Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: December 23, 2013

CLAIM NO. 201283206

SURVEY ANALYSIS PETITIONER

VS. **APPEAL FROM HON. CHRISTOPHER M. DAVIS, ADMINISTRATIVE LAW JUDGE**

STANLEY STIGALL
and HON. CHRISTOPHER M. DAVIS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

RECHTER, Member.

Survey Analysis appeals from the July 16, 2013 Opinion and Order of Hon. Chris Davis, Administrative Law Judge ("ALJ") awarding Stanley Stigall income and medical benefits for a low back injury. Survey Analysis also appeals from an August 13, 2013 Order denying its petition

for reconsideration. On appeal, Survey Analysis challenges the ALJ's findings as unsupported by substantial evidence. For the reasons set forth herein, we affirm.

Stigall began working for Survey Analysis in 2001 as a pipeline inspector. His position required him to walk gas lines and document problems, while wearing a twenty to thirty pound backpack. On April 24, 2012, Stigall was checking for leakage when his heel caught the edge of the sidewalk and he fell backwards. He reported the accident and was advised to go home for the day. He attempted to work the following day, but was unable.

Two days after the injury, Stigall visited the St. Claire Regional Medical Center and reported back and left leg pain. X-rays showed no evidence of acute osseous abnormality and minimal osteophytes at L4 and L5. He was released with the diagnosis of acute lumbar and right shoulder strains, and was restricted from strenuous activities.

When his pain did not improve, Stigall visited Dr. Gregory Snider on June 28, 2012. Dr. Snider diagnosed a lumbar strain with broad based disc protrusion/neural foraminal stenosis and right shoulder strain. He was restricted to light duty and advised to pursue physical therapy.

Dr. Snider also referred Stigall to Dr. Dirk Franzen, who examined him on July 10, 2012. Dr. Franzen ordered an MRI of the lumbar region, which revealed a very small foraminal lateral disc protusion at L4-L5. His impression was Stigall experienced a lumbar strain, and may suffer from minor disc abnormalities. He recommended injections and light duty work.

Stigall continued to visit Dr. Franzen, complaining of ongoing pain. Dr. Franzen recommended a second injection, however, the insurance carrier denied the request. He also recommended a functional capacity evaluation, which was performed on October 22, 2012. The results of the evaluation indicated non-organic pain responses and sub-maximal effort. Upon review of the evaluation results, Dr. Franzen released Stigall to medium duty. He placed Stigall at maximum medical improvement ("MMI") as of October 24, 2012 and assigned a 7% whole person impairment according to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides").

Three independent medical evaluations ("IME") were conducted. Dr. Michael Best evaluated Stigall on December 4, 2012 at Survey Analysis' request. Dr. Best diagnosed resolved lumbosacral sprain/strain with no long

term or permanent harmful changes. He found no impairment of the whole person according to the AMA Guides.

Dr. James Owen conducted an IME on February 26, 2013 at Stigall's request. Dr. Owen diagnosed persistent back pain with non-verifiable radicular symptomology, and suspected Stigall might be experiencing radiculopathy, for which a second opinion was recommended. He did not believe Stigall had reached MMI, and thought therapeutic injections would be appropriate. Referencing the AMA Guides, he assigned a 7% impairment rating.

Dr. Rick Lyon performed an IME on March 28, 2013, at Survey Analysis' request. Dr. Lyon concluded Stigall had suffered a lumbosacral strain as a result of the work injury, which had resolved. He agreed with Dr. Franzen that Stigall had reached MMI as of October 22, 2014, and did not have permanent impairment as a result of the accident.

At the final hearing, a central issue was whether Stigall suffered from a pre-existing low back condition. During his testimony, he denied having been treated previously for low back pain, and also reported no prior low back pain or treatment to Drs. Owen and Best. However, Survey Analysis submitted treatment records from New Hope Clinic and St. Joseph Medical Systems indicating Stigall

had been treated in 2005, 2006, 2009, and 2010 for pain in his legs, hips and back. These treatment records were provided to Dr. Lyon prior to the IME, though not provided to Drs. Owen and Best. When cross-examined about his prior medical visits for low back pain, Stigall repeatedly stated he could not recall receiving any treatment.

In the July 16, 2013 Opinion and Order, the ALJ acknowledged Stigall's prior medical history, and that he was "less than forthright" in his deposition and final hearing testimony. However, the ALJ also noted no evidence had been submitted Stigall had ever missed work due to a low back condition, and he had not previously been assigned an impairment rating. Ultimately, the ALJ concluded any prior condition was not active and ratable on April 24, 2012. As such, there was no exclusion for a pre-existing condition.

Relying on the opinions of Drs. Franzen and Owen, the ALJ found Stigall had suffered a work-related injury which resulted in a 7% whole person impairment. He further found Stigall lacked the capacity to return to his prior employment as a gas line inspector. The ALJ awarded temporary total disability benefits, permanent partial disability benefits, and medical benefits. Survey Analysis filed a petition for reconsideration, raising the same

issues it now raises on appeal, which was denied by order dated August 13, 2013.

Though Survey Analysis identifies two arguments on appeal, both are essentially a challenge to the ALJ's conclusion Stigall did not suffer from a pre-existing active condition. First, Survey Analysis directs our attention to Cepero v. Fabricated Metals, 132 S.W.3d 839 (2004). In that case, a medical opinion could not be considered substantial evidence because the medical history provided to the evaluating physician was substantially inaccurate and incomplete. Survey Analysis argues the ALJ may not rely on the opinions of Drs. Owen and Franzen, because neither were provided records of Stigall's previous treatment for low back pain. In the second, related argument, Survey Analysis argues the evidence compels a finding Stigall suffered a pre-existing active condition.

Addressing Survey Analysis' initial challenge, we disagree Stigall's situation is analogous to Cepero. In Cepero, the claimant alleged a work related injury to his left knee. However, he failed to disclose to his treating physicians that he had previously broken his left knee, and had been confined to a wheelchair for three months as a result. In fact, the injury was significant enough to

warrant surgical intervention, which had been recommended but never performed.

In this case, the medical records submitted by Survey Analysis document Stigall's prior treatment for low back pain, and included reference to "chronic low back pain" and a prior lumbar MRI. Further, Stigall repeatedly indicated he could not recall having received any prior treatment for back pain, even when confronted with medical records from New Hope and St. Joseph.

However, as the ALJ noted, there were no records submitted indicating Stigall had been treated for low back pain after December 1, 2011, nearly five months before his work accident. No evidence was presented of a definitive diagnosis or an identified low back condition. The ALJ also noted Stigall had never previously been assigned an impairment rating. Finally, the ALJ considered the fact no evidence was submitted Stigall had missed any days of work for low back pain prior to the date of injury. These circumstances clearly distinguish the present matter from Cepero.

"Substantial evidence" is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971). We

do not believe the evidence of Stigall's prior treatment establishes a condition so significant, as to render the medical opinions of Drs. Best and Franzen unreliable.

We next consider whether the evidence, when considered as a whole, compels a finding Stigall suffered a pre-existing active condition. "To be characterized as active, an underlying pre-existing condition must be symptomatic *and* impairment ratable pursuant to the AMA Guides immediately prior to the occurrence of the work-related injury." Finley v. DBM Technologies, 217 S.W.3d 261, 265 (Ky. App. 2007)(emphasis original). The burden of proving the existence of a pre-existing condition falls on the employer. Wolf Creek Collieries v. Crum, 673 S.W.2d 735, 736 (Ky. App. 1984). When the employer fails to satisfy that burden, the question on appeal is whether the evidence compels a different result. REO Mechanical v. Barnes, 691 S.W.2d 224, 226 (Ky. App. 1985) *superseded on other grounds by statute as stated in* Haddock v. Hopkinsville Coating Corp., 62 S.W.3d 387 (Ky. 2001).

Here, the ALJ concluded Stigall's prior condition was not active and ratable prior to the work injury. He based this conclusion on the fact Stigall had not been treated for back pain in the five months prior to the work injury, had not missed any days of work for back pain, and

had received no impairment rating for a back condition prior to the injury. While Stigall has pointed to significant evidence in the record which might support a different result, we are unable to agree the evidence is so overwhelming no reasonable person would reach the same result. Id. The existence of evidence supporting a different outcome is not an adequate basis for reversal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974).

For the foregoing reasons, the July 16, 2013 Opinion and Order rendered by Hon. Chris Davis and the August 13, 2013 Order denying Survey Analysis' petition for reconsideration are hereby **AFFIRMED**.

ALL CONCUR.

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