

RENDERED: AUGUST 8, 2008; 10:00 A.M.  
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2007-CA-001740-WC

TAMMY K. KELLY

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-00-00822

OFFICE DEPOT; HON. RICHARD JOINER,  
ADMINISTRATIVE LAW JUDGE; AND  
WORKERS' COMPENSATION BOARD

APPELLEES

### OPINION AFFIRMING AND REMANDING

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BEFORE: CAPERTON AND VANMETER, JUDGES; GUIDUGLI,<sup>1</sup> SENIOR  
JUDGE.

VANMETER, JUDGE: Tammy K. Kelly petitions *pro se* for the review of a  
Workers' Compensation Board (Board) opinion affirming and remanding the  
opinion and order of an Administrative Law Judge (ALJ) resolving a medical fee  
dispute in Office Depot's favor. Kelly argues essentially that the ALJ erred by

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<sup>1</sup> Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

failing to find a causal relationship between her work-related injury and the disputed medical fees. For the following reasons, we affirm and remand the opinion of the Board on the issue of any remaining medical fee disputes.

As set forth in the Board's opinion, the facts giving rise to this matter are as follows:

On March 5, 1998, Kelly sustained an injury to her left shoulder while working for Office Depot. She subsequently underwent two surgeries. Kelly filed a claim seeking workers' compensation benefits on June 9, 1998. In an agreement approved by an ALJ on June 4, 200[3], Kelly settled her claim against Office Depot for a lump sum of \$20,000.00. The settlement did not include a waiver or buy out of future medical benefits pursuant to KRS 342.020.

On March 31, 2006, following utilization review, Office Depot filed a Form 112 Medical Dispute and motion to reopen contesting Kelly's ongoing treatment for reflex sympathetic dystrophy ("RSD"), also known as causalgia or complex regional pain syndrome ("CRPS"), and depression. The medical services and medications at issue were prescribed by Drs. Saroj B. Dubal, Cary L. Twyman, and William B. Kibler. They include interstellate blocks, injection therapy, and prescription medication consisting of Topamax, Relpax, Catapres patches/Clonidine, Baclofen, Ultram, Wellbutrin, and Vistaril.

In the decision on the merits, the ALJ determined Kelly does not have RSD or any work-related psychological component secondary to the 1998 left shoulder injury at Office Depot. The ALJ ruled the various treatments and medications prescribed to address those conditions are not compensable under KRS 342.020.

The ALJ also denied several of Kelly's petitions for reconsideration. The Board affirmed and remanded.<sup>2</sup> This petition for review followed.

Kelly argues that the Board erred by affirming the ALJ's opinion that her medical treatment was not compensable. We disagree.

KRS 342.020(1) requires an employer to pay for reasonable and necessary medical treatment for the cure and relief from the effects of a work-related injury. An employer may move to reopen an award to contest whether medical treatment is reasonable or necessary, or whether the need for the treatment is due to the effects of the work-related injury. *FEI Installation, Inc. v. Williams*, 214 S.W.3d 313, 319 (Ky. 2007). When an employer contests the compensability of post-award medical treatment, it has the burden of proving that the treatment is not compensable. *Bartee v. Univ. Med. Ctr.*, 244 S.W.3d 91, 94 (Ky. 2008). Thus, the issue on appeal is whether substantial evidence supported the ALJ's decision that Office Depot met its burden of proving that the treatment is not compensable. *See Wolf Creek Collieries v. Crum*, 673 S.W.2d 735, 736 (Ky.App. 1984). Substantial evidence is "evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men." *Smyzer v. B.F. Goodrich Chemical Co.*, 474 S.W.2d 367, 369 (Ky. 1971).

Evidence was submitted below supporting both parties' positions. In support of her argument that the medical treatment was compensable, Kelly relied

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<sup>2</sup> The Board affirmed regarding the non-compensability of the medical services and medications at issue. It remanded for the ALJ to rule upon additional medical fee disputes which Office Depot filed after the ALJ issued its opinion denying the compensability issues in dispute herein.

on Dr. Ben Kibler's diagnosis that she had "scapular dyskinesis with forward flexion with prominence of the medial border of the scapula."<sup>3</sup> Dr. Kibler also opined that these problems were related to Kelly's original work injury. Next, Dr. Saroj Dubai diagnosed Kelly with

[l]eft sided neck and shoulder as well as left upper extremity pain. Chronic regional pain syndrome of the left upper extremity area as well as the left side of the neck and left shoulder, muscle spasticity, chronic pain from above as a result of work-related injury, and insomnia secondary to pain.

Like Dr. Kibler, Dr. Dubai opined that these problems were the result of Kelly's work-related injury. Kelly also relied on Dr. Cary Twyman's diagnosis that Kelly had "chronic pain syndrome involving the left arm and shoulder, mild fascial pain, soft tissue pain, and regional pain syndrome." Dr. Twyman opined that Kelly's problems were related to her original work injury and subsequent surgeries.

Other evidence, however, supported Office Depot's argument that Kelly's medical treatment was not compensable. Dr. Douglas Ruth diagnosed Kelly with "somatoform disorder and attention deficit/hyperactivity disorder." He opined that the

somatoform disorders are not considered caused by the illness or injury whose symptoms they mimic or exaggerate. They typically are caused by the patient's or examinee's reaction to some situational or environmental stress to which the examinee or patient responds with somatic complaints that often are erroneously attributed to the physical illness or injury.

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<sup>3</sup> We quote from the ALJ's summary of the evidence, as set forth in his opinion and order.

In addition, Dr. Michael Moskal found “no evidence of reflex sympathetic dystrophy. In his opinion Ms. Kelly does not suffer from chronic regional pain syndrome type 1 or 2 and . . . her current complaints of left upper extremity pain are not related to the March 5, 1998 injury.”

In short, we cannot say that the ALJ erred by finding the opinions of Dr. Moskal and Dr. Ruth more persuasive. When “medical evidence is conflicting, the question of which evidence to believe is the exclusive province of the ALJ.” *Greene v. Paschall Truck Lines*, 239 S.W.3d 94, 109 (Ky.App. 2007) (quoting *Square D Co. v. Tipton*, 862 S.W.2d 308, 309 (Ky. 1993)). Further, Kentucky law does not require an ALJ to “give more weight to the evidence of the attending physician than to the evidence of the others.” *See Wells v. Morris*, 698 S.W.2d 321, 322 (Ky.App. 1985). Since these two doctors’ opinions constituted substantial evidence, the ALJ did not err by finding that Kelly’s medical treatment was not compensable. Nor did the Board err by affirming the ALJ’s opinion.

The Board’s opinion is affirmed, and this matter is remanded, pursuant to 803 KAR<sup>4</sup> 25:012 §1(7)(a), for consideration of any remaining medical fee disputes.<sup>5</sup>

ALL CONCUR.

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<sup>4</sup> Kentucky Administrative Regulations.

<sup>5</sup> 803 KAR 25:012 §7(a) provides that “a Form 112 shall be accompanied by a motion for a partial remand to the administrative law judge assigned to the claim if an appeal is pending before the Workers’ Compensation Board concerning the injury or disease which is the subject of the dispute.” Before the Board issued its opinion here, Office Depot filed additional medical fee disputes.

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