

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: December 29, 2020

CLAIM NO. 200293331

HORIZON NATURAL RESOURCES

PETITIONER

VS.

APPEAL FROM HON. W. GREG HARVEY,
ADMINISTRATIVE LAW JUDGE

RONNIE D. PRATER;
DR. KAREN GOOSLIN -
ARH FAMILY CARE WAYLAND; AND
HON. W. GREG HARVEY,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

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

ALVEY, Chairman. Horizon Natural Resources (“Horizon”) appeals from the September 2, 2020 Opinion and Award in a Post-Award Medical Fee Dispute rendered by Hon. Greg Harvey, Administrative Law Judge (“ALJ”)¹. The ALJ

¹ We note the reopening was originally assigned to Hon. Brent E. Dye, Administrative Law Judge, but was subsequently transferred to the ALJ.

found prescriptions for Cymbalta and Suboxone reasonable, necessary, and related to Ronnie D. Prater's ("Prater") February 27, 2002 work injury. Horizon also appeals from the September 16, 2020 Order on Reconsideration amending the ALJ's opinion, finding Cymbalta compensable since it is prescribed, in part, to treat Prater's pain stemming from his work injury.

On appeal, Horizon argues the ALJ erred in finding Cymbalta compensable since it is prescribed for a condition that was precluded from the original award, and that finding is *res judicata*. Therefore, finding Cymbalta compensable was erroneous. We disagree and affirm.

Prater filed a Form 101 on September 17, 2005 alleging he sustained left knee and low back injuries with psychological overlay when he fell from a ladder while refueling a loader at work. Prater worked as a coalminer for Horizon at the time of the injury. In an Opinion, Award, and Order issued on May 5, 2004, Hon. J. Landon Overfield, Administrative Law Judge ("ALJ Overfield"), found Prater sustained work-related left knee and low back injuries on February 27, 2002. He awarded temporary total disability benefits from February 27, 2002 to December 9, 2002. He awarded permanent partial disability benefits based upon a 7% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment, with 2% attributable to the left knee, and 5% attributable to the low back. ALJ Overfield found Prater did not retain the capacity to return to the type of work performed on the date of the injury. He also found Prater failed to prove he had any psychological impairment attributable to his

injury. ALJ Overfield also found Prater was not permanently totally disabled. He also awarded medical benefits pursuant to KRS 342.020.

Horizon filed a Motion to Reopen and Medical Dispute on October 28, 2019. It argued prescriptions for Cymbalta and Suboxone are not prescribed to treat Prater's work injuries. Horizon filed Dr. Thomas Whealton's October 25, 2019 report in support of its motions. Dr. Whealton specializes in pain management and anesthesiology. Dr. Whealton evaluated Prater at Horizon's request. He concluded the prescription for Suboxone is not reasonable, necessary, nor related to treatment for Prater's work injuries. Regarding Cymbalta (Duloxetine), Dr. Whealton stated it "is a selective serotonin and norepinephrine reuptake inhibitor. It has been shown to help with some neuropathic pains consistent with this patient's radicular symptoms. It can be a helpful long-term medication for this."

Prater filed a statement prepared by his wife in response to the motion. He also filed payment ledgers for his medications. The claim was reopened to the extent the parties were permitted to file evidence.

Prater filed records from Dr. Jeremy Klein at Louisa Family Care. Dr. Klein prescribes the Suboxone. The records pertain to thirty-five office visits between July 26, 2017 and October 16, 2019. The records reflect drug screens were performed. Dr. Klein noted the treatment was necessary in order to "assist in achieving/maintaining recovery." In a note dated January 23, 2020, Dr. Klein stated, "I am Dr. Jeremy Klein. Ronnie Prater was taking narcotics originally prescribed for the original work injury and has now been prescribed Suboxone to substitute for that medication because it is a safer alternative."

Prater also filed a December 10, 2019 note from Dr. Karen Gooslin, D.O., from ARH Family Care in Wayland, Kentucky. Dr. Gooslin prescribes Cymbalta, but not Suboxone. In the note, she indicated the Cymbalta is prescribed to treat Prater's depression. Prater filed a subsequent note from Dr. Gooslin dated January 23, 2020. The note states, "I am Dr. Karen Gooslin. Ronnie Prater has been prescribed Cymbalta in part to deal with the pain from the original work injury and it is also a reasonable medication which provides substantial benefits."

Prater filed multiple listings of medications received and payment ledgers. He also filed a document from his bank indicating he was charged a fee because the workers' compensation insurer had stopped payment on a check issued to him, which he had deposited.

Prater testified by deposition on January 14, 2020, and at the hearing held June 26, 2020. Prater was born in April 1948 and resides in Floyd County, Kentucky. He has had multiple health issues and injuries, but he continues to treat for the injuries he sustained while working for Horizon in 2002. In addition to his low back and knees, his hips bother him despite undergoing replacement surgeries. He sustained right shoulder and neck injuries in a 2006 motor vehicle accident. He has used a cane since the 2002 work-related injury. He testified he initially treated with Oxycodone and Percocet for his knee and back problems. Those medications were replaced with Suboxone, which helps ease his pain. He testified he treated for a period of time at a pain clinic in Lexington, Kentucky, but at his request, the workers' compensation insurer referred him to a Suboxone clinic closer to his home, and paid for all of this treatment until July 2019. He then had difficulty receiving his

treatment and travel reimbursements. He testified some of his bills were subsequently paid. In the interim, he sold several personal items to pay for his medication. He testified that when the workers' compensation insurer initially declined to pay for additional treatment, he attempted to cut back, but his pain increased significantly. He stated all of his treatment helps. He testified both Cymbalta and Suboxone help control his pain. He takes medication for other health issues unrelated to his work injury.

A Benefit Review Conference was held on January 15, 2020. The issues preserved included compensability of treatment with Cymbalta and Suboxone, and whether treatment with those medications is reasonable and necessary.

On August 24, 2020, the ALJ rendered an Opinion and Order in a Post-Award Medical Fee Dispute. The ALJ determined as follows:

The burden of proof to determine whether the medical treatment is unreasonable or unnecessary is with the employer, while the burden remains with the claimant concerning questions pertaining to work-relatedness or causation of the condition. *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).

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 undersigned has the obligation to determine the compensability of medical treatment based upon the evidence presented. Substantial evidence has been defined as some evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable people. See Smyzer v. B.F. Goodrich Chemical Co., 474 S.W.2d 367, 369 (Ky. 1971); Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986). The general rule is the fact-finder cannot "disregard" un-contradicted medical evidence. The fact-finder, however, can decline to follow un-contradicted evidence, including medical evidence, as long as he provides sufficient reasons, and reasonably explains his basis.

In this medical fee dispute the ALJ must determine whether Prater's use of Suboxone and Cymbalta relate to his original work injury and are medically reasonable and necessary to treat the effects. With respect to Suboxone, the ALJ finds Dr. Klein's January 22, 2020 statement persuasive. Dr. Klein noted Prater was put on Suboxone after becoming dependent to narcotics prescribed to him for treatment of his work injury. He is continuing the Suboxone (Buprenorphine/Naloxone) as an effort to treat his narcotic dependency. The ALJ finds the Suboxone is related to and medically reasonable and necessary to treat the work injury.

Dr. Karen Gooslin has responded to the dispute and she continues to prescribe Cymbalta to treat Prater's depression she feels is secondary to his work injury. This statement is persuasive to the ALJ and Cymbalta is

found related to and medically necessary and reasonable to treat the work injury.

Horizon filed a Petition for Reconsideration, arguing the ALJ erred in determining Cymbalta is compensable for a psychological claim ALJ Overfield dismissed. The ALJ issued an Order on reconsideration stating *verbatim* as follows:

This matter is before the ALJ on Defendant's Petition for Reconsideration. It argues the principles of *res judicata* apply to the ALJ's finding that Cymbalta is reasonable and necessary to treat the work injury. The original award issued by ALJ Overfield found Prater failed to meet his burden of proving a psychological injury.

The Plaintiff has responded noting that Cymbalta is offered for two purposes. One is to treat depression. The other is to treat pain. The ALJ amends the decision to note Dr. Thomas Whealton's opinion that Cymbalta (Duloxetine) is also used to treat neuropathic pain consistent with Prater's symptoms. For that reason, and in reliance upon Dr. Whealton's opinion, the ALJ finds the medication both work-related and reasonable and necessary to treat the work injury.

The Petition is OVERRULED and the Opinion is amended consistent with this Order.

On appeal, Horizon argues the ALJ erred in finding the treatment with Cymbalta and Suboxone is compensable. In particular, it argues the prescription for Cymbalta is barred by the doctrine of *res judicata*.

As the moving party in a post-award medical dispute, Horizon had the burden of proving the contested treatment was not compensable, reasonable, or necessary. We note that notwithstanding the holding in C & T Hazard v. Chantella Stollings, et al., 2012-SC-000834-WC, 2013 WL 5777066 (Ky. 2013), an unpublished decision from the Kentucky Supreme Court, a long line of reported decisions establishes 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, 802 S.W.2d 949 (Ky. 1991); 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).

As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, *supra*. Similarly, the ALJ has the discretion to determine 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 10 (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). Although a party may note evidence that would have supported 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).

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 that 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).

We note Dr. Whealton determined the treatment with Suboxone is not work-related or compensable. However, the record also contains a statement from Dr. Klein asserting the treatment with Suboxone is necessitated by Prater's ongoing problems stemming from his 2002 work injury. Regarding the treatment with Cymbalta, we note that even Dr. Whealton found this medication, in addition to treatment for depression, is also shown to help with some neuropathic pains consistent with Prater's radicular symptoms. He stated, "It can be a helpful long-term medication for this." Prater testified the treatment with Suboxone and Cymbalta assist in managing his pain from the work injuries.

The ALJ considered and weighed the evidence of record, and exercised his discretion in finding the treatment with Suboxone and Cymbalta compensable. The ALJ explained his reasoning, and the basis for his opinion in finding the contested medications compensable, and his determination is supported by substantial evidence. While Dr. Whealton's opinion regarding treatment with Suboxone is contrary to both Prater's testimony and Dr. Gooslin's note, he in fact noted that treatment with Cymbalta might be beneficial. We determine the evidence filed by Horizon does not compel a contrary result.

Horizon 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, supra. It was the ALJ's prerogative to determine the treatment with

Cymbalta and Suboxone is compensable based upon the evidence, and the record supports his determination. Therefore, we affirm.

Accordingly, the August 24, 2020 Opinion and Order in a Post-Award Medical Fee Dispute, and the September 16, 2020 Order on Petition for Reconsideration rendered by Hon. Greg Harvey, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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