Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: March 13, 2015

CLAIM NO. 200585736

WALMART STORES, INC. PETITIONER

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

KRISTIN FITZPATRICK,
LAWRENCE PETERS, M.D.,
HON. JOHN B. COLEMAN,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

ALVEY, Chairman. Walmart Stores Inc. ("Walmart") appeals from the November 3, 2014 opinion rendered by Hon. John B. Coleman, Administrative Law Judge ("ALJ"), finding compensable contested treatment for Kristin Fitzpatrick's ("Fitzpatrick") left knee and complex regional pain syndrome

("CRPS"), including Morphine, Fentanyl lollipop, Clonazepam and Zolpidem. No petition for reconsideration was filed.

On appeal, Walmart argues the ALJ exceeded his authority and committed reversible error when he "discounted" the opinions of Drs. Suzanne Novak and David Shraberg because they questioned whether Fitzpatrick suffers from CRPS Type I. Because we find no error, and the ALJ's decision is supported by substantial evidence, we affirm.

Fitzpatrick filed a Form 101 on October 18, 2006 alleging she injured her left knee and subsequently developed reflex sympathetic dystrophy ("RSD") when she tripped on a yellow blind which had fallen from a box at work on November 18, 2004. On January 31, 2008, the ALJ found Fitzpatrick sustained a traumatic work-related injury on November 18, 2004 resulting in a left knee injury, and development of CRPS. The ALJ determined treatment for CRPS and the use of a spinal cord stimulator were reasonable. On February 20, 2009, the ALJ rendered a decision awarding Fitzpatrick permanent total disability benefits, and ordered Walmart to pay for treatment for CRPS Type I pursuant to KRS 342.020, including treatment by Dr. Lawrence H. Peters.

On December 12, 2013, Walmart filed a motion to reopen, and Form 112, to challenge medications prescribed by Dr. Peters. Attached to the medical dispute, Walmart

attached the October 29, 2013 utilization review ("UR") report of Dr. Terry L. Troutt, a physical medicine and rehabilitation physician. Dr. Troutt recommended denial of treatment with Morphine Sulfate, Fentanyl lollipops, Clonazepam and Zolpidem Tartrate. Walmart also attached the November 15, 2013 UR report of Dr. Glenn Babus, D.O., an anesthesiologist, who stated the clinical information does not establish the medical necessity for the request for treatment. An order was issued on January 16, 2014 reopening the claim for consideration of the medical dispute.

On February 5, 2014, an initial telephonic conference was held. The parties agreed the challenge was to the reasonableness and necessity of prescriptions for Morphine, Fentanyl lollipops, Clonazepam and Zolpidem. A proof schedule was issued.

On February 14, 2014, a letter from Dr. Peters was filed. Dr. Peters noted Fitzpatrick sustained a work-related injury to the left lower extremity, and developed CRPS/RSD. She failed to respond to rehabilitation and multiple treatment modalities. He stated Fitzpatrick's current medical regimen, including the medications prescribed, has given her the best symptomatic control of her pain. He noted Fitzpatrick has not exhibited abusive

behavior during her treatment, and is closely monitored with drug screens. He stated her current medical treatment provides some mild pain relief, and allows her to participate in some activities of daily living.

In a supplemental letter dated June 13, 2014, Dr. Peters stated he disagreed with Dr. Shraberg's opinions, and noted multiple physicians have diagnosed her with RSD or CRPS. He stated unfortunately Fitzpatrick has failed to respond to her treatment. He explained why Fitzpatrick has been diagnosed with CRPS. He also noted Dr. Shraberg's recitation of Fitzpatrick's treatment was not entirely correct.

Walmart filed the March 8, 2014 records review report prepared by Dr. Novak. Dr. Novak stated it is difficult to determine if Fitzpatrick's treatment plan is reasonable, necessary and appropriate, because her diagnosis does not appear to be accurate despite the ALJ's previous decision. She stated Fitzpatrick may have osteonecrosis of the left knee which is not work-related. She stated she needed additional information to determine whether MS-Contin or Morphine is appropriate. She stated Actiq is not medically necessary. She stated Zolpidem is inappropriate and Nexium is not work-related. She stated she needed a clarification regarding the Klonopin, but it may not be

work-related. She stated she needed additional information to make a determination regarding Promethazine. She stated Tizanidine may be required.

In a supplemental report dated August 10, 2014, Dr. Novak stated she had received additional material to review, including Dr. Peter's letter. She stated she agreed with Dr. Shraberg. She stated Fitzpatrick is over-medicated and at risk for serious adverse effects.

Walmart also filed the May 6, 2014 report of Dr. Shraberg who evaluated Fitzpatrick on April 28, 2014. He stated, "Ms. Fitzpatrick suffers from a serve chemical dependency associated with essentially a primarily psychogenic somatic symptom of obvious psychogenic origin." He stated she had become chemically dependent in a manner similar to her mother and both siblings. He noted her narcotic regimen is both astounding and causing more pain, dependency and impairment than the original injury. He stated Fitzpatrick had been misdiagnosed and improperly treated for her "**right**" knee injury. He diagnosed atypical somataform disorder; severe chemical dependency, narcotics, severe; and substance induced mood disorder – reversible. He further stated the diagnoses of regional pain syndrome and RSD are inappropriate and suggested a narcotic weaning

program, weight loss, physical therapy and lifestyle changes.

In a supplemental report dated June 11, 2014, Dr. Shraberg again disagreed with the treatment provided by Dr. Peters. He stated Fitzpatrick's continued problems are due to severe opiate dependency and she needs to be detoxified.

Dr. Shraberg also testified by deposition on May 28, 2014. He criticized the medication regimen prescribed by Dr. Peters. He stated Fitzpatrick's treatment is neither reasonable nor necessary, except for Tizanidine. He further opined Fitzpatrick has a psychogenic illness unrelated to her work injury. He stated a diagnosis of CRPS or RSD is inappropriate.

In a decision rendered November 3, 2014, the ALJ reiterated his previous determination of February 20, 2009 finding Fitzpatrick permanently totally disabled, and awarding medical benefits, including treatment for CRPS, Type I by Dr. Peters. He stated the issue before him was a determination of treatment with Morphine, a Fentanyl lollipop, Clonazepam and Zolpidem Titrate.

The ALJ extensively reviewed all of the medical documentation submitted. He noted Walmart had the burden of proving medical treatment is not reasonable or necessary pursuant to National Pizza Company v. Curry, 802 S.W.2d 949

(Ky. App. 1991); and Fitzpatrick had the burden of proving work-relatedness and causation pursuant to R.J. Corman R.R. Construction Company v. Haddix, 864 S.W. 2d 915 (Ky. 1993). The ALJ noted the existence of CRPS had been established through a university evaluator in the original claim pursuant to KRS 342.315, and that determination is *res judicata*.

Regarding the opinions of Drs. Novak and Shraberg, the ALJ stated as follows:

> While I respect the opinions of Dr. Novak and Dr. Shraberg, I must be cognizant of the fact that both of these physicians were under the belief the plaintiff does not suffer from CRPS, type I. Dr. Novak indicated the plaintiff was apparently misdiagnosed with that condition and Dr. Shraberg clearly believes the plaintiff's symptoms to be attributable to something other than CRPS. Since the university evaluator originally found her to suffer from the condition and there has been a judicial determination that she had the condition for which she is entitled to treatment, I feel I have no choice but to somewhat discount the opinions of these two respected physicians in this particular instance. I was and continue to be convinced the plaintiff has CRPS, type I as previously determined. While I recognize that some of the medications have potential risks as is noted by these evaluating physicians, I also have a great deal of faith in the treating physician, Dr. Lawrence Peters, who has cared for the plaintiff for a number of years and was, in fact, correct in his original diagnosis of CRPS. He defended

> his treatment regimen noting that he had attempted other methods for providing the plaintiff some symptomatic control of pain which had not been effective. He is clearly monitoring the plaintiff's use of the narcotic medications as he indicated he has had genetic testing performed in an effort to determine if the plaintiff had any predisposition for misuse and that he had not found any signs of abusive behavior. He clearly understands the nature of the treatment, but also understands the plaintiff is in severe and intractable pain. After a review of the entirety of the evidence, I am convinced the current medication regimen prescribed to the plaintiff by Dr. Peters is reasonable and necessary as a palliative care to improve her quality of life. While the treatment is not without risk, I am convinced it is reasonable and necessary for the cure and relief of the plaintiff's work injury in this particular instance.

The ALJ found the contested medications prescribed by Dr. Peters are compensable. He stated Walmart shall remain responsible for treatment of Fitzpatrick's work injuries pursuant to KRS 342.020.

We begin by noting Walmart did not file a petition for reconsideration and appealed directly to the Board. When no petition for reconsideration is filed, the ALJ's award or order is conclusive and binding as to all questions of fact. KRS 342.285(1). Absent a petition for reconsideration, the issue is narrowed to whether the ALJ's decision is supported by substantial evidence in the record.

Halls Hardwood Floor Co. v. Stapleton, 16 S.W.3d 327 (Ky. App. 2000).

Walmart argues the ALJ erred in discounting the opinions of Drs. Novak and Shraberg because they questioned the diagnosis of CRPS Type I. Here the ALJ painstakingly outlined the facts and the basis for his decision. The ALJ particularly noted the issue of whether Fitzpatrick has CRPS was previously litigated, and is *res judicata*. We agree. Here the issue, as noted by Walmart, is not the diagnosis, but the reasonableness and necessity of the treatment. Based upon the facts, we believe the ALJ could reasonably conclude the medications prescribed are reasonable and necessary for treatment of the work-related injury, and therefore compensable. Despite evidence to the contrary, a different result is not compelled. Compelling evidence is defined as evidence which is so overwhelming no reasonable person could reach the same conclusion as the ALJ. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984); REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985). Hence, we find no error.

Notwithstanding the holding in C & T Hazard v. Chantella Stallings, et al., 2012-SC-000834-WC, 2013 WL 5777077 (Ky. 2013), an unpublished case from the Kentucky Supreme Court, a long line of reported decisions 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, supra; 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); Addington Resources, Inc. v. Perkins, 947 S.W.2d 421 (Ky. App. 1997).

Here, the ALJ determined the evidence established the contested treatment regimen in the form of medications was compensable. The ALJ then proceeded to outline the basis for his decision. It was not error for the ALJ to specifically note the physicians relied upon by Walmart opined the diagnosis of CRPS was incorrect. The ALJ's decision regarding the medications is well reasoned, and is supported by the evidence.

Although Walmart has presented UR reports, records review reports from Dr. Novak, and an evaluation report from Dr. Shraberg in support of its position, these merely present a contrary viewpoint upon which the ALJ could have relied but did not. As noted above, a contrary result is not compelled. REO Mechanical v. Barnes, supra.

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).

Accordingly, the Opinion and Order rendered by Hon. John B. Coleman, Administrative Law Judge, on November 3, 2014 is hereby **AFFIRMED.**

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON H DOUGLAS JONES
P O BOX 0095
FLORENCE, KY 41022

RESPONDENT (*PRO SE*):

KRISTIN R FITZPATRICK
514 RIVER ROAD
HANOVER, IN 47243

RESPONDENT:

LAWRENCE PETERS, MD
1900 BLUEGRASS AVE, STE 200
LOUISVILLE, KY 40215

ADMINISTRATIVE LAW JUDGE:

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