RENDERED: FEBRUARY 1, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001038-WC

CHAD ROGERS — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-98-61734

TOYOTA MOTOR MFG;
WINCHESTER CHIROPRACTIC,
HON. STEPHANIE L. KINNEY,
ADMINISTRATIVE LAW JUDGE;
and KENTUCKY WORKERS'
COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, SMALLWOOD,[1] AND TAYLOR, JUDGES.

[1] Judge Gene Smallwood concurred in this opinion prior to the expiration of his term of office. Release of the opinion was delated due to administrative handling.

COMBS, JUDGE: This appeal arises from a Workers' Compensation case involving a post-award medical fee dispute. Appellant, Chad Rogers (Rogers) appeals from an opinion and order of the Workers' Compensation Board (the Board) affirming the denial of chiropractic treatment for the lumbar and cervical spine. After our review, we affirm.

On September 12, 1997, Rogers sustained an injury to his thoracic spine while employed at Toyota. The case was settled, and Rogers's future medicals remained open pursuant to KRS[2] 342.020.

The medical fee dispute arose on July 27, 2017, Toyota filed a motion to reopen to assert a medical fee dispute contesting the reasonableness, necessity, and work-relatedness of chiropractic care rendered by Perry Williams, D.C. at Winchester Chiropractic. Toyota relied upon the peer/medical record review of David Cox, D.C., who opined that such treatment is not medically necessary or causally related to the 1997 injury. The matter was assigned to Hon. Stephanie L. Kinney, Administrative Law Judge (ALJ). By order dated September 11, 2017, Winchester Chiropractic was joined as a party. On February 9, 2018, following submission of proof and a hearing, the ALJ entered an opinion, award, and order, which provides a summary of the evidence, in relevant part, as follows:

[2] Kentucky Revised Statutes.

Dr. David Cox, D.C. issued a Peer/Medical Record Review report dated June 27, 2017[,] . . . reviewed relevant medical records and reports and concluded the chiropractic treatment is neither medically necessary nor causally related to the 1997 work injury . . . almost 20 years later. Furthermore, the cervical and lumbar treatment are not relevant to the original compensable work injury . . . .

Dr. Perry Williams, DC, issued a report dated November 3, 2017[,] . . . reviewed all relevant medical records and reports and concluded Plaintiff's condition is permanent and inoperable, and that Spinal Manipulation Therapy as performed by a chiropractic doctor is the best, safest way to manage the condition. Dr. Williams noted Plaintiff's care must include the extremity joints and the upper and lower spine to be optimally effective. . . .

Plaintiff testified at the Formal Hearing on December 11, 2017. [He] has treated with Dr. Williams since about 2002 or 2004. Dr. Williams administers adjustments to the thoracic spine. Plaintiff has undergone epidurals, trigger point injections and physical therapy to no relief. Plaintiff discontinued pain medications in 2014. Plaintiff testified the chiropractic treatment has a "desired effect" in that it stops the intense pain, but it does not have a long-lasting effect. Plaintiff receives chiropractic treatment as needed.

Plaintiff continues to have burning mid-back pain into the front of the chest as well as muscle spasms . . . Relieved with ice packs, changing positions and chiropractic treatment. Plaintiff described difficulty performing normal desk duties, riding in a car, and sleeping in a "bad bed". Plaintiff experiences pain with coughing, sneezing and hiccupping. . . .

Plaintiff currently owns and operates a paving company . . . he does not perform much manual labor, but does operate some heavy equipment such has

> backhoes, skid loaders, graders, paver and rollers. Plaintiff explained the paver is electronic and only requires him to flip switches. Plaintiff has a 700-acre cattle farm but can no longer lift 100-pound feed sacks.

The ALJ explained that Rogers had sustained a thoracic injury on September 12, 1997. In a previous medical fee dispute, ALJ Coleman had determined that certain medications and trigger point injections were not compensable but that continued chiropractic treatment for the thoracic spine was reasonable and necessary.

In the case before us, ALJ Kinney determined that continued chiropractic treatment for the thoracic spine would be compensable pursuant to KRS 342.020. However, she also determined that continued chiropractic treatment for the lumbar and cervical spine was not related to the September 12, 1997, work injury and, therefore, that it is not compensable based upon Dr. Cox's opinion.

Rogers appealed to the Board. By opinion affirming and order rendered June 8, 2018, the Board determined that substantial evidence – namely Dr. Cox's opinion – supported the ALJ's determination that the cervical and lumbar chiropractic treatment was not causally related to the 1997 work injury and, therefore, that it is not compensable.

On July 9, 2018, Rogers filed a petition for review on appeal to this Court. The function of our review is "to correct the Board only where [we perceive] the Board has overlooked or misconstrued controlling statutes or

precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice." *Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687–88 (Ky. 1992). With that standard in mind, we turn to the issues that Rogers raises on appeal.

Rogers challenges the adequacy of the ALJ's review of medical records, claiming that the ALJ relied on a review of medical records by a physician who had never examined Rogers nor had conferenced or consulted with any treating physicians. Rogers correctly notes that pursuant to KRS 342.020, "[i]t is well settled in this state that the employer is responsible to pay all medical . . . treatment as may reasonably be required from the effects of an injury . . . ." Further, Rogers contends that the ALJ ignored the requirements of the statute and "ignored the complaints of the Appellant and the testimony of the treating medical provider."

Rogers's argument contained at page 6 of his petition consists of several statements with no citation of authority. It is essentially a re-argument of his case. Rogers contends that the ALJ erred in relying upon Dr. Cox's opinion rather than the treating chiropractor's opinion and the claimant's testimony. He also contends that the Board erred in failing to properly address the ALJ's analysis, which he alleges was not supported by adequate evidence.

Longstanding Kentucky workers' compensation law holds that the fact-finder is "not obligated to give more weight to the evidence of the attending physician than to the evidence of the others." *Wells v. Morris*, 698 S.W.2d 321, 322 (Ky. App. 1985); "Neither Chapter 342 nor the applicable regulations affords greater weight to a treating physician's testimony." *Sweeney v. King's Daughters Medical Center*, 260 S.W.3d 829, 830 (Ky. 2008). It is also well settled that "[t]he ALJ as fact finder has the sole authority to judge the weight, credibility, substance, and inferences to be drawn from the evidence . . . [and] is free to choose to believe or disbelieve parts of the evidence from the total proof, no matter which party offered it." *LKLP CAC Inc. v. Fleming*, 520 S.W.3d 382, 386 (Ky. 2017) (quotation marks and citations omitted). Pursuant to precedent, Dr. Cox's opinion provides a substantial evidentiary basis for the ALJ's determination that chiropractic treatment for the cervical and lumbar spine is not compensable. We find no error.

Next, Roger contends that the ALJ and the Board failed to recognize that the decision in the prior medical fee dispute was *res judicata*. However, that issue is unpreserved for appellate review. *Res judicata* is not listed as a contested issue in the November 29, 2017, order memorializing the November 21, 2017, benefit review conference. 803 KAR 25:010 Section 13(12) [formerly Section 13(14)] provides that "[o]nly contested issues shall be the subject of further

proceedings." And, as Toyota notes in its brief, Rogers raises the issue of *res judicata* for the first time on this appeal. *Whittaker v. Hurst*, 39 S.W.3d 819 (Ky. 2001) (Party's failure to raise question at the administrative level precludes it from doing so in the context of judicial appeal) (citing *Urella v. Kentucky Board of Medical Licensure*, 939 S.W.2d 869, 873 (Ky. 1997)).

We affirm the Workers' Compensation Board's opinion affirming and order of June 8, 2018.

ALL CONCUR.

BRIEF FOR APPELLANT:

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Winchester, Kentucky

BRIEF FOR APPELLEE TOYOTA MANUFACTURING KENTUCKY, INC.:

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