Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: July 8, 2016

CLAIM NO. 201072244

KEVIN TURPEN PETITIONER

VS. **APPEAL FROM HON. JANE RICE WILLIAMS, ADMINISTRATIVE LAW JUDGE**

ZOELLER PUMP CO.
and HON. JANE RICE WILLIAMS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

STIVERS, Member. Kevin Turpen ("Turpen") appeals from the February 24, 2016, Medical Fee Opinion and Order on Remand of Hon. Jane Rice Williams, Administrative Law Judge ("ALJ") resolving a medical fee dispute in favor of Zoeller Pump Co. ("Zoeller"). Based on the medical fee dispute filed by Zoeller, the ALJ determined treatment by Kim White, APRN ("APRN White"), and the prescriptions

Hydrocodone, Xanax, and Prozac were not causally "related to the cure and/or relief of the effects of the work injury and, therefore, the treatment is non-compensable."

This is the second appeal involving the medical fee dispute filed by Zoeller. Since the ALJ incorrectly placed the burden of proof upon Turpen to prove the contested treatment was reasonable and necessary rather than causally related to the work injury, in the January 15, 2016, Opinion, this Board vacated the ALJ's decision and remanded for a determination based on all of the evidence and an accurate understanding of who bore the burden of proof. We adopt our summary of the procedural background contained in our January 15, 2016, Opinion:

> Turpen filed a Form 101 on July 27, 2011 alleging he injured his back and right hip on August 27, 2010 while lifting a cast iron shell at work. An interlocutory decision was rendered by Hon. John B. Coleman, Administrative Law Judge ("ALJ Coleman") awarding temporary total disability and medical benefits, including a back surgery proposed by Dr. Jonathan Hodes. Although Dr. Hodes initially recommended surgery, he later stated it was unnecessary due to normal findings on a subsequent MRI. The claim was settled by the parties, and a Form 110-I was approved by ALJ Coleman on April 29, 2013.
>
> On February 11, 2015, Zoeller filed a motion to reopen the claim, and a Form 112 medical dispute to challenge a treatment with certain medications, and

ongoing treatment with Kim White, APRN ("APRN White"), as not being caused by a work injury.

Further, we summarized the evidence as follows:

> Zoeller filed the January 12, 2015 report of Dr. Steven Wunder in support of the medical dispute. Dr. Wunder noted Turpen reported his low back and hip pain began with a work injury which occurred on August 27, 2010. Dr. Wunder noted Turpen had complained of low back and hip pain for years prior to the work injury. He noted Dr. Hodes had originally recommended surgery, but this recommendation was rescinded after a subsequent MRI showed the disc protrusion had resolved. He specifically stated:
>
>> Based on my history, physical examination and review of the records, the following opinions are offered with a reasonable degree of medical probability.
>>
>> I do not believe that Mr. Turpen's chronic low back symptoms are a direct and proximate result of the August 27, 2010, incident. I believe his symptoms would be due to the chronic low back pain that dated back to 2005. This is well documented in the records. This is further confirmed by Dr. Ballard. She did not think the need for his ongoing care was related to the work accident on August 27, 2010. His current exam showed a lot of exaggerated, inconsistent and non-organic findings. The medication prescriptions are the same as

> what he was taking before August 27, 2010.

Zoeller also filed the March 30, 2015 note of APRN White which states, “I have not been seeing Kevin Turpen for his workers’ comp injury. I see him every six months for his regular checkups and fill his pain medication monthly for his chronic back pain.”

Zoeller additionally filed the April 30, 2013 report of Dr. Ellen Ballard who noted Turpen’s history of chronic low back pain, which he stated worsened with walking, or movements in his sleep. Dr. Ballard determined Turpen’s chronic low back pain existed prior to his work injury. She noted Turpen reported he began treating with medication for this condition in 2006, and had additionally sought treatment with a chiropractor.

APRN White testified by deposition on June 22, 2015. She began treating Turpen in 2008 for various conditions, including high blood pressure, reflux, chronic low back pain and diverticulosis. Although she stated Turpen takes Hydrocodone as a maintenance treatment for his chronic low back pain, she admitted he had complained of this condition since she first treated him in July 2008, and he has taken this medication consistently since that time. She additionally noted Turpen has taken Xanax since 2008.

Attached to APRN White’s deposition were the report of Dr. Hodes which was filed with the Form 101, and the October 30, 2008 report of Dr. Lawrence Peters. Dr. Peters stated as follows:

> Mr. Turpen was referred here initially via Dr. Kemper, I believe, for back pain with

> left lower extremity radiculopathy. He does have discogenic back abnormalities with herniation at L5-S1, which is consistent with his symptom complex.

The parties waived a hearing and the case stood submitted for a decision. The July 7, 2015, Benefit Review Conference ("BRC") Order notes the issues to be determined were causation and work-relatedness of the treatment administered and recommended by APRN White and the medications including Hydrocodone, Xanax, and Prozac.

In the initial July 21, 2015, decision, the ALJ made no reference to APRN White's deposition testimony. The February 24, 2016, decision demonstrates the ALJ reviewed APRN White's June 22, 2015, deposition prior to entering the Opinion and Order on Remand.

In determining the treatment afforded by APRN White and the three challenged prescription medications are non-compensable, the ALJ entered the following findings of facts and conclusions of law:

> A telephonic Benefit Review Conference was held on July 7, 2015. The final hearing was waived and the Medical Fee Dispute was submitted on the record for a decision.
>
> Defendant Employer introduced the April 30, 2013 report of Ellen Ballard, M.D., who conducted follow up examination and determined Plaintiff's

chronic low back pain pre-existed his work injury. He had come to Dr. Ballard who refused to make a referral to Dr. Peters as she did not determine Plaintiff's pain to be work related.

Defendant Employer introduced the January 12, 2015 report of Steven S. Wunder, M.D., who conducted an independent medical evaluation on January 12, 2015 and determined Plaintiff's chronic low back pain symptoms were not related to the August 27, 2010 work injury. It is well documented in the records Plaintiff had suffered chronic low back pain dating back to 2005. He agreed with Dr. Ballard who determined the ongoing care would not be related to the work injury. His current exam showed exaggerated, inconsistent behavior and no organic findings. The medication prescriptions are the same now as what he was taking prior to the August 27, 2010 work injury.

Kim White, APRN testified by deposition on June 22, 2015. She has treated Turpen since July 14, 2009, prior to the work injury, and sees him every three to six months. She maintains his medications so that he is able to function. She last saw him on May 27, 2015. She treats him for high blood pressure, reflux, chronic low back pain and diverticulosis. Back surgery had been ordered by the ALJ on April 11, 2012 but did not occur. Hydrocodone is prescribed for pain maintenance. Xanex [sic] and Prozac are for chronic anxiety which she relates to chronic pain. He has remained on the same dosage and has been compliant based on testing.

White wrote a March 30, 2015 letter simply stating she was not seeing Plaintiff for his workers' comp injury.

"I see him every 6 months for his regular checkups and fill his pain medications monthly for his chronic back pain." During her deposition she testifies she was not the workers' compensation physician, she was simply treating him for chronic pain as a result of the work injury. She attempted a referral to a pain physician, Dr. Peters, with whom Plaintiff treated in 2008, but the carrier denied the request.

White testified she had noticed an increase in pain over the past couple of years compared to 2008. In 2008, Turpen treated for anxiety but not depression. The record includes a letter from White on July 10, 2008 where Turpen requested a referral to Dr. Peters for pain management. He was taking Zantac, Xanax and Lortab. The office note read, "Chronic low back pain L5-S1 protrusion and gird anxiety." Attached to the deposition is a letter from Dr. Peters dated October 30, 2008 where he treated Turpen for lower extremity radiculopathy and noted discogenic back abnormalities with herniation at L5-S1. Dr. Peters planned to perform epidural steroid injections to control the pain. On several occasions when asked if Turpen's problems were worse due to the work injury, White stated she based her response on what Turpen had to say. She stated the chronic back pain to which she made reference in the March 30, 2015 letter was the same chronic back pain for which he treated on July 10, 2008.

In a post-judgment Motion to Reopen to Assert a Medical Fee Dispute, Defendant Employer has the burden of proving the contested medical expenses and/or proposed medical procedure is unreasonable or unnecessary while Plaintiff maintains the burden of

> proving that the contested medical expenses and/or proposed medical procedures is causally related treatment for the effects of the work-related injury. *Mitee Enterprises vs. Yates*, 865 SW2d 654 (KY 1993) *Square D Company vs. Tipton*, 862 SW2d 308 (KY 1993) *Addington Resources, Inc. vs. Perkins*, 947 SW2d 42 (KY App. 1997). In addition, the legislature's use of the conjunctive "and" which appears in subsection 1 of KRS 342.020 "cure and relief" was intended to be construed as "cure and/or relief." *National Pizza Company vs. Curry*, 802 SW2d 949 (KY 1991).
>
> In the [sic] specific instance, Defendant Employer has moved to reopen this claim to challenge the work relatedness of treatment by Kim White, APRN and prescriptions for hydrocodone, Xanax and Prozac. After review of the evidence, the letter from Kim White that her treatment is not related to the work injury, and reviewing her deposition transcript, it is found Plaintiff has not met his burden of proving the treatment was work related. Plaintiff had a well-established pain and depression condition prior to the work injury and has not persuaded the ALJ otherwise.
>
> Therefore, it is found herein Plaintiff has not met his burden of proving the treatment is related to the cure and/or relief of the effects of the work injury and, therefore, the treatment is non-compensable.

Turpen did not file a petition for reconsideration.

On appeal, Turpen argues the ALJ erroneously relied upon APRN White's March 30, 2015, letter in reaching

her decision. Turpen argues the ALJ misunderstood or misconstrued the work-relatedness opinions of APRN White. Turpen insists that in her deposition, APRN White "explained the error of her one sentence letter of 3/30/15 and opined the work relatedness of her treatment of the Petitioner."

Turpen also complains the ALJ did not provide a summary of the conflicting evidence nor provide a sufficient basis to support her ultimate findings and conclusions. Turpen contends the evidence overwhelmingly establishes the subject treatment provided by APRN White and the prescriptions in question are work-related. Turpen also maintains APRN White's deposition testimony establishes her March 30, 2015, letter was not intended to indicate otherwise.

Turpen asserts his history of chronic back pain dating back to 2005 is not dispositive of the medical fee dispute as he testified his symptoms mostly resolved with treatment. He asserts he was able to continue working his regular duty without restrictions and only had to utilize the Hydrocodone for flare-ups. Turpen asserts he also testified that since the injury his low back pain has been much worse than the pre-injury pain.[1]

[1] The record does not contain any testimony either by deposition or at a hearing from Turpen.

Similarly, Turpen asserts even though he was taking anxiety prescription medication prior to the work injury, he was only using it occasionally. He cites to APRN White's testimony as to the need for Xanax. Turpen contends his anxiety has increased since the August 2010 work injury.

In a post-award medical fee dispute, the burden of proof and risk of non-persuasion with respect to the reasonableness of medical treatment falls on the employer. National Pizza Company vs. Curry, 802 S.W.2d 949 (Ky. App. 1991). However, the burden remains with the claimant concerning questions of work-relatedness or causation of the condition. Id; *see also* Addington Resources, Inc. vs. Perkins, 947 S.W.2d 421 (Ky. App. 1997).

Further, we are mindful of the Kentucky Supreme Court's holding in C & T of Hazard v. Stollings, 2012-SC-000834-WC, rendered October 24, 2013, Designated Not To Be Published, that the burden is placed on the party moving to reopen because it is that party who is attempting to overturn a final award of workers' compensation and must present facts and reasons to support the party's position.

> The party responsible for paying post-award medical expenses has the burden of contesting a particular expense by filing a timely motion to reopen and proving it to be non-compensable. *Crawford & Co. v. Wright,* 284 S.W.3d 136, 140 (Ky. 2009) (citing

> *Mitee Enterprises v. Yates,* 865 S.W.2d 654 (Ky. 1993) (holding that the burden of contesting a post-award medical expense in a timely manner and proving that it is non-compensable is on the employer)). As stated in *Larson's Workers' Compensation Law,* § 131.03[3][c], "the burden of proof of showing a change in condition is normally on the party, whether claimant or employer, asserting the change ...." The burden is placed on the party moving to reopen because it is that party who is attempting to overturn a final award of workers' compensation and thus must present facts and reasons to support that party's position. It is not the responsibility of the party who is defending the original award to make the case for the party attacking it. Instead, the party who is defending the original award must only present evidence to rebut the other party's arguments.
>
> . . .
>
> Thus, C & T had the burden of proof to show that Stolling's treatment was unreasonable and not work-related.

Slip Op. at 4-5.

Since Turpen was unsuccessful in proving the need for continuing treatment by APRN White and the prescription medications are causally related to his work injury, the issue in this appeal is whether the evidence compels a different conclusion. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). Compelling evidence is defined as evidence that is so overwhelming no reasonable person could reach the same conclusion as the ALJ. REO Mechanical

v. Barnes, 691 S.W.2d 224 (Ky. App. 1985). In other words, an unsuccessful claimant on appeal must prove that the ALJ's findings are unreasonable and, thus, clearly erroneous, in light of the evidence in the record. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

In rendering a decision, KRS 342.285 grants an ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). An ALJ may draw reasonable inferences from the evidence, reject any testimony, and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). An ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). In that regard, an ALJ is vested with broad authority to decide questions involving causation. Dravo Lime Co. v. Eakins, 156 S.W. 3d 283 (Ky. 2003). Although a party may note evidence that would have supported a different outcome than that reached by an ALJ,

such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). Rather, it must be shown there was no evidence of substantial probative value to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings made are so unreasonable under the evidence that they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). 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, 998 S.W.2d 479 (Ky. 1999).

Pursuant to KRS 342.285, an award or order of the ALJ as provided in KRS 342.275 shall be conclusive and binding as to all questions of fact if a petition for reconsideration is not filed as provided for in KRS 342.281. KRS 342.281 provides for the filing of a petition for reconsideration "[w]ithin fourteen (14) days from the date of the award, order, or decision" of the ALJ. Because Turpen did not file a petition for reconsideration as

provided for in KRS 342.281, the ALJ's decision is conclusive and binding as to all questions of fact.

In the absence of a petition for reconsideration, on questions of fact, the Board is limited to a determination of whether there is any substantial evidence in the record to support the ALJ's conclusion. Stated otherwise, where no petition for reconsideration was filed prior to the Board's review, inadequate, incomplete, or even inaccurate fact-finding on the part of an ALJ will not justify reversal or remand if there is substantial evidence in the record supporting the ALJ's ultimate conclusion. Eaton Axle Corp. v. Nally, 688 S.W.2d 334 (Ky. 1985); Halls Hardwood Floor Co. v. Stapleton, 16 S.W.3d 327 (Ky. App. 2000). Thus, our task on appeal is to determine whether the ALJ's decision is supported by substantial evidence.

In his Independent Medical Evaluation report dated January 12, 2015, based upon a physical examination and review of the medical records, Dr. Steven Wunder opined as follows:

> I do not believe that Mr. Turpen's chronic low back symptoms are a direct and proximate result of the August 27, 2010, incident. I believe his symptoms would be due to the chronic low back pain that dated back to 2005. This is well documented in the records. This is further confirmed by Dr. Ballard. She did not think the need for his ongoing

> care was related to the work accident on August 27, 2010. His current exam showed a lot of exaggerated, inconsistent and non-organic findings. The medication prescriptions are the same as what he was taking before August 27, 2010.

In her April 30, 2013, note, Dr. Ellen Ballard indicates Turpen was seen for a "recheck" on April 30, 2013. Dr. Ballard noted Turpen had a history of chronic low back pain. Turpen reported that on August 27, 2010, he was lifting an 80-pound part out of a crate to hang it on a paint line and had pain in his back and right leg. After reviewing various tests performed subsequent to August 27, 2010, Dr. Ballard stated as follows:

> His chronic low back pain pre-existed his work injury. He came in today immediately demanding to be referred to Dr. Peters for his chronic back problems. He was told that if his family doctor wanted to refer him for narcotics to Dr. Peters that he could do that but he had been on narcotics previously and that is office was not going to make the referral to Dr. Peters.

Under "Plan," Dr. Ballard stated:

> He then walked out of the office without further comment and without scheduling any other appointment. He did report he lost his insurance so it is possible that he also is no longer able to get medicine from his family doctor, but that medicine was obtained for his previous chronic back problems.

APRN White's March 30, 2015, letter relied upon by the ALJ is set forth verbatim in our summary of the medical evidence.

During her June 22, 2015, deposition, APRN White testified she had been employed by Norton Healthcare as a nurse practitioner, and she is an advanced practice registered nurse ("APRN"). As an APRN she can prescribe medications including narcotics. She first saw Turpen on July 10, 2008, and has seen him since that time for chronic conditions which she identified as high blood pressure, reflux, and chronic low back pain. APRN White also treated his diverticulosis. She indicated her role is to maintain Turpen's medications so he is able to function and perform his daily activities. She prescribes Hydrocodone to be taken every six hours to control his pain; Xanax for chronic anxiety; and Prozac for chronic depression. ARPN White testified Turpen's chronic pain relates to his work-related back injury, and Xanax and Prozac relate to his chronic pain. Her referral to Dr. Lawrence Peters for pain management was not authorized by Zoeller. In 2008, APRN White prescribed medication for Turpen's chronic low back pain and chronic anxiety. At that time, she did not prescribe any medication for depression. She acknowledged she referred Turpen to Dr. Peters in 2008. Significantly,

the following exchange took place regarding APRN White's March 30, 2015, letter:

> Q: -- we can do that. On March 30 of 2015, you authored a letter, which is now part of the record in this case, and the second sentence of the letter was: "I see him every six months for his regular check-ups and fill his pain medication monthly for his chronic back pain."
>
> A: Uh-huh.
>
> Q: My question is whether your reference to chronic back pain in this letter of March 30, 2015, is a reference back to the same chronic low back pain which Mr. Turpen offered by way of history on July 10, 2008?
>
> A: Yes.
>
> . . .
>
> RE-CROSS EXAMINATION:
>
> Q: We have your July 10 of 2008, note, and the first thing that is indicated here appears to be: "Would like to see Dr. Peters for pain management."
>
> A: Yes.
>
> Q: Did you make that referral back in 2008?
>
> A: Yes.
>
> Q: And then, if I'm reading correctly, the meds, or the plan for meds – is that Zontac [sic]? Z-O-N-T-A-C?
>
> A: Zantac.
>
> Q: Zantac.
>
> A: Uh-huh.

> Q: And then Xanax 0.5?
>
> A: Yes.
>
> Q: And then finally Lortab 5/500.
>
> A: Yes.
>
> Q: I'm not sure the dosage or the daily –
>
> A: One hundred and twenty pills, one every six hours.
>
> Q: And then there's something written on a fourth entry below. I can't make that out.
>
> A: Yes. "Return to office if no better."
>
> Q: And then finally, under assessment, would just read aloud – not that we can't read it –
>
> A: Uh-huh.
>
> Q: -- but could you read aloud what the assessment was at the time?
>
> A: Sure. "Chronic low back pain L5-S1 protrusion gird anxiety."

The opinions expressed by Drs. Wunder and Ballard, as well as APRN White's statement in her March 30, 2015, letter and her testimony set forth above constitute substantial evidence in support of the ALJ's determination APRN White's treatment and Hydrocodone, Xanax, and Prozac are not causally related to the effects of Turpen's August 27, 2010, work injury. Since the ALJ has the authority to pick and choose among the medical evidence in the record,

she was free to rely upon APRN White's statement set forth in her March 30, 2015, letter unequivocally establishing she was not seeing Turpen for his workers' compensation injury. Further, the ALJ may accept APRN White's statement contained within the March 30, 2015, letter while rejecting portions of her deposition testimony.

In addition, assuming *arguendo*, Zoeller had the burden of proof regarding causation, we believe it satisfied that burden based on the opinions of Drs. Wunder and Ballard and APRN White's March 30, 2015, letter and portions of her deposition testimony.

Accordingly, since substantial evidence supports the ALJ's determination and the record does not compel a contrary result, the ALJ's February 24, 2016, Medical Fee Opinion and Order resolving the medical fee dispute in favor of Zoeller is **AFFIRMED**.

ALL CONCUR.

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