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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001977-WC

RONDA HOSKINS — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-98-57446

COMPUNET AMERICA;
HON. R. SCOTT BORDERS,
ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION
BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON AND NICKELL, JUDGES; LAMBERT,[1] SENIOR JUDGE.

PER CURIAM: Ronda Hoskins petitions for review of a decision of the Workers' Compensation Board. The Board affirmed an Administrative Law

[1] Following completion of Senior Judge William L. Knopf's term of service, Senior Judge Joseph E. Lambert was assigned to the panel 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.

Judge's decision in favor of Compunet America in a post-award medical fee dispute. At issue in this appeal is the ALJ's determination that Hoskins's prescriptions for certain medications were not reasonable and necessary for the treatment of her various psychiatric and physical issues and that other medications should be substituted in their place. For reasons that will be explained, we affirm the decision of the Workers' Compensation Board.

Facts and Procedural History

Hoskins initially sustained a lower-back injury on July 23, 1998, while working for Compunet. The injury ultimately resulted in a herniated disc. Hoskins filed a workers' compensation claim, and on January 19, 2000, an ALJ determined she had a 10% impairment rating and awarded her medical benefits. Hoskins subsequently filed a motion to reopen in which she asserted a worsening of her condition and a corresponding increase in functional impairment that rendered her totally disabled. Hoskins also sought to amend her claim to include a psychological condition that allegedly resulted from her physical injuries. On September 25, 2003, the ALJ sustained Hoskins's motion to amend her claim to include psychological overlay.

In an opinion and award dated August 19, 2004, the ALJ determined there had been no worsening in Hoskins's functional impairment due to the physical injury and she was not totally disabled. However, relying upon the opinion of two physicians, including Dr. Robert Granacher, a psychiatrist, the ALJ determined Hoskins had developed a psychological condition directly related to the work

injury and found Hoskins had a 20% psychological impairment. Using the combined value charts of the Guides to the Evaluation of Permanent Impairment, 5th Edition, the ALJ determined Hoskins had a 28% impairment rating and the multipliers contained in KRS 342.730(1)(b) were applicable. Thus, the ALJ determined Hoskins had a 56% impairment rating and awarded her permanent partial disability and medical benefits for her psychological condition.

On November 27, 2006, Compunet filed a motion to reopen Hoskins's claim because of a medical fee dispute. Compunet specifically contested the psychotherapy that Hoskins was receiving from Dr. John M. Watts and Cumberland River Comprehensive Care ("CRCC") for depression and anxiety. Compunet also contested Hoskins's need for the prescription medications Wellbutrin, Seroquel, Tranxene, and Nexium and generally sought to be relieved of any liability for the contested treatment and for any future psychotherapy and medication. Hoskins objected to this request.

A hearing on the medical fee dispute was held on February 6, 2009. Because Hoskins only appeals the ALJ's finding that her continued use of various prescription medications was not reasonable and necessary for the treatment of her work injuries, we will only summarize the evidence relating to that specific issue.

Hoskins testified at the hearing, and testimony from her deposition of April 24, 2008, was also introduced. During that deposition, Hoskins testified that she took the following medications: (1) 40 mg of OxyContin three times per day; (2) 275 mg of Robaxin four times per day; (3) 15 mg of Mobic once per day; (4) 300

mg of Wellbutrin once per day; (5) 75 to 150 mg of Seroquel once per day; (6) 7.5 mg of Hydrocodeine/Lorcet once per day for breakthrough pain; and (7) 7.5 mg of Tranxene four times per day. Hoskins explained that she saw Dr. Watts, a general practitioner in Corbin, for pain management and that he wrote all of her prescriptions. She also testified that Dr. Watts was the only physician she sees for her issues.

Hoskins also indicated in her deposition that although she does some light work at home, she generally spends her day at home reading, watching television, and quilting. She acknowledged that she had a lot of stressors in her life that affected her depression, including some that were unrelated to her work injury. She specifically referenced problems that she had had with her daughter, but noted that those problems were over at the time of the deposition.

At the hearing before the ALJ, Hoskins testified that she saw Dr. Watts every sixty days and that she continued to take the following medications: (1) 40 mg of OxyContin three times per day; (2) 350 mg of Robaxin four times per day; (3) 15 mg of Mobic one time per day; (4) 25 mg of Seroquel up to four times per day as needed; (5) 300 mg of Wellbutrin once per day; and (6) 7.5 mg of Tranxene up to five times per day as needed. She also indicated that she had been receiving Christian counseling for two years and that she continued to suffer physical and psychological problems. As a result of the latter, she was secluded, had broken all of her friendships, and stayed at home. She also often failed to get out of bed for days at a time and did little physical activity around the home.

On cross-examination, Hoskins acknowledged that she actually saw Dr. Watts no less than every thirty days and that the counseling she was receiving was for financial, physical, and other personal problems. She paid for this counseling out of pocket because some of her problems were unrelated to her work injury and she wanted those issues to remain private. Hoskins acknowledged that some of her anxiety and depression had been attributable to the problems that she has had with her daughter and to other personal issues. However, she stated that her general problems relate to "anxiety and depression with my back and limitations there."

Hoskins introduced the affidavit of Anita Gaylor, a counselor specializing in psychotherapy at CRCC. Gaylor's affidavit reflects that Hoskins needed continued medical care, pain management, psychotropic medications, and a follow-up as instructed by her family physician. Gaylor noted that Hoskins's working diagnosis is major depressive disorder (recurrent, moderate, chronic), and that her treatment is medically necessary because of her chronic symptoms, including difficulty coping with daily stressors, and exacerbation of chronic pain related to her symptoms, which include a depressed mood and apathy. Gaylor also noted that Hoskins had chronic symptoms recurrent with the potential to increase in severity.

Hoskins also submitted affidavits from Dr. Watts. The first affidavit provides that Hoskins suffers from chronic pain and depression secondary to chronic pain and that she receives counseling for depression. Dr. Watts opined that Hoskins's proposed treatment is medically necessary because of her chronic pain and depression.

A second affidavit from Dr. Watts reflects that Hoskins's required medical care was "analgesic control – takes OxyContin to relieve pain" and "depression." Dr. Watts noted that his current working diagnosis is "chronic low back pain – SI dysfunction, lumbar disc disease. Depression 2nd chronic pain." Dr. Watts believed that Hoskins's proposed treatment is medically necessary because he has "nothing else to offer. The only beneficial treatment of SI dysfunction is chronic narcotic treatment." At the bottom of the affidavit, Dr. Watts indicated that Hoskins had no prior depression until she developed her chronic pain issues and that she consequently required an anti-depressant.

In response to Hoskins's evidence and in support of its own position, Compunet submitted a report from Dr. Granacher indicating Hoskins's current psychotherapy needs were based on problems with her daughter and not her original back injury. Dr. Granacher only minimally discussed the medications being prescribed for Hoskins, but noted that "using Nexium with Tranxene will essentially make Tranxene ineffective." He also indicated that because Hoskins's current mental distress had nothing to do with her back injury, he could not provide a treatment plan.

Compunet also submitted a report from Dr. Robert Middleton, a physician specializing in addiction and recovery medicine. After identifying Hoskins's clinical symptoms, Dr. Middleton noted that for the past several years, without major alterations in her pharmacologic regimen, Hoskins had been taking

OxyContin, Robaxin, Lorcet, Mobic, Tranzene, Seroquel, and Wellbutrin. Dr. Middleton's report ultimately made four recommendations:

1) Hoskins needed an updated diagnosis and a treatment plan.

2) Hoskins's pharmacologic regimen needed adjusting to provide reasonable relief of her pain symptoms. For example, he noted:

> Although realistically effective analgesia is not yet present, the current foundation of a long-acting opioid supplemented by a short-acting opioid for break-through pain is simply in need of fine-tuning for better effect.
>
> The long-acting opioid OxyContin (brand name) is excessively expensive and generic oxycodone-controlled release is less costly but still substantial.

Dr. Middleton indicated that the ongoing analgesia needs provided by these medications can be met by the generic form of long-acting opioid methadone for a fraction of the cost. The short-acting opioid analgesia may be accomplished as needed with generic oxycodone. This tended to be more effective than generic hydrocodone/acetaminophen in patients who are taking Schedule II opioids and bypasses the unwanted accumulation of acetaminophen. Dr. Middleton noted that since Hoskins has the expected physiologic dependence that accompanies ongoing opioid use, any adjustments or substitutions in her long-acting opioid medication would need to be accomplished without any decrease in equivalent dosing to avoid precipitating symptoms of opioid withdrawal syndrome. He concluded by noting that after stabilization of opioid dosing and improved relief of pain is established,

the gradual tapering of Hoskins's analgesics may be possible, depending, in part, upon etiologies of her pain. He further indicated:

> Other medications may have a role in her treatment, such as mood stabilizers (gabapentin, Lyrica) or tricyclic antidepressants (amitriptyline) for neuropathic components of pain, SSRI antidepressants (fluoxetine), and baclofen as a receptor-specific muscle relaxant (limited use). These medications may overlay clinically and be quite beneficial also in addressing her insomnia and affective symptoms of anxiety and depression.

3) Dr. Middleton also recommended that Hoskins's therapeutics be adjusted to more effectively treat her symptoms of anxiety and depression. For example, he recommended a very gradual tapering and eventual discontinuation of Hoskins's use of Tranxene because it was best used "for short duration therapies lasting up to a few weeks" and also of her use of Robaxin because of its side effects, which included mood dysfunction and dependence. As to Hoskins's Wellbutrin prescription, Dr. Middleton concluded:

> Her Wellbutrin may have a role in treating her affective symptoms, but may also generate anxiety, especially in an individual who is not on an SSRI, has other reasons for anxiety (pain, life and family issues, etc.), and has learned limited methods of addressing internal distress.

Dr. Middleton also questioned the benefit of Seroquel for Hoskins in any capacity, including as a sleep aid.

Regarding psychotherapeutics, Dr. Middleton noted that the benefit of learned techniques to help individuals address the various obstacles encountered in their lives would clearly be useful to Hoskins. Although she had been in ongoing

counseling, Dr. Middleton did not believe that her specific needs had been met. Hoskins was "obviously overwhelmed by the course of events in her life, yet had no insight into the processes by which such experiences may be understood, accepted and integrated into one's life." He strongly recommended weekly therapy by an experienced psychotherapist who understands this specific purpose, but he did not think that this particular therapeutic work would require more than three months' time. Dr. Middleton also recommended instruction on daily self-care through pain management techniques by a knowledgeable counselor, which he believed could be accomplished in two or three 45-minute sessions.

4) Dr. Middleton finally indicated that Hoskins's insomnia should be addressed, as "insomnia exacerbates and perpetuates [her] pain and affective symptoms." He indicated that clarifying her current diagnosis, establishing a treatment plan, modifying her medications, and providing her with focused psychotherapy and other appropriate modalities "should each contribute over time to improved sleep hygiene, quality of life and maximum function possible."

On April 7, 2009, the ALJ rendered an opinion and order concluding that Hoskins was not in need of psychotherapy as a result of the 1998 work injury and relieving Compunet of the responsibility for payment of any psychotherapy Hoskins had received at CRCC. As to the reasonableness, necessity, and work-relatedness of the medications being prescribed for Hoskins, the ALJ found the opinions of Dr. Middleton to be particularly helpful and essentially adopted his recommendations in their entirety:

> In a specific instance, the Administrative Law Judge finds the opinion of Dr. Middleton to be very persuasive. The Administrative Law Judge believes it would be reasonable for the Plaintiff to be weaned from her OxyContin, replacing the same with Methadone. The Administrative Law Judge further finds the medication Hydrocodone/Acetaminophen to be unreasonable and the same should be replaced with a 5 mg generic Oxycodone. The Administrative Law Judge further finds the Plaintiff should undergo gradual tapering and eventual discontinuation of Tranxene, Robaxin and Seroquel and the medication Wellbutrin should be replaced with medications such as Lexapro.

Accordingly, the ALJ ordered that Compunet was responsible for paying the expenses required to implement Dr. Middleton's treatment plan "and to pay for the medications prescribed pursuant to [the plan] and to continue to pay for the current medications prescribed by Dr. Watts until such time as the Plaintiff's medications are successfully changed to the ones recommended by Dr. Middleton."

Hoskins subsequently filed a petition for reconsideration in which she claimed that the ALJ had committed an error of law in finding that a change in her medications was warranted. However, on May 15, 2009, the ALJ entered an order denying the petition. Hoskins subsequently appealed the decision to the Workers' Compensation Board.

On June 30, 2009, the Board entered an Opinion affirming the ALJ's decision. After setting forth the facts, the Board initially noted that it found the Supreme Court of Kentucky's decision in *Square D Co. v. Tipton*, 862 S.W.2d 308 (Ky. 1993), to be particularly applicable to the case – specifically the following passage from that opinion:

> While the injured worker must be given great latitude in selecting the physician and treatment appropriate to her case, the worker's freedom of choice is not unfettered. KRS 342.020(3) indicates that the legislature did not intend to require an employer to pay for medical expenses which result from treatment that does not provide "reasonable benefit" to the injured worker. An employer may not rely on this section simply because he is dissatisfied with the worker's choice, for example, or because the course of treatment is lengthy, costly, or will not provide a complete cure. **We believe, however, that this section relieves an employer of the obligation to pay for treatments or procedures that, regardless of the competence of the treating physician, are shown to be unproductive or outside the type of treatment generally accepted by the medical profession as reasonable in the injured worker's particular case.** We also believe that such decisions should be made by the ALJs based on the particular facts and circumstances of each case, so long as there is substantial evidence to support the decision.

Id. at 309-10 (emphasis in Workers' Compensation Board's opinion).

With this precedent in mind, the Board further explained its decision as follows:

> In this case, since Hoskins does not appeal the ALJ's decision regarding the psychotherapy services in question, the only issue before us is whether certain medication prescribed by Dr. Watts was reasonable and necessary for the treatment of the work-related injury. It is clear from reading Dr. Middleton's report that he believed the medication Hoskins was taking was causally related to the treatment of her work-related psychological and/or physical injury. He merely disputed the reasonableness and necessity of certain medication.
> . . .
> We believe the record contains substantial evidence in the form of the report of Dr. Middleton that the use of Tranxene, Robaxin, and Seroquel by Hoskins are not reasonable and necessary for the treatment of Hoskins's

work injuries and should eventually be discontinued. Further, we believe the ALJ's decision that the OxyContin and Hydrocodone/acetaminophen prescriptions are not reasonable and necessary for the treatment of the work injuries is supported by substantial evidence in the form of Dr. Middleton's report. Likewise, the ALJ's decision that Hoskins should be weaned from OxyContin, that the OxyContin [be] replaced with "the generic form of the long-acting opioid Methadone," and that the Hydrocodone/acetaminophen be replaced with 5 mg of generic Oxycodone is supported by substantial evidence in the form of Dr. Middleton's report.

We point out that the use of generic drugs in place of brand name drugs is not inconsistent with the workers' compensation regulations[, specifically 803 KAR[2] 25:092 Section 2]. . . . Since there has been no proof that Dr. Watts, the physician who prescribed this medication, marked "do not substitute," generic substitutes are appropriate, and the ALJ was within the parameters of his authority in adopting the recommendations of Dr. Middleton regarding the replacement of Oxycodone and Hydrocodone/acetaminophen with generic substitutes. As to the ALJ's finding that the medication of Wellbutrin should be replaced with Lexapro, a reading of Dr. Middleton's report creates doubt as to whether the Wellbutrin is to be replaced with Lexapro or Fluoxetine or is to be supplemented with Lexapro or Fluoxetine. As to the continued use of Wellbutrin, since the ALJ has directed that the recommendations of Dr. Middleton be implemented by Dr. Watts, certainly Dr. Watts will have to consult with Dr. Middleton and determine his recommendation regarding Wellbutrin. We also point out that contrary to Hoskins's assertion, we find Dr. Middleton offered no opinion regarding Hoskins's continued use of Mobic, and since the ALJ did not address the continued use of Mobic, Compunet must continue to pay for this prescription since it has not met its burden of establishing that it was not a reasonable and necessary treatment of Hoskins's work-related injury.

[2] Kentucky Administrative Regulations.

> Further, the "fill in the blank" affidavits of Dr. Watts introduced by Hoskins offered little insight into Hoskins's need for the prescribed drugs which are the subject of this medical dispute. The first affidavit of Dr. Watts provided absolutely no explanation of why the specific medications are reasonable and necessary for the treatment of either the physical or psychological injury. The second affidavit, while providing a diagnosis and the typical mode of treatment, did not provide a specific reason why each medication is reasonable and necessary for the treatment of her work-related physical and/or psychological injury. The handwritten notations of Dr. Watts have little probative value and provide almost no benefit to the ALJ in the face of the very specific and in-depth report of Dr. Middleton which provided numerous logical reasons supporting his recommendations. Certainly, Dr. Watts's affidavit did not address or attempt to dispute the opinions and conclusions of Dr. Middleton. Given the report of Dr. Middleton, we believe the ALJ was faced with little or no choice but to adopt the recommendations of Dr. Middleton regarding the various prescription medications prescribed by Dr. Watts subject to this medical fee dispute.

Hoskins subsequently filed the present appeal.

Standard of Review and Analysis

On appeal, Hoskins contends the ALJ and the Workers' Compensation Board committed reversible error in their decisions and the record compels a finding that her treatment with OxyContin, Robaxin, Mobic, Seroquel, Wellbutrin, Hydrocodone/Acetaminophen, and Tranxene is reasonable and necessary. This Court can only reverse a decision of the Workers' Compensation Board where 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).

"The party responsible for paying post-award medical expenses has the burden of contesting a particular expense by filing a timely motion to reopen and proving it to be non-compensable." *Crawford & Co. v. Wright*, 284 S.W.3d 136, 140 (Ky. 2009); *see also Square D*, 862 S.W.2d at 309 ("The burden of proving that a treatment is unreasonable is on the employer."). Accordingly, Compunet bore the burden of proof before the ALJ and the Board in this case.

This fact is important for purposes of our review because "where the party with the burden of proof is successful before the ALJ, the issue on appeal is whether substantial evidence supported the ALJ's conclusion." *Burton v. Foster Wheeler Corp.*, 72 S.W.3d 925, 929 (Ky. 2002). "Substantial evidence" is defined as "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).

After reviewing the record and the decisions of the ALJ and the Workers' Compensation Board, we are compelled to conclude that the ALJ's decision was supported by substantial evidence. The issues presented in this case can essentially be summarized as an evidentiary dispute about the need for certain medications that involved competing medical opinions and reports. Both the ALJ and the Board gave considerable deference to Dr. Middleton's report and essentially adopted his recommendations in their entirety. They committed no reversible error in doing so, particularly in light of the fact that the medical evidence submitted by Hoskins did little to dispute the opinions given by Dr. Middleton. Under Kentucky

law, the ALJ has the sole discretion to determine the quality, character, and substance of the evidence, as well as the inferences to be drawn from the evidence. *Miller v. East Kentucky Beverage/Pepsico, Inc.*, 951 S.W.2d 329, 331 (Ky. 1997); *Square D*, 862 S.W.2d at 309; *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418, 419 (Ky. 1985). This is particularly true where medical testimony is concerned. *Addington Resources, Inc. v. Perkins*, 947 S.W.2d 421, 422-23 (Ky. App. 1997). Given the record before us, we conclude that the ALJ and the Board did not commit reversible error in this case. Instead, their decisions are supported by substantial evidence and must, therefore, be affirmed.

Conclusion

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

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE,
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