

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Anthony Lascala, :
 :
 Petitioner :
 :
 v. : No. 2494 C.D. 2009
 : Submitted: May 21, 2010
 Workers' Compensation Appeal Board :
 (Albright College), :
 Respondent :

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE FRIEDMAN

FILED: July 7, 2010

Anthony Lascala (Claimant) petitions for review of the November 19, 2009, order of the Workers' Compensation Appeal Board (WCAB), which affirmed the decision of a workers' compensation judge (WCJ) to deny the reinstatement and review petitions filed by Claimant and to grant the termination petition filed by Albright College (Employer). We affirm.

On March 3, 2006, while working for Employer as a maintenance mechanic, Claimant slipped on ice, fell on his right shoulder and suffered a right rotator cuff tear. Claimant received workers' compensation benefits for a period of time, but, when he returned to work, Employer suspended his benefits. On April 17, 2007, Claimant sustained a cervical spine sprain/strain when he slipped off of the bottom rung of a ladder. As a result, Claimant again received benefits. (WCJ's Findings of Fact, Nos. 4-5.)

In October 2007, Employer filed a petition to terminate the benefits Claimant was receiving for the 2007 work injury as of September 10, 2007. Shortly thereafter, Claimant filed a petition to review the Notice of Compensation Payable (NCP) and amend the description of his April 17, 2007, work injury to include a right-side brachial plexus injury. Claimant later filed a petition to reinstate benefits for the March 3, 2006, injury to his right shoulder. (WCJ's Findings of Fact, Nos. 1-3.) The petitions were assigned to a WCJ, who held hearings on the matters.

In support of the termination petition, Employer presented the deposition testimony of Barry Berger, M.D., who examined Claimant on two occasions. Dr. Berger testified that, at the initial examination on September 10, 2007, Claimant reported that, as he stepped off the bottom rung of a ladder on April 17, 2007, he slipped, lost his balance, fell toward the wall, raised his right arm, landed awkwardly and, several days later, began to have right shoulder and arm pain. Claimant also complained that he could not extend the middle, ring and little fingers on his right hand. After examining Claimant and reviewing Claimant's medical records and diagnostic study reports, Dr. Berger was unable to determine any anatomic cause for Claimant's finger complaints. Dr. Berger ordered a forearm and elbow MRI, but the MRI did not reveal any condition that could be the cause of Claimant's finger complaints. (WCJ's Findings of Fact, Nos. 6(a)-6(d).)

Dr. Berger conducted a second examination of Claimant on December 20, 2007. At that time, Claimant complained that, in addition to his finger problem, he was unable to touch the back of his head with his right hand. However, upon examination, Dr. Berger found that Claimant had a full range of right shoulder

motion; moreover, the doctor observed that Claimant performed the same elbow and upper arm flexion that he claimed he could not do when Claimant removed and put on a pullover shirt. Dr. Berger tested Claimant for a brachial plexus injury, but, based on a negative Tinel's sign at the supraclavicular, the doctor concluded that Claimant did not suffer from that condition. Dr. Berger opined that Claimant was fully recovered from the April 17, 2007, cervical spine sprain/strain and that the March 3, 2006, right shoulder injury had not recurred. (WCJ's Findings of Fact, Nos. 6(e)-8.)

In support of the review and reinstatement petitions, Claimant testified on his own behalf and offered the deposition testimony of Richard Close, M.D., and Leon Venier, M.D. Claimant testified that, on April 17, 2007, as he descended from a ladder, he slipped off the second rung and extended his right arm to keep from falling, but his right shoulder struck the wall, about ten to twelve inches away, causing him to experience immediate numbness and pain in his hand, arm and shoulder. Claimant stated that, about three days later, he began to experience the problem with the last three fingers of his right hand. (WCJ's Findings of Fact, No. 14-15.)

Dr. Close testified that, when Claimant reported his injury, he stated that he fell from a ladder, reached out with his right arm to break his fall and immediately suffered right hand, arm and shoulder pain. After examining Claimant, Dr. Close concluded that, despite the absence of a positive Tinel's sign, Claimant sustained a brachial plexus injury, not a cervical spine injury. Dr. Close based his diagnosis, in part, on the reported mechanism of the work injury, i.e., that Claimant stretched or

distorted the brachial plexus when he fell from the ladder. Dr. Close offered no opinion regarding Claimant's March 3, 2006, right shoulder injury. (WCJ's Findings of Fact, Nos. 9-10.)

Finally, Dr. Venier, who is board-certified in physical medicine and rehabilitation, testified that, in reporting his injury, Claimant stated that he slipped from the last rung of a ladder, fell to his right, reached for the wall to keep from falling and, a few days later, developed severe right arm pain as well as numbness and tingling in his fingers. The doctor performed various studies, including a brachial plexus MRI, which was normal. Dr. Venier explained that a stretch injury, such as falling and hanging onto the ladder, would be more likely to cause a brachial plexus injury, but Claimant's report did not indicate the usual stretch injury. Dr. Venier concluded that Claimant sustained a C8-T1 nerve root injury, i.e., a nerve injury of the cervical spine, when Claimant fell on his outstretched arm. In addition, Dr. Venier testified that he believed Claimant aggravated the March 3, 2006, right shoulder injury on April 17, 2007. Finally, Dr. Venier testified that he examined Claimant the day before the deposition, and, at that time, Claimant was able to flex all the fingers on his right hand. (WCJ's Findings of Fact, Nos. 11-12.)

After considering the evidence, the WCJ rejected Claimant's testimony about the mechanism of the April 17, 2007, injury and his inability to extend the fingers on his right hand. The WCJ also rejected the testimony of Dr. Close and Dr. Venier, but he accepted the testimony of Dr. Berger. Thus, the WCJ found that Claimant was fully recovered from the April 17, 2007, cervical spine sprain/strain, that Claimant's March 3, 2006, injury did not once again adversely affect his earning

power¹ and that Claimant did not suffer a brachial plexus injury. The WCJ granted Employer's petition to terminate but denied Claimant's reinstatement and review petitions. Claimant filed an appeal with the WCAB, which affirmed. Claimant now petitions this court for review.²

Claimant argues that the WCJ erred "in questioning how Claimant's injury occurred in the absence of a specific pleading by [Employer] in its Petition to Terminate." (Claimant's brief at 6.) However, questions regarding the mechanism of Claimant's injury arose from inconsistent evidence on the matter. Employer could not have known at the pleading stage that there would be inconsistent evidence at the hearings regarding the mechanism of Claimant's injury. Moreover, as the factfinder, the WCJ was required to resolve conflicts in the evidence presented in support of and in opposition to the petitions. *City of Philadelphia v. Workers' Compensation Appeal Board (Brown)*, 830 A.2d 649 (Pa. Cmwlth. 2003). Therefore, we reject Claimant's argument.

Claimant next argues that the WCJ erred "by speculating as to the cause of [Claimant's] acknowledged right extremity problems in the absence of supportive

¹ A claimant must prove two things in order to show that the reasons for a suspension no longer exist: (1) through no fault of his own, his earning power is once again adversely affected by his disability; and (2) the disability which gave rise to his original claim, in fact, continues. *Pieper v. Ametek-Thermox Instruments Division*, 526 Pa. 25, 584 A.2d 301 (1990).

² Our scope of review is limited to determining whether constitutional rights were violated, whether the adjudication is in accordance with the law and whether the necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704.

medical defense expert [testimony].” (Claimant’s brief at 6.) In making this argument, Claimant refers to *dicta* in the WCJ’s decision suggesting that Claimant might have injuries to his right shoulder and fingers from Claimant’s work as a barber. The WCJ stated that: (1) while Claimant “might have a medical problem,” (WCJ’s Findings of Fact, No. 20), it is unrelated to the work injuries; and (2) no medical witness testified regarding a possible causal connection between Claimant’s right shoulder and finger problems and his thirty years of work as a barber, (*id.*). However, the WCJ’s first statement is not a finding that Claimant actually has a medical problem, and the second statement is simply one of fact, i.e., there was no medical testimony about possible medical problems arising from Claimant’s work as a barber. Thus, we reject Claimant’s argument.

Finally, Claimant argues that the WCJ did not render a reasoned decision “in view of his failure to address the atrophy in Claimant’s right upper extremity.” (Claimant’s brief at 6.) Claimant maintains that the WCJ was required to give a reason for accepting Dr. Berger’s opinion that there was no atrophy in Claimant’s right upper extremity and for rejecting the testimony of other physicians who found atrophy there.³ However, the WCJ did give reasons for his credibility determinations with respect to Claimant’s right shoulder.

³ Claimant also suggests that the WCJ’s finding of no atrophy is inconsistent with the WCJ’s speculation that Claimant might have developed a right shoulder problem as a result of his thirty years of work as a barber. However, we reiterate that the WCJ did not find that Claimant’s work as a barber actually caused a right shoulder problem. The WCJ found that Claimant had no atrophy in his right shoulder.

The WCJ accepted the testimony of Dr. Berger because of Claimant’s “inconsistent presentation to him,” i.e., although Claimant claimed that he could not touch the back of his head with his right hand, Dr. Berger observed Claimant performing motions “inconsistent with that complaint.” (WCJ’s Findings of Fact, Nos. 9, 20.) The WCJ did not accept the testimony of Dr. Close because “Dr. Close said that he did not treat Claimant’s right shoulder,” and because Dr. Close “had no opinions concerning Claimant’s 2006 right shoulder injury.” (WCJ’s Findings of Fact, Nos. 10, 19.) The WCJ explained that he rejected Dr. Venier’s testimony because his “opinion of aggravation of the 2006 right shoulder injury was almost an afterthought and was based upon an incorrect understanding of the mechanism of the 2007 injury.” (WCJ’s Findings of Fact, No. 19.) Thus, we conclude that the WCJ rendered a reasoned decision.

Accordingly, we affirm.

ROCHELLE S. FRIEDMAN, Senior Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Anthony Lascala,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 2494 C.D. 2009
	:	
Workers' Compensation Appeal Board	:	
(Albright College),	:	
Respondent	:	

ORDER

AND NOW, this 7th day of July, 2010, the order of the Workers' Compensation Appeal Board, dated November 19, 2009, is hereby affirmed.

ROCHELLE S. FRIEDMAN, Senior Judge