Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: February 7, 2020

CLAIM NO. 201800869 & 201779211

FILLIPPE BAILEY PETITIONER

VS. **APPEAL FROM HON. R. ROLAND CASE, ADMINISTRATIVE LAW JUDGE**

MILLER TRANSPORTATION INC.
and HON. R. ROLAND CASE,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

STIVERS, Member. Fillippe Bailey ("Bailey") appeals from the August 23, 2019, Opinion, Award, and Order and the September 16, 2019, Order rendered by Hon. R. Roland Case, Administrative Law Judge ("ALJ") awarding temporary total disability benefits, permanent partial disability benefits and medical benefits for a lumbar spine

injury. The ALJ dismissed Bailey's claim for an alleged cervical injury.[1] On appeal, Bailey argues the ALJ erred in failing to find a cervical injury. We affirm.

BACKGROUND

Bailey testified by deposition on August 20, 2018, and at the hearing held June 27, 2019. Bailey, who was fifty-nine years old at the time of his deposition, has been a type II diabetic for twenty years. Bailey began working as a bus driver for Miller Transportation, Inc. in 2011. Bailey drove for eight to ten hours per day and was responsible for handling the passengers' luggage. Bailey testified he was loading heavy luggage from another tour bus into his bus on May 23, 2017. As he was pulling a piece of luggage out of the bus he felt pain in his lower back, shoulders and neck. Once the luggage was loaded, he finished his route. Bailey indicated he was having pain radiating from his neck to his shoulders and lower back. The following morning he had pain in his left lower back and hips as well as his left leg. He finished his trip to Louisville.

Records from Hardin Memorial Hospital reflect that Bailey was treated in the emergency department on May 24, 2017. The triage nurse noted a chief complaint of left lower extremity pain and that "This occurred yesterday (left hip pain, neck down to lower back pain, from lifting heavy luggage yesterday)." On that same date, Dr. David Rodriguez, the ER physician, noted chief complaints of back pain, left leg pain and left hip pain. On physical examination, he noted a normal inspection of the neck, which was non-tender with painless range of motion. Examination of the

[1] An occupational disease claim was consolidated with Bailey's injury claim, but it is not a subject of this appeal.

back revealed mild vertebral point tenderness over the lumbar spine, mild soft tissue tenderness in the left and central lumbar area, limited range of motion in the back, and "no CVA tenderness." The radiology report, including x-rays of the lumbar spine and hip, lists the reason for the visit as "WC-NEC/BACK/HIP PAIN." A May 24, 2017, ER Department "Workers' Compensation Evaluation Form" signed by Bailey notes his lumbar spine is tender on exam, radiating to the left hip. The form includes a diagnosis of lumbar strain, sciatica, and arthritis.

Bailey treated at Patel Medical Center beginning on May 26, 2017. His chief complaint was noted as left hip and back pain. Bailey provided a history of experiencing a pull in his back while unloading luggage. Towards the end of the day, Bailey was experiencing back pain. He returned to work the next day and "continued to have pain." He left work, went to the emergency room, and was given an injection. Dr. Surya S. Patel noted Bailey continues to have pain which radiates down his left hip and leg. Dr. Patel diagnosed low back pain and ordered an MRI of the lumbar spine. Bailey returned on June 6, 2017, with complaints of back pain. Dr. Patel diagnosed: "1) low back pain, 2) radiculopathy, lumbosacral region."

Records from Dr. Thad Jackson and Erica Greenwell PA-C reflect Bailey was seen on July 31, 2017, for complaints of low back pain radiating to the left leg with tingling and numbness sensation after the work injury on May 23, 2017. Greenwell noted, "Pt had other complaints of neck pain but was instructed to follow up with PCP as workers comp injury is for low back pain only." Greenwell also noted, "He also complains of neck pain since this injury with pain down into the hands with paresthisias." On February 15, 2018, Dr. Jackson saw Bailey in order to provide an

impairment rating. His assessment was lumbago/low back pain, lumbar spinal stenosis, sciatica, and synovial cyst, right at L3-4. Dr. Jackson assessed a 13% impairment rating for the lumbar spine pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"). He recommended restrictions of no lifting greater than 20-30 pounds, no excessive bending or twisting at the waist, and the ability to change positions frequently. An August 17, 2018, report indicates Bailey complained of low back pain with intermittent radiation of pain to the left leg and neck pain causing headaches. Paresthesias were noted in the arms, worse from the elbows down to the hand, with pain from the neck to the hands following a work injury of May 23, 2017, when Bailey was lifting suitcases at work. Dr. Jackson diagnosed lumbago, low back pain, lumbar spinal stenosis, sciatica, synovial cyst L3-L4, hand paresthesia and cervicalgia.

Dr. Ellen Ballard performed an independent medical evaluation ("IME") on March 20, 2019. Dr. Ballard noted a history of diffuse neck and back complaints and degenerative disc disease, not work-related. Bailey had neck pain commencing several weeks after the reported work injury. Dr. Ballard stated Bailey might have carpal tunnel or diabetic neuropathy not related to his work. Dr. Ballard diagnosed a temporary aggravation of Bailey's pre-existing active lumbar condition as a result of the May 23, 2017, incident. Dr. Ballard opined Bailey had a 0% impairment rating pursuant to the AMA Guides related to the work incident. She believed Bailey could return to his pre-injury employment. She concluded the subjective complaints of pain were excessive when compared to the objective findings, indicating positive Waddell signs of secondary gain. Dr. Ballard opined Bailey does not require any

permanent restrictions due to the work incident. Dr. Ballard noted Bailey had no cervical spine complaints until several weeks following the work incident. Dr. Ballard further noted Bailey had previously treated with Dr. Jackson due to lumbar spine problems. She opined a 5% impairment for a pre-existing lumbar spine condition would be appropriate. Dr. Ballard disagreed with Dr. Jules Barefoot's methodology in assigning his impairment rating. She stated there is no evidence the cervical spine was affected by the work injury, as he did not have cervical spine complaints until several weeks after the reported work incident. Dr. Ballard opined the range of motion demonstrated during her examination did not correlate with Dr. Barefoot's report.

Dr. Gregory T. Snider performed an IME on October 2, 2018. Dr. Snider diagnosed low back strain with left sciatica on May 23, 2017, with no evidence in the record to indicate significant, pre-existing, ongoing low back problems. However, Dr. Snider opined Bailey did not suffer an injury to his neck, upper back or mid-back on May 23, 2017. Dr. Snider noted significant pre-existing multi-level degenerative changes and spinal stenosis not caused by the May 23, 2017, injury. He believed Bailey suffered a lumbar sprain or strain superimposed on pre-existing multi-level degenerative change. Dr. Snider opined the May 23, 2017, incident caused a soft tissue strain or sprain, but did not cause any change involving the cervical or thoracic spine. Bailey had pre-existing and active impairment due to the advanced degree of degenerative changes in the spine. Dr. Snider assessed a 5% whole person impairment pursuant to the AMA Guides attributable to the work injury. Dr. Snider stated Bailey has non-injury-related neuropathy of the arms as well as hip arthritis. Dr. Snider assigned a thirty-pound lifting limit with no repetitive bending or lifting. In a

December 7, 2018, supplemental report, Dr. Snider opined a proposed MRI of the cervical spine and an EMG/NCV are not related to the work injury because the medical records clearly show Bailey complained solely of low back symptoms for over two months before any cervical complaints were documented. In a second supplemental report on February 7, 2019, Dr. Snider stated he reviewed Dr. Barefoot's January 8, 2018, evaluation, and his review did not change the conclusions expressed in the October 2, 2018, report.

Dr. Barefoot performed an IME on January 8, 2019. Bailey reported his neck pain became progressively worse after the work incident. Dr. Barefoot diagnosed degenerative disc disease of the lumbar and cervical spine with ongoing non-verifiable radicular complaints. Dr. Barefoot felt the complaints of paresthisias in the hands are related to a manifestation of his diabetes with a peripheral neuropathy. Dr. Barefoot felt the complaint of ongoing cervical pain with radiation is a manifestation of Bailey's cervical disorder brought on by his work accident. He explained Bailey did not have an active impairment ratable condition of the lumbar or cervical spine prior to the work incident. Dr. Barefoot assessed an 8% impairment for the lumbar spine condition and 5% impairment for the cervical spine condition for a combined 13% impairment rating.

After finding Bailey is not totally disabled, the ALJ relied on Dr. Jackson's assessment in finding Bailey has a 13% impairment rating due to the May 23, 2017, lumbar injury. The ALJ's findings regarding the alleged cervical injury are as follows:

> Concerning the alleged cervical injury resulting from the May 23, 2017 incident, the ALJ is not persuaded the

> plaintiff sustained a permanent injury to his cervical area. Only Dr. Barefoot assigned any impairment to the cervical area. The ALJ notes Dr. Jackson did not assign an impairment to the cervical area. Dr. Snider and Dr. Ballard both found no impairment or found that the alleged cervical condition was not work related. The ALJ is persuaded by the opinion of Dr. Snider and Dr. Ballard that the plaintiff did not sustain a cervical injury resulting from the work related accident of May 23, 2017 and his claim for permanent disability to the cervical area is therefore dismissed.

The ALJ found Bailey did not retain the physical capacity to return to the type of work he was performing at the time of his injury and was entitled to the three multiplier and an additional .4 multiplier based upon his age.

Bailey filed a petition for reconsideration seeking additional findings regarding the determination he was not permanently totally disabled and challenging the ALJ's findings regarding the occurrence of a cervical injury.

Concerning the alleged cervical injury, the ALJ provided the following:

> . . . . The Plaintiff also requests a review of the finding of no cervical injury. As indicated in the original Opinion, this is supported by the opinions of Dr. Ballard and Dr. Snider. The Plaintiff's treating physician, Dr. Jackson, assigned no impairment for the cervical area. The mechanism of the injury would certainly be more consistent with a lumbar injury rather than a cervical injury. In any event, the ALJ again relies on the opinions of Dr. Ballard and Dr. Snider to find no cervical injury.

On appeal, Bailey argues the ALJ erred in failing to find a cervical injury. Bailey contends the opinions of Dr. Snider and Dr. Ballard do not constitute substantial evidence as their opinions are based on an incorrect and incomplete medical history. Citing Cepero v. Fabricated Metals Corp., 132 S.W.3d 839 (Ky. 2004), Bailey argues their opinions are corrupt, erroneous, and do not constitute

substantial evidence. Bailey notes the opinions of Dr. Snider and Dr. Ballard concerning causation are predicated on the history of no neck complaints until two months after the injury. However, Bailey notes the records from Hardin Memorial Hospital on May 24, 2017, document "neck down to lower back pain, from lifting heavy luggage yesterday." Bailey also notes he reported neck pain to the emergency room physician. Bailey contends the fact Dr. Jackson did not assess an impairment rating for a cervical condition does not indicate he concluded there was no cervical injury. Bailey observes that Dr. Jackson noted neck pain with pain into the hands with paresthesia. He also recommended an MRI and sought approval to treat the cervical condition. Bailey contends the evidence compels a finding he sustained a work-related neck injury on May 23, 2017.

ANALYSIS

As the claimant in a workers' compensation proceeding, Bailey had the burden of proving each of the essential elements of his cause of action. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because he was unsuccessful in that burden, the question on appeal is whether the evidence compels a different result. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Compelling evidence" is defined as evidence that is so overwhelming, no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985) *superseded by statute on other grounds as stated in* Haddock v. Hopkinsville Coating Corp., 62 S.W.3d 387 (Ky. 2001).

As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308

(Ky. 1993). Similarly, the ALJ has the sole authority to judge all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/ Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). 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). Mere evidence contrary to the ALJ's decision is inadequate to require reversal on appeal. Id. In order to reverse the decision of the ALJ, it must be shown there was no substantial evidence of probative value to support his decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to the weight and credibility to be afforded the evidence or by noting reasonable inferences which otherwise could have been drawn from the record. Whittaker v. Rowland, supra. As long as the ALJ's ruling with regard to an issue is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, supra.

Bailey's reliance on Cepero v. Fabricated Metals Corp., supra, is misplaced. This case is distinguishable from Cepero, which was an unusual case involving not only a complete failure to disclose, but also affirmative efforts by the employee to cover up a significant injury to the left knee 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 with an adequate prior history opined Cepero's left knee impairment was not work-related but, instead, was attributable to the previous non-work-related injury. In Cepero, the Supreme Court found a medical opinion erroneously premised on the claimant's egregious omission of directly relevant past medical history was sufficient to mandate reversal based on an insufficient history received by the medical expert. The Court held a "medical opinion predicated upon such erroneous or deficient information that is completely unsupported by any other credible evidence can never, in our view, be reasonably probable." Id.

After reviewing the evidence and the ALJ's decision, we cannot conclude Dr. Snider and Dr. Ballard were provided a history so inaccurate or incomplete as to render their opinions lacking in probative value. Dr. Snider and Dr. Ballard were provided with the records from the Hardin Memorial ER, Dr. Patel, and Dr. Jackson. Dr. Snider also reviewed Dr. Barefoot's IME report. Thus, Dr. Snider and Dr. Ballard were informed of the history of which Bailey claims they were unaware.

The normal examination of the cervical spine at the ER and the absence of cervical complaints in the May 26, 2017, and June 6, 2017, notes of Dr. Patel are medical evidence supporting Dr. Snider and Dr. Ballard's statements that Bailey did not have cervical complaints at the time of the work incident. The ALJ could reasonably conclude the physicians simply disagreed regarding the significance of the reference to "neck down to lower back pain" recorded by the triage nurse. When the medical evidence is conflicting, the ALJ enjoys the discretion to determine upon which

opinion to rely. Further, the doctors could reasonably infer the reference to "neck down to lower back pain" can be interpreted as defining the range of pain in the spine, and not necessarily the cause of the pain. Again, we note the ER doctor did not make a diagnosis related to the cervical spine and found the neck was non-tender with painless range of motion. The ER physician's examination, standing alone, constitutes substantial evidence sufficient to support a finding that Bailey did not sustain a cervical injury due to the May 23, 2017, work incident.

While Bailey has identified evidence supporting a different conclusion, there is substantial evidence which supports a contrary conclusion. As such, the ALJ acted within his discretion in deciding upon which evidence to rely, and it cannot be said the ALJ's conclusions are so unreasonable as to compel a different result. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

Accordingly, the August 23, 2019, Opinion, Award and Order and the September 16, 2019, Order rendered by Hon. R. Roland Case, Administrative Law Judge, are **AFFIRMED**.

ALVEY, CHAIRMAN, CONCURS.

DISTRIBUTION:

COUNSEL FOR PETITIONER:

HON STEPHANIE WOLFINBARGER **LMS**
640 SOUTH FOURTH STREET STE 400
LOUISVILLE KY 40202

COUNSEL FOR RESPONDENT:

HON THOMAS L FERRERI **LMS**
614 W MAIN ST STE 5500
LOUISVILLE KY 40202

ADMINISTRATIVE LAW JUDGE:

HON R ROLAND CASE **LMS**
MAYO-UNDERWOOD BUILDING
500 MERO ST 3RD FLOOR
FRANKFORT KY 40601