Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: March 4, 2015

CLAIM NO. 199859307

OUR LADY OF THE WAY HOSPITAL PETITIONER

VS. **APPEAL FROM HON. JOHN B. COLEMAN, ADMINISTRATIVE LAW JUDGE**

MARIE MILLER
HON. JOHN B. COLEMAN,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

RECHTER, Member. Our Lady of the Way Hospital ("Our Lady") appeals from the October 13, 2014 Opinion and Order and the November 10, 2014 Order on Reconsideration rendered by Hon. John B. Coleman, Administrative Law Judge ("ALJ"). In a reopening for a medical dispute, the ALJ found contested medical treatment with Dr. Ira Potter non-compensable, but

found Marie Miller ("Miller") is entitled to reasonable and necessary treatment within Our Lady's managed care network. Our Lady argues the ALJ erred in finding Miller's low back condition causally related to a 1998 work injury, and the ALJ either erred in failing to rule upon the reasonableness and necessity of the prescription regimen or his ruling is not supported by substantial evidence. We affirm.

Miller injured her low back on October 19, 1998 while working as a certified nurse's assistant for Our Lady. Medical evidence filed during the pendency of the original claim included the report of Dr. Joseph Rapier, who diagnosed arousal of pre-existing dormant degenerative disc disease in the lumbar spine without significant radiculopathy. He opined the work injury caused Miller's complaints. He indicated Miller did not have an active impairment prior to the work injury. He assessed a 5% impairment pursuant to the American Medical Association Guides to the Evaluation of Permanent Impairment, 5th Edition and assigned restrictions of maximum lifting of twenty pounds on an occasional basis, no repetitive lifting, bending, turning or twisting, and a sit/stand option. He opined Miller did not retain the physical capacity to return to the type of work performed at the time of the injury.

Dr. Phillip Tibbs saw Miller for a neurosurgical consultation on December 21, 1998. He noted a December 4, 1998 MRI revealed bulging at L4-L5 and he felt Miller had a possible annular tear and lumbar strain at that level. He recommended conservative therapy.

Miller also filed records from Appalachian Regional Hospital documenting treatment by Dr. Rueben P. Singayao for chronic back pain throughout 1999.

By agreement approved March 7, 2000, Miller settled her claim based upon a 5% impairment rating with medical benefits remaining open. The agreement listed diagnoses of degenerative disc disease and low back strain.

Our Lady filed a motion to reopen and medical dispute on April 18, 2014, contesting the reasonableness, necessity and work-relatedness of Miller's ongoing treatment with Dr. Brandi Collins, including office visits and medication regimen. Our Lady filed an additional Form 112 on July 21, 2014 to contest treatment with Dr. Potter who is outside the managed care system. Our Lady supported the motion to reopen with the report of Dr. Richard Sheridan who performed an independent medical evaluation ("IME") on December 16, 2013. He diagnosed resolved acute lumbar strain causally related to the work injury. Dr. Sheridan opined Miller required no further treatment for the work

injury and ongoing medications were not reasonable or necessary for her work-related diagnosis.

Dr. Sheridan testified by deposition on June 27, 2014. He noted Miller had been involved in a slip and fall injury at a car dealership in 2010 after which she complained of neck, upper back, left arm and elbow pain. She also was involved in a motor vehicle accident in 2012 after which she complained of low back pain, acute worsening of chronic condition, and constant lumbar dull ache, aggravated with movement. Dr. Sheridan did not believe the motor vehicle accident resulted in a permanent low back injury. He diagnosed resolved low back strain secondary to the work event and opined no further medical treatment would be reasonable or necessary for the work injury.

Our Lady also submitted the March 19, 2014 utilization review report of Dr. Daniel Wolens. Dr. Wolens reviewed medical records consisting primarily of notes from Donetta Wallace, a physician’s assistant, covering treatment from February 2010 through February 2014. Dr. Wolens opined Lidoderm patches would not be indicated for spinal pain or radiculopathy. Flector patches would not be indicated for chronic use and should be discontinued. Muscle relaxers such as Skelaxin are not indicated for treatment of chronic spinal pain. Dr. Wolens stated Miller did not have a

radiculopathy in 1998, so use of Neurontin is not indicated. He did not feel Ultram was warranted because Miller was taking Hydrocodone and Amitriptyline. He recommended continued approval of Hydrocodone and Amitriptyline. Toradol injections are not indicated for treatment of chronic pain.

Miller testified by deposition on June 17, 2014 and at the hearing held August 27, 2014. She injured her low back on October 19, 1998 while lifting and turning a patient. She attempted to return to work on one occasion, but was unable to perform the work due to back pain. Miller has not worked since. She continued to have symptoms in her low back following the work injury. At times, her pain radiates into her legs. She rates her pain at eight to ten on a scale from one to ten. Her pain is at a six when she uses Ultam and Flector patches. Her back pain has remained “about the same” over the years and did not worsen after the post-injury fall or motor vehicle accident. Miller denied that the post-injury incidents resulted in additional injury to her low back. No additional medication was required following those incidents.

Miller began treating with Dr. Collins on a monthly basis beginning in 2010. Miller last saw Dr. Collins on March 16, 2014 because she would no longer treat

her for the work injury after Miller refused to follow a recommendation for treatment by a pain clinic. Miller acknowledged she received a list of physicians within the managed care system, but stated she was not successful in obtaining a new physician from that list. She contacted three providers. One provider only had a physician's assistant at the location. A second was not taking new patients. The third would not prescribe medications until after three months of treatment. None of these providers was located near her home. Miller saw Dr. Mark Caruso on one occasion, but she did not continue treatment since he would not prescribe Ultram. At the time of the hearing, she was treating with Dr. Potter who continued to prescribe the medications Dr. Collins had prescribed. Dr. Potter is not within the managed care system.

After reviewing the evidence submitted in the original claim and upon reopening, the ALJ noted Dr. Wolens' opinion substantiated Miller's neck, elbow and shoulder injuries are not related to the work injury. The ALJ then held this "does not take away from the fact the plaintiff has a compensable lumbar strain for which she is entitled to treatment under KRS 342.020." In rejecting the opinion of Dr. Sheridan, the ALJ noted he overlooked the fact Miller had previously been diagnosed with permanent restrictions

and impairment from the work injury which included the arousal of pre-existing dormant degenerative changes. The ALJ indicated the true question is whether the treatment with Dr. Potter at the current time is compensable. He concluded treatment with Dr. Potter is not compensable because he was not in the managed care system. The ALJ determined care was available within the managed care system, as Miller had seen Dr. Caruso who was part of the system. Miller simply elected not to see him because he would not prescribe a medication she wanted. The ALJ observed "Although the treatment provided by Dr. Potter may indeed be reasonable and necessary, it is nevertheless non-compensable under KRS 342.020." Accordingly, the ALJ relieved Our Lady of responsibility for payment of treatment with Dr. Potter. The ALJ held Our Lady remained responsible for reasonable and necessary medical treatment for the cure and/or relief of the low back strain within the managed care system.

Our Lady filed a petition for reconsideration challenging the ALJ's finding that the current low back condition is related to the work injury and requesting specific findings regarding the reasonableness and necessity of each contested medication.

On reconsideration, the ALJ noted the specific findings regarding certain medications sought by Our Lady were unnecessary because the medications were not currently being prescribed by a physician whose treatment is compensable. He noted the current requests are obviously non-compensable as they were made by a physician outside the managed care plan. Accordingly, the ALJ denied the petition for reconsideration.

Our Lady argues the ALJ erred in failing to find Miller's current low back condition and need for treatment are unrelated to the work injury. Our Lady further contends the ALJ's finding is not supported by substantial evidence. It claims no physician causally relates her current condition to the 1998 work incident.

Further, Our Lady contends it is impermissible for the ALJ to rely on Miller's testimony as a basis for finding the current condition and complaints of pain are medically caused by the 1998 incident because the cause would not be apparent to a lay person. Our Lady contends the opinion of Dr. Sheridan is the only evidence concerning the cause of the current condition.

Because Miller successfully established causation, the question on appeal is whether substantial evidence supports the ALJ's decision. Wolf Creek Collieries v. Crum,

673 S.W.2d 735 (Ky. App. 1984). "Substantial evidence" is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971). 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. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). To reverse, it must be shown there was no evidence of substantial probative value to support the decision.

An ALJ is vested with broad authority to decide questions involving causation. Dravo Lime Co. v. Eakins, 156 S.W.3d 283 (Ky. 2003). 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). While medical causation usually requires proof from a medical expert, the ALJ properly may infer causation, or a lack of causation, from the totality of the circumstances as evidenced by the lay and expert testimony of record. See Mengel v. Hawaiian-Tropic Northwest & Central Distributors, Inc., 618 S.W.2d 184 (Ky. App. 1981); Cf. Union Underwear Co. v. Scearce, id.

The ALJ's decision finding Miller's condition causally related to the 1998 work injury is supported by substantial evidence. Evidence filed in the original action supports a conclusion the work-related injury produced a permanent injury and a resulting permanent impairment rating. A worker who has established a work-related permanent impairment rating has also established a disability for purposes of KRS 342.020 and is entitled to future medical benefits. FEI Installation, Inc., v. Williams, 214 S.W.3d 313 (Ky. 2007).

Miller's testimony indicates she remained symptomatic from the time of the injury and her low back condition was not changed by the subsequent fall or motor vehicle accident. No additional medication was required as a result of those incidents. There is no disagreement that Miller sustained a low back strain as a result of the work injury. There was disagreement as to whether the injury was permanent or resolved. The ALJ specifically rejected Dr. Sheridan's opinion, noting he overlooked the fact Miller previously had been diagnosed with permanent restrictions and impairment from the work injury and was noted to have arousal of pre-existing dormant degenerative changes. An arousal of a previously dormant condition is compensable and is not to be considered "natural aging" to be excluded from

compensability. McNutt Construction/First General Services v. Scott, 40 S.W.3d 854 (Ky. 2001). We find no error in the ALJ's determination Miller is entitled to ongoing reasonable and necessary care within the managed care system.

Our Lady argues the ALJ erred in failing to address the contested issue of whether the medication regimen constitutes reasonable or necessary medical treatment pursuant to KRS 342.020 or in failing to base the decision on substantial evidence. Our Lady asserts the ALJ should have specifically determined whether prescriptions for Lidoderm/Flector patches, Skelaxin, Neurontin, Ultam/Tramadol, and Amitriptyline are reasonable and necessary pursuant to KRS 342.020. Alternatively, Our Lady argues that if the Board believes the ALJ addressed the issue, his findings are not supported by substantial evidence. It contends the evidence from Dr. Sheridan is the most compelling and establishes the medications are neither reasonable nor necessary.

In the claim *sub judice*, Our Lady's initial motion sought to be relieved prospectively of liability for treatment with Dr. Collins. That motion became moot when it was shown Miller ceased treating with Dr. Collins prior to the filing of the motion to reopen. Miller then began treating with Dr. Ira Potter, whose treatment was challenged

as outside the managed care system. The ALJ determined care with Dr. Potter is non-compensable because he is not part of the managed care system. Thus, Miller currently has no treatment plan or medication regimen. It is only after Miller obtains treatment within the managed care system that it can be determined whether her treatment plan or medication regimen is reasonable or necessary. Neither the ALJ nor the Board is empowered to rule on the compensability of prospective medical treatment. In other words, Our Lady remains liable for medical treatment reasonably required for the cure and relief from the effects of Miller's work-related injury, subject to the rules and procedures set forth in the statute and its accompanying regulations pertaining to the compensability and contest of medical expenses. Our Lady retains the right to challenge the reasonableness and necessity of care once Miller obtains care within the managed care system.

Accordingly, the October 13, 2014 Opinion and Order and the November 10, 2014 Order on Reconsideration rendered by Hon. John B. Coleman, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON. RONALD J POHL
303 NORTH HURSTBOURNE PARKWAY SUITE 110
LOUISVILLE, KY 40222

HON BRIAN WIMSATT
303 N HURSTBOURNE PKWY #110
LOUISVILLE, KY 40222

COUNSEL FOR RESPONDENTS:

HON. RANDY CLARK
POB 1529
PIKEVILLE, KY 41502

HON LAURIE GOETZ KEMP
2500 NATIONAL CITY TOWER
LOUISVILLE, KY 40202

ADMINISTRATIVE LAW JUDGE:

HON. JOHN B COLEMAN
PREVENTION PARK
657 CHAMBERLIN AVE
FRANKFORT, KY 40601