

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: November 12, 2013

CLAIM NO. 200087563

KELLOGG'S

PETITIONER

VS. APPEAL FROM HON. HON. STEVEN G. BOLTON,
ADMINISTRATIVE LAW JUDGE

LOIS BOWMAN,
SAMUEL KING, M.D.
and HON. STEVEN G. BOLTON,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

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

RECHTER, Member. Kellogg's appeals from a June 5, 2013 Opinion and Order rendered by Hon. Steven G. Bolton, Administrative Law Judge ("ALJ"), and from a July 12, 2013 Order denying its petition for reconsideration. In this medical fee dispute, the ALJ determined Lois Bowman's ("Bowman") ongoing clinical visits with her treating

physician and five prescription medications are medically reasonable and necessary for the cure and relief of her work-related condition. On appeal, Kellogg's argues there is insufficient evidence to support the ALJ's conclusion Bowman's anti-depressant, arthritis and pain medications are compensable. We disagree and affirm.

Bowman filed claim number 1998-77875 alleging she injured her back in a work-related accident on May 28, 1998. She filed claim number 2000-87563 alleging she again injured her back on March 27, 2000. The two claims were consolidated, and later settled. Future medical benefits were not waived, and Bowman's right to ongoing medical treatment for the cure and relief of her injuries was preserved.

Bowman initially treated with Dr. Samuel King, her family doctor. After a series of referrals to various physicians, Bowman was eventually evaluated by Dr. Timothy Kriss, who performed a discectomy in January 2001. She was off work for six months following this surgery and attended physical therapy. She was released to work in August, 2001 but ceased working by the end of that year, stating she suffered persistent low back pain. Since that time, her care has been primarily managed by Dr. King, who prescribes Bowman two pain medications, Lortab and Lyrica. Dr. King

also prescribes Mobic (an arthritis medication), Flexeril (a muscle relaxer), and Elavil (an antidepressant).

On March 23, 2011, Dr. Henry Tutt, a neurosurgeon, performed an independent medical evaluation ("IME"). He concluded "the basis of complaint proffered by Ms. Bowman is completely inexplicable and ungrounded in physiologic principals." Dr. Steven Wunder performed an IME on September 23, 2011. He likewise found no medical or physiological explanation for Bowman's complaints. Neither physician believed Bowman's ongoing clinical visits with Dr. King nor her prescription medications are reasonable or necessary.

In the ALJ's words, there is a "huge dichotomy" between the opinion of Drs. Tutt and Wunder, and that of Dr. King. Dr. King acknowledged Bowman's work-related condition was corrected with surgery to a certain degree, but she will never be "totally pain-free". He concluded Bowman "will remain symptomatic with significant physical limitations, will require ongoing medication management, and the medications that she is receiving from me are indeed reasonable and necessary in the treatment of her injuries."

Despite the opinions of Drs. Tutt and Wunder, the ALJ was more persuaded by Dr. King's opinion, as Bowman's

treating physician, and by her testimony at the final hearing. Bowman testified she continues to experience diffuse back pain and radiculopathy in her legs. She takes her medications on an "as needed" basis, and testified these medications give her relief. The ALJ described Bowman's testimony as credible and sincere. On this basis, the ALJ denied Kellogg's request to be relieved of the duty to pay for ongoing clinical visits with Dr. King, and for her prescription medications. Kellogg's subsequent petition for reconsideration was denied.

On appeal, Kellogg's first argues the ALJ erred in finding Bowman's Elavil prescription is reasonable and necessary. Kellogg is correct there is no evidence on record that Bowman has never been diagnosed or treated for depression. However, following cross-examination at the final hearing, the ALJ inquired as to the Elavil prescription. Bowman acknowledged she has not been diagnosed with depression, and explained Dr. King prescribed the medication "as a sleep aid." In his August 3, 2012 letter, Dr. King stated the Elavil "will help with both the comorbid insomnia along with the radicular pain."

In a post-award medical fee dispute, it is the employer who bears the burden of going forward and of proving the contested treatment or expenses are

unreasonable or unnecessary. Nat'l Pizza Co. vs. Curry, 802 S.W.2d 949 (Ky. App. 1991); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979); Addington Res., Inc. v. Perkins, 947 S.W.2d 421 (Ky. App. 1997); Mitee Enter. vs. Yates, 865 S.W.2d 654 (Ky. 1993). The claimant, however, bears the burden of proving work-relatedness. See Addington Res., Inc. v. Perkins, 947 S.W.2d 421 (Ky. App. 1997).

Pursuant to KRS 342.275 and KRS 342.285, the ALJ, as the fact-finder, determines the quality, character, and substance of all the evidence and is the sole judge of the weight and inferences to be drawn from the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993); Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997). He or she may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it was presented by the same witness or the same party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000).

When the party with the burden of proof before the ALJ is unsuccessful, the sole issue on appeal is whether the evidence compels a different result. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). In the Order denying Kellogg's petition for

reconsideration, the ALJ explained he "does not think Elavil is prescribed for a separate unrated condition so much as a palliative for the effects of the original work-related injury." This conclusion is supported by Bowman's testimony and Dr. King's letter, which constitutes the requisite substantial evidence to support the ALJ's decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

Kellogg's next argues the ALJ erred in determining Bowman's pain and arthritis medications are compensable, asserting there are no objective medical findings to support this conclusion. Again, Kellogg's directs our attention to the reports of Drs. Tutt and Wunder, both of whom found no physiological basis for Bowman's complaints of ongoing pain and radiculopathy. The ALJ rejected these opinions, and instead relied on Bowman's testimony and Dr. King's opinion.

Dr. King noted Bowman suffered "an extensive injury to her back which we have documented radiographically." He then explained:

With regard to the chronicity of her injury, this condition is permanent and all of this cannot be corrected with surgery such that she will be totally pain-free. Once you sustain soft tissue injuries in addition to herniated disks, these will heal up to

a point but then become chronic, as I have documented. Therefore, these are permanent in nature and will require ongoing treatment. Soft tissue injuries and facet joints are chronically irritated just like arthritis, and as with any other inflammatory condition, she will require an anti-inflammatory in the form of Mobic. ... She is prescribed Lyrica, which does have an indication for neuropathic pain, and we have documented an etiology of her radicular pain. She has had surgery for a herniated disk and she still has a radiculopathy at the L3 nerve root as well. Lidoderm patches also help topically with some of the muscle spasm type pain, as does the Lortab which is a narcotic analgesic indicated for the treatment of her pain.

In addition, Bowman testified why she uses these medications, when she uses them, and what relief she experiences. The ALJ noted Bowman "demonstrates a good understanding of when and why to take each medication."

Notwithstanding the professional opinions of Drs. Tutt and Wunder, we do not find the evidence compels a different result. Bowman provided testimony concerning the relief she experiences from these medications, which the ALJ found "sincere" and "truthful." A claimant's testimony concerning her condition is competent and has probative value. Ira A. Watson Dept. Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). Coupled with Dr. King's opinion, this proof is substantial evidence to support the ALJ's conclusions with

respect to the prescriptions for Lortab, Lyrica and Mobic.
Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

Accordingly, the June 5, 2013 Opinion and Order rendered by Hon. Steven G. Bolton and the July 12, 2013 Order denying Kellogg's petition for reconsideration are hereby **AFFIRMED**.

ALL CONCUR.

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