

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: February 28, 2020

CLAIM NO. 199984274

UNIVERSITY OF KENTUCKY

PETITIONER

VS. **APPEAL FROM HON. CHRISTINA D. HAJJAR,
ADMINISTRATIVE LAW JUDGE**

SUE ANN ANDERSON;
DR. ROBERT NICKERSON/
UK HEALTHCARE;
PHYSICAL MEDICINE AND REHABILITATION;
AND HON. CHRISTINA D. HAJJAR,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
AFFIRMING**

* * * * *

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

ALVEY, Chairman. The University of Kentucky (“UK”) appeals from the November 5, 2019 Medical Dispute Opinion and Order rendered by Hon. Christina D. Hajjar, Administrative Law Judge (“ALJ”). In a reopening for a medical dispute, the ALJ found contested right-sided trigger point injections (“TPI”) were reasonable,

necessary, and related to the work injury. She also found UK is responsible for continuing treatment for failed cervical syndrome and myofascial syndrome. No petition for reconsideration was filed.

On appeal, UK argues the ALJ's finding that right-sided TPIs and continuing treatment for cervical and myofascial syndromes are work-related is clearly erroneous. UK additionally argues the ALJ erred by shifting the burden of proof regarding causation to the employer. We find substantial evidence supports the ALJ's determination and she sufficiently outlined the basis for her decision. Therefore, we affirm.

Sue Ann Anderson ("Anderson") sustained a work-related C5-6 spinal injury while lifting a heavy patient on April 26, 1999, resulting in left upper extremity symptoms. Dr. Paul V. Brooks initially treated her for rotator cuff tendonitis of the left shoulder. On July 30, 1999, she underwent a C5-C6 fusion, which relieved her left shoulder and arm pain.

On May 22, 2000, Hon. Thomas Nanney, Administrative Law Judge, ("ALJ Nanney") found Anderson sustained a herniated disc at C5-6 that first manifested as shoulder pain. ALJ Nanney awarded temporary total disability and permanent partial disability benefits, and ordered UK to pay medical benefits "related to the surgical procedure and other work-related medical expenses." On February 25, 2004, Dr. M. Melvin Hu of UK Kentucky Clinic noted an MRI taken after a clinic visit on January 7, 2004, revealed a C6-7 disc herniation. Anderson had a left C7 radiculopathy at that time. On April 19, 2019, UK filed a Form 112 Medical Dispute and Motion to Reopen challenging the reasonableness and

necessity of TPIs in the right lower trapezius muscle recommended by Dr. Robert Nickerson and treatment for non-work-related myofascial syndrome.

Anderson testified by deposition on June 17, 2019. Anderson was a Medicare recipient when a fusion surgery at C6-7 was performed. The surgery was not paid for by the workers' compensation insurer. The surgery was necessitated by her falling off of an exercise ball. Anderson testified she considered the contested C6-7 treatment related to the work injury. She testified all of her treatment with Dr. Nickerson was causally related to her work injury. Her understanding is the treatment is related to her myofascial pain disorder and the deterioration of her back muscles, all of which she attributes to her work injury, including problems in the neck, scapula, and arms.

Dr. Nickerson treated Anderson for approximately fifteen years for her cervical injury. On January 30, 2006, he noted she fell off an exercise ball three months earlier, increasing her pain on the left. On May 1, 2006, he noted Dr. Scott performed a C6-7 fusion on March 22, 2006 with subsequent complications secondary to a staph infection. Dr. Nickerson noted Anderson had new complaints of numbness in the right hand after the most recent surgery. On March 20, 2007, Dr. Nickerson noted Anderson had new pain in the anterior aspect of the right shoulder for three weeks. She thought the pain was initiated by performing home physical therapy exercises. Dr. Nickerson saw Anderson on March 19, 2014, after she had fallen twice. Anderson reported her neck pain increased and radiated down both upper extremities after her most recent fall. Dr. Nickerson diagnosed failed cervical syndrome, status post ACDF at C5-C6, posterior cervical discectomy and fusion at

C6-C7, recent falls with increasing neck pain, and bilateral upper extremity pain, left greater than right. Dr. Nickerson recommended an MRI. He indicated the fall resulted from weakness in the left lower extremity, which is most likely related to her mild cervical myelopathy. Dr. Nickerson stated, "I believe that getting the MRI of the cervical spine is appropriate to be done under workers' comp specifically the coverage for the C5-C6 disk fusion which did result in the mild cervical myelopathy in the past examinations." On February 12, 2010, Dr. Nickerson noted Anderson had two falls after the November 13, 2019 office visit, related to left foot drop. On October 15, 2014, Dr. Nickerson noted Anderson had foot drop present before her lumbar injury.

Dr. Nickerson recommended TPIs on March 29, 2019 which he opined are causally related to her work injury "as her myofascial pain in the trapezius is directly related to the past surgical intervention with regard to her neck and she had multiple locations [sic] including infections which resulted in abnormal function of the trapezius muscle which intermittently develops myofascial pain syndrome which requires intermittent trigger point injections." Dr. Nickerson wrote a July 22, 2019 letter explaining the medical necessity of TPIs and the relation to the work injury as follows:

The patient had a work injury to cervical region which required surgical intervention that was complicated by severe infection which required prolonged treatment and now has severe atrophy of the cervical paraspinal muscles bilaterally which has resulted in neck weakness and muscular imbalances that periodically result in trigger points developing in the various muscles listed above. These trigger points are directly related to the workers' compensation injury and subsequent treatment and complications from that treatment. The appropriate

medical treatment is trigger point injections. We have performed them in the past and they help her dramatically. I would anticipate the need for 4-6 sets of trigger point injections per year.

Dr. William J. Lester performed an independent medical evaluation on June 24, 2019. Dr. Lester stated Anderson's left-sided neck pain, left arm, and left shoulder pain are related to the work injury. He stated the right-sided neck pain, right scapular pain, and right arm pain are related to a subsequent injury and surgery at C6-7. He concluded the injections on the right performed by Dr. Nickerson do not relate to the work injury and are not medically reasonable and necessary treatment for the work injury. Dr. Lester stated Anderson continues to need some medication related to the C5-6 injury, but her subsequent surgery contributes to the use of high dose narcotics.

Dr. Andrea Pernell performed a utilization review on April 4, 2019, recommending denial of TPIs into the right lower trapezius muscle as not medically necessary. She stated the documentation does not support evidence of an associated twitch response and referred pain upon palpation of the noted trigger points located on exam. Dr. Pernell further stated the documentation lacks sufficient evidence establishing failure of an appropriate course of conservative care prior to considering the requested TPIs. She also noted the documentation lacks a care plan including a concurrent course of conservative care considering that TPI treatment alone is not recommended per guidelines.

A Benefit Review Conference was held on September 18, 2019. The reasonableness and necessity of trigger point injections and work-relatedness of any

and all future treatment for myofascial pain syndrome or cervical failed back syndrome were listed as contested issues. The formal hearing was waived.

The ALJ's findings relevant to this appeal are as follows:

In this dispute, Defendant has challenged the reasonableness, necessity, and work-relatedness of right-sided trigger point injections and the work-relatedness of continuing treatment for the diagnoses of cervical failed back syndrome and myofascial syndrome. Dr. Nickerson has treated Anderson for over 15 years for her cervical pain, and this ALJ finds his opinion persuasive that her current complaints are related to her failed back syndrome, which he opined is directly related to the workers' compensation injury and subsequent treatment. This ALJ recognizes that Dr. Nickerson's report refers to the infection which occurred after the second surgery. However, Anderson had already been referred to a neurosurgeon for a C6-C7 herniation before the exercise ball incident. Although the second surgery may not have been paid for by workers compensation, there was no prior dispute or finding that the surgery was unrelated.

Dr. Nickerson repeatedly diagnosed failed cervical syndrome attributable to both the C5-C6 and C6-C7 cervical fusions. Although Anderson had a significant number of falls and/or subsequent injuries, Dr. Nickerson is aware of each of these, but continues to relate her current complaints to the initial work injury. Dr. Nickerson is credible concerning issues of causation, as he specifically referred her to Dr. Tutt for a workup for cervical complaints following a non-work-related fall, but Dr. Nickerson continued to treat her for complaints related to the work injury.

Defendant relies upon Dr. Lester, who found the left upper extremity complaints are due to the 1999 work injury at the C5-C6 level, and the right upper extremity complaints are due to a second unrelated injury in 2006 to the C6-C7 level with surgery, subsequent injection and scarring. However, the 2006 injury involving the exercise ball resulted in more left upper extremity pain, so it is unclear how he attributes the right shoulder pain to the 2006 injury. Further, he stated that the second surgery resulted in scarring, but Dr. Nickerson noted

that in 2006, Dr. Scott had to do a posterior fusion rather than an anterior fusion at C6-C7 due to prior scarring. Thus, Anderson clearly had scarring due to the first surgery as well. At the very least, Dr. Lester recognizes Anderson is entitled to treatment for her work injury and is symptomatic from the injury, as he acknowledges she still requires medication for her C5-C6 fusion, and that at least a small portion of her chronic pain is related to the April 1999 injury. The ALJ finds Dr. Nickerson more convincing and finds the need for the trigger point injections and treatment for cervical failed back syndrome and myofascial syndrome are due to her work injury.

The ALJ also finds the injections to be reasonable and necessary based upon Dr. Nickerson's report. He advised that he has performed them in the past and they have helped dramatically. Thus, this ALJ was not persuaded by Dr. Pernell's report, and finds that the trigger point injections are compensable.

On appeal, UK argues the ALJ's finding that the right-sided TPis and syndromes are related to the work injury is clearly erroneous. UK argues the right-sided symptoms arose out of the C6-7 surgery and must be considered the direct and natural consequence of a non-work-related fall in 2006. UK contends there is no evidence that Anderson's right-sided symptoms are attributable to the 1999 work injury, either directly or as a natural consequence of that injury or the surgery at C5-6. The current request for treatment came on March 29, 2019, when Anderson reported a new onset of right lower scapular pain radiating beneath the scapula, present for "the past 4-6 weeks." UK contends it is clearly erroneous to relate Anderson's right-sided symptoms to the 1999 work injury. UK asserts Dr. Nickerson does not opine the right-sided symptoms are directly or indirectly related to the 1999 work injury or the surgery at C5-6. UK notes Dr. Nickerson attributes the right-sided

symptoms to Anderson's myofascial syndrome. UK contends Dr. Nickerson clearly relates the myofascial syndrome to the 2006 surgery and its complications. UK contends unrebutted medical evidence establishes the myofascial syndrome is a direct and natural consequence of the non-work-related injury and surgical intervention in 2006, and is entirely unrelated to the work injury and surgery seven years earlier.

UK argues the ALJ erred by shifting the burden of proof on causation to the employer when she stated, "Although the second surgery may not have been paid for by workers compensation, there was no prior dispute or finding that the surgery was unrelated." UK argues no expert medical opinion relates the C6-7 herniation to the work injury or suggests Anderson would have undergone surgery at C6-7 but for the 2006 non-work-related fall. In his 2000 opinion, ALJ Nanney found Anderson had a work-related C5-6 disc herniation and ordered UK to pay for her 1999 fusion and related treatment. UK notes Anderson testified the 2006 surgery was not work-related. Rather, it was performed as a result of a non-work-related episode when she fell off an exercise ball. Anderson was unsure whether Medicare paid for the surgery, but she was clear the surgery was neither billed to nor paid for by UK, inasmuch as it was never considered work-related. It argues there is no evidence suggesting this incident was related to the work injury, and Dr. Nickerson offered no opinion that the 2006 surgery was complicated by or related to the 1999 injury. UK notes that, while the ALJ observed the C6-7 fusion was converted from an anterior procedure to a posterior procedure due to the presence of scarring from the C5-6 surgery, there is no medical opinion suggesting this caused the post-surgical

complications leading to the myofascial syndrome diagnosed by Dr. Nickerson. Dr. Nickerson opined a post-surgical infection and related complications, not scarring at the prior operative site, led to the trapezius dysfunction, atrophy, and resulting myofascial syndrome. UK notes it was under no obligation to file a Medical Dispute regarding the C6-7 surgery, as it was never asked to authorize or pay for that 2006 surgery. Therefore, it is clearly erroneous for the ALJ to rely on the lack of a Medical Dispute or finding of non-work-relatedness as support for her conclusion the C6-7 surgery and resulting myofascial syndrome were work-related. UK submits the claimant's testimony constitutes a clear and unequivocal judicial admission that the 2006 surgery was not work-related.

We initially note that in a post-award medical fee dispute, the employer bears the burden of establishing the requested treatment is not reasonable or necessary. The claimant maintains the burden to prove the contested treatment is causally related to the work injury. National Pizza Company v. Curry, 802 S.W.2d 949 (Ky. 1991).

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 supporting a different outcome than reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974).

The record contains substantial evidence supporting the ALJ's determination. We note the 1999 injury produced myofascial pain. In a March 22, 2000 letter to Dr. Debbie Fibel, Dr. Phillip Tibbs noted some myofascial pain in the cervical spine. Anderson's C6-7 disc herniation was shown on MRI in early 2004. While there is no clear indication in the record as to the cause of the herniation at C6-7, it occurred approximately two years prior to the event that UK argues must have caused the failed cervical syndrome and myofascial pain.

Dr. Nickerson's opinion constitutes substantial evidence supporting the ALJ's finding of compensability of the contested treatment. Dr. Nickerson has treated Anderson for fifteen years. He was clearly aware of the circumstances surrounding the C6-7 level, including disc herniation diagnosed in 2004, and the numerous falls. Dr. Nickerson noted the role of foot drop in the falls and noted the presence of foot drop prior to her lumbar injury. On March 19, 2014, Dr. Nickerson stated, "I believe that getting the MRI of the cervical spine is appropriate to be done under workers' comp specifically the coverage for the C5-C6 disk fusion which did result in the mild cervical myelopathy in the past examinations."

Dr. Nickerson clearly opined the original injury is at least a contributing cause to the failed cervical syndrome and myelopathy responsible for the need for TPIs when he stated in the July 22, 2019 letter, "These trigger points are directly related to the workers' compensation injury and subsequent treatment and

complications from that treatment.” As noted by the ALJ, Dr. Nickerson continued to relate the current complaints to the initial work injury and distinguished some events as not work-related as evidenced by his referral to Dr. Matthew Tutt for a workup of cervical complaints following a non-work-related fall. The ALJ explained her reasons for finding Dr. Lester’s opinion less credible than Dr. Nickerson’s. The ALJ could reasonably conclude Dr. Nickerson’s opinion is the most persuasive and he was in the best position to determine the cause of the need for the contested treatment.

We do not believe the ALJ shifted the burden of proof regarding causation. The ALJ began her analysis by noting the employer has the burden of proving the contested expenses are unreasonable or unnecessary while the claimant bears the burden on the issue of work-relatedness. The ALJ’s statement regarding no dispute having been filed regarding the C6-7 fusion was not an indication that the ALJ was placing the burden on UK. Rather, the ALJ merely appears to have observed there was no previous finding regarding the surgery that would be *res judicata* in the medical dispute.

Anderson’s testimony does not constitute a judicial admission. A judicial admission is a concession or acknowledgement made by a party of the existence of certain facts. Center v. Stamper, 318 S.W.2d 853 (Ky. App. 1958). Anderson’s testimony clearly indicates her position that the contested treatment relates to the original injury. While she admitted she did not submit the bills to workers’ compensation for treatment following the exercise ball incident, she did not offer an opinion regarding causation of the failed cervical syndrome or myofascial

pain syndrome and was not qualified to do so. Also, and importantly, work-relatedness remained a contested issue listed in the benefit review conference order.

Accordingly, the November 5, 2019 Medical Dispute Opinion and Order rendered by Hon. Christina D. Hajjar, Administrative Law Judge, is hereby **AFFIRMED**.

STIVERS, MEMBER, CONCURS.

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