IN THE COMMONWEALTH COURT OF PENNSYLVANIA

City of Philadelphia, Petitioner	:	
v.	:	No. 2552 C.D. 2009
	:	Submitted: April 16, 2010
Workers' Compensation Appeal Board (Shaak), Respondent	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE LEAVITT FILED: July 19, 2010

The City of Philadelphia (Employer) petitions for review of an adjudication of the Workers' Compensation Appeal Board (Board) that granted the claim petition of Wayne Shaak (Claimant). In doing so, the Board affirmed the decision of a Workers' Compensation Judge (WCJ) that Claimant had sustained a work-related binaural hearing loss. Employer asserts that the testimony of Claimant's medical expert was equivocal and, therefore, not competent. Concluding that the record does not support Employer's contention, we affirm.

On June 10, 2006, Claimant retired, having worked as a City firefighter for 33 years. On September 14, 2007, he filed a claim petition, alleging that he had sustained binaural hearing loss as a result of many years of exposure to hazardous noise at work. Employer filed an answer denying liability, and a hearing was conducted by a WCJ.

At the hearing, Claimant testified that his work as a firefighter in Philadelphia had exposed him to loud noise on a daily basis. He explained that the daily 90-minute equipment check exposed him to the loud noise of engines and generators. Responding to an emergency call involved the ringing of loud bells at the fire station, followed by the loud sirens of the truck. Fighting fires exposed Claimant to exploding windows, exploding tires, saws, radios, smoke detectors and air horns. In the 1990's, Employer provided him ear plugs, but Claimant elected not to wear them, explaining that they impeded his ability to hear well enough to perform his job. In retirement, Claimant is no longer exposed to loud noises. Claimant testified that he never served in the military; does not ride motorcycles; and does not shoot guns. There is no family history of hearing loss.

Claimant explained that it was his wife who first noticed a problem with his hearing because he was setting the volume on the television so high that he could not hear her call him from another room. In 2007, when he received notice from his union that hearing testing would be offered at the union hall, he decided to attend. There, he was tested by Ronda Schuman, a licensed audiologist, on June 6, 2007. Because Claimant's test revealed a 19.1 percent hearing impairment, Schuman referred Claimant to Jeffrey Cooper, M.D., an otolaryngologist.

Dr. Cooper testified about the June 21, 2007, audiological examination he performed on Claimant. It showed Claimant to suffer a binaural hearing impairment of 23.1 percent, which Dr. Cooper found to be sensorineural, a type of hearing loss caused by exposure of the inner ear to noise. Further, Dr. Cooper opined that Claimant's sensorineural hearing loss was directly related to his employment as a firefighter. He based his determination on the examination he

conducted, the history provided by Claimant, and a review of the test results obtained by Schuman. He stated that Claimant's history of noise exposure was consistent with the histories he had taken from other Philadelphia firefighters.

In response, Employer presented the deposition testimony of Allen Miller, M.D,[1] who conducted an independent medical examination (IME) of Claimant on April 10, 2008. Claimant provided him with a history and reported wearing hearing aids for the preceding sixteen months, which Claimant described as very helpful. Dr. Miller found a significant bilateral hearing loss in Claimant, but he concluded that the loss was a type of conductive hearing loss, which is not caused by noise exposure. Dr. Miller opined that Claimant's hearing loss was due to otosclerosis, a process by which new bone develops in the middle ear and impedes the transmission of sound into the inner ear. Dr. Miller testified that otosclerosis is caused by a genetic abnormality, and it can be corrected through surgery.

The WCJ found Dr. Cooper's opinion to be credible and consistent with Claimant's uncontradicted testimony regarding his exposure to noise. Schuman's testimony was found credible to the extent it was consistent with Dr. Cooper's. The WCJ rejected Dr. Miller's testimony as inconsistent with the weight of the evidence. As a result, the WCJ held that Claimant proved he sustained a compensable, permanent binaural hearing loss of 23.1 percent and awarded Claimant 60.06 weeks of compensation benefits.

---

[1] Employer also presented the deposition testimony of John Barry and Colin Brigham, who conducted noise exposure studies at Philadelphia fire departments. The WCJ noted that the studies did not provide a basis for determining Claimant's level of exposure and found them credible only where consistent with Claimant's testimony. Employer does not refer to these studies in its appeal to this Court.

Employer appealed to the Board. Employer argued that Claimant had not met his burden of proving that his hearing loss was work-related and that the WCJ erred in disregarding the testimony of Employer's medical witness. The Board rejected Employer's arguments and affirmed the decision of the WCJ. Employer now petitions for this Court's review.

On appeal,[2] Employer raises two issues for our review. Employer asserts that the Board erred in finding Claimant met his burden of proof because Dr. Cooper's opinion was equivocal. Employer also claims that Claimant did not establish sufficient evidence of hearing loss.[3]

The requirements for establishing a claim for benefits for work-related hearing loss are set forth in Section 306(c)(8) of the Workers' Compensation Act (Act), Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. §513. The Act requires the claim to be "filed within three years after the date of last exposure to hazardous occupational noise in the employ of the employer against whom benefits are sought." Section 306(c)(8)(viii) of the Act, 77 P.S. §513(8)(viii). Further, the hearing loss must be established by an audiogram which "conform[s] to OSHA Occupational Noise Exposure Standards." Section 306(c)(8)(iv) of the Act, 77 P.S. §513(8)(iv). The claimant must prove that he suffers from a permanent hearing loss of 10 percent or greater; that the loss is established by medical evidence to be work-related; and that the loss is due to exposure to occupational noise. *Hayduk v.*

---

[2] Our scope of review is limited to determining whether there has been a violation of constitutional rights, an error of law or whether necessary findings of fact are supported by substantial evidence of record. *Tri-Union Express v. Workers' Compensation Appeal Board (Hickle)*, 703 A.2d 558, 561 (Pa. Cmwlth. 1997).

[3] Employer further argues that if this Court finds Dr. Cooper's opinion to be equivocal or Claimant's evidence insufficient, it follows that we should conclude that the Board capriciously disregarded the competent testimony of Employer's medical expert, Dr. Miller.

Workers' Compensation Appeal Board (Bemis Co., Inc.), 906 A.2d 622, 631 (Pa. Cmwlth. 2006).

For a claimant's medical evidence to be competent, it cannot be equivocal. As the Supreme Court has explained:

> Where medical testimony is necessary to establish a causal connection, the medical witness must testify, not that the injury or condition might have or possibly came from the assigned cause, but that *in his professional opinion the result in question did come from the assigned cause*…. Medical evidence which is less than positive or which is based upon possibilities may not constitute legally competent evidence for the purpose of establishing the causal relationship.

Lewis v. Workmen's Compensation Appeal Board (Pittsburgh Board of Education), 508 Pa. 360, 365-366, 498 A.2d 800, 802 (1985) (emphasis added) (citations omitted). In determining whether medical testimony is equivocal, the entire testimony of the medical witness is considered. *Id.* at 366, 498 A.2d at 803.

Employer argues that Dr. Cooper's medical testimony was equivocal. Dr. Cooper's report found that Claimant sustained a "bilateral, *primarily sensorineural hearing loss* of mild to moderate degree from 250 Hz through 8000 Hz." Reproduced Record at 41a (R.R. ___). The report then concluded that Claimant suffered a binaural hearing impairment of 23.1 percent and that "[a] marginal conductive component was also noted for both ears at some of the lower test frequencies." *Id*. In his deposition, Dr. Cooper testified that Claimant's hearing loss involved "[e]ssentially no conductive components." R.R. 22a. On cross-examination about the marginal conductive component noted in his report, Dr. Cooper responded, "I would say that this shows the same thing, very minimal conductive component at the very least." R.R. 28a. Employer claims that Dr.

Cooper's statements that Claimant sustained a "primarily sensorineural hearing loss" and a "marginal conductive component" make his conclusion equivocal.

In *USX Corp. v. Workers' Compensation Appeal Board (Marshall)*, 769 A.2d 1229, 1232 (Pa. Cmwlth. 2001), a medical expert found that the claimant had suffered a "moderate-to-severe high frequency sensorineural hearing loss with a small conductive component at 500 and 4000 Hz" and awarded benefits. *Id.* at 1232. The employer argued that the medical expert was incompetent because he had failed to subtract the conductive component from the sensorineural component. This Court rejected the employer's argument because it presumed that the medical expert's determination could be quantified by a sensorineural component and by a conductive component. However, the employer had not offered any evidence to support this claim.

The facts in the present case are similar. As in *USX*, Employer assumes that a portion of Claimant's hearing loss can be attributable to a conductive component, but it did not offer any evidence to support that claim. Further, Claimant was not required to apportion his hearing loss between aging and noise exposure; as the Supreme Court has held:

> Because there is no way to distinguish, scientifically or mathematically, the amount of hearing loss caused by acoustic trauma from that caused by the aging process … [the Act] does not permit a deduction from a claimant's total binaural hearing impairment for that portion of the impairment caused by [the aging process].

LTV Steel Company, Inc. v. Workers' Compensation Appeal Board (Mozena), 562 Pa. 205, 226, 754 A.2d 666, 677 (2000) (footnote omitted).

First, we reject Employer's assertion that Dr. Cooper was equivocal because he conceded that a "minimal" amount of Claimant's hearing loss was not

caused by noise exposure. Considering all his testimony, Dr. Cooper's opinion about the cause of Claimant's hearing loss is clear. Second, we reject Employer's presumption, which lacks evidentiary support, that the "minimal" part of Claimant's hearing loss that was not attributed to noise could be quantified. Accordingly, we reject Employer's argument that Dr. Cooper's testimony was equivocal.

We turn, next, to Employer's argument that Claimant failed to present sufficient evidence in support of his claim, as required by our holding in *Maguire v. Workers' Compensation Appeal Board (Chamberlain Manufacturing Co., Inc.)*, 821 A.2d 178 (Pa. Cmwlth. 2003). Employer argues that *Maguire* required Claimant to establish how his work-related hearing loss could develop almost a year after he retired. Claimant responds that Employer misapprehends *Maguire*.

In *Maguire*, the claimant had worked for thirty-four years as an artillery shell quality-control inspector before retiring on October 30, 1998. Prior to his retirement, his hearing had been tested on several occasions by his employer. The last examination occurred in July 1998, and showed a binaural hearing loss of 4 percent. The claimant filed a claim petition alleging a work-related hearing loss. At the hearing before the WCJ, he presented expert medical testimony that his hearing loss was 15.625 percent. The employer presented expert medical testimony that the claimant's hearing loss was not work-related and that hearing loss due to noise exposure does not increase over time. Thus, if the claimant's hearing loss was due to noise exposure, it should not have continued to worsen following his retirement. The WCJ rejected the claimant's theory that his hearing loss continued to increase following his retirement and credited the testimony of the employer's medical expert. On appeal, this Court affirmed, concluding that the

WCJ's findings were supported by substantial evidence. In doing so, we explained that "we need not decide whether the Act requires, in every case, that a claimant show a hearing loss of 10% on or before the claimant's last day of work." *Id.* at 181.

Maguire is distinguishable because it involved a claimant whose pre-retirement hearing examination showed a hearing loss of 4 percent. An examination six months after retirement showed a hearing loss of 15.625 percent. Because expert medical testimony established that hearing loss caused by noise exposure would not have increased following claimant's retirement, the claimant had to explain how the dramatic increase in his hearing loss from July 1998 to April 1999 could be work-related. He could not do so.

Here, Claimant never alleged that his hearing loss increased following retirement. Instead, Claimant testified that he did not realize that he had a hearing problem and underwent testing only after repeated admonishments by his wife. Dr. Cooper testified that Claimant's hearing loss of 23.1 percent was directly related to his exposure to noise at work over the course of his 33 years of employment. The WCJ credited this testimony because it was "consistent with Claimant's uncontradicted testimony regarding his noise exposure over the years of his employment with [Employer]." WCJ Decision, March 12, 2009, at 5; R.R. 65a. Employer's allegation of error is nothing more then a challenge to the WCJ's credibility determination, which falls within the exclusive province of the WCJ. *See, e.g., Universal Cyclops Steel Corp. v. Workmen's Compensation Appeal*

Board, 305 A.2d 757, 761 (Pa. Cmwlth. 1973). Therefore, we reject Employer's second allegation of error.[4]

Accordingly, the order of the Board is affirmed.

MARY HANNAH LEAVITT, Judge

[4] Because we reject Employer's claims that Dr. Cooper's testimony was equivocal and Claimant's evidence was insufficient, we need not address Employer's claim that the Board capriciously disregarded the testimony of Employer's medical expert.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

City of Philadelphia, Petitioner	:	
v.	:	No. 2552 C.D. 2009
Workers' Compensation Appeal Board (Shaak), Respondent	:	

O R D E R

AND NOW, this 19th day of July, 2010, the order of the Workers' Compensation Appeal Board dated December 1, 2009, in the above-captioned matter is hereby AFFIRMED.

_____

MARY HANNAH LEAVITT, Judge