

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Christina Peterson,	:	
Petitioner	:	
	:	
v.	:	No. 2458 C.D. 2010
	:	
Workers' Compensation Appeal	:	Submitted: March 4, 2011
Board (Giant Food Stores, Inc.),	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE SIMPSON**

FILED: May 4, 2011

Christina Peterson (Claimant) petitions for review from an order of the Workers' Compensation Appeal Board (Board) that affirmed a Workers' Compensation Judge's (WCJ) termination of her compensation. The WCJ's order also granted Giant Food Stores, Inc.'s (Employer) petition to review utilization review determination (UR petition). Claimant contends Employer's medical evidence is equivocal and otherwise legally incompetent to support a finding of full recovery. Claimant further maintains the WCJ's decision is not a "reasoned decision" under the Workers' Compensation Act (Act)¹ because it fails to make adequate credibility findings regarding Employer's medical evidence. Claimant also argues the WCJ erred in failing to consider Employer's medical expert's prior inconsistent deposition testimony. We affirm.

¹ Act of June 2, 1915, P.L. 736, as amended, added by the Act of July 2, 1993, P.L. 190, 77 P.S. §834.

I. Background

In September, 2003, while working for Employer as a deli manager, Claimant injured her lower back. Pursuant to a temporary notice of compensation payable, later converted to a notice of compensation payable (NCP), Employer acknowledged a work injury described as a lower back strain and sprain.

Claimant initially treated with Dr. James Nicholson (Panel Physician), who referred her to Dr. Paul Marcotte (Neurosurgeon). Neurosurgeon performed two lumbar spine surgeries on Claimant. Panel Physician described the first procedure as a depression laminectomy intended to take the pressure off the nerve at L5. He described the second, more extensive procedure as a second laminectomy, with an iliac bone graft and stabilization with pedical screws and a disc cage. Neurosurgeon continued to treat Claimant between and after the surgeries with physical therapy and pain medication.

In December, 2006, Claimant began treating with Dr. Michael Guthrie (Physiatrist), who practices physical medicine and rehabilitation, with a subspecialty in pain medicine. Physiatrist diagnosed chronic low back pain, status post lumbar laminectomy at L4-5, ongoing lumbar radiculopathy, degenerative joint disease at L3-4 and L4-5, and sacroiliac disease. Physiatrist prescribed pain medication and muscle relaxers, primarily Percocet and Flexeril.

At Employer's request, Dr. Steven J. Valentino (IME Physician), an orthopedic surgeon, with a subspecialty in spine surgery, performed five independent medical evaluations of Claimant, beginning in November, 2003. He

reported that Claimant fully recovered from her work injury and could return to her pre-injury job as of his May, 2008 examination.

Claimant briefly returned to work part-time in February, 2008 as an Easy Scan cashier; she monitored customers going through U-Scan registers with minimal orders. After approximately 10 days, Claimant could not continue working. When Employer unilaterally stopped payment of benefits, Claimant petitioned for reinstatement, which the WCJ granted. The WCJ also granted Claimant's review petition and amended the description of injury to include a herniated disc at L4-5.

In August, 2008, Employer filed a UR petition requesting *de novo* review² of the reasonableness or necessity of Physiatrist's treatment. Employer also filed a petition to suspend, modify or terminate Claimant's benefits. In seeking a termination, Employer alleged that Claimant fully recovered from her work injury as of May, 2008, that she could return to unrestricted work, and that it offered her a specific job. In support of its request for a suspension or modification, Employer alleged Claimant returned to a medically approved, modified-duty position that she could physically perform.

² In July, 2008, Dr. Emmanuel E. Jacob (UR Physician) performed an initial utilization review of Physiatrist's treatment of Claimant. See Reproduced Record (R.R.) at 176a-86a. With the exception of a prescription for Oxycontin, which Physiatrist replaced with Percocet, UR Physician determined Physiatrist's treatment reasonable and necessary for pain management. See id. at 183a-84a.

Claimant testified before the WCJ and submitted depositions from Panel Physician and Psychiatrist. Employer submitted deposition testimony from IME Physician and its claims supervisor.

Ultimately, the WCJ found IME Physician's testimony that Claimant fully recovered from her work injury credible and persuasive. WCJ's Op., 12/03/09, Finding of Fact (F.F.) No. 16. Thus, the WCJ accepted IME Physician's testimony as fact. Id. The WCJ also specifically rejected any medical evidence that contradicted IME Physician's testimony. Id.

Based on IME Physician's testimony, the WCJ concluded Employer established that all of Claimant's work-related disability ceased as of his May, 2008 examination. The WCJ also determined Employer established all treatment by Psychiatrist on or after March 25, 2008 was neither reasonable nor necessary. Accordingly, the WCJ granted Employer's termination and UR petitions.

On appeal to the Board, Claimant argued the WCJ erred in relying on IME Physician's testimony, which did not establish a full recovery. Claimant further asserted the WCJ did not issue a reasoned decision.

The Board rejected these arguments. It concluded IME Physician's testimony constituted substantial competent evidence of full recovery. The Board

further determined Finding of Fact No. 16 adequately set forth the WCJ's reasons for accepting IME Physician's opinion. Claimant petitions for review.³

II. Issues

Claimant states four issues for review. She contends: IME Physician's testimony cannot support a finding of full recovery because he placed restrictions on Claimant due to her work injury; IME Physician's testimony is incompetent because he admitted Claimant suffered a permanent anatomical change at L4-5 that eradicated her ability to move that spinal joint; the WCJ failed to issue a reasoned decision with adequate credibility findings; and, the WCJ erred in failing to consider IME Physician's prior inconsistent testimony in a 2007 deposition, wherein he stated Claimant reached maximum medical improvement with permanent restrictions.

III. Discussion

A. Physical Restrictions

Claimant first contends IME Physician's opinion of full recovery is equivocal because he imposed physical restrictions on her work activities. See Thompson v. Workers' Comp. Appeal Bd. (Sacred Heart Med. Ctr.), 720 A.2d 1074 (Pa. Cmwlth. 1998) (doctor's opinion of full recovery equivocated by both physical restrictions placed on claimant in physical capacities checklist and

³ This Court's review is limited to determining whether the WCJ's findings of fact were supported by substantial evidence, whether an error of law was committed or whether constitutional rights were violated. Shannopin Mining Co. v. Workers' Comp. Appeal Bd. (Sereg), 11 A.3d 623 (Pa. Cmwlth. 2011). As the fact finder in workers' compensation cases, the WCJ is empowered to determine witness credibility and evidentiary weight. Id.

acknowledgment that claimant still needs accommodations because of her subjective complaints of pain); Ernst v. Workers' Comp. Appeal Bd. (Rollins Transp. Sys.), 720 A.2d 1085 (Pa. Cmwlth. 1998) (where doctor testified he found no objective basis for claimant's complaints of pain, but gave claimant the "benefit of the doubt" and placed restrictions on his work activities, the doctor's testimony could not support a termination).

Claimant asserts that following his May, 2008 examination, IME Physician reaffirmed the physical restrictions he placed on Claimant's work activities in September, 2006. Claimant contends IME Physician imposed these restrictions due to Claimant's subjective complaints of pain and her lumbar surgeries, which were connected to her work injury. In addition, IME Physician did not execute an affidavit of full recovery until three months after the last IME. Thus, in light of Thompson and Ernst, Claimant argues IME Physician's opinion of full recovery is equivocal and legally insufficient to support a termination.⁴

Whether expert testimony is equivocal is a question of law fully reviewable on appeal. Inservco Ins. Servs. v. Workers' Comp. Appeal Bd. (Purefoey), 902 A.2d 574 (Pa. Cmwlth. 2006). In making that determination, we

⁴ In order to terminate benefits under Section 413 of the Act, 77 P.S. §772, an employer must prove that all disability related to a compensable injury has ceased. Udvari v. Workmen's Comp. Appeal Bd. (USAir, Inc.), 550 Pa. 319, 705 A.2d 1290 (1997). An employer may meet this burden by offering credible, unequivocal medical evidence which demonstrates, within a reasonable degree of medical certainty, that the claimant fully recovered from her work injury. Id. A claimant is fully recovered from her work injury if she can return to her pre-injury job without restrictions and there are no objective medical findings that either substantiate the claimant's complaints of pain or connect them to the work injury. Id.

examine the testimony of a witness as a whole and do not take words or phrases out of context. Id. “A medical expert’s testimony is unequivocal if, after providing a foundation, he testifies that he believes or thinks the facts exist.” Id. at 579. However, not every utterance from a medical expert must be positive, certain and absent any reservation. Craftsmen v. Workers' Comp. Appeal Bd. (Krouchick), 809 A.2d 434 (Pa. Cmwlth. 2002). Further, answers given on cross-examination, do not, as a matter of law, destroy the effectiveness of the medical expert’s opinion. Hannigan v. Workmen's Comp. Appeal Bd. (Asplundh Tree Expert Co.), 616 A.2d 764 (Pa. Cmwlth. 1992). Rather, the testimony should be assessed as a whole in determining the weight given to the expert’s opinion. Id.

Here, IME Physician provided an adequate foundation for his opinion of full recovery. He evaluated Claimant on five occasions. IME Physician testified he last examined Claimant in May, 2008. Reproduced Record (R.R.) at 256a. He reviewed Claimant’s medical history and described her work injury as a lumbar strain and L4-5 with disc herniation with left sciatica. Id. at 257a. He acknowledged Claimant underwent a lumbar decompression at L4-5 in 2004, which did not improve her condition. Id. In 2005, Claimant underwent a lumbar fusion at L4-5. Id. Following surgery, Claimant’s treatment included facet injections, epidurals, medications and sacroiliac injections. Id.

Significantly, IME Physician’s last examination of Claimant yielded normal results. See id. at 260a-62a. He opined that Claimant’s lumbar disc herniation fully resolved. Id. at 262a. In particular, IME Physician testified Claimant’s 2005 spinal fusion had “more than enough time to mature,” and he

found no objective basis for any complaints or residuals from her work injury. Id. at 263a, 266a-67a. Also, IME Physician found that Claimant reached maximum medical improvement and no longer needed ongoing care or medication related to her work injury. Id. at 262a-63a. IME Physician opined that Claimant could return to her pre-injury deli manager position “without restrictions for her work injury” as of his May, 2008 evaluation. Id. at 267a. This testimony is unequivocal. Inservco; Craftsmen.

In August, 2008, IME Physician executed a physician’s affidavit of recovery.⁵ See Dep. of Steven J. Valentino, D.O., 01/13/09 (Second Valentino Dep.), Ex. 2. He certified Claimant fully recovered from her work injury and could resume, without limitation, her deli manager position as of May 6, 2008. Id.

Claimant, however, argues IME Physician continued his 2006 restrictions based on her subjective complaints of pain and two surgeries. Citing Ernst and Thompson, Claimant asserts this fact renders IME Physician’s testimony equivocal.

We disagree. IME Physician’s testimony, viewed as a whole, supports the WCJ’s termination of benefits. As discussed above, IME Physician ultimately opined Claimant could return to her pre-injury position without restrictions related to her work injury. Claimant’s fusion surgery had more than

⁵ IME Physician also explained that he executed a physician’s affidavit in August, 2008, about three months after his last evaluation of Claimant, because that is when Employer’s counsel mailed it to him. R.R. at 291a. IME Physician opined Claimant fully recovered “consistent with my last evaluation” Id.

enough time to mature. She had no objective findings supporting her subjective complaints of pain, and she no longer needed treatment or medicine for her work injury. This unequivocal testimony distinguishes the present case from Ernst and Thompson. Employer was therefore entitled to a termination of benefits.

B. Permanent Anatomical Change

Claimant further contends IME Physician's testimony is incompetent to support a finding of full recovery because he admitted Claimant suffered a permanent anatomical change at L4-5 that totally eradicated her ability to move that spinal joint. On cross-examination, IME Physician testified:

Q. So we've got cages, screws, rods and bony fusion all there at L4-5; correct?

A. Yes.

Q. So far as this motion segment is concerned, the ability of that joint to move has been totally eradicated; correct;

A. Just at 4-5, yes.

Q. So we have anatomic change at 4-5 which is permanent in nature and which will never change; correct?

A. Yes.

R.R. at 282a-83a. Claimant argues that in view of this testimony a finding of full recovery is impossible as a matter of law. See Harle v. Workmen's Comp. Appeal Bd. (Tel. Press, Inc.), 540 Pa. 482, 658 A.2d 766 (1995) (where work injury resulted in a slight, but permanently reduced range of motion at the thumb joint, suspension rather than termination of compensation was appropriate).

In addition, Claimant attempts to distinguish Wagner v. Workers' Compensation Appeal Board (O'Malley Wood Products, Inc.), 805 A.2d 683 (Pa.

Cmwlth. 2002), where this Court held that an L4-5 fusion, which successfully resolved a work injury and did not result in a loss of range of motion, warranted a termination of benefits. In Wagner, the defense expert attributed the residual physical restriction to claimant's thin stature, not the fusion surgery. Here, however, IME Physician testified Claimant flexed to only 80 degrees. See R.R. at 260a. Also, IME Physician related his physical restrictions to Claimant's back surgery and subjective complaints of pain, not her stature.

We reject Claimant's argument, because this case is more like Wagner than like Harle. Viewed as a whole, IME Physician testified Claimant had normal flexibility. "She flexed to 80 degrees, extended to 40 degrees and laterally rotated to 40 degrees, certainly a physiologic and normal range of motion." R.R. at 260a (emphasis added). Therefore, Claimant's reliance on Harle is misplaced. Rather, similar to the defense expert's testimony in Wagner, IME Physician testified Claimant had normal lumbar flexibility and range of motion despite the L4-5 fusion. By May, 2008, Claimant's fusion matured and "she had completely normal findings on exam" Id. at 267a. Therefore, IME Physician opined Claimant could perform her pre-injury position "without restrictions for her work injury." Id. Consequently, Claimant's L4-5 fusion does not preclude a finding of full recovery. Wagner.

C. Reasoned Decision

Claimant next argues the WCJ failed to issue a reasoned decision as required by Section 422(a) of the Act.⁶ More specifically, Claimant asserts the WCJ's "boilerplate" credibility determinations concerning IME Physician's testimony do not provide for adequate appellate review. Claimant takes issue with the WCJ's finding that IME Physician's testimony was "clear and unequivocal, logical and coherent." F.F. No. 16. Claimant contends this language is insufficient to provide a reasoned decision where she specifically raised the inconsistencies of IME Physician's testimony before the WCJ.

In support of her position, Claimant highlights alleged inconsistencies between IME Physician's 2007 deposition and his 2009 deposition. In his 2007 deposition, IME Physician testified Claimant reached maximum medical improvement and her work restrictions were permanent in nature. In his 2009 deposition, IME Physician testified Claimant fully recovered from her work injury and could return to her pre-injury job. Claimant argues that in the face of this evidence, the WCJ's failure to address these inconsistencies and the credibility issues raised by the parties violates the requirement that the WCJ's adjudication provide the basis for meaningful appellate review. 77 P.S. §834.

⁶ Section 422(a) of the Act requires a WCJ to issue a "reasoned decision containing findings of fact and conclusions of law based upon the evidence as a whole which clearly and concisely states and explains the rationale for the decisions" 77 P.S. §834. "A decision is 'reasoned' if it allows for adequate review by the appellate courts under the applicable review standards." Pryor v. Workers' Comp. Appeal Bd. (Colin Serv. Sys.), 923 A.2d 1197, 1202 (Pa. Cmwlth. 2006). However, "the 'reasoned decision' requirement does not require the WCJ to discuss all evidence presented; rather, the WCJ must make findings that are necessary to resolve the issues presented by the evidence and that are relevant to the decision." Id. (citing Dorsey v. Workers' Comp. Appeal Bd. (Crossing Constr. Co.), 893 A.2d 191 (Pa. Cmwlth. 2006)).

Section 422(a), however, does not require the WCJ to give a line-by-line analysis of each statement by a medical expert and to explain how each statement affected the ultimate decision. Gumm v. Workers' Comp. Appeal Bd. (J. Allen Steel Co.), 942 A.2d 222 (Pa. Cmwlth. 2008). Nonetheless, where a medical expert testifies by deposition, the WCJ must articulate an objective basis for the credibility determination. Id. Although there are numerous objective factors that can support a credibility determination, these factors must be identified and enunciated. Id.

Also, in reviewing credibility determinations for purposes of the reasoned decision requirement, substantial deference is due. Casne v. Workers' Comp. Appeal Bd. (Stat Couriers, Inc.), 962 A.2d 14 (Pa. Cmwlth. 2008). The Court must view the reasoning as a whole and overturn the WCJ's credibility determination only if it is arbitrary or capricious, fundamentally dependent on a misapprehension of material facts, or so otherwise flawed. Id.

Here, Finding of Fact No. 16, which includes the WCJ's credibility determinations, provides (with emphasis added):

The testimony of [IME Physician] that based on Claimant's history, the results of his examinations of Claimant, and his reviews of Claimant's medical records and diagnostic test results, as of May 6, 2008, Claimant was fully recovered from her September 13, 2003 work injury, and was no longer suffering any disability related to that injury, and that on and after March 25, 2008, the treatment, including office visits and medications, provided to Claimant by [Physiatrist] was neither reasonable nor necessary is found to be credible and persuasive and is accepted as fact in this case. To the extent that the testimonies of Claimant, [Panel Physician]

and [Physiatrist], and the reviewer's report of [UR Physician] may undermine the testimony of [IME Physician], the testimonies of Claimant, [Panel Physician] and [Physiatrist], and the report of [UR Physician] are specifically rejected as neither credible nor persuasive. In this regard, the undersigned notes the testimony of [IME Physician] was clear and unequivocal, logical and coherent, and supported by the results of his examinations of Claimant and reviews of Claimant's medical records and diagnostic test results; and that Claimant's work injury is a back injury, and as a board certified orthopedic spine surgeon, [IME Physician's] credentials are superior to those of [Panel Physician] and [Physiatrist]. Furthermore, in this regard, the undersigned notes that unlike [UR Physician] who never examined Claimant, [IME Physician] has evaluated Claimant on five separate occasions over the years. Therefore he is more familiar with Claimant and in a better position to opine about the reasonableness and necessity of Claimant's ongoing treatment than is [UR Physician].

Obviously, the WCJ did more than simply find IME Physician's testimony "clear and unequivocal, logical and coherent." While clarity and coherence are probably sufficient explanations for a credibility determination, the WCJ went further and articulated several other objective reasons for accepting IME Physician's testimony: 1) IME Physician examined Claimant on five separate occasions; 2) IME Physician's opinions were supported by the results of his physical examinations and Claimant's medical records and diagnostic tests; and, 3) as a board-certified orthopedic surgeon with a subspecialty in spine surgery, IME Physician's credentials are superior to those of Panel Physician and Physiatrist in terms of evaluating back injuries. For these reasons, we discern no violation of the reasoned decision requirement of the Act.

D. Inconsistent Depositions

In a closely related argument, Claimant contends the WCJ erred in failing to consider IME Physician's 2007 deposition, wherein he opined Claimant reached maximum medical improvement and could perform only sedentary work subject to permanent restrictions. Claimant argues this testimony constitutes a prior inconsistent statement that the WCJ failed to address.

We disagree. In his 2009 deposition, IME Physician addressed this inconsistency on cross-examination. He testified that in September 2006, he did not find a full recovery likely nine months after surgery. R.R. at 277a-78a. A fusion takes nine to 12 months to fully heal. Id. at 271a. By May, 2008, Claimant's fusion "certainly had more than enough time to mature." Id. at 263a.

The duration and extent of an injury are always at issue in workers' compensation proceedings. Inservco. As the ultimate fact finder, the WCJ may accept or reject the testimony of a medical witness in whole or in part. Craftsmen. Matters of evidentiary weight also fall within the province of the WCJ. Id. Findings of Fact Nos. 8d, 8e and 8f⁷ reflect that the WCJ considered IME

⁷ Findings of Fact Nos. 8d, 8e and 8f pertinently provide (with emphasis added):

d. At the time of his May 6, 2008 evaluation of Claimant, there was no indication present of a failure or non-union of the lumbar fusion. Ordinarily, it takes nine to 12 months for an interbody fusion to heal.

e. When he saw Claimant on May 6, 2008, Claimant was close to 2 and ½ years after her fusion surgery.

(Footnote continued on next page...)

Physician's explanation of his change in opinion following his May, 2008 evaluation. We therefore reject Claimant's assertion the WCJ erred in failing to consider all of the testimony presented.

For the foregoing reasons, we affirm the Board's order.

ROBERT SIMPSON, Judge

(continued...)

f. Given the lack of objective findings on his May 6, 2008 examination of Claimant, the amount of time that had passed since Claimant had her fusion surgery in December 2005 ... in his opinion, as of May 6, 2008, Claimant was fully recovered from her September 13, 2003 work injury and capable of returning to work without restrictions related to that injury.

WCJ's Op., 12/03/09, F.F. Nos. 8d, 8e, 8f.

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Board (Giant Food Stores, Inc.),	:	
Respondent	:	

ORDER

AND NOW, this 4th day of May, 2011, the order of the Workers' Compensation Appeal Board is **AFFIRMED**.

ROBERT SIMPSON, Judge