IN THE COMMONWEALTH COURT OF PENNSYLVANIA

J. L. Hajduk, Petitioner	:	
v.	:	No. 1876 C.D. 2009
	:	Submitted: June 18, 2010
Workers' Compensation Appeal Board (Mary L. Hajduk t/d/b/a Hajduk and Associates and State Workers' Insurance Fund), Respondents	:	

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE FRIEDMAN FILED: July 15, 2010

J. L. Hajduk (Claimant) petitions for review of the August 27, 2009, order of the Workers' Compensation Appeal Board (WCAB), which affirmed the decision of a workers' compensation judge (WCJ) to grant Claimant's claim petition in part. We affirm.

Claimant worked as an attorney for Hajduk & Associates (Employer). In September 2000, the law firm moved its office to a new location. On September 22, 2000, Claimant was unloading file boxes from a pickup truck and carrying them into the new office when he began sweating profusely and felt a pain in his side. Claimant continued working, but, the next day, he began to experience numbness in his face and arm and intense pain in his chest. Claimant went to the hospital and was treated by David M. Murello, M.D., who believed Claimant was having an acute

coronary syndrome. Dr. Murello transferred Claimant to another hospital, where Claimant underwent a cardiac catheterization and coronary bypass surgery. (WCJ's Findings of Fact, Nos. 8, 12-15.)

In September 2003, Claimant filed a claim petition, alleging that, as a result of a work injury on September 22, 2000, he suffered, *inter alia*, a myocardial infarction, a major depression and anxiety disorder and a cognitive disorder. (WCJ's Findings of Fact, Nos. 1-2.) The State Workers' Insurance Fund (SWIF), Employer's insurer, opposed the petition. The petition was assigned to a WCJ, who, after holding hearings, granted the petition with respect to the myocardial infarction and denied the petition with respect to the other claims. Claimant appealed to the WCAB, which affirmed, and Claimant now petitions this court for review.[1]

Claimant first argues that the WCAB failed "to recognize that cognitive loss is a natural consequence of coronary artery bypass graft surgery." (Claimant's brief at 4.) In making this argument, Claimant refers to an article in the *New England Journal of Medicine* stating that cognitive dysfunction commonly occurs after coronary artery bypass surgery.[2] Claimant also quotes from the testimony of expert witnesses indicating that he suffered cognitive decline as a result of his surgery. Our

[1] Our scope of review is limited to determining whether constitutional rights have been violated, whether the adjudication is in accordance with the law and whether the necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704.

[2] Claimant asserts that, according to the article, there is a measured cognitive decline in 42% of patients within five years after the bypass surgery. (Claimant's brief at 14.)

scope of review, however, does not include determining whether the record contains substantial evidence to support findings not made. We consider only whether the record contains substantial evidence to support findings made.

Here, the WCJ found that Claimant did not suffer a cognitive disorder as a result of his surgery. In making that finding, the WCJ relied upon the testimony of Mark Warren Haut, Ph.D., who is board-certified in clinical neuropsychology, and Lawson Bernstein, M.D., who is board-certified in psychiatry and neurology. Dr. Haut testified that Claimant's cognitive disorder was secondary to a cerebral vascular disease and that Claimant's cognitive defects after his surgery were relatively stable when compared to an evaluation done in 1996. Dr. Bernstein opined that Claimant's cognitive disorder was not a result of the surgery and that there was no substantive change in Claimant's neurological testing or his level of functioning after the surgery. (WCJ's Findings of Fact, Nos. 38-39, 46-47.) Thus, the record contains substantial evidence to support the WCJ's finding that Claimant's current cognitive defects are not a result of his surgery.

Claimant next argues that the WCJ erred in admitting the deposition of Dr. Haut into evidence because Dr. Haut's deposition took place in West Virginia, and a Pennsylvania notary notarized it without authority. However, when Claimant raised the notary objection before the WCJ, the following discussion took place.

> [Employer]: Well, Judge, if there's going to be an issue [about the notary], all I'm going to do then, is to pay Dr. Haut to come to Pittsburgh. We're right across the border. And I'll take his deposition. I mean, if I have to cure it.
>
> [WCJ]: I've already ruled on the … issue.

> [Employer]: Okay. I just want to make sure. I don't want to see this go up on appeal on that issue.
>
> [WCJ]: Perhaps it would be more appropriate, if there's a concern on the part of the Employer that this deposition is going to be thrown out by me that[][Claimant] provide a brief to [Employer] and to me within 30 days.
>
> [Employer]: Because all I would do is have the doctor come across the border, and just have him verify that's his testimony, and put it in, Judge.
>
> [WCJ]: Right. Are you going to put [Employer] to that trouble, [Claimant]?
>
> [Claimant]: I'll give you a memo within 30 days….

(R.R. at 327a-28a.) SWIF argues that Claimant failed to preserve the notary issue because the WCJ required Claimant to file a brief and Claimant failed to do so. We agree with SWIF that Claimant failed to preserve this issue.

Claimant also argues that the WCJ erred in granting SWIF's request for an independent medical evaluation (IME) by Dr. Bernstein. Claimant asserts that SWIF requested the IME by Dr. Bernstein only because a previous independent medical examiner, Graham Radcliffe, D. Phil., a neuropsychologist, did not offer an opinion that favored SWIF. SWIF counters that it requested an IME by Dr. Radcliffe in order to determine whether Claimant sustained a cognitive disorder, but it requested an IME by Dr. Bernstein to determine whether Claimant suffered from depression.[3] Because the WCJ believed that the testimony of Dr. Bernstein would

[3] Before Dr. Bernstein testified at the June 1, 2006, hearing, Claimant argued that the WCJ should limit Dr. Bernstein's testimony to questions regarding depression. (R.R. at 341a.) Employer responded that Dr. Bernstein would testify that depression can affect cognitive processes, and, therefore, the doctor should be permitted to address cognitive issues as well. (R.R. at 342a.) The
(Footnote continued on next page…)

cover different ground than that of Dr. Radcliffe, the WCJ did not abuse its discretion in ordering Claimant to undergo an IME by Dr. Bernstein.[4]

Claimant next argues that the WCJ erred in excluding the testimony of WCJ William Lowman and WCJ David Cicola, who would have testified as fact witnesses regarding the "capabilities" of Claimant before and after the heart attack.[5] (Claimant's brief at 30.) However, to establish his physical and mental capabilities, Claimant needed to present expert **medical** testimony. Thus, the WCJ did not err by excluding the testimony of the other WCJs regarding Claimant's "capabilities."

Finally, Claimant asserts that the WCAB improperly concluded that his medical bills were not submitted on the appropriate forms. Claimant maintains that this argument does not appear, and was not explored, in the record, and, thus, the

(continued…)

WCJ did not limit the testimony. (*Id.*) We note that, when the WCJ permitted the IME by Dr. Bernstein, the WCJ would not have known the doctor's findings or the substance of his testimony.

[4] Section 314(a) of the Workers' Compensation Act (Act), Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. §651(a), provides that a WCJ may at any time after a first examination, upon request by an employer, order the employee to submit himself to such further medical examination as the WCJ shall deem reasonable and necessary. The grant of a request to compel an examination is within the sound discretion of the WCJ. *Peters Township School District v. Workers' Compensation Appeal Board (Anthony)*, 945 A.2d 805 (Pa. Cmwlth. 2008).

[5] Claimant asserts that: (1) Employer's office was in the same building as, and across the hall from, the Uniontown Workers' Compensation Office; (2) WCJ Lowman saw and spoke with Claimant during the time Employer was moving its office and had observed Claimant practicing law during the prior years; and (3) WCJ Cicola also saw Claimant during the time period of the move, had a hearing with him days before the heart attack and spoke with him on matters unrelated to workers' compensation. (Claimant's brief at 29.)

WCAB should not have addressed it. However, the WCAB raised the "forms" issue only after it determined that Claimant's medical bills are not compensable because they concern Claimant's hospitalization for "conditions that were found to be not related to the work-related injury." (WCAB's op. at 18.) Claimant does not contend that the WCAB erred in that regard. Thus, we reject Claimant's challenge to the WCAB's additional conclusion that Claimant's medical bills are not compensable because they were not submitted on the appropriate forms.

Accordingly, we affirm.

ROCHELLE S. FRIEDMAN, Senior Judge

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O R D E R

AND NOW, this 15th day of July, 2010, the order of the Workers' Compensation Appeal Board, dated August 27, 2009, is hereby affirmed.

ROCHELLE S. FRIEDMAN, Senior Judge