

OPINION ENTERED: February 24, 2012

CLAIM NO. 201100355

CHARLES BRANHAM

PETITIONER

VS.

APPEAL FROM HON. R. SCOTT BORDERS,
ADMINISTRATIVE LAW JUDGE

ICG, LLC
and HON. R. SCOTT BORDERS,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

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

STIVERS, Member. Charles Branham ("Branham") appeals from the October 14, 2011, opinion and order of Hon. R. Scott Borders, Administrative Law Judge ("ALJ") dismissing Branham's claim for failure to prove his injuries "are casually related to the effects of by [sic] the March 25, 2009 work-related incident or result from cumulative trauma incurred while working as an underground coal miner for ICG

and manifesting on April 17, 2009." Branham filed a petition for reconsideration, dated October 26, 2011, asserting, in part, as follows:

On page 15 of the Opinion and Order, the Administrative Law Judge states that Dr. Potter did not have the benefit of reviewing the medical records regarding Mr. Branham's prior treatment for carpal tunnel syndrome, bilateral shoulder conditions, as well as bilateral knee condition. He further states: 'Dr. Potter's report reflects that he based his opinion regarding causation entirely on Mr. Branham's history.' Opinion and Order, p.15.

In fact, the report of Dr. Potter dated 5/5/11, specifically shows in the Form 107-I report, under Section C, that 'medical records reviewed' consisted of a review of records listed therein as follows: [text omitted]

Branham's petition for reconsideration was overruled by order dated "the 15th day of November, 2010," from which Branham also appeals. Branham filed a second petition for reconsideration pointing out the ALJ's order ruling on the petition for reconsideration was dated November 15, 2010, instead of November 15, 2011. By order dated November 28, 2011, the ALJ amended the November 15, 2010, order on Branham's petition for reconsideration to reflect the correct date. On appeal, Branham makes the same arguments

asserted in his October 26, 2011, petition for reconsideration.

The Form 101 alleges on March 25, 2009, and April 17, 2009, Branham sustained injuries to "both shoulders, both knees and nerves, [and] both hands" while working for ICG, Inc. ("ICG") as a coal miner. Branham described the injuries as follows:

Cumulative trauma to both shoulders, cumulative trauma to both knees, nerves with last date of work being 4/17/09, injured right shoulder jerking on a pipe wrench on 3/25/09, carpal tunnel syndrome- both hands (4/17/09).

In the October 14, 2011, opinion and order, regarding Dr. Ira Potter's report, the ALJ provided the following summary:

Mr. Branham was evaluated by and submitted the medical report of Dr. Ira Potter. Dr. Potter received a history of the Plaintiff presenting with widespread complaints that he attributes to an approximate 35-year history of underground coal mining. He complains of pain and dysfunction manifested about his left shoulder many years ago, and underwent left shoulder arthroscopic [sic] and [sic] 2001/2002. The pain gradually intensified and necessitated additional surgery in the form [sic] a shoulder replacement in 2004. Mr. Branham complained of his right knee and both his hands becoming symptomatic in 2005 and carpal tunnel release was recommended five years ago, but he declined in favor of corticosteroid injections.

Mr. Branham's right shoulder became symptomatic in the latter part of 2007 and a diagnosis in February 2008 of right shoulder osteoarthritis was made. In April of 2008, he underwent right shoulder hemi-arthroplasty [sic]. In March 2009, his right shoulder condition was exacerbated at work while pulling a pipe wrench. He thereafter underwent physical therapy that improved his shoulder at [sic] his knees, particularly the right, continue to be problematic. In December 2010, Mr. Branham underwent a right total knee replacement and January of 2011, he underwent removal of the hardware in the right knee. He was to be seen in August of 2011 for a left total knee replacement.

Dr. Potter reviewed medical records from Dr. Akers, Dr. Pugh, Dr. Burchett, and reviewed diagnostic studies of Mr. Branham's knees and shoulders. He performed a physical examination. Based on the foregoing, Dr. Potter diagnosed him as having a left shoulder replacement, right shoulder hemiarthroplasty, right total knee replacement, left knee osteoarthritis, history of bilateral carpal tunnel syndrome per electrophysiological testing, and lumbago.

Dr. Potter opined Mr. Branham's impairments were caused by years of cumulative trauma and repetitive strain associated with the heavy physical job demands he encountered throughout his 30+ year history of employment in the coal mining industry. He opined Mr. Branham would have a 62% functional impairment rating, 43% of which should be considered permanent at this time, with the remaining 19% not permanent secondary to Mr. Branham's knees not being at MMI pursuant to the Fifth

Edition of the AMA Guides. He found no active impairment and felt Mr. Branham did not retain the physical capacity to return to the type of work she [sic] was performing at the time of his injury.

The ALJ entered the following conclusions:

In addition, that burden includes supporting medical evidence, where necessary, to prove the occurrence of a work-related injury from a physician who receives an accurate history in order for the testimony to be considered substantial evidence. *Cepero v. Fabricated Medicals Corp.*, 132 S.W.3d 839 (Ky 2004).

In this instance, Branham has argued he suffered injuries to both shoulders, both knees, both wrists, and now suffers from psychological problems resulting from cumulative trauma he incurred while working as the chief electrician for ICG in their [sic] underground coal mines. Branham also alleges on March 25, 2009, he suffered a distinct traumatic event to his right shoulder as a result of using a pipe wrench.

Branham admits that he had prior problems with both shoulders, both knees, and was diagnosed with carpal tunnel syndrome several years ago yet decided not to undergo surgical repair. He did undergo surgical treatment to his shoulders and his knees prior to the alleged work-related incidents. He argues that the cumulative effects of working as a chief electrician for ICG is what caused his current conditions and prevents him from being able to continue working.

Branham supports his position with testimony from Dr. Potter who evaluated him on one occasion and opined that his conditions were causally related to his years of working as an underground coal miner. However, Dr. Potter did not have the benefit of reviewing the medical records regarding Mr. Branham's prior treatment for carpal tunnel syndrome, bilateral shoulder conditions, as well as bilateral knee conditions. Dr. Potter's report reflects that he based his opinions regarding causation on Mr. Branham's history.

ICG argues that Mr. Branham has not met his burden of proving that his bilateral shoulder conditions, bilateral knee conditions, bilateral carpal tunnel syndrome, and psychological condition that [sic] are causally related to either the March 25, 2009, traumatic event or are the result of cumulative trauma due to his work as an underground coal miner manifesting on April 17, 2009.

ICG argues Mr. Branham clearly had pre-existing problems with both knees, and both wrists as evidenced by Mr. Branham's testimony regarding the same as well as the medical testimony of Dr. Corbett who evaluated Mr. Branham at ICG's request. Dr. Corbett opined that all of Mr. Branham's problems with both shoulders, and both knees, were clearly pre-existing and not caused by the March 25, 2009 traumatic event or resulted from cumulative trauma. In addition ICG submitted proof from Dr. Burgess who opined that Mr. Branham does not suffer from carpal tunnel syndrome to the extent that he has ratable impairment and is not in need of any medical treatment for the same.

In this specific instance, after careful review of the lay and medical testimony, the Administrative Law Judge is simply not convinced that Branham has met his burden of proving that his bilateral shoulder conditions, his bilateral knee conditions, or his bilateral carpal tunnel syndrome, are causally related to the effects of by [sic] the March 25, 2009 work-related incident or result from cumulative trauma incurred while working as an underground coal miner for ICG and manifesting on April 17, 2009. In so finding the Administrative Law Judge relies upon the medical testimony of Dr. Corbett and Dr. Burgess. The Administrative Law Judge does not find Dr. Potter's opinion in this regard to be persuasive.

Dr. Potter's Form 107-I indicates he examined Branham on May 5, 2011. In the section of the Form 107-I titled "Plaintiff History," Dr. Potter stated as follows:

Plaintiff related history of complaints or alleged injury as follows:

Plaintiff is a 56 year-old white male who presents with widespread complaints that he attributes to an approximate 35-year history of underground coal mining work.

Mr. Branham states that pain and dysfunction manifested about his left shoulder many years ago. Around 2001/2002, he had a left shoulder arthroscopy. That surgery bid [sic] Mr. Branham some time at work and allowed him to maintain his productivity. Unfortunately, the pain about his left shoulder gradually intensified and necessitated additional

surgery in the form of a shoulder replacement in 2004.

Mr. Branham estimates that his right knee and both hands became symptomatic in 2005. Mr. Branham states that Dr. Ahmed recommended surgical release of his carpal tunnels about 5 years ago. However, Mr. Branham declined such intervention in favor of corticosteroid injections. Mr. Branham reports that he has had 3-4 injections about both wrists over the past few days.

Mr. Branham's right shoulder became symptomatic near the latter half of 2007. Kevin Pugh, M.D. evaluated Mr. Branham in February 2008 and gave an impression of right shoulder osteoarthritis. Various treatment options were discussed with Mr. Branham and he was instructed to follow up on an as-needed basis. Shortly thereafter in April 2008, Mr. Branham had a right shoulder hemiarthroplasty.

In March 2009, Mr. Branham [sic] right shoulder condition was exacerbated at work. 'I was changing a pump fitting on a pump. I didn't have full range of motion at my arm. I reached up really high and pulled on a pipe wrench and felt pain.' Mr. Branham was seen at a local emergency department and prescribed Percocet for pain and instructed to follow up with Kevin Pugh, M.D. for an orthopedic assessment. Dr. Pugh evaluated Mr. Branham on 04-07-09 and gave impressions of right shoulder resurfacing and right knee degenerative joint disease. Dr. Pugh recommended a course of physical therapy and gave Mr. Branham's right knee an injection of Kenalog. On 05-19-09 follow up, Dr. Pugh documented that Mr. Branham's right shoulder had improved, but that

his knees, particularly the right, were still quite problematic. Dr. Pugh opined that Mr. Branham would require arthroplasty at the right knee at some point given the severity of his arthritis. When Mr. Branham returned to see Dr. Pugh on 08-18-09 and 10-20-09, anti-inflammatory medications were continued. In December 2009, Dr. Pugh gave [sic] injected Branham's right knee once again and a more serious discussion regarding consideration of right knee total arthroplasty occurred.

Mr. Branham reports that he went to see Dr. Berger in Chicago who performed a right total knee replacement on 12-13-10. Unfortunately, Mr. Branham's knee became infected following the surgery. He was subsequently evaluated by Dr. Branham in Cincinnati who recommended surgical revision. On or about 01-15-11, Mr. Branham claims that Dr. Branham removed the hardware at the right knee and 'put a new knee in.' Since this surgery, Mr. Branham claims that his knee has been 'clicking.' Mr. Branham is no longer under the care of Dr. Branham.

Mr. Branham states that he has a follow-up visit with Dr. Berger in August at which time he will have a left total knee replacement. Mr. Branham also reports that Dr. Berger discussed the possibility of additional surgical revision at the right knee if his present clicking and instability do not improve- 'he will cut back into it and replace the bottom portion of the knee replacement and put in a thicker pad.'

Mr. Branham remains under the care of his primary-care physician, Dr. Webb, for pain medications every 3 months.

Under "past medical history," Dr. Potter stated as follows: "Mr. Branham states that his orthopedic medical history is unremarkable for any non-occupational trauma/injury." Dr. Potter listed the following under "medical record review":

1. Scott R. Akers, M.D. dated 03-22-04 through 05-21-08
2. Arthrogram & MRI reports of the left shoulder dated 03-26-04
3. X-ray reports of the right knee and right shoulder dated 08-15-05
4. EMG/NCV report of the upper extremities dated 08-26-05
5. MRI report of the right knee dated 09-01-06
6. X-ray report of the right shoulder dated 12-28-07
7. Kevin Pugh, M.D. dated 02-12-08 through 12-18-09
8. MRI report of the right shoulder dated 02-05-08
9. Appalachian Regional Healthcare, Inc. dated 03-25-09
10. CT scan report of the right upper extremity dated 03-26-09
11. X-ray report of the right shoulder dated 04-07-09
12. Arthrogram report of the right shoulder dated 05-07-09

13. X-ray report of the right shoulder and right knee dated 05-19-09
14. Leigh Ann Ford, PH.D. dated 09-01-09
15. Barry Burchett, M.D. dated 10-22-09

Dr. Potter listed the following under "surgical procedure(s)":

1. Left shoulder arthroscopy (2001)
2. Left shoulder replacement (2004)
3. Right shoulder hemiarthroplasty (04-01-08)
4. Right total knee replacement (12-13-10)

He set forth the following diagnoses:

1. Left shoulder replacement (2004)
2. Right shoulder hemiarthroplasty (04-01-08)
3. Right total knee replacement (12-13-10)
4. Left knee osteoarthritis
5. History of bilateral carpal tunnel syndrome per electrophysiological testing
6. Lumbago.

Dr. Potter assessed a 62% impairment rating pursuant to the 5th Edition of the AMA Guides to the Evaluation of Permanent Impairment ("AMA Guides"), "43% of which should be considered permanent at this time with the remaining 19% whole person impairment not permanent secondary to Mr. Branham's knees not being at MMI yet."

Dr. Potter indicated he does not believe Branham had an active impairment before the alleged work-related injuries.

In the October 14, 2011, opinion and order, the ALJ clearly indicated his reliance on the opinions of Dr. Philip Corbett and Dr. Ronald Burgess in dismissing Branham's claim. The record contains a report by Dr. Corbett dated June 2, 2011, written after Dr. Corbett performed an independent medical examination ("IME"). In his report, regarding Branham's diagnoses, Dr. Corbett opined as follows:

Left knee advanced osteoarthritic involvement with severe medial joint space articular cartilage deficit. Right knee status post total knee arthroplasty and status post revision for sepsis. Positive effusion in the right knee is worrisome and has, to the best of my knowledge, not been evaluated for sepsis. Patient has bilateral resurfacing Copeland-style hemiarthroplasties of the proximal humeri with excellent positioning, but evidence of glenoid neck shortening and probable right rotator cuff tendon disruption. Etiology of the latter is unknown. Patient's oral history of Raynaud's disease and bilateral carpal tunnel syndrome noted. Finally, severe exogenous obesity. The patient's history of significant power-lifting and weight-lifting over many years is considered to be a significant causal agent as an accelerant in the development of the issues with his shoulders and knees. There is a history according to Dr. Ireland suggesting the possibility of the

patient having a dislocation and/or subluxation of the left shoulder at some point in the past in the process of weight-lifting. The patient's right shoulder could have been injured in the manner described working with the pipe wrench sometime in 2008, but I have no documentation regarding that issue, and I have no documentation or evidence to support a pathologic change to the organism as legally defined as an injury. Patient's weight is the primary problem as regards the development of medial joint space bilateral osteoarthritic changes of the weight-bearing joint, i.e. knees. Significant exacerbating features including repetitive squats with heavy weights during the power-lifting phase of his career must also assume a significant causal role in this issue, and is more likely to be causal than the crawling which the patient alleges he also does at work. Patient's crawling with his advanced obesity obviously would also be an issue for the development of osteoarthritis. The patient's family history of arthritis is not known. The treatment for this patient's conditions, i.e. evaluation of the right total knee arthroplasty which is successful, but may indeed be septic, as well as preparation for a left total knee arthroplasty because of his advanced degenerative joint disease and symptomatology are reasonable, but not, in my opinion, primarily work related. The patient's left shoulder hemiarthroplasty is successful and, in my opinion, does not represent an on-the-job injury whereas his right shoulder may or may not have had an injury in the pipe wrench episode, but I would definitely need the opportunity to evaluate further medical records, as well as diagnostic studies. At this point in time it is not possible, in my

opinion, to arrive at a conclusion on causation within reasonable medical probability as relates to his right shoulder. The remainder;[sic] however, I feel is well within the realm of reasonable medical probability.

In an addendum dated August 11, 2011, Dr. Corbett stated as follows:

I received extensive copies from Sarah K. McGuire regards [sic] Mr. Branham with the promise of future records to be further received. These records include visits with Dr. Ahmed for bilateral carpal syndrome and Raynaud's phenomenon possibly due to an autoimmune condition on 7/31/04, with follow-up visits 3/8/05 for the same condition. Patient had x-rays on 3/25/09 for both shoulders, and a CT of the right knee showing no evidence of loosening of the right knee arthroplasty. ER records from the Appalachian Regional Hospital where patient was seen for right shoulder pain [sic]. No loosening was identified. Barton Branam saw the patient on 1/16/11 diagnosing an infected right total knee, performed an I&D, and exchange of the polyethylene insert. Multiple laboratory records from Pikeville Regional Medical Center also include a right shoulder arthrogram. Occupational medical evaluation at Tri-State for an Internal Medicine exam dated 5/4/09 noted. [sic] The [sic] patient was thought to have a frozen right shoulder after having undergone bilateral total should [sic] arthroplasties. He had also undergone a total knee arthroplasty for degenerative joint disease. Patient had additional diagnoses of type II diabetes, chronic obstructive pulmonary disease, congestive heart failure,

benign prosthetic hypertrophy, and morbid obesity. On 2/5/08 the patient underwent an MR of his right shoulder demonstrating AC arthrosis and tendinosis of the rotator cuff. Finally, a letter from Dr. Michael Wirth at University of Texas Southwest at San Antonio to his predecessor Dr. Charles Rockwood indicates Dr. Wirth was thankful for the ability to perform surgery on that date, 4/1/08 for a resurfacing arthroplasty of an arthritic right shoulder.

In her cover letter Ms. McGuire posed several questions regarding my previous report and my intentions. It is my feeling that this patient's conditions relative to his shoulders and knees requiring arthroplasty were not work related in a primary causal fashion. I am sure Mr. Branham's work activities caused the patient to have some discomfort, but the underlying problem regarding degenerative joint disease of the shoulders necessitating an arthroplasty requires an understanding of his underlying condition which in this case is significant weight lifting activities. As far as his knees are concerned, both his weight lifting activities and his obesity are issues regarding causation of a greater primacy than his employment. Once again I would certainly enjoy being able to receive any additional documentation as specifically relates to the long-term management of Mr. Branham's right shoulder before issuing a further comment. I do agree that there is a greater medical probability that this patient's treatment, specifically surgical treatment of the knee, was primarily not work related. If Mr. Branham's work involved extensive squatting and crawling, certainly these activities at work

would be evocative of a painful response without being considered a primary cause of the development of advanced degenerative joint disease of the knees. Similarly heavy lifting could be responsible on an occasional basis with weights of less than 100 pounds for the aggravation of symptoms of the patient's shoulders, but the patient's description to me of his weight lifting program involving much higher weights and stoop, squat, kneel, and snatch overhead would more likely to [sic] be evocative without any concern for the patient's underlying metabolic and DNA status for the likelihood of inheriting these problems. I do not feel there is a work-related issue in this case other than performing his work activities may have made him aware of an ongoing already active and degenerative destructive process involving weight-bearing joints of his lower extremity and, as he utilizes it [sic], weight-bearing joints of his upper extremities, specifically the shoulders.

Dr. Ronald Burgess conducted an IME and opined 50% of Branham's "current carpal tunnel symptoms are related to his exogenous obesity and 50% to his previous job duties." Dr. Burgess opined Branham reached maximum medical improvement ("MMI"), and assessed a 0% impairment rating for this condition.

As previously noted, listed in Dr. Potter's Form 107-I are the medical records he reviewed before rendering his opinions. Many of the medical records Dr. Potter

reviewed pre-date the alleged injuries of March 25, 2009, and April 17, 2009. We cannot review the majority of the records listed in Dr. Potter's Form 107-I, as they were not filed in the record by either party. Thus, we would only be speculating about the precise nature of the information contained in the records Dr. Potter reviewed which we decline to do.

It is clear from the October 14, 2011, opinion and order the ALJ understood Dr. Potter did review certain medical records, including diagnostic records pertaining to Branham's knees and shoulders. As acknowledged by the ALJ, "Dr. Potter reviewed medical records from Dr. Akers, Dr. Pugh, Dr. Burchett, and reviewed diagnostic studies of Mr. Branham's knees and shoulders." However, the ALJ also concluded as follows:

Dr. Potter did not have the benefit of reviewing the medical records regarding Mr. Branham's prior treatment for carpal tunnel syndrome, bilateral shoulder conditions, as well as bilateral knee conditions. Dr. Potter's report reflects that he based his opinions regarding causation entirely on Mr. Branham's history.

(emphasis added)

While the language above appears, at first glance, to create an inconsistency in the ALJ's October 14, 2011, opinion and order as to what information Dr. Potter

considered before rendering his opinions, based on the evidence in the record, we are unable to determine whether such an inconsistency exists. We cannot determine whether "Dr. Potter did not have the benefit of reviewing the medical records regarding Mr. Branham's prior treatment for carpal tunnel syndrome, bilateral shoulder conditions, as well as bilateral knee conditions." Dr. Potter's Form 107-I contains the following language before his discussion of Branham's medical history: "Plaintiff related history of complaints or alleged injury as follows." Thus, for the ALJ to conclude "Dr. Potter's report reflects that he based his opinions regarding causation entirely on Mr. Branham's history" is an inference the ALJ is entitled to make based on the language in Dr. Potter's Form 107-I. Consequently, we must defer entirely to the ALJ's inference, as there is nothing contained within the record definitively proving there is any inconsistency within the October 14, 2011, opinion and order, regarding the information upon which Dr. Potter relied in forming his opinions on causation.

Additionally, we note Dr. Corbett makes specific references to his review of certain medical records which Dr. Potter, in the Form 107-I, did not indicate he reviewed. For instance, in Dr. Corbett's August 11, 2011, "addendum" report, he makes a specific reference to

reviewing medical records pertaining to Branham's treatment with a "Dr. Ahmed" and "[Dr.] Barton Braham." However, a review of Dr. Potter's Form 107-I indicates a reference to these physicians only in the "Plaintiff History" section and not in the list of medical records he reviewed. Regarding Dr. Ahmed, Dr. Potter states as follows in the Form 107-I: "**Mr. Branham states** that Dr. Ahmed recommended surgical release of his carpal tunnels about 5 years ago." (emphasis added). Regarding Dr. Branam, Dr. Potter states, in part, as follows: "On or about 01-15-11, **Mr. Branham claims** that Dr. Branam removed the hardware at the right knee and 'put a new knee in.'" (emphasis added). Thus, the ALJ's inference regarding the source of Dr. Potter's opinions on causation must be accepted as accurate.

Branham asserts the ALJ committed error by relying on Cepero v. Fabricated Metals Corp., 132 S.W.3d 839 (Ky. 2004) in the case *sub judice*. Branham asserts as follows:

However, the Cepero case is clearly not applicable in the case at bar. Although the Administrative Law Judge states that the doctor relied solely upon the claimant's history in arriving at his opinions of causation, thereby implying that the claimant's statements were in some way inaccurate, it is clear that Dr. Potter did in fact review the records in the case including the records of Dr. Scott R.

Akers, M.D. from 3/22/04 through 5/21/08, which did contain references to the claimant's prior history of having done several years of weight lifting.

While we acknowledge the ALJ briefly referred to Cepero, supra, in the October 14, 2011, opinion and order, the ALJ never explicitly stated he was not relying on Dr. Potter's opinion based upon an inaccurate history provided by Branham. As stated, the ALJ concluded "Dr. Potter's report reflects that he based his opinions regarding causation entirely on Mr. Branham's history" instead of medical records detailing prior treatment Branham underwent for his shoulders, hands, and knees. We do not believe the ALJ found Cepero applicable in the case *sub judice*.

As both Dr. Corbett's and Dr. Burgess' opinions constitute substantial evidence in support of the ALJ's dismissal of Branham's claim, the ALJ's October 14, 2011, opinion and order cannot be disturbed. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

Accordingly, the ALJ's October 14, 2011, opinion and order and the November 15, 2011, order ruling on Branham's first petition for reconsideration are **AFFIRMED**.

ALL CONCUR.

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