Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: April 17, 2015

CLAIM NO. 200695268

LEWIS COUNTY FISCAL COURT PETITIONER

VS. **APPEAL FROM HON. CHRIS DAVIS, ADMINISTRATIVE LAW JUDGE**

ROB CLARK,
DR. GRANT STEVENSON, AND
HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING IN PART
AND REMANDING IN PART

* * * * * *

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

RECHTER, Member. Lewis County Fiscal Court ("Lewis County") appeals from the August 21, 2014 Opinion and Order and the October 24, 2014 Order on Reconsideration of Hon. Chris Davis, Administrative Law Judge ("ALJ"). In this medical fee dispute, ALJ Davis determined a prescription for

daily Percocet is reasonable and necessary for the cure and relief of Rob Clark's work-related back injury. For the reasons set forth herein, we remand for further findings of fact.

Clark filed a Form 101 on June 22, 2006 alleging a work-related left shoulder and low back injury. In an Opinion and Order dated September 22, 2008, ALJ Howard Frazier determined Clark injured his cervical and lumbar spine. He awarded temporary total disability benefits, permanent partial disability benefits and medical benefits based on a 10% whole person impairment. Over the subsequent two years, Clark's condition worsened. The claims for worsening of condition were later resolved through a series of settlement agreements, though Clark's medical benefits remained open.

On February 14, 2013, Lewis County filed a medical dispute, contesting the reasonableness and necessity of injections, medial branch blocks, and a prescription for Percocet. In an Opinion dated August 28, 2013, ALJ Robert Swisher overruled the medical dispute concerning the medial branch blocks, right side joint injections, and epidural steroid injections. He sustained the medical dispute with respect to the trigger point injections and the prescription

for Percocet. With respect to the Percocet, he explained his rationale:

> Finally, with respect to the defendant/employer's challenge to Percocet (Hydrocodone/APAP), the ALJ notes that Dr. [Magdalena] Kerschner did not address this treatment recommendation specifically in her report. Drs. [John] Rademaker and [Albert] Olash felt that the continued use of that narcotic medication was not medically necessary and reasonable for the cure and/or relief of plaintiff's work injury. The flavor of Dr. [Ellen] Ballard's report, on the other hand, convinces the ALJ that while there is no indication that plaintiff requires "constant" use of Percocet, occasional and periodic use of Percocet as prescribed by plaintiff's family physician is appropriate. In so finding, the ALJ notes that plaintiff has, apparently, at various points been weaned completely from pain medication on at least one, if not more, occasion, only to be restarted when he has taken up treatment with a new physician. Further, in light of the ruling herein allowing plaintiff additional injection therapy, the ALJ agrees with the defendant/employer's evaluating medical experts that such treatment, if effective, will necessarily reduce plaintiff's requirement of a daily dose of narcotic pain medication. The defendant/employer and or/its workers' compensation carrier shall, therefore, remain liable for the cost of the prescription of Percocet (Hydrocodone/APAP) on an occasional basis (non-daily), to be determined by Dr. Kerschner. This aspect of the medical dispute is resolved partially in favor of the defendant/employer and partially in favor of plaintiff.

After ALJ Swisher's Opinion was rendered, Clark ceased treating with Dr. Kerschner and instead treated with Dr. Grant Stevenson. Dr. Stevenson prescribed Percocet four times a day and, in a letter dated February 4, 2014, stated the medication is reasonable and necessary to control Clark's back pain resulting from his work injury. Lewis County denied the bill on the basis of ALJ Swisher's opinion, and filed a medical fee dispute and motion to reopen on January 21, 2014. It later supplemented its motion with the utilization review report of Dr. Richard Mortara, who recommended a plan for weaning from narcotic pain medication. He further stated:

> Certainly, it would be in [Clark's] best interest at the present time to take the Percocet but in a progressive decreasing weaning dose allowing him to either stop taking this type of analgesic altogether or to be weaned to other less addictive type analgesics. After reviewing the multiple medical records and seeing the patient's treatment, there is no doubt in my mind that the patient is addicted if not habituated to these medications at this time. I believe that the patient would have to continue on with the use of Percocet at this time for the relief of his pain, but that every attempt should be made to wean him from this drug. Therefore, the medication should be limited in the frequency and have repetitive evaluations prior to administering continual use of medication on a regular basis.

Lewis County also submitted copies of the reports of Drs. Rademaker, Olash, and Ballard, which had previously been considered by ALJ Swisher. Dr. Rademaker believed "[c]ontinued use of oxycodone/APAP at a minimal dosage and frequency may appear to be reasonable and medically necessary, but there is no provided functional objective benefit in the provided medical record." Therefore, he concluded Percocet is not reasonable or medically necessary for the cure and relief of Clark's work-related injury.

Dr. Olash also reviewed Clark's medical records relating to his work injury. He noted Clark had previously broken a pain management clinic narcotic contract, and that he reported no improvement on long-acting narcotics, which "goes against principles of pain control." Like Dr. Rademaker, Dr. Olash similarly concluded "[t]here is no good documentation in the records that support the effectiveness of the narcotics, and thus I believe that oxycodone and Percocet are not medically necessary and reasonable."

Dr. Ballard conducted an independent medical evaluation on April 23, 2013. She diagnosed degenerative changes in Clark's spine consistent with his age, and current pain complaints with no radicular component. With respect to Percocet, Dr. Ballard could not find any clear indication why Clark prefers short-acting, as opposed to

long-acting, drugs. She concluded that Clark "has no significant pathology that would require constant use of Percocet."

In an August 21, 2014 Opinion and Order, ALJ Davis reviewed the medical evidence and ALJ Swisher's August 28, 2013 Opinion. He then explained:

> I am not convinced by the totality of the evidence that [Clark] was "doing fine" during periods in which he was not prescribed Percocet. I also find that although they have helped some the injections have not totally relieved his pain. I find, based on the letter from Dr. Stevenson that the Percocet is reasonable and necessary and work-related and therefore compensable.

Lewis County petitioned for reconsideration, which was denied. On appeal, it argues ALJ Davis acted in excess of his authority by refusing to give *res judicata* effect to ALJ Swisher's prior Opinion. Alternatively, it argues ALJ Davis' opinion is not supported by substantial evidence.

Lewis County first argues that its February 14, 2013 motion to reopen/medical fee dispute was actually a "*de facto* petition for reconsideration of ALJ Swisher's Opinion." Citing to the unpublished Court of Appeals decision in Mick Murf Construction v. Gant, 2009-CA-000877-WC (Ky. App. 2009), it asserts a motion to reopen is the proper procedural vehicle through which to seek

clarification of an ALJ's order. In Mick Murf, a dispute arose over the compensability of treatment relating to a psychological condition arising from a work-related injury. The ALJ issued an order regarding the compensability of the treatment, and neither party petitioned for reconsideration. A dispute later arose regarding compensability of a particular bill which had been submitted prior to the ALJ's decision, however the period for a petition for reconsideration had already passed. The Court of Appeals advised that a claimant should first seek clarification from the ALJ before filing an enforcement action in circuit court because, "[a]n ALJ and the Board are in a better position to interpret what might be an unclear opinion than is the circuit court." In such instances, "a motion to reopen for clarification is appropriate."

In addition to the fact Mick Murf is an unpublished case and, therefore, of limited precedential value, it is factually distinguishable. The contested bill in Mick Murf was submitted prior to the ALJ's decision. Therefore, it was necessary for the ALJ to clarify his ruling as it applied to a contested expense upon which he had already ruled.

Here, ALJ Swisher ruled on the compensability of Dr. Kerschner's prescription for Percocet. Stated

otherwise, he decided the reasonableness and necessity of Percocet as of February 14, 2013. ALJ Davis ruled on the compensability of Dr. Stevenson's prescription for Percocet; or, the reasonableness and necessity of Percocet as of August 21, 2014. Therefore, ALJ Davis did not exceed his authority in considering Lewis County's motion as a new medical fee dispute, as opposed to simply a request for clarification of ALJ Swisher's prior opinion.

The concept of *res judicata* bars the relitigation 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 is a mutuality of parties in this instance, the subject matter is different. As stated above, ALJ Swisher's prior opinion determined the compensability of Percocet as of February 14, 2013, while ALJ Davis considered its compensability as of August 21, 2014.

Lewis County responds that *res judicata* should nonetheless apply because Clark failed to establish any change in his condition since the rendition of ALJ Swisher's

opinion. In its petition for reconsideration, it requested additional findings of fact on this issue. We agree additional findings of fact are required.

In determining the prescription for daily Percocet is reasonable and necessary for the cure and relief of Clark's work-related injury, ALJ Davis stated his reliance on Dr. Stevenson's medical records and letter. This proof constitutes the requisite substantial evidence upon which the ALJ may rely. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). While Lewis County presented significant evidence to the contrary, ALJ Davis, in his role as fact-finder, is entitled to determine the quality, character and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993).

However, we also conclude it was incumbent upon ALJ Davis to determine whether Clark's condition had changed since ALJ Swisher's opinion was issued. ALJ Davis stated he was not convinced "that [Clark] was 'doing fine' during the periods in which he was not prescribed Percocet. I also find that although they have helped some the injections have not totally relieved his pain." These findings evince ALJ Davis' belief Clark's pain was not adequately controlled without Percocet, suggesting a change in condition since ALJ Swisher's opinion. However, ALJ Davis did not state the

factual basis for these conclusions. Shields v. Pittsburgh and Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982)(parties are entitled to findings of fact sufficient to inform them of the basis of the ALJ's decision).

As a final matter, we note that Clark, in his response brief to this Board, refers to a deposition taken on July 15, 2013 in this medical fee dispute. A copy of that deposition is not contained in record before this Board. It does not appear the deposition was entered into evidence by either party. Therefore, it may not be considered by this Board.

For the foregoing reasons, August 21, 2014 Opinion and Order and the October 24, 2014 Order on Reconsideration of Hon. Chris Davis, Administrative Law Judge are hereby **AFFIRMED** in part and **REMANDED** for further findings of fact consistent with this opinion.

ALL CONCUR.

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