Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: October 14, 2022

CLAIM NO. 201389089

LFUCG POLICE DEPARTMENT PETITIONER

VS. **APPEAL FROM HON. JOHN B. COLEMAN, ADMINISTRATIVE LAW JUDGE**

DEBORAH HURT;
DR. HARRY LOCKSTADT;
BLUEGRASS ORTHOPEDICS; AND
HON. JOHN B. COLEMAN
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

BEFORE: ALVEY, Chairman, STIVERS and MILLER, Members.

MILLER, Member. LFUCG Police Department ("LFUCG") appeals from the June 28, 2022 Opinion and Order and the July 29, 2022 Order overruling its Petition for Reconsideration rendered by Hon. John B. Coleman, Administrative Law Judge ("ALJ"). In this reopening for a medical dispute, the ALJ found the posterior decompression and fusion surgery recommended by Dr. Harry Lockstadt is causally

related to Deborah Hurt's ("Hurt") February 17, 2013 work injury, and is reasonable and necessary medical treatment, and therefore, compensable under KRS 342.020.

On appeal, LFUCG argues the ALJ committed reversible error in finding the proposed surgery compensable. For the reasons set forth below, we affirm.

BACKGROUND

This claim is a reopening for a medical dispute. Initially, Hurt alleged injuries to her right shoulder, right knee, low back, left wrist, neck, SI joint, head, left shoulder, right wrist, and psychological injuries stemming from a motor vehicle accident ("MVA") on February 17, 2013, occurring in the course and scope of her employment with LFUCG. Hurt was a police officer responding to a call at the time of the collision. The claim was settled by an agreement approved on February 23, 2015.

LFUCG moved to reopen the claim on November 23, 2021 for a medical dispute concerning the compensability of a proposed cervical decompression and fusion at C3-4, C4-5 level recommended by Dr. Lockstadt. The recitation of evidence will be confined to information pertinent to this medical dispute.

Hurt testified by deposition on March 3, 2022 and at the final hearing on May 12, 2022. At the time of settlement in 2015, Dr. Lockstadt was treating her neck and has been the only spine doctor she has seen for treatment. Hurt continued treatment with Dr. Lockstadt and she testified to continuing pain in her neck, worse on the right side. It is aching "all the time," and at times stabbing. She has headaches and a very hard time sleeping. She stated, sometimes when she moves, her neck "will

make a very loud sound in there where it's popping." Injections only gave her temporary relief for a day or two, while an ablation provided relief for several months. Hurt wants to have the surgery.

At the final hearing, Hurt stated,

> I feel pain primarily on the right side in a spine area that is higher up on the neck and would be—pain that would be correlated along the measurement of my ear and jaw and then down my right side of my neck. Also, in my left side of the neck, similar but on the higher end on that left side.

Though it aches all the time, when the pain is stabbing, she stated it is "debilitating."

Dr. Lockstadt testified by deposition on February 24, 2022 and his medical records were entered into evidence. Prior to Hurt's MVA in 2013, Dr. Lockstadt treated her in 2008 for neck pain and pain in her arms and hands that hand doctors were also treating. At that time, he diagnosed her with spondylosis or degenerative arthritis of the small joints in the back of the neck, mostly on the left side. Treatment included physical therapy and anti-inflammatory medication.

Hurt returned to Dr. Lockstadt in March 2013 following the MVA. Hurt presented with complaints of left side neck pain. Treatment included physical therapy with traction, NSAID medication, and cortisone injections. Dr. Lockstadt found her at maximum medical improvement in June 2014 and he assessed an impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment for her cervical condition.

Dr. Lockstadt saw Hurt again on November 18, 2019 for a headache and neck pain localized at C2-3 and C3-4. On July 2, 2021, Dr. Lockstadt planned

for a right-sided C2-3 and left-sided C3-4 and C4-5 facet block. He noted, "If she gets dramatic improvement, no further treatment, if temporary dramatic improvement she may be a candidate for a posterior decompression and fusion[.]"

Additional records from August 24, 2020 were filed when Dr. Lockstadt saw Hurt again for cervical pain. There were several notes from another physician in the same orthopedic practice regarding ongoing right shoulder symptoms. Dr. Lockstadt discussed a rhizotomy or fusion surgery. A cervical radio frequency ablation was done in September 2020. Treatment continued in 2021, including diagnostic testing.

On August 18, 2021, Dr. Lockstadt performed a left C3-4 and C4-5 facet joint injection under fluoroscopy. He requested surgery authorization on September 29, 2021. The criteria for the surgery were ongoing pain for three months or longer, tenderness in the problem area upon physical examination, and positive diagnostic blocks in the problem area. Dr. Lockstadt stated the recommended surgery has been quite successful for treatment of neck pain. When asked whether the recommended surgery was related to the work accident, Dr. Lockstadt stated, "There is no way to determine the answer. What we've had previously, we had this Special Fund where 50% was attributed to the car accident, 50% to other – other causes."

In answering what he expected to achieve from the surgical procedure requested, Dr. Lockstadt stated, "From that procedure, the pain that she has in the upper third of the neck, in the back of her neck, where she's having that pain, I expect that pain to go away."

Dr. James Farrage conducted the Utilization Review. He found no apparent medical necessity for the recommended posterior cervical decompression and fusion from C3 to C5 in his medical report. He found the imaging studies held no significant neural impingement at those levels. Further, he found there was no corresponding decline in neurological status or sustained relief with facet blocks in the past. Dr. Farrage recommended continuing conservative treatment including radiofrequency ablation for the involved levels of concern for more sustained pain management.

Dr. Timothy Kriss evaluated Hurt on March 16, 2022. He diagnosed muscular tension neck pain and headache due to chronic severe psychological stress. Dr. Kriss noted Hurt has no neck pain or headache at the smaller cervical facet joints at C3 through C5. Dr. Kriss did not believe Hurt is suffering from facet-mediated pain. He believed the majority of Hurt's neck pain and headache is muscular in nature due to chronic muscle tension brought about by her chronic psychological stress. After reviewing Dr. Lockstadt's records, Dr. Kriss opined the recommended decompression and fusion surgery is not medically reasonable or necessary. He recommended non-operative treatment such as cervical stretching, exercise and conditioning, yoga, relaxation techniques, gentle home cervical traction, NSAID medications, Tylenol, and incrementally increasing tricyclic anti-depressants.

Dr. Ryan Donegan evaluated Hurt on August 17, 2020, particularly for right shoulder pain. In an August 20, 2020 report, he noted she had a Type 2B SLAP tear with significant posterior extension. He noted Hurt's symptoms are consistent in character, location, and quality over the years since her work injury. He

opined the SLAP tear is causally related to the work injury and he believed the recommended right shoulder surgery is reasonable.

At the final hearing, the ALJ listed the issues in this post-award medical dispute initiated by LFUCG as causation, work-relatedness, reasonableness and necessity, and the Occupational Disability Guidelines ("ODG") criteria.

The ALJ detailed the evidence of record and ultimately found the proposed fusion surgery compensable. The ALJ recited his reasons for his findings and inferences drawn from the record and, further, the sound medical reasoning offered by the treating physician which complied with the ODG.

LFUCG filed a Petition for Reconsideration, arguing the ALJ mistakenly relied on Dr. Lockstadt in finding the surgery is causally related to the 2013 work injury. It contends the proposed surgery is not reasonable, necessary, nor work-related. The ALJ denied LFUCG's Petition for Reconsideration by Order on July 29, 2022. LFUCG now appeals.

ANALYSIS

In this reopening for a medical dispute, LFUCG bore the burden of proof and was unsuccessful before the ALJ. The employer bears the burden of proof in a post-award medical dispute as to the reasonableness and necessity of treatment, but also as to the work-relatedness of the treatment. We note LFUGC argued it bears the burden of proof regarding reasonableness and necessity of treatment, but that Hurt bears the burden of proof regarding causation and the work-relatedness of the treatment. LFUGC cites Addington Resources, Inc. v. Perkins, 947 S.W.2d 421 (Ky. App. 1997) for this proposition. The Board notes, however, the Kentucky Supreme

Court has since acknowledged the burden of proof regarding work-relatedness in a post-award medical fee dispute is on the employer in two unpublished cases. C&T Hazard v. Stollings, 2012–SC–000834–WC, 2013 WL 5777066 (Ky. Oct. 24, 2013); Conifer Health v. Singleton, No. 2020-SC-0609-WC, 2021 WL 4487772 (Ky. Sept. 30, 2021). KRS 342.735(3) also states, in relevant part: "However, the employee has the burden of proof to show the medical expenses are related to the injury, reasonable and necessary prior to an application of benefits being filed and before an award or order of benefits. Thereafter, the burden is upon the employer."

Since it bore the burden of proof and was unsuccessful before the ALJ, LFUCG must demonstrate the evidence compelled a different result. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). For evidence to be compelling, it must be so overwhelming that no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985).

In rendering a decision, KRS 342.285 grants an ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). An ALJ may draw reasonable inferences from the evidence, reject any testimony, and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). In that regard, an ALJ is vested with broad authority to decide questions involving causation. Dravo Lime Co. v. Eakins, 156 S.W.3d 283 (Ky. 2003). Although a party may note evidence that would have supported a different outcome than that

reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). Rather, it must be shown there was no evidence of substantial probative value to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings made are so unreasonable under the evidence that they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to weight and credibility or by noting other conclusions or reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

In the Agreement approved in 2015, Hurt retained her right to medical treatment pursuant to KRS 342.020. Therefore, LFUGC "shall pay for the cure and relief from the effects of an injury at the time of the injury and thereafter" during disability. Hurt's neck injury was included in the settlement.

LFUCG maintains Dr. Farrage's opinion that the treatment is not reasonable and necessary and Dr. Kriss' opinion the treatment would not be related to the work injury should satisfy its burden; however, the ALJ relied on Dr. Lockstadt's opinion that the surgery is reasonable and necessary and will alleviate Hurt's pain as it has done with many of his other patients. Hurt testified regarding her continuing pain since the MVA and that all treatment has only given her some temporary relief.

The ALJ was presented with conflicting medical opinions as to the cause and reasonableness of the surgery stemming from a motor vehicle accident in 2013. When the question of causation, reasonableness and necessity involves a medical relationship is not apparent to a layperson, the issue is properly within the province of medical experts. Mengel v. Hawaiian Tropic Northwest and Central Distributors, Inc., 618 S.W.2d 184, 186-187 (Ky. App. 1981). The mere possibility of work-related causation is insufficient. Pierce v. Kentucky Galvanizing Co. Inc., 606 S.W.2d 165 (Ky. App. 1980). The ALJ is entitled to pick and choose among conflicting medical opinions and has the sole authority to determine whom to believe. Pruitt v. Bugg Brothers, 547 S.W.2d 123, (Ky. 1977); Copar Inc. v. Rogers, 127 S.W.3d 554 (Ky. 2003).

The ALJ specifically described the evidence he relied upon in determining the proposed procedure was both related to the 2013 work injury and was reasonable and necessary treatment for the relief of the pain. Hurt testified she has endured continued pain since the MVA. The ALJ listed the testimony and medical notes from the treating physician to support finding the surgery compensable. While there are contrary opinions from Dr. Farrage regarding necessity of the surgery and Dr. Kriss as to the causal relationship to the work injury, it was for the ALJ to parse through the record and reach his determination. All doctors agreed medical treatment is necessary, what was disputed was the type of treatment. The ALJ relied on Dr. Lockstadt, the treating physician, who had prescribed conservative care for many years post-injury. He further described the type of surgery to be performed, including the placing of spacers, and that it had proved

successful with many of his patients. The exact levels of the proposed surgery corresponded with the CT scan showing arthritic spurs and the pain was localized at those levels. The ALJ found this rationale was well within the mandates of the ODG criteria. We cannot say the evidence compelled a contrary result.

LFUCG also contends the proposed surgery is not causally related to the work injury. It places particular emphasis on the deposition testimony of Dr. Lockstadt. Specifically, Hurt's counsel asked, "Can you state within the realm of reasonable medical probability, whether the procedure you were recommending is related to the car accident or the pre-existing problems?" Dr. Lockstadt responded, "I don't know the answer to that. There is no way to determine the answer. What we had previously, we had this special fund where 50 percent was attributed to the car accident, 50 percent to other—other causes." The ALJ inferred Dr. Lockstadt was referring to a prior version of KRS 342.120 when apportionment for income benefits would accrue one-half to the special fund when a dormant pre-existing condition was aroused into disabling reality by a work injury. The ALJ has "the sole discretion to determine the quality, character, weight and credibility and substance of the evidence, and to draw reasonable inferences from the evidence." Bowerman v. Black Equipment Co., 297 S.W.3d 858, 866 (Ky. App. 2009). An ALJ has authority to make reasonable inferences from the evidence. *See, e.g.*, Transportation Cabinet Dept. of Highways v. Poe, 69 S.W.3d 60, 62 (Ky. 2001). The Kentucky Supreme Court has stated: "It is the quality and substance of a physician's testimony, not the use of particular 'magic words' that determines whether it rises to the level of

reasonable medical probability, *i.e.*, to the level necessary to prove a particular medical fact." Brown-Forman Corp. v. Upchurch, 127 S.W.3d 615, 621 (Ky. 2004).

Dr. Lockstadt's records included his note from August 24, 2020 indicating her symptoms since 2013, when her work-related injury occurred, always related to her neck. Hurt also testified her symptoms were ongoing since the 2013 work-related MVA. Dr. Lockstadt also specifically testified he was not recommending this procedure when he treated Hurt previously in 2008. The ALJ found Hurt successfully proved the surgery was work-related and that finding was supported by substantial evidence; hence, the Board will not disturb the ALJ's findings.

While the ODG criteria was listed as an issue at the final hearing, it was not particularly argued by counsel. The ODG was adopted by 803 KAR 25:260 and is utilized to determine appropriate medical treatment based on standard protocols. The goal was to standardize and streamline the process for the approval or denial of proposed treatment. Critically, even treatment that is not fully recommended can be approved if the doctor buttresses his recommendation with sound medical reasoning. The ALJ fully explained his reasoning as to Dr. Lockstadt's proposed surgery complying with the ODG, particularly that the treating physician explained his proposal with sound medical reasoning. In this claim, Dr. Lockstadt discussed Hurt's conservative long-term treatment and the proposed treatment would provide a meaningful benefit to the patient. 803 KAR 25:260 Sec. 3(8). The ALJ reviewed the ODG in detail and found the proposed surgery with

interbody fusion spacers is generally recommended and he found the surgery compensable.

Ultimately, the ALJ was confronted with differing medical opinions regarding treatment for continuing symptoms Hurt suffers in her neck. The neck complaints were clearly mentioned in the original claim and Hurt testified her symptoms did not respond to conservative care, including having only temporary relief from injections and the burning of nerves. The ALJ had the authority to decide whether the proposed surgery was reasonable, necessary, and work-related. The ALJ thoroughly explained his reasoning and the evidence in which he relied upon. Substantial evidence in the record supports his determination and a contrary result is not compelled.

Accordingly, the June 28, 2022 Opinion and Order and the July 29, 2022 Order on Petition for Reconsideration rendered by Hon. John B. Coleman, Administrative Law Judge, are **AFFIRMED**.

ALL CONCUR.

DISTRIBUTION:

COUNSEL FOR PETITIONER: **LMS**

HON MARCEL SMITH
300 E MAIN ST., STE 400
LEXINGTON, KY 40507

COUNSEL FOR RESPONDENT: **LMS**

HON JAMES MARTIN
333 WEST VINE ST., STE 1200
LEXINGTON, KY 40507

RESPONDENTS:

DR HARRY LOCKSTADT **USPS**
3480 YORKSHIRE MEDICAL PARK
LEXINGTON, KY 40509

BLUEGRASS ORTHOPEDICS **USPS**
3480 YORKSHIRE MEDICAL PARK
LEXINGTON, KY 40509

ADMINISTRATIVE LAW JUDGE: **LMS**

HON JOHN B COLEMAN
MAYO-UNDERWOOD BLDG
500 MERO ST, 3rd FLOOR
FRANKFORT, KY 40601