Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: January 18, 2019

CLAIM NO. 201660723

IVAN JOHNSON PETITIONER

VS. **APPEAL FROM HON. W. GREG HARVEY, ADMINISTRATIVE LAW JUDGE**

HAIER US APPLIANCE SOLUTIONS and
HON. W. GREG HARVEY,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

ALVEY, Chairman. Ivan Johnson ("Johnson") appeals from the Opinion and Order rendered July 17, 2018 by Hon. W. Greg Harvey, Administrative Law Judge ("ALJ"), finding he failed to prove his bilateral upper extremity conditions are due to his work activities with Haier U.S. Appliance Solutions ("Haier"), and dismissing his claim. Johnson also appeals from the August 9, 2018 Order overruling his petition for reconsideration.

Johnson argues the ALJ abused his discretion in denying his claim for benefits as a matter of law. Johnson essentially argues the opinions of Dr. Rodrigo Moreno, his treating physician, and Dr. David Changaris are more compelling than those expressed by Dr. Thomas Gabriel. Johnson also argues Haier failed to prove his diabetic condition was symptomatic and impairment ratable prior to the work injury. Johnson asserts his diabetic condition was a dormant degenerative condition brought into disabling reality by the work injury resulting in a permanent impairment. We disagree. The ALJ performed the appropriate analysis and because substantial evidence supports his decision, we affirm.

Johnson filed a Form 101 alleging he developed bilateral wrist and hand numbness caused by repetitive trauma while working for Haier as an assembly line worker. Johnson provided November 17, 2016 as the date of injury.

Johnson testified by deposition on March 16, 2018, and at the final hearing held May 23, 2018. Johnson was born in June 1962, and is left hand dominant. Johnson's work history includes work as a security guard, swimming pool installer/laborer, cook, working foreman for irrigation companies, truck driver, manager at fast food restaurants, forklift operator and assembly line worker. Johnson also served in the United States Army from 1983 to 1986.

Johnson's Form 104 indicates he began working for Haier on October 1, 2015 where he performed at least four different jobs until he stopped working there on November 17, 2016. At the hearing, Johnson indicated the first job he performed at Haier entailed screwing hardware onto dishwasher frames. The second job required him to hang pumps. The third job was on the blacksplash and he rotated

every two hours between four positions. Johnson testified all of the jobs required repetitive use of both his upper extremities and pneumatic tools.

Johnson began the fourth job in August 2016. He was performing that job when his bilateral upper extremities symptoms developed. The fourth job consisted of routing a hose on the right side of a dishwasher unit with his right hand. While holding the hose with his right hand, he used his left hand to install two clips to secure it and apply tape to affix it to the unit's side. Johnson estimated he performed those tasks every seventeen seconds during his shift handling approximately twelve hundred units per day. At his deposition, Johnson indicated the fourth job did not require the use of an air gun.

Johnson testified he was diagnosed with Type II diabetes when he was forty years of age. At his deposition, Johnson stated he treats his diabetic condition with medication. He also takes an injection in the evening. Johnson also takes medication for blood pressure and cholesterol. Johnson testified he has had multiple surgeries involving both of his feet, but stated they are unrelated to his diabetic condition. Johnson testified he never had any issues with either upper extremity prior to his employment with Haier.

Johnson agreed that he complained of right wrist symptoms to personnel at the Haier in-house medical clinic soon after his employment began in October 2015. Johnson explained he had never worked on a moving assembly line and was simply getting used to the nature of the job. Johnson testified his right hand symptoms resolved after one or two therapy sessions and he continued with his normal job duties.

Johnson experienced numbness and coldness in both hands in the evenings after work between October 2015 and November 2016, but he did not seek medical attention because he assumed his symptoms would resolve on their own and did not interfere with his job performance. Johnson's symptoms worsened and by November 17, 2016, his left thumb was severely calloused and he could not close or use his left hand. Johnson initially treated at the in-house medical clinic and began complaining of right upper extremity symptoms soon after. Johnson was referred to Dr. Moreno. Electrodiagnostic testing confirmed bilateral carpal and cubital tunnel syndrome. Dr. Moreno performed surgery to the upper right extremity on March 21, 2017, which provided Johnson no relief. Because of this, Dr. Moreno determined Johnson is not a surgical candidate for his left upper extremity. Johnson indicated his primary care physician referred him to a pain management physician, but it is unclear whether he treated with him. Johnson testified he currently experiences bilateral hand pain, coldness, numbness, and lack of any grip or strength. His left upper extremity is worse than his right. Johnson believes he is unable to return to his former job with Haier. Johnson has not worked anywhere since November 17, 2016.

Johnson attributes his bilateral upper extremity condition to the repetitive nature of his job with Haier. He attributed his condition to the use of air tools, mostly screw guns, from his first three jobs with Haier through August 2016. He also attributed his condition to his fourth and last job with Haier he performed from August 2016 through November 2016.

The records indicate Johnson treated at Haier's in-house clinic and with Dr. Moreno for his bilateral upper extremity complaints. Johnson went to the

clinic on October 19, 2015 reporting that, "When I woke up Thursday morning I noticed my right hand and wrist were numb from hanging approximately 1200 motors per shift." The treating nurse documented a history of Type 2 diabetes, hypertension, hyperlipidemia, two angioplasties, and recent foot surgery. His medication regimen included Metformin. Johnson received conservative treatment for his right wrist and hand complaints, and reported resolution of his symptoms by October 22, 2015. Johnson returned to the clinic in June 2016, September 2016, and October 2016 for complaints unrelated to his upper extremities. In the October 2016 note, the treating nurse noted Johnson's history of diabetes, and that he had been on insulin until about six months ago, and is now taking Metformin.

On November 17, 2016, Johnson complained of left thumb numbness, splitting, cracking and pain radiating into his left wrist, as well as difficulty gripping with his left hand, which he attributed to repetitively routing hoses and pushing clips. The clinic nurse noted Johnson had performed this particular job for three months, and his symptoms had gradually worsened. The nurse noted Johnson has Type II diabetes for which he is prescribed Metformin. Johnson's left hand was treated conservatively with padding, a splint and restrictions. On November 21, 2015, Johnson additionally reported right hand pain, numbness, tingling, and coldness that he attributed to his repetitive work activities and overcompensation for his left wrist injury. Johnson was referred to Kleinert Kutz. Throughout his treatment with Dr. Moreno, Johnson continued to visit the in-house clinic.

Johnson began treating with Dr. Moreno on November 28, 2016, and complained of bilateral hand pain, coldness, numbness and tingling beginning two

weeks prior. Dr. Moreno noted Johnson works on an assembly line and constantly places a metal clip with his thumb. Dr. Moreno further noted Johnson, "took insulin for 16 years," lost over one hundred pounds, has diabetes for which he takes Metformin, also has tingling and numbness in his feet, and lost a toe due to a MRSA infection after surgery. Dr. Moreno administered injections into both wrists, provided wrist splints, ordered electrodiagnostic testing, and imposed restrictions. The December 6, 2016 EMG/NCV report by Dr. Vasudeva Iyer notes an abnormal study suggestive of moderately severe median nerve neuropathy at the wrist and ulnar nerve neuropathy at the elbow consistent with bilateral carpal and cubital tunnel syndrome.

Dr. Moreno also diagnosed moderately severe bilateral carpal and cubital tunnel syndrome. Dr. Moreno noted he "explained his diabetes can be contributing on his symptoms" and recommended surgery for the right upper extremity. On March 21, 2017, Dr. Moreno performed a right cubital tunnel release, ulnar nerve anterior transposition and carpal tunnel release. Dr. Moreno subsequently ordered physical therapy, prescribed Neurontin, and restricted Johnson's activities. Despite surgery, Johnson experienced no relief in his right hand/wrist symptoms. Dr. Moreno requested a functional capacity evaluation ("FCE") for both upper extremities and found Johnson attained maximum medical improvement ("MMI") on September 11, 2017. He assessed a 23% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides") for the right upper extremity and a 29% for the left upper extremity. The August 21, 2017 FCE notes

Johnson is able to perform sedentary-light work. It was recommended that Johnson avoid lifting over ten pounds, repetitive/forceful gripping or pinching, or use of vibratory or heavy power tools.

Dr. Moreno completed a Form 107 on March 19, 2018. Dr. Moreno reviewed the treatment he rendered to Johnson, and the diagnostic studies obtained in December 2016. He diagnosed bilateral carpal tunnel syndrome, bilateral cubital tunnel syndrome and Type II diabetes mellitus. Dr. Moreno marked "yes" to the question of whether the work event is the cause of the impairment found, and provided the following:

> Carpal tunnel syndrome can be caused by both repetitive duty and diabetic neuropathy. Cubital tunnel syndrome can be caused by repetitive flexion and extension of the elbow, or by maintaining the elbow in flexed position for an extended period of time. The exact cause of cubital tunnel syndrome does not have a clear etiology.

Dr. Moreno checked "yes" to the question of whether any part of the impairment is due to a cause other than the work event described above, and provided the following explanation:

> I believe diabetic neuropathy is a key contributing factor to his condition, not only in his hands, but also in his feet. The repetitive work he performed at GE contributed to his neuropathy. In my experience, patients acquire this degree of severe compression neuropathy over more than 10 years.

Dr. Moreno again assessed a 23% impairment rating for the right upper extremity and a 29% for the left upper extremity, for a combined 45% impairment rating, pursuant to the AMA Guides. Dr. Moreno indicated it is unknown whether Johnson had an active impairment prior to the work injury and

declined to apportion any of the 45% impairment to a prior active condition. Dr. Moreno opined Johnson does not have physical capacity to return to the type of work performed at time of injury and assigned permanent restrictions consistent with the FCE.

Johnson also filed the February 26, 2018 report prepared by Dr. Changaris after his evaluation. He noted the alleged cumulative trauma injury to Johnson's bilateral upper extremities, and reviewed the medical records. Dr. Changaris noted, "the client reported a history of diabetes." Dr. Changaris diagnosed: 1) bilateral carpal tunnel syndrome, status post-surgery, "due to the work-related repetitive motion injury on record"; and 2) pain "due to the work-related repetitive motion injury of record." Dr. Changaris assessed a 30% upper extremity impairment for each upper extremity and a 3% whole person impairment for pain, which converts to a combined 38% whole person impairment pursuant to the AMA Guides. Under causation, Dr. Changaris stated, "[b]ased upon client history, medical records, and physical examination, the above impairment is solely due to the work-related injury of record." Dr. Changaris opined Johnson reached MMI, recommended additional treatment and assigned permanent restrictions.

On December 8, 2016, a physician at the Haier in-house clinic, Dr. Dustin Hamilton, opined that Johnson's job with hose routing and clip placement is not consistent with causing either carpal or cubital tunnel syndrome, and would not be possible in the time period Johnson was on the job. On May 5, 2017, after the right upper extremity surgery, Dr. Hamilton noted, "There is some component of his diabetes involved in this situation. If he does not respond well to the surgery, it may

be because of the diabetes and it may also be the CTS being more long-lasting than just during his work" at Haier.

Haier filed the report from the March 21, 2018 evaluation performed by Dr. Gabriel. He reviewed Johnson's work duties and the medical records from Haier and Kleinert Kutz. Dr. Gabriel noted Johnson has a longstanding history of diabetes, although no medical records from Johnson's primary care physician had been provided or reviewed. He noted Johnson's current medication includes insulin and Metformin for diabetes. Dr. Gabriel diagnosed: 1) diabetic peripheral neuropathy; 2) chronic median nerve neuropathy bilateral wrists, status post right carpal tunnel release; and 3) chronic ulnar nerve neuropathy, bilateral elbows, status post right cubital tunnel release.

Dr. Gabriel noted that although he did not have available for review any prior records addressing Johnson's long-standing diabetic history, "a review of those medical records from his treating occupational medicine doctors and Dr. Moreno suggest a 15+ history of unstable insulin-dependent diabetes, obesity, and diabetic peripheral neuropathy to include numbness and tingling in the feet, as well as BOTH upper extremities." Dr. Gabriel provided the following explanation regarding causation:

> The consistent overall diagnosis with regard to the persistent bilateral upper extremity complaints over the years has remained diffuse peripheral neuropathy confirmed in the upper extremities on 12/6/16 with electrodiagnostic testing demonstrating BOTH an advanced median nerve neuropathy at the wrists and an ulnar nerve neuropathy at the elbows. This confirmed diffuse upper extremity multiple peripheral nerve neuropathy, in addition to the lower extremity subjective symptoms of 'burning and tingling' suggests a significant

> diabetic peripheral neuropathic condition. It was certainly reasonable to assume an additional component of peripheral nerve COMPRESSION in the areas of the carpal and cubital tunnel regions of the upper extremity based on electrodiagnostic testing, but in retrospect, the lack of any significant symptom improvement following surgery would suggest overwhelming diabetic peripheral neuropathic involvement. With the lack of any improvement following the surgery on the right, Dr. Moreno has not advised any decompressive surgery for the left carpal tunnel or cubital tunnel areas. In his recent report on 3/19/18, Dr. Moreno opines 'I believe diabetic neuropathy is a key contributing factor to his condition, not only in his hands, but also in his feet . . . in my experience, patients acquire this degree of severe compression neuropathy over more than 10 years,' which would be in contradistinction to the neuro symptoms being reported in the hands after just two to three weeks of employment. Although the work activities at GE require a certain degree of repetitiveness and initially the use of airguns, it would be my opinion that the proximate cause of the recalcitrant bilateral upper extremity median and ulnar neuropathies is the result of Mr. Johnson's longstanding history of diabetes and complications related to diabetic peripheral neuropathy. The lack of any improvement following right carpal tunnel and cubital tunnel releases would seem to indicate lesser symptoms related to specific areas of nerve compression.

Dr. Gabriel agreed with Dr. Moreno that Johnson reached MMI on September 11, 2017. Dr. Gabriel assessed a 16% impairment rating for the right upper extremity and a 17% impairment rating for the left upper extremity, for a combined 30% whole person impairment rating, pursuant to the AMA Guides. He assigned permanent restrictions and opined Johnson does not retain the physical capacity to return to his work with Haier. Dr. Gabriel emphasized the impairment rating and permanent restrictions are unrelated to his employment with Haier and

are due to Johnson's overall medical condition of diffuse diabetic peripheral neuropathy.

In dismissing the claim based on causation, the ALJ provided the following analysis:

> The primary issue in this claim is whether or not Johnson's residual bilateral upper extremity complaints are the result of a work injury or his diabetic peripheral neuropathy. Both Dr. Moreno and Dr. Gabriel agree Johnson has diabetic peripheral neuropathy. Dr. Moreno characterized Johnson's diabetic peripheral neuropathy as a key factor in his ongoing symptoms. He also noted the severity of Johnson's compression neuropathy would usually take more than ten years to develop. Finally, Dr. Moreno declined offering a carpal tunnel and cubital tunnel release on the left to Johnson.
>
> Dr. Gabriel notes the immediate onset of symptoms in the right upper extremity in October 2015 when Johnson began his work. He also opined the EMG/NCV indicated diffuse upper extremity multiple peripheral nerve neuropathy along with lower extremity symptoms. Given the lack of improvement following Dr. Moreno's surgery to the right upper extremity, Dr. Gabriel maintains Plaintiff's condition is not caused by a work-related cumulative trauma injury but rather his diabetic peripheral neuropathy.
>
> Given these facts, the undersigned finds Dr. Gabriel's opinion persuasive on the issue of causation. Dr. Moreno expressed similar opinions regading[sic] causation but did not apportion Plaintiff's impairment between the work activities and the diabetic peripheral neuropathy. The onset of symptoms is most consistent with a non-work related cause as Dr. Moreno noted one would expect such severe compressive neuropathy to take 10 years to develop—not a year and four months. In addition, the fact that the carpal and cubital tunnel releases did not provide improvement suggests another proximate cause of the neuropathic pain and sensory loss. Dr. Gabriel's opinion is most consistent with those facts and the undersigned finds it persuasive, along with

> Dr. Moreno's comments regarding the role of Plaintiff's diabetic condition.
>
> This[sic] findings require dismissal of Johnson's claim for benefits. In making this finding the undersigned would note Johnson's complaints of discomfort are genuine and he is a credible witness. However, the question of causation is one that requires a qualified medical opinion. Here, Dr. Gabriel is a hand surgeon and has set forth a detailed and well-reasoned analysis regaring[sic] causation and why the original surgeries provided no relief. That opinion is consistent with the loss of sensation in Plaintiff's left fingers even well after he has ceased employment and as reflected in the FCE.
>
> The undersigned likewise acknowledges Dr. Changaris opinion on causation but finds it lacks credibilitiy[sic] in this instance because it neglects to discuss Johnson's diabetic peripheral neuropathy. In this instance, the treating physician certainly recognized that condition as key and for Dr. Changaris to neglect to mention it leaves the undersigned questioning his ultimate conclusions on causation.

Johnson filed a petition for reconsideration requesting the ALJ to reconsider the evidence, essentially making the same arguments he now raises on appeal. The ALJ summarily overruled the petition after finding it amounted to a re-argument of the merits in an order dated August 9, 2018.

On appeal, Johnson argues the ALJ abused his discretion in denying his claim for benefits as a matter of law. Johnson essentially argues Drs. Moreno's and Changaris' opinions are more compelling than those expressed by Dr. Gabriel. Johnson notes Dr. Gabriel only saw him once, while his treating physician, Dr. Moreno, saw him on numerous occasions. He asserts the ALJ mischaracterized the opinions of Dr. Moreno, when he stated that Drs. Moreno and Gabriel expressed similar opinions regarding causation. Johnson asserts this statement is in error, since

Dr. Gabriel found no causal relationship while Dr. Moreno, as well as Dr. Changaris, opined the work injury was work-related. Johnson asserts Dr. Gabriel relied upon Dr. Moreno's records and opinion in forming his opinion.

Johnson also argues the ALJ erred in concluding Dr. Changaris neglected to discuss his diabetic neuropathy. Johnson notes Dr. Changaris stated the client reported a history of diabetes, but "[b]ased upon client history, medical records, and physical examination, the above impairment is solely due to the work-related injury of record." Johnson also noted Dr. Changaris reviewed all relevant medical records.

Johnson discredits the causation opinion of Dr. Gabriel by noting it was based only upon information he reviewed from Dr. Moreno, who attributed at least a portion of his impairment to his work-related duties with Haier. Johnson also notes he was able to perform all of his past jobs despite his diabetic condition up until November 2015.

Johnson also argues Haier failed to prove his diabetic condition was symptomatic and impairment ratable prior to the work injury. Rather, Johnson implies his diabetic condition was a dormant degenerative condition brought into disabling reality by the work injury resulting in a permanent impairment.

As the claimant in a workers' compensation proceeding, Johnson had the burden of proving each of the essential elements of his claim, including causation. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because Johnson was unsuccessful in his 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). The function of the Board in reviewing the ALJ's decision is limited to a determination of whether the findings made by the ALJ are so unreasonable under the evidence they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

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). An ALJ is vested with broad authority to decide questions involving causation. Dravo Lime Co. v. Eakins, 156 S.W.3d 283 (Ky. 2003). 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 not adequate 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 an 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 could otherwise 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.

After careful review, we find the ALJ accurately summarized the evidence. We determine he relied upon substantial evidence in determining Johnson's bilateral upper extremity complaints are the result of his diabetic peripheral neuropathy. We additionally note Johnson had actively treated his diabetes for an extensive period of time prior to his employment with Haier. The ALJ primarily relied upon Dr. Gabriel's opinion, but also noted Dr. Moreno stated one would expect such severe compressive neuropathy to take ten years to develop (not a year and four months). He also noted the carpal and cubital tunnel releases did not provide improvement suggest another proximate cause of the neuropathic pain and sensory loss. Dr. Gabriel's opinion, in conjunction with portions of Dr. Moreno's opinion and the unsuccessful surgery, constitute substantial evidence supporting the determination Johnson's upper extremity condition was not due his work activities with Haier. We find the ALJ acted within the scope of the deference afforded to him, and a contrary result is not compelled.

We acknowledge Johnson is able to point to conflicting evidence supporting his position on appeal. However, the ALJ as fact-finder determines the credibility of the evidence. The ALJ may also choose whom and what to believe when faced with conflicting evidence. The ALJ is not required to afford Dr. Moreno's opinion more weight because he was a treating, rather than an evaluating, physician. Sweeney v. King's Daughters Medical Center, 260 S.W.3d 829 (Ky.

2008). It was the ALJ's prerogative to rely on Dr. Gabriel's opinions. Because we find substantial evidence supports the ALJ's determination regarding causation, and no contrary result is compelled, we affirm.

As a final note, the ALJ was not required to determine whether Johnson's diabetic condition was symptomatic and impairment ratable prior to the work injury pursuant to Finley v. DBM Technologies, 2017 S.W.3d 261 (Ky. App. 2007). This is not a case where the ALJ concluded Johnson sustained a permanent, work-related injury and then was required to engage in a carve-out for pre-existing active impairment pursuant to Finley v. DBM Technologies, supra.

Therefore, the July 17, 2018 Opinion and Order, and the August 9, 2018 Order on petition for reconsideration rendered by Hon. W. Greg Harvey, Administrative Law Judge, are hereby **AFFIRMED.**

ALL CONCUR.

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