Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: June 3, 2014

CLAIM NO. 197809390

NATIONAL MINES CORP. PETITIONER

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

JUDGE PATTON
COOLEY MEDICAL EQUIPMENT
and HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING IN PART, VACATING IN PART,
AND REMANDING
* * * * * *

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

STIVERS, Member. National Mines Corp. ("National Mines") appeals from the January 21, 2014, Opinion and Order of Hon. Chris Davis, Administrative Law Judge ("ALJ") in which the ALJ resolved a Medical Fee Dispute, filed by National Mines, in favor of Judge Patton ("Patton"). It also appeals from the March 24, 2014, order ruling on its

petition for reconsideration. In the January 21, 2014, Opinion and Order, the ALJ awarded Patton the right to receive the oxygen concentrator prescribed by Dr. Gopal Majmundar.

Significantly, at no point during this Medical Fee Dispute did Patton or Cooley Medical Equipment, the supplier of the oxygen concentrator, enter an appearance.

The record contains the June 18, 1979, Opinion and Award of the Workmen's Compensation Board in which Patton was awarded temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits, and medical benefits for pneumoconiosis and/or silicosis arising out of and in the course of his employment as a coal miner.

On August 29, 2013, National Mines filed a "Motion to Reopen to Contest Compensability of Medical Expenses" and a Form 112 Medical Fee Dispute contesting the compensability of the oxygen concentrator prescribed by Dr. Majmundar and supplied by Cooley Medical Equipment. Attached to the Motion to Reopen is a prescription for the oxygen concentrator by Dr. Majmundar dated April 12, 2013. Also attached is the August 21, 2013, Utilization Review Notice of Denial signed by Dr. Bart Olash. In the Notice of Denial, Dr. Olash opined, in part, as follows:

> I see no association between the treatment rendered on 07/16/2013 and this gentleman's past history of simple coal workers' pneumoconiosis.
>
> Therefore, the treatment is not medically necessary and appropriate for the treatment of simple coal workers' pneumoconiosis.

By order dated September 26, 2013, Hon. Robert Swisher, Administrative Law Judge, determined National Mines made a *prima facie* showing for reopening and reassigned the medical fee dispute to the ALJ.

The October 25, 2013, "Scheduling Order Following Initial Conference on Medical Dispute Reopening" reflects the ALJ checked "reasonableness/necessity" and "causation/work relatedness" as the basis of National Mines' challenge to the oxygen concentrator.

On December 4, 2013, National Mines filed a "Supplemental Motion to Reopen to Contest Compensability of Medical Expenses" and a Form 112 Medical Fee Dispute contesting the compensability of the oxygen concentrator.

The December 5, 2013, Benefit Review Conference ("BRC") order lists "reasonableness and necessity of an oxygenator [sic]" as the only contested issue. Significantly, counsel for National Mines, signed the BRC order. No objection to the BRC order was subsequently filed.

In the January 21, 2014, Opinion and Order, the ALJ determined the oxygen concentrator was compensable writing, in part, as follows:

> The sole listed contested issue was reasonableness and necessity and none of the proof directly addresses the reasonableness and necessity of the oxygenator [sic]. Inasmuch as Dr. Majmundar prescribed the oxygen the undersigned can infer that he believes it is reasonable and necessary.
>
> Even if the undersigned accepts that the issue of work-relatedness had been raised there is still no proof which can be relied upon to make a finding that the oxygenator [sic] is not work-related.
>
> First, while the undersigned understands the complex necessity of filing a UR report when contesting work-relatedness a UR report cannot be the sole basis for a finding of non-work-relatedness. 803 KAR 25:1909 §1.
>
> Second, the treatment is not, on its face, not work-related. The studies cited by Dr. Olash may or may not still be of value in determining this issue but, given their age, this is not certain. Further, they were, as noted, cited in a UR report. Therefore the Movant would still require an actual physical examination, i.e. an IME.
>
> Third and finally the undersigned is aware of a prior decision by the Kentucky Workers' Compensation Board that there is, as a matter of law, no treatment for simple coal workers' pneumoconiosis. The undersigned has a sincere respect for the Board. However, their decisions, while providing

> guidance, are not binding *stare decisis*. Second, that decision was reached a significant time ago, in terms of medical advances and studies, and was based in large part on the studies from the 1940s and 1950s, which I have already discussed.
>
> In short, there is no evidence of non-work-relatedness which can be relied upon and no evidence that the oxygenator [sic] is nor [sic] reasonable and necessary. It is therefore compensable.

In its January 27, 2014, petition for reconsideration, National Mines set forth the following errors:

> (1) The ALJ incorrectly states that the original claim was resolved by a settlement agreement.
>
> (2) The ALJ erred by stating the sole contested issue is reasonableness and necessity of the oxygenator [sic].
>
> (3) Dr. Olash's August 21, 2013, Utilization Review addresses work-relatedness as well the reasonableness and necessity of the oxygenator [sic].
>
> (4) Once National Mines raised the issue of the reasonableness and necessity of the oxygenator [sic], the burden rested on the medical provider or the claimant to establish work-relatedness.
>
> (5) Once National Mines established a prima facie case for reopening to contest the compensability of the oxygenator [sic], No evidence was put forth by the claimant or the provider as to work-relatedness.

> (6) The ALJ erroneously imposed a duty on National Mines to conduct a physical examination of Patton.
>
> (7) Dr. Majmundar's prescription for the oxygenator [sic] does not indicate what medical condition it is for. It cannot be inferred that the prescription is reasonable and necessary for treatment of coal workers' pneumoconiosis.

In the March 24, 2014, order ruling on National Mines' petition for reconsideration, the ALJ ruled as follows:

> 1. The undersigned did have a copy of the June 18, 1979 Opinion and this portion of the Petition is SUSTAINED. This typographical error was not adverse to the Movant and indeed, when making my determination on causation I took the fact that the original claim was resolved by Opinion into account.
>
> 2. As for the work-relatedness-causation issue the undersigned notes, in agreement with the Petition, that it was not included on the Benefit Review Conference Order. No objection to that was filed until this Petition and thus the exclusion of that issue was correct and this objection is not timely.
>
> Further, even if that issue was considered utilization reviews alone are insufficient to make a finding of non-work-relatedness. The Movant does confirm what a complex issue this is. Clearly the regulations state that utilization review is not an appropriate vehicle to contest work-relatedness. *National Pizza Company*

> *v. Curry*, 802 S.W.2d 949 (Ky. App. 1991) states that even in post-award medical fee disputes the injured worker retains the burden of proof. *Pro Se* workers' are at a marked and distinct disadvantage in Kentucky workers' compensation medical fee disputes, perhaps more so than any other court or litigant in the Commonwealth, inasmuch in most other legitimate disputes it is easier to obtain a lawyer, and the Administrative Law Judge has an affirmative duty to protect their rights, within appropriate boundaries. Opinion and Awards, as herein, still retain a *res judicata* effect as to the actual work-related diagnosis.
>
> Given the above, and the fact that the Plaintiff does have work-related coal workers' pneumoconiosis, as a matter of law, the undersigned feels that both legally and factually I am well within my discretion to determine that the contested treatment is work-related.
>
> 3. The remainder of the Petition, beyond paragraph 3., is OVERRULED.

On appeal, National Mines asserts the ALJ erred by stating as follows: "...there is no evidence of non-work-relatedness which can be relied upon and no evidence that the oxygenator [sic] is nor [sic] reasonable and necessary." National Mines asserts this statement is erroneous because Dr. Olash, in his Utilization Review Notice of Denial, addressed the reasonableness and necessity of the oxygen concentrator. National Mines also

argues the ALJ erroneously shifted the burden of proof on the issue of work-relatedness onto National Mines.

We will first address the issue of work-relatedness/causation. While National Mines is correct the ALJ erroneously shifted the burden of proof on the issue of work-relatedness, the issue of work-relatedness was not properly before the ALJ as a contested issue. 803 KAR 25:010 § 13(14) permits only the issues identified as contested issues at the benefit review conference to "be the subject of further proceedings." As noted above and as noted by the ALJ in the March 24, 2014, order ruling on the petition for reconsideration, the December 5, 2013, BRC order did not include work-relatedness as a contested issue. The BRC order only lists reasonableness and necessity of the oxygenator [sic]" as a contested issue. Because National Mines failed to include work-relatedness as a contested issue at the BRC, signed the BRC order, and failed to file any objections to the BRC order, work-relatedness was never a contested issue. Thus, the issue of causation or work-relatedness was not before the ALJ and any erroneous shifting of the burden of proof by the ALJ is irrelevant.

That said, National Mines' argument regarding the ALJ's assessment of Dr. Olash's opinions regarding the

reasonableness and necessity of the oxygen concentrator has merit. The ALJ may not ignore uncontradicted evidence without providing sufficient explanation. Elizabethtown Sportswear v. Stice, 720 S.W.2d 732 (Ky. App. 1986); Commonwealth of Kentucky v. Workers' Compensation Board, 697 S.W.2d 540 (Ky. App. 1985); Mengel v. Hawaiian-Tropic Northwest & Central Distributors, Inc., 618 S.W.2d 184 (Ky. App. 1981). Here, the ALJ has either overlooked or misconstrued uncontradicted evidence consisting of Dr. Olash's August 21, 2013, Utilization Review Notice of Denial in which he opined the oxygen concentrator prescribed by Dr. Majmundar is "not medically necessary and appropriate for the treatment of simple coal workers' pneumoconiosis." While the ALJ is free to reject this evidence, he must do so with a complete and accurate understanding of the evidence and then provide a sufficient explanation for rejection of the evidence.

The ALJ is not required to engage in a detailed discussion of the facts or set forth the minute details of his reasoning in reaching a particular result. The only requirement is the decision must adequately set forth the basic facts upon which the ultimate conclusion was drawn so the parties and the Board are reasonably apprised of the basis of the decision. Big Sandy Community Action Program

v. Chafins, 502 S.W.2d 526 (Ky. 1973). The parties and this Board are entitled to findings sufficient to inform them of the basis for the ALJ's decision to allow for meaningful review. Kentland Elkhorn Coal Corp. v. Yates, 743 S.W.2d 47 (Ky. App. 1988); Shields v. Pittsburgh and Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982).

The ALJ has not provided sufficient explanation for his rejection of Dr. Olash's opinion regarding the reasonableness and necessity of the oxygen concentrator prescribed by Dr. Majmundar. In the January 21, 2014, Opinion and Order, the ALJ merely stated that "none of the proof directly addresses the reasonableness and necessity of the oxygenator [sic]." Then the ALJ pontificated at length on the very issue he determined had not been properly preserved for review- causation/work-relatedness. Indeed, the majority of the ALJ's "Findings of Fact and Conclusions of Law" pertain to why there is allegedly no proof "which can be relied upon to make a finding that the oxygenator [sic] is not work-related." On remand, the ALJ must explain the basis for his decision in light of Dr. Olash's opinions that "the treatment is not medically necessary and appropriate for the treatment of simple coal workers' pneumoconiosis." Although, we express no opinion as to the outcome, if he again resolves the medical fee

dispute in favor of Patton, the ALJ must explain why he rejected Dr. Olash's uncontradicted medical opinions on the issue of reasonableness and necessity.

Accordingly, those portions of the January 21, 2014, Opinion and Order and the March 24, 2014, Order finding causation/workrelatedness was not preserved as a contested issue is **AFFIRMED**. Those portions of the January 21, 2014, Opinion and Order and the March 24, 2014, Order finding the oxygen concentrator is reasonable and necessary treatment are **VACATED** and this claim is **REMANDED** for additional findings and entry of an amended opinion and order in conformity with the views expressed herein.

ALVEY, CHAIRMAN, CONCURS.

RECHTER, MEMBER, DISSENTS WITHOUT SEPARATE OPINION.

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