IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Floyd Dare, Petitioner	:	
v.	:	No. 1632 C.D. 2010
Workers' Compensation Appeal Board (Pennsylvania Conference of Seventh Day Advent), Respondent	:	Submitted: November 5, 2010

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY FILED: March 1, 2011

Floyd Dare (Claimant) petitions for review of an order of the Workers' Compensation Appeal Board (Board) affirming the decision of a workers' compensation judge (WCJ) granting the petition of the Pennsylvania Conference of Seventh Day Advent (Employer) to terminate Claimant's benefits pursuant to the provisions of the Pennsylvania Workers' Compensation Act (Act).[1] We affirm.

On December 20, 2005, Claimant sustained a work-related injury to his left ankle in the nature of an anterior talofibular (ATF) ligament avulsion

[1] Act of June 2, 1915, P.L. 736, as amended, 77 P.S. §§ 1 – 1041.4, 2501 – 2708.

fracture and sinus tarsi syndrome while in the course and scope of his employment with Employer. Pursuant to a medical only Notice of Compensation Payable (NCP) dated June 21, 2007, Employer accepted liability for medical treatment as Claimant did not suffer any loss of wages.

On June 18, 2008, Employer filed a petition to terminate Claimant's benefits alleging, inter alia, that Claimant had fully recovered from his work-related injury with no residual impairment as of June 2, 2008. Hearings on the petition ensued before a WCJ.

In support of the petition, Employer presented the deposition testimony of John F. Perry, M.D., a physician board certified in orthopedic surgery. Claimant testified in opposition to the petition, and presented the report of Alan Tuckman, M.D., an orthopedic surgeon.[2]

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[2] In his decision, the WCJ summarized the evidence presented by the parties, in pertinent part, as follows:

> [Dr. Perry] examined Claimant [on] June 2, 2008. Claimant related the mechanism of his work injury and treatment. Claimant complained of increased pain when he is active on his left leg with a persistent burning on the lateral border of his left foot. Dr. Perry noted the initial diagnosis of Claimant's injury was "left ankle pain with anterior talofibular avulsion fracture and persistent sinus tarsi syndrome."
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> Physical examination by Dr. Perry on June 2, 2008 revealed tenderness at the fifth metatarsal area on palpation and full range of motion of the left foot. The left ankle and subtalar joints were stable. Circulation and sensation was normal.
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> After his examination and review of medical records, Dr. Perry concluded Claimant suffered from a sprained left ankle with continued burning pain of uncertain cause. Dr. Perry explained he could find no explanation for the burning of which Claimant complained. He therefore concluded Claimant subjectively presented complaints without objective verification of an ongoing posttraumatic structural problem in his left ankle and foot. He

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On June 12, 2009, the WCJ issued a decision disposing of the petition in which he made the following relevant findings of fact: (1) Claimant testified that he continues to have left foot pain and discomfort, and that he has discussed with Dr. Tuckman the surgical removal of the left sural nerve; (2) Dr. Tuckman's report, if credible, does not address the sural nerve's involvement with the accepted work-related injury; (3) as of June 2, 2008, Claimant complained of tenderness at the fifth metatarsal area on palpation of the left foot, with full range of motion of the left foot; (4) as of June 2, 2008, Claimant's left ankle and subtalar joints are stable, and circulation and sensation are normal; (5) physical examination findings do not support Claimant's subjective complaints of pain and discomfort; (6) Claimant offered no evidence of any other conditions related to the accepted work-related injury; and (7) Dr. Perry opined that Claimant has fully recovered from the accepted work-related injury, and he found no objective

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> noted Claimant's left ankle was stable with no fluid or swelling. Range of motion and gait was normal, and "the passage of time was sufficient for an anterior talofibular tear to have healed." Dr. Perry opined Claimant fully recovered from his work injury as of the examination date, June 2, 2008.
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> Dr. Tuckman's November 18, 2008 report relates he examined Claimant "a few times, initially on April 16, 2008, and then again on May 6th, 2008." Dr. Tuckman then reports his physical examination revealed Claimant's report of severe discomfort along the sural nerve that was temporarily relieved with an injection of numbing medicine. Dr. Tuckman's report states, "At this time I think the patient [Claimant] still has residual sural nerve injury from his inversion injury."
>
> Claimant outlined his injury and treatment during his testimony…. He continues to have discomfort in his foot and uses orthotics.

WCJ Decision at 1-2 (footnotes omitted).

evidence to relate Claimant's current subjective complaints of pain to the accepted work-related injury. WCJ Decision at 3.

As a result, the WCJ concluded that Employer had sustained its burden of proving that Claimant is fully recovered from the accepted work-related injury as of Dr. Perry's examination of June 2, 2008. WCJ Decision at 3. Accordingly, the WCJ issued an order terminating Claimant's benefits as of June 2, 2008. Id. at 4.

On June 29, 2009, Claimant appealed the WCJ's decision to the Board. On July 16, 2010, the Board issued an opinion and order affirming the WCJ's decision. Claimant then filed the instant petition for review.[3]

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[3] In a workers' compensation proceeding, this Court's scope of review is limited to determining whether there has been a violation of constitutional rights, errors of law committed, or a violation of appeal board procedures, and whether necessary findings of fact are supported by substantial evidence. Lehigh County Vo-Tech School v. Workmen's Compensation Appeal Board (Wolfe), 539 Pa. 322, 652 A.2d 797 (1995). "Substantial evidence" is such relevant evidence as a reasonable person might accept as adequate to support a conclusion. Waldameer Park, Inc. v. Workers' Compensation Appeal Board (Morrison), 819 A.2d 164 (Pa. Cmwlth. 2003); Hoffmaster v. Workers' Compensation Appeal Board (Senco Products, Inc.), 721 A.2d 1152 (Pa. Cmwlth. 1998). In performing a substantial evidence analysis, the evidence must be viewed in a light most favorable to the party who prevailed before the WCJ. Waldameer Park, Inc.; Hoffmaster. In a substantial evidence analysis where both parties present evidence, it is immaterial that there is evidence in the record supporting a factual finding contrary to that made by the WCJ; rather, the pertinent inquiry is whether there is any evidence which supports the WCJ's factual finding. Waldameer Park, Inc.; Hoffmaster.

In addition, it is well settled that, in a workers' compensation proceeding, the WCJ is the ultimate finder of fact. Hayden v. Workmen's Compensation Appeal Board (Wheeling Pittsburgh Steel Corp.), 479 A.2d 631 (Pa. Cmwlth. 1984). As the fact finder, the WCJ is entitled to accept or reject the testimony of any witness, including a medical witness, in whole or in part. General Electric Co. v. Workmen's Compensation Appeal Board (Valsamaki), 593 A.2d 921 (Pa. Cmwlth.), petition for allowance of appeal denied, 529 Pa. 626, 600 A.2d 541 (1991). Questions of credibility and the resolution of conflicting testimony are within the exclusive province of the fact finder. American Refrigerator Equipment Company v. Workmen's Compensation Appeal Board (Jakel), 377 A.2d 1007 (Pa. Cmwlth. 1977). Thus, determinations as to witness credibility and evidentiary weight are within the exclusive province

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The sole claim raised by Claimant in this appeal is that the Board erred in affirming the WCJ's decision because the WCJ's decision is not supported by the record.[4] We do not agree.

An employer seeking to terminate workers' compensation benefits bears the burden of proving either that the claimant's disability has ceased, or that any current disability arises from a cause unrelated to the claimant's work injury. McGee v. L.F. Grammes & Sons Inc., 477 Pa. 143, 383 A.2d 864 (1978); Benson v. Workmen's Compensation Appeal Board (Haverford State Hospital), 668 A.2d 244 (Pa. Cmwlth. 1995); Giant Eagle Inc. v. Workmen's Compensation Appeal Board (Chambers), 635 A.2d 1123 (Pa. Cmwlth. 1993); McFaddin v. Workmen's Compensation Appeal Board (Monongahela Valley Hospital), 620 A.2d 709 (Pa. Cmwlth. 1993).

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of the WCJ and are not subject to appellate review. Hayden.

[4] As a corollary to this claim, Claimant also asserts in the Argument portion of his appellate brief that the WCJ's decision is not "well-reasoned". This Court believes that Claimant is actually arguing that the WCJ did not issue a reasoned decision as required by Section 422(a) of the Act, 77 P.S. §834. However, such a claim is not fairly comprised within the Statement of Questions Involved portion of Claimant's appellate brief. See id. at 4. As a result, any allegation of error in this regard has been waived for purposes of appeal. See Pa.R.A.P. 2116(a) ("[N]o question will be considered unless it is stated in the statement of questions involved or is fairly suggested thereby…."); G.M. v. Department of Public Welfare, 954 A.2d 91, 93 (Pa. Cmwlth. 2008) ("[H]owever, because Petitioner failed to include this issue in the Statement of Questions Involved portion of his brief, this issue is waived….") (citations omitted). Likewise, this claim of error has been waived based upon Claimant's failure to adequately develop any argument in support of this claim in his appellate brief. See Pa.R.A.P. 2119(a) ("[T]he argument shall be divided into as many parts as there are questions to be argued; and shall have at the head of each part—in distinctive type or in type distinctively displayed—the particular point treated therein, followed by such discussion and citation of authorities as are deemed pertinent."); Rapid Pallet v. Unemployment Compensation Board of Review, 707 A.2d 636, 638 (Pa. Cmwlth. 1998) ("[A]rguments not properly developed in a brief will be deemed waived by this Court….") (citation omitted).

In a case where the claimant complains of continued pain, this burden is met when an employer's medical expert unequivocally testifies that it is his opinion, within a reasonable degree of medical certainty, that the claimant is fully recovered, can return to work without restrictions that are causally related to the work injury, and that there are no objective medical findings which either substantiate the claims of pain or connect them to the work injury. Udvari v. Workmen's Compensation Appeal Board (USAir, Inc.), 550 Pa. 319, 705 A.2d 1290 (1997). If the WCJ credits this testimony, the termination of benefits is proper. Id.

In this case, Dr. Perry unequivocally testified that Claimant was fully recovered from the accepted work-related injury, that there were no objective medical findings to either substantiate the claims of continued pain or to connect them to the work-related injury, and that Claimant had returned to work in his pre-injury position without restrictions. See Reproduced Record (RR) at 22a-23a, 24a-28a. The WCJ accepted Dr. Perry's testimony as credible, accepted Claimant's testimony as credible, and rejected as not credible the report of Dr. Tuckman offered by Claimant in opposition to Employer's petition. See WCJ Decision at 2.[5]

[5] More specifically, in his decision the WCJ stated the following, in pertinent part:

> This Judge finds the deposition testimony of [Dr. Perry] competent and credible. He conducted a thorough examination of Claimant and explains his findings, or lack thereof, to support his opinion of full recovery from the recognized work injury. In contrast, Claimant offered only a written report from [Dr. Tuckman]. While a report can certainly be sufficient to address the issues in this litigation, Dr. Tuckman's report falls short. According to Dr. Tuckman's report, he last saw Claimant in May 2008 at which time he noted pain along the sural nerve that was temporarily relieved with numbing medication. Dr. Tuckman does not explain his findings at all. He does not describe the sural nerve

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Dr. Perry's credible testimony is sufficient substantial evidence to support the WCJ's grant of Employer's termination petition. Udvari.

Nevertheless, Claimant asserts that Dr. Perry's testimony was not sufficient to support the termination of benefits because Dr. Perry testified: (1) that he is not aware of any other left ankle injuries sustained by Claimant which would account for the ongoing complaints of pain; (2) that Claimant has never been complaint free since the work injury and there is no other cause for the continued complaints of pain; (3) that a bone scan would be helpful in determining if Claimant has ongoing problems; and (4) that if Claimant were his patient, he would order more diagnostic tests and have him wear a brace for the left ankle. See Brief of Petitioner at 8.

Medical evidence in unequivocal as long as the medical expert, after providing a foundation, testifies that, in his professional opinion, he believes or thinks that facts exist. Philadelphia College of Osteopathic Medicine v. Workmen's Compensation Appeal Board (Lucas), 465 A.2d 132, 134-135 (Pa. Cmwlth. 1983). Even if the witness admits to uncertainty, reservation, doubt, or lack of information with respect to scientific or medical details, as long as the witness does not recant the opinion first expressed, the evidence is unequivocal.

> or how the pain of which Claimant complained in May is related to the work injury. Furthermore, the issue is whether Claimant is recovered from his work injury as of June 2, 2008, and Dr. Tuckman did not report he saw Claimant on or after June 2, 2008. Therefore, this Judge rejects Dr. Tuckman's opinions as stated in his November 19, 2008, report as not credible and not addressing the recognized work injury.
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> Claimant's testimony is credible.

WCJ Decision at 2.

Id. The expert's testimony must be reviewed in its entirety to determine whether the opinions expressed are sufficient to warrant termination of benefits. Udvari, 550 Pa. at 327 n. 3, 705 A.2d at 1293 n. 3.

As noted above, Dr. Perry clearly and unequivocally testified that Claimant was fully recovered from the accepted work-related injury, that there were no objective medical findings to either substantiate the claims of continued pain or to connect them to the work-related injury, and that Claimant had returned to work in his pre-injury position without restrictions. See RR at 22a-23a, 24a-28a. As also noted above, the WCJ accepted Dr. Perry's testimony as credible. See WCJ Decision at 2.

Contrary to Claimant's argument before this Court, we do not find Dr. Perry's testimony establishes that Claimant continued to experience pain as a result of his accepted work-related injury. Rather, we firmly believe that, in reviewing Dr. Perry's deposition in its entirety and the particular testimony at issue, in context, Dr. Perry was merely acknowledging Claimant's ongoing complaints of pain, and attempting to explain how one might go about discovering the source of this pain that is completely unrelated to his accepted work-related injury. As noted by the Supreme Court, "[a]n appellate court cannot, by implication, decide that an expert's opinion was contrary to the opinion he directly and clearly stated." Udvari, 550 Pa. at 330, 705 A.2d at 1295 (citation omitted).[6]

[6] As a corollary to this claim, in his brief, Claimant also cites to portions of Dr. Tuckman's report that he offered in opposition to the termination petition. See Brief of Petition at 9-10. As noted above, the WCJ specifically found Dr. Tuckman's report to be not credible. See WCJ Decision at 2. Moreover, this Court is bound by the WCJ's determination in this regard. Hayden. As a result, we will not accede to Claimant's request to reconsider and reweigh this evidence in the instant appeal.

Accordingly, the Board's order is affirmed.

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JAMES R. KELLEY, Senior Judge

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O R D E R

AND NOW, this 1st day of March, 2011, the order of the Workers' Compensation Appeal Board, dated July 16, 2010, at No. A09-1149, is AFFIRMED.

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JAMES R. KELLEY, Senior Judge