IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Cynthia Jordan,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1902 C.D. 2010
	:	
Workers' Compensation Appeal Board (Charming Shoppes),	:	Submitted: February 11, 2011
	:	
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: August 5, 2011**

Cynthia Jordan (Claimant) appeals from an Order of the Workers' Compensation Appeal Board (Board) that affirmed the decision of the Workers' Compensation Judge (WCJ) granting, in part, a Petition for Review of Utilization Review (UR Petition) filed by Charming Shoppes (Employer). We affirm.

Claimant sustained a work-related injury on February 15, 1995 in the course and scope of her employment as a forklift/warehouse worker. (Notice of Compensation Payable (NCP) at 1, R.R. at 78.) Employer accepted this injury through a NCP recognizing a bilateral trapezius strain, which was further expanded to

include chronic pain syndrome, detrusor hyperreflexia, depression and anxiety/stress, lumbar spine injury, broken dental bridge/teeth, post disc fusion syndrome, C6-7 disc herniation, C4-5 disc bulge, complex regional pain syndrome Type II of the cervical region and upper extremities, and bruxism. (WCJ Order at 16, December 22, 2000, R.R. at 95; WCJ Order at 17-18, May 30, 2006.) Claimant commenced care with F. Scott Carlin, D.O. (Provider) on April 4, 2008, thirteen years post injury, after previously treating with a former provider for eight years; she changed to Provider because his office was in closer proximity to her home. (WCJ Decision, Findings of Fact (FOF) ¶¶ 4(c) and 8(a).) Provider treated Claimant on April 9, 2008 and April 15, 2008 with therapeutic magnetic resonance (TMR) treatment and physical therapy (PT). (FOF ¶ 4(d).) Provider also prescribed medications to Claimant and provided her with a treatment plan that included passive modalities and manipulative therapy. (FOF ¶ 4(c).) On May 12, 2008, Employer filed a Utilization Review (UR) Request seeking a review by the Bureau of Workers' Compensation (Bureau) of the reasonableness and necessity of all medical treatment, pain management and prescriptions administered by Provider to Claimant as of April 9, 2008, and ongoing. (UR Request at 1-2, R.R. at 129-30.) The Bureau assigned the UR to Margroff Review Services as the Utilization Review Organization (URO). Robert A. Cohen, D.O., performed the UR on behalf of the URO.

In conducting the UR, Dr. Cohen reviewed the medical records of Provider and Claimant's previous provider, as well as numerous diagnostic studies and records from multiple treating physicians and specialists dating back to 1995. (UR Determination at 1-3, R.R. at 122-24.) Dr. Cohen also reviewed several treatment protocols and other sources on reflex sympathetic dystrophy (RSD) and complex regional pain syndrome. (UR Determination at 3-4, R.R. at 124-25.) In the UR

Determination, Dr. Cohen found the challenged care by Provider to be reasonable and necessary as of April 9, 2008 through October 4, 2008, but not thereafter. (UR Determination at 5, R.R. at 126.) The UR Determination provides for a six-month time frame during which the treatments rendered to Claimant by Provider were considered reasonable and necessary. This six month period consisted of April 4, 2008 (the date upon which treatment with Provider commenced) through October 4, 2008. The UR Determination further provides that the documentation cited therein supports this six-month time period for Provider's treatments. (UR Determination at 3-5, R.R. at 124-26.)

On August 7, 2008, Claimant and Provider filed a Petition for Review of UR Determination challenging the UR Determination's conclusion that *all* treatment from Provider after October 4, 2008, and ongoing was unreasonable and unnecessary. (Petition for Review of UR Determination at 1-2, R.R. at 131-32.) The matter was assigned to the WCJ. In support of the UR Petition, Provider submitted, *inter alia*, a report dated September 10, 2008 (Provider's Report). (Letter from Provider to Claimant (Sept. 10, 2008), R.R. at 39.) In Provider's Report, Provider: (1) objected to the prohibition of his treatment of Claimant after his initial six-month course of treatment because Claimant's response to his treatment was still unknown and some patients would still require palliative care more than six months after beginning treatment with Provider; (2) disagreed with the limitation of medications beyond October 4, 2008; and (3) noted that TMR has improved Claimant's level of functioning and quality of life. (FOF ¶ 5(b)-(c).) In further support of the UR Petition, Claimant testified that her pain was unbearable and she could not handle it without the medications "Oxycontin, Oxycodone, Topamax, Wellbutrin, Xanax, and Neurontin." (FOF ¶ 8(b).) Claimant testified that most of the treatment she received

from Provider helped, but did not take the pain away completely as she still needed the medications, heat, and home therapy to manage the pain. (FOF ¶ 8(d).) However, Claimant possesses a massage chair for her home use that helped her to manage pain and improve function by providing "exactly the same kind of treatment as she receives at [Provider]'s office" and that her medications have increased since treatment with Provider commenced. (FOF ¶¶ 8(c), 9(a), (c).)

The WCJ found the medical opinions of Provider and Dr. Cohen credible, in part. The WCJ determined that Provider's Report and Claimant's testimony did not support ongoing PT or TMR treatment, but that the increase in prescription medication clarified that Claimant required ongoing medication. (FOF ¶¶ 10.) The WCJ found Claimant's testimony credible that she has ongoing pain but, by Claimant's own testimony, she could obtain relief from her prescribed home massage chair, similar to what she was receiving at Provider's office, and that her medications had increased. (FOF ¶¶ 10, 11, 12.) As such, the WCJ concluded that, after October 4, 2008, "the only treatment by [Provider] that is reasonable and necessary is the prescription of medications and the requisite office visits to prescribe medications." (WCJ Decision, Conclusions of Law (COL) ¶ 2.) Claimant appealed the WCJ's decision to the Board, which affirmed. Claimant now petitions this Court for review.[1]

On appeal, Claimant argues that the WCJ erred in finding Claimant's PT and TMR treatments reasonable and necessary only for a period of six months, ending on

[1] This Court's "scope of review in a workers' compensation appeal is limited to determining whether an error of law was committed, constitutional rights were violated, or whether necessary findings of fact are supported by substantial evidence." Bloom v. Workmen's Compensation Appeal Board (Keystone Pretzel Bakery), 677 A.2d 1314, 1317 n.4 (Pa. Cmwlth. 1996).

October 4, 2008, because the WCJ: (1) failed to consider the palliative benefit of these treatments and improperly relied upon whether there was quantifiable improvement in Claimant's work-related condition; (2) substituted her opinion for that of a physician in concluding that prescription medications and home treatment therapy provided the same pain relief as the PT and TMR; and (3) limited the PT and TMR treatments to six months, which was speculative.

Claimant first argues that the WCJ did not consider the palliative benefit of PT and TMR treatments and improperly relied upon whether there was a quantifiable improvement in Claimant's work-related condition. We begin by pointing out that when Claimant first consulted Provider, thirteen years post injury, her presenting complaints were of neck pain, upper and lower back pain, headaches, difficulty sleeping, chronic right arm numbness, tingling and pain, chronic right leg pain, depression, and anxiety. (Letter from Provider to Claimant at 2-3 (April 4, 2008), R.R. at 42-43.) Our review of this record confirms that Claimant's treatment goals with Provider centered upon pain relief. We do not disagree with Claimant that palliative treatments can be appropriate in those cases where the WCJ finds such treatments to be reasonable and necessary.[2] Here, Provider noted his agreement with Dr. Cohen's UR Determination that "there is no cure for chronic regional pain syndrome and treatment is focused on relieving painful symptoms associated with RSD." (Provider's Report at 2, R.R. at 40 (quoting Dr. Cohen's UR Determination).) Provider's treatment plan was based upon addressing and controlling Claimant's pain

[2] In Cruz v. Workers' Compensation Appeal Board (Philadelphia Club), 728 A.2d 413, 417 (Pa. Cmwlth. 1999), we stated that "treatment may be reasonable and necessary even if it is designed to manage the claimant's symptoms rather than to cure or permanently improve the underlying condition." In the instant case, Provider's treatment plan was based mainly upon pain control. (Letter from Provider to Claimant at 4-5 (April 4, 2008), R.R. at 44-45.)

through PT, TMR, and medications. (Letter from Provider to Claimant at 4 (April 4, 2008), R.R. at 44.) Thus, the WCJ's findings and conclusion in this case were arrived at within the context of palliative treatments for pain alleviation and control, as addressed by Provider in his treatment plan. We disagree with Claimant that the WCJ determined that the PT and TMR treatments were not reasonable or necessary *just because* they were palliative. This was clearly not the basis of the WCJ's decision. In fact, the WCJ's approval of ongoing prescription pain medications by Provider and the continuing office visits required for that purpose was, in fact, based upon their palliative effects.

Claimant next argues that the WCJ substituted her opinion for that of a physician in concluding that prescription medications and home treatments provided the same pain relief as the PT and TMR treatments. Claimant further maintains that there is nothing in the record to support the WCJ's findings that Claimant is able to obtain the same pain relief without these treatments by Provider. Claimant bases these assertions on her claim that the WCJ capriciously disregarded competent evidence about the palliative benefit of these Provider-based treatments. Claimant argues that there is no substantial evidence to support the WCJ's findings that Claimant needed only prescription medications and home therapy, and not the PT and TMR treatments, to control her chronic pain after October 4, 2008.

In response, Employer argues that the WCJ, in fact, considered the palliative effects of the PT and TMR treatments, but determined that the reports of Provider and the testimony of Claimant, herself, do not support the continuation of these treatments when there has been no improvement in Claimant's pain after receiving these treatments and her medications, including pain medications, were increasing.

We begin our analysis with the

> Administrative Agency Law, which governs appeals taken by persons aggrieved by agency adjudications, [and] provides that a reviewing court "shall affirm the adjudication unless it shall find that . . . any finding of fact made by the agency and necessary to support its adjudication is not supported by substantial evidence." 2 Pa.C.S. § 704. Clearly, the reviewing court is not directed to inquire into the reasonableness of the agency's adjudication, but rather to determine only whether it was supported by substantial evidence.

Bethenergy Mines v. Workmen's Compensation Appeal Board (Skirpan), 531 Pa. 287, 291, 612 A.2d 434, 436 (1992). Substantial evidence is such relevant evidence as a reasonable person might accept as adequate to support a conclusion. Id., 531 Pa. at 293, 612 A.2d at 437. In performing a substantial evidence analysis, this "court must view the evidence in a light most favorable" to the party who prevailed before the factfinder. Birmingham Fire Insurance Co. v. Workmen's Compensation Appeal Board (Kennedy), 657 A.2d 96, 98 (Pa. Cmwlth. 1995). In a substantial evidence analysis where both parties present evidence, it does not matter that there is evidence in the record which supports 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. Grabish v. Workmen's Compensation Appeal Board (Trueform Foundations, Inc.), 453 A.2d 710, 713 (Pa. Cmwlth. 1982). "In short, the appellate role is not to reweigh the evidence or to review the credibility of the witnesses. [citation omitted] Rather, the . . . reviewing court must simply determine whether, upon consideration of the evidence as a whole, the [WCJ's] findings have the requisite measure of support in the record." Bethenergy Mines, 531 Pa. at 293, 612 A.2d at 437. It is solely for the WCJ, as the factfinder, to determine what weight to give to any evidence. Dana v. Workers' Compensation Appeal Board (Hollywood), 706 A.2d 396, 400 (Pa. Cmwlth. 1998). As such, the WCJ "may reject

the testimony of any witness in whole or in part, even if that testimony is uncontradicted." Id.

Here, the WCJ credited the testimony of Claimant to establish that the massage chair prescribed for Claimant's home use provided her with exactly the same PT treatment as she received at Provider's office. As for Provider's TMR treatments, the WCJ credited Dr. Cohen's UR Determination, indicating that the "use of physical therapy modalities," of which TMR is one, "is reasonable and appropriate when started early at the onset of injury, but is felt to be most beneficial within six months post acute injury." (UR Determination at 3, R.R. at 124.) The WCJ found that Claimant's prescription medications increased since commencing treatments with Provider. Thus, after crediting Claimant's testimony and Provider's reports in part, the WCJ additionally credited Dr. Cohen's UR Determination in part, as noted, and weighed those reports in a manner to conclude that the Provider's PT and TMR treatments were not reasonable or necessary.

In reviewing Claimant's arguments, we note that it was Claimant herself who testified that Provider prescribed a massage chair for her home use that improves her function throughout the day. (Hr'g Tr. at 16, R.R. at 16.) She describes it as "a chair that you would find in a therapy office. . . It can give you heat, it stimulates your whole entire body. You can elevate yourself where if you can't sleep, you can actually recline it, and you would be able to sleep in it." (Hr'g Tr. at 17-18, R.R. at 17-18.) When asked if it was similar to the type of formal PT that she would get over the course of the years in Provider's or other doctors' offices, she answered, "Yes, *it's exactly the same thing*." (Hr'g Tr. at 18, R.R. at 18 (emphasis added).) Claimant further testified that the TMR treatments do not eliminate her pain, stating that she

could not manage her pain with only these treatments or without her medications, and that the TMR does not take the place of PT and heat therapy. (Hr'g Tr. at 19, R.R. at 19.) When questioned about her medications during the times she was receiving TMR treatments from Provider, Claimant testified that none of her medications were reduced and, instead, got stronger during that period. (Hr'g Tr. at 31, R.R. at 31.) Thus, Claimant's testimony provides substantial evidence to support the findings by the WCJ.

The WCJ found Claimant's testimony credible in that Claimant had ongoing pain, but also found that she could generate relief from the massage chair prescribed by Provider for her home use that provided exactly the same kind of treatment she received at Provider's office. (FOF ¶¶ 8(c), 11.) The WCJ also found that Provider prescribed medications for breakthrough pain and increased Claimant's prescription medication on the same date that Provider recorded Claimant's improvement as a result of Provider's treatment. (FOF ¶¶ 7(b), 10.) Noting the increase in prescription medications, the WCJ found that the testimony of Claimant and the Provider's reports did not support ongoing PT or TMR treatment. (FOF ¶ 10.) Therefore, the WCJ concluded that only the prescriptions for pain, and office visits necessary for those prescriptions, were reasonable and necessary prospectively, but that PT and TMR treatments were no longer reasonable and necessary after October 4, 2008. (COL ¶ 2.) It was within the province of the WCJ to ascribe credibility and weigh the testimony and evidentiary reports as she did and there is substantial evidence in the record to support her findings and conclusions.

Claimant's third argument is that the prohibition on PT and TMR treatments beyond October 4, 2008 was improper as speculative. Claimant relies upon Snyder v.

Workers' Compensation Appeal Board (International Staple and Machine), 857 A.2d 202 (Pa. Cmwlth. 2004), for this argument. Claimant asserts that Snyder prohibits a UR physician from limiting treatment six months or more in the future because it is speculative. In Snyder, the UR physician concluded that treatment through the date of his report was reasonable and necessary and, additionally, that "treatment of a supportive nature, approximately [two] office visits monthly, over the next six months would be reasonable *should exacerbations occur*." Snyder, 857 A.2d at 204 (emphasis added). Upon this Court's review, we agreed with the WCJ that the UR physician "opined that every time an exacerbation of Claimant's condition occurred she was then entitled to another two chiropractic treatments per month, up to six months . . . until six months elapsed without an exacerbation." Id. at 207. We noted that the UR "may not speculate that chiropractic care six months or more in the future would no longer be needed because a claimant's condition will improve by the end of the projected period." Id.

Here, Claimant has not raised exacerbations of her condition as an issue or speculation about potential exacerbations of her condition, as the UR physician did in Snyder. What was speculative in Snyder was the planning for future, potential exacerbations that had not yet occurred. In the instant case, there was no speculation about Claimant's potential exacerbations of her condition involved. The issues involved Claimant's ongoing pain thirteen years post injury. Therefore, Snyder is distinguishable and not applicable to the facts in this case. We consider Claimant's argument to be merely another means of expressing her dissatisfaction with the disallowance of Provider's PT and TMR beyond October 4, 2008, which is without merit.

There is nothing speculative about the WCJ's conclusion that the PT and TMR treatments beyond the six-month period were no longer reasonable and necessary for all the reasons we have noted. In fact, a UR determination can be prospective, as Section 306(f.1)(6)(i) of the Workers' Compensation Act,[3] specifically provides: "The reasonableness or necessity of all treatment provided by a health care provider under this act may be subject to *prospective*, concurrent or retrospective utilization review at the request of an employe, employer or insurer. The department shall authorize utilization review organizations to perform utilization review under this act." 77 P.S. § 531(6)(i) (emphasis added). For all of the foregoing reasons, we affirm the Order of the Board.

RENÉE COHN JUBELIRER, Judge

[3] Act of June 2, 1915, P.L. 736, as amended, 77 P.S. § 531(6)(i).

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Workers' Compensation Appeal Board (Charming Shoppes),	:	
	:	
Respondent	:	

O R D E R

NOW, August 5, 2011, the Order of the Workers' Compensation Appeal Board in the above-captioned matter is hereby **AFFIRMED**.

RENÉE COHN JUBELIRER, Judge