IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Robert Noble,	:	
Petitioner	:	
	:	No. 2595 C.D. 2009
v.	:	
	:	Submitted: April 30, 2010
Workers' Compensation Appeal	:	
Board (City of Philadelphia),	:	
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 McCULLOUGH FILED: July 28, 2010

Robert Noble (Claimant) petitions for review of the December 8, 2009, order of the Workers' Compensation Appeal Board (Board), which affirmed the decision of a workers' compensation judge (WCJ) denying Claimant's claim petition. We affirm.

Claimant began working as a firefighter for the City of Philadelphia (Employer) in 1969. Thereafter, from 1982 to 2004, Claimant served as a fire battalion chief, and his duties changed from actively fighting fires to directing operations as part of command control at the fire scene. (WCJ's Finding of Fact No. 3.) From 1996 to 2004, Claimant simultaneously served as a HAZMAT battalion chief, responding to and directing operations at all HAZMAT incidents in the City. Id. Claimant retired on October 1, 2004. Id.

On February 22, 2005, Claimant was hospitalized with chest pains and eventually underwent double bypass surgery. Id. In the spring of 2006, Claimant began working part-time in the pro shop of a local golf course, where he is still employed. Id. On September 13, 2007, Claimant filed a claim petition against Employer alleging that, as of September 30, 2004, he was disabled by heart disease as a result of his repeated exposure to smoke, fumes, gases, heat, and extreme physical and mental stress in the course of his employment. (R.R. at 3a.) Claimant averred in the petition that his heart disease, along with financial problems, caused him to stop working. (R.R. at 4a.) Employer filed an answer with new matter denying that Claimant suffered from an occupational disease and asserting that Claimant was not forced to retire as a result of any such disease. (R.R. at 5a-8a.)

The case proceeded with hearings before the WCJ. Claimant testified regarding the various positions he held with Employer and the corresponding duties he performed over the years.[1] Claimant indicated that with the exception of the last five to ten years of his employment, air packs were rarely used, were of lesser quality and were not mandatory. (R.R. at 23a-27a.) Claimant testified that, as a lieutenant and captain, he stood behind but within earshot of the firefighters operating a hose, most times without an air mask so that he could be heard. (R.R. at 26a.) Claimant recalled one lengthy fire during which he inhaled carbon monoxide and required oxygen. (R.R. at 28a-29a.)

[1] After five years as a firefighter, Employer promoted Claimant to lieutenant. Claimant was subsequently promoted to captain and, ultimately, battalion chief. (WCJ Finding of Fact No. 3.)

Claimant stated that, as a battalion chief, he would direct the overall operations at a fire scene and would initiate the investigation as to the cause and origin of the fire. (R.R. at 30a-31a.) Claimant indicated that whether he was investigating the fire or directing operations outside, he would not wear an air mask because his duties involved a lot of communication and, hence, he would routinely be exposed to smoke and fumes. (R.R. at 31a.) Claimant recalled a fire during his tenure as a battalion chief when he was actually in a fire tower above the fire without an air mask and the atmosphere was hot and smoky. (R.R. at 32a.) Claimant testified that, as a HAZMAT battalion chief, he was called to ammonia and chlorine leaks and "absolutely" inhaled some fumes. (R.R. at 33a.)

Claimant stated that he voluntarily entered the City's deferred retirement option plan (DROP), a retirement incentive program, in September 2000, to ensure future financial resources for his family.[2] (R.R. at 39a-40a.) Claimant then described the incident in February of 2005 which resulted in his hospitalization and double bypass surgery. According to Claimant, he was walking around a track at a local gym when he felt pressure on his right side. (R.R. at 44a-45a.) As the pressure progressively worsened, Claimant's wife drove him to a nearby firehouse where he was treated by paramedics and taken to a local hospital. (R.R. at 45a.)

[2] The DROP program allowed for a maximum participation period of four years, after which a participant was required to retire. Under this program, a participant's monthly retirement benefit is calculated at the time of entry into the program, and the benefit is placed into an interest bearing account while the participant continues to work for the employer without earning any future service credit. The participant thereafter chooses how to receive the monies in this account at the termination of the specified amount of time. Claimant's maximum participation time ended on September 30, 2004, and Claimant retired the following day.

Claimant admitted that he smoked a pack of cigarettes per day for ten years, from ages eleven to twenty-one, and that he had taken Lipitor, a drug to control high cholesterol, for the past ten years. (R.R. at 52a-53a, 74a.) Claimant also testified as to his family history, which included his father's death from a heart attack at the age of forty-nine and his older brother's quadruple bypass surgery at the age of fifty.[3] (R.R. at 53a-54a.) Additionally, on cross-examination, Claimant acknowledged that he retired after he maximized his participation in the DROP program and not because of any injury. (R.R. at 57a.)

Claimant also presented the deposition testimony of Arthur Meltzer, M.D., who is board certified in internal medicine, cardiovascular disease, and interventional cardiology. (R.R. at 94a.) Dr. Meltzer examined Claimant once on August 17, 2007, at the request of Claimant's counsel. Dr. Meltzer diagnosed Claimant as suffering from coronary artery disease, and he opined that Claimant's occupational exposure as a firefighter was a significant contributing factor to the development and progression of his disease. (R.R. at 111a-12a.) Dr. Meltzer did acknowledge Claimant's elevated cholesterol and his family history of coronary artery disease. (R.R. at 114a.)

Employer presented the deposition testimony of Ruchira Glaser, M.D., who is board certified in internal medicine, cardiology, and interventional cardiology. (R.R. at 149a.) Dr. Glaser examined Claimant on February 12, 2008, and noted a significant family history of premature coronary artery disease. (R.R. at 153a.) Dr. Glaser indicated that a physician's note in Claimant's

[3] Claimant's father worked as a machinist at the Philadelphia Navy Yard and his brother worked as a police officer. (R.R. at 53a-54a.)

medical records stated that Claimant suffered from hypertension, but Claimant did not mention this condition when discussing his medical history. (R.R. at 152a.)

Dr. Glaser diagnosed Claimant as suffering from coronary artery disease, which she opined was the result of several well-established risk factors, including elevated LDL cholesterol, low HDL cholesterol, hypertension, and a family history of the disease. (R.R. at 152a-53a.) Dr. Glaser opined that Claimant's 2005 heart attack was related to the aforementioned factors and was not related to his employment. (R.R. at 155a.) Dr. Glaser further opined that Claimant was not disabled as a result of his heart attack. (R.R. at 156a.)

The WCJ accepted the testimony of Dr. Glaser as credible and resolved any conflicts in the medical testimony in favor of Dr. Glaser. (WCJ's Findings of Fact No. 9.) The WCJ specifically credited Dr. Glaser's testimony that Claimant was not disabled and that his coronary artery disease resulted from non-work-related risk factors. The WCJ rejected Claimant's testimony regarding his duties and exposures, particularly as a battalion chief, as not credible, stating that Claimant attempted to liken this role to a firefighter actively fighting a fire. (WCJ's Findings of Fact No. 7.) The WCJ also noted Claimant's admission that he voluntarily retired as of October 1, 2004, due to an early retirement incentive and not because of a medical condition. Id.

Based upon these credibility determinations, the WCJ determined that Claimant did not suffer from an occupational disease as a result of his employment. (Finding of Fact No. 10.) In doing so, the WCJ specifically found that Employer had rebutted the presumption afforded by section 301(e) of the

Workers' Compensation Act (Act)[4] that Claimant's condition was related to his employment.[5] (Finding of Fact No. 11.) Claimant appealed to the Board, which affirmed the WCJ's decision.

On appeal to this Court,[6] Claimant argues that the Board erred in affirming the WCJ's conclusion that Claimant did not suffer an occupational disease as a result of his employment. Claimant asserts that the WCJ capriciously disregarded his testimony, denied him the applicable statutory presumption, and treated the matter as a traditional injury claim rather than an occupational disease claim. We disagree.

The WCJ's Finding of Fact No. 3 sets forth a lengthy, detailed summary of Claimant's testimony. Contrary to Claimant's assertion, the WCJ did not disregard that testimony but instead exercised his prerogative to reject it as not credible.[7]

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[4] Act of June 2, 1915, P.L. 736, added by the Act of October 17, 1972, P.L. 930, as amended, 77 P.S. §413.

[5] Section 108(o) of the Act, added by the Act of October 17, 1972, P.L. 930, as amended, 77 P.S. §27.1(o), defines "occupational disease" to include diseases of the heart and lungs incurred after four years or more of service in fire fighting as the result of extreme over-exertion in times of stress or exposure to heat, smoke, fumes, or gases. Section 301(e) of the Act provides for a presumption that the occupational disease arose out of and in the course of employment if the claimant was employed at or immediately before the date of disability in any occupation in which the occupational disease is a hazard.

[6] Our scope of review is limited to determining whether findings of fact were supported by substantial evidence, whether an error of law was committed or whether constitutional rights were violated. Meadow Lakes Apartments v. Workers' Compensation Appeal Board (Spencer), 894 A.2d 214 (Pa. Cmwlth. 2006).

[7] As always, the WCJ has exclusive province over questions of credibility and evidentiary weight, and may accept or reject the testimony of any witness, including a medical witness, in

(Footnote continued on next page…)

Furthermore, while the presumption afforded by section 301(e) provides a claimant with a procedural or evidentiary advantage, it is not conclusive and may be rebutted by substantial, competent evidence. Rex v. Workers' Compensation Appeal Board (City of Oil City), 879 A.2d 854 (Pa. Cmwlth. 2005), appeal denied, 587 Pa. 703, 897 A.2d 462 (2006); Dillon v. Workers' Compensation Appeal Board (City of Philadelphia) 853 A.2d 413 (Pa. Cmwlth. 2004), appeal denied, 582 Pa. 703, 871 A.2d 194 (2005).

In Rex, the claimant was a firefighter who filed a claim petition alleging occupational disease after suffering a heart attack. The employer presented expert medical testimony, accepted as credible by the WCJ, that the claimant's heart attack resulted from a non-work-related vasospasm, a rare singular event involving the constriction of blood vessels, rather than coronary artery disease. Based on this testimony, the WCJ found that the claimant did not suffer from an occupational disease. Therefore, the WCJ refused to afford the claimant the presumption under section 301(e) of the Act, treated the case as a traditional injury claim, concluded that the claimant failed to prove causation, and ultimately denied the claimant's claim petition. The Board affirmed, and this Court affirmed the Board's order.

In Dillon, the claimant was a firefighter who filed a claim petition alleging occupational heart disease following two catheterizations and an angioplasty in a one-year period. Similar to the present case, the employer

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whole or in part. Repash v. Workers' Compensation Appeal Board (City of Philadelphia), 961 A.2d 227 (Pa. Cmwlth. 2008).

presented expert medical testimony, accepted as credible by the WCJ, that the claimant's heart disease was not related to his employment, but instead was related to traditional risk factors, such as a strong family history, cholesterol abnormalities, intermittent hypertension, and obesity. The WCJ concluded that the employer had successfully rebutted the presumption provided by section 301(e) and denied the claimant's claim petition. The Board affirmed, and this Court affirmed the Board's order.

As in these cases, the WCJ here accepted the testimony of Dr. Glaser as credible and persuasive that Claimant's coronary artery disease and heart attack resulted from several well-established and non-work-related risk factors, and he further determined this testimony sufficient to rebut the presumption of causation set forth in section 301(e).

Claimant essentially avers that the testimony of Dr. Glaser was not competent because she never opined whether Claimant was disabled from his duties as a battalion chief and she failed to consider his various exposures from 1969 to 1982. We disagree. We begin by noting that Claimant admitted that he voluntarily retired from his employment due to a retirement incentive program and not because of any injury or disease. (R.R. at 57a.) Moreover, Dr. Glaser testified that she reviewed Claimant's medical records and discussed with Claimant his thirty-five year occupational history, including his amount of exposure to smoke. (R.R. at 153a, 160a.)

Claimant also contends that Dr. Glaser mischaracterized his heart disease as an "injury" and erred in basing her opinion on the fact that he was not working when he suffered the heart attack. Although Dr. Glaser found it significant that Claimant was not working at the time of his heart attack, served in

a supervisory capacity for the last twenty-three years of his employment, and over the last several years of active duty, was physically more removed from exposure to fire and toxic fumes, Dr. Glaser also referenced studies concerning the relationship between firefighting and coronary artery disease that noted a stronger link with active-duty firefighters. (R.R. at 153a-56a.) Ultimately, Dr. Glaser opined that Claimant's coronary artery disease and heart attack were not work related and were not disabling. We conclude that Dr. Glaser's testimony is competent and supports the WCJ's findings. Thus, the Board did not err in affirming the WCJ's conclusion that Claimant did not suffer an occupational disease as a result of his employment.

Accordingly, the order of the Board is affirmed.

PATRICIA A. McCULLOUGH, Judge

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v.	:	No. 2595 C.D. 2009
Workers' Compensation Appeal Board (City of Philadelphia), Respondent	: :	

ORDER

AND NOW, this 28th day of July, 2010, the December 8, 2009, order of the Workers' Compensation Appeal Board is hereby affirmed.

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PATRICIA A. McCULLOUGH, Judge