

RENDERED: MAY 20, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2011-CA-000113-WC

LONZIE LOVE

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. 2004-00241

AIK (INSURER FOR FORMER
EMPLOYER, HAZARD ARH);
HON. DOUGLAS GOTT,
ADMINISTRATIVE LAW JUDGE;
and WORKERS' COMPENSATION
BOARD

APPELLEES

OPINION
AFFIRMING
* * * * *

BEFORE: CAPERTON, MOORE, AND STUMBO, JUDGES.

MOORE, JUDGE: Lonzie Love appeals from an August 25, 2010 opinion and order of an Administrative Law Judge (ALJ) resolving a medical fee dispute in

favor of AIK, and the subsequent opinion of the Workers' Compensation Board affirming the ALJ's decision. Love only appeals the ALJ's determination that she was not entitled to continuing pain management treatment. After careful review, we affirm.

I. FACTUAL AND PROCEDURAL HISTORY

The first record tracing the genesis of Love's alleged work-related injury is a July 23, 2002 chart note from Dr. Joseph Williams, Jr., a neurosurgeon in Hazard, Kentucky. Love consulted with Dr. Williams under her private plan of health insurance. In relevant part, his chart note states:

COMPREHENSIVE HISTORY CHIEF

COMPLAINT: Patient comes in today with chief complaint of back pain, right and left leg pain coming on since about January 2002.

HISTORY OF PRESENT ILLNESS: Patient is a 36 year old right handed white female has [sic] been having problems with low back and right and left leg pain that just sort of came on. She really does not know any particular incident. She does do work in the endoscopic suite and does do a lot of pulling and pushing of large patients off and on the examining table. She has been having this back and right leg pain intermittently since January. It has worked its way up to about 6 out of 10 now. It goes down both legs when she gets it. She states that her pain seems to start in about her low back and then goes down both legs. She states that most of her pain is in her thigh area when she gets it and sometimes works it [sic] way down below her knee.

Thereafter, Dr. Williams ordered a magnetic resonance image (MRI) of Love's lumbosacral spine, which was performed on August 9, 2002. To this effect, the record contains a radiology report of Dhiren Desai, M.D., noting "mild

to moderate degree of concentric disk bulge of L4 disk lateralizing towards the left with pressure impression on the ventral left aspect of the thecal sac.”

On August 21, 2002, Love submitted an incident report to her employer, Hazard ARH, alleging that she had suffered a work-related injury. Hazard ARH provided Love with a list of doctors approved by its workers' compensation carrier, which included Suzanne Dansereau, M.D. Love consulted with Dr. Dansereau on September 4, 2002. In relevant part, Dr. Dansereau's consultation note states:

This 37-YOW, who works as a nurse at Hazard ARH, had some problems with some lower back pain. She's had some long-standing problems for the past several months, even pre-dating injury sustained on 07/19/02. Before that time, she'd had some pain, especially pre-menstrually in the lower back, radiating down into the left thigh area. Sometimes it will go to her ankle. She said it wasn't very serious. It wasn't continuous. On 07/19/02, she was working assisting with Colonoscopy where she had to pull and twist a particularly heavy patient. It was in the 2 weeks after that she noticed an increase in pain in the back going to the left side, down the left leg and into the ankle area.

On January 29, 2004, Love filed her workers' compensation claim in this matter. In her application, she described in detail the nature and origin of her alleged injury:

I was working in endoscopy with a sedated patient. The doctor was unable to get the scope into the patient because she was one [sic] her right side and sedated. He asked me to move her onto her back and he was still unable to get the scope inserted. I then had to move her back onto her side. The patient weighed around 400

pounds. I felt an immediate onset of pain in my low back.

On May 6, 2004, Love was deposed in this matter. The following exchange occurred regarding the origin and nature of Love's alleged injury and, in particular, Dr. Dansereau's consultation note:

Q: Dr. Dansereau says that you have had long standing problems for the past several months even pre-dating your injury of July 19th of 2002?

Love: I was referring to the leg pain. I had told her that I had leg pain four to six weeks prior to that incident.

Q: Before the work related injury you had had leg pain for four to six weeks?

Love: Yes, sir.

Q: You didn't have any back pain before the incident?

Love: No.

Q: Do you know what the cause of your leg pain was?

Love: I just took it that, you know, I was working on the—I mean walking on the treadmill and I figured that may be what it was caused from.

Q: Okay. And she says before the injury you had some pain, low back radiating down into the left thigh, sometimes it would go into your ankle?

Love: That was after the incident.

Q: Okay. But she has got it before the incident. That would be incorrect?

Love: That would be incorrect.

Q: So just so I understand it—before the incident you had never treated for any kind of back pain other than ten years ago at Mary Breckinridge Hospital and you had an x-ray only?

Love: Exactly.

On August 17, 2004, the parties in this matter, which included Love, Hazard ARH, and Hazard’s workers’ compensation carrier, AIK, entered into an approved settlement in which Love received a \$7,500 lump sum and preserved her right to reopen this matter with regard to “Medical benefits as it relates to the L4-5 region only of the back.” As such, the origin and nature of Love’s alleged injury was never adjudicated.¹

Prior and subsequent to the settlement, and continuing until June, 2009, Love maintained full-time employment as a licensed practical nurse, or “LPN.” Specifically, Love testified that she continued her employment with Hazard ARH until she was terminated in April, 2008, for taking prescription medication that had not been prescribed for her use. Thereafter, she was employed by Shepherd’s Medical from April, 2008, to October, 2008; Hyden Nursing Home from October, 2008, to February, 2009; and again at Shepherd’s Medical, from February, 2009, to June or July, 2009. Love testified that during this time, there were occasions where she experienced no back pain at all.

¹ Where an award originates from a settlement approved by an ALJ, rather than an ALJ’s judgment, *res judicata* does not preclude an employer from raising any issue which could have been previously considered upon an employee’s original application for benefits. See KRS 342.125(7); *Newberg v. Davis*, 841 S.W.2d 164 (Ky. 1992); *Beale v. Faultless Hardware*, 837 S.W.2d 893 (1992); see also *Whittaker v. Hurst*, 39 S.W.3d 819, 821 (Ky. 2001) (holding that upon reopening a settlement award an employer was permitted to contest the very existence of the disease upon which that award was based).

Love also testified that since her July 17, 2002 injury, she has always taken some kind of pain medication for her lower back and has repeatedly sought treatment. That aside, the record in this matter contains only a few medical reports indicating that Love sought any kind of treatment for her lower back between the date of the settlement and June, 2009, and the information contained in those medical reports is limited.

The first of these reports is dated December 15, 2005, authored by Scott D. Stevens, M.D., and it regards an MRI of Love's lower back that was requested by Dr. James Bean, one of Love's treating physicians. Similar to Dr. Desai's August 9, 2002 report, this report notes "At L3-4, there is a mild diffuse disc protrusion, with mild mass effect on the ventral aspect of the thecal sac." Additionally, it states "At L4-5, there is degenerative disc disease present. There is a broad-based small-moderate sized left paracentral and left lateral disc protrusion at L4-5. This has mass effect on the left ventral aspect of the thecal sac." The report does not contain findings indicating what caused these conditions, nor is any treatment indicated.

The second report is a March 11, 2010 medical opinion, rendered by Dr. Werner Grentz, which mentions that Love "was seen by Dr. [Caesar] Agtarap² in 2005-06 who was writing her pain medication." The record contains no information directly from Dr. Agtarap or his office, and only includes a few inferences regarding his treatment of Love and when it occurred. In her

² The record in this matter also refers to Dr. Agtarap as "Dr. Agtrap," "Dr. Agatarap," and "Dr. Agtrapp," but gives no indication of the proper spelling of his last name.

deposition, Love testified that Dr. Agtarap was a pain specialist who had provided her with pain management at clinics based in Manchester and Jackson, Kentucky. Love further testified that Dr. Agtarap had written her prescriptions for Oxycontin, morphine, Xanax, and Percocet, among other pain medications, and that he had, at some point, given her at least one epidural injection to treat her lower back pain.

Finally, the record contains a May 25, 2009 report regarding Love's admission to the emergency room at Mary Breckinridge Hospital, written by an internal medicine specialist, Dr. Roy Varghese. The note lists Love's symptoms as "muscle spasm," "CVA tenderness," and "vertebral point-tenderness." The note states that Love's "current medications" included Percocet, and further describes Love's chief complaint as "[i]njury @ work from '02, low back pain 9/10 on scale tonight." In his later deposition Dr. Varghese would testify that when he made this remark, his only understanding of Love's injury came from his reading of the December 15, 2005 MRI report, referenced above, and what Love had told him during her visit about the history of her injury.

Around the beginning of June or July, 2009, Love quit working,³ claimed that her back pain had grown markedly worse, and continued to assert that the source of her back pain was her alleged injury of July 19, 2002. By contrast, Dr. Grentz's above-referenced March 11, 2010 medical opinion states that Love had been doing "fairly well until June 2009 when she 'raised out of bed' and noted worsening of her pain." On June 16, 2009, Love went to the University of

³ Love briefly returned to working as an LPN on October 21, 2009, but resigned two days later after claiming that her lower back pain made this work too difficult for her.

Kentucky Family Practice Clinic and another MRI of her lower back was conducted. A report regarding this MRI, dictated by Shardan M. Radmanesh, M.D., noted:

1. Disc protrusion at the L3/4 level with mild left neuroforaminal stenosis and displacement of the L4 nerve root.
2. Broad-based disc bulge at the L4/5 level with an annular tear and moderate neuroforaminal stenosis on the left. There is compression of the left L5 nerve root. Pain related to outer annular tear is likely.

The record does not indicate that Love sought further treatment for her back immediately following her June 16, 2009 MRI. However, on August 29, October 23, and December 12, 2009, Love drove herself to the emergency rooms of Hazard ARH and Mary Breckinridge Hospital, complaining of severe, chronic back pain. Each time, Love was treated with pain medication. The memoranda regarding her August and December visits also indicate that Love was released within a short period of time. The records of her October visit indicate that Love presented at the Hazard ARH emergency room with “fever with chills” in addition to complaints of chronic lower back pain, but was discharged the next day after her fever resolved.

In her depositions, Love also testified that her pain medications had been stolen from her on two different occasions during this period of time—once in June or July, 2009, and again in December, 2009. Love testified that the latter theft had been committed by a member of her family whom she refused to identify.

Love testified that she had improperly disposed of approximately eight Oxycontin pills while treating with Dr. Agtarap. And, Love testified that Dr. Agtarap had dropped her as a patient after she had violated the terms of their pain management agreement by testing positive for medication he had not prescribed for her use.

The record also contains a February 11, 2010 letter from Love's subsequent pain management provider, Dr. Luis Vascello, to AIK. There, Dr. Vascello informed AIK that he would be dropping Love from his practice because of what he described as Love's "erratic behavior" in seeking the results of a urine drug screen, and "her unwillingness to undergo a psychological evaluation and psychological assistance, and her lack of compliance with [his] treatment plan[.]"

Beginning in March, 2010, Love resumed her pain management treatment, this time with Dr. Grentz at Kentucky Pain Management Services. In relevant part, Dr. Grentz's progress note of March 31, 2010, assessed Love's condition as:

1. Chronic pain-moderate to severe
2. Lumbar radiculopathy
3. Unspecified arthropathy in other specified sites
4. Degenerative disc disease (DDD) – lumbar spine
5. Facet joint arthropathy
6. Intervetebral disc disorder (DO) – lumbar spine
7. Spinal stenosis – lumbar spine
8. Lumbago, myofasciitis
9. Opioid dependence.

Thereafter, Love continued to see Dr. Grentz on a monthly basis, and Dr. Grentz's pain management regime for Love consisted of prescriptions for

Percocet, Xanax, Trazadone, and Fentanyl patches. Also, on April 27, 2010, Dr. Grentz performed injective therapy on Love's lower back at the L5-S1 disc space. Dr. Grentz's March 31, 2010 note, and his prior note of March 11, 2010, both conclude with "The patient has been advised to follow up in this clinic in 28 days, or with the family physician."

With the foregoing in mind, we return to January 19, 2010. On this date, AIK moved to reopen Love's approved settlement to dispute whether it was liable to pay for the emergency room treatment Love received on December 12, 2009. On April 10, 2010, AIK also received the bill relating to Love's October 23 and 24, 2009 emergency room treatment and added this bill to its dispute. Finally, AIK disputed whether it had any liability to pay for the continuing pain management treatment and medication management Dr. Grentz was providing for Love.

AIK's argument for reopening was that the sum of these treatments was neither related to, nor reasonable and necessary for the treatment of, Love's alleged injury of July 19, 2002. In support, AIK offered medical opinions from several doctors, including Dr. Ellen Ballard, a physical medicine physician, and Dr. Varghese. On May 10, 2010, after reviewing Love's medical history, Dr. Ballard opined that Love's July 19, 2002 injury was a lower back strain that was unrelated to her current diagnosis of left L5 nerve root compressions, and that "her present complaints are in no way related to her July 19, 2002 incident[.]" Dr. Ballard further opined that Love's emergency room visits were unnecessary and

that Love's "current medication is not necessary for the July 19, 2002 injury but may be necessary for her unrelated present complaints." Ballard concluded by stating:

This patient has had a long history of problems with her back and her present complaints are due to events and conditions, which are the result of age and continued heavy lifting, which is not in any fashion related to the strain that she had in 2002.

In turn, Dr. Varghese opined that Love's family doctor could manage Love's pain complaints, and that he did not believe that injective therapy was very effective for patients with long-term back pain.

In an August 25, 2010 order, the ALJ sustained AIK's motion to reopen Love's approved settlement and resolved all of the issues raised in the medical fee dispute in AIK's favor. The only issue that Love would later raise in her appeal to the Workers' Compensation Board was the reasonableness and necessity of her continued pain management treatment and medication management with Dr. Grentz, and its relationship to her alleged injury. In relevant part, the portion of the ALJ's order directed toward that issue states:

The final issue concerns continued pain management treatment. This ALJ had reservations with Love's credibility as a witness, which when coupled with the more persuasive medical evidence supports the finding that continued pain management treatment is no longer necessary as related to the 2002 non-surgical work injury. Love's testimony contained inconsistencies; the testimony that "this girl" from whom she obtained additional pain medication in violation of her pain management agreement with Dr. Agatarap^[4] was

⁴ See footnote 2.

actually her mother reflected poorly on her credibility; and the report from Dr. Vascello about her lack of treatment compliance created a negative impression. The ALJ notes that both Dr. Varghese and Dr. Grentz, Love's treating physicians, said that she should be able to continue medication management with a family physician and not a pain management specialist. But the ALJ relies on Dr. Ballard to find that Love's current complaints, giving her the benefit of the doubt as to their legitimacy, stem from L5 nerve root compression that is not related to the July 19, 2002 work injury. This would be consistent with the note from Dr. Grentz that Love had done "fairly well" since 2006 until having an onset of back pain while rising up in bed three years later in June 2009.⁵

Love did not petition the ALJ to reconsider the August 25, 2010 order.

Thereafter, Love appealed to the Board. In its subsequent order of

December 21, 2010, the Board summarized Love's argument on appeal:

Love argues the most credible evidence of record compels a finding that continued pain management treatment with Dr. Grentz is reasonable and necessary for treatment of her work injury. Accordingly, Love maintains that the ALJ erred in finding that treatment not compensable. Further, Love maintains the ALJ's decision noting that Drs. Varghese and Grentz said she should be able to continue medication management with a family physician and not a pain management specialist is inaccurate since a review of the record reveals no such statement by Dr. Grentz. Love argues even though Dr. Grentz's treatment records note Love should follow-up with his clinic in 28 days or with the family physician, Dr. Grentz did not express an opinion which of the two choices is preferred. After noting the ALJ emphasized

⁵ The portion of the ALJ's order titled "Statement of the Case" also includes a reference to Love's October 24, 2009 emergency room discharge summary, noting that "The 'Discharge Summary' from Hazard ARH on October 24, 2009 states that Love had no medical treatment for her back between 2002 and 2009."

the discharge summary from Hazard ARH on October 24, 2009, states Love had no medical treatment for her back between 2002 and 2009, Love asserts the record reflects that notation is erroneous. Love points out the deposition of Dr. Varghese reveals Dr. Bean requested an MRI on December 15, 2005, and Love treated with Dr. Agrap⁶ sometime in 2006. Love argues the most credible medical and lay evidence taken as a whole compels a finding her continued pain management is reasonable and necessary.

Nevertheless, the Board found that Love had failed to properly raise and preserve her arguments regarding alleged inaccuracies appearing on the face of the ALJ's August 25, 2010 order because Love had failed to file a petition for reconsideration. The Board further held:

In reading the ALJ's opinion and order, we conclude the ALJ determined Love was not entitled to continued pain management treatment because Love's current complaints were not related to and, thus, not caused by the July 19, 2002, work injury.

The Board thus framed the issue on appeal: “[G]iven the fact Love did not file a petition for reconsideration, our sole task on appeal is to determine whether the ALJ's decision is supported by substantial evidence contained within the record.”

The Board affirmed the ALJ's decision after determining that it was supported by substantial evidence:

The opinions expressed by Dr. Varghese, Dr. Grentz's medical records, and Dr. Ballard's opinions summarized herein constitute substantial evidence in support of the ALJ's determination Love's past pain management treatment and any continuing pain management treatment

⁶ See footnote 2.

is not reasonable and necessary treatment nor causally related to the July 19, 2002, work injury. Since the ALJ has the authority to pick and choose, he was free to rely primarily upon the opinions of Dr. Ballard as more credible, and this Board is not authorized to disturb that choice on appeal. Special Fund v. Francis, [708 S.W.2d 641 (Ky. 1986)].

This appeal followed.

II. STANDARD OF REVIEW

The ALJ is the finder of fact in workers' compensation matters. *Ira A. Watson Dept. Store v. Hamilton*, 34 S.W.3d 48, 52 (Ky. 2000). In that regard,

KRS 342.285(2) provides that the Board shall not reweigh the evidence and substitute its judgment for that of the ALJ with regard to a question of fact. The standard of review with regard to a judicial appeal of an administrative decision is limited to determining whether the decision was erroneous as a matter of law. *American Beauty Homes v. Louisville & Jefferson County Planning & Zoning Commission*, Ky., 379 S.W.2d 450, 457 (1964). Where the ALJ determines that a worker has satisfied his burden of proof with regard to a question of fact, the issue on appeal is whether substantial evidence supported the determination. *Special Fund v. Francis*, Ky., 708 S.W.2d 641, 643 (1986). Substantial evidence has been defined as some evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable people. *Smyzer v. B.F. Goodrich Chemical Co.*, Ky., 474 S.W.2d 367 (1971). Although a party may note evidence which would have supported a conclusion contrary to the ALJ's decision, such evidence is not an adequate basis for reversal on appeal. *McCloud v. Beth-Elkhorn Corp.*, Ky., 514 S.W.2d 46 (1974). The crux of the inquiry on appeal is whether the finding which was made is so unreasonable under the evidence that it must be viewed as erroneous as a matter of law. *Special Fund v. Francis*, *supra*, at 643.

Id.

III. ANALYSIS

On appeal before this Court, Love argues that no substantial evidence of record supports the ALJ's and Board's conclusions that her July 19, 2002 work injury is unrelated to her to her present complaints. To this effect, Love asserts that "All the evidence in the record establishes that the July 19, 2002 work injury involved the L5 disc and nerve root," and that "The MRI's back in 2002 clearly document that [her] original work injury was a herniation at L4-5, left which she has continued to suffer with over the years." In a similar vein, Love argues that the substantial evidence of record only demonstrates that Dr. Grentz's continued pain and medication management is both reasonable and necessary to treat her work injury.

As to the issue of relatedness, while the evidence in this matter does trace the unfortunate degeneration of Love's lower back in the L4-L5 region, nothing in the record beyond Love's own testimony and representations links any of Love's lower back diagnoses to her alleged injury of July 19, 2002. Indeed, Dr. Dansereau's September 4, 2002 consultation note states that Love had been experiencing lower back pain for several months prior to the alleged July 19, 2002 incident. Additionally, Dr. Williams' July 23, 2002 chart note places the origin of Love's lower back pain as early as January, 2002. And, contrary to Love's testimony, which describes a specific, work-related incident causing an acute onset of pain, Dr. Williams' chart note describes that Love "has been having problems

with low back and right and left leg pain that just sort of came on. She really does not know any particular incident.”

Moreover, Dr. Desai’s report regarding Love’s August 9, 2002 MRI—the only 2002 MRI of record—is only probative of two things: 1) Love’s lower back suffered a “mild to moderate degree of concentric disk bulge of L4 disk lateralizing towards the left with pressure impression on the ventral left aspect of the thecal sac,” which is a diagnosis that is repeated throughout Love’s MRI’s in later years; and 2) this specific condition occurred sometime before August 9, 2002.

There are no medical opinions linking Love’s alleged July 19, 2002 injury with this diagnosis, aside from Dr. Varghese, who testified that his only understanding of Love’s injury came from his reading of the December 15, 2005 MRI report and what Love told him during her visit about the history of her injury. And, there are no MRI reports of record predating July 19, 2002, to contrast the August 9, 2002 MRI against. The evidence demonstrates that it was equally possible that Love’s August 9, 2002 MRI displayed an injury predating July 19, 2002. Consequently, Dr. Ballard’s opinion that Love’s injury was at best a “lower back strain” is not contrary to the evidence in this matter, and the ALJ was entitled to rely upon it in determining that “Love’s current complaints, giving her the benefit of the doubt as to their legitimacy, stem from L5 nerve root compression that is not related to the July 19, 2002 work injury.” The only evidence to the

contrary is Love's testimony, and the ALJ was entitled to disregard it and negatively assess her credibility.

Moreover, the record is also capable of supporting that Love's complaints of pain in 2009 were new and unrelated to the condition of her back in 2002. In spite of what the August 9, 2002 MRI revealed, substantial evidence demonstrates, as Dr. Grentz put it, that Love was doing "fairly well until June 2009 when she 'raised out of bed' and noted worsening of her pain." Consistent with that statement, the record only reflects that Love began visiting emergency rooms for her pain complaints on May 25, 2009; Love was able to work full time until June or July, 2009; on June 16, 2009, an MRI revealed, for the first time, the presence of an "annular tear"; and Dr. Radmanesh opined that "Pain related to outer annular tear is likely." In short, there is substantial evidence supporting that Love's alleged July 17, 2002 injury is unrelated to the pain and medication management services provided by Dr. Grentz, and no other evidence of record compels the opposite conclusion.

As such, the issue of whether Dr. Grentz's continued care is reasonable and necessary to treat Love's lower back pain is moot. Nevertheless, substantial evidence supports the conclusion that it is not reasonable or necessary. The record contains a July 7, 2010 opinion from Dr. Varghese, which states "Pain is a subjective feeling—and [Love's] pain can be managed by her family doctor," and "In my past experience injection therapy for back pain for long term basis is not very effective." The only other evidence of record from any other doctor,

relating to Love's continued treatment with Dr. Grentz, derives from Dr. Grentz himself and is permissive at best, *i.e.*, in his March 11 and March 31, 2010 notes, Dr. Grentz merely states that Love could follow up with his office *or* her family physician.

IV. CONCLUSION

For these reasons, the respective decisions of the ALJ and Board are
AFFIRMED.

ALL CONCUR.

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