

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Ronald Meyers,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1143 C.D. 2010
	:	
Workers' Compensation Appeal	:	Submitted: September 3, 2010
Board (Alcoa),	:	
	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
 HONORABLE P. KEVIN BROBSON, Judge
 HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER**

FILED: January 3, 2011

Ronald Meyers (Claimant), pro se, petitions for review of the order of the Workers' Compensation Appeal Board (Board), which affirmed a Workers' Compensation Judge's (WCJ) Order denying workers' compensation benefits and dismissing Claimant's Claim Petition against Alcoa, Inc. (Employer).

Claimant filed his Claim Petition on October 4, 2006 alleging that he sustained a work-related injury on August 23, 2005, in the nature of bronchiectasis. He claimed to have worked in close proximity to PCBs in dust and dirt for a minimum of

five years while working for Employer. Employer filed a timely Answer, denying the allegations in the Claim Petition. The case was then assigned to a WCJ.

Claimant testified that he began working for Employer as a packer in 1993. In November of 2000, Employer moved him to a different physical location in the plant, called the west end. Claimant testified that, shortly after moving to this location, he was exposed to dust and dirt from a construction project undertaken by Employer involving the taking of core samples for PCBs and the remediation of any PCB contamination. Claimant first became sick just after moving to the new area of the plant. He took NyQuil and Tylenol each evening after work, going to bed thinking he had a “flu-type thing,” and did not improve. (Hr’g Tr. at 9, R.R. at 195d.) He went to the Emergency Room, had an x-ray, and was given antibiotics and something for the cough. (Hr’g Tr. at 9, R.R. at 195d.) He continued to work for nearly five more years, although during this time period he was hospitalized five times for pneumonia and also was treated at home three or four times for ten day intervals. Claimant testified that he was out for forty-two days in April and May of 2005 for treatment. His last day of work was August 23, 2005, after which date he did not return because of symptoms of violent coughing, increasingly difficult breathing, and recurrent lung infections as a result of restrictive pulmonary function and bronchiectasis. (Hr’g Tr. at 5, 11, 21, R.R. at 191d, 197d, 207d; Susan Gerhardt, M.D. Dep. at 12, 13, 15, R.R. at 91b, 92b, 94b; Michael Ader, M.D. Dep. at 8, R.R. at 151c.)

In further support of the Claim Petition, Claimant submitted the deposition testimony of Susan Gerhardt, M.D., who began treating Claimant in September 2005, upon referral from his primary care physician. (Gerhardt Dep. at 7, R.R. at 86b.) Dr.

Gerhardt performed testing for pulmonary functioning, including a CT scan of the chest which showed bronchiectasis in which the breathing passages or bronchi are enlarged, thickened, and permanently dilated. Blood testing indicated a low alpha-1 antitrypsin level, a genetic condition that causes a low level of antitrypsin, a protein that protects the lungs against damage from the “pollutants and things that we all inhale every day.” (Gerhardt Dep. at 13-14, R.R. at 92b-93b.) Dr. Gerhardt testified that she did not have specific knowledge of what Claimant may have been exposed to in his workplace. Although Claimant told her that there was an exposure to PCBs, he did not provide her with details or any data from Employer concerning an exposure. (Gerhardt Dep. at 17-19, R.R. at 96b-98b.) Dr. Gerhardt stated that she did not know what Claimant may have been exposed to at the Employer’s facility other than dust exposure, (Gerhardt Dep. at 50, R.R. at 129b), and she “couldn’t quite understand what exposure it was,” (Gerhardt Dep. at 17, R.R. at 96b). Further, she did not know if Claimant’s occupation played any part in the development of the bronchiectasis. (Gerhardt Dep. at 20, R.R. at 99b.)

In further support of his position, Claimant presented the deposition testimony of Friedrich Kueppers, M.D., a pulmonary physician and professor of immunology and pulmonary medicine, who reviewed Claimant’s account of his alleged exposure to a number of chemicals in the dust during workplace construction in November of 2000 and his subsequent development of flu-like symptoms.¹ Dr. Kueppers

¹ There is a dispute in the record concerning whether Dr. Kueppers meant to use the word “house” construction or “workplace” construction. Upon cross-examination during his deposition, Dr. Kueppers read from his patient notes from his first meeting with Claimant on December 6, 2005, in which he had written the word “house” rather than “workplace” referring to where the construction dust occurred. Although this patient note by Dr. Kueppers is reproduced in FOF #22, the deposition record shows that Dr. Kueppers disputed his use of the term “house” and said he
(Continued...)

diagnosed Claimant with hyperreactive airway disease, emphysema, and bronchiectasis. (Kueppers Dep. at 25, R.R. at 25a.) Blood tests showed that Claimant was a M.Z. heterozygous carrier for antitrypsin deficiency, which is an inherited condition. (Kueppers Dep. at 11-12, 38, R.R. at 11a-12a, 38a.) He stated that this condition could lead to emphysema and obstructive lung diseases and that the antitrypsin deficiency was not related to Claimant's work or work environment. (Kueppers Dep. At 12, R.R. at 12a.) Dr. Kueppers also stated that Claimant could have come into contact with chemicals outside the workplace and admitted that he has had patients with bronchiectasis with no known cause. (Kueppers Dep. at 42- 44, R.R. at 42a-44a.)

In opposition to the Claim Petition, Employer presented the deposition testimony of Michael Ader, M.D., who specializes in pulmonary medicine. He performed a records review of a prior independent medical examination (IME) report by Dr. Paul Epstein, who, because of a stroke, was not able to be deposed. Dr. Ader also reviewed the records of Dr. Gerhardt, Claimant's hospitalization records and lab work, and portions of Dr. Kueppers' deposition transcript.² Dr. Ader testified that Claimant has a chronic respiratory condition that is apparently bronchiectasis and it is probably post-infectious. (Ader Dep. at 14-15, R.R. at 157c-158c.) He also believed the condition might be related to low gamma globulin and did not believe it was

misunderstood this at the time. (Kueppers Dep. at 33, R.R. at 33a.) His testimony refers to Claimant's "workplace" exposure to construction dust, not exposure to construction dust at Claimant's house. This dispute does not have any relevance to the legal conclusions in this case and we have assumed that any dust exposure occurred at the workplace.

² Dr. Ader did not review the deposition transcript of Dr. Kueppers prior to writing his report, but saw portions just prior to his deposition in this case.

related to the antitrypsin deficiency. (Ader Dep. at 15, R.R. at 158c.) He believed that Claimant may have had an old infection that was silent for many years and then was activated later in life, noting that Claimant had an infection when his condition started. (Ader Dep. at 15, R.R. at 158c.) He said there was no obvious cause for the bronchiectasis, but that Claimant's recurrent hospitalizations from 2000 to 2005 support his opinion that Claimant suffers from a post-infectious bronchiectasis. (Ader Dep. at 16, R.R. at 159c.) Dr. Ader said that the majority of people whom he treats with this diagnosis do not have any obvious cause of the condition. (Ader Dep. at 16, R.R. at 159c.) He also testified that Claimant's respiratory illness and symptoms are unrelated to any occupational exposure and that, to make a link between this particular condition and an alleged workplace exposure, a physician needs an environmental or air quality analysis of the workplace exposure. (Ader Dep. at 29, R.R. at 172c.) He explained that physicians often will use Material Safety Data Sheets from the workplace to identify known chemicals. (Ader Dep. at 29, R.R. at 172c.) Dr. Ader testified that a physician cannot make a definitive causal link, within a reasonable degree of medical certainty, that a particular respiratory condition was related to an occupational exposure without additional information documenting the composition of the air and surfaces in the workplace environment during the times and in the location where this Claimant worked at the plant. (Ader Dep. at 29-30, R.R. at 172c-73c.)

In further support of Employer's opposition to the Claim Petition, Employer presented the testimony of Clay Long, the environmental manager for Employer since 1987. He testified that there was some PCB contamination at the plant in 1987 as a result of hydraulic fluids within the hydraulic machines. (Hr'g Tr. at 12, R.R. at

228e.) He explained that this fluid was replaced and multiple samplings and remediation measures were undertaken after approval by the EPA in a consent decree in 1993. (Hr'g Tr. at 18, R.R. at 234e.) Mr. Long further stated that the EPA did not require any employees to be removed from their normal work areas and that no employees ever filed a workers' compensation claim based upon alleged exposure to silica, asbestos, or creosol. He stated there was never an alleged respiratory ailment due to PCB exposure at the plant. (Hr'g Tr. at 18-19, R.R. at 234e-35e.)

The WCJ ascribed much credibility to Dr. Ader, whose opinions on the lack of causation were further supported by Dr. Epstein, Claimant's original IME physician. (WCJ Decision, Findings of Fact (FOF) ¶ 38.) The WCJ specifically noted that Claimant's treating physicians all referred to other potential causes of bronchiectasis beyond the environmental exposure. Dr. Gerhardt "clearly indicates that there were other possible causes of Claimant's problems other than occupational exposure," as did Dr. Kueppers. (FOF ¶ 39.) The WCJ also did not find the testimony of Dr. Kueppers persuasive because, in rendering his opinions on causation, he relied only on the history provided by Claimant. (FOF ¶ 40.) Dr. Kueppers personally had no knowledge of Claimant's work environment and did not review any materials documenting chemical or substance exposures at Employer's site. In addition, Claimant did not present any documentary evidence of the presence of any of the alleged substances at the work site. The WCJ found Claimant to be credible "as to his medical history and symptoms only", but also found that Claimant "provided no supporting evidence as to his claims to PCB exposure." (FOF ¶ 41.) Based on these findings, the WCJ concluded that Claimant failed to meet his burden of proof of establishing causation between his employment and his present medical condition.

Claimant appealed the WCJ's decision to the Board, which affirmed, stating that "the WCJ has made no error of law in determining as a matter of law that none of the doctors established a causal connection between the Claimant's lung problem and his work." (Board Decision at 4.)

Claimant, pro se, has appealed to this Court, arguing that the Board: (1) erred in affirming "the Finding of Fact" by the WCJ; and (2) committed an error of law by affirming the WCJ's conclusion that Claimant did not meet his burden of proof to provide competent medical testimony connecting his employment with the onset of his bronchiectasis.³

We first address Claimant's argument that the WCJ's "Finding of Fact" was not "supported by the Court record." (Claimant's Br. at 6.)⁴ Claimant does not state which Finding of Fact he believes is not supported by the record. From his discussion, it appears that Claimant disagrees with the WCJ's credibility findings regarding Drs. Ader, Gerhardt, and Kueppers. (Claimant's Br. at 9.)⁵ In support of his argument on this point, Claimant disputes the WCJ's evaluation of Dr. Ader's testimony regarding the causation of his bronchiectasis, as well as the WCJ's characterization of the testimony of Claimant's physicians. Because these arguments

³ "Our review is limited to determining whether an error of law was committed, whether necessary findings of fact are supported by substantial evidence and whether constitutional rights were violated." Scott v. Workers' Compensation Appeal Board (Ames True Temper, Inc.), 957 A.2d 800, 803 n.3 (Pa. Cmwlth. 2008).

⁴ Claimant's Brief does not contain page numbers. We provided this page number counting the first cover page as page 1. Page 6 begins with "D. Statements of Questions Involved."

⁵ Page 9 of Claimant's Brief begins with "G. Argument of Petitioner."

are directed to the second issue, regarding whether Claimant met his burden of proof, we will discuss the medical testimony presented in that context.

We next address Claimant's argument that he did, in fact, meet his burden of proof by providing competent medical evidence connecting his employment with his bronchiectasis. Claimant specifically challenges the Board's conclusion that "[t]he WCJ found as a matter of law the Claimant had failed to meet his burden of proof to show by competent medical testimony a connection between the Claimant's bronchiectasis and any exposure at work." (Board Decision at 4, ¶ 3.)

It is the claimant who bears the burden of proving that he suffers from a work related injury. Inglis House v. Workmen's Compensation Appeal Board (Reedy), 535 Pa. 135, 634 A.2d 592 (1993). In support of a claim petition, the claimant has the burden of proving all the elements necessary to support an award of benefits. Vista International Hotel v. Workmen's Compensation Appeal Board (Daniels), 560 Pa. 12, 742 A.2d 649 (1999). Where the causal connection between the claimant's employment and his disabling injury is not obvious, unequivocal medical testimony is necessary to establish the causal connection. Weaver v. Workmen's Compensation Appeal Board (Pennsylvania Power Co.), 487 A.2d 116, 117 (Pa. Cmwlth. 1985).

Claimant argues that his injury, bronchiectasis, resulted from his inhalation and exposure to dust at his workplace, where Employer was engaged in a PCB remediation project. Because the causal connection between his injury and his employment is not obvious, he needed to present competent and unequivocal medical testimony. Claimant presented the testimony of Drs. Gerhardt and Kueppers to

establish his injury and its causal connection to his workplace. In opposition to his Claim Petition, Employer presented the testimony of Dr. Ader, who performed a records review of Claimant's treating physicians, and the report of Dr. Epstein, who had performed an IME of Claimant. The WCJ found the testimony of Dr. Ader credible and did not find Claimant's experts credible that his bronchiectasis was caused by exposure at work. Claimant argues that the Board was wrong in affirming these findings.

It is solely the role of the WCJ to assess credibility and resolve conflicts in the evidence. Hoffmaster v. Workers' Compensation Appeal Board (Senco Products, Inc.), 721 A.2d 1152, 1155-56 (Pa. Cmwlth. 1998). The WCJ alone determines the weight of the evidence and, as such, may reject the testimony of any witness in whole or in part, even if that testimony is uncontradicted. Id. at 1156. The appellate role is not to reweigh the evidence or to review the credibility of the witnesses. Bethenergy Mines, Inc. v. Workmen's Compensation Appeal Board (Skirpan), 531 Pa. 287, 291, 612 A.2d 434, 436 (1992). Rather, the reviewing court must simply determine whether, upon consideration of the evidence as a whole, the WCJ's findings have the requisite measure of support in the record. Id.

We, therefore, must consider the evidence presented to determine whether the WCJ's conclusion that Claimant has not met his burden of proof is supported by substantial evidence. We discern two main reasons for Claimant's argument that he met his burden of proof: (1) Dr. Ader's deposition should not have been admitted because he was a replacement for Dr. Epstein, Claimant had no notice of Dr. Ader's deposition and, so, was not present for it, and Dr. Epstein's report should not have

been admitted through Dr. Ader's testimony; and (2) the WCJ made erroneous credibility determinations concerning Drs. Ader, Gerhardt, and Kueppers.

We first address Claimant's arguments with regard to Dr. Ader's testimony. The WCJ found the following:

This Judge ascribes much credibility to the testimony and opinions of Dr. Michael Ader. His opinions on causation were further supported by the opinions of Dr. Epstein, Defendant's original IME physician, who did not testify because of a stroke. Dr. Ader clearly identified other possible potential causes of the Claimant's condition. It is noted by this Judge that these explanations to other potential causes were supported by all other doctors['] testimony in this matter, who all acknowledged that bronchiectasis can be caused by factors other than environmental exposure.

(FOF ¶ 38.)

Claimant argues that the WCJ should not have relied on the testimony of Dr. Ader. Initially, we note that Claimant was apparently represented by counsel at this time, because his counsel was present during the deposition, and cross-examined Dr. Ader. When Dr. Ader conducted his records review, he reviewed not only the Claimant's records of his hospitalizations, lab reports, and treating physicians, including Dr. Gerhardt, but also reviewed the report from Dr. Epstein's IME. (R.R. at 149c-56c.) Dr. Epstein had performed an IME of Claimant, reported a low antitrypsin level, and concluded that Claimant's bronchiectasis was a result of his recurrent lung infections and was not related to his work. (IME Report of Dr. Epstein on Ronald Meyers, Ader Dep. Ex. 2 at 1-6, R.R. at 175c-79c.)

Claimant further argues that Dr. Epstein's report is a hearsay document and that his inability to cross-examine Dr. Epstein requires exclusion of Dr. Ader's

opinion testimony inasmuch as it is based upon Dr. Epstein's IME report. Claimant's counsel did not object when Dr. Ader offered Dr. Epstein's IME report into evidence, (Ader Dep. at 13, R.R. at 156c), or when he testified about the conclusions he made, in part, from Dr. Epstein's report. As a result, this was "unobjected to" when the report and Dr. Ader's testimony about it were received into the record.⁶ But even if Claimant or his counsel had objected to Dr. Epstein's report or Dr. Ader's testimony about it, the law does not require the exclusion of Dr. Ader's testimony.

It is well understood that medical experts are permitted to express opinions which are based, in part, upon reports which are not in evidence, but which are customarily relied upon by experts in the practice of the profession. This exception to the rule against hearsay was adopted in Pennsylvania law in 1971 in Commonwealth v. Thomas, 444 Pa. 436, 445, 282 A.2d 693, 698 (1971).

Primavera v. The Celotex Corporation, 608 A.2d 515, 518-19 (Pa. Super. 1992). Pa.R.E. No. 703 supports Dr. Ader's partial reliance upon Dr. Epstein's IME report since it is of a type reasonably relied upon by consulting physicians. See generally Thomas, 444 Pa. 436, 282 A.2d 693 (1971). "Our courts have described this rule as 'wise and salutary' . . . and. . . Rule of Evidence 703. . . reflects the reality of expert analysis and decision-making[.]" Primavera, 608 A.2d at 520. For these reasons, Dr. Ader's review and partial reliance upon Dr. Epstein's IME report is permissible.

Regarding Dr. Epstein's IME report, in this case it was offered and accepted into evidence, without objection by the counsel representing Claimant during Dr.

⁶ The Walker rule, in relevant part, provides that: "Hearsay evidence, [a]dmitted without objection, will be given its natural probative effect and may support a finding . . . [i]f it is corroborated by any competent evidence in the record, . . ." Walker v. Unemployment Compensation Board of Review, 367 A.2d 366, 370 (Pa. Cmwlt. 1976).

Ader's deposition. (Ader Dep. at 13, R.R. at 156c.) Moreover, Dr. Ader's testimony was not based solely on Dr. Epstein's report. As noted above, Dr. Ader's opinions were based upon all of the Claimant's hospitalizations, lab reports, records provided by Claimant's previous treating physicians before his referral to Dr. Gerhardt, the deposition of Dr. Gerhardt, and portions of Dr. Kueppers' deposition. It is true that uncorroborated hearsay evidence, even when admitted without objection, cannot support a finding of fact. Walker v. Unemployment Compensation Board of Review, 367 A.2d 366 (Pa. Cmwlth. 1976). But this is not the case here where there was medical testimony corroborated by other competent medical evidence of record, including portions by Dr. Gerhardt and Dr. Kueppers as previously noted.

Claimant also essentially argues that Dr. Ader's testimony, based in part upon Dr. Epstein's IME report, foreclosed the WCJ from finding contradictory evidence to support the Claimant. Claimant believes this was unfair. However, Claimant or his counsel had the right to cross-examine Dr. Ader to show if there were any untrustworthy data or faulty assumptions made in Dr. Epstein's report. In fact, Claimant's counsel cross-examined Dr. Ader about the conclusions he drew from Dr. Epstein's report. (Ader Dep. at 22-28, R.R. at 165c-71c.) The WCJ, as factfinder, was also aware of the bases for Dr. Ader's ultimate conclusions and his partial reliance on indirect sources, such as the report by Dr. Epstein. Primavera, 608 A.2d at 521. "The adverse party then has the opportunity. . . to present its own countervailing facts and figures and/or expert testimony to convince the factfinder that the weight to be given to the other side's expert testimony should be little or none." Id. For these reasons, we do not agree that Dr. Ader's testimony, inasmuch as

it relied upon any of Dr. Epstein's report, was excludable or that it was unfair to Claimant.

Claimant's final argument is that the WCJ and the Board incorrectly ascribed credibility to Dr. Ader. Claimant believes that it was wrong for the WCJ to find that the other doctors supported Dr. Ader on causation when Claimant's doctors did not know of Dr. Ader's testimony. This is not an accurate characterization of the WCJ's rationale. The WCJ did not indicate that Drs. Gerhardt and Kueppers reviewed Dr. Ader's deposition and his opinion on causation, but rather the WCJ interpreted their testimony as supporting Dr. Ader's opinion on causation. The WCJ found that Dr. Ader concluded that Claimant's bronchiectasis could have resulted from various non-work-related causes. This conclusion was supported by Dr. Ader's records review of Dr. Epstein's IME report, in addition to Claimant's records of his hospitalizations, lab reports, and treating physicians. Additionally, Dr. Ader's opinions from his records review were supported by the opinions of Claimant's treating physicians, who provided deposition testimony in this case acknowledging that the Claimant's present medical condition could have resulted from various non-work-related causes. As previously noted, the WCJ alone determines the weight of the evidence and, as such, may accept or reject the testimony of any witness in whole or in part. Here, the WCJ credited Dr. Ader's opinion on causation, which the WCJ noted was supported by the opinion of Dr. Gerhardt, who agreed independently that there were clearly other possible non-work-related causes for Claimant's bronchiectasis. This was a credibility finding for which there is substantial evidence in the record. Moreover, the WCJ found that Dr. Kueppers, whose opinions on causation were not accepted as persuasive, even "admitted there were other potential causes of bronchiectasis in

patients other than environmental.” (FOF ¶ 40.) Claimant views the record in a light most favorable to himself, but he is the party who lost before the WCJ.

Such viewing of the record in a light most favorable to the party who lost before the factfinder runs contrary to the established appellate practice of viewing the record in a light most favorable to the party who prevailed before the factfinder. For, we are to draw all reasonable inferences which are deducible from the record in support of the factfinder's decision in favor of that prevailing party, viewing the record in a light most favorable to that party.

Cerasaro v. Workers’ Compensation Appeal Board (Pocono Mountain Medical, Ltd.), 717 A.2d 1111, 1114 (Pa. Cmwlth. 1998). Accordingly, even if the reasons proffered by the WCJ would be susceptible of an interpretation both in support of his decision as well as an interpretation against his decision, we are required to accept that interpretation which supports the WCJ's decision.

For the above reasons, the Claimant cannot prevail. We, therefore, must affirm the decision of the Board.

RENÉE COHN JUBELIRER, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Ronald Meyers,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1143 C.D. 2010
	:	
Workers' Compensation Appeal Board	:	
(Alcoa),	:	
	:	
Respondent	:	

ORDER

NOW, January 3, 2011, the order of the Workers' Compensation Appeal Board in the above-captioned matter is hereby **AFFIRMED**.

RENÉE COHN JUBELIRER, Judge