

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: April 24, 2015

CLAIM NO. 198417832

LEXINGTON-FAYETTE URBAN COUNTY GOV.

PETITIONER

VS.

APPEAL FROM HON. CHRIS DAVIS,  
ADMINISTRATIVE LAW JUDGE

FRED HARLOW  
HON. CHRIS DAVIS,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION  
REVERSING AND REMANDING

\* \* \* \* \*

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

**RECHTER, Member.** Lexington-Fayette Urban County Government ("LFUCG") appeals from the December 30, 2014 Opinion and Order rendered by Hon. Chris Davis, Administrative Law Judge ("ALJ"). In a medical dispute, the ALJ determined LFUCG is responsible for Fred Harlow's ("Harlow") copayments for treatment rendered in November, 2013. LFUCG argues the ALJ

erred by disregarding uncontradicted medical evidence regarding causation. For the reasons set forth herein, we reverse and remand.

Harlow was employed by LFUCG as a firefighter. He settled his occupational disease claim for chronic obstructive pulmonary disease ("COPD") against the employer in 1985. The Special Fund was determined to have liability in an Opinion and Award issued by the "old" Workers' Compensation Board on February 24, 1986.

LFUCG filed a Form 112 and motion to reopen on May 30, 2014 to contest the compensability of out-of-pocket expenses for treatment rendered on November 4 and 11, 2013. Harlow sought treatment following shortness of breath and weakness. He was ultimately admitted to the hospital and diagnosed with a non-ST elevation myocardial infarction. Among his discharge diagnoses was pulmonary embolism.

LFUCG supported the reopening with March 14, 2014 report of Dr. Jennifer Jackson, who performed a records review. Dr. Jackson noted that, although Harlow presented to the emergency room with increased shortness of breath and weakness, he was found to have a non-ST elevation myocardial infarction after admission to the hospital. Harlow had numerous risk factors for coronary artery disease including Type 2 diabetes mellitus, hypertension, cigarette use and

dyslipidemia. Dr. Jackson opined Harlow's symptoms were related to the myocardial infarction and not to his COPD. By order dated August 13, 2014, the ALJ determined LFUCG made a *prima facie* case for reopening.

Thereafter, LFUCG submitted reports from Dr. Gregory T. Snider who reviewed medical records. Dr. Snider noted Harlow's asthma/COPD had been "remarkably stable" over the last several years with no documentation of acute flare-ups, exacerbations, or hospitalizations. Dr. Snider indicated an 81-year-old man with a history of hypertension and elevated cholesterol, combined with an increasingly sedentary lifestyle, might be at increased risk for pulmonary embolism, especially with a history of deep vein thrombosis. He noted a "quick review of on-line literature" suggests asthma/COPD in and of itself is not a risk factor for pulmonary embolism. He noted the rate of pulmonary embolism in individuals over the age of 80 dramatically increases compared to the general population. Dr. Snider felt Harlow's recent hospitalization for weakness, shortness of breath, and pulmonary embolism was not directly related to his diagnosis of asthma/COPD, but was more likely related to other well-established risk factors. Dr. Snider recommended formal review by a pulmonologist and requested a more complete medical record file.

In an October 27, 2014 supplemental report, Dr. Snider indicated he reviewed additional records and saw no reason to change his opinion. He continued to believe the treatment was, within reasonable medical probability, related to other well-established risk factors.

Harlow filed medical records from Saint Joseph Jessamine and Saint Joseph East documenting treatment from November 4 through 11, 2013. Harlow was admitted for shortness of breath. His discharge diagnoses included bilateral pulmonary embolism, elevated troponins, syncope, severe pulmonary hypertension, anemia, bladder contracture, acute respiratory failure, COPD, chronic kidney disease and debility. The records contain no opinion indicating the treatment is causally related to Harlow's COPD. Harlow did not testify in the reopening.

The ALJ's findings concerning the work-relatedness of the treatment are as follows:

As for work-relatedness Dr. Snider has not really offered a convincing opinion that it is not work-related. Dr. Snider is highly respected by the undersigned and his reports herein confirm one of the reasons why. Namely that he implies that he cannot provide a firm opinion that the condition is not work-related. A quick on-line review, with insufficient records and a note that a pulmonologist might be better is not really convincing.

Of course Mr. Harlow retains the burden of proof as to causation. The records he provided do clearly demonstrate that, initially, the hospital and doctors thought his condition was due to a MI or cardiac episodes. However, during his seven days in the hospital and following further treatment it became clear his symptoms were related to his lungs.

The implication Mr. Harlow would have me make my way to is that since his work-related condition was to his lungs, and he has no co-morbid factors, then his condition must be work-related. In fact this line of reasoning is adopted. The treatment from November 4, 2013 through November 11, 2013, at the St. Joseph hospitals is compensable.

LFUCG argues it established a *prima facie* case for reopening. The ALJ determined Dr. Jackson's opinion was sufficient to meet that burden. Thus, the burden shifted to Harlow to rebut that evidence. The only additional evidence addressing causation came from Dr. Snider who opined there was no causal link between the contested treatment and the work-related condition. LFUCG asserts the causal connection is not readily apparent to a lay person. Thus, medical evidence is required. Because Harlow produced no evidence to rebut these opinions, LFUCG argues the decision is not based upon substantial medical evidence. It suggests the ALJ's decision is based upon his own observations and contrary to the medical evidence.

Reopening of a prior claim pursuant to KRS 342.125 is a two-step process. Stambaugh v. Cedar Creek Mining, 488 S.W.2d 681 (Ky. 1972). The first-step is the *prima facie* motion, which places the burden on the moving party to provide sufficient information to demonstrate a substantial possibility of success in the event evidence is permitted to be taken. AAA Mine Service v. Wooten, 959 S.W.2d 440 (Ky. 1998). "*Prima facie* evidence" is evidence which "if unrebutted or unexplained is sufficient to maintain the proposition, and warrant the conclusion [in] support [of] which it has been introduced . . . but it does not shift the general burden. . . ." Prudential Ins. Co. v. Tuggle's Adm'r., 72 S.W.2d 440, 443 (Ky. 1934). Only if the moving party prevails in making a *prima facie* showing as to all essential elements of the grounds alleged for reopening will the adversary party be put to the expense of further litigation. Big Elk Creek Coal Co. v. Miller, 47 S.W.3d 330 (Ky. 2001). Step two of the reopening process then commences, with additional proof time being set so that the merits of the reopening can be finally adjudicated. Campbell v. Universal Mines, 963 S.W.2d 623 (Ky. 1998).

Causation is a factual issue to be determined within the sound discretion of the ALJ as fact-finder. Union Underwear Co. v. Scearce, 896 S.W.2d 7 (Ky. 1995);

Hudson v. Owens, 439 S.W. 2d 565 (Ky. 1969). When the question of causation involves a medical relationship not apparent to a lay person, the issue is properly within the province of medical experts and an ALJ is not justified in disregarding the medical evidence. Mengel v. Hawaiian-Tropic Northwest and Central Distributors, Inc., 618 S.W.2d 184 (Ky. App. 1981). Medical causation must be proven by medical opinion within "reasonable medical probability." Lexington Cartage Company v. Williams, 407 S.W.2d 395 (Ky. 1966). The mere possibility of work-related causation is insufficient. Pierce v. Kentucky Galvanizing Co., Inc., 606 S.W.2d 165 (Ky. App. 1980).

In C & T of Hazard v. Stollings, 2012-SC-000834-WC, 2013 WL 5777066 (Ky. October 24, 2013), an ALJ decided a post-award medical fee dispute in favor of an employee. Stollings appears to stand for the proposition that an employer has an initial burden to produce substantial evidence of non-work-relatedness, which triggers a reciprocal burden on the part of an employee to produce substantial evidence in rebuttal. In Sumitomo Electric Wiring v. Kingery, -- S.W.3d --, 2014 WL 2916965 (Ky. App. 2014), an unpublished decision of the Court of Appeals currently pending review by the Supreme Court, the Court of Appeals concluded as follows:

In sum, Kingery failed to produce medical evidence capable of sustaining her burden to prove that her appointments with and prescriptions from Dr. Douglas were causally related to her 1989 work injury, or a condition caused by it. The ALJ's decision to resolve this medical fee dispute in favor of Kingery was not based upon substantial evidence. The record does not contain any substantial evidence that would have otherwise allowed Kingery to prevail in this matter.

Here, the ALJ determined LFUCG made a *prima facie* showing for reopening and additional proof time was set. However, Harlow failed to produce any medical opinion relating the pulmonary embolism to the work-related condition. The uncontradicted medical opinions of Drs. Jackson and Snider establish the pulmonary embolism was not caused by the COPD. Although the ALJ did not find Dr. Snider to be very convincing, he failed to offer any criticism of Dr. Jackson's opinion or any explanation as to why her opinion was not persuasive. The ALJ adopted Harlow's reasoning that the work-related condition "was to his lungs, and this was to his lungs, and he has no co-morbid factors" which is not a conclusion that may be drawn without expert medical evidence. Further, Dr. Snider identified co-morbidities including age, history of hypertension and elevated cholesterol, increasingly sedentary lifestyle and history of deep vein thrombosis.

Because there is no medical evidence to support a finding of compensability of the contested treatment, we must reverse.

Accordingly, the December 30, 2014 Opinion and Order rendered by Hon. Chris Davis, Administrative Law Judge, is **REVERSED** and this matter is **REMANDED** for entry of an amended decision resolving the medical dispute in LFUCG's favor.

ALVEY, CHAIRMAN, CONCURS.

STIVERS, MEMBER, CONCURS IN RESULT ONLY.

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