

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: August 21, 2020

CLAIM NO. 200989522

HUMANA

PETITIONER

VS. APPEAL FROM HON. CHRISTINA D. HAJJAR,
ADMINISTRATIVE LAW JUDGE

MARY NICHTER;
RODNEY CHOU, M.D.; AND
HON. CHRISTINA D. HAJJAR,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

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

ALVEY, Chairman. Humana appeals from the April 13, 2020 Medical Dispute Opinion and Order rendered by Hon. Christina D. Hajjar, Administrative Law Judge ("ALJ"). The ALJ found prescriptions for Metaxalone and Topamax are reasonable, necessary, and related to the May 8, 2009 work injury. Humana also appeals from the May 13, 2020 Order overruling its Petition for Reconsideration.

On appeal, Humana argues Mary Nichter (“Nichter”) failed to present evidence establishing that within a reasonable degree of medical probability the contested medications are causally related to the May 2009 ankle fracture. Humana also argues the ALJ erred in inferring medical causation that is not established by a medical expert. Humana additionally argues Dr. Ellen Ballard’s uncontroverted opinion on the issue of work-relatedness is controlling. Finally, Humana argues the ALJ failed to provide sufficient findings of fact to support her determination. We disagree and affirm.

On October 25, 2019, Humana filed a motion to reopen and a Form 112 medical dispute challenging prescriptions for Topamax and Metaxalone prescribed by Dr. Rodney Chou as unreasonable, unnecessary, and unrelated to the May 8, 2009 work injury. Humana attached the August 2, 2011 settlement agreement and the September 27, 2019 utilization review report by Dr. Marvin Pietruszka.

The settlement agreement, approved on August 2, 2011, indicates Nichter slipped on a newly waxed floor on May 8, 2009. The settlement agreement reflects Nichter injured her right leg and ankle, and sustained a trimalleolar fracture of the right ankle and a deep vein thrombosis of the right lower extremity. The agreement also reflects Nichter underwent surgery consisting of an open reduction internal fixation of the fracture due to her surgery. Nichter’s diagnosis was an inner articular ankle fracture with displacement in addition to deep vein thrombosis. Dr. Warren Bilkey assessed a 24% impairment rating and Dr. Rodney Chou assessed a 12% impairment rating for Nichter’s work injury. At the time of her injury, Nichter

worked as a Medicare enrollment specialist. She later returned to work on May 10, 2010, but resigned on January 3, 2011. The claim was settled for a lump sum amount with Nichter retaining her right to past and future medical benefits.

In his September 27, 2019 utilization review report, Dr. Pietruszka indicated he had reviewed medical records, including Dr. Chou's July 16, 2019 treatment record. He noted Nichter slipped and fell on May 8, 2009, sustaining three fractures of her right ankle. Nichter underwent surgery the next day, followed by a period of inpatient rehabilitation. Dr. Pietruszka noted Nichter underwent two cervical surgeries in 2017, and in the interim, was diagnosed with colon cancer, and had her thyroid removed. Dr. Pietruszka noted Nichter reported right ankle pain on July 16, 2019. Dr. Chou examined Nichter's right ankle and cervical spine. Based upon the 2019 Official Disability Guidelines and his review of the records, Dr. Pietruszka did not certify the prescriptions Metaxalone and Topamax.

Nichter filed Dr. Chou's November 18, 2019 office note. Dr. Chou diagnosed Nichter as status-post fracture of the ankle and neuropathic limb pain. He answered "yes" to the following question: "Is the treatment and medication you have provided/prescribed, and are recommending, including recommendation for (1) Topamax 100 mg, 1 tablet, two times daily for 180 days and (2) Metaxalone 800 mg, 1 tablet, three times daily for 180 days, reasonable and necessary for (and related to), treatment of Ms. Nichter's work-related injury?" Dr. Chou stated as follows in explaining why the recommended prescriptions are reasonable and necessary:

She takes the Topamax for the pain in the limb, specifically the neuropathic pain. She has failed Neurontin, NSAIDS, topical cream. She takes Metaxalone for spasm. She has failed cyclobenzaprine.

Both above medication allow her to be functional and off narcotic pain medication.

Humana filed Dr. Ballard's February 5, 2020 report. She noted Nichter reported the May 8, 2009 work injury, ankle surgery, inpatient rehabilitation, and a second procedure to remove ankle hardware. Nichter reported she then began treating with Dr. Chou for her foot, and he prescribed Skelaxin and Topamax. Nichter reported pain and weakness in her right foot and leg. Nichter additionally reported a history of diabetes, anemia, spurs in her neck, chronic low back pain, and thyroid and colon cancer. She reported three surgeries to her lumbar spine, a carpal tunnel release, removal of her thyroid, and colon surgery. She reported Dr. Chou prescribed Metaxalone and Topiramate for her work injury. Her family physician prescribed other medications, including Oxycodone, for her multiple unrelated conditions.

Dr. Ballard reviewed the medical records subsequent to the work injury and performed an examination. Dr. Ballard diagnosed a history of previous treatment for a trimalleolar fracture, right ankle; insulin-dependent diabetes; chronic pain resulting from multiple joint problems and status post lumbar surgery times three; morbid obesity; history of thyroid and colon cancer; anemia; carpal tunnel; allergies; and hypothyroidism. Dr. Ballard found no evidence of neuropathic pain or spasm caused by the May 2009 work injury. Dr. Ballard opined the prescription of Topamax is not reasonable, necessary, or related to the May 2009 work injury. She explained that Nichter "has multiple reasons for having problems with her legs. Having three spinal surgeries would be the primary cause, and the use of Topamax is not reasonable or necessary." Dr. Ballard opined the prescription of Metaxalone is

not reasonable, necessary, or related to the May 2009 work injury since there is no evidence of spasm in her right lower extremity. Dr. Ballard opined Nichter does not require any treatment due to her May 2009 work injury.

The March 3, 2020 benefit review conference (BRC”) Order reflects the parties stipulated Nichter sustained a work-related injury on May 8, 2009 that was settled by agreement, which was approved on August 2, 2011. The parties identified the reasonableness and necessity of Topamax and Metaxalone as contested issues. The parties waived the formal hearing. The BRC Order was subsequently amended to include the issue of work-relatedness.

In the April 13, 2020 Medical Dispute Opinion and Order, the ALJ found the prescriptions for Metaxalone and Topamax are reasonable, necessary, and related to the work injury, stating as follows *verbatim*:

....

It is the employer's responsibility to pay for the medical expenses reasonably related to the injury pursuant to KRS 342.020. In a post-judgment medical dispute, the employer bears the burden of proving the contested medical expenses are unreasonable or unnecessary. *National Pizza Company vs. Curry*, 802 S.W.2d 949 (Ky. 1991). Treatment which is shown to be unproductive or outside the type of treatment generally accepted by the medical profession is unreasonable and non-compensable. *Square D Co. v. Tipton*, 862 S.W.2d 308 (Ky. 1993). Nichter argues pursuant to *Tipton*, Defendant must show the evidence is controversial within the medical community or dangerous and severe in nature. She retains the burden of proof on the issue of work-relatedness. *Addington Resources, Inc. v. Perkins*, 947 S.W.2d 421 (Ky. App. 1997).

TOPAMAX

Dr. Ballard stated she did not find any objective evidence of neuropathic pain caused by the work injury. Dr. Ballard did not believe Topamax is related to the injury, noting that Nichter had multiple reasons for having problems with her legs, with three spinal surgeries being the primary cause. Dr. Pietruszka stated in regard to Topamax, it was unclear as to why Nichter was taking this medication. There has been no documentation of neuropathic pain, postherpetic neuralgia, fibromyalgia, or neuropathic pain associated with diabetes or spinal cord injury. He opined it does not meet evidence-based guidelines, as Gabapentin is generally recommended as the first-line trial gabapentinoid for off-label use unless otherwise specified.

By contrast, Dr. Chou opined the medications are for her work-related injury. Dr. Chou stated Nichter is taking Topamax for neuropathic pain in the limb. She has failed Neurontin, NSAIDs, and topical cream. He stated her medications allow her to be functional and off narcotic pain medications.

This ALJ finds Dr. Chou is most convincing that the medication is reasonable, necessary, and due to the injury. Dr. Ballard noted she had multiple reasons for taking the medication. However, Dr. Ballard's report indicates that Nichter was first put on Topamax by Dr. Chou, who was treating her for her work injury. Although she may be taking medication which also helps other symptoms due to other causes, it does not mean that the medication is automatically not compensable for that reason. This ALJ is convinced by Dr. Chou that he is prescribing the medication for her work injury, and that the first-line treatment for her neuropathic pain failed. Thus, it is reasonable and necessary.

METAXALONE

Dr. Pietruszka stated Nichter was taking metaxalone as of December 17, 2017. However, current evidence-based guidelines recommend treatment with muscle relaxants should be brief and is not recommended for longer than

two weeks. He stated muscle relaxants are not recommended for chronic use in non-acute pain. Further, muscle spasm has not been documented as a complaint or in the physical exam. Dr. Chou stated Nichter takes Metaxalone for spasm due to the injury, and she has failed cyclobenzaprine. He stated both medications allow her to be functional and off narcotic pain medications.

Dr. Ballard found no evidence of spasm in her right lower extremity, and concluded Metaxalone would not be reasonable, necessary, or related to the injury. She stated Nichter does not require any treatment due to her injury. Again, this ALJ finds Dr. Chou to be most convincing. Although spasm may not be documented in the records reviewed by Dr. Pietruszka, Dr. Chou stated the medication allows her to be more functional and keeps her off narcotic medication. The ALJ is not convinced that the medication is dangerous, unproductive, or that it is generally not recommended by the medical community. Thus, the medication is reasonable, necessary, and related to the injury.

Humana filed a Petition for Reconsideration raising the same arguments it now makes on appeal. It argued the ALJ erred in relying upon Dr. Chou's report and requested additional findings. The ALJ overruled Humana's petition in an Order dated May 13, 2020, making the following additional findings:

The ALJ relied on Dr. Chou's report to conclude the medications are being prescribed for the work injury. Additionally, it is Defendant's burden to prove the treatment is unreasonable or is generally not recommended by the medical community. Although Metaxalone is not recommended by evidence-based guidelines, in this particular case, Dr. Chou stated the medication allows her to be more functional and keeps her off narcotic medication. In light of these benefits, this ALJ found the Defendant had not met its burden to prove the medication was unreasonable or unnecessary.

On appeal, Humana argues Nichter failed to establish through medical proof that within a reasonable degree of medical probability, the contested

medications are causally related to the 2009 ankle fracture. Humana notes that questions of medical causation and the reasonableness and necessity of medical treatment in the context of a medical dispute are questions solely within the province of medical experts. Humana maintains Dr. Chou's report fails to provide a medical opinion within a reasonable degree of medical probability regarding why and how the contested medications "would be appropriate to treat an ankle fracture sustained 11 years prior." It asserts Dr. Chou also fails to support his diagnoses with objective medical findings, does not specify which limb is affected by neuropathic pain or spasm, and does not indicate whether the neuropathy is due to any particular physical condition. Humana argues it cannot be inferred from the questionnaire that Nichter suffers neuropathic pain due to the 2009 work injury. Humana asserts Dr. Chou does not clarify what he considers the work injury to be. Humana argues the ALJ is not entitled to draw inferences from the record that requires expert medical proof. Humana asserts the uncontroverted opinions of Dr. Ballard on the issue of work-relatedness are controlling pursuant to Kingery v. Sumitomo Electric, 481 S.W.3d 492 (Ky. 2015). Humana also argues the ALJ failed to provide sufficient findings of fact to support her determination.

As the moving party in a post-award medical dispute, Humana had the burden of proving the contested treatment was not reasonable and 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).

Since Nichter was successful in her burden, the question on appeal is whether the ALJ's finding concerning causation is supported by substantial evidence. 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).

As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). 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).

Contrary to Humana's assertions, Dr. Chou's report constitutes substantial evidence supporting the ALJ's determination the contested medications are related to the 2009 work injury. Dr. Chou has treated Nichter since at least 2010 for her work injury. In the September 27, 2019 utilization review report, Dr. Pietruszka summarized her injury and Dr. Chou's July 16, 2019 treatment note. Dr. Chou diagnosed pain in unspecified limb and other fracture unspecified lower leg, noting Nichter, "has continued leg pain, has had surgery, PT, NSAIDs, medications. Still with edema, venous stasis issues. Has been using these medications since early 2018. Pain has been increasing in the leg, right ankle pain at 7/10."

In the February 5, 2020 report, Dr. Ballard noted she had reviewed Dr. Chou's records from February 17, 2010 to November 18, 2019. Dr. Ballard provided the following treatment summary:

The patient was seen by Dr. Chou for trimalleolar fracture, DVT, chronic swelling. She was to go to pool therapy. The biggest problem was swelling, as well as pain and immobility. Thought lap band would be helpful, but it would not be for a work injury. She was followed by Dr. Chou and given medication, Neurontin, Skelaxin. She was allowed to return to work in 2010. She continued to follow up. February 28, 2017,

continue skelaxin and transdermal cream. Should wean Neurontin, start Topamax. Discussed a compressive device. She was on multimodality topical cream, Gabapentin with other medications was discontinued on December 18, 2017. February 27, 2018, x-ray showed no injury. Back bothering her. Awaiting scans for possible cancer recurrence. Refilled Topamax, Skelaxin. Had blisters on her leg on January 17, 2019. Need custom shoes. Discussed weight loss. July 16, 2019, getting cervical epidurals, not work related. November 18, 2019, Skelaxin helps the most. Asked if she could take more Topamax. Refilled Topamax. Increased Topamax to two pills a day.

Neither party filed Dr. Chou's treatment records, however he completed a questionnaire on November 18, 2019, identifying Nichter's diagnoses as status-post fracture of the ankle, pain in the limb, and neuropathic pain in the limb. He answered "yes" to the following question: "Is the treatment and medication you have provided/prescribed, and are recommending, including recommendation for (1) Topamax 100 mg, 1 tablet, two times daily for 180 days and (2) Metaxalone 800 mg, 1 tablet, three times daily for 180 days, **reasonable and necessary for (and related to)**, treatment of Ms. Nichter's work-related injury?" (emphasis added) Dr. Chou explained why the recommended prescriptions are reasonable and necessary as follows:

She takes the Topamax for the pain in the limb, specifically the neuropathic pain. She has failed Neurontin, NSAIDS, topical cream. She takes Metaxalone for spasm. She has failed cyclobenzaprine. Both above medication allow her to be functional and off narcotic pain medication.

Causation is a factual issue that must be determined within the sound discretion of the ALJ as fact-finder. Union Underwear Co. v. Scarce, 896 S.W.2d 7 (Ky. 1995). When the question of causation involves a medical relationship not

apparent to a layperson, the issue is properly within the province of medical experts. Mengel v. Hawaiian-Tropic Northwest and Central Distributors, Inc., 618 S.W.2d 184, 186-187 (Ky. App. 1981). Medical causation must be proven by medical opinion within “reasonable medical probability.” Lexington Cartage Company v. Williams, 407 S.W.2d 395 (Ky. 1966). The mere possibility of work-related causation is insufficient. Pierce v. Kentucky Galvanizing Co., Inc., 606 S.W.2d 165 (Ky. App. 1980). While objective medical evidence must support a diagnosis of a harmful change, it is not necessary to prove causation of an injury through objective medical findings. Staples, Inc. v. Konvelski, 56 S.W.3d 412 (Ky. 2001).

The ALJ considered and weighed the evidence of record, and exercised her discretion in finding Dr. Chou’s opinion most persuasive. The ALJ explained why she found Dr. Chou most persuasive, in finding the contested medications compensable. His opinions constitute substantial evidence supporting the ALJ’s determination that the contested medications are reasonable and necessary. While the contrary opinions from Dr. Ballard and Dr. Pietruszka could support a determination in Humana’s favor, they do not compel a contrary result.

Humana 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 rely upon Dr. Chou’s office note. The ALJ’s analysis sufficiently supports her determination. Since the ALJ’s decision is supported by the record, we affirm.

We also determine the holding in Kingery v. Sumitomo Elec. Wiring, supra, is not controlling. In that case, Kingery provided no evidence establishing the

disputed medical treatment was causally related to her work injury. Here, Dr. Chou noted Nichter's diagnoses, opined the contested medications are reasonable, necessary and related to the work injury, and provided a written explanation addressing the reasonableness and necessity of the medication. Dr. Chou checked "yes" on the report indicating the contested medication is reasonable, necessary, and due to her work-related injuries. We note Dr. Chou was not cross-examined regarding his opinion, and the ALJ could reasonably rely upon his statements in reaching her determination.

Humana additionally argues the ALJ failed to provide sufficient findings for her determination. While authority generally establishes an ALJ must effectively set forth adequate findings of fact from the evidence in order to apprise the parties of the basis for her decision, she is not required to recount the record with line-by-line specificity nor engage in a detailed explanation of the minutia of her reasoning in reaching a particular result. Shields v. Pittsburgh and Midway Coal Mining Co., *supra*; Big Sandy Community Action Program v. Chaffins, 502 S.W.2d 526 (Ky. 1973). In this instance, the ALJ reviewed the evidence of record and provided a sufficient explanation in finding Dr. Chou's opinion most persuasive.

Accordingly, the April 13, 2020 Medical Dispute Opinion and Order and May 13, 2020 Order on Petition for Reconsideration rendered by Hon. Christina D. Hajjar, Administrative Law Judge, are hereby **AFFIRMED**.

BORDERS, MEMBER, CONCURS.

STIVERS, MEMBER, CONCURS IN RESULT ONLY.

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