Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: July 26, 2019

CLAIM NO. 200996659

WESTFIELD INSURANCE CO.
as medical payment obligor for
BENCHMARK FAMILY SERVICES INC. PETITIONER

VS. **APPEAL FROM HON. CHRIS DAVIS, ADMINISTRATIVE LAW JUDGE**

HEATHER BLANTON
DR. ROBERT NICKERSON
ORTHODYNE LLC
and HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

STIVERS, Member. Westfield Insurance Co., as medical payment obligor for Benchmark Family Services Inc. ("Benchmark"), seeks review of the March 11, 2019, Opinion and Order of Hon. Chris Davis, Administrative Law Judge ("ALJ") resolving a medical fee dispute filed by Benchmark in favor of the claimant, Heather Blanton

("Blanton"). The ALJ found physical therapy three times a week for four (4) weeks with dry needling to be compensable. Benchmark also appeals from the April 11, 2019, Order overruling its petition for reconsideration.

On appeal, Benchmark attacks the ALJ's decision on two grounds. First, it argues the ALJ "committed clear error in his assessment of the evidence;" second, it asserts the ALJ applied an incorrect legal standard in resolving the medical fee dispute.

BACKGROUND

The record reveals Blanton sustained a work-related right shoulder injury when she slipped and fell on ice in the parking lot on November 4, 2009. The Form 110 Settlement Agreement, approved by Hon. Otto D. Wolff, Administrative Law Judge on September 11, 2013, reflects that as a result of this work injury, Blanton underwent surgery consisting of "right rotator cuff repair with subsequent removal of a loose anchor." Three doctors assessed impairment ratings arising from the injury and all agreed Blanton should not engage in work above the shoulder level using the right arm.[1] Two of the three doctors also assessed a thirty-pound lifting restriction related to the right arm. Blanton received a lump sum settlement, a portion of which compensated her for waiving her right to vocational rehabilitation, right to open, and entitlement to further income benefits. She did not waive her right to past and future medical benefits.

[1] Dr. Ronald Burgess assessed a 3% impairment rating, Dr. Robert Nickerson assessed a 4% impairment rating, and Dr. Ira Potter assessed a 5% impairment rating.

In May 2015, Benchmark filed a medical dispute contesting a request from Dr. Nickerson, with the Physical Medicine & Rehabilitation Department of the University of Kentucky Medical Center, for pre-authorization of physical therapy. Benchmark represented that, since it had not received a statement for services, it was contesting the reasonableness and necessity of future physical therapy based on the opinions of Dr. Eddie Sassoon and Dr. Sheryl Levin. Dr. Nickerson was joined as a party because he had submitted a request for pre-authorization of additional therapy.

In a September 28, 2015, Opinion and Order, Hon. Jane Rice Williams, Administrative Law Judge ("ALJ Williams"), found Benchmark had not met its burden of establishing future physical therapy and trigger point injections were not reasonable and necessary. ALJ Williams found as follows:

> The opinion of Plaintiff's treating physician, Dr. Nickerson, is persuasive that physical therapy is beneficial. He did note multiple trigger point injections had been used to help augment her physical therapy. Therefore, it is found herein, Defendant Employer has not met its burden of proving the contested physical therapy and injection are not reasonable and necessary for the cure and relief of the effects of the work injury. The contested treatment is found compensable. For clarity, it should be noted that the ALJ is persuaded by the opinion of the treating physician and his recommendations and will not step in to recommend to this physician what he can and cannot do including future physical therapy or injections.

On May 30, 2017, Benchmark filed another medical fee dispute contesting its "liability for ongoing and future physical therapy of [Blanton's] right shoulder recommended by Dr. Nickerson on the grounds of reasonableness and necessity." Benchmark relied upon Dr. Sassoon's Utilization Review ("UR") report and the independent medical examination report of Dr. Philip Corbett. Both Drs.

Sassoon and Corbett opined that two physical therapy sessions per week for eight weeks for which Dr. Nickerson sought approval were not reasonable and necessary treatment of her shoulder injury.

In a January 16, 2018, Opinion and Order, Hon. Douglas Gott, Chief Administrative Law Judge ("CALJ") resolved the medical fee dispute in favor of Blanton. The CALJ summarized, in relevant part, the deposition testimony of Dr. Nickerson:

> Dr. Nickerson gave a deposition requested by the Defendant. He reviewed his treatment for right shoulder girdle myofascial pain syndrome that began on December 22, 2009, and had continued through the most recent appointment on September 27, 2017. Blanton developed adhesive capsulitis after surgery. She reached MMI on September 24, 2012, but continues to benefit from treatment. He has recommended three or four trigger point injections per year; 10-12 physical therapy visits per year; manual manipulation; and the medications Motrin, Lidoderm patches, and Soma. Blanton is not on any narcotic medication.
>
> He said the therapy is to help with range of motion. He emphasized that physical therapy was 'a maintenance program. We're trying to keep her at her current level of function.' (p. 30). Challenged on whether the treatment has actually 'maintained her,' he said, "You could make that argument, right, that things are more symptomatic than they were after the second surgery…I have tried to treat her within the confines of what we put forth in our plan of care back in 2012. Would I like to be more aggressive? Sure,' he said, adding that botox [sic] 'can be very helpful in people with chronic myofascial pain' but would likely be denied if recommended in this case. (p. 38).

In resolving the medical fee dispute in favor of Blanton, the CALJ provided the following:

> The CALJ relies on Dr. Nickerson and Blanton's testimony to find: a) the physical therapy provides "relief" as contemplated by KRS 342.020(1); and b) the Defendant has not sustained its burden of proof that physical therapy is not reasonable or necessary. It may be atypical for an injury to require physical therapy eight years after the fact, but, as noted above, the duration of treatment does not dictate compensability. And this has not been a typical injury. A rotator cuff surgery did not occur for two years. Blanton developed adhesive capsulitis. She had another surgery a year later. She was referred to Dr. Nickerson for pain management. Dr. Nickerson enjoys a good reputation in these cases; he has served on the panel that performs university evaluations at the University of Kentucky under KRS 342.315. The Defendant has not submitted a medical opinion that physical therapy is unproductive or outside the type of treatment generally accepted by the medical profession in the context of this case, as required by *Square D*, *supra*. Dr. Nickerson only anticipates 10-12 visits per year, a minimal cost in the scope of treatment Blanton has received.
>
> The Defendant's motion to reopen is overruled, and the pending medical dispute is resolved in Blanton's favor.

On August 9, 2018, less than seven months after the CALJ's decision, Benchmark filed another motion to reopen and medical fee dispute. Benchmark again joined Dr. Nickerson as a party as well as Orthodyne LLC ("Orthodyne"). Benchmark acknowledged the CALJ had previously resolved a medical fee dispute via the January 16, 2018, Opinion and Order relying upon Dr. Nickerson's testimony. It asserted that, since entry of that opinion, Blanton had come under the care of Orthodyne, and between March 16, 2018, and June 22, 2018, had undergone an evaluation and twelve physical therapy sessions for a total of thirteen physical therapy visits in three months. Following those visits, Orthodyne had requested authorization of twelve physical therapy sessions at the rate of three times per week for four weeks with dry needling.

Benchmark disputed the need for these sessions contending that a review of Orthodyne's notes did not reflect this request originated with Dr. Nickerson, as he had "written an open prescription for the PT provider 'to evaluate and treat as indicated.'" Benchmark posited that, notwithstanding his previous testimony, Dr. Nickerson had left it to the therapist to "evaluate and treat as indicated." Thus, it charged that since Orthodyne was given a blank check, it chose not to continue the maintenance program recommended by Dr. Nickerson and authorized by the CALJ, but to accelerate treatment at a rate commensurate with an acute condition rather than an injury more than nine years old. Benchmark contested the recommendation of physical therapy on the grounds of reasonableness and necessity based upon the reports of Drs. Sassoon and William Barreto.[2]

By Order dated September 17, 2018, the ALJ determined, based upon the UR reports of Drs. Sassoon and Barreto, Benchmark made a *prima facie* showing for reopening and sustained the motion to reopen.

Blanton introduced the records of Dr. Nickerson spanning the period from September 27, 2017, through September 26, 2018, and the physical therapy records of Orthodyne covering portions of 2018. Both parties introduced the July 5, 2018, letter of Kyle Salsbury, PT, DPT ("Salsbury") which requested reconsideration of the original denial of the physical therapy services in question.[3]

A November 6, 2018, Order reflects the ALJ conducted a telephonic conference attended by Blanton, Dr. Nickerson, Salsbury, and Benchmark's attorney.

[2] Both doctors' reports were attached to the Form 112.
[3] Salsbury had written this letter as an appeal or request for reconsideration of the initial UR denial based on the opinion of Dr. Sassoon.

All parties were given an opportunity to make a brief statement and provide responses. The order notes additional proceedings would be scheduled and, if necessary, a full evidentiary hearing would be conducted. The ALJ set a proof schedule and a telephonic Benefit Review Conference ("BRC") for January 15, 2019.

On December 20, 2018, Benchmark filed a motion to submit the pending medical fee dispute with the parties to have an opportunity to submit brief position statements. It noted that, since the telephonic conference, Blanton had filed the records of Orthodyne and Dr. Nickerson covering the last year and represented it did not intend to file additional evidence in rebuttal.

In a January 15, 2019, Order the ALJ stated a telephonic BRC was conducted on that date which Salsbury and Benchmark's attorney attended. The matter would stand submitted as of January 15, 2019, and the parties were permitted to file position papers of no more than five pages no later than February 14, 2019. No testimony was taken.

On March 11, 2019, the ALJ provided the following summary of the evidence, findings of fact and conclusions of law in determining the physical therapy with dry needling to be compensable:

> Dr. Eddie Sasson [sic] conducted a utilization review on July 3, 2018. He states that the recommended number of physical therapy sessions is sixteen. If an additional 12 PT visits are approved this will exceed the recommended amount. In addition, there is no documentation of the deficits to be addressed or the benefits of the PT she has had. There is no criteria upon which to assess the need for dry needling as there is no standardized form to administer it. As such, the dry needling is not reasonable and necessary.

Dr. William Barreta [sic] conducted a utilization review on July 11, 2018. Additional PT will exceed the recommended maximum number of 16. There is no documentation as to why home exercise is not sufficient, in lieu of PT. There is no documentation of Blanton's deficits and the improvements from PT or her goals. Dry needling is a controversial technique and requires further evidence based studies before it can be recommended.

Dr. [sic] Salsbury wrote a letter on July 5, 2018. He states Blanton needs physical therapy to improve pain management, reduce pain and increase range of motion. Blanton has had good results with prior dry needling.

Medical records from Dr. Nickerson were submitted. His records make it clear that it is his expectation that Blanton will need 10-12 physical therapy sessions on a yearly basis for the foreseeable future. It assists with pain management. Since her PT was cut off her pain, particularly her headaches have increased. It does not appear in the records either from Dr. Nickerson or Dr. [sic] Salsbury that Blanton takes any narcotic medications.

This is the third Medical Dispute that has been filed regarding the number and frequency of Blanton's PT. The Medical Payment Obligor certainly has that right and has [sic] a matter of law and fact the circumstances could change. However, Blanton long ago exceeded 16 physical therapy sessions. This makes Drs. Barreta [sic] and Sasson's [sic] opinions regarding the number of sessions dated.

Further, while both physicians have stated there is insufficient documentation of the benefits of PT to approve it I would note three things. One, whether or not there is sufficient documentation is subjective, there is some documentation. Two, both Dr. [sic] Salsbury and Dr. Nickerson have noted the PT helps. Finally, why would anyone continue to subject herself to physical therapy if it did not help.

In reliance on Drs. [sic] Nickerson and Salsbury, the physical therapy of three times per week for four weeks is compensable.

> As for the dry needling this procedure also helps Blanton. She has, as is documented, a relatively severe condition that causes a significant amount of pain. She is done with surgeries. She minimizes medications. In reliance on Dr. [sic] Salsbury, the dry needling is compensable.[4]

Benchmark filed a petition for reconsideration requesting the ALJ to cite the evidence upon which he relied in finding physical therapy relieves Blanton's pain. Benchmark relied heavily upon the subjective pain scores contained in the physical therapist notes relating to previous physical therapy sessions. Benchmark asserted the ALJ had applied the wrong standard in determining compensability, arguing the standard is governed by Ausmus v. Pierce, 894 S.W.2d 631 (Ky. 1995). Benchmark contended that since the treatment was counter-productive, it should be found non-compensable in accordance with Ausmus, supra. It requested the ALJ to provide a specific finding as to the changed circumstances which render the physical therapy visits in dispute reasonable and necessary. Benchmark argued the previous testimony of Dr. Nickerson and the finding of the CALJ in the previous medical fee dispute indicated only ten to twelve physical therapy visits per year would be needed.

In overruling the petition for reconsideration, the ALJ provided the following:

> On September 27, 2017 Dr. Nickerson noted the benefits of physical therapy for pain reduction and noted this was well documented in the past. On September 26, 2018 he noted that since PT had been cut off Ms. Blanton's pain levels had increased. On July 5, 2018 Dr. [sic] Salsbury wrote a letter indicating the PT helps with pain

[4] We note that throughout his March 11, 2019, Opinion and Order, the ALJ erroneously referred to Salsbury as "Dr. Salsbury." Salsbury's July 5, 2018, letter reveals he is a physical therapist and not a doctor. We also note the ALJ stated he relied on Salsbury in determining the drying needling is compensable. That fact aside, Dr. Nickerson's opinions, standing alone, constitute substantial evidence supporting the ALJ's decision "in *toto*."

> management. The MPO merely re-argues the merits of the claim, in however much detail they record the reported pain levels at each office visit. Even that is not persuasive. It records the pain levels while she is going to PT. Not what they are, which are higher, when she doesn't go. The MPO relies on UR reports that state the number of PT sessions should be capped at 16 despite losing prior Disputes when PT had already exceeded 16. The recommending provider, Dr. Nickerson, and the provider being paid, Dr. [sic] Salsbury, are not the same person and there is no evidence of a business relationship. Why would Dr. Nickerson recommend it if he did not think it would help and why would Ms. Blanton go if it was not helping. I never said this was the "standard" but it is a legitimate part of the analysis.

In support of its first argument asserting the ALJ erroneously assessed the evidence, Benchmark cites to the CALJ's previous finding that "Dr. Nickerson only anticipates ten to twelve visits per year, a minimal cost in the scope of treatment Blanton has received." Even though the CALJ did not specifically limit the physical therapy to ten to twelve visits per year, it argues he was persuaded by Dr. Nickerson's testimony that the physical therapy recommended was infrequent and in the form of maintenance treatment because he recognized a return to Blanton's pre-injury function level was not realistic.

Benchmark contends no evidence was introduced demonstrating Dr. Nickerson's opinion regarding the appropriate therapy frequency is different now than when the CALJ resolved the previous medical fee dispute. It asserts the current request is equivalent to allowing 144 physical therapy visits per year. Alternatively, it asserts even if there is no extrapolation of the "current request to its mathematical conclusion," the ALJ has still allowed 25 physical therapy visits over four months which is the equivalent of 75 physical therapy visits per year. In Benchmark's view,

the finding Dr. Nickerson agreed with the disputed treatment plan constitutes an error in the assessment of the evidence so flagrant as to constitute a gross injustice that requires reversal of the opinion.

Next, Benchmark contends the ALJ applied an incorrect legal standard in resolving this dispute which is violative of the Kentucky Supreme Court's holding in Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). It notes that in Tipton, supra, there was evidence the procedure was only marginally effective and the patient would not benefit from the procedure. Thus, the Supreme Court held the ALJ's decision that the medical treatment was neither reasonable nor necessary was supported by substantial evidence. Benchmark maintains the Supreme Court held the test for determining what is reasonable and necessary treatment requires resolving whether the medical treatment in question is outside the type of treatment generally accepted by the medical profession or is unproductive. As it did in its petition for reconsideration, Benchmark cites to Ausmus, supra, arguing that even though treatment providing some relief may be reasonable, it may no longer be reasonable if the evidence shows that over time the treatment becomes counterproductive.

Benchmark also cites to the Kentucky Court of Appeals decision in Grimm v. Whayne Supply Co., 2010-CA-001146-WC, rendered November 12, 2010, Designated Not To Be Published. It argues the fact-finder is obligated to inquire whether the medical evidence establishes that the claimant's medical condition has shown signs of improvement or change throughout the course of the contested treatment and whether the medical evidence suggests the treatment prevented further deterioration of the worker's condition. Thus, treatment that is unproductive or only

marginally effective is non-compensable. Benchmark argues the ALJ has failed to apply this standard in the case *sub judice*. According to Benchmark, the case *sub judice* is analogous to the facts in Ausmus, supra, and Grimm, supra, because Blanton's condition has shown no signs of improvement and her subjective pain scores do not establish improvement.

Benchmark also maintains the ALJ overlooked the statements of Drs. Sassoon and Barreto that there is no current standardized form of dry needling, nor proven physiologic pathways, and only poor supportive evidence in the medical literature. It contends Salsbury's statement that Blanton told him dry needling helped is unsupported by an evidence in the record. Since Blanton has never met the goals set for her by Orthodyne over the course of her past physical therapy and her condition has actually worsened over the most recent course of treatment at that facility, Benchmark argues the ALJ should have found the proposed physical therapy is not reasonable and necessary. Benchmark asserts, "the law requires accountability for a 'reasonable benefit,' which has not been established in this case."

ANALYSIS

In a post-award medical fee dispute, the burden of proof and risk of non-persuasion with respect to the reasonableness and necessity of medical treatment falls on the employer. National Pizza Company vs. Curry, 802 S.W.2d 949 (Ky. App. 1991). Since Benchmark failed in its burden of establishing the contested treatment is not reasonable and necessary, the sole issue in this appeal is whether the evidence compels a different conclusion. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984).

> The claimant bears the burden of proof and risk of persuasion before the board. If he succeeds in his burden and an adverse party appeals to the circuit court, the question before the court is whether the decision of the board is supported by substantial evidence. On the other hand, if the claimant is unsuccessful before the board, and he himself appeals to the circuit court, the question before the court is whether the evidence was so overwhelming, upon consideration of the entire record, as to have compelled a finding in his favor.

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). In other words, an unsuccessful employer on appeal must prove that the ALJ's findings are unreasonable and, thus, clearly erroneous in light of the evidence in the record. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986). For an unsuccessful employer, this is a great hurdle to overcome. In Special Fund v. Francis, supra, the Supreme Court said:

> If the fact-finder finds against the person with the burden of proof, his burden on appeal is infinitely greater. It is of no avail in such a case to show that there was some evidence of substance which would have justified a finding in his favor. He must show that the evidence was such that the finding against him was unreasonable because the finding cannot be labeled "clearly erroneous" if it reasonably could have been made. Thus, we have simply defined the term "clearly erroneous" in cases where the finding is against the person with the burden of proof. We hold that a finding which can reasonably be made is, perforce, not clearly erroneous. A finding which is unreasonable under the evidence presented is "clearly erroneous" and, perforce, would "compel" a different finding.

Id. at 643.

As fact-finder, the ALJ has the sole authority to determine the quality, character and substance of the evidence. Square D Company v. Tipton, supra.

Similarly, the ALJ has the sole authority to judge the weight to be accorded the evidence and the inferences to be drawn therefrom. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Luttrell v. Cardinal Aluminum Co., 909 S.W.2d 334 (Ky. App. 1995). The fact-finder 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 parties' total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000); Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999); Halls Hardwood Floor Co. v. Stapleton, 16 S.W.3d 327 (Ky. App. 2000).

We disagree the ALJ erroneously assessed the evidence. On the last page of his opinion, the ALJ specifically stated he relied upon "Drs. [sic] Nickerson and Salsbury" to find the physical therapy three times per week for four weeks was compensable. In finding the dry needling procedure compensable, the ALJ found Blanton documented a relatively severe condition causing a significant amount of pain. He noted Blanton had minimized her medications. Based upon Salsbury's opinion, the ALJ found dry needling compensable.

Benchmark's assertion that no evidence was submitted establishing Dr. Nickerson's current opinion is any different than when the CALJ relied upon his opinion in determining the ten to twelve physical therapy sessions were reasonable and necessary misses the point. As previously noted by the CALJ, Blanton's physical therapy program is one of maintenance, i.e. keep Blanton at her current level of function. Dr. Nickerson's May 30, 2018, record notes Blanton was last seen on January 24, 2018, and since then she has been working with physical therapy on strengthening the scapular stabilizers and the range of motion activities. Blanton

continued to have ten to twelve headaches per month which seemed to be associated with the upper trapezius myofascial pain resulting in the posterior headaches. She had three remaining physical therapy sessions. Dr. Nickerson then stated:

> Talked at length today about trying to do some myofascial release acupressure and dry needling to the upper trapezius muscle. At this point does not appear that the local physical therapy group is able to provide these types of treatment options. She does have a massage therapist in her church and I encouraged her to may be seek out 1-2 visits with a massage therapist to see if this would help manage the posterior headaches and upper trap pain better.

The May 30, 2018, record reveals Dr. Nickerson's plan was:

> #1 the patient will finish up her course of physical therapy #2 she will attempt to try to get a massage therapist to see if this type of treatment would help address the upper trap myofascial pain and posterior headaches. #3 patient will come back to see me in 4 months to monitor her medications #4 the patient had her medications refilled for her today.

In his September 26, 2018, record, Dr. Nickerson noted Blanton's physical therapy had been discontinued by the carrier because the UR report states physical therapy was no longer medically necessary. Dr. Nickerson offered the following opinion regarding the carrier's decision to terminate the physical therapy:

> I disagree with this decision as the physical therapy has clearly been beneficial to the patient with regard to her functional status as well as helping her control her pain. Today she reports that the pain is an 8 or 9 on a scale of 0-10. Pain has significantly increased since the physical therapy has been discontinued. The increase in the trapezius pain has resulted in chronic daily headaches. She reports that she is now having to put something up underneath her right forearm to support her right upper extremity to try to take any amount of stretch and strain off of the right trapezius. She reports that her therapy

> stopped and now the headaches have returned back to their daily schedule.
>
> She reports that she is having significant difficulty getting proper sleep the pain wakes her up at night her fit bit shows that she is awake and restless approximately 18 times per night and she thinks she is only getting about 3 hours of restful sleep.
>
> Dr. Nickerson's physical examination revealed the following:
>
> Palpation notes three very active trigger points in the right middle trapezius muscle when these areas were palpated there is referral of pain in known sclerotomal distributions. After the palpation, I decided to offer the patient trigger point injections to try to help control the myofascial pain as well as try to improve the severity of her posterior cervical headache. Patient agreed with the trigger point injections.

His assessment was "1. myofascial pain syndrome. 2. Adhesive capsulitis of shoulder." Dr. Nickerson set forth the treatment plan and explained why the physical therapy in question is medically necessary:

> #1 the patient will continue with her current medications [sic] are no changes today #2 I'll [sic] will hopefully be able to conference call the hearing with regard to her Worker's Comp. case on November 6, 2018. Once I get the notification of the hearing I will check my schedule [sic] see if I'm available to be part of that conference. #3 I'll see the patient back in 3-4 months to monitor her medications and I will state that the physical therapy is medically necessary for her to maintain her current range of motion to control her myofascial pain which results in the chronic daily headaches and it [sic] the pain is under better control that should be able to have better sleep patterns. It should be noted that these 3 areas are affecting each other and they are chronic in nature [sic] the current physical therapy is the most cost effective way to manage her overall condition. The physical therapy is medically necessary to maintain her current level of function and help control her chronic pain.

In a July 5, 2018, letter regarding the need for further physical therapy, Salsbury wrote as follows:

> The client would benefit from continued physical therapy (PT) services. The client needs continued PT to improve self-pain management skills, reduce pain, increase range of motion (ROM), increase strength, and reduce functional deficits. The client had received dry needling from a previous physical therapist with good results. The client had been educated with a HEP, and self-care techniques. The client needs skilled services for proper adjustment and progress program, mobilization, stretching, and other manual techniques/procedures. This physical therapist discussed the client with Dr. Nickerson and he also recommended continued PT services.

The records of Dr. Nickerson and the July 5, 2018, letter of Salsbury indicate the ALJ did not erroneously assess the evidence. Dr. Nickerson's reports and Salsbury's letter indicate that, without the physical therapy, Blanton's condition had worsened. They also indicate the dry needling procedure had helped Blanton in the past. Dr. Nickerson stated the continued physical therapy is medically necessary for Blanton to maintain her current range of motion and to control her myofascial pain which results in the chronic daily headaches. Further, when her pain is better controlled, Blanton has better sleep patterns. The March 11, 2019, decision and the April 11, 2019, Order indicate the ALJ possessed an accurate understanding of the findings and opinions of Dr. Nickerson and Salsbury. The ALJ could reasonably infer from Dr. Nickerson's reports that, in order to maintain Blanton's current level of function, the physical therapy in question was reasonable and necessary.

We also find no merit in Benchmark's assertion Dr. Nickerson was not in agreement with the proposed treatment plan of an additional twelve visits over a

three-month period using the dry needling technique. Dr. Nickerson's records recited herein reflect his strong belief Blanton needs the dry needling physical therapy in order to maintain her current level of function.

In Tipton, supra, the Supreme Court instructed as follows:

> While the injured worker must be given great latitude in selecting the physician and treatment appropriate to her case, the worker's freedom of choice is not unfettered. KRS 342.020(3) indicates that the legislature did not intend to require an employer to pay for medical expenses which result from treatment that does not provide "reasonable benefit" to the injured worker. An employer may not rely on this section simply because he is dissatisfied with the worker's choice, for example, or because the course of treatment is lengthy, costly, or will not provide a complete cure. We believe, however, that this section relieves an employer of the obligation to pay for treatments or procedures that, regardless of the competence of the treating physician, are shown to be **unproductive** or outside the type of treatment generally accepted by the medical profession as reasonable in the injured worker's particular case. **We also believe that such decisions should be made by the ALJs based on the particular facts and circumstances of each case, so long as there is substantial evidence to support the decision.** (emphasis added).

Id. at 309-310.

In the case *sub judice*, there is evidence demonstrating the proposed physical therapy using the dry needling technique is productive and that this type of treatment has been beneficial in the past. Unlike in Tipton, supra, there is disagreement among the doctors as to whether this treatment is unproductive. Dr. Nickerson opined more than once that the physical therapy sessions in question are productive and medically necessary as they allow Blanton to better function in the affected areas and significantly reduce her pain and chronic headaches. Since Dr. Nickerson's records

establish the physical therapy utilizing the dry needling technique is reasonable and necessary treatment of Blanton's work-related injuries, we find no merit in Benchmark's assertion that the ALJ was clearly erroneous in his assessment of the evidence.

Similarly, we find no merit in Benchmark's assertion the ALJ applied an incorrect legal standard. As previously pointed out, the evidence does not unequivocally establish the proposed physical therapy treatment with dry needling has shown to be unproductive. Rather, the records of Dr. Nickerson and Salsbury reflect the proposed physical therapy which is the subject of this dispute accomplishes the maintenance program designed by Dr. Nickerson. Moreover, we find this situation is not encompassed by Ausmus, supra, as Dr. Nickerson's records and the letter of Salsbury do not establish that over time the physical therapy with dry needling had become counterproductive. On the contrary, Dr. Nickerson's records establish the physical therapy is necessary in order for Blanton to maintain her current range of motion and control her myofascial pain and headaches.

The Court of Appeals' holding in National Pizza Co. v. Curry, supra, is insightful:

> We know of no case exactly on point in Kentucky. Although under some statutory schemes, benefits for treatment to prevent pain and discomfort are not allowed for those for whom no hope for cure or rehabilitation exists, a majority of jurisdictions do so provide such benefits. *See* A. Larson, *The Law of Workmen's Compensation,* Vol. 2, § 61.14 (1989). We are convinced that our legislature by using the conjunctive "and" did not intend that only one who has sustained a "curable" work-related injury or disease should be entitled to medical benefits for relief therefrom. Accordingly, we hold that the words in KRS 342.020(1) "cure and relief" should be

> construed as "cure and/or relief." *See* KRS 446.080 and *Firestone Textile Company Division, Firestone Tire and Rubber Company v. Meadows,* Ky., 666 S.W.2d 730 (1984), which states that "[a]ll presumptions will be indulged in favor of those for whose protection the enactment [the Workers' Compensation Act] was made." *Id.* at 732. Thus KRS 342.020(1) requires the employer of one determined to have incurred a work-related disability to pay for any reasonable and necessary medical treatment for relief whether or not the treatment has any curative effect.

Id. at 951.

The opinions expressed by Dr. Nickerson and Salsbury establish the physical therapy sessions in question provide relief from the effects of Blanton's injury and constitute substantial evidence supporting the ALJ's determination that the physical therapy three times per week for four weeks utilizing the dry needling technique is compensable. Since the ALJ has the authority to pick and choose from the evidence, he was free to rely primarily upon the opinions of Dr. Nickerson as more credible, and this Board is not authorized to disturb that choice on appeal. Special Fund v. Francis, supra.

Substantial evidence exists within the record in support of the ALJ's determination, the ALJ accurately understood the evidence and did not apply the wrong evidentiary standard, and the record does not compel a contrary result.

Accordingly, the March 11, 2019, Opinion and Order and the April 11, 2019, Order overruling the petition for reconsideration are **AFFIRMED**.

ALL CONCUR.

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