Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: September 2, 2016

CLAIM NO. 200489664

RALPH TURNER PETITIONER

VS. **APPEAL FROM HON. JANE RICE WILLIAMS, ADMINISTRATIVE LAW JUDGE**

TOYOTA MOTOR MFG. and
HON. JANE RICE WILLIAMS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

ALVEY, Chairman. Ralph Turner, *pro se*, ("Turner") seeks review of the decision rendered April 19, 2016 by Hon. Jane Rice Williams, Administrative Law Judge ("ALJ"), resolving a medical dispute in favor of Toyota Motor Manufacturing Kentucky, Inc. ("Toyota"). Turner also appeals from the

May 24, 2016 Order denying his petition for reconsideration.

On appeal, Turner argues the evidence compels a determination contrary to that reached by the ALJ. In this instance, the ALJ acted within her discretion, and her decision is supported by substantial evidence. Because a contrary result is not compelled, we affirm.

Turner filed a Form 101 on October 7, 2004 alleging he injured his low back while working for Toyota on January 16, 2004. He specifically alleged he injured his "lower back (DX: HNP L4-5 and L5-S1 with L4-5 central thecal sac compression & bilateral L4-5 & L5-S1 neuroforaminal narrowing."

In support of the Form 101, Turner filed the June, 22, 2004 report of Dr. Phillip Tibbs, a neurosurgeon. Dr. Tibbs noted Turner had not reached maximum medical improvement, but had a minimum impairment rating of 12% pursuant to the Fifth Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"). He also recommended restrictions of no lifting over forty pounds maximum on a maximum basis, or over twenty-five pounds frequently. He did not believe Turner needed a lumbar fusion.

Turner also filed the September 9, 2004 report of Dr. Anthony McEldowney who confirmed the diagnosis alleged in the Form 101. He determined the injury was work-related and assessed a 13% impairment rating pursuant to the AMA Guides. Dr. McEldowney agreed Turner's activities should be restricted and determined he did not have the capacity to return to the job performed at the time of the injury.

Turner and Toyota eventually settled the claim. The Form 110-I settlement agreement was approved by Hon. James L. Kerr, Administrative Law Judge on March 10, 2005. The claim was settled for a lump sum of $62,879.00 on the basis of a compromised 12% impairment rating. Medical benefits were to remain open.

On December 17, 2015, Toyota filed a motion to reopen to challenge medical treatment in the form of continued pain management, injections and prescriptions for Celebrex, Gabapentin and Norco. Toyota additionally filed a Form 112 Medical Fee Dispute, and a motion to join Dr. Traci Westerfield and M. Joseph Medical.

In support of the medical dispute, Toyota filed the November 30, 2015 utilization review report of Dr. Phillip Chiou, who is board certified in Physical Medicine and Rehabilitation, as well as Pain Medicine. Dr. Chiou

found the prescriptions for Celebrex, Gabapentin and Norco were not medically necessary.

Toyota also filed the report of Dr. David Jenkinson who evaluated Turner on July 29, 2015 at its request. In addition to his examination, Dr. Jenkinson reviewed numerous medical records from 2004 through 2015. He opined Turner needs no additional medical treatment for the work injury. He found Turner's subjective complaints grossly exceeded his objective abnormality. He found no basis or need for fusion surgery. He specifically found no need for Celebrex, and stated Turner should be weaned from Norco.

The claim was assigned to the ALJ by order dated January 7, 2016. In an order dated January 20, 2016, she found Toyota had made the necessary *prima facie* showing, and sustained its motion to reopen.

At the telephonic conference held on February 8, 2016, it was noted the medical dispute concerned the ongoing prescriptions for Celebrex, Gabapentin, and Norco. The dispute also included pain management and injections. The basis of the challenge was for both causation and reasonableness and necessity. A telephonic benefit review conference ("BRC") was scheduled.

Dr. Westerfield, who works with Dr. Ballard Wright, submitted treatment records from January 10, 2006; September 9, 2015; November 10, 2015 and January 8, 2016. Those records reflect ongoing treatment with Celebrex, Gabapentin and Norco which she related to the 2004 work injury.

Turner filed a statement in which he outlined his treatment and the belief his ongoing treatment was reasonable and necessary.

A telephonic BRC was held on March 15, 2016. At that time, the issues identified at the previous telephonic conference were confirmed. The parties agreed to waive the hearing and submitted the case on the record.

The ALJ rendered a decision on April 19, 2016, resolving the medical dispute in Toyota's favor. The ALJ specifically found as follows:

> A telephonic Benefit Review Conference was held on March 15, 2016. Plaintiff, the medical provider and Defendant Employer participated. The formal hearing was waived and the Medical Fee Dispute was submitted on the record for a decision as of March 15, 2016.
>
> Defendant Employer introduced the November 30, 2015 report of Phillip Chiou, M.D., who conducted a records review and noted the diagnosis of chronic pain related to degenerative lumbar/lumbosacral intervertebral disc disease. He found the contested

medications were prescribed without adequate required documentation of the benefit or any improvement from the drug. Celebrex was not recommended to be prescribed on a long term basis. Gabapentin is an anti-epileptic drug for neuropathic pain and there was no documentation that it provided even 30% relief. The use of opioids (Norco) is inappropriate if it fails to improve quality of life. The record reflects Plaintiff leads a sedentary lifestyle and has not worked in over 10 years. For these reasons, none of the contested medications should be continued.

Defendant Employer introduced the report of David J. Jenkinson, M.D., who conducted an Independent Medical Evaluation (IME) on July 29, 2015, by taking a history from Plaintiff, reviewing medical records and conducting a physical examination. He provided a history of a 2004 onset of pain while pulling a cord. He has continued in pain management and has not worked since 2004. He sees Dr. Tibbs about every 4 years. Following a thorough examination, Dr. Jenkinson determined there is no need for further treatment related to the work injury. He found no symptoms consistent with lumbar facet arthropathy and noted a modest degree of degenerative disc change such as is noted in the general population. He found Plaintiff should be weaned from Norco and Celebrex, and should be discontinued.

The record includes treatment notes from Dr. Westerfield confirming the contested treatment.

In a post-judgment Motion to Reopen to Assert a Medical Fee Dispute, Defendant Employer has the burden of proving that

the contested medical expenses and/or proposed medical procedure is unreasonable or unnecessary, while the Plaintiff maintains the burden of proving that the contested medical expenses and/or proposed medical procedure is causally related treatment for the effects of the work-related injury. *Mitee Enterprises vs. Yates*, 865 SW2d 654 (KY 1993) *Square D Company vs. Tipton*, 862 SW2d 308 (KY 1993) *Addington Resources, Inc. vs. Perkins*, 947 SW2d 42 (KY App. 1997). In addition, the legislature's use of the conjunctive "and" which appears in subsection 1 of KRS 342.020 "cure and relief" was intended to be construed as "cure and/or relief". *National Pizza Company vs. Curry*, 802 SW2d 949 (KY 1991).

In the specific instance, Defendant Employer has moved to reopen this claim to challenge the work relatedness, reasonableness and/or necessity of pain management, including injections and prescriptions for Gabapentin, Celebrex and Norco. After careful consideration of the evidence, the only real opinion testimony is provided in support of Defendant Employer's position. Dr. Westerfield's office notes do not adequately address the contested issues herein and the opinions of Dr. Chiou and Dr. Jenkinson are persuasive that the 2004 strain type injury would not continue to result in all Plaintiffs' symptoms 12 years later. As Plaintiff always bears the burden of proving work relatedness and has failed to do so in this case, the contested treatment is found not work related and non-compensable. Possibly unrelated problems are responsible for a need of current treatment but not the 2004 work injury.

III. AUTHORITIES

KRS 342.020

Mitee Enterprises vs. Yates, 865 SW2d 654 (KY 1993)

Square D Company vs. Tipton, 862 SW2d 308 (KY 1993)

Addington Resources, Inc. vs. Perkins, 947 SW2d 42 (KY App. 1997)

National Pizza Company vs. Curry, 802 SW2d 949 (KY 1991)

IV. ORDER

IT IS HEREBY ORDERED AND ADJUGED AS FOLLOWS:

The Motion to Reopen filed by Defendant Employer, Toyota Motor Manufacturing Kentucky, Inc., and/or its insurance carrier, to assert a Medical Fee Dispute challenging the work relatedness, reasonableness and/or necessity of pain management, including injections and prescriptions for Gabapentin, Celebrex and Norco, shall be, and the same is hereby resolved in favor of Defendant Employer. Following a weaning, if necessary, the disputed expenses are non-compensable

Turner filed a petition for reconsideration challenging the ALJ's determination and requesting the decision be set aside. In support of his petition, Turner attached multiple medical records. The petition for reconsideration was denied in an order issued May 24, 2016.

We first note, in a post-award medical fee dispute, the burden of proof to determine the 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).

Here, the ALJ determined the contested medical treatment was not work-related and therefore not compensable. The ALJ has the right and obligation to determine the compensability of medical treatment based upon the evidence presented. Substantial evidence has been defined as some evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable people. *See* Smyzer v. B.F. Goodrich Chemical Co., 474 S.W.2d 367, 369 (Ky. 1971); Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986). In this instance, the ALJ's determinations are supported by substantial evidence of record and will not be disturbed.

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).

Here, the ALJ properly considered the evidence of record and applied the correct analysis in reaching her determination. She found the evidence from Drs. Chiou and

Jenkinson to be more persuasive in determining the contested treatment is not compensable. The ALJ specifically noted Dr. Westerfield's office notes do not adequately address the issues raised by Drs. Chiou and Jenkinson. Since substantial evidence supports the ALJ's determination, and she clearly outlined her reasoning for doing so, we must affirm. While Turner may point to documentation contrary to this determination, a different decision is not compelled. This merely constitutes evidence upon which the ALJ could have relied, but did not.

Accordingly, the April 19, 2016 Medical Fee Opinion and Order, and order denying the petition rendered May 24, 2016 by Hon. Jane Rice Williams, Administrative Law Judge, are hereby **AFFIRMED.**

ALL CONCUR.

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