taking pain medication for chronic back pain at that time, with increasing medications needed to control his pain. He showed no signs of substance abuse. Dr. Kassem opined Moore's functional status would decline if pain medication was discontinued.

Moore submitted a February 20, 2002 letter from Dr. John R. Allen who indicated Moore's current medications were directly related to his long standing residuals from his injuries. Moore was prescribed Lorcet, Darvocet, Ambien, Skelaxin, and Ziac. Dr. Allen did not expect any change in the required medication.

Moore submitted a February 13, 2016 letter from Dr. El-Naggar who treated Moore for discogenic back pain, lumbar degenerative disc disease, lumbar spondylolisthesis, cervical radiculitis, and cervical spondylosis. Moore's cervical CT scan showed a small osteophyte at C4-5 on the right and moderate osteophytes at C4-5 and C6-7 on the left. Dr. El-Naggar identified grade 1 L5-S1 spondylolisthesis with a significant angle of slippage. He noted Moore has significant pain and opined Skelaxin, Ultram, Percocet, Ambien and Valium prescribed by Dr. Saylor were appropriate and medically necessary.

Moore submitted a December 21, 2015 letter from Dr. Saylor who treated Moore "for an extended amount of time." She noted Moore had a work injury which initially produced cervical and lumbosacral abnormalities. His neck pain at first was quite severe, and was now "producing much more of an issue". He had a stimulator placed in his back.

Moore's medications were appropriate, resulted in some improvement, and were being monitored. He had no ill side effects and the medications allow him to be functional.

A telephonic Benefit Review Conference was held on March 1, 2016 in which UPS and Moore participated. The Benefit Review Order listed contested issues as reasonableness/necessity and work relatedness of the medications. The formal hearing was waived and the matter was submitted for decision.

The ALJ's findings relevant to this appeal are as follows:

In the specific instance, Defendant Employer has moved to reopen this claim to challenge the work relatedness, reasonableness and/or necessity of prescriptions for Oxycodone/Acetaminophen, Tramadol, Diazepam, Zolpidem Tartrate and Metaxalone. One of the problems is that there is strong opinion testimony from Dr. Saylor that Plaintiff's main pain issues are low back/lumbar pain. Although she relates the pain to the work injury, the work injury was not a low back injury but was an injury to the cervical spine and right shoulder. It is very possible that, but for the severe low back pain, Plaintiff's work related pain, if any, could be managed by over the counter remedies. Possibly Dr. Saylor does not realize the compensable injury was not a low back injury. Dr. El Nagggar's report places the pain source as discogenic back pain due to lumbar DDD, spondylolisthesis,

cervical radiculopathy and cervical spondylosis. He does not even mention work related pain. In light of these opinions failing to establish a causal relationship with the current low back pain and the work injury, the opinion of Dr. Loubser is persuasive, the contested medications are not reasonable and necessary for the cure and/or relief of the effects of the 1993 and 1995 work injuries and, therefore, non-compensable. As noted above, Plaintiff always bears the burden of proving work relatedness and has failed to do so in this case.

Moore filed a petition for reconsideration indicating he did not believe the ALJ fully understood the case. Moore noted previous disputes had been resolved in his favor and he identified evidence in his favor. By order dated April 19, 2016, the ALJ overruled the petition for reconsideration as an impermissible re-argument of the merits.

On appeal, Moore argues the ALJ erred in failing to apply *res judicata* to the issue of compensability of the contested medications. He notes ALJ Coleman found the same medications compensable. He notes ALJ Coleman summarized the opinion of Dr. Saylor that while the cervical issues were initially severe, the injury also produced lumbosacral abnormalities which began to be more of an issue. Moore contends that ALJ Coleman "found that the lumbar, thoracic

and cervical spine are all related to the original work injury based upon all the evidence submitted to him.”

Moore argues the ALJ failed to consider all of the record, thereby depriving him of due process. Moore contends the ALJ failed to consider medical evidence filed in the prior disputes. Moore notes the same medications were at issue in the dispute resolved by the May 9, 2014 decision of ALJ Coleman who cited the record from Dr. Saylor that was introduced in the current dispute. Moore contends the opinions of ALJ Coleman in the previous disputes, based on medical records in those disputes, extend the work injury to include the lumbosacral spine and the thoracic spine. Moore asks the Board to reverse the ALJ’s decision and instruct the ALJ to consider the previous rulings and evidence filed in the previous disputes and issue a new opinion in conformance with the record.

The concept of *res judicata* bars the re-litigation of a cause of action previously adjudicated between the same parties. It requires a final judgment, identity of subject matter and mutuality of parties. BTC Leasing Inc. v. Martin, 685 S.W.2d 191 (Ky. App. 1984). *Res judicata* has limited effect in medical fee disputes,

because medical benefits necessarily relate to an employee's evolving physical condition. Thus, while there may be a mutuality of parties, the subject matter is not identical simply because it relates to the same injury or body part. ALJ Coleman's prior opinion determined the compensability of the contested medications as of May 4, 2014, while ALJ Williams considered compensability as of March 11, 2016. What may be reasonable and necessary treatment at one point in time is not necessarily reasonable or necessary at a future time. To illustrate, Dr. Loubser specifically noted Diazepam, Zolpidem Tartrate and Metaxalone were reasonable short term treatment per guidelines, but were not recommended for long term use.

Moore's lumbar condition was not listed in the settlement agreement, nor was the causation of the lumbar condition adjudicated in any of the prior medical fee disputes. ALJ Coleman did initially extend medical treatment to the thoracic spine in the January 13, 2015 decision based upon treatment for the thoracic spine contemporaneously with the work injuries. However, the ALJ reversed his determination of compensability for the thoracic spine treatment on reconsideration. The lumbar condition was never an issue in any of the prior medical

disputes. ALJ Coleman never determined that Moore's lumbar condition was work related. Because the causation of the lumbar condition was not a part of any previous decision, *res judicata* cannot apply to the lumbar condition.

Moore identifies no evidence of medical treatment for the lumbar spine contemporaneous with the alleged injury dates. The evidence filed in prior disputes is not helpful to his case. The records do not establish treatment or complaints regarding a low back condition at the time of the subject work injuries. To the contrary, on January 7, 2009, Dr. David Bullock noted Moore had work injuries in 1993, 1995, and 1999. Dr. Bullock noted Moore experienced new symptoms of low back pain that occurred after a "wreck" in 1999. Records of the Department of Workers' Claims indicate Moore was paid temporary total disability benefits for a low back strain or tear with UPS in claim number 1999-68515, but Moore did not file an application and any claim for the 1999 injury is barred. The record falls far short of compelling a finding Moore's low back condition is related to the 1993 or 1995 work injury.

The ALJ considered the evidence relevant to the current medical treatment. Substantial evidence supports

the ALJ's conclusion that the current medications are not reasonable or necessary for treatment of the 1993 and 1995 injuries and/or not causally related to those injuries. The ALJ acted within her discretion to determine which evidence to rely upon, and it cannot be said the ALJ's conclusions are so unreasonable as to compel a different result. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

Accordingly, the March 11, 2016 Medical Fee Opinion and Order and the April 19, 2016 Order rendered by Hon. Jane Rice Williams, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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