Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: January 23, 2015

CLAIM NO. 200684485

TIMOTHY HOWARD PETITIONER

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

BASIN ENERGY COMPANY
TERRY WRIGHT, M.D. AND
HON. JANE RICE WILLIAMS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

ALVEY, Chairman. This appeal comes before the Board upon reversal and remand from the Kentucky Court of Appeals from an opinion we entered on September 9, 2013. This Board determined neither it, Hon. Jane Rice Williams, Administrative Law Judge ("ALJ"), nor Hon. James Landon Overfield, Chief Administrative Law Judge ("CALJ") had

jurisdiction to entertain the motion to reopen or to decide the medical fee dispute filed by Basin Energy Company ("Basin"). In its decision rendered August 8, 2014, the Kentucky Court of Appeals reversed the Board's decision, and remanded for entry of a decision in the appeal filed by Timothy Howard ("Howard") against Basin. Howard appealed from the decision issued by the ALJ on January 4, 2013, finding treatment rendered and recommended by Dr. Terry Wright, including prescriptions for Oxycodone, were noncompensable. Howard also appeals from the order denying his petition for reconsideration issued on February 6, 2013.

On appeal, Howard argues the ALJ's conclusion is not supported by substantial evidence and must be reversed as a matter of law since the evidence compels a contrary result, and the ALJ's decision is arbitrary and capricious. Because the ALJ's decision is supported by substantial evidence, and a contrary result is not compelled, we affirm.

Howard filed a Form 101 on October 5, 2007 alleging neck, low back and right shoulder injuries, with an emotional component, stemming from an incident occurring May 11, 2006, when he assisted an Emergency Medical Technician ("EMT") in crossing a ditch to tend to a co-worker who died at the scene. Howard alleged Post Traumatic Stress Disorder ("PTSD") and depression in addition to his physical injuries

because of his failed attempts at resuscitation of the co-worker. After the filing of voluminous medical records and reports, and multiple medical disputes, the parties agreed to settle the claim subsequent to the Hearing held on April 29, 2009. A Form 110-I was approved by Hon. John B. Coleman, Administrative Law Judge ("ALJ Coleman") on July 30, 2009. The terms of the settlement included a payment by Basin in the amount of $85,000.00 for a complete and total dismissal of all claims stemming from the incident except future medical expenses would remain open pursuant to KRS 342.020. The parties agreed any treatment for the psychiatric/psychological condition was waived. Subsequent to the approval of the settlement agreement, ALJ Coleman signed an order tendered by Basin indicating the claim was dismissed with prejudice.

On May 22, 2012, Basin filed a motion to reopen and medical dispute challenging Howard's monthly office visits with Dr. Wright, and his prescriptions for Oxycodone as neither medically necessary nor related to the May 11, 2006 accident. Basin later amended the medical dispute to challenge Dr. Wright's request for referral of Howard to pain management. In the motion to reopen, Basin requested Dr. Wright be joined as a party. The CALJ entered an order

on June 20, 2012 sustaining the motion to reopen and joining Dr. Wright as a party.

In support of the medical dispute, Basin filed the April 19, 2012 utilization review report of Dr. Bart Olash who stated monthly visits with Dr. Wright and prescriptions for Oxycodone were not medically necessary. He stated Howard's condition was chronic and stable. He further stated Howard should see Dr. Wright no more than four times per year, and there was no need for treatment with narcotic analgesics.

Basin also filed the May 1, 2012 utilization review report of Dr. Frank Parker. Dr. Parker opined follow up visits with Dr. Wright and treatment with Oxycodone were not medically necessary or appropriate for the May 11, 2006 injury. In a subsequent utilization review report dated September 6, 2012, Dr. Parker stated the request for referral for pain management and Dr. Wright's subsequent office visits were not medically necessary or reasonable for the cure and relief of the May 11, 2006 work-related injury.

Basin also filed the March 23, 2012 report of Dr. Henry Tutt, a neurosurgeon, who evaluated Howard at its request. Dr. Tutt's evaluation encompassed a review of Howard's persistent low back pain, bilateral hip and leg pain, right shoulder pain, weakness and numbness involving

the right arm. He noted Howard stated he had the same complaints in 2006 but they had worsened. Howard reported he had used a cane for six years, but Dr. Tutt observed he had no difficulty maneuvering in the office or getting on and off the examination table without using it. Dr. Tutt stated Howard possibly strained his low back and right shoulder in the May 11, 2006 incident, which had resolved. He stated Howard's current complaints are not related to the May 11, 2006 accident. He opined Howard needs no additional medical treatment or medications for the May 11, 2006 incident.

In response to the motion to reopen, Howard filed copies of Dr. Wright's billings and his office notes. Howard also filed statements from Dr. Wright in which he declared his treatment was reasonable and necessary for the treatment of the back and shoulder injuries sustained in the May 2006 work injury. Howard also filed a copy of an x-ray report dated June 7, 2011 demonstrating degenerative changes of the lumbar spine with narrowing at L4-L5. He also filed an MRI report dated October 23, 2012 from the Highlands Regional Medical Center demonstrating severe degenerative disk disease at L3-L4 and multilevel neuroforaminal stenosis.

Howard also filed a notice of designation of evidence from the original claim on November 16, 2012; however, he did not attach any of the medical documentation upon which he intended to rely. Finally, Howard filed an article purportedly drafted by Dr. Andrew D. DeSimone supporting monthly office visits when prescribing a controlled substance. Howard did not identify the source of the article, or when it was published. Howard also filed records from the St. Joseph Hospital from 2008 for treatment for his liver condition.

Howard testified at the Hearing held November 14, 2012. He stated he injured his spine and right shoulder on May 11, 2006 when assisting an EMT across a ditch to help a co-worker. Howard currently has loss of feeling in the right shoulder however his primary difficulties are in the low back. He experiences constant extreme low back pain and intermittent numbness. He stated he cannot take Ibuprofen, Tylenol or other non-steroidal anti-inflammatories due to his liver problems. He stated Oxycodone allowed him to manage his pain. He has had no back or shoulder surgery. He stated he does home exercises.

The ALJ rendered an opinion and order on January 4, 2013. She determined Howard had sustained injuries to his neck, back and right shoulder with an emotional

component while working for Basin on May 11, 2006. She noted the claim was settled by agreement and the Form 110-I was approved by ALJ Coleman on July 30, 2009. She noted Howard did not waive his entitlement to medical benefits except those related to his psychiatric/psychological condition. The ALJ noted in a post award medical dispute, the employer bears the burden of proof on reasonableness and necessity and the employee bears the burden of proof on causation/work-relatedness. The ALJ stated she was persuaded by the opinions of Drs. Tutt, Parker and Olash, and resolved the medical dispute in Basin's favor.

Howard filed a petition for reconsideration on January 18, 2013. He argued the ALJ erred in relying upon the opinions of Drs. Tutt, Parker and Olash. He stated the ALJ's findings were without merit, and she should have relied upon Dr. Wright in rendering her decision. He argued Dr. Tutt's opinion should have been disregarded based upon the holding in Cepero v. Fabricated Medicals Corp., 132 S.W.3d 839 (Ky. 2004). He argued the ALJ failed to address records from the previous proceedings. Finally, Howard argued the ALJ erred by finding the monthly office visits with Dr. Wright and treatment with Oxycodone were not reasonable and necessary for the cure and relief of the effects of the work injury.

The ALJ entered an order on February 6, 2013 regarding the petition for reconsideration. The remainder of the petition for reconsideration was denied as an impermissible re-argument of the case.

On appeal, Howard argues the ALJ's decision is not supported by substantial evidence and should be reversed as a matter of law since a contrary result was compelled.

Notwithstanding C & T of Hazard v. Stollings, 2012-SC-000834-WC, 2013 WL 5777077 (Ky. 2013), a long line of reported decisions of the Kentucky Supreme Court establish in a post-award medical fee dispute, the employer bears both the burden of going forward and the burden of proving entitlement to the relief sought, except that the claimant bears the burden of proving work-relatedness. National Pizza Company vs. Curry, 802 S.W.2d 949 (Ky. App. 1991); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979); Addington Resources, Inc. v. Perkins, 947 S.W.2d 421 (Ky. App. 1997); Mitee Enterprises vs. Yates, 865 S.W.2d 654 (Ky. 1993); Square D Company v. Tipton, 862 S.W.2d 308 (Ky. 1993).

Regardless of who bore the burden of proof, the ALJ determined the evidence established the treatment contested was noncompensable. The ALJ then proceeded to

outline the basis for her decision. Clearly Basin had the burden of proof on the issue of whether the contested medical expenses were unreasonable and unnecessary. Because it was successful before the ALJ on this issue, the question on appeal is whether substantial evidence supports the ALJ's conclusion. *See* Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986). 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).

As fact-finder, the ALJ has the sole authority to determine the quality, character, and substance of the evidence. Square D Company v. Tipton, supra; 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). Assuming arguendo Basin has the burden of proving the contested treatment was not causally related, again the evidence relied upon by the ALJ supports her findings.

Here the reports of Drs. Tutt, Parker and Olash support the ALJ's determination finding the treatment rendered by Dr. Wright including the prescription of Oxycodone unreasonable and unnecessary. We note Howard's reference to Cepero, supra, however we are not persuaded the opinions of the physicians upon which the ALJ relied in reaching her determination were so flawed as to render their opinions deficient. We note Howard made no attempt to cross-examine the physicians, nor discredit their opinions in any fashion other than to refer to them as "hired guns" in his brief.

Assuming Howard had the burden of proving the causation and work-relatedness, we determine in this

instance a contrary result is not compelled. "Compelling evidence" is defined as evidence so overwhelming no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985). Here the ALJ's decision is supported by substantial evidence and a contrary result is not compelled.

We conclude the ALJ properly considered the evidence of record and applied the correct legal analysis in determining the treatment with Dr. Wright, including treatment with Oxycodone, noncompensable. Since substantial evidence supports the ALJ's determination, and Howard merely points to conflicting evidence supporting his position which does not compel a contrary result, the decision will not be disturbed on appeal.

Accordingly, the January 4, 2013 Opinion and Order rendered by Hon. Jane Rice Williams, Administrative Law Judge, and the order on reconsideration issued February 6, 2013 are hereby **AFFIRMED.**

ALL CONCUR.

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