Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: May 27, 2016

CLAIM NO. 200100310 & 199783700

LOUIS CHORAK PETITIONER

VS. **APPEAL FROM HON. R. SCOTT BORDERS, ADMINISTRATIVE LAW JUDGE**

MANALAPAN MINING COMPANY
HON. R. SCOTT BORDERS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

ALVEY, Chairman. Louis Chorak ("Chorak") appeals from the Opinion and Order rendered January 8, 2016 by Hon. R. Scott Borders, Administrative Law Judge ("ALJ"), resolving a medical fee dispute in favor of Manalapan Mining Company ("Manalapan") by finding prescriptions for Hydrocodone/APAP and Tizanidine are noncompensable because they are neither

reasonable nor necessary for the cure or treatment of his work injuries. Chorak also appeals from the January 25, 2016 order denying his petition for reconsideration.

On appeal, Chorak argues the objective medical evidence compels a finding the medications prescribed by his treating physician, Dr. Jeremy Jackson, are reasonable and necessary for the effects of his work-related injury, and therefore compensable. The ALJ's decision is supported by substantial evidence, therefore, we affirm.

Manalapan filed a motion to reopen and Form 112 Medical Fee dispute on February 25, 2015 challenging the reasonableness and necessity of the medications prescribed by Dr. Jackson, including Hydrocodone, Gabapentin, and Tizanidine. In support of the motion to reopen, Manalapan filed the settlement agreement approved on May 19, 2003, and the February 10, 2015 utilization review report prepared by Dr. William Nemeth. The ALJ subsequently found Manalapan had established a *prima facie* showing for reopening the claim and Dr. Jackson was joined as a party.

The Form 110 Settlement Agreement indicates Chorak injured his low back on May 20, 1997 while pulling a roof bolter cable, for which he had a L4-5 discectomy. On July 2, 1999, Chorak re-injured his back while shoveling coal in an underground mine and he eventually underwent a

L5-S1 posterior fusion with pedicle screws and plates on November 3, 2000. The settlement agreement was approved on May 19, 2003 by Hon. W. Bruce Cowden, Administrative Law Judge.

In the February 10, 2015 utilization review, Dr. Nemeth noted he reviewed all relevant medical records, including two urinary drug screens dated September 26, 2012 and September 22, 2014. Dr. Nemeth concluded the prescriptions for Hydrocodone APAP, Gabapentin, and Tizanidine are not medically reasonable or necessary. Dr. Nemeth noted Chorak's pain was controlled without narcotic or other neuropathic medications prior to being placed on Hydrocodone for sleep. Dr. Nemeth additionally noted the medical records do not document neuropathy, three urinary drug screens were negative for all prescribed medications, and no pill counts or KASPAR analysis had been performed. Dr. Nemeth opined the controlled medications should no longer be prescribed and Chorak should be evaluated for diversion and/or addiction.

Chorak testified at the hearing held on October 16, 2015. Following his work injuries, Chorak treated with Dr. Richard Stoltzfus until he retired. After Dr. Stoltzfus retired, Dr. Jackson took over Chorak's care. Chorak testified Dr. Stoltzfus had prescribed OxyContin for

approximately ten years. At Chorak's request, Dr. Jackson weaned him off the OxyContin and began prescribing a milder pain medication.

Chorak testified Dr. Jackson currently prescribes three month supplies of Hydrocodone and Tizanidine, and he is directed to take one daily dose of each medication. Although Dr. Jackson writes a prescription for a three month supply for each medicine, Chorak testified he only takes them "as needed" and "occasionally" has some left over at the end of the prescription period. Chorak testified he has informed Dr. Jackson of this, however, he has never been asked how many pills he had remaining, stating, "When I go see him - - which is probably not right, I just flush it, because he always gives me a new prescription." Likewise, Dr. Jackson has never performed a pill count. Chorak admits he tested negative for his prescribed medications on two or three drug screens, but attributes this to the fact he only takes his medication as needed. Chorak denies selling or giving away his medication.

Chorak testified he experiences pain every day, and has muscle spasms three to four days a week. His pain level varies, but increases with activity. Chorak indicated the muscle relaxer, Tizanidine, helps his muscle

pain and spasms while the Lortab helps with his hip and nerve pain. Chorak testified he continues to need his prescribed medication on an as needed basis.

Chorak filed the May 11, 2015 affidavit of Dr. Jackson, who also testified by deposition on August 29, 2015. In the affidavit, Dr. Jackson indicated Chorak's medications are required because of chronic pain and degenerative disc disease, his current working diagnosis. He also stated the Hydrocodone, Gabapentin and Tizanidine are medically necessary because of his chronic pain and degenerative disc disease.

Dr. Jackson testified he took over Chorak's care in June 2011 after Dr. Stoltzfus retired. He noted Chorak complained of chronic back pain since the date of his work injuries, and he has disc degeneration. When Dr. Jackson began treating Chorak, he was initially weaned off of Soma and OxyContin, which had been previously prescribed by Dr. Stoltzfus. On June 25, 2012, Chorak reported his pain was not in control and interfered with his sleep. Dr. Jackson then began prescribing a low dose of Lortab.

Dr. Jackson acknowledged September 2012 and September 2014 drug screens were both negative for Lortab. However, Dr. Jackson explained Chorak, "only takes the pain medication intermittently and not necessarily full time."

Based upon the drug screens, Dr. Jackson agreed there is no way of telling if Chorak is actually taking the prescribed medication. Despite the negative drug screens, Dr. Jackson continued to prescribe the same dosage of medication. Dr. Jackson testified he conducts pill counts "from time to time," although none are documented in the records. At the most recent visit in September 2015, Dr. Jackson prescribed a three month supply of Norco to be taken once a day and Zanaflex to be taken twice a day.

Dr. Jackson agreed disc degeneration can be due in part to trauma, but may also be attributable to genetics or wear and tear. Dr. Jackson testified Chorak's back pain is related to his injuries and degenerative disc disease. When pressed further on the cause of Chorak's disc disease, Dr. Chorak stated as follows:

> [h]e's going to have degenerative disc disease from the injury, and it's going to gradually get worse. It really can't be separated at this point. . . Any injury like this is going to make arthritis worse, degenerative disc disease worse. So there would be a combination potentially of injury related degenerative disc disease versus age related normal wear and tear.

Manalapan submitted Dr. Daniel Primm's June 5, 2015 report. Dr. Daniel Primm noted Chorak's 1997 and 1999 low back injuries and subsequent treatment, including both

surgeries. Dr. Primm noted he reviewed all relevant medical records, including those from Drs. Henry Tutt, Stoltzfus and Jackson. He stated Chorak continues to complain of low back pain, occasional right hip and leg pain, and intermittent numbness in the toes of his right foot. He noted Chorak is currently prescribed Hydrocodone, Gabapentin, and Tizanidine. After performing an examination, Dr. Primm diagnosed Chorak as status post L4-5 discectomy, status post L4-5 fusion, and he saw no evidence of radiculopathy or neuropathy. Dr. Primm made the following conclusions:

> At this point in time, based on everything I have reviewed and also based on Mr. Chorak's physical findings, I know of no reason this man should still require any type of prescription pain medication, including narcotics. Also, I do not feel that any type of muscle relaxants would be indicated this long after his injuries and surgeries. Finally, I would agree with Dr. Boyd and Dr. Nemeth that I can find no documentation at all in the large volume of medical records I reviewed that suggests this man ever has been diagnosed with neuropathic pain. So therefore I do not believe the gabapentin would be reasonable either. At this point in time, I feel this man should be taking over-the-counter analgesics and/or anti-inflammatories. His condition seems to have been stable over approximately a 12 to 13-year period, as evidence by the physical exams reported by Dr. Stoltzfus.

A Benefit Review Conference was held on August 20, 2015. The parties agreed the issue to be determined is the reasonableness and necessity of, "hydrocodone/APAP, tizanidine." Gabapentin was not listed as a contested medication. At the hearing, the ALJ confirmed the contested medications were Hydrocodone/APAP and Tizanidine.

In the January 8, 2016 opinion and order, the ALJ summarized the medical evidence and testimony provided by Drs. Jackson and Chorak. After noting Manalapan had the burden of proving the contested medical treatment is unreasonable or unnecessary, the ALJ provided the following analysis in determining the medications are not compensable:

> The Defendant Employer has moved to reopen this claim to challenge the reasonableness and necessity of the continued use of the medications Hydrocodone/APAP and Tizanidine. They have supported their position with testimony from Dr. Nemeth and Dr. Primm who opined that continued use of these medications are [sic] not reasonable or necessary for the Plaintiff's 1997 and 1999 work-related injuries.
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> In fact Dr. Primm, an orthopedic surgeon, physically examined the Plaintiff and reviewed all of his medical records and diagnostic studies to date and was of the opinion that Plaintiff is not in need of a narcotic or a muscle relaxer and could be treated just as easily with over-the-

counter analgesics and muscle relaxers. He saw no need for the Plaintiff to continue to be prescribed Hydrocodone/APAP and Tizanidine.

The Plaintiff's treating physician, Dr. Jackson, is of the opinion that Plaintiff suffers from degenerative disc disease that he believes was accelerated and/or caused by the 1997 and 1999 work injuries. However, Dr. Jackson admitted that degenerative disc disease is an age-related process that gets worse as one gets older and it is impossible for him to separate what portions of the Plaintiff's subjective complaints of back pain are due to the natural aging process or due to the work-related injury.

In this specific instance, after careful review of the lay and medical testimony the Administrative Law Judge finds persuasive and relies upon the opinions of Dr. Primm in finding that the continued use of the medication Hydrocodone/APAP and Tizanidine, are neither reasonable or necessary and are therefore not compensable. In so finding it is readily apparent to the undersigned Administrative Law Judge that the Plaintiff is only taking his medications "as needed" and that he could effectively receive the same relief by the use of over-the-counter medications as recommended by Dr. Primm.

The Administrative Law Judge sees no reason for the Plaintiff to be prescribed narcotics and muscle relaxers to take as needed when the same relief can be afforded by over-the-counter less-expensive medications. Therefore, the medications Hydrocodone/ APAP, and Tizanidine, are deemed non-compensable.

Chorak filed a petition for reconsideration asserting the same arguments now made on appeal. In an order issued January 25, 2016, the ALJ denied the petition as a re-argument of the merits of the case.

On appeal, Chorak argues the objective evidence of record compels a finding the contested medications are reasonable and necessary for the treatment of his work-related injuries. Chorak points to the opinion and testimony of Dr. Jackson, his treating physician, in support of his arguments. Chorak also points to his own testimony establishing his ongoing problems with pain, and his belief he needs medication when he is active.

In a post-award medical dispute, the burden of proof to determine whether medical treatment is unreasonable or unnecessary is with the employer, while the burden remains with the claimant concerning questions pertaining to work-relatedness or causation of the condition. *See* KRS 342.020; Mitee Enterprises vs. Yates, 865 S.W.2d 654 (Ky. 1993); Addington Resources, Inc. v. Perkins, 947 S.W.2d 421 (Ky. App. 1997); R.J. Corman Railroad Construction v. Haddix, 864 S.W.2d 915, 918 (Ky. 1993); and National Pizza Company vs. Curry, 802 S.W.2d 949 (Ky. App. 1991).

As fact-finder, the ALJ has the sole authority to determine the quality, character, and substance of the evidence. Square D Company v. Tipton, 862 S.W.2d 308 (Ky. 1993); Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). Similarly, the ALJ has the sole authority to judge the weight and inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Luttrell v. Cardinal Aluminum Co., 909 S.W.2d 334 (Ky. App. 1995). Where the evidence is conflicting, the ALJ may choose whom or what to believe. Pruitt v. Bugg Brothers, 547 S.W.2d 123 (Ky. 1977). The ALJ has the discretion and sole authority to reject any testimony and believe or disbelieve parts of the evidence, regardless of whether it comes from the same witness or the same party's total proof. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977); Magic Coal v. Fox, 19 S.W.3d 88 (Ky. 2000); Halls Hardwood Floor Co. v. Stapleton, 16 S.W.3d 327 (Ky. App. 2000). Mere evidence contrary to the ALJ's decision is not adequate to require reversal on appeal. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

Chorak's argument on appeal constitutes nothing more than a re-argument of the evidence before the ALJ. Chorak impermissibly requests this Board to engage in fact-

finding and substitute its judgment as to the weight and credibility of the evidence for that of the ALJ. This is not the Board's function. *See* KRS 342.285(2); Paramount Foods, Inc. v. Burkhardt, supra. In this instance the ALJ clearly understood the evidence of record, properly weighed it, and, as was his prerogative, determined Chorak's evidence was not persuasive.

Dr. Primm's opinion constitutes substantial evidence supporting the ALJ's determination the contested medications are not reasonable and necessary. Dr. Primm reviewed the medical records dating from 1998 to the present. Based on his review of medical records and physical findings on examination, Dr. Primm found Chorak's continued use of narcotic pain medication and muscle relaxers unnecessary primarily since the use of over-the-counter analgesics and/or anti-inflammatories would be sufficient to treat his symptoms. He also noted Chorak's condition appears to have been stable over a twelve to thirteen year span based upon the physical examinations and finding reported by Dr. Stoltzfus. We also note, on appeal, Chorak does not argue the opinion of Dr. Primm is deficient or any way unsubstantial. Although Chorak contends Dr. Jackson's opinion, as the treating physician, is persuasive, nothing in Chapter 342 mandates greater

weight be given to a treating physician's testimony. Wells v. Morris, 698 S.W.2d 321 (Ky. App. 1985); Sweeney v. King's Daughters Medical Center, 260 S.W.3d 829 (Ky. 2008). While Dr. Jackson arrived at a different conclusion, his opinion represents nothing more than conflicting evidence which the ALJ, as fact-finder, was free to reject. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). Because the ALJ's decision is supported by substantial evidence, and a contrary result is not compelled, his decision will not be disturbed.

Accordingly, the January 8, 2016 opinion and order and the January 25, 2016 order on petition for reconsideration by Hon. R. Scott Borders, Administrative Law Judge, are hereby **AFFIRMED.**

ALL CONCUR.

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