

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: September 11, 2013

CLAIM NO. 201180473

GATE PRECAST

PETITIONER

VS.

APPEAL FROM HON. EDWARD D. HAYS,
ADMINISTRATIVE LAW JUDGE

BILLY G. BERRYMAN
and HON. EDWARD D. HAYS,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

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

RECHTER, Member. Gate Precast ("Gate") appeals from the February 21, 2013 Opinion, Award and Order rendered by Hon. Edward D. Hays, Administrative Law Judge ("ALJ"), finding Billy G. Berryman ("Berryman") permanently totally disabled as a result of a July 25, 2011 injury. Gate also appeals

from the April 18, 2013 Order on Petition for Reconsideration. Gate argues the ALJ's findings regarding causation and unpaid medical expenses are unsupported by substantial evidence. We disagree and affirm.

Berryman initiated his claim on July 9, 2012, alleging he sustained an injury while employed by Gate as a carpenter. On July 25, 2011, he injured his right shoulder, right arm, right hand and neck while moving a large rail with another employee. He described his arm being "jerked", "twisted" and "pulled all the way up through [the] neck."

Later that day, he received medical treatment from Dr. Anita Rogers, whose medical records were introduced. Berryman complained of an injury to his wrist when a rail buckled, twisting his wrist. He had pain in the wrist radiating to his elbow. Within a week of the accident, Berryman began experiencing shaking or tremors in his right hand and arm. He testified he never had problems with his neck, right shoulder or extremity before the work incident, although he had seen chiropractors in the past for low back treatment.

At an August 4, 2011 follow-up visit, Berryman reported his wrist had improved but he continued to have pain over the extensor surface of his forearm and elbow and

radiating up to his shoulder. Dr. Rogers noted Berryman was working with restrictions of no lifting over ten pounds with his right hand and no repetitive activity or pushing/pulling with his right hand. She referred Berryman to Dr. Michael R. Heilig, an orthopedic surgeon.

Dr. Heilig ordered a cervical MRI obtained on August 25, 2011, which revealed disc protrusions. An EMG of the right upper extremity on September 12, 2011, revealed mild right carpal and cubital syndrome. A right shoulder MRI on September 20, 2011, revealed a tear of the labrum. Dr. Heilig performed surgery on the right shoulder on November 3, 2011, including debridement of the rotator cuff and labrum as well as a subacromial decompression. Intraoperatively, Dr. Heilig found a complete rupture of the biceps tendon, significant tearing of the subscapularis and labrum, as well as impingement.

Dr. Heilig continued to treat Berryman for the next six months. In a June 28, 2012 report, Dr. Heilig indicated Berryman sustained a work-related injury to his right shoulder, upper extremity and cervical spine on July 25, 2011. Dr. Heilig assigned an 8% impairment for the cervical condition, 4% for loss of range of motion in the shoulder, and 6% for decrease of sensation in a median distribution for a combined 16% impairment pursuant to the

American Medical Association Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"). Dr. Heilig assigned permanent restrictions of no overhead use of the right upper extremity, no repetitive motion of the right upper extremity, and no lifting greater than twenty pounds.

During the next year, Berryman was evaluated by five other physicians, four of whom performed an independent medical evaluation ("IME"). Several of the evaluating physicians came to conclusions that differed markedly from Dr. Heilig's.

Following the surgery, Dr. Heilig referred Berryman to Dr. Phillip Tibbs, a neurosurgeon, who evaluated Berryman on November 22, 2011. Dr. Tibbs reviewed the cervical MRI ordered by Dr. Heilig, and interpreted multi-level degenerative changes and some mild disc bulging at the C3-4 and C4-5 levels on the left side. There was no spinal canal compromise or right side neural foraminal impingement. Dr. Tibbs opined there was no indication for surgical intervention. He prescribed a trial of Neurontin to "alleviate some of his stretch pain from his nerves." He released Mr. Berryman to return on an as-needed basis.

On September 23, 2011, prior to Berryman's surgery or his referral to Dr. Tibbs, Dr. David Jenkinson

performed an IME Gate's request. Dr. Jenkinson agreed the August 25, 2011 cervical MRI revealed some multi-level degenerative changes with disc osteophyte formation at several levels. He found no significant sign of nerve root or spinal cord compression. He believed the September 20, 2011 MRI of the right shoulder revealed acromioclavicular joint degeneration. Dr. Jenkinson found some indication of rotator cuff tendonitis, but did not see any significant rotator cuff tear. He diagnosed a history of possible minor sprain or strain of the right wrist, but stated Berryman shows typical signs for self-limiting behavior with no objective basis. He attributed Berryman's complaints to the work incident, but believed a causal relationship could be attributed to the injury by history only. He further opined the present complaints of diffuse shoulder, neck, and upper arm pain cannot be related to the history of minor sprain or strain involving the right wrist. He found no permanent impairment pursuant to the AMA Guides, and recommended no further treatment.

Dr. Ronald Burgess performed an IME on October 12, 2012, at Gate's request. Like Dr. Jenkinson, Dr. Burgess found indications of self-limiting behavior during his evaluation of Berryman. He opined Berryman had a minor injury to his right wrist that had resolved. Dr. Burgess

found no evidence of injury to the right shoulder, neck, or any other part of the right upper extremity as a result of the work incident. He opined Berryman can return to his previous job duties without restrictions, and assessed a 0% permanent impairment.

Dr. Joseph Zerga performed an IME of Berryman on October 3, 2012. Dr. Zerga noted an MRI scan of the neck revealed evidence of moderate spondylosis at C3-C4 on the left-hand side, but there was no finding that could cause symptoms in the right upper extremity. On physical examination, Berryman had mild decreased range of motion of his neck on turning to the left and right, typical of osteoarthritis. He had decreased range of motion of his right shoulder and a mild tremor of his right arm. Interestingly, Dr. Zerga also noted a tremor of Berryman's left upper extremity. Nerve conduction studies of the right ulnar nerve were entirely normal and the EMG study of the right arm revealed no evidence of denervation of any muscles. There was no evidence of radiculopathy or ulnar neuropathy. The study did show evidence of mild, very early bilateral carpal tunnel syndrome.

Dr. John Vaughan performed an IME on October 24, 2012. Dr. Vaughan stated the only deformity in the right upper extremity appeared to be a balled-up right biceps

muscle with distal migration consistent with a proximal biceps rupture. He found Berryman had a somewhat diminished right biceps reflex that was more likely due to the biceps rupture and deformity than a neurologic deficit. Dr. Vaughan diagnosed mild/moderate cervical spondylosis and assessed a 0% impairment to the cervical spine. Dr. Vaughan opined the objective findings on the MRI were normal age-related degenerative changes for a middle-aged man and he did not believe any further medical treatment for the cervical spine was indicated.

Berryman testified at the hearing held December 20, 2012, and explained that his symptoms had worsened since the date of the accident. He described his current symptoms as "spasms from the neck down through the shoulder. It's like you have electricity going up and down your arm." He still has shaking in his arm for which he takes Neurontin. Berryman described his condition as painful from his neck through his shoulder "like a dull toothache" and a stabbing sensation in the biceps. He stated an "electrical shock" sensation runs throughout his arm. Berryman indicated his right arm is still "really painful" and he has a lack of grip strength which causes him to drop things.

On cross-examination, Berryman acknowledged being seen at the Pain Treatment Center for about two years preceding the work accident. He acknowledged being asked questions about his neck, but denied he had experienced any previous problems other than a stiff neck when he awakened in the morning or after having finished a long stint of hard work in the construction business. He acknowledged having had muscle pain and having taken Percocet. Berryman further testified Dr. Heilig is aware of his continuing treatment at the Pain Treatment Center. Berryman stated his primary problem is with his neck and shoulder. He no longer has any problem with his wrist.

In the February 21, 2013 Opinion, Award and Order, the ALJ acknowledged the "gross disparity" in the opinions of the seven physicians who had evaluated and/or treated Berryman. Ultimately, the ALJ was most persuaded by the opinions of Drs. Heilig, Rogers and Tibbs. He found Berryman "has a 16% permanent impairment to the body as a whole, based upon the findings of Dr. Heilig." The ALJ concluded Berryman is permanently totally disabled.

Gate filed a petition for reconsideration requesting additional findings and alleging numerous errors in the recitation of the evidence and conclusions drawn therefrom. Gate also argued the ALJ erred in finding

unpaid medical expenses compensable. The ALJ issued his Order on Petition for Reconsideration on April 18, 2013, indicating he carefully considered each of Gate's arguments. In nearly all respects, the petition was denied, though the ALJ did correct the commencement date of the award.

On appeal, Gate challenges several of the ALJ's findings of fact, which we consider cumulatively to be a general attack on the sufficiency of the evidence. Berryman alleged injuries to his neck/cervical spine, right shoulder, and median nerve as a result of the July 25, 2011 work incident. Gate argues the ALJ failed to offer any additional specific findings on causation and failed to meaningfully distinguish the evidence presented on each specific allegation or to offer distinct findings on each allegation. For the same reason, Gate further contends it is insufficient for the ALJ to generally state Berryman's "condition" was supported by the opinions of Drs. Heilig and Rogers. Gate further asserts the evidence does not support a finding of both a compensable neck and shoulder injury. Citing Cepero v. Fabricated Metals Corp., 132 S.W.3d 839 (Ky. 2004), Gate also contends the ALJ erred in relying on Dr. Heilig's opinion as a basis to find a neck

injury because Dr. Heilig was unaware of Berryman's pre-existing problems.

We are bound by a stringent standard of review on appeal. This Board is prohibited from substituting its judgment for that of the ALJ as to the weight of evidence on questions of fact. See KRS 342.285(2). It is well established the claimant in a workers' compensation claim bears the burden of proving each of the essential elements of his cause of action. Burton v. Foster Wheeler Corp., 72 S.W.3d 925, 928 (Ky. 2002). Where the party with the burden of proof is successful before the ALJ, the question on appeal is whether the decision is supported by substantial evidence. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). Substantial evidence is defined as evidence of relevant consequence, having the fitness to induce conviction in the minds of reasonable people. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971). As fact-finder, the ALJ has the sole authority to determine the quality, character and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993); Paramount Foods Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). Similarly, the ALJ has the sole authority to judge the weight to be accorded to and the inferences to be drawn from the evidence. Miller v. East Kentucky

Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Luttrell v. Cardinal Aluminum Co., 909 S.W.2d 334 (Ky. App. 1995). The ALJ may 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. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000); Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999); Halls Hardwood Floor Co. v. Stapleton, 16 S.W.3d 327 (Ky. App. 2000). Mere evidence contrary to the ALJ's decision is not adequate to require reversal on appeal. Whittaker v. Rowland, supra. In order to reverse the decision of the ALJ, it must be shown there was no substantial evidence to support his decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

Here, the ALJ was faced with conflicting evidence regarding the nature and extent of Berryman's condition attributable to the work incident. Where evidence in a workers' compensation claim is conflicting, the ALJ as fact-finder is free to pick and choose whom and what to believe. Caudill v. Maloney's Discount Stores, 560 S.W. 2d 15 (Ky. 1977). Dr. Heilig found cervical and shoulder injuries as well as decreased sensation in the median nerve distribution. He further opined that each of these conditions was caused by the work accident. As documented

in his November 27, 2012 report, a review of records from Drs. Burgess and Zerga did not alter his opinions. The evidence from Dr. Heilig is substantial evidence and sufficient to support the ALJ's determination.

After an examination of the record, we conclude Cepero, supra, is inapplicable in the case *sub judice*. Cepero, supra, was an unusual case involving not only a complete failure to disclose, but affirmative efforts by the employee to cover up a significant injury to the left knee only two and a half years prior to the alleged work-related injury to the same knee. The prior, non-work-related injury left Cepero confined to a wheelchair for more than a month. The physician upon whom the ALJ relied was not informed of this prior history by the employee and had no other apparent means of becoming so informed. Every physician who was adequately informed of this prior history opined Cepero's left knee impairment was not work-related but, instead, was attributable to the non-work-related injury two and a half years previous.

In this case, while Berryman made some neck complaints in his visits with Dr. Wright, treatment was primarily for Berryman's low back injury. There is no evidence in the record indicating Berryman had a prior cervical injury. Berryman's testimony, which the ALJ found

credible, indicates his prior neck complaints were of occasional stiffness or soreness following strenuous work. Berryman further testified he had no previous injuries to his right arm, biceps or upper extremities prior to the work injury. The ALJ considered all of the evidence, including Dr. Wright's records, and was not persuaded that Berryman had any significant cervical condition prior to the work injury. Even assuming Dr. Heilig did not know of the prior reference to neck complaints in Dr. Wright's records, we cannot conclude Dr. Heilig had a history so inaccurate or incomplete as to render it lacking in probative value.

We believe the ALJ's findings are sufficient. While the ALJ's decision must effectively set forth adequate findings of fact from the evidence upon which his ultimate conclusions are drawn so the parties are reasonably apprised of the basis of the decision, he is not required to engage in a detailed explanation of the minutia of his reasoning in reaching a particular result. Big Sandy Community Action Program v. Chaffins, 502 S.W.2d 526 (Ky. 1973); Shields v. Pittsburg and Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982). While Gate is able to identify evidence that could have supported a finding in

its favor, such evidence is insufficient to require reversal on appeal.

Gate next argues the ALJ erred in finding unpaid medical expenses were work-related and compensable. Gate contends the bills from Injured Workers' Pharmacy ("IWP") should be deemed non-compensable because Berryman failed to submit any medical records substantiating the basis for the prescriptions. Gate observes the provider names are partially redacted and some prescriptions are from the Pain Treatment Center for medication Berryman was taking prior to the work incident. Gate notes the prescription log sheet from IWP reveals prescriptions for Mobic, Percocet, Ambien, and two different muscle relaxers. Further, Gate notes documentation submitted by Berryman from IWP includes charges for Oxycodone (Percocet), Meloxicam (Mobic), Zolpidem Tartrate (Ambien), and Skelaxin. Gate asserts there is no way to determine why the medications were prescribed and the only reasonable inference to be drawn from the records is that the medications were being prescribed for pre-existing problems.

The medical expenses at issue were incurred after the carrier ceased paying medical expenses following Dr. Jenkinson's examination. Berryman testified his neck and shoulder conditions remained painful following Dr.

Jenkinson's examination, and he continued to have a tremor and cramps in his right arm. He also testified he continues to have spasms in his neck. Dr. Tibbs prescribed Neurontin for the nerve injury. While Gate notes Berryman took medication for his low back condition prior to the work injury, that does not obviate the fact he is entitled to medical treatment for his pain and spasms produced by the work injury. The ALJ could reasonably find the medical treatment at issue was related to the work injury, and is reasonable and necessary for the cure and/or relief from the effects of the injury. Berryman testified all of the travel expenses he submitted were incurred for treatment related to the work injury. His testimony regarding the travel expenses is uncontroverted.

Accordingly, the February 21, 2013 Opinion, Award and Order rendered by Hon. Edward D. Hays, Administrative Law Judge and the April 18, 2013 Order on Petition for Reconsideration are **AFFIRMED**.

ALL CONCUR.

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