IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Eleanor Biawogei,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 2334 C.D. 2009
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Workers' Compensation Appeal Board (Woods Services),	:	Submitted: May 21, 2010
	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER **FILED: July 27, 2010**

Eleanor Biawogei (Claimant) petitions for review of the order of the Workers' Compensation Appeal Board (Board), which granted the second Petition to Terminate Compensation Benefits (second Termination Petition) filed by her employer, Woods Services (Employer), and denied two petitions for review of utilization review determination (collectively, UR Petitions) filed by Claimant. Claimant asks this Court to determine whether the Board erred in finding that: (1) there was substantial evidence to determine that Claimant had fully recovered from her work-related disability; and (2) there was substantial competent medical evidence to support a denial of Claimant's UR Petitions.

On November 19, 2003, Claimant sustained an injury while working in the course and scope of her employment for Employer as a client care worker. On April 27, 2005, Workers' Compensation Judge (WCJ) Michael Snyder issued and circulated a decision granting Claimant workers' compensation benefits for injuries sustained to Claimant's forehead, neck, mid-back and trapezius muscles, lower back, and right leg, which rendered her unable to return to her pre-injury duties. Employer filed its first termination petition on September 8, 2005, which alleged that Claimant had made a full recovery as of August 11, 2005, according to an evaluation by Marc Manzione, M.D. WCJ David Slom, in a decision circulated December 26, 2006, denied the first termination petition finding that Claimant "continues to suffer residuals of disability pertaining to an injury to the myoligamentous supporting structures of the neck and back, trapezius myofascitis, and chronic pain syndrome sustained as a result of the work-related injury of November 19, 2003." (WCJ Decision, Findings of Fact (FOF) ¶ 15, December 26, 2006.)

Employer filed a second Termination Petition on April 3, 2007, which alleged a full recovery as of March 20, 2007, based on an examination by Stuart Gordon, M.D. Claimant presented the testimony of her physician, John Bowden, Jr., D.O., in opposition to Employer's second Termination Petition. By decision rendered January 27, 2009, WCJ Denise Krass accepted Dr. Gordon's testimony as credible and found that Claimant had made a full recovery.[1] (WCJ Decision, FOF ¶¶ 11(b), 11(d), January 27, 2009.)

[1] WCJ Krass found Dr. Bowden's testimony and conclusions to be unpersuasive when inconsistent with those of Dr. Gordon. (WCJ Decision, FOF ¶ 11(c), January 27, 2009.) WCJ Krass also found Claimant's testimony regarding her continuing disability to be "neither credible nor convincing" because there was no objective evidence to support claimant's complaints of

During the course of the proceedings for the second Termination Petition, Employer filed two separate utilization review requests (UR Requests) regarding Claimant's ongoing treatment. Specifically, on December 12, 2007, Employer filed its first UR Request for the review of Claimant's chiropractic treatment provided by Lorenzo Alston, D.C. This UR Request was assigned to utilization review chiropractor Gregg Fisher, D.C. Dr. Fisher reviewed documentation from the Bureau of Workers' Compensation and Claimant's medical records. Dr. Fisher opined that all treatment provided to Claimant by Dr. Alston was neither reasonable nor necessary on and after November 6, 2007. (WCJ Decision, FOF 13(c), February 2, 2009.) The second UR Request was filed by Employer on December 13, 2007, for the review of treatment provided to Claimant by Dr. Bowden. This UR Request was assigned to Michael Ziev, D.O. After reviewing the documentation of the Bureau of Workers' Compensation and the medical records from several doctors that had provided treatment to Claimant, Dr. Ziev determined that all treatment rendered by Dr. Bowden, with the exception of monthly visits to monitor Claimant's pain medication, was neither reasonable nor necessary on and after November 13, 2007. (WCJ Decision, FOF ¶ 9(c), February 2, 2009.)

Claimant filed two UR Petitions, requesting review of the determinations of Dr. Fisher and Dr. Ziev. These UR Petitions were evaluated by WCJ Krass. On February 2, 2009, WCJ Krass denied the UR Petitions and affirmed the UR determinations of Dr. Ziev and Dr. Fisher, finding that the treatment provided to Claimant by both Dr. Alston and Dr. Bowden was neither reasonable nor

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pain, and her testimony was inconsistent, in part, with the testimony that was presented by Dr. Bowden. (WCJ Decision, FOF ¶ 11(a), January 27, 2009.)

necessary. Claimant appealed these UR determinations, along with WCJ Krass' order granting the second Termination Petition, to the Board, arguing that not one of the three decisions was supported by substantial evidence. On October 30, 2009, the Board affirmed WCJ Krass' opinions and orders. Claimant now petitions this Court for review of the Board's decision.[2]

Claimant first argues that the termination of her benefits was not supported by substantial evidence because Employer's experts did not show through unequivocal and competent testimony that she had fully recovered from her work-related injuries. In a termination proceeding, an employer must prove that "a claimant's disability has ceased or that any remaining disability is not a result of the original work-related injury." Jaskiewicz v. Workmen's Compensation Appeal Board (James D. Morrisey, Inc.), 651 A.2d 623, 625 (Pa. Cmwlth. 1994). This burden may be satisfied by providing "unequivocal and competent medical evidence" that the claimant has fully recovered from the work-related injury. Koszowski v. Workmen's Compensation Appeal Board (Greyhound Lines, Inc.), 595 A.2d 697, 699 (Pa. Cmwlth. 1991). Expert medical testimony is not competent when "the foundation for the medical evidence is contrary to the established facts in the record, or is based on assumptions not in the record." AT & T v. Workers' Compensation Appeal Board (Hernandez), 707 A.2d 649, 653 (Pa. Cmwlth. 1998). For an expert medical witness' testimony to be unequivocal,

[2] This Court's scope of review is "limited to determining whether an error of law was committed, whether necessary findings of fact are supported by substantial evidence and whether constitutional rights were violated." DeGraw v. Workers' Compensation Appeal Board (Redner's Warehouse Mkts., Inc.), 926 A.2d 997, 999 n.2 (Pa. Cmwlth. 2007). Substantial evidence is defined as "such relevant evidence as a reasonable person might accept as adequate to support [the] conclusion." Capuano v. Workers' Compensation Appeal Board (Boeing Helicopter Co.), 724 A.2d 407, 409 (Pa. Cmwlth. 1999).

an accurate foundation of facts must support the expert's opinion. Newcomer v. Workmen's Compensation Appeal Board (Ward Trucking Corp.), 547 Pa. 639, 647-48, 692 A.2d 1062, 1066 (1997). Where prior termination petitions have been filed, the employer must show a change in the claimant's condition in order to prevail on its current termination petition. Lewis v. Workers' Compensation Appeal Board (Giles & Ransome, Inc.), 591 Pa. 490, 498, 919 A.2d 922, 926 (2007).

Claimant argues that, at the time of her examination by Dr. Gordon on March 20, 2007, she was still suffering from chronic pain syndrome in the cervical/trapezial area and the lumbar area. Claimant's assertion is supported by the deposition testimony of Dr. Gordon, in which he states that Claimant told him that she had pain in her lower back and neck. (Gordon Dep. at 10, December 13, 2007.) Claimant contends that, because she was still suffering from chronic pain syndrome from her work-related injury at the time of Dr. Gordon's examination, her condition had not changed, and she had not fully recovered from her work-related injury. As such, Claimant contends that the Board erred in affirming the second Termination Petition and denying the UR Petitions because the denial was based, in part, on the equivocal and legally insufficient testimony of Dr. Gordon that Claimant had fully recovered from her injury. We disagree.

In his December 26, 2006 decision regarding the first Termination Petition, WCJ Slom found Claimant's remaining injuries to consist of "injury to the myoligamentous supporting structures of the neck and back, trapezius myofascitis, and *chronic pain syndrome*." (WCJ Decision, FOF ¶ 13, December 26, 2006 (emphasis added).) In making this decision, WCJ Slom rejected expert testimony

that Claimant had fully recovered from her injuries. (WCJ Decision, FOF ¶¶ 13-15, December 26, 2006.)

After examination of Claimant on March 20, 2007, for the second Termination Petition, Dr. Gordon testified that, within a reasonable degree of medical certainty, Claimant had fully recovered from her injury and he "saw no reason why she could not return to work within her full duties as a health care worker." (Gordon Dep. at 15-16.) Specifically, Dr. Gordon testified that Claimant had no indication of myofascitis or any soft tissue injury, (Gordon Dep. at 14), and that there was no objective support for Claimant's subjective complaints of pain. (Gordon Dep. at 21.) Dr. Gordon described chronic pain syndrome and the circumstance in which it arises:

> Q: Doctor, does the fact that a person says that they have pain mean that they have chronic pain syndrome?
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> A: They do not. Just because you suggest you have pain, it's a perception of pain, it doesn't mean that you should confirm those impressions, confirm that symptoms complex with the diagnosis of chronic pain syndrome.
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> Chronic pain syndrome is really somebody, for instance, who has an unstable knee. There is a structural deficiency. When that person walks, they limp. They have a swelling and tenderness increased with activity, decreased with rest.
>
> If it's unfixable, you can't replace the knee, whatever it is, that would be a chronic pain syndrome. There is a structural issue that cannot be repaired, and the patient has a chronic pain syndrome.
>
> Q: Did you find any indication of any structural problem in this case?
>
> A: I did not.

(Gordon Dep. at 29-30.) Dr. Gordon found that there was no structural problem that would cause chronic pain syndrome in the neck or back at the time he examined Claimant and, thus, he unequivocally opined that Claimant no longer showed any signs of chronic pain syndrome.

In workers' compensation cases, the WCJ is the exclusive fact finder and arbiter of the credibility of witnesses and testimony. Greenwich Collieries v. Workmen's Compensation Appeal Board (Buck), 664 A.2d 703, 706 (Pa. Cmwlth. 1995). WCJ Krass found that Claimant's physical condition regarding her work-related injury had changed since the prior disability determination. (WCJ Decision, FOF ¶ 11(e), January 27, 2009.) WCJ Krass also found "Dr. Gordon's testimony, conclusions, and opinions regarding the Claimant's full recovery as of March 20, 2007 to be credible and persuasive." (WCJ Decision, FOF ¶ 11(b), January 27, 2009.)

Claimant argues that the testimony of Dr. Gordon is equivocal and legally insufficient. However, Dr. Gordon based his testimony on a full examination of Claimant and her records, which demonstrated a full recovery, as discussed previously. In his deposition, Dr. Gordon mentioned several observations from his examination of Claimant which led to his opinion that she had recovered from her injuries. Dr. Gordon found that Claimant had no spasms in the affected muscle groups, she had excellent flexibility of the cervical spine, Claimant's shoulders were of equal height, and there were no focal findings on neurologic evaluation. (Gordon Dep. at 11-14.) These observations, along with a review of Claimant's medical records, led Dr. Gordon to credibly opine by a reasonable degree of medical certainty that Claimant had fully recovered from her injury and did not

need any further medical care. (Gordon Dep. at 14-16.) These observations found by Dr. Gordon set out a factual foundation that makes his testimony both unequivocal and competent. See Newcomer, 547 Pa. at 647-48, 692 A.2d at 1066; AT & T, 707 A.2d at 653.

Claimant further contends that Dr. Gordon's testimony cannot support a finding of full recovery under the principle enunciated by this Court in Westmoreland County v. Workers' Compensation Appeal Board (Fuller), 942 A.2d 213 (Pa. Cmwlth. 2008), and Gillyard v. Workers' Compensation Appeal Board (Pennsylvania Liquor Control Board), 865 A.2d 991 (Pa. Cmwlth. 2005). In these cases, this Court found that a medical opinion that does not recognize the adjudicated injury as the injury from which the claimant has recovered is not sufficient to support a termination of benefits. Westmoreland County, 942 A.2d at 218-19; Gillyard, 865 A.2d at 996. Claimant argues that Dr. Gordon's testimony is not competent and unequivocal because he did not acknowledge the underlying cause of her chronic pain syndrome, or that it existed at all, and merely said that she had recovered.

In Westmoreland County, the employer's physician testified that the claimant's injury was a back strain, not a herniated L4-5 disc or lumbar radiculopathy as was determined in a previous proceeding by the WCJ. 942 A.2d at 219. Because the physician did not take into account the "established facts" of the nature of the injury by failing to address the adjudicated injury, the testimony was not sufficient to support a termination of benefits. Id.

Similarly, in Gillyard, the employer's physician testified that the claimant had only a back strain and sprain, and not chronic sciatica at the L5-S1 distribution as was adjudicated in the first termination petition proceeding. 865 A.2d at 996. This Court found that the physician's testimony that the claimant had made a full recovery from the back strain and sprain could not support a decision that the claimant had fully recovered from his adjudicated injury. Id.

In Westmoreland County, this Court distinguished the situation at issue there from Jackson v. Workers' Compensation Appeal Board (Resources for Human Development), 877 A.2d 498 (Pa. Cmwlth. 2005). In Jackson, the employer's physician did not acknowledge that the claimant had a disabling knee injury, but testified "in the alternative and based on the assumption that [the claimant] had suffered a knee injury, that 'it resolved.'" Id. at 503 (quoting the WCJ Hr'g Tr. at 21). The physician's testimony was found to be competent. Id.

Additionally, in Westmoreland County, this Court distinguished the situation at issue there from the facts of To v. Workers' Compensation Appeal Board (Insaco, Inc.), 819 A.2d 1222 (Pa. Cmwlth. 2003). In To, the employer's physician stated that "he was unable to see how the work injury could possibly happen." 819 A.2d at 1225. The physician opined that, based on his examination of the claimant and his medical records, "since there was no evidence of medical impairment, Claimant had made a full and complete recovery." Id. This Court accepted the physician's testimony as competent. Id.

In the present case, Dr. Gordon testified that during his examination he did not find any indication of a structural problem that would lead him to believe that

Claimant was suffering from chronic pain syndrome. (Gordon Dep. at 29-30.) Additionally, when Dr. Gordon was asked whether, in his opinion, Claimant was suffering from chronic pain syndrome *when he examined her*, he replied that she "did have subjective complaints of pain," but that those complaints "were not objectively substantiated." (Gordon Dep. at 21.)

Dr. Gordon's testimony more closely resembles the physicians' testimony given in Jackson and To. Although Dr. Gordon never specified that Claimant's injury included chronic pain syndrome, he did not opine that Claimant never had chronic pain syndrome or that her injury was a different injury from the injuries found by WCJ Slom, as the employers' physicians did in Westmoreland County and Gillyard. Instead, like To, Dr. Gordon testified only that Claimant did not show any signs of chronic pain syndrome at the time of his examination. (Gordon Dep. at 21.) In light of Jackson and To, the Board did not err in affirming the WCJ's decision that Dr. Gordon's testimony regarding Claimant's recovery from chronic pain syndrome was competent.

Additionally, even though Claimant has made subjective complaints of pain resulting from the injury, this remains a question of fact to be determined by the WCJ. Udvari v. Workmen's Compensation Appeal Board (U.S. Air, Inc.), 550 Pa. 319, 327, 705 A.2d 1290, 1293 (1997). The WCJ does not need to accept such subjective claims unless objective medical testimony corroborates the pain. Id. Our Supreme Court has held that in cases where a claimant subjectively complains of pain, the employer has met its burden of proof in a termination proceeding if the employer's medical expert testifies, within a reasonable degree of medical certainty, that the claimant has fully recovered from the work injury, is able to

return to work without restrictions, and there is no objective medical evidence that would substantiate the claimant's complaints of pain or associate them with the work injury. Jordan v. Workmen's Compensation Appeal Board (Consol. Elec. Distribs.), 550 Pa. 232, 237, 704 A.2d 1063, 1065 (1997). In the present case, the burden of proof has been met through the credible testimony of Dr. Gordon. Therefore, there is substantial and competent evidence to support a finding that Claimant has fully recovered from her work-related injury and to terminate benefits.

Second, Claimant contends that there was not substantial evidence to support a denial of her UR Petitions because the WCJ's decision was based, in part, on the testimony of Dr. Gordon. As discussed above, Dr. Gordon's testimony is competent and unequivocal, and his testimony provides substantial evidence for WCJ Krass to deny Claimant's UR Petitions. Therefore, the Board did not err in affirming the WCJ's decision to terminate benefits and deny Claimant's UR Petitions.

Accordingly, we affirm the order of the Board.

RENÉE COHN JUBELIRER, Judge

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	:	
Respondent	:	

O R D E R

NOW, July 27, 2010, the order of the Workers' Compensation Appeal Board in the above-captioned matter is hereby **AFFIRMED**.

RENÉE COHN JUBELIRER, Judge