

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Diane Graham,	:
Petitioner	:
	:
v.	: No. 199 C.D. 2011
	: Submitted: May 20, 2011
Workers' Compensation Appeal	:
Board (Philadelphia School District),	:
Respondent	:

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE PELLEGRINI

FILED: June 13, 2011

Diane Graham (Claimant) has filed a petition for review from an order of the Workers' Compensation Appeal Board (Board) affirming the decision of the Workers' Compensation Judge (WCJ) granting the termination petition filed by the Philadelphia School District (Employer) discontinuing her workers' compensation benefits. For the reasons that follow, we affirm the Board's decision.

On February 8, 2005, Claimant, while employed as a school teacher, sustained an injury while breaking up a fight. Employer issued a medical only notice of compensation payable describing her injury as a "lumbosacral sprain/strain/contusion, bruised lower back and left shoulder." Because Employer

filed a denial stating that Claimant's injury did not result in a disability, Claimant filed a claim petition alleging that her work-related back injury rendered her disabled from March 16, 2005, forward. On January 30, 2006, Employer filed a termination petition alleging that Claimant had fully recovered from her work injury as of September 8, 2005.

Both petitions were heard before WCJ Bowers who, by order dated June 30, 2006, granted Claimant's claim petition and denied Employer's termination petition. The WCJ found Claimant's testimony credible as well as that of her treating physician, Vincent Baldino, M.D. (Dr. Baldino), and found that Claimant sustained an additional work-related injury in the nature of "acute posttraumatic S1-2 radiculopathy on the right and persistent low back pain syndrome," which rendered her disabled from March 16, 2005, forward. The WCJ further found that Claimant had not fully recovered from her work injury. WCJ Bowers rejected Employer's medical expert, William Spellman, M.D., who opined that Claimant had nothing wrong with her back that could cause her symptoms.

In May 2007, Employer filed a second termination petition alleging that Claimant had fully recovered from her work injury. By order dated July 16, 2008, WCJ Santoro denied the termination petition. She rejected the testimony of Employer's expert, Richard Mandel, M.D., who opined that Claimant was no longer disabled by her work injury because it was inconsistent with Claimant's testimony of her ongoing symptoms and history of being asymptomatic and able to function prior to the work injury. Instead, the WCJ accepted the testimony of Claimant's expert, again Dr. Baldino, who opined that Claimant continued to

suffer with residuals from her work injury that prevented her from returning to her pre-injury duties. Based on the most current diagnostic studies, he further diagnosed her with “chronic pain syndrome with right lumbar radiculopathy and S1 sacroiliac dysfunction” and the WCJ found that the February 8, 2005 injury should be amended to include those injuries.

On October 28, 2008, Employer filed its third termination petition, the subject of this appeal, alleging that Claimant had fully recovered from her work injury as of October 3, 2008. Before WCJ Devlin, Employer offered the deposition testimony of Ira Sachs, M.D. (Dr. Sachs), a board-certified orthopedic surgeon, who performed an independent evaluation of Claimant on October 3, 2008. Dr. Sachs stated that he was told by Claimant that she was pushed into a wall by a female student and bounced off the wall and then fell to the ground in a sitting position. Her complaints were in the low back, including leg pain. Based on his extensive review of the medical records and his medical examination, Dr. Sachs attributed any pain that Claimant had to degenerative changes. He arrived at that opinion because all tests for lumbar radiculopathy were negative and during the exam, he noticed that Claimant was able to walk without a limp and get on the exam table with no distress. He diagnosed her with resolved lumbar sprain and strain, resolved lumbosacral contusion, resolved acute posttraumatic S1-2 radiculopathy and resolved sacroiliac dysfunction. He did not see any evidence of low back radiculopathy or lumbar disc syndrome. He opined that she had fully recovered from all injuries related to her work injury and placed no restrictions on her return to work.

In opposition, Claimant testified that she continued to experience painful symptoms with sharp pain going down her legs. She stated that she consistently treated with Dr. Baldino and attended physical therapy twice weekly. She also received pain medication. She stated that she had not worked since her injury in 2005 and did not believe that she was physically capable of returning to her job. She had to lie down at least six times a day to relieve her pain and pace her activities of daily living such as cooking and cleaning. Claimant admitted that she had been on two vacations – one to Atlanta, Georgia and the other to the Bahamas. She also continued to drive.

Claimant also offered the deposition testimony of Dr. Baldino who was board certified in family practice and currently treated Claimant once every month by prescribing medication and recommending modalities. Dr. Baldino diagnosed Claimant as having failed chronic pain syndrome, lumbar radiculopathy, bilateral, right greater than left, lumbar disc herniation at L4-5 and right sacroiliac dysfunction. He opined that Claimant was not capable of returning to unrestricted work and testified that Claimant was unable to perform a light-duty or sedentary job at the time of his testimony. He also indicated that Claimant could not perform the jobs located by vocational experts even though he had never reviewed the job analysis forms. Dr. Baldino admitted that he did send Claimant for an updated EMG in July 2009 and the results indicated that there was no evidence of lumbar radiculopathy.

WCJ Devlin granted Employer's termination petition finding Dr. Sachs credible and persuasive based on his records review, his thorough physical

exam of Claimant and his years of experience as an orthopedic surgeon treating injuries such as those suffered by Claimant. He did not find Dr. Baldino credible or persuasive because he did not perform surgeries, and he testified that Claimant continued to suffer from lumbar radiculopathy when the updated 2009 EMG indicated otherwise. WCJ Devlin also did not find Claimant credible or persuasive. Claimant appealed to the Board which affirmed, and this appeal followed.¹

Claimant contends that the Board erred in affirming the WCJ's decision granting Employer's termination petition because Dr. Sachs never testified that Claimant had fully recovered from her work-related injury of "chronic low back pain syndrome;" yet acknowledged that Claimant complained of low back pain during her exam.²

In a termination petition, the defendant has the burden of proving by substantial medical evidence that the claimant has fully recovered from all of the recognized work injuries. *Westmoreland County v. Workers' Compensation*

¹ Our scope of review of the Board's decision is limited to determining whether necessary findings of fact are supported by substantial evidence, whether constitutional rights were violated or whether an error of law was committed. *Repash v. Workers' Compensation Appeal Board (City of Philadelphia)*, 961 A.2d 227 (Pa. Cmwlth. 2008).

² Claimant also contends that there was no factual finding that her physical condition had changed since the 2008 disability adjudication. However, this issue was not raised before the Board. Claimant only alleged before the Board that Dr. Sachs never testified that there was an actual physical change in her condition since her last exam performed by Dr. Mandel on February 8, 2007. Because this issue was not raised before the Board, it is not properly before this Court and is waived on appeal. Pa. R.A.P. 1551.

Appeal Board (Fuller), 941 A.2d 213 (Pa. Cmwlth. 2008). Where the WCJ finds during the termination proceedings that additional injuries exist beyond those previously accepted, the defendant has the burden of proving a full recovery from those additional injuries to prevail in subsequent termination proceedings. *Lewis v. Workers' Compensation Appeal Board (Giles & Ransome, Inc.)*, 591 Pa. 490, 919 A.2d 922 (2007). Where a termination has previously been denied and the defendant again seeks termination at a later date, the defendant must show that a change in the claimant's physical condition has occurred since the last adjudication addressing the nature and extent of the claimant's injury. *Lewis*.

While Claimant is correct that Dr. Sachs never specifically stated that she had recovered from her work-related injury of "chronic low back pain syndrome" as found by WCJ Bowers and WCJ Santoro, Dr. Sachs opined that Claimant had fully recovered from *all* of her work-related injuries despite her complaints, which included her chronic low back pain syndrome. Dr. Sachs acknowledged that Claimant had complained of pain during his examination of her on October 3, 2008, but he stated that her testing was negative and there was no objective evidence of radiculopathy on exam. Moreover, in *Udvar v. Workers' Compensation Appeal Board (USAir, Inc.)*, 550 Pa. 319, 327, 705 A.2d 1290, 1293 (1997), our Supreme Court stated the following regarding a termination being granted when a claimant complained of pain:

The determination of whether a claimant's subjective complaints of pain are accepted is a question of fact for the WCJ. In the absence of objective medical testimony, the WCJ is neither required to accept the claimant's assertions, nor prohibited from doing so. Testimony by the employer's medical expert as to the existence of the

claimant's complaints of pain does not require the WCJ to find for the claimant. A contrary conclusion would lead to the absurd result that a claimant could forever preclude the termination of benefits by merely complaining of continuing pain. What is relevant in deciding whether the termination of benefits is warranted is whether the claimant suffers from pain as a result of the work-related injury.

The WCJ found Dr. Sachs credible, and the WCJ is the ultimate factfinder and has exclusive province over questions of credibility and evidentiary weight. *Newcomer Products v. Workers' Compensation Appeal Board (Irvin)*, 826 A.2d 69 (Pa. Cmwlth. 2003).³

Accordingly, the order of the Board is affirmed.

DAN PELLEGRINI, JUDGE

³ Notably, Dr. Sachs' testimony was later supported by the July 24, 2009 EMG stating that there was no evidence of lumbar radiculopathy.

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ORDER

AND NOW, this 13th day of June, 2011, the order of the Workers' Compensation Appeal Board, dated January 11, 2011, at No. A10-0704, is affirmed.

DAN PELLEGRINI, JUDGE