Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: December 16, 2013

CLAIM NO. 200493979

TOMMY TACKETT PETITIONER

VS. **APPEAL FROM HON. GRANT S. ROARK, ADMINISTRATIVE LAW JUDGE**

SOUTH AKERS MINING
and HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION AND ORDER
AFFIRMING

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

ALVEY, Chairman. Tommy Tackett ("Tackett") seeks review of the opinion and order rendered August 9, 2013 by Hon. Grant S. Roark, Administrative Law Judge ("ALJ"), resolving a medical fee dispute in favor of South Akers Mining ("South Akers"). The ALJ determined Tackett's contested treatment with Dr. Kevin Gooch, including a neurosurgical referral,

is not causally related to the original 2003 work injury. Tackett also seeks review of the September 19, 2013 order denying his petition for reconsideration.

On appeal, Tackett argues the ALJ erred in finding his treatment with Dr. Gooch and the referral to a neurosurgeon are not causally related to the 2003 injury and therefore not compensable. Because the ALJ's decision is supported by substantial evidence, and a contrary result is not compelled, we affirm.

This claim originated when Tackett filed a Form 101 in September 2004 alleging multiple injuries on December 8, 2003 while pulling a piece of mining belt. The Form 104 reflects Tackett worked for South Akers from May 1989 through April 2001 and again from October 2002 to December 2003. The claim was ultimately resolved by settlement, which was approved on March 21, 2005 by Hon. Marcel Smith, Administrative Law Judge. The settlement reflects Tackett sustained a lumbosacral strain or sprain as a result of the December 8, 2003 accident, which did not require surgery or hospitalization. It indicates three impairment ratings were assessed, ranging from 5% to 11%. The settlement agreement reflects payment was to be made in equal weekly installments for 425 weeks based upon a compromised 6.5% impairment rating increased by the three

multiplier. Tackett retained his right to future medical benefits.

The medical fee dispute subject to this appeal was filed by South Akers on June 5, 2012, challenging the current and ongoing treatment rendered by Tackett's primary care physician, Dr. Gooch, as not causally related to the original December 2003 injury. South Akers subsequently filed a motion to re-open on June 18, 2012. On February 5, 2013, South Akers filed a motion to amend its medical dispute to challenge the compensability of a lumbar spine MRI and neurosurgical referral ordered by Dr. Gooch. In support of its argument, South Akers relies upon the opinions of Drs. John Vaughan and William Nemeth.

Tackett testified by deposition on March 18, 2013. Tackett was born on March 12, 1967 and resides in Jenkins, Kentucky. He confirmed he worked for South Akers on two separate occasions in the underground mines moving equipment forward and supporting the production crew. On December 8, 2003, Tackett experienced low back pain while pulling a piece of belt line. He had no surgery due to his work injury and eventually settled his claim with South Akers in 2005. Tackett did not return to work with South Akers following the December 2003 accident. Since the settlement, he has primarily treated with Dr. Gooch for his

work-related injury, as well as other unrelated conditions. He also went to pain management for a period of time prior to 2007, where he was prescribed medication and given injections.

Tackett testified he returned to the workforce in February 2007 because he wanted to earn an income. He began working in the oil field for Jet-X, Inc. ("Jet-X"), primarily driving a cased-hole wireline service truck. Tackett worked with Jet-X until he was laid off in August 2010 for reasons unrelated to his back injury. Tackett testified that during his employment with Jet-X, his low back was better, but still bothered him. Tackett could not recall how frequently he saw Dr. Gooch or if he took medication regularly during this time period. Tackett has not worked since being laid off in August 2010.

Tackett testified he could not return to jobs similar to the one he had with Jet-X in his current condition. Since August 2010, Tackett testified his symptoms have worsened. He continues to experience low back pain, which has now broadened from the left side to the center of his back, as well as increased left leg numbness. Tackett does not recall when his symptoms began to increase. Tackett testified regarding a specific incident of symptom exacerbation occurring in August 2011.

Tackett was at home walking down the hall when he suddenly experienced severe low back pain and was unable to move. Tackett acknowledged there was no specific event precipitating his increased symptoms. Since then, he has experienced many similar incidents. Tackett testified he has not had any other injuries, slips, falls or accidents since his original December 2003 injury.

Tackett stated he now treats with Dr. Gooch on a monthly basis and is prescribed Flexeril and Neurontin, which have provided some relief. He continues to do home exercise and uses a TENS unit, both of which help his symptoms. Tackett confirmed he recently had a lumbar spine MRI and has been referred to a neurosurgeon. Tackett testified he understood the MRI as showing more problems in the small of his low back. Tackett also stated Dr. Gooch prepared a July 25, 2012 letter stating his current treatment is reasonable, necessary and work-related.

Both parties filed the treatment records of Dr. Gooch from January 2, 2007 to April 2, 2013. Tackett saw Dr. Gooch on six occasions in 2007 for several conditions, including chronic back pain and degenerative disc disease. The records generally reflect his chronic back pain remained stable with medication, range of motion exercises, heat and use of a TENS unit. In February 2007, Dr. Gooch noted

Tackett's pain symptoms and range of motion had improved, and he wanted to return to work. He also recommended restrictions of no lifting over ten pounds, alternate between sitting and standing, and no stooping, bending or crawling. In March 2007, Dr. Gooch noted Tackett had returned to work and was doing well, despite occasional low back stiffness and soreness.

The record reflects Tackett returned for follow up visits once each in 2008 and 2009. Both notes reflect Tackett's history of chronic back pain and degenerative disc disease, as well as other unrelated conditions. In 2009, Dr. Gooch prescribed Flexeril, and advised continued application of heat and home exercises. Tackett returned on two occasions in 2010. In June 2010, Tackett reported he continued to work but experienced occasional flare-ups of his low back symptoms, relieved with muscle relaxer and/or pain medication.

On August 18, 2011, Tackett reported he was laid off. He also reported he experienced severe left lower back pain and left leg numbness as he was walking through his house. Dr. Gooch diagnosed exacerbation of low back pain, and suspected an acute strain. He referred Tackett to physical therapy, ordered a lumbar x-ray, prescribed Flexeril and Lorcet, and recommended applying heat. The x-

ray demonstrated mild degenerative disc disease with no fracture.

In 2012, Tackett began seeing Dr. Gooch on a monthly basis for low back pain, stiffness, and numbness in the left lateral thigh. Tackett was diagnosed with stable chronic low back pain and lumbar disc degeneration, and was treated conservatively. Dr. Gooch recommended a lumbar support brace, use of a TENS unit, home exercises and application of heat. He also prescribed Flexeril and Lorcet. On July 2, 2012, Dr. Gooch noted Tackett developed severe low back pain while attempting to use a weed eater.

In a letter dated July 25, 2012, Dr. Gooch noted he first saw Tackett following an injury several years previous, for which he administered treatment for a strain and degenerative disc disease. Dr. Gooch noted Tackett continued to follow-up with him several times in 2007 reporting persistent low back stiffness and soreness despite returning to work. He was seen once in 2008 and again in 2009. In 2010, Tackett was seen with occasional flare-up of pain with increasing activity on two occasions. He returned in 2011 with low back symptoms and was referred to physical therapy, restricted to sedentary activity, and provided with conservative treatment. Dr. Gooch noted he had treated Tackett on a monthly basis since January 2012 due to

increased symptoms. Dr. Gooch noted at the most recent visit, he recommended continuing muscle relaxers, avoiding heavy lifting, alternating sitting and standing, along with home therapy and regular use of a heating pad. On April 2, 2013, Dr. Gooch prepared a statement of medical necessity indicating Tackett needs a neurosurgical referral.

South Akers submitted three lumbar MRI reports. The March 15, 2004 MRI showed benign hemangioma L2 vertebral body and mild annular disc bulge at L4-5. The October 24, 2006 MRI showed L4/5 and L5/S1 annular bulges with mild neural foraminal narrowing; mild L3/4 disc bulge; and L2 vertebral body hemangioma. The January 7, 2013 MRI showed "broad-based large right herniation at L4-5. Small right herniation at L2-3."

In support of its medical dispute, South Akers attached the May 7, 2012 report of Dr. Vaughan, who noted he had performed two previous independent medical evaluations in 2004 and 2006. Dr. Vaughan noted the original December 8, 2003 work injury and reviewed Tackett's treatment history since the 2006 evaluation with Dr. Upadhyay, a pain management physician. He also noted Tackett's return to work from February 2007 to August 2010 and flare-up of low back pain in August 2011 while walking in his house. Dr.

Vaughan noted current complaints of left-sided low back pain with occasional numbness in the left anterior thigh.

Dr. Vaughan performed an examination and noted the 2004 and 2006 MRIs showed mild disc degeneration at L4-5 and L5-S1 with mild disc bulges, with no stenosis or herniated discs present. Dr. Vaughan stated as follows:

> This is a 45-year-old man with symptoms predominantly of axial/mechanical back pain. I would attribute this to lumbar spondylosis (age related degenerative changes). He also has some numbness in his anterior lateral thigh which I would say is most likely due to meralgia paresthetica associated with obesity.
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> . . . .
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> For ongoing care I believe use of a nonnarcotic analgesic such as Advil or Aleve, weight loss, and continuation of exercises would be appropriate. I do not see a medical reason why he would need to be seen every month for his back condition.
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> In my opinion his current back pain and numbness in his thigh is not related to the 2003 work accident. I base this on the fact that he returned to regular duty and had a long period of little to no back pain and was functioning normally. Latest bout of back pain started at home in August 2011. I do not think this is work related.

In an addendum dated March 19, 2013, Dr. Vaughan opined the right disc herniation at L4-5 demonstrated in the 2013 MRI is a new condition unrelated to his 2003 work

injury. He noted although Tackett has experienced low back and left leg pain since the work accident, a disc herniation had never been identified. He also noted previous symptoms had been on the left side. Dr. Vaughan opined the right disc herniation could not be objectively attributed to an injury occurring over ten years prior. Therefore, Dr. Vaughan stated "the new large right-sided L4-L5 disc herniation and the need for any medical treatment is not related to the 2003 work injury."

South Akers also submitted the January 18, 2013 records review report of Dr. Nemeth. He ultimately concluded the January 7, 2013 MRI findings are unrelated to the December 8, 2003 work injury. Rather, the findings are all "evolving ordinary disease of life and degenerative changes that have occurred over a long period of time and are not related to the original soft tissue injury to the back."

In the August 9, 2013 opinion, the ALJ found Tackett's current treatment with Dr. Gooch and the referral to a neurosurgeon not causally related to the 2003 work injury. He noted the symptoms following the original injury were on the left, and are now on the right. He also noted the sudden increase in pain. The ALJ determined Dr. Vaughan's opinions were persuasive. Tackett filed a

petition for reconsideration, which was denied by the ALJ in an order dated September 19, 2013.

On appeal, Tackett argues the ALJ erred in finding his ongoing medical treatment unreasonable, unnecessary and non-compensable. Tackett directs our attention to the treatment records of Dr. Gooch, including the July 25, 2012 report. He argues this report establishes Dr. Gooch's conservative treatment is reasonable, necessary and work-related. Tackett also argues the statement of medical necessity by Dr. Gooch explains the neurosurgical referral was necessary as a result of low back and left lower extremity pain based upon the findings of the 2013 MRI demonstrating a herniated disc. Similarly, Tackett argues South Akers failed in its burden to prove the treatment rendered by Dr. Gooch was unreasonable or unnecessary.

In a post-award medical fee dispute, Tackett is correct in noting the burden of proof to demonstrate whether the medical treatment is unreasonable or unnecessary is with the employer. However, 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); National Pizza Company vs. Curry, 802 S.W.2d 949 (Ky. App. 1991).

Since Tackett, the party with the burden of proof regarding work-relatedness of the continuing medical treatment, was unsuccessful before the ALJ, the question on appeal is whether the evidence is so overwhelming, upon consideration of the record as a whole, as to compel a finding in his favor. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). Compelling evidence is defined as evidence which is 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). We conclude there was no such evidence.

The ALJ, as fact-finder, is the sole judge of the weight and inferences to be drawn from the evidence and determines the quality, character, and substance of the evidence. *See* Square D Company v. Tipton, 862 S.W.2d 308 (Ky. 1993). The ALJ may reject any testimony and believe or disbelieve various parts of the evidence. *See* Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). 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). Although an opposing party may note evidence

supporting a conclusion contrary to the ALJ's decision, such evidence is not an adequate basis for reversal on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974).

South Akers supported its position with the opinions of Drs. Vaughan and Nemeth. Dr. Vaughan diagnosed Tackett with axial/mechanical back pain, attributable to age related degenerative changes. He also noted Tackett's numbness symptoms are attributable to obesity. In concluding Tackett's current symptoms are unrelated to the original 2003 work accident, Dr. Vaughan noted he had returned to work, had a long period of little to no back pain, and was functioning normally. Finally, Dr. Vaughan concluded the right-sided herniated disc appearing in the 2013 MRI is unrelated to the 2003 work injury since he had never had disc herniations following the 2003 accident and his symptoms were to his left side.

Dr. Vaughan's opinions constitute substantial evidence which could be and were relied upon by the ALJ regarding the work-relatedness of the treatment. Tackett merely points to the conflicting records and opinions of Dr. Gooch which would support a conclusion contrary to the ALJ's decision. This is not an adequate basis for reversal. It cannot be said the record compels the result Tackett seeks. This Board may not substitute its judgment for that

of the ALJ in matters involving the weight to be afforded evidence on questions of fact. *See* KRS 342.285(2).

Finally, Tackett requested an oral argument be held. After having reviewed the record, it is determined an oral argument is unnecessary in arriving at a decision, and therefore the request is **DENIED**.

Accordingly, the opinion and order rendered by Hon. Grant S. Roark, Administrative Law Judge, on August 9, 2013 and the order on reconsideration issued September 19, 2013 are hereby **AFFIRMED.**

ALL CONCUR.

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MICHAEL W. ALVEY, CHAIRMAN
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