IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Andrew Andrusky, Petitioner	:	
	:	No. 706 C.D. 2010
v.	:	
	:	Submitted: August 27, 2010
Workers' Compensation Appeal Board (Signature Aluminum), Respondent	:	

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McCULLOUGH FILED: January 24, 2011

Andrew Andrusky (Claimant) petitions for review of the March 23, 2010, order of the Workers' Compensation Appeal Board (Board), which affirmed the decision of a workers' compensation judge (WCJ) denying his claim petition. We also affirm.

In August of 2006, Claimant began working for Signature Aluminum (Employer), eight hours per day, as a mechanic. His duties included repairing presses, saws and furnaces used for extruding aluminum. Prior to working for Employer, Claimant was diagnosed with Anitiphospholipid Syndrome (APS), an autoimmune deficiency disorder known to cause clots in the arteries and veins.

In March of 2007, Employer required all employees to work swing shifts of twelve to sixteen hours rather than regular shifts of eight hours. Around the same time, Claimant began to experience difficulty eating and sleeping, and he suffered from complex migraine headaches. On May 3, 2007, Claimant's treating physician,

Todd L. Jones, M.D., wrote Claimant a prescription, which stated that the swing shifts were exacerbating Claimant's migraine headaches and that Claimant's work schedule should be limited to eight hours per day. Claimant provided Employer with the prescription on May 23, 2007, but Employer responded that Claimant must work a minimum of twelve hours per day. Claimant did not return to work after May 23, 2007.

On February 12, 2008, Claimant filed a claim petition alleging that the change in shifts aggravated his preexisting APS. Employer filed a timely answer denying that Claimant's disability was due to a work injury, and the matter was assigned to a WCJ.

In support of his petition, Claimant testified that he began to experience migraine headaches when he was required to work swing shifts rather than regular shifts of eight hours. Claimant stated that his treating physician, Dr. Jones, wrote a prescription on April 20, 2007, stating that Claimant should not work swing shifts because the shifts were exacerbating Claimant's migraine headaches. Claimant testified that he did not provide this prescription to Employer because he was afraid he would lose his job. However, Claimant testified that on May 3, 2007, Dr. Jones wrote a second prescription limiting him to daylight shifts of eight hours, which Claimant provided to Employer's maintenance and personnel supervisors on May 23, 2007. On cross-examination, Claimant testified that he previously experienced migraine headaches while working less than eight hours per day as a truck driver but that his former employer attempted to accommodate Claimant's condition by allowing him to work eight hours and then take a ten hour break. Claimant stated that he has not experienced a migraine headache since he left his position with Employer, and that he is willing to return to work but is unable to work more than eight hours per day.

Claimant also submitted into evidence two letters from Dr. Jones. In the first letter, dated April 18, 2008, Dr. Jones states that Claimant suffers from APS and migraine headaches and that a set schedule would help to minimize the occurrence of Claimant's migraines. (R.R. at 115a.) In a subsequent letter of August 20, 2008, Dr. Jones states as follows:

> I am writing on behalf of my patient, [Claimant], with regard to his long standing [APS]. The patient has been treated for years for this and has suffered several strokes in the past. It is my opinion with a reasonable amount of degree of medical certainty, [Claimant's] underlying blood disorder and [APS] was aggravated during the course of employment when he was working more than eight hours in an environment containing heat, dust, and smoke as of May 3, 2007. This did exacerbate his significant migraines at that time. Furthermore, it is my medical opinion that he should not work more than eight hours per day given the fact that this does affect his migraines.

(R.R. at 124a.)

Claimant also offered the deposition testimony of Dr. Jones, a board certified internist. Dr. Jones testified that a change in schedule is a common trigger for migraines. Dr. Jones stated that he was not aware that there was an association between APS and migraine headaches until he reviewed the notes of Dr. Mathews, Claimant's former physician, which indicated that patients with APS tend to experience migraine headaches. Dr. Jones also reviewed his August 20, 2008, letter, and he revised his opinion stating that the work environment and change in Claimant's schedule might affect Claimant's migraine headaches, but not necessarily the APS.[1]

[1] Specifically, Dr. Jones testified that "[i]t would be more that the migraines would be more aggravated by his work schedule and his environment including the heat, dust and smoke at that **(Footnote continued on next page…)**

In opposition to the claim petition, Employer offered the medical reports and deposition testimony of John B. Talbott, M.D., a board certified neurologist. Dr. Talbott conducted a records review and issued a report on August 18, 2008, which states in part:

> It is my opinion that [Claimant's APS], which requires Coumadin therapy, is not a consequence of his employment. This is a medical condition. Although I do agree that a patient with such a medical condition would be at significantly increased risk of developing complex migraine. The migraine itself would not be caused by his employment, but rather would be a consequence of his medical condition. Patients with these conditions generally do better when they work a regular schedule so that their sleep cycle is not disturbed. Excessive fatigue can trigger migraines in a susceptible individual. However, these migraines are not caused by his employment.

(R.R. at 173a.) Dr. Talbott testified that APS is an autoimmune deficiency that causes the blood to clot prematurely. He stated that persons who have APS have a significantly increased risk of complex migraines. Dr. Talbott opined that any prolonged activity can increase the risk of a migraine headache but that a person's work environment does not have any effect on APS.

The WCJ accepted Claimant's testimony regarding his symptoms and the events that lead to him stopping work as credible. (WCJ's Finding of Fact No. 7.) However, the WCJ found that Dr. Jones recanted his written opinion that the change in Claimant's schedule aggravated Claimant's APS when Dr. Jones testified that the work environment and change in schedule would affect Claimant's migraine headaches, but not the APS. (WCJ's Finding of Fact No. 5.) The WCJ accepted Dr.

(continued…)

time." (R.R. at 84a.) Dr. Jones reiterated, "I don't think it is stated very good with the [APS] because those things may not affect the [APS], but it does affect his migraines." (R.R. at 85a.)

Talbott's testimony that, although Claimant's work schedule may have triggered Claimant's migraine headaches, it did not aggravate Claimant's APS. (WCJ's Finding of Fact No. 7.) Based on these findings, the WCJ concluded that Claimant failed to sustain his burden to prove that he was injured in the course and scope of his employment and denied the claim petition. (R.R. at 180a-84a.) Claimant appealed to the Board, which affirmed the WCJ's decision.

On appeal to our Court,[2] Claimant contends that the WCJ's findings are not supported by substantial evidence.[3] Claimant avers that Dr. Jones did not recant his written opinion that Claimant's preexisting APS was aggravated by the change in schedule but instead merely clarified that the APS was not aggravated by the heat,

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[2] Our scope of review is limited to determining whether an error of law was committed, whether constitutional rights were violated or whether necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704.

[3] As this Court has observed:

> Substantial evidence is such relevant evidence as a reasonable person might accept as adequate to support a conclusion. In performing a substantial evidence analysis, this Court must view the evidence in a light most favorable to the party who prevailed before the factfinder. Moreover, we are to draw all reasonable inferences which are deducible from the evidence in support of the factfinder's decision in favor of that prevailing party. Furthermore, in a substantial evidence analysis where both parties present evidence, it does not matter that there is evidence in the record which supports a factual finding contrary to that made by the WCJ, rather, the pertinent inquiry is whether there is any evidence which supports the WCJ's factual finding. It is solely for the WCJ, as the factfinder, to assess credibility and to resolve conflicts in the evidence. In addition, it is solely for the WCJ, as the factfinder, to determine what weight to give to any evidence. As such, the WCJ may reject the testimony of any witness in whole or in part, even if that testimony is uncontradicted.

Locher v. Workers' Compensation Appeal Board (City of Johnstown), 782 A.2d 35, 38 (Pa. Cmwlth. 2001) (internal citations omitted).

dust, and smoke at the workplace. Claimant also asserts that the medical testimony, taken as a whole, supports a finding that the change in Claimant's schedule aggravated his APS. We disagree.

A claimant seeking workers' compensation benefits for the aggravation of a preexisting condition has the burden to demonstrate that the injury arose in the course of employment and is related to that employment. Pawlosky v. Workmen's Compensation Appeal Board, 514 Pa. 450, 525 A.2d 1204 (1987). Pursuant to section 301(c) of the Workers' Compensation Act,[4] 77 P.S. §411(1), a work-related aggravation of a preexisting condition constitutes an injury. Where, as here, the cause of an injury is not obvious, a claimant must prove the causal relationship between his injury and his employment with unequivocal medical testimony. Vazquez v. Workmen's Compensation Appeal Board (Masonite Corporation), 687 A.2d 66 (Pa. Cmwlth. 1996). Moreover, a claimant is not entitled to compensation when a work-related aggravation of a preexisting condition subsides, even if returning to the work environment would again aggravate that condition. Bethlehem Steel Corporation v. Workmen's Compensation Appeal Board (Baxter), 550 Pa. 658, 708 A.2d 801 (1998).

Here, the WCJ found that Claimant did not sustain his burden to prove that he was injured in the course and scope of his employment because both medical experts testified that the change in Claimant's schedule may have triggered his migraine headaches but had no effect on his underlying medical condition.[5] Moreover, Claimant testified that his headaches subsided after he stopped working

[4] Act of June 2, 1915, P.L. 736, as amended, 77 P.S. §§1-1041.4; 2501-2708.

[5] To the extent the testimony establishes that persons with APS are more likely to suffer migraine headaches, neither medical expert testified that the worsening of Claimant's migraine headaches reflected a corresponding worsening of his APS.

and that he has not experienced a migraine headache in over one year. (R.R. at 44a.) Thus, any aggravation he may have experienced has since resolved and Claimant, therefore, is ineligible to receive benefits. Bethlehem Steel.

Accordingly, we affirm.

PATRICIA A. McCULLOUGH, Judge

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ORDER

AND NOW, this 24th day of January, 2011, the order of the Workers' Compensation Appeal Board dated March 23, 2010, is hereby affirmed.

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PATRICIA A. McCULLOUGH, Judge

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HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

DISSENTING OPINION
BY JUDGE PELLEGRINI FILED: January 24, 2011

Because the testimony of John B. Talbott, M.D. (Dr. Talbott) indicates that Andrew Andrusky (Claimant) suffered from migraines that were aggravated by the change in his shift hours, and the Board found Dr. Talbott credible, I respectfully dissent from the majority decision affirming the Board and denying him benefits.

In this case, Claimant suffered from migraines due to Anitiphospholipid Syndrome (APS), which Claimant informed Employer of before he was hired. He claimed his condition was aggravated by a change from a steady shift to swing shifts. His treating physician, Todd L. Jones, M.D. (Dr. Jones) wrote him a prescription stating that the swing shifts were exacerbating his migraine headaches and that his

work schedule should be limited to eight hours per day. When Claimant applied for workers' compensation benefits, Dr. Jones overall testified to the same[6] but further stated that Claimant's migraines subsided after he stopped working. Employer's physician, Dr. Talbott, issued an expert medical report stating:

> It is my opinion that [Claimant's APS], which requires Coumadin therapy, is not a consequence of his employment. This is a medical condition. Although I do agree that a patient with such a medical condition would be at significantly increased risk of developing complex migraine. The migraine itself would not be caused by his employment, but rather would be a consequence of his medical condition. *Patients with these conditions generally do better when they work a regular schedule so that their sleep cycle is not disturbed. Excessive fatigue can trigger migraines in a susceptible individual.*

(Reproduced Record at 173a.) (Emphasis added.) Regarding the fact that working irregular hours could cause Claimant to have migraine headaches, Dr. Talbott testified: "And the only point I'm making is that if he is required to work long shifts at irregular hours that would predispose him to becoming symptomatic." (Reproduced Record at 159a.) Dr. Talbott did not discuss whether Claimant's migraines subsided after he stopped working. The Workers' Compensation Judge denied benefits finding Dr. Talbott most credible, and the Board affirmed.

On appeal, the majority affirms the Board's decision denying Claimant benefits as he failed to prove he was injured in the course and scope of his

[6] Dr. Jones did make one comment that the change in Claimant's schedule "may have" affected his migraines. (Reproduced Record at 70a.)

employment "because both medical experts testified that the change in Claimant's schedule may have triggered his migraine headaches but had no effect on his underlying medical condition. Moreover, Claimant testified that his headaches subsided after he stopped working and that he has not experienced a migraine headache in over one year. Thus, any aggravation he may have experienced has since resolved and Claimant, therefore, is ineligible to receive benefits." (Slip at 6-7.) I dissent because Dr. Talbott stated that Claimant's migraines were affected by his schedule and because Claimant proved that he remained injured throughout his claim petition. It is irrelevant that Claimant's migraines subsided after he stopped working because Dr. Talbott never addressed that in his testimony.

In a claim petition for an aggravation of a pre-existing condition, the claimant has the burden of proving that his injury arose in the course of employment and was related to that employment. *Pawlosky v. Workmen's Compensation Appeal Board*, 514 Pa. 450, 525 A.2d 1204 (1987). A pre-existing condition constitutes an injury under Section 301(c) of the Workers' Compensation Act, 77 P.S. §411(1).[7] When the cause of the injury is not obvious, unequivocal medical testimony must prove the causal relationship between the injury and the employment. *Vazque v. Workmen's Compensation Appeal Board (Masonite Corporation)*, 687 A.2d 66 (Pa. Cmwlth. 1996).

Here, the Board found Dr. Talbott most credible, and Dr. Talbott opined that if Claimant was required to work swing shifts, he would be predisposed to becoming symptomatic and having migraines, which is what happened.

[7] Act of June 2, 1915, P.L. 736, *as amended.*

Consequently, Claimant met his burden of proof, and the Board erred in denying him benefits.

Accordingly, I would reverse the Board.

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DAN PELLEGRINI, JUDGE