

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Deborah O'Connor,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 2220 C.D. 2009
	:	
Workers' Compensation Appeal	:	
Board (Aetna, Inc.),	:	
	:	
Respondent	:	
	:	
Aetna, Inc.,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 2316 C.D. 2009
	:	
Workers' Compensation	:	Submitted: March 5, 2010
Appeal Board (O'Connor),	:	
	:	
Respondent	:	

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE JOHNNY J. BUTLER, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY

FILED: June 29, 2010

In these consolidated appeals,¹ we review an order of the Workers' Compensation Appeal Board (Board) that granted in part, denied in part, and amended an order of a Workers' Compensation Judge (WCJ). Pursuant to the

¹ The parties' appeals were consolidated by Order of this Court dated December 14, 2009.

Pennsylvania Workers' Compensation Act (Act),² the WCJ granted a Review Petition of Deborah O'Connor (Claimant), denied Claimant's Claim Petition and a second Review Petition, and granted the Utilization Review (UR) Petition of Aetna, Inc. (Employer). On appeal, the Board amended the WCJ's order to include a diagnosis of pain disorder, affirmed the WCJ's Order in all other respects, and denied Claimant's Petition for Rehearing. We affirm.

Claimant was injured during the course and scope of her work for Employer on March 2, 2006, when she suffered a slip and fall on ice, landing on the left side of her head, shoulder, elbow and hand. Employer accepted the work-related injury via a Notice of Compensation Payable (NCP) that described Claimant's injuries as left shoulder strain/sprain. Claimant thereafter began receiving benefits under the Act.

On November 28, 2006, Employer filed a Termination Petition, alleging Claimant's full recovery as of October 24, 2006. On December 15, 2006, Claimant filed a Claim Petition alleging a specific loss in the form of a surgical scar on her neck. Concurrently, Claimant additionally filed her First Review Petition, seeking amendment of the NCP injury to include reflex sympathetic dystrophy (RSD). On February 12, 2007, Employer filed a UR Petition seeking review of the medical necessity and reasonableness of a prescriptive spinal cord stimulator treatment to be administered to Claimant by Dr. Simon Galapo in relation to her asserted RSD diagnosis. On August 3, 2007, Claimant filed her

² Act of June 2, 1915, P.L. 736, as amended, 77 P.S. §§ 1 - 1041.4; 2501 - 2708.

Second Review Petition seeking further amendment of the NCP injury to include pain disorder, major depressive disorder, and sleep disorder. The respective parties filed timely Answers to the above-noted Petitions, denying the material allegations therein. The various Petitions were consolidated, and hearings were subsequently held before the WCJ.

Each party submitted significant medical evidence and testimony before the WCJ. Following the conclusion of the hearings, the WCJ issued a Decision and Order dated July 22, 2008. Therein, in part relevant to the instant appeal, the WCJ found Claimant's testimony and evidence to be credible, over that of Employer's medical experts, in relation to her continued suffering of pain related to her compensable injuries, and in relation to her lack of full recovery from the work injuries. The WCJ also found several of the medical experts credible in part, expressly finding credible the testimony and evidence that Claimant does not suffer from work-related RSD (either in her specific injured areas, or spread throughout her entire body), and finding not credible the opinions that Claimant had fully recovered from her injuries.

The WCJ further found credible testimony establishing that Claimant's physical condition has led to diagnoses of pain disorder, major depressive disorder, and sleep disorder, with no evidence credited of any of these disorders preexisting Claimant's work-related injuries and with credit given to the evidence and testimony that these diagnoses were caused by either the work-related injuries and concomitant physical symptoms, and/or the impaired daily function resultant therefrom. The WCJ noted that the medical evidence did not

specifically relate Claimant's psychological disorders to the unaccepted diagnosis of RSD. The WCJ further credited medical testimony establishing that Claimant suffered from chronic pain, symptoms of depression concomitant with that chronic pain, and sleep difficulties related thereto. The WCJ rejected medical testimony that these diagnoses were not related to Claimant's compensable injuries.

Noting that Claimant had had a dorsal spinal column stimulator implanted in relation to the diagnosis of RSD, and relying upon his rejection of RSD as caused by Claimant's work-related injuries, the WCJ rejected Claimant's argument that the cervical scarring resulting from the implant was compensable under the Act.

By order dated July 22, 2008, the WCJ denied and dismissed Claimant's Claim Petition and First Review Petition (seeking to add RSD to the NCP) and denied Employer's Termination Petition. Further, the WCJ's order granted Employer's UR Petition, and granted Claimant's Second Review Petition (seeking to add major depressive and sleep disorders to the NCP).³ The WCJ thereafter issued, upon Claimant's request, an Amended/Corrected Order circulated August 6, 2008, amending her July 22, 2008, Order to include a diagnosis of pain disorder as part of her grant of Claimant's Second Review Petition, and otherwise affirming in all respects her prior Order. The WCJ subsequently issued another Amended/Corrected Order, circulated August 11, 2008, revoking the WCJ's August 6 Amended/Corrected Order due to Employer's objection to Claimant's

³ Due to Claimant's success in part on her Petitions, the WCJ further ordered that Employer reimburse Claimant's litigation costs, with certain exclusions thereto.

request therefor, and otherwise affirming in all respects the WCJ's original July 22, 2008, Decision and Order. Claimant thereafter appealed to the Board, via two separate timely appeals dated, respectively, August 8, 2008, (following the WCJ's first Amended/Corrected Order) and August 11, 2008 (following the WCJ's second Amended/Corrected Order). Additionally, Claimant filed with the Board a Petition for Rehearing, seeking to introduce three additional medical evaluations – addressing psychological and physical diagnoses, and an impairment rating evaluation - that occurred after her filed appeals to the Board.

Following its review of the matter, the Board concluded that the WCJ's Findings rejecting Claimant's RSD claims were supported by substantial competent evidence found credible by the WCJ, and that the WCJ's credibility determinations on this issue precluded Claimant's satisfaction of her burden on the RSD claims. The Board further concluded that Claimant's two separate but independently timely appeals from the WCJ's multiple orders did not operate to waive her claim regarding Claimant's assertion of a pain disorder diagnosis, and agreed that the WCJ erred in crediting the medical evidence as to a pain disorder diagnosis while granting Claimant's Second Review Petition only on the depressive and sleep disorder issues. Accordingly, the Board modified the WCJ's order to include an additional diagnosis of pain disorder.

Additionally, the Board denied Claimant's Petition for Rehearing seeking the address and inclusion of three medical evaluations that occurred after Claimant had filed her appeals, on the basis that Claimant's proposed additional evidence was cumulative and/or inapplicable to the issues on appeal.

By Order dated November 3, 2009, the Board amended the WCJ's Order to include a diagnosis of pain disorder, affirmed the WCJ's Order in all other respects, and denied Claimant's Petition for Rehearing. Both parties now appeal the Board's Order to this Court.

This Court's scope of review is limited to determining whether there has been a violation of constitutional rights, errors of law committed, or a violation of Board procedures, and whether necessary findings of fact are supported by substantial evidence. Lehigh County Vo-Tech School v. Workmen's Compensation Appeal Board (Wolfe), 539 Pa. 322, 652 A.2d 797 (1995).

Collectively, the parties present three general issues on appeal: 1.) whether the Board erred in concluding that the WCJ's rejection of Claimant's RSD claims was based upon substantial competent evidence; 2.) whether the Board erred in its amendment of the NCP to include pain disorder, and; 3.) whether the Board abused its discretion in denying Claimant's request for a rehearing based on after-acquired medical evidence. We will address both parties' arguments on these three issues seriatim.⁴

We first address the parties' arguments regarding the substantial evidence⁵ supporting the WCJ's rejection of Claimant's RSD claims, which rejection was affirmed by the Board. Accordingly, this issue must be addressed

⁴ The parties' respective arguments have been reordered in the interest of clarity.

⁵ Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Mrs. Smith's Frozen Foods v. Workmen's Compensation Appeal Board (Clouser), 539 A.2d 11 (Pa. Cmwlth. 1988).

through the prism of the medical evidence presented by the respective parties, as accepted and rejected by the WCJ.⁶ Employer presented the testimony and/or evidence of three medical experts: Richard Katz, M.D.; Wilhelmina Korevaar, M.D., and; Gladys Fenichel, M.D. Claimant also presented the testimony and/or evidence of three medical experts: Simon Galapo, M.D.; Gerald Cooke, Ph.D., and; Rene R. Rigal, M.D. With the exception of Dr. Rigal, whose evidence consisted solely of the report generated thereby regarding his prospective review of the reasonableness and necessity for Claimant's spinal cord stimulator prescribed by Dr. Galapo as treatment for Claimant's alleged RSD, the WCJ found each of the other five medical experts to be credible in part to varying degrees on various specific aspects of their testimony, and accepted that testimony accordingly.

In her argument on this issue, Claimant recognizes both that the WCJ is free to accept or reject medical testimony in whole or in part, and that the diagnosis of RSD is made by clinical observation and cannot be objectively or definitively tested by medical science. However, Claimant relies solely upon certain selected, preferred portions of Dr. Katz's testimony in support of her argument that substantial evidence exists supporting a finding that Claimant did indeed suffer from RSD related to her work injury. Claimant acknowledges Dr. Katz's testimony that his examination of Claimant, and his review of the other

⁶ The WCJ, as the ultimate fact finder in workers' compensation cases, has exclusive province over questions of credibility and evidentiary weight, and is free to accept or reject the testimony of any witness, including a medical witness, in whole or in part. General Electric Co. v. Workmen's Compensation Appeal Board (Valsamaki), 593 A.2d 921 (Pa. Cmwlth.), petition for allowance of appeal denied, 529 Pa. 626, 600 A.2d 541 (1991).

existing medical records and other medical expert opinions, leads him to conclude that Claimant did not suffer from RSD related to her work injury, which opinion the WCJ accepted as credible. Claimant argues, however, that the clinical examination findings in her case, when compared to the RSD symptoms acknowledged by Dr. Katz as indicative of RSD, support a finding that Claimant did indeed suffer from RSD.

Claimant additionally cites to Dr. Korevaar's testimony that Claimant did not suffer from RSD related to her work injuries, which opinion was also accepted as credible by the WCJ. Claimant argues that Dr. Korevaar's testimony that Claimant did not present to her with significant RSD-related symptoms is contradicted by Dr. Korevaar's admission in her testimony that her review of other medical experts' examination of Claimant revealed that Claimant did have RSD-related symptoms when examined by those other medical experts. Additionally, Claimant presents to this Court, in her brief, what amounts to her own summary of the medical testimony presented below as applied to Claimant's analysis of certain medical standards for RSD diagnosis, which leads to Claimant's conclusion that the evidence does establish that Claimant suffered from RSD related to her work injuries.

We first note that Claimant does not challenge the actual evidence supporting the WCJ's Findings that Claimant did not suffer from RSD. See WCJ Opinion at Findings 12-15, 17-18. Notwithstanding, our thorough review of the medical testimony in this matter reveals that the Findings as made by the WCJ are all supported by ample, substantial competent evidence of record.

The remainder of Claimant's arguments, in total, can only be viewed as a request by Claimant that this Court reweigh the evidence presented below, reject evidence found credible by the WCJ, and accept evidence found not credible thereby. However, it is axiomatic in Workers' Compensation cases that in determining whether substantial evidence supports a WCJ's finding of fact, it is irrelevant that the record reveals evidence that would support a contrary finding; the relevant inquiry is whether the record contains substantial evidence supporting the actual findings that were made. Grabish v. Workmen's Compensation Appeal Board (Trueform Foundations, Inc.), 453 A.2d 710 (Pa. Cmwlth. 1982). Further, determinations as to witness credibility and evidentiary weight are not subject to appellate review. Hayden v. Workmen's Compensation Appeal Board (Wheeling Pittsburgh Steel Corp.), 479 A.2d 631 (Pa. Cmwlth. 1984). It is not this Court's function to reweigh the evidence and to determine whether the WCJ made the most reasonable and probable findings that could have been rendered. Bethenergy Mines v. Workmen's Compensation Appeal Board (Skirpan), 531 Pa. 287, 612 A.2d 434 (1992). As the Findings made by the WCJ in this matter are in fact supported by substantial evidence of record, as filtered through the WCJ's credibility determinations,⁷ Claimant's arguments on this issue are without merit. Grabish.

⁷ We emphasize that Claimant flatly states, in her Reply Brief to this Court, that at least one medical expert's opinion that Claimant does not suffer from RSD "simply flies [sic] in the face of believability." Claimant's Reply Brief at 5. Notwithstanding Claimant's attempts to characterize this argument as a matter of medical witness competency, Claimant's own argument plainly recognizes her request as one that requires this Court to revisit, and usurp, the WCJ's

(Continued....)

Next, we address Employer's argument that the Board erred as a matter of law in amending the NCP in this case to include a pain disorder. Primarily on this issue, Employer relies upon the WCJ's omission of any reference to a pain disorder within her Order expanding the NCP injury description. Employer founds its argument on this issue on its contention that Claimant's pain disorder symptoms are intertwined with, and a sole result of, her RSD condition, which condition was rejected as not compensable as noted above. Accordingly, Employer argues, given that no RSD diagnosis has been accepted as work-related herein, any conditions related to RSD, or caused thereby, such as Claimant's pain disorder, cannot be held to be work-related.

As its sole support for this argument, Employer relies upon the testimony of Dr. Cooke. Employer argues that Dr. Cooke's examination was guided by Claimant's assertions to Dr. Cooke that she suffered from RSD, assertions that Employer argues were prefatory conditions to Dr. Cooke's examination and subsequent diagnoses. While Employer asserts that Dr. Cooke's testimony taken as a whole reveals that his diagnosis of pain disorder cannot be disassociated with his foundational assumption that Claimant suffered from RSD, and that thusly any pain disorder diagnosis must be dependant on an acceptance of compensable RSD, our review of Dr. Cooke's testimony reveals the contrary.

As the Board and the WCJ both noted, Dr. Cooke expressly testified that his diagnosis of Claimant's psychological reaction to her injuries, which

credibility determinations. As noted, in our appellate function we will not disturb the WCJ's credibility determinations on review. Bethenergy Mines; Hayden.

include pain disorder given Dr. Cooke's entire testimony as a whole, are not dependant on any positive RSD diagnosis. After being asked to review the testimony of Drs. Katz and Korevaar – which testimony disputed and rejected any diagnosis of work-related RSD, and was accepted as credible by the WCJ – Dr. Cooke was asked:

Claimant's attorney: Now, after having read those opinions [of Drs. Katz and Korevaar] and considered those opinions along with the other information you previously reviewed, do your opinions that you previously expressed today with regard to your diagnosis and the causal relationship, do they change having reviewed these two physicians' conclusions?

Dr. Cooke: No. I mean, they're disputing that she has RSD, but they're saying that she had other injuries and from my perspective as a psychologist it's her psychological reaction to those injuries whether or not the doctors agree or disagree about whether it's RSD or something else.

Supplemental Reproduced Record (S.R.R.) at 81b-82b. Clearly, Dr. Cooke's plain testimony contradicts Employer's assertion that any diagnosis of pain disorder can only be associated with, and/or caused by, the WCJ-rejected RSD diagnosis.

As the Board notes, Dr. Cooke's testimony clearly establishes that Claimant was diagnosed with pain disorder associated with psychological factors, major depressive disorder, and sleep disorder. S.R.R. at 62b-68b. Dr. Cook found no evidence that these conditions preexisted Claimant's work injuries, and

concluded that they were caused by the work-related injury and/or the resultant symptoms and impaired functions, independent of any RSD diagnosis. *Id.* at 68s-69b, 81b-82b. The WCJ credited Dr. Cooke's testimony that Claimant's physical condition led to his diagnoses of pain disorder, major depressive disorder, and sleep disorder, which diagnoses were not dependant on an RSD diagnosis. WCJ Opinion, Finding 15.

We agree with the Board's conclusion that, given the WCJ's express acceptance of Dr. Cooke's pain disorder diagnosis in Finding 15, and her crediting of Dr. Cooke's diagnoses in their entirety, no basis within the record exists for the WCJ's exclusion of Dr. Cooke's pain disorder diagnosis within the WCJ's amendment of the NCP to include the remaining diagnoses of major depressive disorder and sleep disorder. As such, the Board did not err in modifying the WCJ's order to include pain disorder within the amendment to the NCP.

Finally, we address Claimant's argument that medical evidence produced by three medical experts that did not testify before the WCJ, and whose examinations and reports on Claimant were produced subsequent to the WCJ proceedings and subsequent to Claimant's appeals to the Board, form a proper basis for rehearing in this matter in order to provide Claimant an opportunity to have this after-acquired evidence considered. Claimant argues that this after-acquired evidence bolsters her prior argument that she suffers from RSD as a result of her compensable work injuries, and that the Board's denial of her Petition for Rehearing constitutes an abuse of discretion.

In addressing this issue, the Board cogently stated:

[] Claimant filed a Petition of rehearing pursuant to Section 426 of the Act, providing for our grant [of] a rehearing of any petition upon which we have made an award or disallowance of compensation or other order or ruling, or upon which we have sustained or reversed any action of a [WCJ]. 77 P.S. § 871. However, a rehearing is appropriate only for the introduction of newly discovered noncumulative evidence, and will not be granted to permit a party to strengthen weak proofs already presented. Helverson v. [Workmen's Compensation Appeal Board] (Cent. Foundry Co.), 463 A.2d 1243 (Pa. Cmwlth. 1982).

In that Claimant's Petition for Rehearing is premised on the inclusion of three medical evaluations that occurred after her Appeals, specifically relating to psychological diagnoses, physical diagnoses and an impairment rating evaluation, we determine that the evidence is cumulative to that presented before the WCJ or, regarding the impairment rating evaluation, inapplicable to the issues before us. The Petition is therefore denied.

Board Opinion at 10-11. We agree.

By Claimant's own admission within her brief to this Court, she seeks to introduce the after-acquired evidence "for a reconsideration of whether RSD is an includable injury in the Notice of Compensation Payable." Claimant's Brief at 14. Therefore, Claimant seeks to produce additional evidence directed at an issue – the existence of RSD as a result of her work injuries – which has already been addressed by the evidence previously presented by Claimant during the proceedings before the WCJ. Accordingly, the basis for Claimant's Petition for Rehearing is unarguably and solely to present further, cumulative evidence to strengthen the evidence already presented thereby on that very issue in these

proceedings. As such, the Board did not abuse its discretion in denying Claimant's Petition for Rehearing. Helverson.

Accordingly, we affirm.

JAMES R. KELLEY, Senior Judge

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ORDER

AND NOW, this 29th day of June, 2010, the order of the Workers' Compensation Appeal Board dated November 3, 2009, at A08-1499, is affirmed.

JAMES R. KELLEY, Senior Judge