

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2015-CA-000101-WC

SCHWAN'S HOME SERVICE, INC.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-00-59621

DAVID DAMRON; HON. JOHN B.  
COLEMAN, ADMINISTRATIVE LAW  
JUDGE; DR. LELA C. JOHNSON; AND  
WORKERS' COMPENSATION  
BOARD

APPELLEES

OPINION  
AFFIRMING

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BEFORE: ACREE, DIXON AND STUMBO, JUDGES.

ACREE, JUDGE: The issue before us is whether the Administrative Law Judge (ALJ) erred in a post-award medical fee dispute by determining certain prescription medications to be causally related to the treatment of an employee's ten year old work-related injuries, and therefore, compensable pursuant to

Kentucky Revised Statutes (KRS) 342.020, entitling a claimant to medical benefits for a work-related injury “for so long as the employee is disabled regardless of the duration of the employee’s income benefits.” The Workers’ Compensation Board (the Board) affirmed the ALJ’s decision. After careful review of the record, we affirm.

## I. FACTUAL AND PROCEDURAL BACKGROUND

David Damron was granted a worker’s compensation award in 2003 for two work-related injuries suffered while in the course and scope of his employment at Schwan’s Home Service, Inc., including left upper extremity and right knee injuries with development of a pulmonary embolism. The injuries occurred as a result of a motor vehicle accident on December 4, 2000, with exacerbation to the right knee injury on September 9, 2001.

In the Opinion and Award dated January 17, 2003, the ALJ determined three separate impairment ratings as a result of Damron’s injuries. Relevant to our discussion is Damron’s pulmonary embolism caused by his right knee injury. The ALJ found Damron to have a 10% functional impairment as a result of his pulmonary embolism based upon the opinion of Dr. Glen Baker. The ALJ determined that based upon the testimony of Damron’s and Schwan’s experts, the pulmonary embolism resulted from his compensable right knee surgical procedure performed in January 2001. The assessment of impairment was based upon the American Medical Association (AMA) Guidelines. The ALJ provided the following explanation of his reliance upon Dr. Baker’s opinions in finding

Damron's loss of pulmonary function was related to his work-related pulmonary embolism:

I find the most credible and convincing evidence in the record concerning Plaintiff's lung condition resulting from the pulmonary embolus is submitted by the Plaintiff in the nature of the Form 107-I of Glen Ray Baker, Jr., M.D. Dr. Baker noted that Plaintiff developed chest pain and was found to have a pulmonary embolism and was transferred from Pikeville Methodist Hospital to Central Baptist Hospital. He was medicated with Heparin for pulmonary embolism and deep venous thrombophlebitis. The pulmonary function studies performed on April 12, 2002 revealed a mild restrictive ventilator defect. Dr. Baker diagnosed status post pulmonary embolism, on chronic anticoagulation and a mild restrictive ventilator defect based upon pulmonary function testing. It was his opinion that the injury (pulmonary embolus) did cause Plaintiff's lung condition but also recognized that some of Plaintiff's complaints **may** be secondary to deconditioning and weight gain which had occurred since his injury because of decreased level of activity.

On March 20, 2014, Schwan's filed a motion to reopen, a Form 112, contesting the compensability of certain medical expenses and a motion to join Dr. Cary Twyman as a party to the proceedings. Specifically, Schwan's asserted that two of the drugs Damron was taking, Advair Diskus and Combivent Aro, were not prescribed to treat his work-related pulmonary condition.

Schwan's attached an independent medical examination (IME) report from Dr. William Lester to support its motion. The IME was performed on January 16, 2014. Dr. Lester reviewed the medical records from Damron's original award and conducted a physical examination of Damron. Dr. Lester stated in his report that Damron's current right knee and pulmonary embolism conditions

were related to his work-related injuries occurring in 2000 and 2001. Dr. Lester also concluded the following:

[Damron] has a pulmonary embolism condition and is currently stable unless he had surgery on the right knee and is at higher risk for [deep vein thrombosis] DVT.

[Damron]'s Advair and Combivent treatments aren't related to pulmonary embolism but are used to treat more asthma which he has related to wheezing he describes and not related to pulmonary embolism.

[Damron] will need a total knee replacement related to his injury. He will need close follow up and prophylaxis for treatment for high risk pulmonary embolism.

Damron filed a *pro se* response and affidavit stating that he suffered a pulmonary embolism following knee surgery which ultimately caused chronic obstructive pulmonary disease (COPD) from which he continues to suffer. Therefore, he maintained the Advair and Combivent prescriptions were necessary for his treatment of his work-related pulmonary embolism.

On April 14, 2014, the ALJ sustained Schwan's motion to reopen and ordered Dr. Twyman to be joined as a party. Dr. Twyman submitted a letter dated April 25, 2014. Dr. Twyman simply stated in his letter:

Mr. Damron is seen by me approximately every six months, and is on medication resulting from the accident in question.

Damron also filed two letters dated April 11, 2014, and May 14, 2014, from Dr. Lela C. Johnson, his treating internal medicine specialist. Dr. Johnson had been treating Damron since his work-related injuries occurred. Dr. Johnson was then

joined as a party to the proceedings on May 5, 2014. Dr. Johnson's April 11, 2014

letter stated in relevant part:

David Damron is my patient whom I have prescribed Advair Diskus 500-50 mcg and Combivent Respimat 20-100 mcg for obstructive chronic bronchitis. This was initially prescribed to Mr. Damron in 2001 following a blood clot of his lung which occurred after his compensable knee surgery. This medication had not been prescribed for him prior to his injury.

Mr. Damron has never been diagnosed with asthma.

Dr. Johnson further explained in her May 14, 2014 letter:

The above listed medicines had not been prescribed to Mr. Damron prior to his injury and I continue to prescribe them for him because he has less shortness of breath and has had no exacerbations of breathing since being on them.

Schwan's subsequently filed a letter dated June 13, 2014, from Dr. Lester stating that his opinions on causation had not changed upon review of Dr. Johnson's letters.

A Benefit Review Conference (BRC) was held on July 1, 2014.

Damron was not present for the conference. The resulting BRC order identified the work-relatedness of Dr. Johnson's treatment with Advair and Combivent as the sole issue. According to the order, the parties had waived a hearing and the matter was submitted to the ALJ for a decision on July 15, 2014. Prior to submission, Schwan's tendered a memorandum and Damron submitted a letter containing his position.

The ALJ reviewed Dr. Lester's medical report as well as Dr. Johnson's explanation of her treatment of Damron with the two prescriptions at issue. The August 5, 2014, Opinion and Order provided:

The question for the ALJ is simply whether the need for Advair and Combivent are related to the plaintiff's work related pulmonary embolus. The position of the defendant is that it is not, but is instead related to chronic obstructive bronchitis which Dr. Lester opined would not be related to the plaintiff's pulmonary embolism. On the other hand, the plaintiff's treating physician simply indicated a temporal relationship between his need for the medication and his work injury. If that were the entirety of the evidence, the ALJ would have no choice but to find for the defendant. However, as there was a prior Opinion and Award, the ALJ is obligated to look at the entirety of the medical evidence including the findings of the original ALJ. As noted above, the original ALJ relied upon the opinion of Dr. Glenn Baker in finding the plaintiff had 10% whole person impairment as a result of his pulmonary embolus. A review of the report of Dr. Glenn Baker indicates that he found the plaintiff to have decreased breathing capacity on pulmonary function testing. ... Dr. Baker opined the cause of the mild restrictive ventilator defect on pulmonary function testing was the work related injury with subsequent pulmonary embolism. While he recognizes some of the plaintiff's complaints may be secondary to deconditioning or weight gain, he placed causation firmly with the work injury.

The ALJ went on to note that the opinion and temporal relationship of the treatment of Dr. Johnson must be viewed in light of Dr. Baker's previous determination that the pulmonary embolism was found to be caused by his work-related injury. The ALJ then concluded the Advair and Combivent prescriptions were compensable pursuant to KRS 342.020.

Schwan's filed a petition for reconsideration asserting first that it was error for the ALJ to rely on evidence from the original award, specifically, the opinion of Dr. Baker. Secondly, Schwan's argued that the medications at issue were prescribed to treat Damron's chronic obstructive bronchitis and asthma, which were different medical conditions than the work-related pulmonary embolism.

The ALJ denied Schwan's petition for reconsideration stating that Damron's treatment was contested only on the issue of work-relatedness, not on the basis of reasonableness or necessity. The ALJ also remarked that the original opinion and award designated what evidence it relied on in reaching its determination that Damron's loss of pulmonary function was caused by the pulmonary embolism resulting from his right knee surgery, and that decision is *res judicata* on the cause of the Damron's decreased pulmonary function.

Schwan's then filed a petition for review with the Workers' Compensation Board. Schwan's argued to the Board that Damron had the burden of proof with respect to medical causation, which must be established with competent and substantial medical evidence. Schwan's maintains that Damron failed to meet his burden. Schwan's relies on the ALJ's statement that if the medical opinions of Dr. Lester and Dr. Johnson were the only evidence under consideration, the ALJ would have no choice but to find for Schwan's. Schwan's insists that there is no medical evidence establishing a causal relationship between

the pulmonary condition and Damron's chronic obstructive bronchitis as they are two separate and distinct medical conditions as stated by Dr. Lester.

In its December 19, 2014, Opinion affirming the ALJ, the Board determined the ALJ's finding regarding the medications at issue to be causally related to the work-related pulmonary embolism was supported by substantial evidence. The Board reviewed Dr. Lester's report noting that he expressed the opinion that Damron's right knee injury and pulmonary embolism condition are related to his 2000 and 2001 work injuries. However, Dr. Lester opined that the Advair and Combivent medications were not used to treat a pulmonary embolism, but "more asthma." The Board stated that Dr. Lester also specifically connected generic version of the contested medications with Damron's pulmonary condition in the following question and response:

5. Do you believe that generic version of Advair Diskus and/or Combivent Aro, would be just as effective for the treatment of Damron's pulmonary condition? Please explain. **Yes, his treatment for asthma can be controlled with generic medication.**

The Board concluded that this response supported the ALJ's decision.

The Board went on to state that it disagreed with the ALJ's conclusion that based solely upon the medical evidence provided upon the reopening, he would have had no choice but to find for Schwan's. The Board observed that in reviewing the letters of Dr. Johnson, Damron's treating physician, Dr. Twyman, and the report of Dr. Lester, all of this evidence, without considering Dr. Baker's opinion from the original award, supports the ALJ's decision that the contested



medications are prescribed to treat Damron's work-related pulmonary embolism.

The Board also observed in its opinion that the findings in the original award read in conjunction with the medical evidence considered on reopening constitute substantial evidence supporting the ALJ's decision. Schwan's now appeals.

## II. STANDARD OF REVIEW

As a reviewing court in workers' compensation cases, we will affirm the Board absent a finding that 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). This requires a review of the ALJ's decision. Where the ALJ rules in favor of the party who "had the burden of proof, the standard of review on appeal is whether there was substantial evidence to support such a finding." *See Addington Resources, Inc. v. Perkins*, 947 S.W.2d 421, 423 (Ky. App. 1997). Substantial evidence is defined as evidence of relevant consequence which would induce conviction in the minds of reasonable people. *Smyzer v. B.F. Goodrich Chemical Co.*, 474 S.W.2d 367, 369 (Ky. 1971).

## III. ANALYSIS

As a preliminary matter, we point out that Damron has not filed a brief in this case. Although Kentucky Rule of Civil Procedure (CR) 76.12(8)(c) provides that when an appellee fails to file an appellate brief, this Court may (i) accept the appellant's statement of the facts and issues as correct; (ii) reverse the judgment if appellant's brief reasonably appears to sustain such action; or (iii) regard the appellee's failure as a confession of error and reverse the judgment without considering the merits of the case, we decline to invoke the provisions of the rule, and accordingly, proceed with our review.

Schwan's contends on appeal that the ALJ erred as a matter of law in awarding the Advair and Combivent prescriptions because Damron failed to meet his burden of proof with respect to medical causation. In other words, Damron did not present competent and substantial medical evidence demonstrating the contested prescriptions were related to his 2000 and 2001 work injuries. We disagree.

Schwan's states in its brief that it has no reason to dispute that Damron's pulmonary embolism that occurred ten years ago was work-related. However, Schwan's argues that Dr. Johnson and Dr. Twyman's opinions did not expressly state Damron's current lung condition and treatment were caused by his work-related pulmonary embolism. Schwan's criticizes their medical opinions as too broad to be considered substantial evidence, and asserts Dr. Johnson's letter creates nothing more than a temporal relationship between the work-related injury and subsequent treatment.

As the finder of fact in workers' compensation cases, the ALJ is vested with the sole discretion to determine the quality, character, and substance of evidence and to draw reasonable inferences from the evidence. KRS 342.285; *See Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418 (Ky. 1985). When conflicting evidence is presented, the ALJ must determine which is more persuasive. *Pruitt v. Bugg Brothers*, 547 S.W.2d 123, 124 (Ky. 1977).

In this case, the record contains substantial evidence to support the ALJ's finding that the two prescription medications are causally related to

Damron's work-related pulmonary condition. It is clear the ALJ considered the medical opinions provided by both parties upon the reopening as well as the medical testimony relating to Damron's pulmonary embolism from his original award. Ultimately, the ALJ was persuaded by Damron's medical experts' explanations of his lung condition and treatment.

The medical opinion from the original award was clear that Damron had decreased pulmonary function caused by his compensable right knee surgery. Furthermore, Dr. Johnson's first letter plainly stated that the two medications at issue were initially prescribed in 2001 due to his pulmonary embolism. She also flatly stated Damron had not been diagnosed with asthma. Dr. Johnson explained in her second letter that she continued to prescribe Advair and Combivent because the medications relieved Damron's persisting breathing difficulties.

Schwan's medical evidence consisted of Dr. Lester's report based upon his IME of the record and evaluation of Damron. Dr. Lester opined that the two medications at issue were considered appropriate treatments for asthma, not a pulmonary embolism. He acknowledged that Damron has chronic obstructive pulmonary disease, necessitating the use of Advair and Combivent, but stated he did not believe a pulmonary embolism would cause that condition.

The ALJ relied upon relevant evidence in the record that, when considered in its entirety, supported a reasonable finding that the Advair and Combivent prescriptions were causally related to Damron's work-related pulmonary embolism. Therefore, the ALJ did not err in awarding the two

prescriptions as compensable pursuant to KRS 342.020. Based upon this conclusion, we cannot say that the Board erred by affirming the ALJ's opinion and order.

#### IV. CONCLUSION

For the foregoing reasons, the opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

NO BRIEF FOR APPELLEES

Natalie Laszkowski  
Louisville, Kentucky