

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: August 20, 2021

CLAIM NO. 201684274

SHERYL PERKINS

PETITIONER

VS. **APPEAL FROM HON. MONICA RICE-SMITH,
ADMINISTRATIVE LAW JUDGE**

WAL-MART STORES, INC. and
HON. MONICA RICE SMITH,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
AFFIRMING AND REMANDING**

* * * * *

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

ALVEY, Chairman. Sheryl Perkins (“Perkins”) appeals from the April 12, 2021 Medical Dispute Opinion and Order rendered by Hon. Monica Rice-Smith, Administrative Law Judge (“ALJ”). The ALJ found in favor of CMI (Wal-Mart Stores Inc.) (“Wal-Mart”) in this Medical Dispute. The ALJ found treatment for Perkin’s left hip is not compensable. The ALJ also found Perkins’ requests for reimbursement of expenses were either not timely submitted, or for items that Wal-

Mart is not responsible, and are therefore not compensable. Perkins also appeals from the May 12, 2021 Order denying her Petition for Reconsideration.

On appeal, Perkins argues the ALJ's findings are based upon a misunderstanding of the underlying claim, and the previous findings in the original decision rendered by Hon. Richard E. Neal, Administrative Law Judge ("ALJ Neal"), and the subsequent medical fee disputes. Perkins also argues the ALJ's decision is not supported by substantial evidence. She argues Dr. John Evan's opinions cannot constitute substantial evidence pursuant to Cepero v. Fabricated Metals Corp., 132 S.W.3d 839 (Ky. 2004), because he relied upon an inaccurate history. Because the ALJ's determination is supported by substantial evidence and a contrary result is not compelled, we affirm. We remand for a determination of Perkins' Motion to Reopen for an alleged worsening of her condition.

Perkins filed a Form 101 on January 18, 2017, alleging she injured her low back and left hip on May 16, 2016 when she fell while moving a television set while working for Wal-Mart. In support of the claim, she filed the May 18, 2016 and May 25, 2016 records from Bluegrass Business Health noting bilateral low back pain and mild lumbar muscle spasms. She was diagnosed with a lumbar/sacral contusion. The medical records Perkins filed in support of her claim did not mention her left hip.

The claim was assigned to ALJ Neal, who rendered an Opinion, Award & Order on August 31, 2017. ALJ Neal determined Perkins had a compensable low back injury. He awarded Perkins permanent partial disability ("PPD") benefits based upon a 6% impairment rating Dr. Anthony McEldowney

assessed for her low back injury. ALJ Neal determined Perkins was not entitled to an enhancement of her PPD benefits pursuant to KRS 342.730(1)(c)1, and noted she had returned to work at the same or higher pay rate. He determined that if she ceases earning the same or greater wages, she would be entitled to an enhancement of her PPD benefits by the two-multiplier contained in KRS 342.730(1)(c)2. ALJ Neal awarded medical benefits for Perkins' low back injury, and found her previous lumbar treatment compensable, except for a contested lumbar epidural steroid injection. ALJ Neal made no finding pertaining to Perkins' alleged left hip injury, and he did not award medical benefits for that condition.

Wal-Mart filed a Petition for Reconsideration regarding the interest rate applicable on past due benefits. ALJ Neal amended the award to find 12% interest was applicable on unpaid benefits through June 28, 2017, and 6% on any unpaid benefits thereafter. ALJ Neal again addressed that future medical benefits were awarded for the low back injury. No petition for reconsideration was filed regarding the compensability of the alleged left hip condition.

Wal-Mart subsequently filed a medical dispute contesting Dr. David Waespe's request for epidural injections. ALJ Neal found this request for lumbar and sacroiliac injections compensable. In an Order denying Wal-Mart's Petition for Reconsideration entered September 20, 2018, ALJ Neal reiterated he found the requested injections compensable, and his previous ruling on an earlier similar request did not prevent such a determination.

Wal-Mart filed another medical dispute on April 27, 2020, challenging the bill from the emergency room of the Georgetown Community Hospital as not

timely submitted. It also challenged the bill since it was apparently for treatment of the left knee and left elbow pain, and therefore not related to the 2016 low back injury. The dispute was assigned to Hon. R. Roland Case, Administrative Law Judge (“ALJ Case”) for determination. ALJ Case, citing to KRS 342.020(1) and 803 KAR 25:096 sections 6 and 10, determined the bill was not timely submitted for payment, and therefore not compensable. ALJ Case also determined the referral to a neurologist at the Pain Treatment Center of the Bluegrass was not related to the May 16, 2016 low back injury, and therefore was not compensable. No petition for reconsideration was filed from that determination.

On November 3, 2020, Wal-Mart filed a medical dispute challenging the compensability of a left hip injection. It argued that although Perkins alleged low back and left hip injuries, ALJ Neal only found she sustained a low back injury. Wal-Mart attached Dr. Waespe’s records indicating he treated Perkins on August 14, 2020 and September 25, 2020 for chronic low back pain, bilateral leg pain, bilateral sacroilitis, left trochanteric bursitis, and left hip arthritis.

Wal-Mart also submitted Dr. Evans’ records review report. Dr. Evans noted Perkins had treated for left hip and groin pain on August 1, 2020, and that a trochanteric injection provided no relief. She treated again on August 14, 2020 and September 25, 2020 for continued low back pain and left trochanteric pain. He found the request for trochanteric bursa injections were medical necessary, but not related to Perkins’ May 16, 2016 work injury.

Perkins filed Dr. McEldowney’s January 19, 2021 report. Dr. McEldowney diagnosed Perkins with a left posterolateral disc protrusion at L4-L5,

and left greater trochanteric bursitis. He found both the low back and left hip conditions were caused by the May 16, 2016 work accident. Dr. McEldowney assessed a 13% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment, attributing 10% to the low back, and 3% to the left hip.

Perkins also filed Dr. Waespe's February 2, 2021 responses to a medical questionnaire. He stated he treats Perkins for lumbar degenerative disk disease, radiculopathy, and radiculitis due to the May 16, 2016 work injury. He stated her current medical conditions stem from her May 16, 2016 work injury. He additionally stated the injections he recommended are due to that work injury.

On February 4, 2021, Perkins filed a Motion to Reopen alleging a worsening of her low back and hip injuries. On February 25, 2021, Wal-Mart filed a motion to amend the medical dispute. It stated Perkins submitted an 18-page request for reimbursement on February 10, 2021 dating back to 2017. It argued only bills incurred within 60 days of submission could be considered pursuant to 803 KAR 25:096 section 11, and could only be compensable if they were due to her work injury.

On April 13, 2021, the ALJ rendered a Medical Dispute Opinion and Award. The ALJ specifically found the contested left hip injections are unrelated to the May 16, 2016 lumbar injury, and are therefore not compensable. The ALJ noted that in his August 3, 2017 decision, ALJ Neal found Perkins sustained a low back injury, and he only awarded income and medical benefits for that condition. The ALJ also determined that except for the period of December 12, 2020 through

February 10, 2021, the request for reimbursement was untimely. The ALJ also determined requests for reimbursement of expenses incurred during the period from December 12, 2020 through February 20, 2021 were not incurred for treatment of Perkins' work injury, and are therefore not compensable.

Perkins filed a Petition for Reconsideration arguing the ALJ erred in relying upon Dr. Evans, and in finding her hip injury is not compensable. Perkins argued the ALJ misunderstood the evidence. The ALJ entered an Order denying the Petition for Reconsideration on May 12, 2021, finding Perkins' arguments were essentially a re-argument of the merits of the claim.

On appeal, Perkins again argues the ALJ misunderstood the evidence, and findings in the original decision in this claim, and the subsequent medical fee disputes. She argues ALJ Neal referenced the left hip in the original claim. Perkins also argues the ALJ's decision is not supported by substantial evidence. She argues Dr. Evan's opinion cannot constitute substantial evidence pursuant to Cepero v. Fabricated Metals Corp., *supra*, because he relied upon an inaccurate history.

As the moving party in a post-award medical dispute, Wal-Mart had the burden of proving the contested treatment was not compensable, reasonable, or 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).

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). 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, 708 S.W.2d 641, 643 (Ky. 1986).

Perkins bore the burden of proving her left hip condition is compensable. "Compelling evidence" is defined as evidence that is so overwhelming that 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 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 sole authority to judge 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); Whittaker v. Rowland, *supra*. Mere evidence contrary to the ALJ's decision is inadequate to require reversal on appeal. *Id.* In order to reverse the decision of the ALJ, it must be shown there was no substantial evidence of probative value to support his decision. Special Fund v. Francis, *supra*.

After reviewing the history of the original claim, and the subsequent medical disputes, we find the ALJ did not err in determining the treatment for Perkins' left hip is not compensable. While ALJ Neal made a passing reference in his decision to Perkins' allegation of a left hip injury, he only found her low back condition is compensable. There was never a finding that Perkins sustained a compensable left hip injury. Since this appeal only concerns Perkins' left hip complaints, we find the ALJ did not err in denying reimbursement of expenses for treatment of that condition.

We additionally conclude the ALJ committed no error to the extent she may have relied upon the Dr. Evans' opinions. We find Perkins' reliance on Cepero v. Fabricated Metals Corp., *supra*, is misplaced. This case is distinguishable from Cepero, which was an unusual case involving not only a complete failure to disclose, but also affirmative efforts by the employee to cover up a significant injury to the left knee two and a half years prior to the alleged work-related injury to the same knee. The prior, non-work-related injury left Cepero confined to a wheelchair

for more than a month. The physician upon whom the ALJ relied was not informed of this prior history by the employee and had no other apparent means of becoming so informed. Every physician who was adequately informed of this prior history opined Cepero's left knee impairment was not work-related but, instead, was attributable to the non-work-related injury two and a half years previous. In Cepero, the Supreme Court found a medical opinion erroneously premised on the claimant's egregious omission of directly relevant past medical history was sufficient to mandate reversal based on an insufficient history received by the medical expert. The Court held a "medical opinion predicated upon such erroneous or deficient information that is completely unsupported by any other credible evidence can never, in our view, be reasonably probable." Id.

After reviewing the evidence and the ALJ's decision in the present claim, we cannot conclude Dr. Evans was provided a history so inaccurate or incomplete as to render his opinion lacking in probative value. In her brief, Perkins has attempted to establish what Dr. Evans may or may have not known, or what specific history he may have been provided. Dr. Evans was not deposed, nor was there any other attempt to cross-examine him. Therefore, there is no evidence establishing what medical history or records he may have reviewed, and there is certainly no indication regarding what his thoughts may have been in formulating his opinions. Dr. Evan's opinions constitute substantial evidence upon which the ALJ could rely, and we will not disturb her determinations.

As referenced above, we note Perkins filed a Motion to Reopen to allege a worsening of her condition, and an increase in her occupational disability.

The ALJ addressed this in her April 12, 2021 decision by referring the motion to the Frankfort Motion Docket for additional consideration. Therefore, this claim is remanded for a determination of Perkins' Motion to Reopen.

Accordingly, the April 12, 2021 Medical Dispute Opinion and Order, and the May 12, 2021 Order denying Perkins' Petition for Reconsideration, rendered by Hon. Monica Rice-Smith, Administrative Law Judge, are **AFFIRMED**. This claim is **REMANDED** for a determination on Perkins' Motion to Reopen.

ALL CONCUR.

DISTRIBUTION:

COUNSEL FOR PETITIONER:

LMS

HON WILLIAM E BROWN, II
2224 REGENCY RD
LEXINGTON, KY 40503

COUNSEL FOR RESPONDENT:

LMS

HON BRANDON L ROSEN
1108 THIRD AVE #204
HUNTINGTON, WV 25701

ADMINISTRATIVE LAW JUDGE:

LMS

HON MONICA RICE-SMITH
MAYO-UNDERWOOD BLDG
500 MERO STREET, 3rd FLOOR
FRANKFORT, KY 40601