

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: October 9, 2020

CLAIM NO. 200500491

SHEILA G. FRANKLIN

PETITIONER

VS.

APPEAL FROM HON. R. ROLAND CASE,
ADMINISTRATIVE LAW JUDGE

SOMERSET INDEPENDENT SCHOOLS and
HON. R. ROLAND CASE,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

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

BORDERS, Member. Sheila Franklin (“Franklin”), *pro se*, appeals from the July 17, 2020 Medical Dispute Opinion and Order rendered by Hon. Roland Case, Administrative Law Judge (“ALJ”). The ALJ determined the proposed medical treatment challenged by the Employer, Somerset Independent Schools (“School Board”), is not compensable. For the reasons to be set forth herein, we affirm.

Franklin suffered work-related neck, back, and upper extremity injuries as a result of slipping and falling at work on December 12, 2003. In an Opinion and Award rendered on October 11, 2005, the ALJ awarded temporary total disability (“TTD”) benefits, permanent partial disability (“PPD”) benefits, and medical expenses for her neck, back, and upper extremity injuries. The ALJ dismissed her claim for psychiatric benefits.

The School Board file a motion to reopen to assert a medical fee dispute on June 20, 2006, contesting an anterocervical discectomy and fusion proposed by Dr. Amir El-Naggar. In an Opinion rendered on August 29, 2007, the ALJ determined the proposed surgery was not medically reasonable, necessary, or related to the work injury. The School Board filed a second motion to reopen to assert a medical fee dispute on October 29, 2010, contesting a recommended RFTC procedure. In an Opinion dated July 11, 2011, the ALJ determined the RFTC procedure was reasonable, necessary, and compensable. The School Board filed another motion to reopen to assert a medical fee dispute on July 13, 2015, contesting recommended injections as well as prescriptions for Gabapentin, Methocarbamol, Senna Lax, Morphine, and Oxycodone. In an Opinion dated October 15, 2015, the ALJ determined the contested injections and medications were compensable. The School Board filed another medical dispute on July 23, 2018, contesting physical therapy, frequency of urine drug screens, and the prescriptions for Morphine and Cyclobenzaprine. In an Opinion dated April 4, 2019, the ALJ determined physical therapy and Morphine were compensable, limited urine drug screens to three/four times a year, and found Cyclobenzaprine compensable as needed.

This appeal concerns the School Board's latest motion to reopen to assert a medical fee dispute, filed on March 18, 2020, contesting the reasonableness, necessity, and work-relatedness of a proposed cervical MRI and bilateral upper extremity EMG/NVC recommended by Dr. Magdy El-Kalliny and Heather Ramsey, APRN.

The parties agreed to waive the final hearing and to submit this dispute on the record for a decision. The ALJ considered the following medical proof in making his determination.

Dr. Maria Elaina Sumas performed a medical records review of Franklin's treatment with Lake Cumberland Neurosurgical Associates as well as all other medical records and diagnostic studies generated to date. Dr. Sumas opined the last office notes of February 20, 2020, did not indicate a physical examination had been performed. An MRI was previously performed on July 1, 2019, and there is no clear indication for the studies as there are no positive indicators on physical examination to substantiate the need for tests. Therefore, Dr. Sumas opined the requested testing is not indicated.

Dr. Gregory Nazar performed a medical records review of Franklin's treatment and diagnostic studies from Lake Cumberland Neurosurgical Associates as well as other medical providers. Based on his review, he opined that the medical records do not indicate any findings on physical examination, which he felt was essentially normal, showing the need for a repeat cervical MRI or upper extremity EMG/NCV. Therefore, Dr. Nazar opined the requested testing is not indicated.

Franklin submitted medical records from Lake Cumberland Neurosurgical Associates, and Heather Ramsey, APRN. The records consist of office notes reflecting treatment Franklin received on February 20, 2020 and May 14, 2020. The records indicate Franklin was seen for complaints of nocturnal paresthesia and numbness that has recently worsened. Based on the fact her prior MRI indicated two level cervical disc protrusions with severe bilateral spinal stenosis, the records indicate the proposed MRI and EMG/NCV are necessary as she will likely need a C5-6, C6-7 fusion surgery.

In the Medical Dispute Opinion and Order dated July 17, 2020, the ALJ found, in relevant part as follows, *verbatim*:

ANALYSIS AND CONCLUSIONS

KRS 342.020 provides that it is the responsibility of the Defendant-employer to pay for the cure and relief from the effects of an injury or occupational disease, all medical, surgical, hospital treatment, including nursing, medical and surgical supplies and appliances as may be reasonably be required at the time of the injury and thereafter during disability. However, treatment which is shown to be unproductive or outside the type of treatment generally accepted by the medical profession is deemed unreasonable and non-compensable. This finding shall be made by the ALJ based upon the facts and circumstances surrounding each case. Square D Company v. Tipton, 862 S.W.2d 308 (Ky. 1993).

In a post-award medical fee dispute, the employer has the burden of proving that contested medical treatment is not reasonable or necessary for the cure and relief of a work injury. National Pizza Company v. Curry, 802 S.W.2d 949 (Ky. App., 1991). Plaintiff retains the burden of proof on the issue of work-relatedness. Addington Resources, Inc. v. Perkins, 947 S.W.2d 421 (Ky. App. 1997). In a medical dispute reopening, the claimant is obligated to present medical evidence to overcome expert medical testimony on issues of

causation which are not apparent to a layperson. Kingery v. Sumitomo Electrical Wiring, 481 S.W.3d 492 (Ky. 2015).

Based upon a careful review of the evidence, the ALJ is persuaded by and relies the reports of Dr. Sumas And Dr. Nazar that the contested MRI of the cervical spine and EMG of the bilateral upper extremities are not reasonable, necessary, or related to the injury of December 12, 2003.

Franklin did not file a petition for reconsideration seeking additional findings of facts or challenging any of the ALJ's factual determinations. Instead, Franklin prosecuted an appeal to this Board.

We are compelled to point out that, while we are sympathetic to Franklin's predicament and are cognizant of the fact the School Board has now reopened this claim to assert a medical fee dispute for the fifth time, *pro se* claimants are treated no differently by this Board than claimants represented by counsel. A *pro se* claimant assumes all the risks and rewards associated with self-representation. Smith v. Bear Inc., 419 S.W.3d 49, 55 (Ky. App. 2013).

On appeal, Franklin argues the School Board should be compelled to pay for the proposed cervical MRI and upper extremity EMG/NCV as she suffers from continuous numbness, tingling, and pain.

In a post-award medical fee dispute, the employer has the burden of proving the contested medical treatment is not reasonable or necessary for the cure and relief of a work injury. National Pizza Company v. Curry, 802 S.W.2d 949 (Ky. App., 1991). Plaintiff retains the burden of proof on the issue of work-relatedness. Addington Resources, Inc. v. Perkins, 947 S.W.2d 421 (Ky. App. 1997). In a medical dispute reopening, the claimant is obligated to present medical evidence to

overcome expert medical testimony on issues of causation which are not apparent to a layperson. Kingery v. Sumitomo Electrical Wiring, 481 S.W.3d 492 (Ky. 2015).

Because Franklin was unsuccessful in that burden, the question on appeal is 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) *superseded by statute on other grounds as stated in* Haddock v. Hopkinsville Coating Corp., 62 S.W.3d 387 (Ky. 2001).

Franklin’s failure to file a petition for reconsideration further restricts our review. Pursuant to KRS 342.285, in the absence of a petition for reconsideration, concerning questions of fact, the Board is limited to a determination of whether substantial evidence in the record supports the ALJ’s conclusion. Stated otherwise, where no petition for reconsideration was filed prior to the Board’s review, inadequate, incomplete, or even inaccurate fact-finding on the part of an ALJ will not justify reversal or remand if there is any evidence of substance in the record supporting the ALJ’s ultimate conclusion. Eaton Axle Corp. v. Nally, 688 S.W.2d 334 (Ky. 1985); Halls Hardwood Floor Co. v. Stapleton, 16 S.W.3d 327 (Ky. App. 2000).

In this specific instance, the ALJ was confronted with conflicting medical evidence from Drs. Sumas and Nazar opining the proposed cervical MRI and upper extremity EMG/NCV were not reasonable, necessary or related for treatment of her work-related injuries, as opposed to an opinion from Lake

Cumberland Neurosurgical Associates indicating the testing is reasonable, necessary, and related to treatment for her work-related injuries. The ALJ chose to rely on the medical evidence from Drs. Sumas and Nazar in finding the School Board had met its burden of proving the contested medical treatment was neither reasonable, necessary, or related, which was clearly in his discretion to do.

The ALJ's Opinion was supported by evidence of substance from both Dr. Sumas and Dr. Nazar, opining the proposed testing is not reasonable, necessary or related to treat the effects of her work related injuries. Both physicians likewise set forth with specificity in their respective reports the basis for their opinions. This clearly constitutes substantial evidence upon which the ALJ could rely in making his determination regarding the compensability of the proposed testing, and will not be disturbed on appeal.

Accordingly, the Medical Dispute Opinion and Order rendered on July 17, 2020 by the Hon. Roland Case, Administrative Law Judge, is hereby **AFFIRMED**.

ALL CONCUR.

DISTRIBUTION:

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