Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: **December 14, 2018**

CLAIM NO. 201176738

CHRIS MIXON PETITIONER

VS.

APPEAL FROM HON. JOHN H. McCRACKEN,
ADMINISTRATIVE LAW JUDGE

ANYTHING GROES/LUSTIG ENTERPRISES,
MICHAEL CRONEN, D,O.,
And HON. JOHN H. McCRACKEN,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

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

RECHTER, Member. Chris Mixon appeals from the August 6, 2018 Opinion and Order rendered by Hon. John H. McCracken, Administrative Law Judge ("ALJ"). In a medical dispute, the ALJ determined quarterly office visits and two urine drug tests per year are reasonable. On appeal, Mixon argues the ALJ erred in denying

monthly office visits with Dr. Michael C. Cronen and in limiting the frequency of urine drug testing. For the reasons set forth herein, we affirm.

Mixon resolved his claim for an August 15, 2011 low back injury by agreement approved on August 5, 2013. The parties settled the claim based upon a compromise 6.5% impairment rating. Mixon retained his right to future medical benefits. Anything Groes/Lustig Enterprises ("Lustig Enterprises") filed a medical fee dispute arguing monthly office visits, quarterly drug screens, and continued use of compound creams and Biofreeze are not medically reasonable or necessary for treatment of Mixon's work injury.

Dr. Cronen is Mixon's pain management physician. Mixon visits Dr. Cronen on a monthly basis to monitor the use of opioid medications. In a September 8, 2017 letter, Dr. Cronen indicated Mixon had been stable on his medications and believes monthly visits are necessary, based upon the chronicity of his condition and his long-term use of opioids. Dr. Cronen reported Mixon has a minimum of four random drug tests per year to ensure compliance and to identify the use of any illegal substances.

Dr. Timothy Kriss performed an independent medical evaluation ("IME") on June 21, 2017. He diagnosed chronic low back pain due to persistent musculoskeletal strain, osteoarthritis, spondylosis, and degenerative disc disease. Mixon demonstrated no signs of symptom magnification, somatization, malingering, nor overt secondary gain. Dr. Kriss noted Mixon tested positive for non-prescription oxycodone and marijuana metabolites in a urine drug test on only one occasion, but there is no evidence of significant substance abuse. For this reason, Dr. Kriss

recommended two random urine drug tests per year so long as compliance continues. He further recommended office visits every four to six months, unless new symptoms, side effects, or a change in his condition occurs.

In an October 21, 2017 supplemental IME report, Dr. Kriss indicated he had read Dr. Cronen's letter. Dr. Kriss noted Mixon had taken hydrocodone for more than three years with no abuse issues, and monthly visits have not resulted in any change in his condition or treatment plan. Dr. Kriss noted Dr. Cronen's only basis for quarterly urine drug screens was a concern for illegal drug use and, if that occurred, he would cease the prescriptions involving controlled substances. He further recommended random, as opposed to scheduled, urine screens.

Dr. John Rademaker conducted a utilization review on July 19, 2017. He stated that, because Mixon had been compliant with his medications and was receiving good pain control, monthly office visits are not medically necessary or reasonable for the cure and/or relief of the effects of the work injury. Dr. Rademaker opined Mixon could be seen every two to three months as long as there is no change in his medical condition, or issues with function or use of narcotics. Because Mixon was compliant with his medications, Dr. Rademaker recommended one or two urine drug screens per year on a random basis, subject to continued observation for abuse or misuse.

The ALJ's findings relevant to the appeal are as follows:

> **1. Monthly Office Visits**
>
> The evidence is clear that Mr. Mixon is following the instructions provided by Dr. Cronen in the use of his narcotic medication. He apparently has had no issues

with compliance in at least three years. Dr. Cronen's basis for monthly office visits due to the chronicity of the complaints of low back pain and the need to see him because he is taking a pain narcotic. However, both Dr. Kriss and Dr. Rademaker found that Mr. Mixon is compliant. Dr. Kriss recommended office visits every four months, Dr. Rademaker recommended every two to three months. The ALJ does not find Dr. Cronen's rationale for monthly office visits to be persuasive in the case of Mr. Mixon. He appears to be a model patient. Therefore, the ALJ relies on Dr. Rademaker to find that that office visits once every three months are medically reasonable and necessary for the cure and/or relief of the effects of his August 15, 2011 work injury. The ALJ relies on Dr. Kriss to condition quarterly office visits on whether or not Mr. Mixon's new symptoms, or new side effects, or some significant change in symptoms of his low back condition. Based on the evidence present at this time, the ALJ finds that monthly office visits are not medically reasonable or necessary.

2. Monthly Urine Toxicology [Testing]

Likewise, the ALJ is not persuaded that quarterly random drug testing is necessary, as stated by Dr. Cronen. This is specific to Mr. Mixon. The evidence reveals that Mr. Mixon is stable in his treatment and condition with the medications he is using. The ALJ recognizes that not every patient is as compliant as Mr. Mixon. However, the ALJ is more persuaded by the opinions of Dr. Kriss and Dr. Rademaker on the issue of the frequency of drug testing. The ALJ relies on Dr. Kriss and Dr. Rademaker to find that quarterly urine drug testing is not medically reasonable or necessary for Mr. Mixon. The ALJ relies on Dr. Kriss and Dr. Rademaker to find that random drug testing two times a year is medical reasonabl[y] and necessary at this time. The ALJ relies on Dr. Kriss' condition that if Mr. Mixon presents any concerns of abuse or misuse of his medication, or illegal use of this medication, then a more frequent period of testing may be appropriate. The ALJ wants Dr. Cronen to know that two times a year is not a hard and fast number if Mr. Mixon presents with actual issues of concern regarding his compliance with and use of narcotic medication.

On appeal, Mixon argues the ALJ erred in limiting the frequency of office visits and urine drug testing. Given the current climate concerning the use and abuses of opioid medication, Mixon argues the monthly office visits and the quarterly urine drug screens are reasonable and necessary medical treatment when requested for the protection of the physician and his patient. Dr. Cronen noted there has been a statewide crackdown on prescription and opioid drug abuse. He felt it was necessary to see Mixon on a monthly basis due to the chronicity of his problem and due to the long-term use of opioids. Dr. Cronen stated the continued use would potentially put Mixon at risk for abuse or misuse of the medication.

In a post-award medical fee dispute, the burden of proof and risk of non-persuasion with respect to the reasonableness and necessity of medical treatment falls on the employer. National Pizza Company v Curry, 802 S.W.2d 949 (Ky. App. 1991). Thus, Lustig Enterprises bore the burden of proving the contested visits and testing were not reasonable and necessary treatment of Mixon's injury. Because Lustig Enterprises was successful in that burden, the question on appeal is whether substantial evidence of record supports the ALJ's decision. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "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).

In rendering a decision, KRS 342.285 grants an ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence.

Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). An ALJ may draw reasonable inferences from the evidence, 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. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). Although a party may note evidence that would support a different outcome than that reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). Rather, it must be shown there was no evidence of substantial probative value to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

We begin by noting Mixon did not file a petition for reconsideration. Pursuant to KRS 342.285, an award or order of the ALJ shall be conclusive and binding as to all questions of fact if a petition for reconsideration is not filed as provided for in KRS 342.281. In the absence of a petition for reconsideration, the Board is limited to a determination of whether there is substantial evidence in the record to support the ALJ's factual findings. Stated otherwise, inadequate, incomplete, or even inaccurate fact-finding on the part of an ALJ will not justify reversal if there is substantial evidence in the record supporting the ultimate conclusion. Eaton Axle Corp. v. Nally, 688 S.W.2d 334 (Ky. 1985). Thus, our sole task on appeal is to determine whether substantial evidence supports the ALJ's decision.

Mixon essentially requests this Board to re-weigh the evidence, and substitute its opinion for that of the ALJ, which we cannot do. Whittaker v.

Rowland, 998 S.W.2d 479 (Ky. 1999). It was the ALJ's prerogative to rely upon the opinions of Drs. Kriss and Rademaker, which constitute substantial evidence upon which to base his decision. Because our only task on appeal is to determine whether substantial evidence supports the ALJ's decision and Mixon does not contend the opinions of Drs. Kriss and Rademaker do not constitute substantial evidence, we must affirm the ALJ's decision. While Mixon has identified evidence supporting a different conclusion, there was substantial evidence presented to the contrary. The ALJ acted within his discretion to determine which evidence to rely upon, and it cannot be said the ALJ's conclusions are so unreasonable as to compel a different result. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

Accordingly, the August 6, 2018 Opinion and Order rendered by Hon. John H. McCracken, Administrative Law Judge, is hereby **AFFIRMED**.

ALL CONCUR.

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