

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: January 25, 2019

CLAIM NOS. 200189956 & 200085989

PATTI'S ENTERPRISES/BRENTWOOD SERVICES, TPA PETITIONER

VS.

**APPEAL FROM HON. JANE RICE-WILLIAMS,
ADMINISTRATIVE LAW JUDGE**

CYNTHIA AKINS,
DR. MONTE ROMMELMAN/
PADUCAH PHYSIATRIC PARTNERS,
WEST TOWNE PHARMACY
& COMPOUNDING CENTER,
IMAC/DR. JASON BRAME,
And HON. JANE RICE-WILLIAMS,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
AFFIRMING**

* * * * *

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

RECHTER, Member. Patti's Enterprises/Brentwood Services, TPA ("Patti's")
appeals from the September 5, 2018 Remand Medical Dispute Opinion and Order

and the October 3, 2018 Order rendered by Hon. Jane Rice Williams, Administrative Law Judge (“ALJ”), finding contested treatment by Dr. Jason Brame compensable. On appeal, Patti’s argues the ALJ erred on remand in finding the contested treatment compensable. We affirm.

In our prior decision rendered February 16, 2018, we summarized the procedural history and evidence as follows:

Cynthia Akins worked as a waiter for Patti’s Enterprises, LLC (“Patti’s”), a restaurant. She suffered work-related injuries to her low back in 2000 while lifting a tray filled with plates. A few months later, she injured her neck when she tripped on wet carpeting. The neck injury is the basis of the current medical fee dispute.

Akins filed a claim for benefits and submitted, among other evidence, a cervical MRI report dated October 1, 2001, which showed a bulging disc at C4-7. Her treating chiropractor diagnosed a disc bulge and sUBLUXATION at C4-7. In an opinion rendered October 18, 2002, Hon. Landon Overfield, Administrative Law Judge (“Judge Overfield”) relied upon the medical opinion of Akins’ chiropractor. He awarded Akins permanent partial disability benefits based on a 13% impairment rating for her low back injury and an 18% impairment rating for the cervical spine injury. She was also awarded medical benefits. Judge Overfield determined Patti’s had defended the claim without reasonable grounds, and additionally referred the matter to the Commissioner of the Department of Workers’ Claims for possible unfair claims settlement practices.

Patti’s filed a medical fee dispute in 2007 to challenge continued chiropractic care and spinal decompression therapy. Akins was represented by counsel, and a hearing was held, at which she testified. Judge Overfield relied on Akins’ testimony to conclude the chiropractic treatment affords her some measure of relief. He further noted Patti’s medical proof challenged only the finding that Akins had suffered permanent

cervical and lumbar spine injuries, an issue which had already been determined in the 2002 Opinion and Order.

In 2013, Patti's again challenged the compensability of chiropractic treatment, including spinal decompression, noting the frequency of treatments had increased significantly. The attorney who had represented Akins in the original claim and 2007 medical fee dispute moved to withdraw. In the motion to withdrawal, counsel explained Akins' claim had reached the statutorily-permitted attorney fee cap and she could not afford to pay his standard hourly fee. With regret, he acknowledged Akins would proceed *pro se*.

Hon. Douglas Gott, Administrative Law Judge ("Judge Gott"), was assigned the 2013 medical fee dispute. By 2013, Akins' treating chiropractor was Dr. Jason Brame. Akins requested a hearing, at which she testified and explained the relief she receives from the chiropractic adjustments. Patti's filed the report of Dr. Kyle Owsley, who concluded Akins' description of ongoing pain with episodic exacerbations, "are the unfortunate but expected result of the traumatic insult to the spine." Dr. Owsley recommended chiropractic care once every two to three weeks, with increased visits during times of exacerbation. Judge Gott relied on Akins' testimony, and the reports of Drs. Brame and Owsley, to conclude the chiropractic treatment is reasonable and necessary for the cure of and relief from the work injury.

Patti's filed two medical fee disputes in 2016, and Akins again proceeded *pro se*. The first challenged the compensability of compound cream. Akins submitted a letter from Kelly Faulkner, a nurse in her chiropractor's office, stating the anti-inflammatory cream is used to relieve Akins' pain related to her work injuries. The ALJ determined the cream is non-compensable.

During the pendency of that medical fee dispute, Patti's filed a second motion to reopen to challenge the compensability of further treatment with Dr. Brame. This medical fee dispute is the subject of the current appeal. Dr. Brame originally requested treatment

consisting of chiropractic adjustments, physical therapy, trigger point injections, plasma rich platelet (“PRP”) injections, a back brace and two physical therapy reevaluations.

In a letter dated May 1, 2017, Dr. Brame explained that Akins developed increasing pain in her cervical spine in September 2016, particularly when she performed tasks requiring her to raise her arms above her head. She simultaneously developed a swallowing problem that caused her to choke on food. Dr. Brame suspected Akins’ bulging disc in her cervical spine and requested an MRI. Because of the severity of Akins’ symptoms, he began treatment while Akins was waiting on approval or denial from her workers’ compensation insurance carrier.

The MRI was ultimately performed and confirmed “disc problems.” In his letter, Dr. Brame offered to forward Akins’ 2001 MRI report for comparison purposes. Dr. Brame treated Akins with adjustments and decompression. He noted her range of motion has doubled since she started the treatment, the choking sensation has ceased, and her pain has significantly reduced. Dr. Brame further explained that his treatment plan had altered since he initially evaluated Akins, and he no longer recommended trigger point injections or a back brace. Therefore, his recommended treatment consisted of 32 physical therapy visits with decompression and PRP injections.

In a June 6, 2017 letter, Dr. Brame noted Akins has completed 38 sessions of physical therapy with decompression and needed no further sessions. He attached a neck disability index from her first session and after her final session to document her progress. The neck disability index form consisted of a questionnaire which Akins completed documenting her symptoms and pain level. Dr. Brame explained that the purpose of the treatment is to avoid surgical intervention.

Dr. Waldtraut Jedamski conducted a utilization review and provided a summary of Akins’ care since 2016. Dr. Jedamski stated Akins suffered a neck injury

but did not specify her original diagnosis. He noted that she has undergone extensive treatment in different modalities, including massage, chiropractic care, acupuncture and physical therapy. Dr. Jedamski reviewed the 2017 MRI report which indicated a neuroforaminal narrowing at C6-7 and a decrease in the diameter of the AP cord at C5-6 and C4-5. Dr. Jedamski's medical records review documents improved range of motion and decreased spasms following chiropractic treatment sessions.

With respect to the requested treatment, Dr. Jedamski explained:

Recommendations and Clinical Rational

...

32 PT treatments: NON-CERTIFIED

This claimant is a 57 year-old female with a 10/21/2000 DOI, injured while working for Patti's Enterprises; the injury occurred to the neck and lumbar spine. There has been extensive physical therapy, chiropractic care, message therapy; acupuncture has been trialed with some improvement reported. While it is stated that she is improved with her care, such improvement has not been translated into objective functional improvement and decreased VAS scores. The number of physical therapy treatment sessions that have been provided and when is not stated; there is no discussion as to her functional abilities prior to such treatment and after how long this lasted; there is no discussion as to VAS scores prior and post such treatment sessions and how long the pain relief lasts. Physical therapy has limited benefit for an injury that is now over 16 years old and is not supported for ongoing care unless there is a clear exacerbation not shown. There is noted to be a home exercise program and no need

shown for a therapist involvement to assure she is doing a HEP appropriately. The specific treatment to be provided and how this will be different from the chiropractic care being proposed concomitantly is not stated; the body parts to be treated are not noted; even if ongoing chronic PT would be appropriate, based on this lack of information, further PT sessions are not supported.

3 PRP injections: NON-CERTIFIED

There is no statement as to where these injections are planned; this is not supported by ODG for any of the complaints stated in the reports.

Dr. Avrom Gart conducted a utilization review and recommended all requested treatment be denied. Dr. Gart noted Akins had been diagnosed in 2000 with cervical disc degeneration at C6-7 and C5-6, tension headaches, and radiculopathy. He noted the 2017 MRI revealed neural foramina narrowing on the left at C6-7 and C7-T1, and an AP diameter of the spinal cord at the lower limits of normal at the C4-5 and C5-6 levels. With respect to the request for decompression therapy and PRP injections, Dr. Gart stated:

While the evidence-based guidelines recommend consideration for physical therapy to address cervical intervertebral disc degeneration and radiculopathy, it appears that the patient has already undergone physical therapy. The quantity of completed sessions is not clear. Nevertheless, the records do not establish objective functional improvement resulting from any previous physical therapy. Regarding the component of decompression therapy, the guidelines do not recommend this treatment for the neck, as there are no quality studies associated with this body part. Therefore, my recommendation is to NON-

CERTIFY the appeal for Decompression Therapy and PT x 20.

The provider has recommended PRP injections to target the ligaments and tightened them to allow long-term stability. However, the evidence-based guidelines do not recommend autologous blood-derived products for neck conditions except in an experimental setting. The setting in which the injections are to be administered is not experimental. Based on this information, the medical necessity is not established. Therefore, my recommendation is to NON-CERTIFY the appeal for PRP Injections.

Akins waived a hearing and, in the initial decision rendered July 28, 2017, the ALJ determined the challenged treatment was non-compensable. Akins filed a petition for reconsideration, arguing she was denied the opportunity to speak during the two telephonic benefit review conferences. She acknowledged that she had waived her right to a hearing, but only did so because the ALJ had informed her she would not be permitted to speak. The ALJ denied the petition for reconsideration, stating Akins failed to establish her current symptoms relate to her 2000 cervical spine injury.

Akins appealed, arguing she was improperly denied an opportunity to be heard, and that the evidence compels a result in her favor. The Board vacated, determining there was insufficient evidence to establish Akins' knowingly and voluntarily waived her right to a hearing. The Board remanded the claim, and directed that Akins be afforded the opportunity to revisit her decision to waive a final hearing.

On remand, the ALJ conducted a hearing on July 31, 2018 at which Akins testified. She stated the contested treatment is the exact type of treatment approved in disputes in 2008 and 2013. She indicated all of her conditions and symptoms are the same as she has had since the initial injury. Her problem with choking was caused by a disc pressing on a nerve, the same disc injured in the fall at work in 2000. Dr. Brame did not feel her treatment could wait, and proceeded with treatment despite not having approval from the insurance company. Akins stated her treatment provided relief for the work-related symptoms and her choking stopped.

On remand, the ALJ found as follows:

In the specific instance, Defendant Employer has moved to reopen this claim to challenge the work relatedness, reasonableness and necessity of 32 chiropractic benefits; 32 physical therapy visits; 32 trigger point/facet injections; 3 PBR injections; back brace; and, 2 PT reevaluations. After review of the records including letters from Dr. Brame, the majority of these items are no longer requested. Only the 32 physical therapy treatments and 3 PRP injections are requested. Although the letter of Dr. Brame provided no clear explanation for why the treatment is related to the work injury other than a brief reference, Plaintiff's testimony was extremely beneficial on the issue. Without testifying as to medical opinion, she laid out the facts of her treatment having been consistent since the work injury. Because of her fear of choking, she went ahead and had the contested treatment with an excellent result. Based on this additional testimony of Akins in conjunction with the medical reports of Dr. Brame, the contested treatment is found related to the work injury. As it provides such dramatic results for Akins, it is also found to be reasonable and necessary for the cure and/or relief of the effects of the work injury.

Patti's filed a petition for reconsideration arguing Akins failed to establish a causal relationship between her injury and the contested treatment. The ALJ overruled Patti's petition for reconsideration, providing the following findings:

Plaintiff's injury to her low back and neck occurred in 2000. Her award of medical benefits occurred in 2002. Since that time, this is at least the fourth medical dispute requiring litigation. In prior medical disputes, in 2008 and 2013, chiropractic treatment was found compensable. Akins testified concerning the hardship of having to plead her case as a *pro se* litigant every few years in order to keep her medical benefits. In deciding the dispute prior to the hearing, the issue of work relatedness was not so obvious in the record. Although Plaintiff is not a physician and did not provide medical testimony, her explanation that the contested treatment is the same as what she has had all along for her work injury was completely believable. This is not the same situation as in *Hush v. Abrams*, 584 S.W.2d 48 (Ky. 1979) which stands for the proposition that when making a determination of whether a claimant is totally disabled, the ALJ may rely on the medical testimony as well as a worker's own testimony regarding his or her physical condition and ability to labor, but her testimony was persuasive. This claimant has been in workers' compensation litigation for most of 18 years. Plaintiff does not have an attorney for obvious reasons - there is no system to pay an attorney to help her hold on to her medical benefits. Her testimony that her treatment is the same treatment that has always been found compensable was believable, credible, persuasive, compelling and was relied upon. Not only is it work related, it provides remarkable relief. Additionally, Dr. Brame has helped Plaintiff with her evidence and has explained in writing the treatment and the purpose of the treatment. Clearly, although he does not use "magic words," by asking the workers' compensation ALJ to approve the treatment, he believes it relates to the work injury.

On appeal, Patti's argues there is no medical evidence to establish a causal relationship between the contested treatment and Akins' work injury.

Moreover, according to Patti's, the uncontroverted medical evidence proves the treatment is neither reasonable or necessary. Because no additional medical evidence was submitted after the claim was remanded to the ALJ, Patti's argues she erred in reversing her ultimate conclusions.

The Board's prior opinion vacated the ALJ's original decision, in essence rendering the ALJ's July 28, 2017 Opinion null and void. Therefore, the ALJ's prior opinion was invalidated, and she was no longer bound by the determinations or conclusions contained in the July 28, 2017 Opinion. Skelton v. Roberts, 673 S.W.2d 733 (Ky. App. 1984). The ALJ was free to consider the totality of the evidence anew, and was not bound by her assessment of Dr. Brame's letter, or any other evidence in the record.

The remainder of Patti's appeal is essentially a challenge to the sufficiency of the evidence supporting the ALJ's decision. As the ALJ noted, Dr. Brame's letter does not adopt the format typically used by physicians conducting an independent medical examination. However, there is no requirement a physician use a certain set of "magic words" to establish causation; rather, the ALJ may examine the "quality and substance" of a physician's opinion. Brown-Forman v. Upchurch, 127 S.W.3d 615 (Ky. 2004).

In his May 1, 2017 letter, Dr. Brame explained the increased pain Akins had experienced for the prior eight months, as well as the choking sensation. He stated, "This has also been occurring since the fall with a gradual increase in occurrence." He later stated that the proposed physical therapy is intended to relieve this pain and offered to provide "the MRI from 2001" for comparison to Akins' most

recent MRI. Though brief, we conclude it is not unreasonable for the ALJ to interpret Dr. Brame's statements to establish a causal connection between the proposed therapy and her work injury.

Other aspects of the proof support the ALJ's interpretation of Dr. Brame's letter. As the ALJ noted, the fact Dr. Brame recommended the treatment and assisted Akins in seeking coverage through her workers' compensation claim is additional proof of his belief that the proposed therapy is work-related. Additionally, in the 2013 dispute, Dr. Kyle Owsley concluded Akins' description of ongoing pain with episodic exacerbations, "are the unfortunate but expected result of the traumatic insult to the spine." Dr. Owsley recommended chiropractic care once every two to three weeks, with increased visits during times of exacerbation. Clearly, there is evidence in the claim that Akins' work-related condition was expected to require ongoing care and would flare up from time to time. For these reasons, we conclude the ALJ's determination that the contested treatment is work-related is supported by substantial evidence.

Further, the ALJ found Akins' testimony credible regarding the relief provided by the treatment. Treatment providing even temporary relief from the effects of the work injury may be found compensable. National Pizza Company v. Curry, 802 S.W.2d 949 (Ky. App. 1991). Her testimony, in addition to Dr. Brame's letter, constitutes substantial evidence to support the conclusion the challenged treatment provided relief.

We believe the ALJ followed the Board's directives upon remand, understood and accurately addressed the issues presented for determination, and

supported her conclusions with adequate findings of fact which were supported by substantial evidence of probative value. Accordingly, her decision will not be disturbed on appeal. KRS 342.285; Wolf Creek Collieries vs. Crum, 673 S.W.2d 735 (Ky. App. 1984); Special Fund vs. Francis, 708 S.W.2d 641 (Ky. 1986); and McCloud vs. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). While Patti's has identified evidence supporting a different conclusion, there was substantial evidence presented to the contrary. The ALJ acted within her discretion to determine which evidence to rely upon, and it cannot be said the ALJ's conclusions are so unreasonable as to compel a different result. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

Accordingly, the September 5, 2018 Remand Medical Dispute Opinion and Order and the October 3, 2018 Order rendered by Hon. Jane Rice Williams, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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