Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: August 9, 2013

CLAIM NO. 201186784

VICKY G. SIZEMORE PETITIONER

VS. **APPEAL FROM HON. ROBERT L. SWISHER, ADMINISTRATIVE LAW JUDGE**

KAY & KAY CONTRACTING,
JOHN MCCLELLAN, M.D.,
and HON. ROBERT L. SWISHER,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING AND REMANDING

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

ALVEY, Chairman. Vicky Sizemore ("Sizemore"), *pro se*[1], seeks review of the decision rendered January 25, 2013 by Hon. Robert L. Swisher, Administrative Law Judge ("ALJ"), awarding permanent partial disability ("PTD") benefits and

[1] Sizemore was represented by counsel throughout the litigation of her claim and subsequently filed this appeal to the Board *pro se*.

medical benefits, but finding compensable chiropractic treatment rendered by Dr. John McClellan, D.C. only through December 19, 2011. Sizemore also seeks review of the order denying her petition for reconsideration rendered March 21, 2013.[2]

On appeal, Sizemore essentially argues the ALJ's determination limiting her chiropractic care through December 19, 2011 is erroneous, and not supported by substantial evidence. Because the ALJ's determination is supported by substantial evidence, and a contrary result is not compelled, we disagree and affirm.

Sizemore filed a Form 101 on March 19, 2012 alleging she injured her neck and back while employed by Kay & Kay Contracting, LLC ("Kay & Kay") on May 26, 2011, when she fell down steps as she was leaving work. At the time of the accident, Sizemore was employed as an administrative assistant for Kay & Kay.

In support of the Form 101, Sizemore attached the June 3, 2011 office note of Dr. Samuel Kreis, her family physician, stating she complained of right side, low back pain radiating into her right leg with a "numb" feeling

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[2] The date appearing on the order states March 21, 2012, but was actually rendered on March 21, 2013.

since her fall down steps at work the previous week. Dr. Kreis noted she complained of tenderness in the mid-lumbar region. He also noted she demonstrated positive findings in straight leg raising on the right, and negative on the left. He further noted normal reflexes in both lower extremities, and a decrease in sensation in the right leg.

Sizemore also filed the May 26, 2011 emergency room record from St. Joseph Hospital in London, Kentucky. The record reflects she fell down steps at work, and complained of low back pain.

Kay & Kay contested the chiropractic bills, and filed a motion to join Dr. McClellan, and McClellan Chiropractic Center, P.S.C. Those entities were joined as parties to the claim by order dated October 14, 2012.

Sizemore testified by deposition on May 4, 2012, and again at the hearing held November 30, 2012. At the time of her deposition, Sizemore was a resident of London, Kentucky, but had moved to Somerset, Kentucky by the date of the hearing. Sizemore was born on November 30, 1958. She is a high school graduate with some college coursework. She began working for Kay & Kay in January 1996 as an administrative assistant, which she described as consisting of general office duties such as typing, filing, etc. At

the time of the accident, she was the assistant to Ron Pfaff who was vice president of the company.

Sizemore testified she primarily treats with Dr. Kreis, her family physician. She initially stated she did not recall previous back treatment, but later admitted she had treated for low back pain in the distant past. She saw Dr. William Brooks, a neurosurgeon, several years prior to this accident for complaints of low back pain.

After the May 26, 2011 accident, Sizemore was taken to the local emergency room. She followed up with her family physician, and was referred to a neurosurgeon in Lexington who she saw on one occasion. She later saw Dr. El-Kaliny, a neurosurgeon with Lake Cumberland Neurosurgical, who recommended pain management. Instead, she sought chiropractic treatment with Dr. McClellan beginning in August 2011. She testified each treatment provides relief for two to three days. She stated the workers' compensation insurer authorized a certain number of chiropractic treatments, but she has paid for treatment received in excess of that authorization. She stated she continues to experience pain in her back and numbness in her right hip and leg.

Sizemore returned to work as an administrative assistant after the accident. She was laid off in January

2012 for reasons unrelated to her injury. She stated she does not believe she can return to her previous job because she cannot sit for long periods of time. She stated her family physician has not taken her off work. She also stated she experiences low back pain when she twists her right arm.

Carolyn Westerfield, the office manager for Kay & Kay and Sizemore's direct supervisor, testified by deposition on July 30, 2012. She stated Sizemore's job duties required no heavy lifting and consisted of answering the telephone, typing, preparing spreadsheets, filing, and general office duties. Sizemore returned to work the Monday following the accident with no restrictions, and continued to work there without difficulty until January 2012 when she was laid off for reasons unrelated to her injury. Since the layoff, Sizemore has drawn unemployment benefits.

Sizemore supported her claim with a treatment note from Physician's Express Care, dated May 31, 2011, which reflects complaints of mid and low back pain with numbness and tingling radiating into her right leg due to a fall at work. She also filed reports of imaging studies performed of her back on June 7, 2011, and left knee on October 28, 2011. The back study demonstrated mild discogenic changes,

and the knee study demonstrated no evidence of deep vein thrombosis or Baker's cyst.

Sizemore also submitted the Form 107-I medical report prepared by Dr. Robert K. Johnson, an orthopedic surgeon, who evaluated her on April 25, 2012. Dr. Johnson noted the May 26, 2011 injury when Sizemore slipped and fell down five steps. She complained of numbness in her right middle finger, low back pain and sensitivity in her right leg. He diagnosed a right sided fracture of the transverse process at L2; suspected S1 radiculopathy and complaints of numbness of the right middle finger. He found Sizemore had reached maximum medical improvement, and assessed a 7% impairment rating pursuant to the American Medical Association, Guides to Evaluation of Permanent Impairment, Fifth Edition ("AMA Guides"). He opined she does not retain the capacity to perform her previous work, and advised her to avoid repetitive or strenuous activities. Dr. Johnson specifically restricted her lifting repetitively greater than ten pounds, bending, carrying, pushing, pulling, shoveling and associated activities. In a follow up note dated September 22, 2012, Dr. Johnson stated he had reviewed additional x-rays, and his opinion regarding the impairment rating remained unchanged.

Dr. Johnson testified by deposition on August 1, 2012. He testified Sizemore's condition could not be explained by the physical findings. He specifically testified as follows:

> Q. And I think you mentioned in your report you thought she had some somatoform symptoms; is that correct?
>
> A. Yes sir.
>
> Q. And what exactly is a somatoform symptom?
>
> A. That's kind of a term that we finally came up with that was a little more politically soft. It means the person is not strictly factual.

Dr. Johnson also testified Sizemore does not have piriformis syndrome.

Dr. McClellan filed a response to a peer review performed by Dr. Steven B. Smith, D.C., on November 21, 2012. Dr. McClellan stated Dr. Smith did not review the complete file, and erred in stating there was no indication of a rehabilitation exercise program. He stated Sizemore has massive scar tissue of the right piriformis due to lack of initial care. Dr. McClellan later opined Sizemore's problems are not adequately addressed by the Official Disability Guideline due to a number of factors.

Dr. McClellan filed a report prepared by Dr. Christopher Gast, D.C., a chiropractor, who reviewed the

case on his behalf. Dr. Gast diagnosed chronic constant moderate to severe right lumbosacral low back pain with attendant chronic sacroiliac dysfunction/misalignment and associated right gluteal region myofascial trigger points causing referred radicular pain to the right foot and ankle. He also noted these conditions caused paresthesias of the right leg complicated by lumbar degenerative disc disease, a lumbar disc protrusion and facet arthropathy. He noted all chiropractic treatment administered resulted from her work injury. He stated Sizemore "may" have piriformis syndrome. Dr. Gast recommended chiropractic treatment two to three times per month, and possible trigger point injections.

Dr. Daniel D. Primm, Jr., an orthopedic surgeon, evaluated Sizemore at Kay & Kay's request on June 29, 2012. Dr. Primm noted the history of injury. He diagnosed a lumbar strain with history of L2 transverse process fracture due to a fall at work. He noted probable symptom magnification. Dr. Primm stated Sizemore had recovered from the slip and fall injury, and the fractured transverse process. He stated nothing on the examination or in the records demonstrated radiculopathy or nerve root compromise. He assessed a 3% impairment rating pursuant to the AMA Guides due to her residual complaints. He further stated Sizemore could return to work without restrictions. Dr.

Primm also opined Sizemore needs no additional or ongoing chiropractic treatment. In a supplemental note dated October 2, 2012, Dr. Primm stated there is no evidence of right L2 or other transverse process fractures.

Kay & Kay filed treatment records of Dr. McClellan from 2004 through October 12, 2011. Those records reflect previous treatment for low back and right hip pain in 2006. Additionally, Kay & Kay filed Dr. McClellan's treatment record from August 1, 2012 wherein he stated Sizemore's response to treatment is "worse" indicating the treatment rendered had not improved her condition.

Kay & Kay filed Dr. Paul Woolridges's MRI report dated September 12, 2012. Dr. Woolridge stated Sizemore has lumbar disc disease.

Kay & Kay submitted the chiropractic peer review report prepared by Dr. Smith on November 1, 2012. Dr. Smith opined ongoing chiropractic care was not reasonable or necessary. He noted a previous review by Bluegrass Health Network on November 1, 2011 approved chiropractic treatment three times per week for four weeks. He specifically stated, "Continued chiropractic intervention is not supported with measured objective findings of improved functional capacity or decreased activity tolerance."

Finally, Kay & Kay deposed Dr. Gast on January 3, 2013. Dr. Gast stated he was unaware Sizemore had seen neurosurgeons before she began treating with Dr. McClellan in August 2012. He was also unaware she had been referred to pain management. Dr. Gast was not provided her previous imaging studies from 2005 indicating degenerative lumbar changes and impingement at L5-S1. He agreed approximately one hundred treatment dates was a lot, and he stated he would like to see a quicker response to treatment of his patients. He stated there is no reason Sizemore cannot work. Dr. Gast agreed the treatment did not appear to be improving her condition. He specifically stated, "It does not look like anything is helping her, to be honest with you." He stated the fact she receives some pain relief, albeit brief, is significant.

A benefit review conference was held on August 8, 2012. Pertinent to this appeal, the compensability of Dr. McClellan's treatment was preserved as an issue.

The ALJ rendered a decision on January 25, 2013. Regarding the issue on appeal, he specifically found as follows:

> **Medical fee dispute contesting chiropractic treatment beyond the number of approved visits (unpaid or contested medical expenses); reimbursement of mileage expenses.**

The defendant disputes liability for expenses incurred with respect to chiropractic treatment rendered by Dr. McClellan subsequent to December 19, 2011. In support of its position the defendant/employer submitted a "physician review report" from chiropractor Steven B. Smith. Dr. Smith indicated that although he had recommended approval of chiropractic treatment at the rate of three times per week for four weeks as of November 2, 2011, continued chiropractic treatment beyond that time was not supported by Dr. McClellan's clinical records. Specifically, he indicated that continued chiropractic intervention was not supported with measured objective findings of improved functional capacity or "decreased activity intolerance" and there was no indication that the plaintiff was being transitioned to a dedicated and substantial rehabilitative exercise program or placed on a home exercise program to establish self-care. Further, Dr. Primm, in his report of June 29, 2012 expressed the opinion that plaintiff needed no further medical treatment for her work injury, "particularly any additional chiropractic or other passive treatment."

In support of ongoing chiropractic treatment the plaintiff submitted reports from Dr. McClellan, one of which was highly critical of Dr. Smith and the second of which indicated that the plaintiff's condition "mainly the piriformis syndrome" is not addressed in the ODG Guides specifically and that, in any event, guidelines issued by the Council on Chiropractic Guidelines and Practice Parameters provided recommendations with respect

to treatment of patients suffering ongoing chronic pain after treatment had exceeded ODG recommendations. He also noted that the plaintiff has several "complicating factors" which are by and large unrelated to the work injury itself. Finally, the plaintiff has submitted a report from chiropractor Christopher Gast which was requested by Dr. McClellan and offered support for the ongoing treatment provided by Dr. McClellan.

Having carefully considered the evidence submitted by the parties the Administrative Law Judge finds that the treatment rendered by Dr. McClellan subsequent to December 19, 2011, is not related to the residual effects of the work injury. Specifically, Dr. McClellan hangs his hat on a diagnosis of piriformis syndrome which the plaintiff's evaluating orthopedic surgeon, Dr. Johnson, specifically dismissed. When asked to comment on the diagnosis of piriformis syndrome, Dr. Gast was, in the undersigned's view, lukewarm at best in that the most he could say was that the plaintiff "may indeed be suffering from piriformis syndrome" (emphasis added). The diagnostic basis on which ongoing chiropractic treatment has been rendered, therefore, has been disproven by the testimony of Dr. Johnson which the undersigned finds more probative, persuasive and convincing than the chiropractic records and reports. Moreover, Dr. Johnson acknowledged that the plaintiff may have gluteal-related complaints which he could not causally attribute to the work injury. Therefore, having carefully considered the evidence and in light of the totality of the medical evidence submitted the Administrative Law Judge finds that chiropractic treatment

> rendered by Dr. McClellan subsequent to December 19, 2011, is not directly and causally related to the work injury of May 26, 2011 and is, therefore, not compensable. Having determined that the contested chiropractic treatment is not compensable, mileage expenses incurred by the plaintiff subsequent to December 19, 2011 to receive that treatment are likewise non-compensable.

Sizemore filed a petition for reconsideration alleging the ALJ erred in finding her alleged neck injury non-compensable. The petition for reconsideration was denied by the ALJ on March 12, 2013.

On appeal, Sizemore argues the ALJ erred in denying chiropractic treatment subsequent to December 19, 2011. Because Sizemore is proceeding *pro se*, we will attempt to explain the fundamental legal principles controlling how this Board must decide an appeal.

In the Kentucky's workers' compensation system, the ALJ functions as both judge and jury. When performing the duties of a jury, the ALJ is commonly referred to as the "fact-finder." As fact-finder, the ALJ reviews the evidence submitted by the parties and decides which testimony from the various witnesses is more credible and best represents the truth of the matter or matters in dispute. The ALJ, as judge, then applies the law to the facts as he determines them to be true. As a matter of

law, the facts as decided by the ALJ cannot be disturbed on appeal by this Board so long as there is some substantial evidence of record to support the ALJ's decision. *See* KRS 342.285(1); Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

Although we understand Sizemore is frustrated regarding the determination of compensability of chiropractic care rendered by Dr. McClellan, we also recognize the ALJ's job as fact-finder is difficult. As a rule, in every worker's compensation claim, both sides resolutely contend they have presented evidence of "the truth" concerning those matters at issue. It is for this very reason in cases where the evidence is conflicting, the facts concerning an issue as determined by the ALJ are afforded vast deference as a matter of law on appellate review.

Authority establishes Sizemore, as the claimant in a workers' compensation case, bore the burden of proving each of the essential elements of her cause of action before the ALJ, including compensability of her chiropractic treatment. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Sizemore was unsuccessful in her burden regarding the compensability of chiropractic care subsequent to December 19, 2011, 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 her favor. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984).

"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). As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the sole authority to judge all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/ Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d (Ky. 1979). The ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000); Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). Mere evidence contrary to the ALJ's decision is not adequate to require reversal on appeal. Id. In order to reverse the decision of the ALJ, it must be shown there was no substantial

evidence of probative value to support his decision. Special Fund v. Francis, supra.

Here, the record contains substantial evidence supporting the ALJ's determination chiropractic care subsequent to December 19, 2011 is non-compensable. In making his determination, the ALJ relied upon Dr. Smith's peer review report, Dr. Primm's report, and to a limited extent Dr. Johnson's opinion she does not have piriformis syndrome. This constitutes substantial evidence supporting the ALJ's determination regarding compensability of additional chiropractic care, and a contrary result is not compelled. The ALJ properly considered all evidence of record, weighed that evidence, and reached a decision supported by substantial evidence and in conformity with the law. Thus, we are without authority to direct a different result.

It is noted Sizemore's attorney, who represented her before the ALJ, filed a motion for approval of attorney fee. This appeal was filed, and the ALJ lost jurisdiction prior to ruling on that motion. Sizemore made reference to the attorney fee in her brief; however, since that issue is not before us, it will not be addressed. Although we affirm the ALJ's decision regarding compensability of chiropractic care subsequent to December 19, 2011, we

remand for determination of any attorney fee due Sizemore's attorney.

Accordingly, the January 25, 2013 Opinion and Order and the March 21, 2013 order on petition for reconsideration rendered by Hon. Robert L. Swisher, Administrative Law Judge, are hereby **AFFIRMED**. This claim is **REMANDED** for determination of an appropriate attorney fee.

RECHTER, MEMBER, CONCURS.

STIVERS, MEMBER, NOT SITTING.

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