

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Erskine Cole, :  
Petitioner :  
 :  
v. : No. 1339 CD 2009  
 : Submitted: October 9, 2009  
Workers' Compensation Appeal :  
Board (Erie School District), :  
Respondent :

BEFORE: HONORABLE DAN PELLEGRINI, Judge  
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge  
HONORABLE KEITH B. QUIGLEY, Senior Judge

*OPINION NOT REPORTED*

MEMORANDUM OPINION  
BY SENIOR JUDGE QUIGLEY

FILED: January 20, 2010

Erskine Cole (Claimant) petitions for review of the June 12, 2009, order of the Workers' Compensation Appeal Board (WCAB), which affirmed the decision of Workers' Compensation Judge Carmen F. Lugo (WCJ Lugo) denying Claimant's Petition to Reinstate Compensation Benefits. We affirm.

Claimant originally suffered a work-related injury on June 6, 2003, which was acknowledged by Erie School District (Employer) through a Notice of Compensation Payable, dated June 26, 2003. The work-related injury was described and accepted as a low back strain.

On November 3, 2003, Employer filed a Petition to Terminate Compensation Benefits Based on Physician's Affidavit alleging that Claimant had fully recovered from his June 6, 2003 work-related injury as of October 8, 2003.

By decision and order circulated November 30, 2004, WCJ Lugo granted Employer's petition.

In finding that Claimant had fully recovered from the June 6, 2003 lumbar strain, WCJ Lugo relied on the deposition testimony of Employer's medical expert, Paul Shields, D.O., a board-certified family practitioner, also certified to perform independent medical examinations, who saw Claimant on June 6, 2003, and diagnosed an acute lumbar strain. Dr. Shields testified that Claimant's medical records established that Claimant had been treating regularly for low back, left hip, and left leg problems prior to the June 6, 2003 work-related injury, and that Claimant had recovered from the lumbar strain and returned to his preexisting baseline as of October 8, 2003. WCJ Lugo also relied on the deposition testimony of Claimant's medical expert, Anthony Snow, M.D., a board-certified family practitioner, who acknowledged on cross-examination that Claimant's symptoms prior to June 6, 2003, were similar to those after Claimant's work-related injury. Claimant did not appeal the November 30, 2004 decision and order.

On May 22, 2006, Claimant filed the instant Petition to Reinstate Compensation Benefits against Employer pursuant to Section 413 of the Workers' Compensation Act (Act),<sup>1</sup> alleging a worsening in condition as of August 4, 2005, and seeking a reinstatement of workers' compensation benefits for his June 6, 2003 work-related injury.<sup>2</sup> A hearing was held on August 24, 2006, before WCJ Lugo.

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<sup>1</sup> Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. §772.

<sup>2</sup> A claimant seeking a reinstatement of benefits after a termination of benefits due to a finding of full recovery must establish a causal connection between the work-related injury and his current physical condition. *Stevens v. Workers' Compensation Appeal Board (Consolidation Coal Company)*, 563 Pa. 267, 760 A.2d 369 (2000). To meet this burden, the claimant must  
**(Footnote continued on next page...)**

In support of his petition, Claimant presented the deposition testimony of Anthony M. Ruffa, D.O., a board-certified family practitioner. Dr. Ruffa first saw Claimant as a patient on January 18, 2006, and opined Claimant's work-related injury was not a lumbar strain, but was in fact disc herniations at the L5-S1 and L4-5 levels. Dr. Ruffa testified that Claimant had not recovered from his work-related injury and that his condition had worsened.

In response, Employer presented the deposition testimony of Dr. Shields. Dr. Shields testified that he examined Claimant on October 27, 2006, and found that Claimant continued to suffer from degenerative disc disease, which predated the June 6, 2003 work-related injury, and, therefore, Claimant's condition had not changed since Dr. Shields last saw him on September 18, 2003. Dr. Shields acknowledged that a June 23, 2003 MRI indicates the presence of a left-sided disc protrusion at L5-S1 and L4-5, but opined that the disc protrusions were not related to the work injury because Claimant's symptoms were the same before and after the work injury, and, thus, there was no change in the underlying pathology.

By decision and order circulated February 26, 2008, WCJ Lugo denied Claimant's petition, finding that Claimant had not suffered a recurrence of compensable disability. WCJ Lugo stated:

This Judge, by order circulated November 30, 2004, found that the Claimant had fully recovered from his June 6, 2003 lumbar strain as of October 8, 2003. . . .

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establish that his disability has increased or recurred after the date of the prior decision and that his physical condition has changed or deteriorated in some manner. *Id.* Where the causal connection between the claimant's work-related injury and current physical condition is not obvious, it must be established by unequivocal medical testimony. *See Lewis v. Commonwealth*, 508 Pa. 360, 498 A.2d 800 (1985).

The medical expert relied on by the Claimant, Dr. Ruffa, did not opine that the Claimant had a recurrence of disability or a change in condition, in August 2005, but rather testified that the Claimant's work injury was not a lumbar strain but was in fact herniations at L4-5 and L5-S1. Dr. Ruffa did not provide an opinion suggestive of a new problem or change in the Claimant's condition at any time after this Judge's finding of full recovery....

Based on the evidence presented, it appears the Claimant is trying to expand the description of the injury to include L4-5 and L5-S1 disc herniations. . . . The knowledge of the disc herniations existed before the finding of full recovery. As the issue was not raised during the prior litigation, it cannot be asserted as a basis to reinstate compensation benefits following a finding of full recovery. Had the knowledge of the disc herniations occurred after the finding of full recovery, a review would be appropriate.

However, even though this Judge finds that procedurally the Claimant cannot seek to review the description of injury after a finding of full recovery, this Judge notes that Dr. Ruffa's opinion is equivocal and would not meet the Claimant's burden to expand the description of injury. Dr. Ruffa himself acknowledges that he cannot be sure within a reasonable degree of medical certainty that the work injury caused the disc herniations at L4-5 and L5-S1.

(February 26, 2008 decision and order at 3-4.)

Claimant appealed the February 26, 2008 decision and order to the WCAB. By order dated June 12, 2009, the WCAB affirmed, finding that Dr. Ruffa's testimony was incompetent in that he disagreed with the prior finding of full recovery, and, in any event, that his testimony was equivocal. This appeal followed.<sup>3</sup>

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<sup>3</sup> This Court's scope of review is limited to determining whether constitutional rights  
(Footnote continued on next page...)

Claimant argues that the WCAB erred in finding that Claimant failed to present substantial competent evidence to establish a change in condition after a finding of full recovery. We disagree.

Under the doctrine of collateral estoppel, “where particular questions of fact essential to the judgment are actually litigated and determined by a final valid judgment, the determination is conclusive between the parties in any subsequent action on a different cause of action.” *Williams v. Workers’ Compensation Appeal Board (South Hills Health System)*, 877 A.2d 531, 535 (Pa. Cmwlth. 2005) (quoting *Patel v. Workmen’s Compensation Appeal Board (Sauquoit Fibers Company)*, 488 A.2d 1177, 1179 (Pa. Cmwlth. 1985)). This Court has held that a claimant is collaterally estopped from relitigating the original medical diagnosis underlying a prior termination of benefits by way of a reinstatement petition. *Williams; Lowe v. Workmen’s Compensation Appeal Board (Pennsylvania Mines Corp.)*, 683 A.2d 1327 (Pa. Cmwlth. 1996).

In *Williams*, the claimant suffered a work-related injury in the nature of a lumbar strain, accepted by the employer through a notice of compensation payable. Subsequently, the employer filed a termination petition, which the WCJ granted on the basis that the claimant had fully recovered from the lumbar strain. No appeal was taken from the WCJ’s decision. Later, the claimant filed a reinstatement petition, presenting medical evidence that she had suffered a disc herniation as a result of the work accident and that her condition had worsened, which the WCJ granted. The WCAB reversed, concluding that the claimant was

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were violated, whether an error of law was committed, or whether necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704.

collaterally estopped from seeking reinstatement based on the herniated disc. This Court affirmed, holding that the claimant was estopped from arguing in her reinstatement petition that the herniated disc was related to the work injury because the WCJ previously found—in ruling on the employer’s termination petition—that the claimant had fully recovered from the work-related lumbar strain.

The facts of the case *sub judice* are remarkably similar to *Williams*. Here, Claimant’s June 6, 2003 work-related injury was accepted by Employer as a low back strain. By decision and order circulated November 30, 2004, WCJ Lugo determined that Claimant had fully recovered from the lumbar strain and granted Employer’s termination petition. Although knowledge of the disc herniations existed before the finding of full recovery, Claimant did not appeal; making the WCJ’s decision a final order on the scope of Claimant’s June 6, 2003 work-related injury. Subsequently, Claimant sought reinstatement of benefits, presenting the testimony of Dr. Ruffa, who opined that Claimant suffered L4-5 and L5-S1 disc herniations as a result of the June 6, 2003 work accident and that Claimant had not fully recovered. This, Claimant cannot do. As this Court stated in *Williams*, “Claimant is seeking in [his] reinstatement petition to relitigate the question of whether [his] lower back disc problem was caused by work, when it has already been decided that it was not.” *Williams*, 877 A.2d at 536. Furthermore, we have held that expert testimony is incompetent to the extent that it contradicts judicially established facts. *U.S. Steel Mining Co., LLC v. Workers’ Compensation Appeal Board (Sullivan)*, 859 A.2d 877 (Pa. Cmwlth. 2004).

Accordingly, we affirm.<sup>4</sup>

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KEITH B. QUIGLEY, Senior Judge

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<sup>4</sup> Because we hold that Claimant's reinstatement petition is precluded by collateral estoppel, we need not address the other issues raised by Claimant on appeal.

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***ORDER***

AND NOW, this 20<sup>th</sup> day of January, 2010, the order of the Workers' Compensation Appeal Board (WCAB), dated June 12, 2009, is hereby affirmed.

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KEITH B. QUIGLEY, Senior Judge