

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: December 20, 2019

CLAIM NO. 200495986

MARILYN McCANN

PETITIONER

VS. **APPEAL FROM HON. RICHARD E. NEAL,
ADMINISTRATIVE LAW JUDGE**

RITE AID CORPORATION;
DR. RICHARD CAMPBELL; AND
HON. RICHARD E. NEAL,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
AFFIRMING**

* * * * *

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

ALVEY, Chairman. Marilyn McCann¹ (“McCann”) appeals from the June 28, 2019, Opinion and Order on Medical Dispute rendered by Hon. Richard E. Neal, Administrative Law Judge (“ALJ”) resolving a medical dispute filed by Rite Aid Corporation (“Rite Aid”). The ALJ found McCann’s treatment with medications

¹ At the time of the injury and settlement, McCann’s name was Marilyn J. Maynard.

including Ambien, Tramadol, Percocet, Tizanidine, Lidocaine patches, Gabapentin, as well as bilateral sacroiliac injections are not causally related to her work injury, and Rite Aid is not responsible for payment for those treatments. The ALJ also determined the medical dispute was timely filed. McCann also appeals from the August 6, 2019 order denying her Petition for Reconsideration.

On appeal, McCann argues Rite Aid did not timely file a medical dispute. She argues Dr. Randy Rizor, of Marietta, Georgia, performed an evaluation on July 2, 2018, and the insurer issued a notice of denial of her claim on August 9, 2018. However, a medical dispute was not filed until November 8, 2018, and therefore it was untimely. McCann relies upon the holding in Kentucky Associated General Contractors Self-Insured Fund v. Lowther, 330 S.W.3d 456 (Ky. 2010) in support of its argument. Because we determine the ALJ provided an appropriate analysis, exercised the discretion afforded to him, and his determination is supported by substantial evidence, with a contrary result not compelled, we affirm.

A Form 110-I approved on May 17, 2006, by Hon. Sheila C. Lowther, Chief Administrative Law Judge, notes McCann injured her upper and lower back while working for Rite Aid in Greenup County, Kentucky on March 15, 2003. She was unloading a truck, and a tote weighing fifty to sixty pounds came down some rollers. As she attempted to catch the tote, she twisted her back. She also alleged she had depression and anxiety as a result of the accident. The claim was settled based upon a 13% impairment rating assessed by Dr. Bal Bansal. McCann received a lump sum payment of \$48,256.30, which reflects application of the three multiplier

contained in KRS 342.730(1)(c)1. McCann did not waive her right to future medical treatment.

As noted above, Dr. Rizor evaluated McCann at Rite Aid's request on July 2, 2018. Dr. Rizor's report reflects McCann moved around the examining room without difficulty, and she was able to change positions during the examination without assistance, or apparent pain. He noted McCann complained of chronic low back pain following a strain type injury, which occurred in 2003. He noted there was no indication she sustained a structural injury to the lumbar spine, radiculopathy, or spinal instability. He found she has chronic lumbar degeneration unrelated to the 2003 work injury. He also determined her recent diagnosis of sacroiliac joint osteoarthritis is not causally related to the 2003 work injury. Dr. Rizor opined McCann's strain sustained in 2003 resolved long ago. He additionally stated he did not see any need for radiofrequency ablations. Regarding McCann's treatment with medication, Dr. Rizor stated, "there is no indication for continued use of opioids, muscle relaxants, membrane stabilizing drugs, or topical analgesic patches for any condition arising out of the 2003 injury.

Rite Aid's insurer issued a Utilization Review: Notice of Denial on August 9, 2018 indicating it was denying McCann's treatment with various medications, however no motion to reopen was filed. McCann saw Dr. Richard Campbell for treatment on September 17, 2018. The bill reflects Dr. Campbell signed it on September 20, 2018. Rite Aid's insurer received the bill on October 8, 2018. Rite Aid filed a medical dispute and motion to reopen on November 5, 2018 contesting McCann's ongoing treatment for the 2003 injury, and Dr. Campbell's bill.

McCann moved to dismiss the reopening. She argued Dr. Rizor evaluated her on July 2, 2018, and the notice of denial was issued on August 8, 2018. McCann argued that because Rite Aid did not move to reopen within thirty days of either of those dates, reopening was barred. Rite Aid responded that all medical bills prior to the receipt of Dr. Campbell's bill on October 8, 2018 had been paid, and it timely filed the medical dispute within thirty days of receipt of that billing. The ALJ denied the motion to dismiss on February 13, 2019.

Dr. Campbell submitted a letter as evidence on May 4, 2019. Dr. Campbell noted that McCann began treating at his facility in 2015. He stated that Dr. Rizor incorrectly noted that McCann only sustained a back strain in 2003. He also noted that a complete elimination of opioids would adversely affect McCann.

The Benefit Review Conference Order and Memorandum dated March 14, 2019 reflects two issues were preserved for determination. The first issue was the reasonableness, necessity, and work-relatedness of medications including Ambien, Tramadol, Percocet, Tizanidine, Lidocaine patches, and Gabapentin. The other issue preserved was whether Rite Aid had timely filed a motion to reopen/medical dispute. The parties subsequently agreed to waive the hearing, and submit the claim for decision on the record.

The ALJ rendered an Opinion and Order in a Medical Dispute on July 10, 2019. The ALJ determined Rite Aid is not responsible for medications including Ambien, Tramadol, Percocet, Tizanidine, Lidocaine patches, and Gabapentin. He also determined Rite Aid is not liable for bilateral sacroiliac injections. The ALJ also

determined the medical dispute was timely filed. The ALJ specifically found as follows:

The Plaintiff sustained a work-related injury to her mid and low back in 2003. Her pain and permanent restrictions were substantial after the injury as documented by Dr. Bansal in 2005. However, there is no filed evidence that specifically outlines the course of the Plaintiff's symptoms and treatment from 2005 up through the beginning of her treatment with Dr. Campbell in 2015. There is a brief mention in Dr. Rizor's report of an October 2, 2012, office visit with Dr. Baldock where it was noted that that[sic] the Plaintiff was doing well taking Mobic for her low back and knee pain, and was also using Lidoderm patches for the back. There was no indication in that record that any narcotics or any other medications were being prescribed.

Dr. Campbell, the Plaintiff's treating physician since 2015, has filed a report wherein he discusses at length the pain relief and improvement in functioning that the Plaintiff has had with the injections. He also discussed how the elimination of opioids would adversely affect the Plaintiff's quality of life. Dr. Campbell did not specifically address the efficacy of the other challenged medications. More problematic, Dr. Campbell does not persuasively connect the Plaintiff's need for the challenged medications and recommended sacroiliac joint injections to the Plaintiff's work injury. The closest thing that Dr. Campbell does to addressing causation is generally noting the 2003 work injury to the Plaintiff's lower back, and several sentences later stating, "this injury has resulted in a chronic problem which is best managed by combining treatment modalities which have proven to be beneficial." This lack of specific information is particularly problematic since the Plaintiff's injury occurred in 2003, and Dr. Campbell did not start seeing her until 2015.

Conversely, Dr. Rizor has opined that the Plaintiff has chronic low back pain following a strain type injury in 2003. However, he specifically stated that the only medication that was causally related to this 2003 injury was the Celebrex, and he recommended that it be continued at a rate of 200mg twice a day. Dr. Rizor

further stated that the Plaintiff had degenerative disc disease of the lumbar spine (shown in 2015 MRI) that was not work-related, whereas Dr. Campbell did not specifically address the work-relatedness of this condition. Dr. Rizor also specifically opined that the Plaintiff had sacroiliac joint osteoarthritis that was not work-related rendering the sacroiliac injections not work-related, whereas Dr. Campbell did not address the work-relatedness or existence of this condition. Dr. Rizor also specifically opined that the medications Ambien, Tramadol, Percocet, Tizanidine, Lidocaine patch, and Gabapentin are not indicated for the treatment of the Plaintiff's work injury.

The ALJ notes that this claim was settled and did not go to a decision wherein the ALJ made a specific finding on causation. The settlement paperwork listed lumbosacral strain / sprain and thoracic sprain / strain as the diagnoses, which is consistent with Dr. Rizor's diagnosis. Given the totality of the above circumstances, the ALJ finds that that[sic] the Plaintiff has failed to meet her burden of proof that the challenged medications, as well as the bilateral sacroiliac injection, are causally related to the work injury. In reaching this conclusion, the ALJ relies upon the opinion of Dr. Rizor.

Concerning the timeliness of the Motion to Reopen for the Medical Dispute, the HCFA for date of service of September 17, 2018, was signed by Dr. Campbell on September 20, 2018, and received by the medical payment obligor on October 8, 2018, as displayed by the date and time stamp on the top of the form. The medical dispute was filed on November 5, 2018, which would have been within 30 days as required by 803 KAR 25:096 Section 8(1) and 803 KAR 25:096 Section 8(2)(d). As such, the ALJ finds that the dispute was timely filed.

McCann filed a petition for reconsideration, arguing the ALJ erred in excusing Rite Aid for failing to file a medical dispute within thirty days after the Utilization Review Denial issued on August 9, 2018. In his order on

reconsideration, the ALJ amended his decision based upon typographical errors pointed out by Rite Aid, but denied McCann's argument. The ALJ specifically held as follows:

As noted in the original Opinion, the HCFA for date of service of September 17, 2018, was signed by Dr. Campbell on September 20, 2018, and received by the medical payment obligor on October 8, 2018, as displayed by the date and time stamp on the top of the form. The medical dispute was filed on November 5, 2018, which would have been within 30 days as required by 803 KAR 25:096 Section 8(1) and 803 KAR 25:096 Section 8(2)(d). As such, the ALJ finds that the dispute was timely filed.

The Plaintiff contends in her Petition for Reconsideration is that that[sic] the medical fee dispute was not filed within thirty days of a Utilization Review report. However, as pointed out by the Defendant, the UR report was performed prior to the receipt of any disputed bills. Specifically, no bills prior to the one received on October 8, 2018, for a September 17, 2018, date of service has been denied or is a part of the instant medical dispute. The medical fee dispute is triggered by the receipt of a completed statement of services that the employer disputes. The Defendant did not dispute any prior medical bill related to prior treatment with Dr. Campbell. The ALJ does not believe that the Defendant was prospectively required to file a dispute without first having received a statement for services. The receipt of the report alone did not trigger the filing of the medical dispute.

The ALJ would note that the Defendant has pointed out two clerical errors in the Opinion and Order. On page 1, the ALJ Opinion should be amended to state that the original settlement was dated February 1, 2019, and that the Motion to Reopen and Form 112 were filed on November 5, 2018.

We initially note that 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, 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).

Here, the ALJ determined the contested treatment was not reasonable and necessary for the injuries McCann sustained in the 2003 accident, and therefore are not compensable. The ALJ has the right and obligation to determine the compensability of 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). In this instance, the ALJ's determinations are supported by substantial evidence of record and will not be disturbed.

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).

In reaching a determination, the ALJ must provide findings sufficient to inform the parties of the basis for the decision to allow for meaningful review, and as noted above the determination must be based upon substantial evidence. Kentland Elkhorn Coal Corp. v. Yates, 743 S.W.2d 47 (Ky. App. 1988); Shields v. Pittsburgh and Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982); Big Sandy Community Action Program v. Chafins, 502 S.W.2d 526 (Ky. 1973).

Here, the ALJ properly considered the evidence of record and applied the correct analysis in reaching his determination. We additionally find the ALJ set forth sufficient findings supporting his determination, and clearly addressed McCann's concerns in his order on reconsideration. While authority generally establishes that an ALJ must effectively set forth adequate findings of fact from the evidence in order to apprise the parties of the basis for his decision, he or she is not required to recount the record with line-by-line specificity nor engage in a detailed explanation of the minutia of his reasoning in reaching a particular result. In

reaching a determination, the ALJ must only provide findings sufficient to inform the parties of the basis for the decision to allow for meaningful review.

As 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, supra. McCann 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. McCann merely points to conflicting evidence supporting a more favorable outcome, which is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974).

Since substantial evidence supports the ALJ's determination, and the ALJ provided a sufficient explanation for his decision, we must affirm. While McCann may be able to point to documentation contrary to this determination, a different decision is not compelled. This merely constitutes evidence upon which the ALJ could have relied, but did not.

Regarding McCann's argument that the medical dispute was not timely filed, we disagree. There is no evidence of record that either Rite Aid or its insurer received a request for treatment or a billing prior to the October 8, 2018 that it intended to contest, as contemplated by Kentucky Associated General Contractors Self-Insured Fund v. Lowther, supra. In that case, the Kentucky Supreme Court held that for purposes of time limitations imposed in the statute, a request for pre-authorization is treated as a "statement of services". There the Court stated that it is the employer who bears the burden of filing a medical dispute and moving to reopen a workers' compensation award when pre-authorization for medical treatment is

denied upon utilization review. In this instance, although a Utilization Review Notice of Denial was issued in August 2018, no medical dispute was filed, and all of McCann's treatment bills were paid.

We note Dr. Rizor evaluated McCann on July 2, 2018, and Rite Aid issued a Notice of Denial in August 2018, with no medical dispute filed until November, 2018. However, Rite Aid acknowledged it continued to pay for McCann's treatment until its insurer received Dr. Campbell's bill on October 8, 2018. The medical dispute was filed on November 5, 2018, well within the thirty days required. If Rite Aid had challenged any bills prior to the receipt of Dr. Campbell's invoice, without filing a medical dispute, the result may be different. However, since the only bill challenged was timely filed within thirty days of receipt, there was no error. Again, the ALJ acted within his discretion, and his determination is affirmed.

Accordingly, the July 10, 2019 Opinion and Order on a Medical Dispute, and the August 6, 2019 Order on petition for reconsideration issued by Hon. Richard E. Neal, Administrative Law Judge, are hereby **AFFIRMED**.

RECHTER, MEMBER, CONCURS.

STIVERS, MEMBER, DISSENTS AND FILES A SEPARATE OPINION.

Stivers, Member. Respectfully, I dissent. In Lawson v. Toyota Motor Mfg., Kentucky, Inc., 330 S.W.3d 452, 456 (Ky. 2010), the Kentucky Supreme Court held:

We determined today in *Kentucky Associated General Contractors Self-Insurance Fund v. Lowther* [footnote omitted] that an employer wishing to contest liability for a proposed medical procedure must file a medical dispute and motion to reopen within 30 days of

a final utilization review decision that recommends refusing pre-authorization. The rationale of *KAGC v. Lowther* applies with even greater force to a utilization review recommendation to grant pre-authorization. We conclude that in either instance an employer, having failed to invoke an ALJ's jurisdiction by filing a timely medical dispute and motion to reopen, may not circumvent KRS 342.020 and the regulations by engrafting such a dispute onto a worker's pending motion for TTD.

Based on the above language, Rite Aid had thirty (30) days from August 9, 2018, to file a medical dispute concerning the medications addressed in Dr. Rizor's report. Therefore, I disagree the medical dispute was timely filed.

DISTRIBUTION:

COUNSEL FOR PETITIONER:

LMS

HON WILLIAM C O REAVES
PO BOX 2557
ASHLAND, KY 41105

COUNSEL FOR RESPONDENT:

LMS

HON LYN DOUGLAS POWERS
HON ROBERT NEMES
1315 HERR LANE, STE 210
LOUISVILLE, KY 40222

RESPONDENT:

USPS

DR. RICHARD CAMPBELL
ATTN: SUSAN BRISCOE
1620 PRINCE AVENUE
ATHENS, GA 30606

ADMINISTRATIVE LAW JUDGE:

LMS

HON RICHARD E NEAL
MAYO-UNDERWOOD BLDG
500 MERO STREET, 3rd FLOOR
FRANKFORT, KY 40601