

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: March 29, 2019

CLAIM NO. 201394135

MCKECHNIE VEHICLE COMPONENTS

PETITIONER

VS. **APPEAL FROM HON. STEPHANIE L. KINNEY,
ADMINISTRATIVE LAW JUDGE**

ALLEN TURPIN,
REBECCA MERCER, PA,
UK SPORTS MEDICINE, and
HON. STEPHANIE L. KINNEY
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
AFFIRMING & REMANDING**

* * * * *

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

ALVEY, Chairman. McKechnie Vehicle Components (“McKechnie”) appeals from the October 30, 2018, Opinion and Order rendered by Hon. Stephanie Kinney, Administrative Law Judge (“ALJ”), resolving a medical dispute in favor of Allen Turpin (“Turpin”). The ALJ determined a recommended bariatric weight loss

surgery is reasonable and necessary treatment for the cure and relief of Turpin's work injury and is, therefore, compensable. McKechnie also appeals from the December 3, 2018 order denying its petition for reconsideration

On appeal, McKechnie argues Turpin did not meet his burden of proving the contested bariatric surgery is work-related. It also argues the ALJ's decision is contrary to applicable case law. McKechnie finally argues Turpin's condition pre-existed, and was not caused by or related to his work. We determine the ALJ made an appropriate analysis, and her decision is supported by substantial evidence. Therefore, we affirm her determination regarding the compensability of the proposed bariatric surgery. However, we remand for a determination regarding Turpin's motion to reopen which was passed in the ALJ's order issued September 6, 2018.

Turpin filed a Form 101 on December 2, 2013, alleging he injured his left knee and back while employed by McKechnie on February 11, 2013 when he slipped and fell in oil while pushing a skid. The claim was assigned to Hon. Roland Case, Administrative Law Judge ("ALJ Case"). In a decision rendered August 13, 2014, ALJ Case awarded temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits, and medical benefits for Turpin's work-related left knee injury. ALJ Case apportioned half of the 16% impairment rating to a pre-existing active left knee condition, and the remainder to the work injury.

On March 23, 2017, McKechnie filed a Motion to Reopen and Medical Fee Dispute. McKechnie challenged the work-relatedness and necessity of proposed gastric bypass surgery. Turpin subsequently filed a motion to reopen the

claim on July 2, 2018 based upon a change of condition. Turpin supported his motion to reopen with his own affidavit asserting his occupational injury had progressed, and he is now permanently totally disabled. He also filed the June 29, 2018 affidavit of Chad Morgan, D.C. who opined Turpin is “incapable of engaging in any substantial gainful activity and is therefore permanently totally disabled from any type of employment.” The ALJ issued an order on September 6, 2018, finding, in part, “2. Plaintiff’s Motion to Reopen to assert his right to additional indemnity benefits following the contested bariatric surgery is passed pending the outcome of the medical fee dispute.”

Turpin testified by deposition on June 26, 2018. He testified he slipped and fell in oil in February 2013, while working for McKechnie, and injured his left knee. Turpin testified that at the time of ALJ Case’s decision he continued to have problems with swelling of the left knee while walking, and he wore a left knee brace but did not use a cane. At that time, he weighed 397 pounds. He was advised to lose weight, and he subsequently lost sixty-seven pounds, but he has been unable to lose any additional weight. He testified Dr. Stephen Duncan has recommended a left knee replacement due to the worsening of his left knee pain and swelling. However, Dr. Duncan will not perform the surgery until Turpin loses an additional hundred pounds. Bariatric or gastric by-pass surgery has been recommended.

In support of the medical dispute, McKechnie filed Dr. Phillip Corbett’s January 21, 2017 report. Dr. Corbett reviewed medical records, and ALJ Case’s decision. He diagnosed Turpin with post-traumatic osteoarthritis of the left knee. Dr. Corbett opined some of Turpin’s arthritis pre-existed the February 11,

2013 injury and was due to a previous 2012 ATV accident and surgery. Regarding the bariatric surgery, Dr. Corbett opined as follows:

The obesity preexisted the injuries and, although the obesity magnifies the effect of the injury and accelerates the destruction of a weightbearing joint by the application of weightbearing and axial loading, it is not a treatment for the condition of the injury of 02/11/13. Given Mr. Turpin's age, some form of treatment for this joint, in order to maintain some ambulatory abilities, is certainly worthwhile, and he is not considered a standard candidate for knee replacement. I do applaud his treating physicians for attempting to give him some form of relief, but ascribing the injury of 02/11/13 as a causal agent necessitating the gastric bypass surgery is far beyond reasonable medical probability. It is reasonable and medically probable that Mr. Turpin's condition of osteoarthritis stemming from his initial injury was accelerated by his obesity to and through the time of the second injury and thereafter.

Turpin filed the December 13, 2016 record from Rebecca Mercer, P.A. ("Ms. Mercer"), of the University of Kentucky Healthcare Sports Medicine. She noted Turpin presented with left medial knee pain. After performing an examination, Ms. Mercer diagnosed Turpin with osteoarthritis of the left knee and morbid obesity due to excess calories. Ms. Mercer noted that Turpin's Body Mass Index ("BMI") of 54 precluded surgical treatment. Ms. Mercer acknowledged Turpin's weight problem pre-existed, but exacerbates the sequelae from his work injury. She also stated that surgical weight loss is the only way to solve the issue, and is a prerequisite for additional left knee surgery.

Ms. Mercer testified by deposition on July 30, 2018. At the time of her deposition, Ms. Mercer was employed at the Lexington Clinic and no longer with UK Sports Medicine. She agreed the extra weight Turpin is carrying around on a

daily basis accelerated any kind of diagnosis with respect to his knees. She testified osteoarthritis is a progressive disease which is accelerated by morbid obesity due to weight bearing going through the knee joint.

Turpin also filed the May 29, 2019 record from Erika Reynolds, P.A. (“Ms. Reynolds”), of UK Healthcare Department of Orthopaedic Surgery. Ms. Reynolds diagnosed Turpin with post-traumatic osteoarthritis of the knee. She noted Turpin had returned for treatment due to worsening left knee pain. She stated he continues to be morbidly obese despite losing sixty pounds over the past couple of years. She additionally noted Turpin was attempting to get the bariatric surgery approved through the workers’ compensation insurer. She stated he would benefit from the weight loss surgery since he was not yet a candidate for knee replacement due to his obesity. She also stated Turpin had exhausted conservative measures for knee arthritis and his pain was worsening.

Turpin also filed Dr. Duncan’s June 21, 2018 report. Dr. Duncan noted Turpin had treated for severe left knee medial joint arthritis with gel, steroid injections, physical therapy, and bracing, but all had failed to alleviate his knee pain for any significant length of time. Dr. Duncan stated Turpin needs to have a total knee replacement, but cannot proceed with that treatment until he loses a large amount of weight. He noted Turpin’s BMI was 47.61. Dr. Duncan stated he supported the weight loss surgery, and this should improve his condition to the point he can undergo the left knee surgery.

A Benefit Review Conference (“BRC”) was held April 11, 2018. At that time, the only issue for determination was the work-relatedness, reasonableness

and necessity of the recommended weight loss surgery. No BRC was held after Turpin filed his motion to reopen. Likewise, since the ALJ passed ruling on the motion to reopen, McKechnie has not filed a Form 111.

The ALJ rendered a decision on October 30, 2018, finding the proposed bariatric surgery compensable. The ALJ specifically found as follows:

The only impediment, which prevents Plaintiff from undergoing a knee replacement is his weight. To be clear, Plaintiff attempted to lose weight following December 2016. During the next two year period Plaintiff lost 60 pounds, which is commendable considering he is unable to engage in any rigorous exercise due to knee pain. Plaintiff's weight loss has plateaued and he has significant difficulty with further weight loss. Plaintiff has reached the end of the line in two different regards. Firstly, Plaintiff has exhausted conservative treatment, leaving a left knee replacement as the only option left on the table. Secondly, Plaintiff is unable to lose additional weight in order to undergo a total knee replacement.

Dr. Duncan recommended a total knee replacement and opined bariatric surgery is required. We have an orthopedic who is diligently concerned about Plaintiff's BMI, as it relates to the recommended left knee replacement. Plaintiff was obese at the time of the work injury. However, his obesity prevents his ability to undergo a left knee replacement. KRS 342.020 requires an employer to pay for the cure and relief from the effects of an injury. Simply put, Plaintiff requires a total knee replacement for relief of left knee pain. He cannot undergo it until he loses a significant amount of weight. Thus, this ALJ finds the contested bariatric surgery is compensable, relying on Dr. Duncan. This ALJ further notes Dr. Latterman recommended this surgery at well.

Defendant challenges the history Plaintiff's treating physicians received. Defendant deposed PA Mercer, and had an opportunity to cross-examine her regarding Plaintiff's previous history. It is clear PA Mercer was aware of Plaintiff's prior left knee history because she discusses Dr. Talawalker's surgery. It is clear Dr.

Latterman was aware of Plaintiff's prior left knee surgery, before recommending surgery in 2013. This ALJ does not believe Plaintiff has engaged in any type behavior to conceal his prior left knee surgery. Based upon Plaintiff's treatment records, this ALJ finds Dr. Latterman, PA Mercer, and Dr. Duncan are aware of Plaintiff's extensive left knee treatment.

On page 10 of Defendant's brief, it asserts the issue of compensability of a bariatric surgery "is not even ripe for discussion." However, Defendant filed a medical dispute contesting this procedure, which indicates the matter had ripened enough to seek adjudication of that issue. Plaintiff's treating physicians have discussed/recommended bariatric surgery on more than one occasion. Certainly, a gastric bypass procedure requires hurdles, as articulately explained by PA Mercer. Whether Plaintiff clears the pre-requirements is between him and his medical providers. Based upon the evidence currently in the record, this ALJ finds a gastric by-pass is reasonable and necessary treatment for the cure and relief of Plaintiff's work injury.

McKechnie filed a petition for reconsideration arguing Turpin did not establish the proposed bariatric surgery is causally related to his work injury. It also argued the ALJ made no determination regarding work-relatedness and causation of the recommended procedure. McKechnie also argued the ALJ did not provide a sufficient basis for her determination that Turpin's weight loss had plateaued, and requested additional findings of fact.

The ALJ entered an order on McKechnie's petition for reconsideration on December 3, 2018. The ALJ, quoting from the holding from the Kentucky Supreme Court in Derr Construction v. Bennett, 873 S.W.3d 824 (Ky. 1994), stated that, "Liability for medical expenses requires only that an injury was caused by work and that medical treatment was necessitated by the surgery." She

also stated that Turpin's obesity was noted during his original claim, but it presented no obstruction or barrier to treatment at that time. She stated Turpin now requires a knee replacement, but his BMI diminishes his ability to "achieve a positive result following a total knee replacement." The ALJ found that bariatric surgery is necessitated by the work injury, and is therefore compensable. The ALJ specifically found as follows:

At present, Plaintiff's treating orthopedic, recommended total knee replacement. However, this surgery has not taken place as Plaintiff's BMI diminishes his ability to achieve a positive result following a total knee replacement. Understandably, bariatric surgery was recommended after Plaintiff's efforts to lose weight, without surgical measures, plateaued. The fact pattern in the case sub judice indicates bariatric surgery was recommended to reduce Plaintiff's BMI to allow for a successful total knee replacement. Thus, this ALJ finds bariatric surgery was necessitated by the work injury, and is therefore compensable.

On appeal, McKechnie argues Turpin did not meet his burden of proof. It also argues the ALJ's decision is directly contradicted by applicable case law. Finally, it argues the need for bariatric surgery is not caused by or related to the work injury. We initially 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 that 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).

The ALJ determined the bariatric surgery was necessary treatment to assist Turpin in losing weight in order to have a left knee replacement. In her order on reconsideration, the ALJ noted Turpin was obese when his claim was originally decided in 2014, and his treatment was not hindered at that time. The ALJ determined the proposed bariatric surgery is part of a course of treatment to relieve Turpin from the effects of the work-related injury, and is therefore compensable. The questions on appeal are therefore whether the ALJ erred as a matter of law, and whether the evidence compels a different result. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). “Compelling evidence” is defined as evidence that is so overwhelming no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985). The function of the Board in reviewing the ALJ’s decision is limited to a determination of whether the findings made by the ALJ are so unreasonable under the evidence that they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

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 supporting a different outcome than reached by an ALJ, this 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 afforded to 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). An ALJ's determination shall not be disturbed on appeal as long as it is supported by substantial evidence. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

The ALJ determined the bariatric surgery is reasonable and necessary for treatment of the work-related injury. She addressed reasonableness, necessity and work-relatedness in her decision and the order on reconsideration, and we find she committed no error in reaching her determination. She explained the reasons for her decision. McKechnie 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. McKechnie 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., supra.

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., 634 S.W.2d 440 (Ky. App. 1982); Big Sandy Community Action Program v. Chaffins, 502 S.W.2d 526 (Ky. 1973). The ALJ's analysis of the evidence in this claim was sufficient to support her determination. Likewise, we do not believe the ALJ abused her discretion or committed reversible error. The record supports the ALJ's decision, and therefore we affirm regarding the compensability of the proposed bariatric surgery.

That said, this Board is permitted to *sua sponte* reach issues even if unpreserved but not raised on appeal. KRS 342.285(2)(c); KRS 342.285(3); George Humfleet Mobile Homes v. Christman, 125 S.W.3d 288 (Ky. 2004). We note the ALJ failed to address Turpin's motion to reopen in the October 30, 2018 decision. Although this was not raised by any party on appeal, it is noted that in the September 6, 2018 order, the ALJ stated a determination on Turpin's Motion to Reopen would be made upon resolution of the medical dispute. Although the medical dispute was resolved in Turpin's favor, the ALJ did not address the outstanding Motion to Reopen. Therefore, we must remand this claim to the ALJ for a determination on the Motion to Reopen.

Accordingly, the Opinion and Order rendered by Hon. Stephanie L. Kinney, Administrative Law Judge, on October 30, 2018, and the order on reconsideration issued on December 3, 2018, are hereby **AFFIRMED**. This claim is **REMANDED** for the ALJ to issue a determination on Turpin's Motion to Reopen.

RECHTER, MEMBER, CONCURS.

STIVERS, MEMBER, NOT SITTING.

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