IN THE COMMONWEALTH COURT OF PENNSYLVANIA

John Troilo,	:	
Petitioner	:	
	:	
v.	:	No. 1986 C.D. 2010
	:	Submitted: February 11, 2011
Workers' Compensation Appeal Board	:	
(Merck & Co., Inc.),	:	
Respondent	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE FRIEDMAN FILED: March 18, 2011

John Troilo (Claimant) petitions for review of the September 21, 2010, order of the Workers' Compensation Appeal Board (WCAB) affirming the decision of a workers' compensation judge (WCJ) to grant the petition of Merck & Company, Inc. (Employer) to terminate benefits. We affirm.

Claimant worked as a biotechnician in Employer's vaccine department, where his duties included changing vent filters, mixing solvents, and computer work. Claimant also worked overtime stripping and waxing Employer's floors. While working overtime on August 14, 2005, Claimant slipped and fell, injuring his back and right wrist. Claimant missed no work after the fall and continued working light duty, including overtime, without any wage loss until September 2007, when his union contract changed and eliminated his opportunity for overtime work. Claimant began receiving partial disability benefits to compensate for his lost overtime wages.

On April 1, 2008, Employer issued a notice of compensation payable (NCP) identifying Claimant's injury as an aggravation of pre-existing degenerative disc disease due to a lumbar sprain and strain. Employer also filed a supplemental agreement relating to Claimant's lost overtime wages between October 1, 2007, and March 17, 2008.

On April 14, 2008, Employer filed a petition to terminate benefits, alleging that Claimant had fully recovered from his work-related injury as of November 28, 2007. The WCJ held a hearing on January 6, 2009.

Employer presented the deposition testimony of Dr. Wilhelmina Korevaar, a board-certified anesthesiologist. Dr. Korevaar testified that she examined Claimant on November 28, 2007, and diagnosed him with a prior aggravation of a pre-existing degenerative condition of the lumbar spine. (Korevaar Dep., 7/17/08, at 25.) She opined that, as of the examination date, Claimant had recovered to his pre-injury condition. (*Id.*) The MRI reports showed that Claimant's aggravation injury had ceased and that the conditions indicated in the MRI were pre-existing. (*Id.* at 25-26.) According to Dr. Korevaar, Claimant could return to work full time as a biotechnician, including overtime, with no restrictions related to his work injury. (*Id.* at 31.) However, due to Claimant's pre-existing degenerative disease, Dr. Korevaar would restrict him from lifting more than fifty pounds and from stripping and waxing floors. (*Id.* at 48.)

Claimant testified on his own behalf and presented the deposition testimony of Dr. Sofia Lam, a board-certified anesthesiologist, and Dr. Dennis DeBias, a board-certified family practitioner. Dr. Lam testified that she began

treating Claimant in November 2005 and diagnosed him with lumbar facet syndrome and discogenic lumbar radiculopathy. (Lam Dep., 9/26/08, at 19.) During her last examination on September 25, 2008, Claimant complained that he had trouble lifting, carrying, and bending and continued to exhibit a limited range of lumbar motion. (*Id.* at 14-15.) Dr. Lam opined that Claimant had not fully recovered from his work injury and that he should be restricted from lifting or carrying more than ten pounds. (*Id.* at 21.)

Dr. DeBias testified that he began treating Claimant in May 2006 and diagnosed him with chronic back strain and left lumbar radiculopathy. (DeBias Dep., 10/24/08, at 54.) However, Dr. DeBias explained that the radiculopathy diagnosis was based solely on Claimant's subjective complaints because the EMG results were inconclusive. (*Id.* at 55.) Dr. DeBias opined that Claimant had not fully recovered from his work injury and restricted him to working light duty, lifting no more than twenty pounds, and doing no repetitive bending or twisting. (*Id.* at 17.)

On March 25, 2009, the WCJ granted the termination petition, concluding that Employer proved that Claimant had fully recovered from his work injury as of November 28, 2007. The WCJ found as follows:

> The testimony of Dr. Wilhelmina Korevaar that as of November 28, 2007, Claimant was fully recovered from his August 14, 2005 work injury and capable of returning to work full-time and overtime at his time-of-injury job with Employer is found to be credible and persuasive and is accepted as fact in this case. To the extent that the testimonies of Dr. Sofia Lam, Dr. Dennis DeBias and Claimant are inconsistent with the testimony of Dr. Korevaar, the[y] . . . are specifically rejected as neither credible nor persuasive. . . . [I] note[] that Dr. Korevaar's testimony was clear and unequivocal, logical and

> coherent, and well supported by the results of her examination of Claimant and review of Claimant's medical records and diagnostic studies; that Dr. Korevaar based her opinions on Claimant's full and accurate work history, whereas Dr. Lam and Dr. DeBias both acknowledged they did not have a full understanding of Claimant's post-injury work history; that [I] had an opportunity to observe Claimant testify about the nature and extent of his symptoms and its affects [*sic*] on his functional ability, and to assess Claimant's demeanor on direct and cross-examination; and that Dr. Lam and Dr. DeBias gave undue weight to Claimant's subjective complaints.

(WCJ's Findings of Fact, No. 10.) Claimant timely appealed to the WCAB, which affirmed. Claimant now petitions for review of that decision.[1]

First, Claimant argues that Employer's medical evidence was insufficient to prove that Claimant had fully recovered from his work injury.[2] Specifically, he claims that Dr. Korevaar's testimony that she would restrict Claimant from lifting more than fifty pounds and from stripping floors does not support the WCJ's finding that Claimant had fully recovered from his work injury. We disagree.

In *Saville v. Workers' Compensation Appeal Board (Pathmark Stores, Inc.)*, 756 A.2d 1214, 1218 (Pa. Cmwlth. 2000), this court explained:

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[1] Our scope of review is limited to determining whether constitutional rights were violated, an error of law was committed, or findings of fact were unsupported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704.

[2] In the argument section of his brief, Claimant also asserts that the WCAB erred in granting Employer's termination petition because the NCP was filed after the date on which Employer claimed that Claimant had fully recovered from his work injury. (Claimant's Brief at 10-11.) Because Claimant failed to raise this issue in either his petition for review or his statement of questions involved, it is waived.

> [I]n a termination proceeding where restrictions are placed upon a claimant, but it is established that those restrictions are not causally related to the work injury, the employer is entitled to a termination so long as the medical expert has testified that the claimant is fully recovered from the work-related injury.

See also Pavonarius v. Workers' Compensation Appeal Board (Samuel Levitt Sheet Metal, Inc.), 714 A.2d 1135, 1139 (Pa. Cmwlth. 1998) (affirming termination of benefits where employer's expert testified that Claimant was completely recovered from his work injury and that any restrictions placed on Claimant's return to work were related only to his pre-existing degenerative disc disease).

Here, Dr. Korevaar testified that Claimant had fully recovered from his work injury as of November 28, 2007, and that Claimant could return to work full time as a biotechnician with no restrictions related to his work injury. Although Dr. Korevaar testified that she would restrict Claimant from lifting more than fifty pounds and from stripping floors, she explained that those restrictions were due solely to Claimant's pre-existing degenerative disc disease. The WCJ credited Dr. Korevaar's testimony and rejected the testimony of Claimant's experts that any physical restrictions were directly related to his work injury. Therefore, Dr. Korevaar's credible testimony that the restrictions were unrelated to Claimant's work injury was sufficient to sustain Employer's burden.

Moreover, by asserting that the WCJ should have believed the testimony of Claimant's experts, Claimant is asking this court to overturn the WCJ's credibility determinations, which we will not do. As the ultimate factfinder, the WCJ is free to accept or reject the testimony of any witness, including a medical witness, in whole or in part. *Rocco v. Workers' Compensation Appeal Board (Parkside Realty*

Construction), 725 A.2d 239, 243-44 (Pa. Cmwlth. 1999). This court will not re-weigh the evidence or substitute its judgment for that of the WCJ. *Id.* at 244.

Second, Claimant argues that the WCJ failed to issue a "reasoned decision" as required by section 422 of the Workers' Compensation Act[3] because he mischaracterized Claimant's post-injury work as being a "full-duty position" instead of restricted duty. (WCJ's Findings of Fact, No. 2.) The WCAB properly concluded that the WCJ's single reference to "full-duty" was harmless error and not a sufficient basis for overturning the WCJ's credibility determinations, as they were neither arbitrary nor capricious.[4] The WCJ referred to the restricted nature of Claimant's post-injury work throughout his decision and offered specific, objective reasons for accepting the testimony of Employer's medical expert and rejecting that of Claimant's experts. *See Supervalu, Inc. v. Workers' Compensation Appeal Board (Bowser)*, 755 A.2d 715, 722 (Pa. Cmwlth. 2000) (concluding that WCJ's decision was reasoned, where WCJ outlined the evidence considered, stated the credible evidence upon which he relied, and set forth his reasons for denying employer's review request). We agree with the WCAB that the WCJ's decision is both reasoned and supported by substantial evidence.

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[3] Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. §834.

[4] A careful review of the WCJ's decision in its entirety reveals that the WCJ most likely intended to refer to Claimant's post-injury work as a "full-time" position rather than a "full-duty" position, as that is how the WCJ describes Claimant's post-injury work later in the decision. (*See* WCJ's Findings of Fact, Nos. 8(g) & 10.)

Accordingly, we affirm.

ROCHELLE S. FRIEDMAN, Senior Judge

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O R D E R

AND NOW, this 18th day of March, 2011, we hereby affirm the September 21, 2010, order of the Workers' Compensation Appeal Board.

ROCHELLE S. FRIEDMAN, Senior Judge