

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000632-WC

MCDOWELL ARH HOME HEALTH

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-99-55719

LILLY ISAACS; DR. MITCHELL WICKER;
HON. HOWARD E. FRASIER, JR.,
ADMINISTRATIVE LAW JUDGE;
and WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * * * ** ** ** ** *

BEFORE: DIXON AND VANMETER, JUDGES; GRAVES,¹ SENIOR JUDGE.

GRAVES, SENIOR JUDGE: McDowell ARH Home Health (McDowell) petitions for the review of an opinion of the Workers' Compensation Board (Board), entered February 22, 2007, affirming the decision of an Administrative Law Judge (ALJ) finding that a referral of Lilly Isaacs to an orthopedic surgeon to be compensable following a medical

¹ Senior Judge John W. Graves sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

fee dispute. McDowell argues that the ALJ erred in finding that the referral was causally related to Isaacs' work injury. We affirm.

Isaacs, 47 years old, filed her claim for benefits on January 18, 2001, alleging a work-related injury to her back and right leg that occurred while she was lifting a patient onto a bed in August 1999. Isaacs supported her claim with medical reports from two doctors, both of whom placed her in DRE Category VII and assigned a 60% impairment. The medical records documented weakness and numbness in Isaacs' right leg. On August 1, 2001, an ALJ entered an opinion and award concluding that Isaacs had no prior active disability and awarded her medical benefits for her back and right leg problems, as well as other medical problems.

On September 6, 2005, McDowell filed a motion to reopen for a medical fee dispute. The dispute arose because Isaacs' medical provider, Dr. Mitchell Wicker, requested a referral to an orthopedic specialist. Isaacs had gone to Dr. Wicker complaining of pain in her right leg and instability while standing and walking and required the use of a cane. Dr. Wicker's medical report of Isaacs stated that her right knee problems "may be secondary to her abnormal gait." Following a utilization review, McDowell denied the referral. The utilization review was conducted by Dr. Daniel Wolens who determined that "gait derangement would cause neither a median meniscal tear nor an ACL tear" and thus not related to the work injury. McDowell's motion to reopen also included the report of Dr. Daniel Primm, Jr., who performed an orthopedic examination of Isaacs, including x-rays of her knee. Dr. Primm concluded that Isaacs'

request for evaluation by an orthopedic specialist would be reasonable but felt that the referral would not be related to the original work injury to her knee.

On May 8, 2006, in connection with McDowell's motion to reopen, Isaacs testified by deposition and acknowledged having right knee problems prior to the work injury. Isaacs had right knee surgery during high school as well as a second surgery following a prior work-related injury. Isaacs testified that after the second surgery she went back to work and her knee did not bother her. After reviewing the evidence, the ALJ found Isaacs testimony credible concerning her continuing pain, use of a cane, and frequent falls. The ALJ also found “that the reports of Dr. Wolens and Dr. Primm are not credible that a referral to an orthopedic surgeon is not related to her 1999 injury.”

McDowell filed a Petition for Reconsideration that was denied on August 28, 2006.

Following the denial, McDowell filed a timely appeal with the Board. On February 22, 2007, the Board affirmed the decision of the ALJ. This appeal followed.

McDowell's only argument on appeal is that the ALJ erred when he found Isaacs' referral to an orthopedic surgeon to be causally connected to the August 1999 work injury. We disagree.

McDowell contends that the only real evidence before the ALJ came from Drs. Wolens and Primm who were both of the opinion that referral was unrelated to the 1999 injury. KRS² 342.020(1), in pertinent part, provides that “. . . the employer shall pay for the cure and relief from the effects of an injury . . . the medical, surgical, and hospital

² Kentucky Revised Statute.

treatment . . . as may reasonably be required at the time of the injury and thereafter during disability” KRS 342.020(1) allows an injured employee to choose his own physician and to have whatever medical treatment is reasonably necessary for the cure and/or relief of his injury. *See Square D Co. v. Tipton*, 862 S.W.2d 308 (Ky. 1993). The burden of proving that a treatment is unreasonable is on the employer. *National Pizza Co. v. Curry*, 802 S.W.2d 949 (Ky.App. 1991). In *Square D Co.*, our Supreme Court discussed the factors under KRS 342.020(1) that an ALJ must consider when determining the compensability of a medical procedure or treatment:

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 . . . [w]e believe . . . that [KRS 342.020(3)] 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.

862 S.W.2d at 309-310. In this case, we are of the opinion that the ALJ’s decision was based upon substantial evidence.

In its opinion affirming the ALJ’s decision, the Board stated

[t]here was sufficient evidence for the ALJ to conclude that any current problems (with Isaacs right knee) were the result of the 1999 injury. Drs. Wolen and Primm discounted the possibility that the ACL and meniscal tear were the result of gait derangement. . . . [h]owever, neither addressed the repeated falls and their effect on the knee condition. Indeed,

Dr. Primm included in his assessment a history of recent right knee injury with probable contusion. There is nothing in the record to indicate that the weakness and numbness in Isaacs' right leg which causes her falls is related to anything other than the 1999 work injury. Of course, any additional trauma to the knee caused directly by the weakened condition would be attributable to the original injury and related medical expenses would be compensable.

It is well settled that “the ALJ, as fact-finder, has the sole authority to judge the weight, credibility and inferences to be drawn from the record.” *Miller v. East Kentucky Beverage/Pepsico, Inc.*, 951 S.W.2d 329, 331 (Ky. 1997). Based on our review of the record, we believe the ALJ had substantial evidence to conclude that Isaacs' referral to an orthopedic surgeon is causally connected to the work injury. Because there is substantial evidence to support the ALJ's findings, we must affirm the Board's decision.

The February 22, 2007, decision of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

NO BRIEF FILED FOR APPELLEES

Lee Jones
Dwight T. Lovan
Owensboro, Kentucky