RENDERED: JUNE 5, 2020; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2020-CA-000218-WC

RESCARE, INC. APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-12-90001

PATRICIA MONTGOMERY (CAIN); KEITH HALL, PIKEVILLE MEDICAL CENTER; KATHERINE BALLARD, THE PAIN TREATMENT CENTER OF THE BLUEGRASS; HONORABLE CHRIS DAVIS, ADMINISTRATIVE LAW JUDGE; AND KENTUCKY WORKERS' COMPENSATION BOARD APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, KRAMER, AND L. THOMPSON, JUDGES.

COMBS, JUDGE: This appeal arises from a post-settlement medical fee dispute (MFD) in a workers' compensation case. The administrative law judge (ALJ) determined that a proposed total knee replacement surgery was compensable. The

Workers' Compensation Board (Board) affirmed. On appeal, ResCare, Inc. (ResCare) contends that the ALJ erred in his interpretation of the parties' 2014 settlement agreement. We disagree; therefore, we affirm.

Appellant, ResCare, and Appellee, Patricia Montgomery (Cain) (hereinafter Montgomery), entered into a settlement of the following three claims/injury dates for a lump sum of $40,000.00:

> January 26, 2011: right knee.
> August 26, 2011: back.
> March 28, 2012: right knee, right arm, low back, cervical spine and head.

The Form 110 Agreement as to Compensation (Form 110) was approved by ALJ Borders on April 10, 2014, and we summarize its allocation of the consideration paid for settlement:

> for the March 28, 2012 injury: $35,000.00 for permanent partial disability benefits; $1,000.00 for the waiver of vocational rehabilitation; $1,000.00 for the waiver of the right to re-open; and $1,000.00 for the waiver/dismissal of the psychological claim;
>
> the remaining $2,000.00 consideration allocated $1,000.00 for the "complete dismissal" of the January 26, 2011, claim and $1,000.00 for the "complete dismissal" of the August 26, 2011, claim.

The Form 110 itself further recited as follows:

> It is not the purpose of this settlement agreement to shift responsibility for medical care in this matter to Medicare. The claimant retains her right to payment of medical expenses in relation to her right knee and back.

. . . .

> ***Under the terms of the settlement agreement, the claimant will retain ONLY her right to reasonable and necessary medical treatment of the right knee and back. All other rights and claims are dismissed. The defendant agrees, however, that it will raise no objection to payment of medical expenses related to the back or right knee, based on the allegation that the treatment actually relates to one of the 2011 injuries, rather than the 2012 injury.***
>
> The parties specifically acknowledge that, although they have not provided a specific assignment of consideration for dismissal of the two 2011 claims, the $1000 consideration for each of those dismissals is to be attributed equally to the various waivers.

(Emphasis original.)

The "box" at the bottom of page 4 of the Form 110 (which required a claimant's signature if medical benefits were waived) was signed by Montgomery and stated, "I understand that I am waiving all medical coverage **except for my back and right knee** . . . ." (Emphasis added.)

On October 8, 2018, ResCare filed a motion to reopen accompanied by a Form 112 MFD challenging the reasonableness and necessity of two medications, Percocet and topiramate.[1] The matter was assigned to ALJ Davis. Thereafter, Dr. Keith Hall recommended total knee arthroplasty surgery. On

[1] The ALJ found in ResCare's favor with respect to the challenged medications, and that determination is not at issue on appeal.

December 13, 2018, ResCare filed an amended MFD "***contesting the compensability of the proposed total knee replacement as to work-relatedness/causation***." (Emphasis original.)

On May 22, 2019, the ALJ conducted a telephonic benefit review conference. ResCare's counsel and Montgomery attended. Montgomery waived her right to a hearing, and the matter was taken under submission.

The ALJ rendered an opinion and order on July 18, 2019. He noted that ResCare had argued that the right knee injury date was March 28, 2012. However, the ALJ did not believe that to be the correct date. Instead, the ALJ found that the "date of injury for the right knee is January 26, 2011[,]" and explained:

> The records of Dr. Hall are not . . . controlling in this instance. [Montgomery] had three separate dates of injuries, beginning eight years ago. . . .
>
> The medical records . . . provide a much clearer picture. These records include the records from Dr. Anbu Nadar, Dr. Don Chaffin and x-rays and MRIs. Following the January 26, 2011 date of injury, which was to the right knee only, [Montgomery] began extensive medical treatment for her right knee, with multiple physicians. . . .

The ALJ determined that by virtue of the language in the settlement agreement, "the right knee, and low back, remain forever compensable based on causation while the other claims were forever dismissed." The ALJ concluded that

"the condition of the right knee and the need for the right total knee replacement related to the 2011 dates of injury and thus cannot be contested on causation." Relying upon Dr. Shockey's opinion that the proposed surgery is reasonable and necessary,[2] the ALJ found the proposed surgery compensable.

ResCare filed a petition for reconsideration and asserted that:

> the ALJ erred in his ultimate finding as his presumption that the parties intended that the right knee treatment is never to be contested is inaccurate. The parties only agreed that right knee treatment would not be contested on the basis that the necessity of the treatment "related back" to the 2011 injury.

ResCare explained that it had not argued that the proposed knee replacement was related to the 2011 injury but instead that Montgomery's current condition was attributable to the progression of non-work-related degenerative changes. ResCare argued that the ALJ's finding that the right knee injury date was January 26, 2011, compelled a determination that the proposed surgery is not compensable because future medicals for the January 26, 2011 injury were "bought out" in the settlement.

By an order entered August 19, 2019, the ALJ denied the petition in relevant part as follows:

[2] Dr. Shockey did not believe that Montgomery's current knee condition was related to either injury but that it was due to progression of a degenerative process, noting that arthritis was present on July 2011 films.

> The language . . . in the Settlement Agreement is unusual in a workers' compensation claim. However, the ALJ is vested with wide authority to interpret the evidence. In this claim, again unusual, the language in the Form 110 constitutes evidence. I have accurately quoted it and I have provided a reasonable interpretation of it.

The ALJ noted that a different attorney/law firm had prepared the Form 110/settlement agreement and that ResCare's current counsel in the MFD "is only providing her own interpretation of the evidence and re-arguing the merits."

ResCare appealed to the Board, which affirmed by an opinion entered January 10, 2020:

> [A] settlement agreement constitutes a contract by and between the parties. The scope . . . must be determined primarily by the intent of the parties as expressed within the four corners of the document. The terms . . . should be interpreted in light of the usage and understanding of the average person. Stone v. Kentucky State Farm Bureau Mutual Insurance Company, 34 S.W.3d 809 (Ky. App. 2000).
>
> The ALJ interpreted the provisions of the agreement as expressing the agreement of the parties that future medical treatment for the knee would remain compensable. The statement "It is not the purpose of this settlement agreement to shift responsibility for medical care in this matter to Medicare. The claimant retains her right to payment of medical expenses in relation to her right knee and back" evidences that intent. Additionally, the box on the settlement agreement where Montgomery signed states, "I understand that I am waiving all medical coverage except for my back and right knee." These two provisions do not reference limitations on medical care for the knee. The agreement expressly waived ResCare's ability to assert the 2011 injury as a basis to challenge

causation. The ALJ interpreted the agreement as the parties expressing an intent that the knee be compensable and precluding ResCare from asserting the 2011 injury is the cause of the knee condition. The ALJ was without authority to use the grounds bargained away by ResCare to find the contested surgery is not compensable. **The effect of the language in the settlement is that reasonable and necessary medical expenses related to either the 2011 or the 2012 injury are compensable since ResCare is foreclosed from asserting the expenses relate to the 2011 injury**. The ALJ could reasonably conclude the parties intended to make a bargain including compensability of medical expenses for the work-related knee, whether from the 2011 or the 2012 injury.

The ALJ's statement that the agreement "clearly shows . . . that the right knee, and low back, remain forever compensable based on causation . . ." may be somewhat overbroad, but constitutes at most harmless error. **Contrary to ResCare's argument, the ALJ made a finding as to causation, stating, "The condition of the right knee, and the need for the right total knee replacement related to the 2011 dates of injury** and thus cannot be contested on causation." Additionally, the ALJ noted that there is no medical evidence that the proposed right total knee replacement is not reasonable and necessary. He noted Dr. Shockley's opinion that it is reasonable and necessary. **ResCare is not precluded from asserting some other cause, such as natural aging, progression of a preexisting condition independent of the work injuries in 2011 or 2012, or subsequent events as it relates to future care.**

ResCare's argument that the ALJ's finding of injury occurring in 2011 is essentially an attempt to assert the 2011 injury as a defense to causation, which it bargained away. Because the surgery could not be contested on grounds that it was causally related to the 2011 injury, and because the ALJ determined the surgery is

> reasonable and necessary, he did not err in finding the surgery compensable.

(Emphases added.)

Nonetheless, ResCare appealed[3] and now argues: that the ALJ's interpretation of the settlement agreement conflicts with its plain language; that the ALJ's finding that the injury date is January 26, 2011, necessitates a finding that the knee surgery is not compensable because future medicals for the January 26, 2011, injury were bought out in the settlement; and that the ALJ did not issue findings of fact as to whether surgery was causally related. ResCare has simply re-argued its underlying case on this appeal.

The standard of our review of a decision of the Workers' Compensation Board is long established.

> The function of further review of the [Board] in [the] Court of Appeals 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). We perceive no such error in the case before us. Instead, we agree with the Board's sound

[3] Montgomery has not filed a response as permitted by Kentucky Rule of Civil Procedure 76.25(6), which provides that "[e]ach appellee may file . . . a response to the petition within 20 days of the date on which the petition was filed with the Court of Appeals."

reasoning and adopt it as if it were our own.

We AFFIRM.

ALL CONCUR.

BRIEF FOR APPELLANT:

Mark R. Bush
Samantha L. Steelman
Fort Mitchell, Kentucky

NO BRIEF FILED FOR APPELLEE