Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: July 5, 2019

CLAIM NO. 200691823

BRIAN J. CAMUEL PETITIONER

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

NOLAN FORD OF GEORGETOWN
DR. OLIVER C. JAMES
and HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING IN PART,
VACATING IN PART & REMANDING

* * * * * *

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

STIVERS, Member. Brain J. Camuel ("Camuel") appeals from the March 18, 2019, Order sustaining Nolan Ford of Georgetown's ("Nolan Ford") petition for reconsideration and the April 17, 2019, Order overruling in part and sustaining in part Camuel's petition for reconsideration of Hon. Grant S. Roark, Administrative Law Judge ("ALJ"), resolving a medical fee dispute filed by Nolan Ford. Camuel

does not appeal from the February 18, 2019, Opinion and Order, in which the ALJ determined Ketoprofen and the treatment for Camuel's thoracic spine are work-related and compensable, but thoracic spine diagnostic studies and trigger point injections are not compensable. In the March 18, 2019, Order sustaining Nolan Ford's petition for reconsideration, the ALJ determined Nolan Ford is only responsible for payment of one narcotic pain medication and one muscle relaxant, but not two.

On appeal, Camuel asserts his pain and muscle relaxer medications were not an issue in the medical dispute. He further asserts the ALJ's decision to limit his pain and muscle relaxer medication is not supported by substantial evidence.

The Form 101 alleges Camuel sustained work-related injuries to his lower back on March 24, 2006, in the following manner: "I was lifting a wheel with a tire."

The record contains a Form 110 Settlement Agreement, entered into between the parties and approved on March 7, 2011. The settlement agreement describes the nature of the injury as "low back at L4-5 disc level," and indicates Camuel underwent a fusion and discectomy at L4-5. The agreement further indicates three physicians provided impairment ratings: Dr. Timothy Kriss, 11%; Dr. John J. Vaughan, 12%; and Dr. James Bean, 20%. The parties settled for a lump sum amount of $94,000.

A Motion to Reopen/Form 112 Medical Fee Dispute was filed by Nolan Ford on February 2, 2018, in which the nature of the dispute is noted as

follows: "Request for pre-authorization of topical analgesic compound medication; Treatment of unrelated body part – thoracic spine."

The Motion to Reopen was sustained by Order dated March 2, 2018.

On May 15, 2018, Nolan Ford filed a "Verified Motion for Extension of Proof Time" requesting additional proof time of up to and including June 25, 2018, so that it may file the Independent Medical Examination ("IME") report of Dr. Gregory Snider. By order dated May 25, 2018, the motion was sustained.

Camuel filed the May 25, 2018, "Questionnaire" completed by Dr. Oliver James. Dr. James checked "yes" by the following: "Please state whether your treatment for Brian Camuel's thoracic spine pain and muscle spasms, specifically the trigger point injections, Ketoprofen 100%, and any diagnostic studies you ordered, are related to his 03/24/06 L3-4-5 work injury." Dr. James handwrote the following explanation: "Mr. Camuel has a dorsal column stimulator implanted at the region of T6, T9 and T8 to assist with pain in the lumbar region and bilateral leg pain. The paddle lead was surgically placed with anchoring hardware causing irritation of the thoracic musculature (ie spasms)." Dr. James also checked "yes" by the following: "Please state whether the aforementioned treatments are reasonable and necessary."

Pursuant to the May 25, 2018, Order, Nolan Ford filed the June 13, 2018, IME report of Dr. Snider. Dr. Snider performed an examination and medical records review. He noted Camuel was on the following medication regimen: "oxymorphine 10 mg q.i.d., Neurontin 800 mg t.i.d., Percocet 10 mg q.i.d., Zanaflex

4 mg q.h.s., Soma 350 mg q.h.s., and Mobic 7.5 mg q.d."[1] Dr. Snider set forth the following opinions:

> 1. Mr. Camuel's diagnosis relative to the 03/24/06 work injury is low back pain with left radiculopathy. He is now status post five surgeries without resolution of his complaints.
>
> 2. I recommend conservative treatment for Mr. Camuel. I do not see an indication for additional surgical intervention, injection therapy, or other aggressive or invasive [sic]. I recommend a conservative approach with the realization that Mr. Camuel will continue to complain of significant back and leg pain. Prognosis for resolving his complaints is extremely poor. I agree with an anti-inflammatory as a baseline medication, **I recommend either Soma <u>or</u> Zanaflex at bedtime for sedating properties to assist in sleep.** The effect of Neurontin is not clear at this time, but seems reasonable. **I recommend weaning Mr. Camuel to a single narcotic**: based on his 12-year history and five surgical procedures, in my opinion, it is reasonable to expect that he will require ongoing pain medication.
>
> 3. Dr. James' prescription for topical ketoprofen gel is related to a complication of the spinal cord stimulator implant that was done for long-term symptoms related to the 03/24/06 injury. Mr. Camuel reports that it gives him some relief; therefore, in my opinion, it is reasonable.
>
> 4. Mr. Camuel reports to me that the trigger point injections resulted in 45% relief of pain for about two to three weeks. He says this was done only once. Despite the short period of relief, he asserts that he would have the procedure done again; however, in my opinion, it is unlikely to have any long-term effect and, in my opinion, is not reasonable or necessary.
>
> 5. In my opinion, Mr. Camuel does not require additional diagnostic testing for his thoracic spine. The symptoms he is having, as above, are related to a complication of

[1] Zanaflex and Soma are muscle relaxers, and Dr. Snider's report indicates both are taken "q.h.s." or at bedtime.

> spinal cord stimulator treatment for his original 03/24/06 injury. It does not appear, based on documentation and clinical evidence, that the stimulator has resulted in much functional improvement. Options are that it could: remain in place, functioning partially as it is, be turned off or "decommissioned," or it could be removed. In any event, I cannot predict what effects any of these options might have. (emphasis added).

Camuel filed his August 30, 2018, Affidavit which states the following:

> I suffered an injury to my lumbar spine (L4-L5-S1) on 3-24-2006.
>
> I have undergone six or seven surgeries by Dr. Harry Lockstadt and then Dr. James Bean, who ultimately did a two-level fusion.
>
> Because the pain persisted, I had a spinal cord stimulator (SCS) placed in my back on 7-19-2017 by Dr. Robert Owen.
>
> The attached photo of my back depicts the two places in my back where Dr. Owen operated, the upper scar is where he placed lead wires and the scar near my right hip is where the SCS is implanted.
>
> The attached x-ray pictures show the paddle leads that are in my mid-back (the upper scar) and the lead wires that run from the SCS up the my mid-back.
>
> The SCS helped to reduce my back pain to the point that I have been able to work part-time light duty jobs such as the Kroger deli and delivering hot meals to the elderly and disabled.
>
> After the SCS was implanted I started to feel pain in my mid back, above my original injury but in the area where the SCS paddles and leads were implanted.
>
> I returned to Dr. Owens and he recommended an MRI and prescribed Ketoprofen cream which the WC insurance denied. I paid for the medicine out of my pocket and it helped reduce the pain.

> **I have been on pain medication since 2006 and I currently take Oxymorphine and Percocet. Since the SCS was implanted, my prescribed dosage of Oxymorphine has been *reduced* from 30 mg twice a day down to 10 mg once a day.**
>
> **I take two different muscle relaxers to relieve my back pain. I take one during the day that is non-drowsy and I take another type at night that makes me drowsy and helps me sleep.**
>
> **Without the pain medications and the two types of muscle relaxers my back pain would be much worse and I would not be able to even work part-time.** (emphasis added).

In the February 18, 2019, Opinion and Order, the ALJ set forth the following findings of fact and conclusions of law:

> As indicated above, the only issues in this reopening for a medical dispute are whether plaintiff's prescription for ketoprofen 100%, a topical compound gel, is reasonable and necessary, and whether any treatment for plaintiff's thoracic spine is causally related to the effects of his original work injury. Plaintiff relies on the opinions of his treating physician, Dr. James, who ordered thoracic trigger point injections to attempt to relieve plaintiff's pain from his work injury and who prescribes the compound gel for pain relief as well. For its part, the defendant employer relies on the opinions of its expert, Dr. Snider. Dr. Snider concluded the compound gel provides relief of plaintiff's symptoms and, therefore is reasonable and necessary. He added that plaintiff's thoracic spine pain is coming from his lumbar injury and his spinal cord stimulator and, therefore, is work-related. Because the thoracic pain is coming from the lumbar spinal cord stimulator, thoracic spine diagnostic studies are not necessary. He also indicated thoracic trigger point injections, while work-related, would not be reasonable or necessary because they do not provide any significant ongoing relief of symptoms.
>
> Having reviewed the limited evidence available, the Administrative Law Judge is ultimately most

> persuaded by Dr. Snider's opinions. Dr. Snider explained that the ketoprofen gel is effective and he would consider it reasonable. He also explained that plaintiff's thoracic spine pain is emanating from plaintiff's lumbar spine and his spinal cord stimulator, and not due to some separate thoracic spine pathology. He therefore concluded treatment of thoracic spine symptoms would be work-related but that thoracic diagnostic studies and additional thoracic spine trigger point injections would not be reasonable. Based on Dr. Snider's conclusions, it is determined the disputed ketoprofen gel is reasonable and necessary and compensable. It is further determined that treatment of plaintiff's thoracic spine symptoms is work-related and compensable, but that thoracic spine diagnostic studies and additional thoracic spine trigger point injections would not be reasonable or necessary and, therefore, are not compensable.

Nolan Ford filed a petition for reconsideration, asserting the ALJ erred by failing to issue a ruling on the reasonableness and necessity of Camuel's medication stating, in relevant part, as follows:

> 3. On August 23, 2018, the parties conducted a telephonic status conference. At that time, the undersigned advised that Ketoprofen was no longer contested based on Dr. Snider's report, but the Respondent's medication regimen was no [sic] at issue. The ALJ granted the parties an additional thirty (30) days to submit evidence.
>
> …
>
> 7. The Movant respectfully petitions the ALJ for additional findings of fact and conclusions of law regarding the medical reasonableness/necessity of the Respondent's use of two different narcotic pain medications and two different muscle relaxers. In hindsight, the undersigned realizes that the best course would have been to file a Motion to amend this dispute to include the issue, but the undersigned nonetheless believes the issue was properly raised during the August 23, 2018 phone conference as demonstrated by the fact

> that the Respondent's subsequently filed affidavit specifically addressed the medication issue.

In his Response to Nolan Ford's petition for reconsideration, Camuel asserted Nolan Ford seeks to expand the scope of its original medical fee dispute.

In the March 18, 2019, Order, the ALJ held as follows:

> This matter comes before the Administrative Law Judge pursuant to the defendant employer's petition for reconsideration of the Opinion & Order rendered on February 18, 2019. In its petition, the defendant employer argues it [sic] the Opinion & Order erroneously failed to address the reasonableness and necessity of plaintiff's medication regimen with Dr. James. Specifically, it argues that [sic] submitted Dr. Snider's report, in which Dr. Snider indicated plaintiff required only one narcotic pain medication and one muscle relaxant, rather than two of each as prescribed at that time by Dr. James. In his response, plaintiff argues the medical dispute was never properly amended to include the medication regimen.
>
> Having reviewed the defendant employer' has [sic] petition and the plaintiff's response thereto, the ALJ is first persuaded the defendant employer did not formally amend its medical dispute to challenge the reasonableness and necessity of Dr. James' prescriptions for two narcotic pain medications and two muscle relaxers. However, the ALJ is also persuaded that the issue was tried by implied consent and that counsel for the defendant employer advised all parties present in the August 23, 2018 telephonic conference that plaintiff's medication regimen was now at issue. As a result of that information, the parties were given an additional 30 days to submit evidence. On August 31, 2018, plaintiff's counsel filed plaintiff's affidavit, in which he explained why he believed he should be continued on his current medications. It was not until December 4, 2018, and another telephonic conference, that this matter was submitted for a decision on the record, without a hearing. Based on these facts, the ALJ is persuaded the defendant

> employer advised all parties who chose to participate of the new issues regarding Dr. James' medication regimen and that all interested parties have the opportunity to respond and submit evidence on the issue. Accordingly, the ALJ finds it is appropriate to conform the pleadings to the evidence filed and amend the defendant employer's medical dispute to include the reasonableness and necessity of plaintiff's medication regimen.
>
> Having therefore concluded the reasonableness and necessity of plaintiff's medication regimen was an issue to be determined, the ALJ agrees it was error not to address that issue. With regard to the reasonableness and necessity of the medication regimen, the ALJ is persuaded by Dr. Snider's opinions. He pointed out that, given plaintiff's condition and symptoms, it was appropriate for plaintiff to be prescribed one narcotic pain medication and one muscle relaxant, but not two of each. Although plaintiff's affidavit explained his belief why his medication should not be altered, the ALJ is more persuaded by Dr. Snider's explanations and expert opinion.
>
> For these reasons, the defendant employer's petition for reconsideration is sustained and it is further determined that the defendant employer shall only be responsible for payment of one narcotic pain medication in[sic] one muscle relaxant as prescribed by Dr. James, but not two of each.
>
> In all other respects, the February 18, 2019 Opinion & Award remains unchanged.

Camuel filed a petition for reconsideration asserting several arguments. First, Camuel asserted the reasonableness and necessity of his pain and muscle relaxer medication were not an issue before the ALJ. Next, Camuel asserted Nolan Ford failed to conduct a Utilization Review regarding the medication. Camuel also argued the ALJ exceeded his authority by allowing Nolan Ford to modify the medical fee dispute. Finally, Camuel argued that, assuming *arguendo*, the

medical fee dispute was properly amended, the ALJ misconstrued Dr. Snider's report.

In the April 17, 2017, Order, the ALJ overruled in part and sustained in part Camuel's petition for reconsideration ruling as follows:

> This matter comes before the Administrative Law Judge upon the plaintiff's petition for reconsideration of the March 18, 2019 Order sustaining the defendant employer's petition for reconsideration by adding the reasonableness and necessity of Dr. James' medication regimen of two narcotic medications and two muscle relaxers and then finding that one of each would be reasonable and necessary but not two of each. Plaintiff argues those issues were not properly before the ALJ because the defendant employer never performed utilization review on those questions as required by the Regulations. He also argues that even if the ALJ correctly amended the pleadings to conform to the evidence, it was not proper to immediately cease one of plaintiff's narcotic medication as even Dr. Snider recommended gradual weaning.
>
> Having reviewed the plaintiff's petition and being otherwise sufficiently advised, the ALJ first is not persuaded the compensability of two narcotic and two muscle relaxers were not properly before the ALJ for determination. As indicated in the March 18, 2019 Order, all parties were made aware of those issues and were given ample time to respond and file evidence. At no time prior to the current petition for reconsideration was the issue of UR not being performed ever raised as a contested issue. As such, to require the issue to be dismissed would only require the defendant employer, and the plaintiff, to go through the UR process and then file another medical fee dispute and motion to reopen. For these reasons and those set forth in the March 18, 2019 Order, plaintiff's petition with respect to whether it was error to address the reasonableness and necessity of plaintiff's prescription regimen with Dr. James is OVERRULED.

> However, with respect to plaintiff's petition as to whether one narcotic may be immediately ceased or, instead, should be gradually tapered as recommended by Dr. Snider, the defendant employer's expert, plaintiff's petition is SUSTAINED. Dr. Snider did recommend that any narcotic to be eliminated should be gradually tapered and the ALJ specifically so finds.

Camuel first asserts the reasonableness and necessity of his pain and muscle relaxer medication were not before the ALJ. We affirm on this issue.

As stated by the ALJ in both the March 18, 2019, Order and the April 17, 2019, Order, all parties were notified at the August 23, 2018, telephonic conference that Nolan Ford was also contesting Camuel's pain and muscle relaxer medication regimen. At that time, the parties were given an additional thirty (30) days to submit evidence, and Camuel utilized that time by submitting the above-recounted affidavit addressing why his pain and muscle relaxer medication regimen is necessary. As stated by Camuel in his affidavit, '[w]ithout the pain medications and the two types of muscle relaxers my back pain would be much worse and I would not be able to even work part-time." At no time did Camuel file medical evidence addressing the reasonableness and necessity of taking two narcotic pain medications and two muscle relaxers, nor did he request additional proof time beyond the thirty additional days the ALJ granted at the August 23, 2018, telephonic conference. Even though in the March 18, 2019, Order, the ALJ acknowledged Nolan Ford did not formally amend its medical fee dispute to challenge the reasonableness and necessity of Camuel's two narcotic pain medications and two muscle relaxers, he determined the issue was tried by consent by all parties. As this Board has no reason to challenge the veracity of the ALJ, we affirm on this issue.

Camuel next asserts the ALJ's decision to limit his narcotic pain medication and muscle relaxer medication is not supported by substantial evidence. We affirm on the issue of the narcotic pain medication, vacate the ALJ's determination regarding the muscle relaxers, and remand for additional findings.

In a post-award medical fee dispute, the burden of proof to determine if the medical treatment is unreasonable or unnecessary is with the employer. *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). Since Nolan Ford was successful in its burden, the question on appeal is whether the ALJ's determination is supported by substantial evidence. "Substantial evidence" is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (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, 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).

The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to the weight and credibility to be afforded the evidence or by noting reasonable inferences which otherwise could have been drawn from the record. Whittaker v. Rowland, 998 S.W.2d 479, 481 (Ky. 1999). So long as the ALJ's ruling with regard to an issue is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

The ALJ determined Nolan Ford is not responsible for paying for more than one narcotic pain medication and one muscle relaxer medication, and he relied upon Dr. Snider's medical opinions to reach this determination. The ALJ could reasonably infer from Dr. Snider's report that only one narcotic medication is reasonable and necessary for the treatment of Camuel's work-related injury, as Dr. Snider clearly stated he recommends, "weaning Mr. Camuel to a **single** narcotic." (emphasis added).

Despite Camuel's argument to the contrary, it is not necessary for Dr. Snider to have specifically stated two narcotic pain medications are neither

reasonable nor necessary. It is sufficient for Dr. Snider to recommend Camuel be weaned to a single narcotic medication. Camuel's reliance upon the Board's decision in Shelley Matz v. University of Louisville (No. 1999-59022, April 23, 2009) for this assertion is misplaced. While it is true, in Matz, that Dr. Lawrence J. Frazin recommended Matz's doctor consider using only one prescription, Methadone, Dr. Frazin also opined the two medications at issue, MS-Contin and Fentanyl, "were appropriate and secondary to the injury." Therefore, despite Camuel's argument on appeal, the Board's *actual* inquiry in Matz on this specific issue centered on what Dr. Frazin said (i.e. MS-Contin and Fentanyl were appropriate and secondary to the injury) and not what he did not say (i.e. MS-Contin and Fentanyl were neither reasonable nor necessary).[2] In contrast, while Dr. Snider did recommend Camuel be weaned to one narcotic pain medication in the case *sub judice*, we do not have a definitive statement from Dr. Snider indicating both narcotic pain medications are appropriate. Consequently, we affirm the ALJ's conclusion, based upon Dr. Snider's medical opinions, that only one narcotic pain medication is reasonable and necessary for the treatment of Camuel's work-related injury.

[2] The Board was affirmed in the unpublished opinion University of Louisville/American Interstate Insurance Company v. Matz, 2009-CA-1004-WC (Nov. 13, 2009).

That said, we vacate the ALJ's finding regarding Camuel's muscle relaxer medication and remand for additional findings. In Dr. Snider's June 13, 2018, IME report, he notes Camuel is taking both Zanaflex and Soma muscle relaxers "q.h.s." or at bedtime. Based upon this understanding of Camuel's muscle relaxer regimen, Dr. Snider recommended Camuel to take either Zanaflex or Soma at bedtime. However, in Camuel's affidavit, he states he takes one muscle relaxer during the day and one at night. Yet, Dr. Snider never acknowledges Camuel taking a daytime muscle relaxer in his report. On remand, the ALJ must address and resolve this discrepancy. While the ALJ certainly has the discretion to rely exclusively upon Dr. Snider's understanding of Camuel's muscle relaxer regimen and his recommendation that Camuel take only one at bedtime, the ALJ must at least acknowledge the discrepancy between what Dr. Snider has noted in his report regarding Camuel's usage of muscle relaxers and what Camuel has asserted in his affidavit.

Accordingly, regarding the ALJ's determination the issue of the Camuel's pain and muscle relaxer mediation regimen was tried by consent and his conclusion Nolan Ford is only responsible for paying for one narcotic pain medication, the March 18, 2019, Order and the April 17, 2019, Order are **AFFIRMED**. The ALJ's determination regarding the muscle relaxer medications is **VACATED**. The claim is **REMANDED** to the ALJ for additional findings consistent with the views set forth herein.

ALL CONCUR.

DISTRIBUTION:

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