

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Candice Casey,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1735 C.D. 2010
	:	
Workers' Compensation Appeal	:	Submitted: January 7, 2011
Board (The Vanguard Group),	:	
	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER**

FILED: May 13, 2011

Candice Casey (Claimant) petitions for review of the Order of the Workers' Compensation Appeal Board (Board) affirming the order of the Workers' Compensation Judge (WCJ), which, *inter alia*, granted The Vanguard Group's (Employer) Termination Petition. The Board found that the WCJ had substantial evidence to support the termination of benefits. Claimant argues that the Board erred in affirming the WCJ's decision because surveillance, alone, cannot support a termination of benefits for a work-related injury and, therefore, Employer did not

meet its burden by offering substantial, competent medical testimony. For the reasons that follow, we affirm the Board's Order.

On February 10, 2003, Claimant suffered a work-related injury to her left knee, left calf, and back while employed with the Employer. (Agreement for Compensation for Disability or Permanent Injury (Agreement) at 1, R.R. at 1a; WCJ Hr'g Tr. at 5-6, R.R. at 11a-12a.) Claimant returned to work on April 21, 2003.¹ (WCJ Hr'g Tr. at 6, R.R. at 12a.) Employer issued an agreement for compensation on May 16, 2003, suspending Claimant's benefits based on her return to work without a wage loss. (Agreement at 1, R.R. at 1a.) Employer filed the Termination Petition on August 22, 2008. (Termination Petition at 1, R.R. at 131a.) Claimant filed timely answers, and the matter was assigned to the WCJ.

In support of its Termination Petition, Employer offered the April 9, 2008, and August 25, 2008, deposition testimony of Leonard A. Brody, M.D. (Dr. Brody). Dr. Brody testified at his first deposition that he performed an independent medical examination (IME) of Claimant on September 20, 2007. (Brody Dep. at 7, April 9, 2008, R.R. at 84a.) Based on that examination, Dr. Brody opined that Claimant suffered a work-related aggravation to her preexisting degenerative disc disease and that, while Claimant had thoracic and lumbar spine disc herniations, those herniations were not caused by the work incident, but became symptomatic as a result. (WCJ

¹ During the workers' compensation hearing, Claimant testified that she returned to work on April 21, 2003. (WCJ Hr'g Tr. at 6, R.R. at 12a.) However, Claimant's testimony conflicts with the agreement for compensation, which indicates that Claimant returned to work on April 22, 2003. (Agreement at 1, R.R. at 1a.)

Decision, Findings of Fact (FOF) ¶ 5; Brody Dep. at 18, April 9, 2008, R.R. at 95a.) Dr. Brody based his opinion, in part, on Claimant's subjective complaints of pain during the examination. (FOF ¶ 5; Brody Dep. at 11, April 9, 2008, R.R. at 88a.) Specifically, Claimant "complained of pain beyond 45 degrees of lumbar spinal flexion"² from both sitting and lying down positions. (Brody Dep. at 11, April 9, 2008, R.R. at 88a.) As a result of Claimant's IME, Dr. Brody opined that Claimant was not fully recovered and, thus, not able to return to work in her regular job. (FOF ¶ 5; Brody Dep. at 18, 25, April 9, 2008, R.R. at 95a, 102a.)

However, before Dr. Brody's first deposition, Employer surveilled Claimant on February 26, 2008. (FOF ¶ 4.) The surveillance video showed Claimant and three males loading the contents of a house into a U-Haul Truck and unloading the contents at another residence. (FOF ¶ 4; Investigative Report at 3-4, March 7, 2009, R.R. at 196a-97a.) During his first deposition, Dr. Brody had the opportunity to review the surveillance report, but was unable to review and comment on the surveillance film as it was not yet available. (FOF ¶ 5; Brody Dep. at 24-25, April 9, 2008, R.R. at 101a-02a.) After having an opportunity to review the surveillance film, Dr. Brody issued an addendum report and stated that,

the activities noted on the surveillance video tape of 2/26/08 showing the patient performing the very vigorous, heavy activities, including repetitive bending, stooping, and lifting, is quite at variance with the physical examination that I obtained when I evaluated the patient on 9/20/07. With this in mind, I have now completed a Physician's Affidavit of Recovery for your records, which I am enclosing with today's letter.

² "Flexion" is defined as "the act of bending or condition of being bent." Dorland's Illustrated Medical Dictionary 685 (29th ed. 2000).

(Letter from Leonard A. Brody, M.D., to Nancy M. Farese, Esq., Employer's counsel, (May 8, 2008), R.R. at 174a.) Dr. Brody then testified, at a second deposition, that it was his opinion that Claimant had fully recovered and could "return to work on a full time, full duty basis with no restrictions" based upon the physical examination and his subsequent viewing of the surveillance video. (FOF ¶ 5; Brody Dep. at 7-8, August 25, 2008, R.R. at 142a-43a.)

At the hearing before the WCJ, Claimant testified that, after she returned to work, she experienced continued symptoms for which she sought treatment, (WCJ Hr'g Tr. at 6-7, R.R. at 12a-13a), but Claimant did not offer any rebuttal concerning the surveillance videos, (FOF ¶ 7). Claimant also offered the deposition testimony of her chiropractor, Russell T. Montalbano, D.C. (Dr. Montalbano). (FOF ¶ 6; Montalbano Dep. at 1, October 13, 2008, R.R. at 215a.) Dr. Montalbano opined that Claimant had not fully recovered from her work-related injuries and, therefore, was not able to return to her pre-injury work duties. (FOF ¶ 6; Montalbano Dep. at 17, 20, October 13, 2008, R.R. at 231a-34a.) Dr. Montalbano did not review the surveillance video. (FOF ¶ 6.)

Regarding Claimant's full recovery, the WCJ found the testimony of Dr. Brody, a board certified orthopedic surgeon, more credible and persuasive than that of Dr. Montalbano. Based on Dr. Brody's credited testimony, the WCJ held that Employer established that Claimant had fully recovered from her work-related injury and could return to full duty with no restrictions. Therefore, the WCJ granted

Employer's Termination Petition.³ (FOF ¶ 8.)⁴ Claimant appealed and the Board affirmed the WCJ's decision, upholding the termination of Claimant's benefits. (Board Op. at 6, R.R. at 291a.) Claimant now petitions this Court for review.⁵

On appeal, Claimant argues that the Board erred in affirming the WCJ's decision to terminate benefits because the WCJ's findings were not supported by substantial evidence. In making this argument, Claimant argues that surveillance films, alone, are inadequate to sustain the employer's evidentiary burden of proving that a claimant has sufficiently recovered from her work-related injuries to return to her regular job such that her benefits should be terminated.

Substantial evidence is defined as such relevant evidence as a reasonable person might accept as adequate to support a conclusion. Bethenergy Mines, Inc. v. Workmen's Compensation Appeal Board (Skirpan), 531 Pa. 287, 292, 612 A.2d 434, 436 (1992). The WCJ is the ultimate finder of fact and final arbiter of witness credibility and, as such, determines the weight to be given to any evidence. Dana Corporation v. Workers' Compensation Appeal Board (Hollywood), 706 A.2d 396,

³ The WCJ also ordered Employer to pay Claimant certain disability benefits, granted Claimant's penalty petition, and ordered Employer to pay Claimant's outstanding chiropractic bills and an unreasonable contest fee. (WCJ Decision, Order at 1.) None of these determinations are at issue in this appeal.

⁴ The WCJ's Findings of Fact contain two paragraphs numbered eight. The citation preceding this footnote refers to the second such paragraph.

⁵ Our scope of review is limited to determining whether the Board violated constitutional rights, committed an error of law, or whether necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. § 704; Sule v. Workmen's Compensation Appeal Board (Kraft, Inc.), 550 A.2d 847, 848-49 (Pa. Cmwlth. 1988).

400 (Pa. Cmwlth. 1998). Because the WCJ is the ultimate finder of fact, this Court is bound by the WCJ's findings of fact where they are supported by substantial evidence. See Bethenergy Mines, 531 Pa. at 293, 612 A.2d at 437.

To obtain the termination of benefits, the burden of proof is on the employer to prove, by substantial medical evidence, "either that the employee's disability has ceased, or that any current disability arises from a cause unrelated to the employee's work injury." Campbell v. Workers' Compensation Appeal Board (Antietam Valley Animal Hosp.), 705 A.2d 503, 506-07 (Pa. Cmwlth. 1998). The claimant's disability is presumed to continue until the employer has met this burden. Giant Eagle, Inc. v. Workmen's Compensation Appeal Board (Chambers), 635 A.2d 1123, 1127 (Pa. Cmwlth. 1993). Where the claimant complains of continued symptoms, the employer has met its burden and the termination of benefits is proper when the employer's medical expert, through testimony credited by the WCJ, "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 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, 327, 705 A.2d 1290, 1293 (1997). Furthermore, although "[s]urveillance films alone are inadequate to sustain the evidentiary burden of showing that a claimant's disability has been reduced," Sule v. Workmen's Compensation Appeal Board (Kraft, Inc.), 550 A.2d 847, 849 (Pa. Cmwlth. 1988), such films may be used by a medical expert in conjunction with a physical examination in evaluating a claimant's "actual, as opposed to [her] stated, physical capabilities." Fye v. Workers' Compensation Appeal Board (Super Moche), 762 A.2d 428, 430 (Pa. Cmwlth. 2000).

“Moreover, a surveillance film may be a basis for the grant of a termination petition only so long as it is corroborated by competent medical testimony.” Ernst v. Workers' Compensation Appeal Board (Rollins Transportation System), 720 A.2d 1085, 1088 (Pa. Cmwlth. 1998).

Claimant argues that Westinghouse Electric Corporation v. Workmen's Compensation Appeal Board (McClave), 565 A.2d 204, 206 (Pa. Cmwlth. 1989), and Sule, 550 A.2d at 849, support her assertion that surveillance films, alone, are inadequate to sustain Employer’s evidentiary burden. Claimant’s reliance on these cases is misplaced. In Westinghouse, the claimant was surveilled, *inter alia*, carrying various heavy items and catching and throwing a football, activities that should not have been possible for someone with the claimant’s condition. Westinghouse, 565 A.2d at 205. Similarly, in Sule, the claimant was surveilled shoveling dirt without apparent discomfort or pain and doing other activities inconsistent with her alleged condition. Sule, 550 A.2d at 848. In both Westinghouse and Sule, the referees,⁶ based on their own review of the surveillance video, concluded that the claimants had fully recovered from their work-related injuries. Westinghouse, 565 A.2d at 205; Sule, 550 A.2d at 848. There was no medical evidence of full recovery in Westinghouse, 565 A.2d at 222, and, in Sule, the referee rejected the testimony of the employer’s medical expert that the claimant had no prognosis for recovery of her right shoulder injury and based his finding on the surveillance video of the claimant,

⁶ Workers' Compensation Judges were known as referees prior to the amendments to Section 401 of the Workers’ Compensation Act, Act of June 2, 1915, P.L. 736, as amended, 77 P.S. § 701. Conaway v. Workers’ Compensation Appeal Board (City of Philadelphia), 728 A.2d 1037, 1038 n.3 (Pa. Cmwlth. 1999).

Sule, 550 A.2d at 848. The claimants in Westinghouse and Sule appealed, and this Court ultimately held that surveillance films, alone, are inadequate to sustain the employer's evidentiary burden. However, the present matter is unlike both Westinghouse and Sule.

In the present matter, the WCJ did not base his finding of full recovery on his own review of the surveillance video. Furthermore, the surveillance video is not the only evidence of Claimant's full recovery. Dr. Brody's findings from Claimant's IME, his competent medical testimony after viewing the surveillance video, and the surveillance video, itself, are corroborative evidence which support the WCJ's determination. The present matter is similar to Fye, wherein the medical expert, after viewing surveillance video of the claimant participating in activities at variance with the expert's previous findings, opined that claimant should be under no restrictions. Fye, 762 A.2d at 430. In Fye, this Court held that it was proper for the medical expert to use the surveillance films, along with his physical examination of the claimant, as a basis for his opinion. Id. Here, the WCJ found Dr. Brody's testimony to be credible. (FOF ¶ 8.) In his second deposition, Dr. Brody, after viewing the surveillance video, opined within a reasonable degree of medical certainty that Claimant was fully recovered and could "return to work on a full time, full duty basis with no restrictions." (Brody Dep. at 7-8, August 25, 2008, R.R. at 142a-143a.) Dr. Brody's medical opinion was based upon both the results of Claimant's IME and his subsequent viewing of the surveillance video. (Brody Dep. at 7-8, August 25, 2008, R.R. at 142a-143a.) Because a medical expert, not a WCJ, determined that Claimant's disability had ceased based both on viewing the surveillance video and an IME, this matter is distinguishable from both Westinghouse and Sule. Dr. Brody's

credible and competent medical testimony constitutes substantial evidence which supports the WCJ's factual findings and satisfies Employer's burden that Claimant's work injury has ceased and that Claimant is fully recovered and can return to work without restrictions. We, therefore, hold that the WCJ's termination of Claimant's benefits was proper under these circumstances.

Accordingly, because the WCJ's findings are supported by substantial evidence and the Board did not err in affirming the WCJ's decision, we affirm the Board's Order.

RENÉE COHN JUBELIRER, Judge

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	:	
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ORDER

NOW, May 13, 2011, the Order of the Workers' Compensation Appeal Board in the above-captioned matter is hereby **AFFIRMED**.

RENÉE COHN JUBELIRER, Judge