

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
WENDELL L. GRIFFEN, JUDGE

DIVISION II

CA06-301

November 29, 2006

ANDY E. SANDERS
APPELLANT

AN APPEAL FROM THE ARKANSAS
WORKERS' COMPENSATION
COMMISSION [F202727]

V.

BACKUS PAINT & BODY SHOP;
UNION STANDARD INSURANCE
COMPANY
APPELLEES

REVERSED AND REMANDED

Andy E. Sanders appeals from an order of the Arkansas Workers' Compensation Commission denying his request for a functional capacity evaluation and for additional temporary-total disability benefits. We reverse and remand because the Commission erred in denying Sanders a functional capacity evaluation on the ground that such an evaluation does not constitute reasonable medical treatment. We also reverse and remand because the Commission erred in concluding that Sanders was not entitled to receive additional temporary-total disability benefits because his healing period ended on June 26, 2005.

Sanders sustained a compensable injury on January 21, 2002, when he fell out of a truck and injured his right knee while working for appellee Backus Paint & Body Shop. Sanders first sought treatment on March 8, 2002, from his family physician, Dr. Obama

Asemota. He complained of pain and swelling in his right knee, but Dr. Asemota did not indicate any objective findings of swelling. He diagnosed Sanders with knee strain.

Dr. Asemota referred Sanders to an orthopedic specialist, Dr. John Lytle. Dr. Lytle saw Sanders on March 18, 2002. He noted Sanders's complaints of knee pain but stated that his knee was not swollen and that it showed no outward signs of trauma or injury. He diagnosed Sanders with knee pain, secondary to contusion. Dr. Lytle also noted that Sanders "continues to work on and off" and indicated that Sanders could continue to work "on limited duty, with limited ambulation."

Although there are no physical therapy reports in the record, the next record from Dr. Lytle indicates that Sanders had undergone physical therapy and "has done excellent" with his therapy by greatly improving the strength in his right knee. However, because Sanders continued to complain of pain, Dr. Lytle ordered an MRI. After an x-ray and MRI of Sanders's right knee revealed no abnormalities, Dr. Lytle recommended exploratory arthroscopic surgery. He is the only physician of record to recommend surgery for Sanders.

Dr. Kelly Agnew, an orthopedic surgeon, subsequently submitted a peer-review analysis, based on his review of Sanders's medical record and his conversation with Dr. Lytle. He concluded that arthroscopic surgery was not recommended given Sanders's normal MRI.

Appellee thereafter denied the request for surgery but sent Sanders to Dr. Ken Martin, a Little Rock orthopedist. Sanders saw Dr. Martin on June 26, 2002. Dr. Martin did not have a copy of the MRI report but diagnosed Sanders with patella contusion with

patellofemoral pain syndrome, noting “mild soft tissue swelling inferior to the patella along with the proximal patella tendon.” He did not believe that Sanders would receive significant benefits from surgery or formal physical therapy. He recommended a home-exercise program but stated that he wished to examine the MRI to further assess Sanders’s need for surgery. Dr. Martin informed Sanders that it could take as long as eighteen months for the pain to subside. Finally, Dr. Martin stated that Sanders “should continue with his activities as tolerated.”

Sanders next saw Dr. Massanelli, another orthopedist, on January 28, 2003. A second MRI ordered by Dr. Massanelli revealed a small effusion, changes that could indicate a strain or a sprain, and a mild patellofemoral compartment chondromalacia. Dr. Massanelli diagnosed Sanders with persistent chronic right-knee pain consistent with patellofemoral syndrome. He opined that pain management treatment would be necessary. On February 3, 2004, the doctor further stated: “His MRI certainly does not account for the severe pain that he says he has, and it certainly would not restrict him from doing any manual labor...He is not a year out from his injury and it is my impression that he has reached maximum medical improvement.”

However, in the same February 3 report, Dr. Massanelli recommended that Sanders undergo a functional capacity evaluation. Appellee scheduled the evaluation, but Sanders testified that he was notified only fifteen minutes before the evaluation, which was to take place in another town, and that he could not make the appointment on such short notice. Appellee later approved another evaluation, but Dr. Massanelli refused to recommend

another evaluation at that time because it had been over one year since he had seen Sanders. Accordingly, no functional capacity evaluation was performed.

Sanders next saw Dr. James Mulhollan, an arthroscopic knee surgeon, on November 11, 2003. Dr. Mulhollan thought the most likely diagnosis to explain all of Sanders's symptoms was chronic bursitis. He recommended conservative treatment and indicated that if Sanders did not improve in six weeks, he would get Sanders an electrical stimulator for his knee. Dr. Mulhollan indicated that because Sanders had been off work for so long, "the prognosis is guarded, at best." He provided appellant an "off work" note for the time period between November 11, 2003, and December 18, 2003, Sanders's next appointment.

On November 20, 2003, Dr. Mullhollan issued a letter to the insurance adjustor in which he agreed with Dr. Massanelli (whom Mullhollan misidentified as Sanders's original treating physician) that Sanders reached MMI in January 2003, although Dr. Massanelli actually stated that Sanders reached MMI on February 4, 2003.¹ Dr. Mulhollan also noted that because Sanders suffered no anatomical injury, the "entire physical impairment here relates to a lack of normal strength." He opined that Sanders's anatomical impairment was "perhaps" two percent and that no additional care was indicated.

The employer originally accepted the knee injury as compensable and paid medical expenses and temporary total benefits from March 18, 2002-July 21, 2002. However, appellee ultimately controverted Sanders's entitlement to any additional medical treatment.

¹It is clear from our review of the records in this case that Dr. Massanelli opined that Sanders reached MMI on February 4, 2003, not in January 2003.

Three witnesses testified at the hearing before the Administrative Law Judge (ALJ): Sanders, Joe Backus (Sanders's employer and longtime friend), and Leslie Goodbar (the employer's insurance adjustor). Sanders had not worked since March 2002. He was forty-six at the time of the hearing and had worked predominantly as a manual laborer. He maintained at the hearing that he still suffered from swelling and pain in his right knee and that he used a brace, cane, or crutches to keep his foot from turning inward and to keep his balance, although no walking aid was ever prescribed by any of his treating physicians. Backus's testimony generally corroborated Sanders's testimony.

Goodbar testified that Sanders's temporary-total disability benefits were stopped in July 2002, which is consistent with the documentary evidence in the record. She stated that she approved two functional capacity evaluations but that Dr. Massanelli refused to issue the second referral because it had been more than one year since he had seen Sanders. Finally, she testified that the only procedure that was denied was the arthroscopic surgery recommended by Dr. Lytle.

The ALJ determined that: 1) Sanders received a compensable injury on January 21, 2002; 2) Sanders was not entitled to a functional capacity evaluation because such an evaluation is not medical treatment; 3) Sanders was entitled to pain management treatment; 4) Sanders's healing period ended in June 26, 2002, when Dr. Martin released him from treatment; 5) appellee was liable for temporary-total disability benefits through June 26, 2002; 6) because the claim was controverted, Sanders's counsel was entitled to an attorney's fee. The Commission affirmed and adopted the ALJ's findings in full.

I. Entitlement to a Functional Capacity Evaluation

We reverse and remand for the Commission to order that Sanders receive a functional capacity evaluation at the employer's expense. In determining that Sanders was not entitled to a functional capacity evaluation because such an evaluation was not "medical treatment," the Commission ignores the result reached in *Gansky v. Hi-Tech Engineering*, 325 Ark. 163, 924 S.W.2d 790 (1996). In that case, the Arkansas Supreme Court reversed and remanded the Commission's finding that the claimant was not entitled to receive additional medical treatment, which included a recommendation for functional capacity evaluation.

In reviewing decisions from the Workers' Compensation Commission, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings, and we affirm if the decision is supported by substantial evidence. *Whitlach v. Southland Land & Dev.*, 84 Ark. App. 399, 141 S.W.3d 916 (2004). Substantial evidence exists if reasonable minds could reach the Commission's conclusion. *Id.* When a claim is denied, the substantial-evidence standard of review requires us to affirm if the Commission's opinion displays a substantial basis for the denial of relief. *Id.* The Commission is not required to believe the testimony of any witness, and it may accept and translate into findings of fact only those portions of the testimony that it deems worthy of belief. *Holloway v. Ray White Lumber Co.*, 337 Ark. 524, 990 S.W.2d 526 (1999). The Commission may accept or reject medical opinions and determine their medical soundness and probative force. *Green Bay Packing v. Bartlett*, 67 Ark. App. 332, 999 S.W.2d 695 (1999).

An employer is required to pay for medical “services” that are reasonably necessary in connection with the injury received by the employee. Ark. Code Ann. § 11-9-508(a) (Supp. 2005). The term “services” is not defined in our workers’ compensation statutes, but is commonly referred to as reasonably necessary “treatment.” *See generally Hamilton v. Gregory Trucking*, 90 Ark. App. 248, ___ S.W.3d ___ (2005). The employee has the burden of proving by a preponderance of the evidence that medical treatment is reasonable and necessary. *Id.* What constitutes reasonably necessary treatment under the statute is a question of fact for the Commission. *Id.*

In determining that a functional capacity evaluation constituted reasonably necessary medical treatment, the *Gansky* court reasoned:

[In concluding that the claimant’s symptoms had resolved], the Commission discounted the fact that [the neurosurgeon] had ordered a functional capacity assessment for Gansky and had refrained from releasing him from his care until that examination was completed and he could decide whether Gansky could return to work. *At that juncture, Hi-Tech intervened and refused to pay for additional medical care, including the functional capacity assessment. Hence that essential examination ordered by [the neurosurgeon] was never performed, and a final evaluation by the neurosurgeon was never made.* The Commission appears to have concentrated on the reports of the physical therapist as opposed to those of [the neurosurgeon]. Under these circumstances, when the treating neurosurgeon has prescribed a functional capacity assessment and that was not done because Hi-Tech would not pay for it, we cannot agree with the Commission that additional medical treatment was not reasonably necessary or that the healing period had ended.

Gansky, 325 Ark. at 169, 924 S.W.2d at 794 (emphasis added).

The same is true here. The functional capacity evaluation was ordered by Dr. Massanelli, Sanders’s treating orthopedic doctor, on June 26, 2002, but the evaluation was never performed. Thus, the conclusions reached by Dr. Massanelli and by Sanders’s other

treating physicians regarding Sanders's condition were reached in spite of two requests for, and without benefit of, a functional capacity evaluation. Yet, such an evaluation could be probative to determine when Sanders's healing period ended and may also be probative of Sanders's entitlement to permanent disability benefits, an issue that has not yet been litigated. Pursuant to *Ganksy, supra*, we hold that Sanders is entitled to receive a functional capacity evaluation at the employer's expense.

II. Temporary-Total Disability Benefits

We also reverse and remand because the Commission erred in determining that Sanders was not entitled to receive additional temporary-total disability benefits (TTD benefits). The Commission determined that Sanders's healing period ended on June 26, 2002, based on Dr. Martin's report of that same date. It is undisputed that Sanders received TTD benefits from March 18, 2002-July 21, 2002; he also received additional TTD benefits from November 11, 2003-November 24, 2003, presumably because Dr. Mullhollan excused him from work during that period. Apparently based on Dr. Massanelli's determination that Sanders reached MMI on February 4, 2003, Sanders maintains that he is entitled to receive additional TTD benefits through January 30, 2003.

The "healing period" is that period of healing of an injury resulting from an accident. Ark. Code Ann. § 11-9-102(12) (Supp. 2005). The healing period continues until the employee is as far restored as the permanent character of his injury will permit, and there is nothing further in the way of treatment that will improve that condition. *Smith-Blair, Inc. v. Jones*, 77 Ark. App. 273, 72 S.W.3d 560 (2002). The determination of when the healing

period has ended is a factual determination for the Commission, which is affirmed on appeal if supported by substantial evidence. *Id.* Temporary total disability is that period within the healing period in which the workers' compensation claimant suffers a total incapacity to earn wages. *Emerson Elec. v. Gaston*, 75 Ark. App. 232, 58 S.W.3d 848 (2001).

The Commission determined that Sanders's healing period ended on June 26, 2002. However, we reverse on this issue because substantial evidence does not support the Commission's determination that Sanders's healing period ended on June 26, 2002.²

The Commission apparently accepted Dr. Martin's statement in his June 26, 2002 report that Sanders should "continue with his activities as tolerated" to mean that Sanders's healing period had ended and that no further treatment would improve his condition. In so doing, the Commission adopted in full the ALJ's finding that

[t]he healing period ended in June 2002 when Dr. Martin released the claimant. By that time both Dr. Agnew and Dr. Martin had concluded that the claimant was not a surgical candidate. After that, treatment was offered to help the claimant cope with pain but no other medical treatment was offered that would improve the condition of his knee.

We do not find evidentiary support for the Commission's findings that Dr. Martin "released" Sanders on June 26, 2002, or that he contemplated no further treatment for Sanders other than pain management. First, while Dr. Martin indicated that Sanders "should continue with his activities as tolerated," he did not state that Sanders had reached maximum medical improvement or was able to return to work. Dr. Martin simply did not speak to

²The employer does not claim entitlement to reimbursement or set-off for any TTD benefits paid beyond June 26, 2002.

either of those matters.

Second, the record does not support the Commission's conclusion that Sanders's condition had resolved as of June 26, 2002, except for the need for pain management. On that same day, Dr. Martin also noted objective findings of mild swelling along the tendon in Sanders's knee. Although Dr. Martin tentatively concluded that Sanders was not a surgical candidate, he also stated in the June 26, 2002 report that he wished to see Sanders's MRI to determine if he needed to revise his nonsurgical recommendation. While Dr. Agnew opined that surgery was not an option, he was not Sanders's treating physician. Moreover, unlike Dr. Martin, Dr. Agnew did not examine Sanders and saw no objective findings of an injury. Regardless, it cannot be said that the only treatment contemplated by Dr. Martin on June 26, 2002, was pain management where Dr. Martin wished to examine Sanders's MRI and acknowledged that diagnostic result could change his nonsurgical recommendation.

Accordingly, we reverse this case and remand for the Commission to determine when Sanders's healing period ended, in light of our holding. We note that, in so doing, the Commission should consider the results of Sanders's functional capacity evaluation and should determine whether Sanders was totally incapacitated from earning wages during his healing period.

Finally, Sanders points this court to numerous discrepancies between the Commission's opinion and the record. We acknowledge the discrepancies but defer to the Commission to resolve any discrepancies on remand.

Reversed and remanded for further proceedings.

PITTMAN, C.J., and GLOVER, J., agree.