

RENDERED: NOVEMBER 26, 2008; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001098-WC

ANGELA JOHNSON

APPELLANT

PETITION FOR REVIEW OF A DECISION
v. OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-04-70944

ACTION PETROLEUM, LTD.; HON.
JAMES L. KERR, ADMINISTRATIVE
LAW JUDGE; AND WORKERS'
COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

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BEFORE: KELLER AND WINE, JUDGES; LAMBERT,¹ SENIOR JUDGE.

LAMBERT, SENIOR JUDGE: Angela Johnson petitions for review of a Workers' Compensation Board (Board) opinion affirming the order of an Administrative Law Judge (ALJ) resolving a medical fee dispute in favor of her former employer

¹ Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Action Petroleum, LTD (Action Petroleum). The sole issue upon review is whether the ALJ's finding that Angela Johnson was not entitled to pain management was supported by substantial evidence.

On May 14, 2004, Angela Johnson was injured when she lifted a box of canned goods at her place of employment, Action Petroleum. On March 27, 2006, Johnson filed for workers' compensation benefits with a recorded injury date of May 14, 2004. On March 20, 2007, the ALJ awarded Johnson permanent partial disability benefits and future medical benefits. On April 16, 2007, Action Petroleum filed a Form 112 and moved to re-open and join Dr. Binder based upon Dr. Binder's referral of Johnson for pain management.

At a hearing on the medical fee dispute, Action Petroleum submitted medical evidence to the ALJ primarily consisting of medical reports from Drs. Travis, Marshall, and Pittman that were obtained during a utilization review. After reviewing Johnson's post operative MRI, which showed no evidence of a recurrent disc problem or other finding to explain Johnson's ongoing pain, Dr. Travis stated that he did not see a reason for Johnson to attempt further pain management. After reviewing Johnson's MRIs, Dr. Marshall concluded that there was no clear relationship between Johnson's 2004 injury and Johnson's current pain. Dr. Marshall concluded that a referral to pain management would be unnecessary.

Dr. Nicci Pittman also concluded that pain management was unnecessary when she reviewed Johnson's March 2007 MRIs at the request of

Action Petroleum. Dr. Pittman noted that Johnson had back pain radiating into her left leg but had no neurological findings on examination. Dr. Pittman also concluded that nothing related Johnson's current symptoms to the injury from 2004.

Johnson presented evidence to the ALJ that she claims is more persuasive than the evidence presented by Action Petroleum. Johnson submitted four reports from Dr. Kathleen Binder, a physical medicine and rehabilitation specialist who referred Johnson to a pain management clinic and acted as her treating physician. Dr. Binder diagnosed Johnson as having failed back syndrome with chronic S1 radiculopathy and muscle spasms. Dr. Binder initially ordered Johnson to take prescription medication for pain and to perform a home exercise routine. On May 18, 2007, however, Dr. Binder recommended that Johnson pursue pain management for chronic low back pain and referred Johnson to Dr. Harold Rutledge at Central Kentucky Pain Professionals, PLC.

Johnson also submitted medical records from Dr. Phillip Tibbs. In his initial 2006 evaluation of Johnson, Dr. Tibbs opined that Johnson was not a candidate for surgery and would benefit from chronic pain management. Dr. Tibbs re-evaluated Johnson in 2007 and reached the same conclusion.

In addition to the reports, Johnson also submitted medical records including notes from Dr. Lockstadt, the physician who performed Johnson's surgery. In his notes, Dr. Lockstadt maintained that Johnson's MRI showed no further nerve root compression but there was a minor degeneration at L4-5 and

complete loss of disc space at L5-S1. Dr. Lockstadt estimated that Johnson would have a recovery period of at least a year and recommended epidural injections for pain relief.

After reviewing the evidence, on December 13, 2007, the ALJ made a finding that Johnson's referral to pain management was non-compensable in accordance with the evidence offered by Johnson's employer and denied her claim. Further the ALJ concluded that Action Petroleum acted in good faith and followed the appropriate procedures in submitting the referral to the utilization review.

On May 9, 2008, the Workers' Compensation Board upheld the ALJ's decision finding that the decision was based upon substantial evidence. Now Johnson appeals to this Court claiming that the Board was clearly erroneous.

As a reviewing Court, we must decide whether the evidence is " . . . so overwhelming, upon consideration of the entire record, as to compel a finding in favor of . . ." the appellant. *Wolf Creek Collieries v. Crum*, 673 S.W. 2d 735, 736 (Ky. App. 1984). The evidence in the case at hand does not meet this standard. Therefore, we must affirm the Board's decision.

KRS 342.020 (1) requires an employer to pay all reasonable and necessary medical treatment for the cure and relief from the effects of a work-related injury. An employer may move to re-open an award to contest whether medical treatment is reasonable or necessary, or whether the need for 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 does so, it has the burden of

proof to show that the treatment is noncompensable. *Bartree v Univ. Med. Ctr.*, 244 S.W.3d 91, 94 (Ky. 2008). After the administrative determination is made, the issue upon further review is whether the ALJ's decision was supported by substantial evidence. *Wolf Creek Collieries v. Crum*, *supra* at 736.

Although Johnson argues that the ALJ's decision was not supported by substantial evidence, the record clearly reflects otherwise. 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). Action Petroleum submitted reports from three physicians. Each physician reviewed Johnson's medical records and tests, and each physician concluded that there was no direct relationship between Johnson's 2004 injury and the pain she claimed to suffer.

Johnson argues that even though Action Petroleum submitted such evidence, the evidence she submitted was so overwhelming that it compelled a finding in her favor. Johnson further claims the ALJ erroneously failed to consider her lay testimony as evidence as required by *Hush v. Abrams*, 584 S.W.2d 48 (Ky. 1979). Our review of the ALJ's opinion reveals a thorough discussion of Johnson's testimony, including complaints of pain and a belief that pain medication is the only way she can live a normal life. While the ALJ acknowledged Johnson's arguments and the opinions of her physicians, the ALJ nevertheless found that Johnson's referral to pain management was non-compensable. In his analysis, the ALJ specifically stated that he relied on the

opinions of Drs. Marshall and Travis. To successfully contest an ALJ's findings, an appellant must show that the ALJ's opinion was not supported by evidence of probative value. *Special Fund v. Francis*, 708 S.W.2d 641 (Ky. 1986). Johnson failed to make such a showing.

Johnson also claims, citing *Transport Assoc. v. Butler*, 892 S.W.2d 296 (Ky. 1995), that the Board erred in upholding the ALJ's findings because Action Petroleum failed to utilize proper procedures by failing to move for a change in Johnson's treating physician. However, Action Petroleum did not file a motion under KRS 342.020 (7). Instead, Action Petroleum filed a motion to re-open the case. Action Petroleum was under no obligation to request a change in Johnson's treating physician because there is no allegation that Johnson was not receiving proper medical care or that her treatment was substantially affected or delayed by Dr. Binder. The issue at hand is simply a dispute as to payment of medical fees and the compensability of Johnson's pain management. We agree with the Board that Action Petroleum followed proper procedures.

Accordingly, we affirm the decision of Workers' Compensation Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

John E. Hunt
Eric C. Conn
Stanville, Kentucky

BRIEF FOR APPELLEE, ACTION PETROLEUM, LTD.:

Lee Jones
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