RENDERED: DECEMBER 17, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000985-WC

RAYMOND O. POYNTER — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-97-79559

BARREN-METCALFE AMBULANCE SERVICE; HON. CHRIS DAVIS, ADMINISTRATIVE LAW JUDGE; DR. MICHAEL CASSARO; DR. AMELIA KISER;THE LASER SPINE INSTITUTE; AND WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: TAYLOR, CHIEF JUDGE; STUMBO, JUDGE; SHAKE,[1] SENIOR JUDGE.

SHAKE, SENIOR JUDGE: Raymond O. Poynter ("Poynter") seeks review of a Workers' Compensation Board opinion affirming the order of the Administrative

[1] Senior Judge Ann O'Malley Shake 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.

Law Judge ("ALJ") entered on November 20, 2009. Poynter also appeals from an order entered by the ALJ on January 12, 2010 denying his petition for reconsideration. Poynter's appeal alleges that the ALJ improperly selected and directed him to undergo a treatment option as a condition of future medical treatment. Because the ALJ's decision was supported by substantial evidence, we affirm.

Poynter sustained a work-related lower back injury in 1997 while lifting a patient on a stretcher. At the time, Poynter worked for the Barren-Metcalfe Ambulance Service ("Barren"). Poynter has been unable to work since his injury. This matter was originally settled by agreement approved by the arbitrator on January 5, 2000. In that agreement, Barren agreed to remain responsible for the payment of reasonable, necessary and related medical expenses.

Over the course of several years, Poynter underwent several surgeries, including a discectomy at L5-S1, a fusion at L1-2, and a fusion at L5-S1. None of the surgeries ultimately provided any relief. Poynter's current pain management physician is Dr. Michael Cassaro, whose treatments included trigger point injections and radiofrequency or "nerve burning" treatments. Poynter testified that the nerve burning procedure provided a 50% reduction in pain. Dr. Cassaro does not prescribe the pain medications taken by Poynter, which are managed by his family physician, Dr. Angela Kiser.

Dr. Cassaro surgically implanted an electrical stimulator in Poynter's lower back in November 2004. Poynter experienced relief for approximately three

months. After three months, he began having infections, and it was ultimately determined that he was having an allergic reaction to the stimulator, and Dr. Cassaro surgically removed the stimulator.

Poynter and Dr. Cassaro have also considered surgically implanting a morphine pump for the purpose of placing the medication directly into the spinal cord. Poynter testified that he declined the pump due to the risk of infections and the risk that he would have a reaction to the pump, as the pump is made of a material similar to the stimulator. Dr. Cassaro recommended that Poynter not have the pump implanted due to the risk of a second allergic reaction.

Barren filed a motion to reopen and medical fee dispute, challenging the reasonableness and necessity of the series of trigger point injections proposed by Dr. Cassaro and the reasonableness and necessity of the dosage of the prescription drug Avinza which was being prescribed by Dr. Kiser.

Because the issues presented were medical in nature, Barren requested that the ALJ appoint a university evaluator pursuant to KRS 342.315. The motion was granted, and Poynter was examined by Dr. William O. Witt, a professor and specialist in pain management at the University of Kentucky Medical School. Dr. Witt's report was filed as evidence, and he was also deposed by Poynter's counsel.

Dr. Witt was provided with copies of Poynter's relevant treatment records, and he reviewed those records in addition to taking a history and performing a physical examination. Dr. Witt noted that, under the care of Dr. Cassaro, Poynter had undergone "multiple interventional procedures including and

not limited to various nerve blocks, ligament injections, trigger point injections, and rhizotomies." He pointed out that the trigger point injections provided a "significant reduction in his pain for a period of approximately one week after each injection and a modest increase in his ability to function."

In discussing the use of the opioid-based pain medications prescribed by Dr. Kiser, Dr. Witt pointed out that there was "lacking even a single long term study looking at the efficacy of opioid based pain medications for chronic non malignant pain of at least six months duration." He further noted that there were "many studies that have documented the existence of opioid-induced hyperalgesia and clearly this individual has manifestations of this problem." Those "manifestations" were identified as hypogonadism, depression, obesity, and sleep apnea which, in turn, resulted in "deprivation of delta brainwave sleep which will further aggravate his pain condition and interfere with the body's healing."

Dr. Witt testified that in his treatment of patients, he does not use high dose opioid pain medications for relief of chronic pain. He recognized that some physicians do use that treatment, but a fair reading of Dr. Witt's report and his deposition plainly show that Dr. Witt was of the opinion that Poynter needed to curb his use of opioid medications.

Dr. Witt stated that it was his opinion that Poynter should be referred to a comprehensive inpatient treatment program "which emphasizes behavioral and physical functioning in the context of chronic pain," and recommended a specific treatment program located in Birmingham, Alabama. The goal of that program

was to wean Poynter from the opioid based medications, and also to provide him with "a comprehensive physical and behavioral evaluation and treatment program." Dr. Witt's opinion was that, after Poynter had been weaned from the high doses of opioid pain medications he was being prescribed by Dr. Kiser, he could then be maintained at a very low dosage of pain medication.

Dr. Witt also stated that Poynter "would be an excellent candidate for an implanted intrathecal infusion device. . . [.]" He continued that "[i]t is further my opinion that this could be maintained at a very low dosage that would not likely interfere with his endocrine function."

Dr. Witt concluded with the opinion that:

> [i]n this context, I see two broad courses of therapy, either of which is acceptable although I have a strong preference for the latter. The first is to continue the trigger point injections and rhizotomies as indicated which will not be expected to significantly improve this individual's level of functioning but will at least give him some measure of palliative pain control. The second option is to pursue a rehabilitative approach which I personally favor and I have outlined above.

The ALJ performed a thorough review of all of the medical information introduced by the parties, and concluded that he was persuaded by the opinion of Dr. Witt that Poynter was significantly over-medicated, and that Poynter needed to wean himself from the high doses of opioid medications. The ALJ ordered that "the treatment program recommended by the University Evaluator shall be followed."

Poynter filed a petition for reconsideration with the ALJ, which was summarily denied. In his opinion on reconsideration, the ALJ noted that "a clear and open reading of the report and testimony of Dr. Witt is that in his opinion the plaintiff's treatment is not, within the meaning of the Kentucky Workers' Compensation Act, reasonable and necessary." He also pointed out that Dr. Witt's opinion created a "rebuttable presumption that the undersigned sees no reason to reject."

Poynter then filed a notice of appeal to the Kentucky Workers' Compensation Board and, on April 29, 2010, the Board unanimously affirmed the ALJ's opinion, noting that "although conflicting evidence was presented, it was reasonable for the ALJ to arrive at the conclusions opined in his decision and the subsequent order on reconsideration." Poynter has now filed a petition for review with this Court.

KRS 342.285 provides that the ALJ's decision is "conclusive and binding as to all questions of fact" and that the Board "shall not substitute its judgment for that of the [ALJ] as to the weight of evidence on questions of fact." KRS 342.290 limits the scope of review by the Court of Appeals to that of the Board and also to errors of law arising before the Board. *Whittaker v. Rowland*, 998 S.W.2d 479, 481 (Ky. 1999). Our review "is to correct the Board only where the . . . Court perceives 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).

In a post-award medical fee dispute, the burden of proof to demonstrate that the medical treatment is unreasonable or unnecessary is with the employer, while the burden remains with the claimant concerning questions pertaining to work-relatedness or causation of the condition. *See* KRS 342.020(1); *Mitee Enterprises v. Yates*, 865 S.W.2d 654, 655 (Ky. 1993). Therefore, at the ALJ level, Barren bore the burden of proof on the issue of the reasonableness and necessity of the medical treatment.

When the party bearing the burden of proof has prevailed, the issue on appeal is whether the ALJ's decision was supported by substantial evidence. *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986). Therefore, because Barren was successful in demonstrating that Poynter's continuing medical treatment was unreasonable and unnecessary, the question on appeal is whether the ALJ's decision is supported by substantial evidence. Substantial evidence is "evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men." *O'Nan v. Ecklar Moore Exp., Inc.*, 339 S.W.2d 466, 468 (Ky. 1960) (citing *American Rolling Mill Co. v. Pack*, 278 Ky. 175, 128 S.W.2d 187 (1939), and *Wadkins' Adm'x v. Chesapeake & O. Ry. Co.*, 298 S.W.2d 7 (Ky. 1957)).

As the fact finder, the ALJ had the sole authority to determine the weight, credibility, substance and inferences to be drawn from the evidence.

Square D Co. v. Tipton, 862 S.W.2d 308, 309 (Ky. 1993); *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418, 419 (Ky. 1985). The fact-finder also had the sole authority to judge the weight to be afforded to the testimony of a particular witness. *McCloud v. Beth-Elkhorn Corp.*, 514 S.W.2d 46, 47 (Ky. 1974). Where the evidence is conflicting, the fact-finder may choose whom or what to believe. *Pruitt v. Bugg Bros.*, 547 S.W.2d 123, 125 (Ky. 1977). The ALJ, as 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 party's total proof. *Magic Coal Co. v. Fox*, 19 S.W.3d 88, 96 (Ky. 2000). Mere evidence contrary to the ALJ's decision is not adequate to require reversal on appeal. *Whittaker*, 998 S.W.2d at 482.

In resolving the issue presented, this Court must also consider the provisions of KRS 342.315. This statute allows an ALJ to enlist the assistance of an impartial expert from one of the medical schools in the Commonwealth "whenever a medical question is at issue." KRS 342.315 provides that the "clinical findings and opinions of the designated evaluator shall be afforded presumptive weight by Administrative Law Judges and the burden to overcome such findings and opinions shall fall on the opponent of that evidence." The statute also mandates that, if the ALJ chooses to reject the opinions of the evaluator, the ALJ "shall specifically state in the order the reasons for rejecting that evidence."

Poynter's position is that the ALJ abused his discretion in relying upon the testimony of Dr. Witt and in ordering that his treatment plan be

implemented. However, the ALJ ordered that a university evaluation be performed pursuant to KRS 342.315. The evaluation was performed, and the ALJ then ordered treatment in accordance with the plan recommended by the university evaluator.

The function of both the Board and this Court in reviewing the ALJ's decision is limited to a determination of whether the findings made are so unreasonable under the evidence that they must be reversed as a matter of law. *Ira A. Watson Dep't Store v. Hamilton*, 34 S.W.3d 48, 52 (Ky. 2000). This Court, as an appellate tribunal, may not assume the ALJ's role as fact finder by applying its own assessments as to weight and credibility or by noting other conclusions or reasonable inferences that otherwise could have been drawn from the evidence.

In this case, the ALJ exercised his discretion to pick and choose from the medical testimony presented and, in addition, recognized his obligation to give presumptive weight to the opinion of Dr. Witt as the university evaluator. Because the

result chosen by the ALJ is supported by substantial evidence in the record, we are without authority to disturb his decision on appeal. Obviously, the record contains plenty of evidence that would support a decision contrary to that reached by the ALJ. Specifically, Dr. Witt testified that *both* treatment options were reasonable. Were we to consider this matter afresh, we may well have arrived at a different conclusion and allowed Poynter the ability to choose his own treatment from those that were considered reasonable, without consideration for Dr. Witt's preferred

methods. However, as noted above, the record contains evidence in support of the ALJ's ultimate conclusions. Accordingly, we are duty bound to affirm.

For the foregoing reasons, we affirm.

TAYLOR, CHIEF JUDGE, CONCURS IN RESULT ONLY.

STUMBO, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

STUMBO, JUDGE, DISSENTING: Respectfully, I dissent for the simple reason that the University Evaluator testified that "based on [Mr. Poynter's] medical history and treatment," he viewed both options as being reasonable. The fact that Dr. Witt did not regard the treating physician's regime as his own preferred method does not render the treatment unreasonable or unnecessary. I would not take the ability to choose between reasonable choices of treatment from an injured worker simply because an evaluator finds another method preferable.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Thomas W. Davis Glasgow, Kentucky	Denis S. Kline Louisville, Kentucky