

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Marlene Pucilowski,	:	
Petitioner	:	
	:	
v.	:	No. 2565 C.D. 2009
	:	Submitted: April 23, 2010
Workers' Compensation Appeal	:	
Board (Wal-Mart Stores, Inc.),	:	
Respondent	:	

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

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE SIMPSON**

FILED: May 26, 2010

In this workers' compensation appeal, Marlene Pucilowski (Claimant) asks whether total disability related in part to depression from chronic pain may be modified to partial disability based on an impairment rating evaluation (IRE), where the controlling American Medical Association Guides to the Evaluation of Permanent Impairment (AMA Guides) does not contain a discrete method to rate depression. She asks that the order of the Workers' Compensation Appeal Board (Board) affirming the modification request by Wal-Mart Stores, Inc. (Employer) be reversed. Upon review, we affirm.

Claimant was 64 years old when she injured her low back while working for Employer as a pharmacy associate in 2001. Shortly thereafter, a low back injury was accepted by Employer. However, in 2006 Claimant sought to expand the description of her injury. Claimant and Employer stipulated that the

injury description should be expanded to include depression as a result of the chronic pain from the work injury, and a workers' compensation judge (WCJ) accepted the stipulation in May, 2007.

Thereafter, Employer asked that the 70 year-old Claimant undergo an IME. In October, 2007, the case was assigned to Dr. Kenneth W. Gentilezza, a physician board-certified in physical medicine and rehabilitation who is also certified in Pennsylvania as an impairment rating evaluator (IRE Specialist). After reviewing medical records and examining Claimant, the IRE Specialist consulted the Fifth Edition of the AMA Guides. He calculated a 27% whole person impairment rating related to Claimant's low back condition. To this rating he added a 3% whole person impairment rating for Claimant's depression secondary to her chronic pain. Based on the resulting 30% whole person impairment rating, Employer filed a modification petition pursuant to Section 306 (a.2) of the Pennsylvania Workers' Compensation Act (Act).¹

After hearings at which Claimant testified and the deposition testimony of IRE Specialist was received, a WCJ accepted the testimony of the IRE Specialist and granted the modification petition. As a result, Claimant's benefits were not reduced, but her disability was reclassified from total disability to partial disability, with a 500 week benefit maximum, as of the date of IRE Specialist's evaluation.

¹ Act of June 2, 1915, P.L. 736, as amended, added by Section 4 of the Act of June 24, 1996, P.L. 350, 77 P.S. §511.2.

Claimant appealed to the Board, which affirmed. She now appeals to this Court.²

Claimant asserts two related errors. First, contending that the Fifth Edition of the AMA Guides does not allow for the assignment of a percentage of impairment to depression, Claimant contends that an injured worker with an accepted injury of depression cannot be given an impairment rating under the Act as a matter of law. Second, Claimant challenges the reasoning of IRE Specialist that an impairment rating for depression can be assigned under the chronic pain provision of the AMA Guides. According to Claimant, such an approach fails to rate all compensable injuries. Claimant contends that she is entitled to separate impairment ratings for depression and for chronic pain. Because all compensable injuries were not considered in the impairment rating, the modification order is not supported by substantial evidence.

Employer counters, first, that there is no authority to support Claimant's argument that psychological injuries, such as depression, are excluded from IREs. The Act, by its plain language, does not exclude any injuries, and this Court should not judicially amend the Act to provide for such an exclusion. Second, Employer argues that IRE Specialist clearly considered all of Claimant's injuries, including depression and chronic pain, in rendering his undisputed

² 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. Minicozzi v. Workers' Comp. Appeal Bd. (Indus. Metal Plating, Inc.), 873 A.2d 25 (Pa. Cmwlth. 2005).

opinion. The WCJ accepted the opinion, which constitutes substantial evidence supporting the modification.

Section 306(a.2)(1) of the Act, 77 P.S. §511.2, provides, with footnote added:

When an employe has received total disability compensation pursuant to clause (a) [Section 306(a), 77 P.S. § 511 (schedule of total disability benefits)] for a period of one hundred four weeks, unless otherwise agreed to, the employe shall be required to submit to a medical examination which shall be requested by the insurer within sixty days upon the expiration of the one hundred four weeks to determine the degree of impairment^[3] due to the compensable injury, if any. The degree of impairment shall be determined based upon an evaluation by a physician who is licensed in this Commonwealth, who is certified by an American Board of Medical Specialties approved board or its osteopathic equivalent and who is active in clinical practice for at least twenty hours per week, chosen by agreement of the parties, or as designated by the department, pursuant to the most recent edition of the American Medical Association 'Guides to the Evaluation of Permanent Impairment.'

We discern no merit in Claimant's first argument. Although IRE Specialist testified that the Fifth Edition of the AMA Guides does not allow for the rating of depression in and of itself numerically, Reproduced Record (R.R.) at 28a, he also stated that the Fifth Edition Guides has a chapter and provision to rate it.

³ The term "impairment" is defined as "an anatomic or functional abnormality or loss that results from the compensable injury and is reasonably presumed to be permanent." Section 306(a.2)(8)(i) of the Act.

Id. There is also a chapter for chronic pain, with an ability to allow extra percentages when there are chronic pain issues. Id. When there is depression related to chronic pain, IRE Specialist always gives the patient those percentage points. Id.

Here, Claimant's depression and chronic pain are interrelated. Also, it is undisputed that IRE Specialist evaluated Claimant's depression secondary to chronic pain and awarded an additional percentage of disability because of it. The challenge to the process of awarding the additional percentage of disability for depression caused by chronic pain under the AMA Guides goes to the credibility of the expert's testimony, not its competence.⁴ In the absence of any legal authority or expert testimony supporting the proposition that injured workers with depression can never be properly evaluated for permanent impairment, we reject Claimant's argument on this point.

We also discern no merit in Claimant's substantial evidence argument. The argument is based on the inaccurate premise that Claimant's depression and chronic pain are separate injuries, and each is entitled to separate numerical

⁴ In a workers' compensation case, credibility determinations and the evaluation of evidentiary weight are within the province of the WCJ as a fact-finder. Clear Channel Broad. v. Workers' Comp. Appeal Bd. (Perry), 938 A.2d 1150 (Pa. Cmwlth. 2007). The WCJ may accept or reject the testimony of any witness, including medical testimony, in whole or in part. Id. Further, the Court must review the evidence in a light most favorable to the party who prevailed before the WCJ. Shop Vac Corp. v. Workers' Comp. Appeal Bd. (Thomas), 929 A.2d 1236 (Pa. Cmwlth. 2007). The appellate role in a workers' compensation case is not to reweigh the evidence or review the credibility of the witness, but to simply determine whether the WCJ's findings have the requisite measure of support in the record as a whole. Bethenergy Mines, Inc. v. Workmen's Comp. Appeal Bd. (Skirpan), 531 Pa. 287, 612 A.2d 434 (1992).

ratings. To the contrary, the parties previously stipulated that “Claimant suffers depression as a result of the chronic pain from the work related injury, and, to that extent, Claimant’s description of injury shall be amended to include depression.” R.R. at 13a, 17a. IRE Specialist evaluated all of Claimant’s injuries, including her depression secondary to chronic pain, and he awarded an additional disability percentage for it. The fact-finder was free to accept or reject the expert opinion offered by IRE Specialist; however, once that opinion was accepted, it constituted substantial evidence supporting the modification order.

For all these reasons, the Board’s order which affirmed the modification of Claimant’s disability from total to partial is affirmed.

ROBERT SIMPSON, Judge

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ORDER

AND NOW, this 26th day of May, 2010, the order of the Workers' Compensation Appeal Board mailed December 2, 2009 in the above-captioned matter is hereby **AFFIRMED**.

ROBERT SIMPSON, Judge