

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Nancy Cornwell, :
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 Petitioner :
 :
 :
 v. : No. 1530 C.D. 2009
 : Submitted: December 31, 2009
 Workers' Compensation Appeal Board :
 (PMA Group), :
 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 FRIEDMAN FILED: March 5, 2010

Nancy Cornwell (Claimant) petitions *pro se* for review of the July 8, 2009, order of the Workers' Compensation Appeal Board (WCAB) denying Claimant's remand request and affirming the decision of a workers' compensation judge (WCJ) to deny Claimant's claim petition. We affirm.

Claimant injured her left wrist on May 23, 2006, while working for The Clark Companies¹ (Employer) in its shipping department. Employer issued a Notice of Compensation Denial (NCD) acknowledging that Claimant sustained a work-related left wrist contusion but alleging that Claimant had fully recovered from that

¹ The Clark Companies are insured by PMA Group, a respondent here.

injury and was able to work with no disability.² On September 12, 2006, Claimant filed a claim petition, alleging that she sustained injuries to her left wrist and arm and seeking payment of medical bills and full disability benefits as of July 13, 2006. (WCJ's Findings of Fact, No. 3; R.R. at 2-3.) The matter was assigned to a WCJ for hearings.

Claimant testified in support of her claim petition at a December 23, 2006, hearing and provided the following account. On May 23, 2006, Claimant noticed that a shipping label she had placed on a case was not in the right position; she tried to pull it off, but it was stuck, and when it finally detached, the sudden force caused Claimant to fall back against a metal desk. When Claimant hit the desk, she felt an immediate throbbing pain throughout her left arm, and, minutes later, she reported the incident to her supervisor. (R.R. at 14-16.)

The next morning, Employer directed Claimant to Hanover Works, where a Dr. Daniels took x-rays and informed Claimant that she had a contusion of the left forearm and wrist. Dr. Daniels prescribed Ibuprofen for Claimant, placed her left arm in a small splint and told her she was not to use the arm.³ (R.R. at 17-18.) About a week later, Claimant began experiencing involuntary movements in her left

² We note that, in the NCD, Employer indicated both that Claimant did not suffer a work-related injury and that Claimant's work injury was a left wrist contusion from which she had fully recovered. (R.R. at 1.) Employer subsequently clarified this apparent conflict, acknowledging Claimant's work-related wrist contusion but denying that this was a disabling injury.

³ Employer had no work within the restrictions imposed, and Claimant used some vacation time until she was given limited duty work funded by Employer. However, on July 13, 2006, Claimant's workers' compensation claim was denied, and she was told that she had to leave the alternate work and return to her regular job or go on family medical leave. (R.R. at 18-21.)

arm, often accompanied by sharp pain or a tingling sensation. Any type of activity will cause her left arm to go into a spastic state, during which it flails uncontrollably for anywhere from ten to forty-five minutes. (R.R. 25-26, 29, 33-35, 39.) Claimant has seen a number of medical specialists, has been prescribed a variety of medications and has undergone various diagnostic tests,⁴ but her condition continues unabated, leaving her unable to work. (R.R. at 17-18, 21-30, 35-38.)

Claimant also presented the May 21, 2007, deposition testimony of John R. Gandionco, M.D., who is board-certified in internal medicine. Dr. Gandionco testified that, when he first saw Claimant as a new patient on July 14, 2006, she told him that she banged her left forearm at work on May 23 and, about a week later, started having uncontrolled movements in the arm. Dr. Gandionco stated that he examined Claimant and diagnosed her with left arm spasms “possibly” due to the May 23, 2006, work injury because they started a week later. (R.R. at 57.) Subsequently, Dr. Gandionco opined that there was a physical connection between

⁴ Claimant provided the following history of her medical treatment. Dr. Daniels at Hanover Works sent Claimant to physical therapy, but, after attending therapy sessions on May 30 and 31, 2006, Claimant returned to see Dr. Daniels because she was in severe pain. Dr. Daniels then took another x-ray, scheduled a bone scan and referred Claimant to an orthopedic practice, where Claimant saw Drs. Sacchetti and Rutter. On June 5, 2006, Dr. Sacchetti examined Claimant, prescribed steroids and requested an MRI; at a subsequent appointment, Dr. Rutter examined Claimant, but offered no further treatment and told Claimant to return to work. Claimant also saw a Dr. VanSant on one occasion; he prescribed occupational therapy, but Claimant could not do the exercises because her arm would go into spasms, and Dr. VanSant refused to provide further treatment. After she was denied workers’ compensation, Claimant saw other doctors on her own. Claimant treated with Dr. Gandionco, a family physician, who prescribed Diazepam and referred Claimant to a movement disorder center. Claimant also saw Dr. Samuels, a neurologist, as well as another doctor at a medical center in Maryland. (R.R. at 17-18, 21-30, 35-38.)

Claimant's left arm pain and her May 23, 2006, injury.⁵ (R.R. at 62.) Dr. Gandionco said that he continued to treat Claimant periodically on an as needed basis and that Claimant's complaints remained much the same throughout this period; based on those complaints, Dr. Gandionco opined that Claimant was not able to do any type of work. (R.R. at 58-63.)

On cross-examination, Dr. Gandionco testified that Claimant was seen by a Dr. Samuels, a neurologist, whose report indicated that Claimant's tremor was not organic, but psychogenic, in origin. Dr. Gandionco acknowledged that this same impression was shared by a number of different specialists with whom Claimant had consulted, including a Dr. Fishman from the movement disorder clinic in Baltimore.

⁵ Dr. Gandionco initially explained that he used the word "possibly" because of the time frame involved between her injury and the onset of her symptoms. (R.R. at 57.) When asked later whether he could confirm the relationship between Claimant's condition and her work injury, Dr. Gandionco gave the following testimony.

A. It's still hard to say if that's all connected. I mean, she's been to two neurologists who ... don't believe that there's any kind of neurological problem. But time related it seems to be related. She had injured her arm, you know, and then like a week later then she started having this problem. Well, I guess beforehand she never had a problem with her arm before. But, it's, like I said, I'm not sure if neurologically this is all connected.

Q. Physically, physically, is it connected?

A. I believe so. I mean ... she banged it against the desk at work, and ever since then, she's been having problems with her arm.

Q. So can you say to a reasonable degree of medical certainty that ... the condition ... is directly related to the injury of May 23, 2006?

A. I would say yes.

(R.R. at 62.)

In fact, Dr. Gandionco admitted that Claimant's condition seemed like it might be psychogenic, and he, too, recommended that Claimant see a psychiatrist to get to the possible root of her problem. (R.R. at 63-66.)

In opposition to Claimant's petition, Employer presented the September 10, 2007, deposition testimony of Chad Rutter, D.O., board-certified in orthopedic surgery. Dr. Rutter testified that Claimant saw Dr. Sacchetti, another orthopedist in the practice, on June 5, 2006. According to Dr. Sacchetti's notes, Claimant complained of left arm pain that began after a May 23, 2006, work injury. Based on Claimant's history, her physical examination and the results of a bone scan and x-ray, Dr. Sacchetti diagnosed Claimant with a contusion of the left wrist. He allowed Claimant to return to one-handed work, and he recommended that Claimant obtain an MRI and then see Dr. Rutter for a follow-up. (R.R. at 76-78, 90-91.)

Dr. Rutter assumed Claimant's care on June 12, 2006. Dr. Rutter testified that Claimant's MRI revealed no fracture or bone contusion and that her physical examination with palpation and passive motion basically was normal.⁶ He opined that, if Claimant sustained a left wrist contusion, she had fully recovered. Dr. Rutter also explained that he saw no reason why a normal bone contusion would cause the kind of involuntary motor function Claimant described, and, therefore, he

⁶ Dr. Rutter stated that, when he asked Claimant to make a fist, she reported that she was unable to do so and started shaking in the upper left extremity when she tried, yet when Dr. Rutter passively moved Claimant's fingers, there was no problem. Similarly, Claimant was unable to flex her biceps and started shaking in her upper extremities, but Dr. Rutter was able to passively flex it without difficulty. Dr. Rutter noted that Claimant's bone scan showed some uptake at the distal ulna and her MRI showed some edema around the tendons, but he felt that both findings were incidental. (R.R. at 81, 93-94.)

did not feel that the findings in her upper extremity were orthopedically related to the injury she described. Dr. Rutter testified that, finding no orthopedic connection, he discharged Claimant back to Hanover Works for treatment and released her to return to work without restrictions. (R.R. at 78-85, 95.)

The WCJ accepted Claimant's testimony as competent, but rejected it as not credible. The WCJ also accepted Dr. Gandionco's testimony as competent, but rejected it as equivocal and not persuasive. Finally, the WCJ accepted Dr. Rutter's opinion as competent, unequivocal and persuasive in its entirety. (WCJ's Findings of Fact, Nos. 12-14.) Accordingly, the WCJ concluded that Claimant could not successfully expand the description of her work-related injury beyond the accepted left wrist contusion, and, because Claimant had fully recovered from that injury as of June 12, 2006, she was not entitled to benefits beyond that date. (WCJ's Conclusions of Law, Nos. 4-6.)

Claimant appealed to the WCAB and requested a remand "in the interest of justice" to allow her to present additional medical evidence;⁷ specifically, a report from a Dr. Solomon and a revised medical opinion from Dr. Gandionco. Claimant contended that she treated with Dr. Solomon after testifying at the December 23, 2006, hearing and that he identified a neurological basis for Claimant's condition directly related to her work injury. Claimant further asserted that Dr. Gandionco changed his prior opinion and agreed with Dr. Solomon that Claimant's tremors are

⁷ In her appeal to the WCAB, Claimant also challenged the WCJ's finding that Dr. Gandionco's testimony was equivocal, (R.R. at 112); however, the WCAB rejected Claimant's argument, and Claimant does not pursue the matter before this court.

neurologic, not psychogenic, in nature. However, observing that both these reports were available prior to Dr. Rutter's deposition,⁸ the WCAB denied Claimant's remand request and affirmed the WCJ's denial of benefits. Claimant now petitions this court for review of that determination.

Claimant argues that the WCAB should have granted her request to remand the case for the WCJ to consider Dr. Solomon's medical evidence and the supplemental statement from Dr. Gandionco.⁹ According to Claimant, the interests of justice and fairness require a determination based on a complete and accurate record; therefore, this evidence needs to be included in the record so that the neurological origins of her condition finally may be known and so that Dr. Gandionco may express an unequivocal medical opinion. We disagree that the WCAB abused its discretion in denying Claimant's remand request.¹⁰

⁸ Dr. Solomon examined Claimant on May 18, 2007, and issued his report on June 11, 2007. Dr. Gandionco's revised medical opinion is dated September 9, 2007.

⁹ We note that Claimant confines her argument to this single issue in both her petition for review and the argument portion of her brief. Therefore, to the extent that Claimant attempts to raise any other issues in the Statement of Questions Involved portion of her brief, (Claimant's brief at 6-8), these issues are waived. *See* Pa. R.A.P. 1513(d) (relating to the contents of a petition for review) and Pa. R.A.P. 2119 (relating to the argument portion of a brief).

¹⁰ In a workers' compensation case, the decision to grant or deny rehearing is within the discretion of the WCAB, and we will reverse that decision only for an abuse of that discretion. *Puhl v. Workers' Compensation Appeal Board (Sharon Steel Corp.)*, 724 A.2d 997 (Pa. Cmwlth. 1999). Because Claimant here sought a remand *before* the WCAB ruled in this matter, Claimant's request to present new evidence is properly considered a petition for remand under section 419 of the Workers' Compensation Act (Act), Act of June 2, 1915, P.L. 736, *as amended*, added by section 6 of the Act of June 26, 1919, P.L. 642, 77 P.S. §852. However, requests for remand under section 419 are frequently analyzed under the same standards as rehearing cases under section 426 of the Act, added by section 6 of the Act of June 26, 1919, P.L. 642, 77 P.S. §871. *Puhl*.

In keeping with the humanitarian purposes of the Workers' Compensation Act (Act)¹¹, the WCAB is afforded broad discretion to grant a remand or rehearing when justice requires.¹² *Joseph v. Workmen's Compensation Appeal Board (Delphi Company)*, 522 Pa. 154, 560 A.2d 755 (1989); *Cudo v. Hallstead Foundry, Inc.*, 517 Pa. 553, 539 A.2d 792 (1988); *Puhl v. Workers' Compensation Appeal Board (Sharon Steel Corp.)*, 724 A.2d 997 (Pa. Cmwlth. 1999). The purpose of granting a rehearing in workers' compensation cases is to allow a party to present newly-discovered, non-cumulative evidence. However, a rehearing is not allowable simply for the purpose of strengthening weak proofs already presented or for the purpose of hearing additional testimony that is merely cumulative. *Paxos v. Workmen's Compensation Appeal Board (Frankford-Quaker Grocery)*, 631 A.2d 826 (Pa. Cmwlth. 1993).

Here, Claimant readily acknowledges that her prior counsel had Dr. Solomon's medical report and Dr. Gandionco's revised medical opinion "well in time for the [WCJ] to review," but he did not offer Dr. Solomon's report into evidence at the WCJ's final hearing on August 22, 2007, and he did not refer to either report in his February 11, 2008, brief to the WCJ. (Claimant's brief at 13.) Therefore, the evidence that Claimant seeks to place into the record clearly is not newly discovered. In fact, Claimant's counsel could have requested further proceedings in order to present this evidence at any time prior to the issuance of the WCJ's decision on July 2, 2008. He did not; instead, Claimant's counsel relied solely on Dr. Gandionco's

¹¹ Act of June 2, 1915, P.L. 736, as amended, 77 P.S. §§1-1041.4, 2501-2626.

¹² The only statutory restriction placed upon the WCAB is that its discretion may be exercised "upon cause shown." Section 426 of the Act, 77 P.S. §871.

opinion that there was a physical connection between Claimant's condition and her May 23, 2006, injury. Where counsel has medical evidence in his possession during the WCJ proceedings, and the reasons for not presenting it "are as readily explained as strategic decisions as negligence," there is no basis for a rehearing or remand.¹³ *Martell v. Workers' Compensation Appeal Board (Doyle Equipment)*, 707 A.2d 242, 244 (Pa. Cmwlth. 1998).

Moreover, Claimant's proposed additional evidence also is cumulative in nature in that Dr. Solomon's report offers just another medical opinion in addition to all those already provided and testified to by Claimant's medical expert.¹⁴ As the WCAB correctly observed, unlike cases allowing a rehearing or remand for *new* medical evidence, this case does not present the situation where surgery or additional diagnostic testing revealed something that had not been ascertainable through a normal examination or a course of treatment. *See, e.g., Stitchick v. Workers' Compensation Appeal Board (Trumbull Corporation)*, 782 A.2d 1133 (Pa. Cmwlth. 2001); *Puhl*. Rather, following the WCJ's rejection of Claimant's medical evidence of record, Claimant merely points to the opinion of yet another doctor, which she

¹³ The WCAB reasoned that counsel's decision not to seek admission of this additional evidence before the WCJ "could be fairly assumed to be a strategic decision, since Dr. Gandionco's change of opinion likely would have further compromised his testimony." (WCAB op. at 9.)

¹⁴ Thus, this case is distinguishable from *Bickel v. Workmen's Compensation Appeal Board (Williamsport Sanitary Authority)*, 538 A.2d 661 (Pa. Cmwlth. 1988), in which a rehearing to consider *non-cumulative* medical testimony was found to be appropriate where a claimant's counsel *inexplicably* failed to present *any* medical evidence before the referee (now WCJ), despite stating repeatedly that he would do so.

maintains now supports her claim for disability.¹⁵ (WCAB op. at 9-10.) Although the WCAB has broad discretion to order a rehearing, our caselaw does not mandate a remand “every time a losing party can point to some evidence which his attorney did not introduce. Otherwise, piecemeal hearings prompted by the wisdom of hindsight would become the rule rather than the exception.” *Martell*, 707 A.2d at 244. In light of the circumstances here, we conclude that the WCAB did not abuse its discretion in denying Claimant’s request for a remand to present additional evidence.

Accordingly, we affirm.

ROCHELLE S. FRIEDMAN, Senior Judge

¹⁵ In fact, however, Claimant mischaracterizes the content of Dr. Solomon’s June 11, 2007, report. In that report, Dr. Solomon merely reiterates the history that Claimant provided to all of the specialists she saw. Moreover, the report indicates that, while Dr. Solomon performed a physical examination of Claimant, he did not perform any additional procedures or diagnostic tests. With respect to his diagnosis of Claimant’s problem, Dr. Solomon states only that he can confidently *exclude* various neurological diagnoses and that “*whatever the etiology of these movements is,*” the problem is reduced with clonazepam taken on a daily basis. (Claimant’s brief, attached exhibit.) It also is noteworthy that Dr. Solomon states that he asked Claimant if she had ever been referred to a psychiatrist for treatment, and Claimant responded that this had not previously been recommended. *Id.*

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Petitioner	:	
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v.	:	No. 1530 C.D. 2009
	:	
Workers' Compensation Appeal Board	:	
(PMA Group),	:	
Respondent	:	

ORDER

AND NOW, this 5th day of March, 2010, the order of the Workers' Compensation Appeal Board, dated July 8, 2009, is hereby affirmed.

ROCHELLE S. FRIEDMAN, Senior Judge