IN THE COMMONWEALTH COURT OF PENNSYLVANIA

John Matzus,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 2150 C.D. 2007
	:	
Pennsylvania Department of Corrections, State Correctional Institution at Greene,	:	Submitted: March 14, 2008
	:	
	:	
	:	
Respondent	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER **FILED: June 13, 2008**

John Matzus (Claimant) petitions for review of an order of the Secretary of Corrections (Secretary), which adopted, as modified, the recommendation of a hearing examiner terminating his benefits under what is commonly known as the "Heart and Lung Act."[1] On appeal, Claimant argues that the Secretary erred in adopting the hearing examiner's recommendation because: (1) the factual findings were based on inadmissible hearsay; and (2) the hearing examiner capriciously disregarded evidence necessary to fully assess Claimant's credibility.

[1] Act of June 28, 1935, P.L. 477, as amended, 53 P.S. §§ 637-638.

On March 18, 2004, Claimant sustained a work-related injury while employed by the Pennsylvania Department of Corrections (Employer) as a correctional officer at State Correctional Institution Greene (SCI-Greene). Claimant was injured while responding to a fight when he slipped on the floor, hit a table with his knee and hip, and fell onto the table. As a result of this injury, Claimant began receiving Heart and Lung Act benefits (HLB).

Employer sent Claimant a letter, dated April 3, 2004, in which it offered Claimant a full-time, modified-duty position as a roster Lieutenant. Claimant immediately accepted this position and began working on April 9, 2004. Nine days later, after completing his shift on April 18, 2004, Claimant called the facility to advise his superiors that he would not be returning to work because, on April 25, 2004, he had an appointment with Stanley E. L. Falor, M.D., who treated Claimant after his discharge from the local hospital following his work injury. Claimant has not returned to work since April 18, 2004. Ultimately, Claimant was referred to Thu Le, M.D., in May 2005 for treatment. Employer requested an Independent Medical Examination (IME) of Claimant, which ultimately occurred on July 5, 2005, by Betsey Blazek-O'Neill, M.D., a board-certified physician in physical medical rehabilitation.

Claimant requested a reinstatement of HLB, which Employer refused. As such, a hearing was scheduled before a hearing examiner. Claimant testified that following his work injury on March 18, 2004, he began treating with Dr. Falor. Claimant testified that, at the time of the hearing, he had pain between his shoulder blades, around his waistline, and that the work injury had also aggravated the upper

part of his back, which he previously injured. Claimant testified that this prior injury (quad incident) occurred when he participated in a quad vehicle ride on April 30, 2004. Claimant testified that, on the day of the trail ride, while loading the quad back onto the truck, the quad fell off the truck and the handle bar hit him in the ribs, causing bruising on his lung. Claimant admitted that he never reported the quad incident to either Dr. Le or Dr. Falor. Claimant testified that he sees Dr. Falor approximately once per month and Dr. Le approximately every four to six weeks.

Claimant testified that he returned to the modified-duty position on April 9, 2004, wherein his sole function was to keep up the daily roster. According to Claimant, he called off work on April 18, 2004 because of back pain and medications he was taking, which medications allegedly interfered with his ability to drive back and forth to work.

In support of his position to reinstate HLB, Claimant also offered the testimony of Officer Timothy Lewis, a correctional officer at SCI-Greene. Officer Lewis testified that he is the metal detector/IONSCAN operator for Employer. Officer Lewis stated that he saw Claimant during the period of time that Claimant was working the modified-duty position and recollected Claimant telling him that Claimant was taking pain medication; that Claimant told him "that it still hurt [Claimant]";[2] and that "it kind of looked like [Claimant] was in a little bit of pain."[3]

[2] (Hr'g Tr. at 11, October 3, 2006.)

[3] (Hr'g Tr. at 16, October 3, 2006.)

Major Jeffrey Allen Martin and Captain Michael Muccino, who supervised Claimant, testified on behalf of Employer. They testified that Claimant performed his modified position in a satisfactory manner. Major Martin and Captain Muccino also testified that Claimant did not complain to them about being in pain or experiencing side effects from his medications; therefore, when Claimant called off work on April 18, 2004, it came as a surprise to Captain Muccino.

Both parties presented medical expert testimony. Claimant presented the testimony of Dr. Le, who began treating Claimant on May 23, 2005 for pain in his lower back, which Claimant alleged was due to his work-related injury. Based upon Dr. Le's physical examination and her review of Claimant's history and diagnostic studies, Dr. Le diagnosed Claimant with discogenic lumbago with sciatica. When questioned as to her opinion, within a reasonable degree of medical certainty as to the cause of Claimant's physical limitations, Dr. Le stated "it could be caused by his fall which could have caused an injury to his back in the terms of the disk as well as having the symptoms down his legs, both the right and the left." (Le Dep. at 18.) Dr. Le testified that Claimant did not tell her about any other incidents or injuries that happened to him other than the March 18, 2004 work injury, including the quad incident. (Le Dep. at 42.) She further noted that patient history is vital to her role as Claimant's treating physician and that she depends on the patient to provide such history accurately to her. (Le Dep. at 43; 49-50.)

Dr. Falor sent a letter, dated September 13, 2005, to Claimant's counsel (Falor Letter) acknowledging that he had been treating Claimant for his injury. In this letter, Dr. Falor noted that Claimant had numbness in his left leg from a previous injury in

2002 and asserted that Claimant injured his right lower leg from his March 18, 2004 work injury. During Dr. Falor's examination of Claimant on March 25, 2004, Claimant complained of low back pain associated with right leg numbness and complaints of urinary frequency. Dr. Falor opined that Claimant was able to do sedentary work, but that he still needed treatment. Dr. Falor went on to note that he could not say that Claimant was still suffering from his March 18, 2004 work injury "due to the consideration that [Claimant] was not completely honest with me." (Falor Letter at 2, Ex. D-9.) Dr. Falor noted that Claimant suffered an injury due to the quad incident prior to his May 5, 2004 MRI and prior to his May 31, 2004 visit with Dr. Falor. Dr. Falor states that he found out about the quad-related injury by reading the IME of Claimant by Dr. Blazek-O'Neill. Thus, Dr. Falor noted that the radiographic findings, which were obtained after the quad incident, cannot reflect whether those findings were caused by the quad-related injury or by the work-related injury from March 18, 2004. The hearing examiner sustained Claimant's Counsel's objection to the Falor Letter and, specifically, excluded the Falor Letter from the record. (See Objection Letter from Claimant's Counsel to Hearing Examiner (December 18, 2006); Letter from Hearing Examiner to Counsel for Claimant and Counsel for Employer (December 22, 2006).)

On behalf of Employer, Dr. Blazek-O'Neill testified by deposition that she performed an IME of Claimant on July 5, 2005. She reviewed Claimant's medical records, and Claimant provided a history of his injuries. While performing the physical examination of Claimant, Dr. Blazek-O'Neill felt that Claimant exaggerated pain behavior, was self-limiting his movements throughout the exam, and was someone who presented symptom magnification. (Blazek-O'Neill Dep. at 25-27.)

Dr. Blazek-O'Neill opined to a reasonable degree of medical certainty that Claimant could now perform correction officer work and that he was fully recovered from his work-related injury of March 18, 2004. (Blazek-O'Neill Dep. at 30.)

Upon review of the evidence, the hearing examiner found Claimant's testimony incredible and recommended a termination of Claimant's HLB. Claimant filed exceptions to the hearing examiner's recommendation, asserting that the hearing examiner's findings and conclusions were erroneous because: (1) they were based upon the Falor Letter, to which a hearsay objection had been previously sustained; and (2) the hearing examiner capriciously disregarded (a) the testimony of Officer Lewis, who testified that Claimant was in pain while at work, and (b) Claimant's testimony explaining that while the travel distances between Dr. Falor's office and SCI-Greene were the same, Claimant's ability to drive to Dr. Falor monthly for office visits was different than driving to work six days per week.

The Secretary agreed with Claimant that the hearing examiner erred in relying on the Falor Letter to assess Claimant's credibility after sustaining the hearsay objection to the Falor Letter. However, the Secretary concluded that this error was harmless because there was substantial, credible evidence to support the quad incident's occurrence and Claimant's lack of credibility based on the testimony of Dr. Blazek-O'Neill. With regard to Claimant's exception that the hearing examiner capriciously disregarded evidence, the Secretary noted that while Officer Lewis did testify on Claimant's behalf, Officer Lewis was not his supervisor, and thus, the hearing examiner did not err in finding that "Claimant did not complain of any pain or discomfort **to any of his superiors** . . . ." (Secretary Op. at 7 (quoting Hr'g Ex.

Recommendation at 19).) Further, the Secretary disagreed with Claimant that a remand was necessary to develop Claimant's point that driving to work six days a week is distinguishable from driving to see Dr. Falor once a month. Claimant now petitions this Court for review.[4]

On appeal, Claimant reasserts the same arguments that he raised before the Secretary. First, Claimant argues that the recommendation of the hearing examiner should have been rejected because the hearing examiner's findings referenced the Falor Letter and were, therefore, tainted. Thus, Claimant contends that the hearing examiner committed reversible error. We disagree.

At the outset, we note that a hearing examiner is not granted the identical status of a workers' compensation judge, but rather, "the Hearing Examiner is only the *designee* of the Secretary, and the Secretary is the ultimate authority who takes the final agency action which is subject to appeal to this Court. As a result, the Secretary is the ultimate finder of fact in the instant matter." Highway News, Inc. v. Department of Transportation, 789 A.2d 802, 810 n.13 (Pa. Cmwlth. 2002) (quoted in Duvall v. Department of Corrections, 926 A.2d 1220, 1225 (Pa. Cmwlth. 2007). Here, the Secretary agreed that the hearing examiner erred in relying on the Falor

[4] This Court's review is limited to determining whether the Secretary's decision is supported by substantial evidence, whether the Secretary committed an error of law, or whether the Secretary violated the appellant's constitutional rights. Duvall v. Department of Corrections, 926 A.2d 1220, 1224 n.3 (Pa. Cmwlth. 2007). In determining whether the Secretary's decision is supported by substantial evidence, this Court stated that "[t]he findings of an administrative agency need only be enough to enable a reviewing court to decide the issues and ensure that the conclusions follow from the facts." Siemon's Lakeview Manor Estate v. Department of Public Welfare, 703 A.2d 551, 556 (Pa. Cmwlth. 1997).

Letter. However, the Secretary, who is the ultimate fact finder, did not rely on the Falor Letter in determining that Claimant was not credible, as there was other credible evidence that supported the quad incident's occurrence and Claimant's lack of credibility. Furthermore, Dr. Blazek-O'Neill, whom the Secretary found credible, provided substantial evidence to support the determination to terminate Claimant's HLB.

In this case, Claimant, himself, testified that he attempted to ride his four-wheel quad on April 30, 2004, just *six weeks* after his work-related injury when he stated he had a pain level of 9 out of 10. (Hr'g Tr. at 22, 26, March 1, 2006.) Claimant explained that the ride was to occur on an off-road trail, but that he did not participate in the full trail ride. (Hr'g Tr. at 27, March 1, 2006.) Claimant stated that he unloaded the quad off of his truck and let it sit on the ground for about two hours. When he was re-loading the quad back onto his truck, he admitted that the left rear wheel slipped and fell off the truck with the handlebar hitting Claimant in the ribs. (Hr'g Tr. at 27-29, March 1, 2006.) As a result, Claimant admitted to getting medical treatment at the Uniontown Hospital on the same day for a bruised lung. (Hr'g Tr. at 29-30, March 1, 2006.) Additionally, Claimant failed to notify Dr. Le, who treated Claimant, and Dr. Blazek-O'Neill, who took a medical history from Claimant, of the quad incident injury. Dr. Le testified that she was unaware of the quad incident injury until she read it in Dr. Blazek-O'Neill's IME report. (Le Dep. at 49-50.) Dr. Le further agreed that the quad incident injury is a significant piece of information that she would want to be made aware of as Claimant's treating physician. (Le Dep. at 50.) Likewise, Dr. Blazek-O'Neill indicated she was made aware of the quad incident injury after reviewing Claimant's medical records in conducting the IME.

(Blazek-O'Neill Dep. at 16, 18-19.) Thus, the Falor Letter was not relied upon by the Secretary, nor was it necessary to support the Secretary's finding that Claimant was not credible. As such, we will not disturb the Secretary's findings and credibility determinations.

Furthermore, this Court notes that the finding that Claimant is fully recovered from his work-related injury is supported by substantial, competent evidence. Dr. Blazek-O'Neill, who was the only medical witness to be found credible by the Secretary, testified that she conducted an IME of Claimant and found that Claimant was someone who presented symptom magnification. (Blazek-O'Neill Dep. at 25-27.) Further, Dr. Blazek-O'Neill opined to a reasonable degree of medical certainty that she could not find any evidence that the thoracic and lumbar strains which Claimant suffered as a result of his work-related injury continued to the time of the IME. (Blazek-O'Neill Dep. at 28.) Thus, Dr. Blazek-O'Neill opined that Claimant was fully recovered from his work-related injury of March 18, 2004. (Blazek-O'Neill Dep. at 30.) Accordingly, we agree with the Secretary that the hearing examiner's reliance and/or reference to the Falor Letter constitutes harmless error. See Benson v. Workmen's Compensation Appeal Board (Haverford State Hospital), 668 A.2d 244, 248-49 (Pa. Cmwlth. 1995) (admitting and relying on hearsay testimony over objection of claimant was harmless error where there was other credible evidence, standing alone, which supported the decision).

Next, Claimant argues that the hearing examiner capriciously disregarded crucial evidence necessary in order to fully and fairly assess Claimant's credibility. Specifically, Claimant contends that the hearing examiner erred in stating that he

disbelieved Claimant because Claimant did not complain about any pain or discomfort to his supervisor or "any other officers at work" during his modified employment. (Hr'g Ex. Recommendation at 19.) Contrary to this statement, Claimant argues that the hearing examiner ignored the testimony of Officer Lewis, who testified that in April 2004 he observed Claimant walking to his vehicle to take pain medication because his back was hurting him and also observed that Claimant seemed to be in pain. (Hr'g Tr. at 11, 16, October 3, 2006.)

Claimant's argument misconstrues the hearing examiner's statement. As the Secretary discussed in his opinion, the hearing examiner stated that "Claimant did not complain of any pain or discomfort **to any of his superiors** . . . ." (Secretary Op. at 7 (quoting Hr'g Examiner's Recommendation at 19).) Claimant did not complain to his superiors. Major Martin stated that, during the nine days that Claimant worked as the roster Lieutenant, Claimant never complained to him about being in pain or complications with his medicines. (Hr'g Tr. at 186-191, August 16, 2006.) Major Martin testified that, on one occasion, he asked Claimant how he was doing, and Claimant indicated to him that "everything's okay, but I have some concerns about my driving"; however, Claimant did not elaborate on any specifics. (Hr'g Tr. at 192, 195, August 16, 2006.) In fact, on the day that Major Martin stopped in Claimant's office to see how he was doing, Major Martin indicated that "he looked fine. No grimace of pain, not slow to respond. . . . I didn't see anything that would indicate that he was anything but okay." (Hr'g Tr. at 193-94, August 16, 2006.) Likewise, Captain Muccino, who was Claimant's immediate supervisor, testified that he saw Claimant at least three times a day. (Hr'g Tr. at 207, August 16, 2006.) Each day, Captain Muccino asked Claimant how he was doing, and Claimant never complained

about any pain or indicated that he was having issues with his drive to work. (Hr'g Tr. at 206-07, 210, August 16, 2006.) Accordingly, we find no error with the Secretary's finding that Claimant never complained to his superiors. Further, we conclude that Officer Lewis' testimony that Claimant "seemed to be in pain" does not undermine these findings because Officer Lewis was not Claimant's superior.

Additionally, Claimant contends that the hearing examiner erred in concluding that Claimant was not credible because he stated that he had trouble driving home from SCI-Greene due to his medications in April 2004, yet was able to drive to Dr. Falor's office once a month for treatment, which is the same distance from his home. Claimant argues that the hearing examiner failed to note that Claimant was only required to visit Dr. Falor once per month, but was required to drive to and from work six days per week. We find this argument meritless.

The Secretary, as the ultimate fact finder, clearly understood the distinction Claimant was trying to make between driving to Dr. Falor's office once per month and driving to SCI-Greene six days per week, which is the same distance. However, the Secretary disagreed that a remand was necessary to develop this point and stated that "simple logic dictates that it is the length of the trip that would be relevant to pain or medication side effects, not the number of times the trip is made." (Secretary Op. at 8.) Whether or not the Secretary was correct in making this statement is not determinative of the issue. As previously discussed, there was substantial, credible evidence supporting the Secretary's finding that Claimant was not credible. Therefore, this Court will not disturb the Secretary's factual findings or credibility determinations.

Accordingly, we affirm the Secretary's determination terminating Claimant's HLB.

RENÉE COHN JUBELIRER, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

John Matzus,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 2150 C.D. 2007
	:	
Pennsylvania Department of Corrections, State Correctional Institution at Greene,	:	
	:	
Respondent	:	

O R D E R

NOW, June 13, 2008, the order of the Secretary of Corrections in the above-captioned matter is hereby affirmed.

RENÉE COHN JUBELIRER, Judge