

OPINION ENTERED: SEPTEMBER 28, 2012

CLAIM NO. 199031078

JIMMY RAY SPEARS

PETITIONER

VS.

APPEAL FROM HON. J. LANDON OVERFIELD,
CHIEF ADMINISTRATIVE LAW JUDGE

YELLOW FREIGHT SYSTEMS, INC.
and J. LANDON OVERFIELD,
CHIEF ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
VACATING & REMANDING

* * * * *

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

ALVEY, Chairman. Jimmy Ray Spears ("Spears"), *pro se*, appeals from the June 4, 2012, order entered by Hon. J. Landon Overfield, Chief Administrative Law Judge ("CALJ"), summarily resolving a medical fee dispute in favor of Yellow Freight Systems, Inc. ("Yellow Freight") and relieving it of payment of the contested medical expenses,

and from the responsibility of payment of any similar medical expenses for treatment of the same condition by the same medical provider; and further granting Yellow Freight leave to select a physician to treat Spears for the cure and relief from the effects of the work-related injury.

On appeal, Spears argues the CALJ erred in canceling the benefit review conference ("BRC"), and finding in Yellow Freight's favor without giving him the opportunity to be heard. We agree, and vacate and remand the CALJ's summary ruling, and direct further proceedings be conducted as outlined below.

Spears testified by deposition on May 8, 2012. He stated he injured his low back on July 29, 1990 as he was attempting to open a damaged trailer door. He underwent surgery to his low back in August, 1990. Spears has never returned to work since the accident, and he has undergone continuous treatment for his work-related injury since that time. Spears stated he is satisfied with the treatment provided by Dr. Robert Cochran, Jr., which he believes is helpful and provides relief. He further stated that Oxycontin is the only medication which has been able to relieve his pain.

In a decision rendered January 13, 1992, Ronald McDermott, Administrative Law Judge ("ALJ"), found Spears

sustained a work-related injury, and awarded permanent partial disability benefits based upon a sixty percent occupational disability. Spears subsequently reopened his claim alleging he was permanently totally disabled. The reopening was dismissed by ALJ Thomas Nanney in an opinion rendered July 25, 1995. Spears later reopened the claim again, and in an opinion rendered December 15, 2000, ALJ Nanney found his low back condition had worsened to the point he was rendered permanently totally disabled.

On November 9, 2011, Yellow Freight filed a motion to reopen and Form 112 contesting the treatment by Dr. Cochran, and the medications he continues to prescribe. Yellow Freight attached to the motion the utilization review report of Dr. Vinson Di Santo, a family physician who opined the medication prescribed by Dr. Cochran was not reasonable or necessary. Yellow Freight also attached the June 28, 2011 report of Dr. Ellen Ballard, a physical medicine physician, who opined treatment with Neurontin is reasonable and necessary; Clonazepam could be substituted for a different medication but was not unreasonable; Meloxicam and Prilosec are reasonable and necessary; and, further recommended weaning from Oxycontin. On December 1, 2010, Dr. Ballard stated Spears' present medication was

appropriate for treatment of his chronic pain, but generics could be substituted.

On December 14, 2011, the CALJ entered an order joining Dr. Cochran as a party, and sustained the motion to reopen. A scheduling order was issued. The ALJ noted that failure to file evidence in response may result in a finding the challenged treatment is not compensable.

On January 6, 2012, Spears filed a notice stating the treatment provided by Dr. Cochran is reasonable and necessary. On January 25, 2012, the CALJ entered an order referring the claim to an ALJ for final adjudication. A scheduling order was issued by the Department of Workers' Claims on February 22, 2012 assigning the claim to ALJ Caroline Pitt Clark, and scheduling a BRC for June 12, 2012 at the Paducah hearing site.

Yellow Freight filed numerous medical records and reports in support of the reopening. Dr. Suzanne Novak, who specializes in anesthesia and pain management, performed a records review. In her report dated February 2, 2012, she opined Dr. Cochran's current treatment regimen was inappropriate. She stated it was time Spears was weaned from opioid medication. She also recommended an evaluation be performed by an addiction professional. Dr. Novak further opined Klonopin, Mobic, Prilosec, Neurontin

and Pamelor were not appropriate for treatment of the work-related injury.

Yellow Freight also filed the January 19, 2012 records review report prepared by Dr. Ballard, who determined treatment with Neurontin and Meloxicam was not unreasonable. She stated Spears could use generic medications instead of the name brand. She determined Clonazepam and Prilosec were not required for treatment of the low back injury. She noted the Oxycontin treatment is excessive, and Methadone could be substituted.

Yellow Freight next filed the report of Dr. Richard Sheridan, an orthopedic surgeon who evaluated Spears on March 18, 2009. Dr. Sheridan noted the injury history, and the fact that Spears was 62 years old at the time of the evaluation. Dr. Sheridan opined no medications are reasonable and necessary for treatment of the work injury. He stated Oxycontin is contraindicated. He found no evidence of inflammation, so he determined there was no need for anti-inflammatory medication.

Finally, Yellow Freight filed office notes from Dr. Cochran. Those notes outlined his treatment, along with the medications prescribed. Dr. Cochran noted Spears was doing well with his treatment.

On May 16, 2012, ALJ Clark entered an order re-assigning the claim to the CALJ. On June 4, 2012, the CALJ entered an order finding in Yellow Freight's favor without conducting a BRC or hearing. The order states as follows:

This matter comes before the undersigned Chief Administrative Law Judge (CALJ) upon Defendant Employer's "Motion to Remove Dr. Cochran as Treating Physician". There have been several orders filed granting Plaintiff and his treating physician, Robert Cochran, M.D., opportunities to respond to the medical dispute and Defendant Employer's motion was served on Plaintiff and Dr. Cochran on May 7, 2012. There has[sic] been no objections or any other response filed by either Plaintiff for[sic] his physician. The proof time granted Plaintiff and Dr. Cochran expired on May 22, 2012.

Defendant Employer cites as part of its motion the statutory provisions of KRS 342.020(7). Although Defendant Employer asked that Dr. Cochran be removed as Plaintiff's treating physician, the statute authorizes only an order allowing the Defendant Employer to select a physician to treat Plaintiff and the hospital or hospitals in which the Plaintiff is to be treated. The CALJ is of the opinion that the difference is merely semantics.

Defendant Employer has submitted medical evidence containing medical opinions supporting the allegation that Plaintiff's continued treatment by Dr. Cochran would result in Plaintiff not receiving proper medical treatment and the funds being paid by Defendant Employer for the treatment by Dr. Cochran being spent without reasonable

benefit to Plaintiff. There is no evidence whatsoever to rebut those medical opinions. Defendant Employer's evidence has convinced the CALJ that Defendant Employer is entitled to benefits afforded under KRS 342.020(7). The CALJ is further convinced that the treatment and medication provided by Dr. Cochran to Plaintiff is not reasonable and necessary for the cure and relief from the effects of the subject work-related injury. The CALJ having reviewed the pleadings, including the medical evidence presented by Defendant Employer, and being fully and sufficiently advised thereby,

It is therefore ORDERED and ADJUDGED as follows:

1. Defendant Employer is granted leave to select a physician to treat Plaintiff for the cure and relief from the effects of the subject work-related injury.
2. The contested medical expenses are unreasonable and/or unnecessary for treatment of Plaintiff's work-related condition pursuant to KRS 342.020. Further, said expenses were timely challenged pursuant to Phillip Morris, Inc. v. Poynter, Ky., 786 SW2d 124 (1990).
3. The medical fee dispute is summarily resolved in favor of the Defendant Employer. Defendant Employer is relieved from the responsibility of payment of the contested medical expenses relating to the treatment provided by Dr. Cochran, and further is relieved from the responsibility of payment of any similar medical expenses for treatment of the same condition by Dr. Cochran.

4. The June 11, 2012 benefit review conference is **CANCELLED** and this medical dispute is **DISMISSED** as resolved in favor of Defendant Employer.

Because we believe the CALJ erred in summarily canceling the BRC, and ruling in favor of Yellow Freight, we vacate the order entered on June 4, 2012. First, the ALJ stated no response had been provided by Dr. Cochran to the motion to remove him as the treating physician, and no evidence rebutting the medical opinions of the reports filed by Yellow Freight. This is not entirely true. Yellow Freight filed Dr. Cochran's treatment records, and Spears testified at his deposition regarding the benefit of treatment provided by Dr. Cochran. We believe this is sufficient for Spears to be afforded the opportunity to attend a BRC, and to be heard at a formal hearing.

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). 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.

For purposes of KRS Chapter 342, it has long been accepted the ALJ has the authority to control the taking and presentation of proof in a workers' compensation proceeding in order to facilitate the speedy resolution of the claim and to determine all disputes in a summary manner. Dravo Lime Co., Inc. v. Eakins, 156 S.W.3d 283 (Ky. 2005); Yocum v. Butcher, 551 S.W.2d 841 (Ky. App. 1977); Cornett v. Corbin Materials, Inc., 807 S.W.2d 56 (Ky. 1991); Searcy v. Three Point Coal Co., 134 S.W.2d 228, 231 (Ky. 1939). However, unlike Cornett, *supra*, in this instance, proof was presented in the initial report of Dr. Ballard attached to the Form 112, Dr. Cochran's notes filed by Yellow Freight, and Spears' deposition regarding the

reasonableness and necessity of the ongoing medical treatment. It is further noted Spears, despite proceeding *pro se*, participated in the reopening by attending medical evaluations, depositions, and filing pleadings. We believe this is sufficient to allow the claim to proceed to a BRC and hearing.

For those reasons, the decision on the merits of the medical fee dispute must be vacated. On remand, the CALJ is instructed to reschedule the BRC, providing adequate notice of the time and date of the proceeding to the parties. At the conclusion of the BRC, the CALJ shall conduct a hearing on the merits, if necessary, with the parties being granted a reasonable time in which to prepare and file briefs if desired, and a new decision on the merits of the medical dispute shall be issued. The CALJ may well reach the same conclusion, and we are not directing any particular result. However, we deem it necessary to afford the parties the opportunity to be heard.

Accordingly, the CALJ's June 4, 2012, order cancelling the BRC, and summarily ruling in favor of Yellow Freight, is **VACATED** and this matter is **REMANDED** to the CALJ to conduct a BRC, and any other proceedings, including a

hearing, necessary for final resolution of the medical fee dispute.

ALL CONCUR.

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