

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: February 26, 2019

CLAIM NO. 200191697

DAVID FARM, INC./LOWELL FARM, INC.

PETITIONER

VS.

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

CHRISTOPHER GLAZEBROOK
DR. DEBRA WALLACE
and HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

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

STIVERS, Member. David Farm, Inc./Lowell Farm, Inc. (“David Farm”) appeals from the September 17, 2018, Opinion and Order and the October 19, 2018, Order on Petition for Reconsideration of Hon. Grant S. Roark, Administrative Law Judge (“ALJ”). In the September 17, 2018, Opinion and Order, the ALJ resolved a medical fee dispute in favor of Christopher Glazebrook (“Glazebrook”) by finding all contested medical treatment compensable.

David Farm asserts two arguments on appeal. First, it argues the ALJ erred when he determined Glazebrook could be seen by Dr. Sean Wolfort, as it was not a contested issue to be resolved by the ALJ. In a related argument, David Farm asserts the ALJ erred in allowing Glazebrook to use a petition for reconsideration as an opportunity for the ALJ to rule on an issue “not preserved for decision.”

BACKGROUND

The Form 101 relating to the work injury in question alleges Glazebrook sustained work-related injuries to his left foot and ankle, in the following manner: “Plaintiff’s left foot went through a guard on a fertilizer spreader degloving the foot from the arch back to the ankle.” Glazebrook was required to undergo several tissue graft surgeries to treat his injury.

The parties settled the injury claim via a Form 110 Settlement Agreement approved on September 15, 2004, by Hon. James Kerr, Administrative Law Judge. The agreement indicates medical expenses were paid in the amount of \$116,492.35, temporary total disability (“TTD”) benefits were paid in the total amount of \$35,917.46, and Glazebrook received a lump sum amount of \$105,000.00 which included income benefits, a waiver of entitlement to additional periods of TTD benefits, vocational rehabilitation, and the right to reopen for increased impairment or disability. Glazebrook retained the right to future medical benefits.

On December 21, 2017, David Farm filed a Motion to Reopen and Form 112 Medical Fee Dispute contesting the reasonableness and necessity of a request from Dr. Debra Wallace for a referral to a plastic surgeon, Hydrocodone 7.5/325, Fluconazole & Nystatin cream, continued pain management treatment with

Dr. Winters¹, and hyperbaric oxygen.² Attached to the Motion to Reopen and Form 112 are several documents. One document is the November 22, 2017, Physician Review Report of Dr. Bart Olash in which he opines, in part, as follows:

I do not find indication for referral to a plastic surgeon. In my opinion, a plastic surgeon would not have anything to offer. The patient is already being seen by a wound care specialist, orthopedic surgeon, and infectious disease specialist. These physicians should be able to reasonably treat his skin and soft tissue pathology due to the work accident.

The record also contains Dr. Frank Parker's December 6, 2017, Final Utilization Review Decision in which he opines, in relevant part, as follows:

The plastic surgeon's role in wound healing is to create a flap to cover a wound once infection is eliminated. The medical record reveals that this patient's orthopedic surgeon has a plan for debridement and antibiotics to insure wound infection is controlled by eliminating non-viable bone and tissue. In my opinion, a referral to plastic surgery should be delayed until infection is eliminated from this patient's wounds.

On March 19, 2018, Glazebrook filed an undated letter from Dr. Wallace which reads as follows:

I am Christopher Glazebrook's primary care physician.

I have reviewed the Utilization Review Report of Bart Olash of November 22, 2017, and I disagree with some of his opinions.

I believe a referral to a plastic surgeon is a reasonable referral. Mr. Glazebrook has a difficult wound to treat and it is reasonable to obtain the opinion of a plastic surgeon to determine what, if any, reconstruction, could be done to Mr. Glazebrook's foot and ankle to help alleviate the continuous wound problems he has.

¹ We were unable to locate Dr. Winters' first name in the record.

² We were unable to locate the original referral by Dr. Wallace in the record.

I also believe Mr. Glazebrook is in need of long term pain medicines. The fact that he tests positive for THC is irrelevant to the need for pain medicines. It is my understanding that the urine screens show that Mr. Glazebrook is not abusing his narcotics and therefore, continued use of the narcotics is appropriate. Over the counter analgesics will not suffice in his pain management.

I would also be hesitant to withdraw any of Mr. Glazebrook's antibiotics for fear of the great risk of allowing an infection in his foot and ankle.

I agree that Mr. Glazebrook would benefit from a referral to Dr. Sean Wolfort in Phoenix, Arizona. Dr. Wolfort treated Mr. Glazebrook at Vanderbilt and the peculiar nature of Mr. Glazebrook's wound coupled with Dr. Wolfort's expertise and familiarity with the history justifies that referral. (emphasis added).

On May 21, 2018, David Farm filed a "Notice to Supplement Form 112" in which it attached the December 5, 2017, Physician Review Appeal Report of Dr. Parker who states, in relevant part, as follows:

The plastic surgeon's role in wound healing is to create a flap to cover a wound once infection is eliminated. The medical record reveals that this patient's orthopedic surgeon has a plan for debridement and antibiotics to insure wound infection is controlled by eliminating non-viable bone and tissue. In my opinion, a referral to plastic surgery should be delayed until infection is eliminated from this patient's wounds.

Most plastic surgeons will not perform a flap procedure while a patient is smoking cigarettes. This patient has experienced failure of his initial skin flap. In my opinion, any skin graft in this patient is in peril unless he stops smoking.

...

In my opinion, the medical records reveal the request from Dr. Wallace for referral to a plastic surgeon is not

medically reasonable or necessary for the treatment or relief of the work injury of 4/24/2001.

In Dr. Parker's summary of the medical records reviewed, the following is noted regarding a November 1, 2017, office visit with Dr. Wallace: "Assessment: cellulitis left foot, non-healing wound of lower extremity...**previous plastic surgeon referral needed**...Orthop. Surgeon in this area have refuse [sic] to do any further treatment." (emphasis added).

The record reflects a Benefit Review Conference ("BRC") was not conducted. The parties agreed to waive a formal hearing and the record contains no briefs for the ALJ to review.

In the September 17, 2018, Opinion and Order, the ALJ set forth the following findings of fact and conclusions of law concerning the reasonableness and necessity of the referral to a plastic surgeon:

Moreover, Dr. Olash concluded referral to a plastic surgeon would not be necessary because plaintiff is already saying [sic] enough specialists who should be able to adequately treat his injury and that a plastic surgeon would have nothing additional to offer. Yet the defendant employer's other utilization review expert, Dr. Parker, indicated only that referral to a plastic surgeon should be delayed until all infections have been eliminated from the foot, at which time a plastic surgeon could determine how best to reconstruct the damaged areas of the foot. For these reasons, and because Dr. Wallace opined referral to a plastic surgeon would be reasonable in plaintiff's situation, it is determined the defendant employer has not carried its burden of proving [sic] referral to a plastic surgeon is not reasonable or necessary. As such, that referral is compensable.

Glazebrook filed a "Motion for Clarification/Petition for Reconsideration" on October 1, 2018, in which he states as follows:

Plaintiff, Christopher R. Glazebrook, requests that the ALJ clarify the finding in his September 17, 2018, Opinion granting the referral to a plastic surgeon. To the extent, necessary, this Motion may be considered a Petition for Reconsideration. However, it is simply filed to avoid another lengthy separate filing on the key issue at hand.

Plaintiff was treated in the past by Dr. Sean Wolfort at Vanderbilt. However, Dr. Wolfort left Vanderbilt and relocated to Phoenix, Arizona. Dr. Wallace, in her report of record filed March 19, 2018, stated that she believes that a referral to Dr. Wolfort is appropriate. Dr. Wolfort is a specialist in this area and familiar with the patient's history. It should be noted that this is an atypical injury claim consisting of a devastating degloving of Plaintiff's foot and ankle soft tissues. Absent a specific finding by the ALJ, Plaintiff does not believe that Defendant-employer's carrier will acknowledge and pay for the referral to Dr. Wolfort.

Plaintiff requests that the ALJ clarify his Opinion to state specifically that the referral to Dr. Wolfort in Phoenix, Arizona is reasonable and necessary for the cure and relief of the injury.

In the October 19, 2018, Order, the ALJ held as follows:

This matter comes before the Administrative Law Judge upon the plaintiff's petition for reconsideration of the Opinion & Order rendered in this matter on September 17, 2018. In his petition, plaintiff requests clarification and for the ALJ to specify that the defendant employer is obligated to authorize a referral to Dr. Sean Wolfort of Phoenix, Arizona. In its response, the defendant employer argues the issue before the ALJ in this reopening was whether referral to a plastic surgeon, in general, was reasonable and necessary; a specific referral to Dr. Wolfort was not at issue.

Having reviewed the matter, the ALJ is persuaded this reopening -- as to the referral -- was precipitated by Dr. Wallace's referral to Wolfort. Only after Dr. Wallace indicated referral to Dr. Wolfort in Phoenix would be appropriate did the defendant supplement the 112 to challenge that referral, even though it did not specifically

mention Dr. Wolfort in the supplemental 112. Moreover, given that if the matter is not now decided and the defendant employer refuses to voluntarily authorize referral to Dr. Wolfort in Arizona, then either it will be obligated to file a new medical fee dispute or the plaintiff will file one to decide the issue. Either scenario would be a waste of resources since the matter can be disposed of now. As such, the ALJ agrees the matter was/is before the ALJ and that it makes sense to decide it now.

As to the merits of the issue, the ALJ is persuaded the specific issue was whether the referral to Dr. Wolfort in Arizona is reasonable and necessary, again because that was what precipitated the defendant employer's supplemental Form 112. For the reasons set forth in the September 17, 2018 Opinion, the ALJ remains persuaded by Dr. Wallace's report that her referral to the plastic surgeon, Dr. Wolfort, is reasonable and necessary. Obviously, if Dr. Wallace is willing to refer plaintiff to a closer plastic surgeon whom she believes is just as capable as Dr. Wolfort, then the matter could be considered anew. Yet, as the matter stands, the defendant shall approve and pay for referral to Dr. Wolfort in Phoenix, Arizona, and the plaintiff's petition for reconsideration is therefore SUSTAINED.

ANALYSIS

As an initial matter, we note 803 KAR 25:010 reads, in relevant part, as follows:

Section 13. Benefit Review Conferences. (1) The purpose of the BRC shall be to expedite the processing of the claim and to avoid if possible the need for a hearing.

(2) The BRC shall be an informal proceeding.

...

(11) If at the conclusion of the BRC the parties have not reached agreement on all the issues, the administrative law judge shall:

(a) Prepare a final BRC memorandum and order including stipulations and identification of all issues,

which shall be signed by all parties or if represented, their counsel, and the administrative law judge; and

(b) Schedule a final hearing.

(12) Only contested issues shall be the subject of further proceedings.

Contrary to David Farm's assertion, there were no issues preserved for review as the record reflects a BRC was not conducted. Thus, David Farm relinquished its right to identify the contested issues to be resolved by the ALJ.

David Farm first argues the ALJ erred when, in response to Glazebrook's Petition for Reconsideration, he ruled on the reasonableness and necessity of a specific referral to Dr. Wolfort in Phoenix, Arizona instead of allowing a general referral to a plastic surgeon, which was one of the contested issues before him.

In Dr. Wallace's undated letter, filed on March 19, 2018, she directly addressed the benefit Glazebrook would derive from a referral to Dr. Wolfort in Phoenix, Arizona. Dr. Wallace opined a referral is justified because of Dr. Wolfort's expertise, he treated Glazebrook at Vanderbilt and he is familiar with the peculiar nature of Glazebrook's wound. At no point after Dr. Wallace's letter was filed in the record did David Farm file an objection or a motion to strike that portion of her letter expressing her opinion regarding the need for a specific referral to Dr. Wolfort. In fact, David Farm filed a "Notice to Supplement Form 112" on May 21, 2018, two months after Glazebrook filed Dr. Wallace's letter in the record, in which it failed to address the specific referral to Dr. Wolfort. This is despite the fact that, in the December 5, 2017, Physician Review Appeal Report which David Farm attached to the "Notice to

Supplement Form 112,” Dr. Parker appeared to have reviewed something from Dr. Wallace indicating “**previous** plastic surgeon referral needed.” (emphasis added).

We conclude one could reasonably expect that, in the interest of judicial economy and a speedy resolution of the medical fee dispute, the ALJ would fully resolve all intertwined issues which surfaced in *this* medical fee dispute. By not addressing the specific referral to Dr. Wolfort in this medical fee dispute, the ALJ would have created a scenario requiring the filing of another medical fee dispute immediately after rendition of his decision in this dispute. We fail to see how such a scenario would be reasonable, particularly since David Farm had been on notice of the specific referral to Dr. Wolfort by Dr. Wallace since her letter was filed in the record on March 19, 2018, *nearly six months before the September 17, 2018, Opinion and Order*. As previously noted, contrary to David Farm’s assertion, the record demonstrates there were no issues preserved for review as the record is devoid of a BRC identifying the contested issues to be decided by the ALJ. Moreover, in light of the contents of Dr. Wallace’s undated letter, David Farm could hardly be surprised the ALJ chose, albeit in an order addressing a Petition for Reconsideration, to determine whether a referral to Dr. Wolfort was reasonable and necessary. In short, absent the parties identifying the contested issues in a BRC, David Farm’s argument that the ALJ addressed an issue not preserved for a decision fails. The ALJ did not err by ruling on the reasonableness and necessity of the referral to Dr. Wolfort.

Next, David Farm asserts the ALJ erred by permitting Glazebrook, in his petition for reconsideration, to request a ruling on the referral to Dr. Wolfort when the issue had not been preserved for adjudication. David Farm also notes the purpose

of a petition for reconsideration is to point out patent errors and not “obtain [a] ruling on an issue on which evidence was not presented.”

Significantly, a BRC Order was not filed in the record, and by agreement of the parties, the formal hearing was waived.³ Also, briefs were not filed. Thus, the ALJ was left to discern the contested issues without any help from the parties. However, as previously stated, the specific referral to Dr. Wolfort was made an issue by virtue of Dr. Wallace’s letter placed in the record on March 19, 2018. We acknowledge the ALJ determined the referral to Dr. Wolfort was reasonable and necessary in the October 19, 2018, Order in response to Glazebrook’s October 1, 2018, Motion for Clarification/Petition for Reconsideration. Although Glazebrook did not reference a patent error in the original September 17, 2018, Opinion and Order, we believe one of the issues before the ALJ was whether Glazebrook should see Dr. Wolfort. Thus, the Petition for Reconsideration pointed out an issue the ALJ failed to resolve. Glazebrook sustained a highly specific and egregious wound, and there is no question Dr. Wolfort previously treated Glazebrook and is uniquely qualified to address his care. Consequently, Glazebrook was pointing out an aspect of the medical dispute the ALJ failed to address. We attach great significance to the fact that in his summary of Dr. Wallace’s testimony, the ALJ stated as follows:

Dr. Debra Wallace being Glazebrook’s primary care physician states that in her opinion the referral to the plastic surgeon, Dr. Sean Wolfort, could assist with the difficulty in treating the wound, he could possibly determine what, if any, reconstruction could be done to

³ According to an Order dated March 13, 2018, there was a telephonic conference held on March 8, 2018, and one to be held on April 11, 2018.

Glazebrook's foot and ankle, to help alleviate the continuing problems.

...

She also indicated plaintiff would benefit from a referral to Dr. Sean Wolfort in Phoenix, Arizona. Dr. Wolfort treated plaintiff at Vanderbilt and the peculiar nature of plaintiff's one combined with Dr. Wolfort's expertise and familiarity with the history justifies that referral.

In resolving this issue, the ALJ ruled in favor of Glazebrook due to Dr. Parker's opinion that a referral to a plastic surgeon should be delayed until all infection had been eliminated and "because Dr. Wallace opined referral to a plastic surgeon would be reasonable in [Glazebrook's] situation." Given the ALJ's summary of Dr. Wallace's testimony and his partial reliance upon her in resolving the issue of whether Glazebrook should be referred to a plastic surgeon, David Farm should not have been surprised that the ALJ believed the referral to Dr. Wolfort was one of the contested issues. The ALJ's resolution of this issue *in full* was reasonable and appropriate, and it will not be disturbed by this Board.

Accordingly, the September 17, 2018, Opinion and Order and the October 19, 2018, Order are **AFFIRMED**.

ALL CONCUR.

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