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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 01/27/2011
RUTH WILLINGHAM,
ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

RAMON F. OZUNA,) 1 CA-IC 10-0021
)
Petitioner,) DEPARTMENT B
)
v.)
) **MEMORANDUM DECISION**
) (Not for Publication -
THE INDUSTRIAL COMMISSION OF) Rule 28, Arizona Rules
ARIZONA,) of Civil Appellate
) Procedure)
Respondent,)
)
LAWRENCE FURNITURE,)
)
Respondent Employer,)
)
SENTRY INSURANCE,)
)
Respondent Carrier.)

Special Action - Industrial Commission

ICA Claim No. 20001-360323

Carrier Claim No. 51C133216

Hon. Robert F. Retzer, Administrative Law Judge

AWARD AFFIRMED

Ramon F. Ozuna
In Propria Persona

San Luis

Andrew F. Wade, Acting Chief Counsel
The Industrial Commission of Arizona
Attorney for Respondent

Phoenix

K E S S L E R, Presiding Judge

¶1 Claimant Ramon Ozuna ("Ozuna") seeks special action review of an Industrial Commission of Arizona ("ICA") award and decision upon review affirming the denial of his second petition to reopen his ICA claim. Ozuna essentially contends that examinations by multiple doctors in response to his ICA claim were insufficient and the doctors' diagnoses were wrong; the doctors were biased in favor of the insurance company; an interpreter rushed him through an examination, causing him to present an unclear case to the doctors; and the attorney that represented him in his first petition to reopen was ineffective.

FACTUAL AND PROCEDURAL HISTORY¹

¶2 In May 2000, Ozuna injured his back after he fell from a forklift while working at a Lawrence Furniture warehouse. The same day, he received x-rays of his spine at a local hospital. The following day, Ozuna's primary care physician diagnosed

¹ Ozuna does not cite the record to support his description of the facts, nor legal authority to support his arguments, in violation of Rule 13 of the Arizona Rules of Civil Appellate Procedure. While the facts are essentially undisputed in this case, we rely upon the facts in the record in reaching our decision. Regarding the failure to cite legal authority, although we have the discretion to treat Ozuna's failure as a waiver of his argument, we decline to do so. See *Watahomigie v. Ariz. Bd. of Water Quality Appeals*, 181 Ariz. 20, 26, 887 P.2d 550, 556 (App. 1994).

Ozuna as having a cervical and lumbosacral strain, but no fracture. Ozuna saw his primary care physician and a chiropractor multiple times through July 2000.

¶3 Ozuna opened a claim against Lawrence Furniture and its insurance carrier ("Respondents"). Respondents closed Ozuna's claim in July 2000, having decided that Ozuna's injury "resulted in no permanent disability." After that point, there is a gap in the medical information Ozuna has provided to the ICA, but the information in the record indicates that Ozuna did not see another doctor regarding this injury until about three years later in 2003. Also, until 2003, Ozuna continued to work for other companies in positions that involved physical labor; he was a mechanic, maintenance worker, tractor driver, and machine operator.

I. Ozuna's first petition to reopen.

¶4 In May 2003, Ozuna went to a neurologist, Dr. Zonis, complaining of a "spontaneous onset of pain, numbness and tingling in both arms, more on the right than the left," and also abnormal motor capabilities in his legs. Dr. Zonis conducted MRIs and other electrodiagnostic tests on Ozuna. He found that Ozuna had bilateral carpal tunnel syndrome, but he had no "abnormalities to account for his upper extremity symptoms." Also, he found Ozuna's reported difficulties with his legs from a young age were compatible with a diagnosis of

mild motor polyneuropathy. Further, the MRI showed degenerative disease of the lumbar spine but no "abnormalities to account for his leg symptoms," and Ozuna had a "right frozen shoulder." Dr. Zonis did not have the chance to evaluate whether any of Ozuna's symptoms related to the 2000 accident because Ozuna did not tell Dr. Zonis about the accident.

¶15 In January 2004, after almost four years since the accident, Ozuna filed his first petition to reopen his claim. Ozuna alleged he had pain in all of his back, his entire right arm, and his entire right leg. Respondents denied Ozuna's petition to reopen, and the ICA granted Ozuna a review of Respondents' denial to reopen the claim.

¶16 Before the hearings were held, Doctors Ginsburg and Patel examined Ozuna. Dr. Patel found that given Ozuna's work history since the accident and prior workups that revealed carpal tunnel syndrome and polyneuropathy, Ozuna's complaints were not directly related to the 2000 accident. Rather, his symptoms "certainly could be because of his age, deconditioning from relative inactivity, and perhaps natural progression of the underlying preexisting changes of the cervical and lumbar spine." On the other hand, Dr. Ginsburg opined that "assuming there has [sic] been no subsequent injuries that are

significant, [he] would still feel that [the 2000 accident] is the causative factor for most of [Ozuna's] symptoms."²

¶17 After considering Dr. Zonis's report and the testimony of Doctors Ginsburg and Patel, the ALJ adopted Dr. Patel's opinion as being "more probably correct and well founded that the MRI scan performed in 2003 showed degenerative changes of the cervical spine, which explain applicant's symptoms and the electrical studies do not support a diagnosis of radiculopathy in the cervical or lumbar spine." The ALJ then denied Ozuna's petition to reopen. Ozuna did not appeal the ALJ's decision to this Court.

II. Ozuna's second petition to reopen.

¶18 In December 2008, almost five years after the denial of his first petition, Ozuna filed a second petition to reopen, alleging worsened pain in the same areas as alleged in the first petition. He also alleged that he could not sleep. Respondents denied his petition, and Ozuna requested that the ICA review Respondents' decision.

¶19 Ozuna offered a report by Dr. Amrani, which found that Ozuna had a "[n]eck and back sprain and spinal stenosis

² The record indicates that during the first appointment, Dr. Ginsburg ordered MRIs of Ozuna's cervical and lumbar spine because Ozuna's symptoms were consistent with a cervical radiculopathy. However, there is no other report in the record, and Dr. Ginsburg's testimony at trial appears to be based on the report that is in the record.

[at] L3-5 and [a] herniated disc [at] C4-5 and C6-7." Dr. Amrani testified that he related "the onset of his symptoms" to the accident. He testified that he had not seen any prior medical records, including any from 2004, and was not able to testify to any change in condition since 2004. Prior to the hearing, the court had advised Ozuna that he must provide Dr. Amrani with his medical records, and if he did not do so, then Dr. Amrani's testimony would not help him in meeting his burden. Ozuna said he understood.

¶10 Respondents offered the report and testimony of Dr. McLean. In his report, Dr. McLean summarized Ozuna's medical history since the accident, including diagnoses of bilateral carpal tunnel syndrome, hyperlipidemia, hypothyroidism, hypertension, diabetes mellitus, coronary artery disease, and obesity. Dr. McLean performed his own examination and found "little in the way of any objective findings" to support Ozuna's complaints. He opined:

[t]hus, more probably than not, [Ozuna's] current symptoms are related to natural ageing process as well as the peripheral neuropathies that he has secondary to his diabetes mellitus. He may also have some symptoms of his carpal tunnel syndrome.

¶11 At the hearing, when asked whether Ozuna was suffering "from any new, additional, or previously undiscovered conditions or disability" relating to the 2000 accident that were different

from symptoms evaluated by a different doctor in 2005, Dr.

McLean answered:

No. Again, what is most interesting in this case is the evaluation by neurologist, Dr. Zonis in his very complete workup. He found nothing in the spine that he attributed to the patient's extremity complaints. In fact, when you review the reports of the cervical and lumbar MRI, there is no evidence of any neural compression. There were some mild degenerative changes.

He did find electrodiagnostic evidence of carpal tunnel syndrome in the upper extremities and mild motor neuropathy in the lower extremities. *None of this would be related to the industrial injury, which was three years prior to that evaluation.* [emphasis added].

Thus, I do not find anything new, additional or previously undiscovered that I would related [sic] to the industrial injury of 05/03/2000.

¶12 The ALJ found that Ozuna "failed to carry his burden of proving beyond a reasonable preponderance of the evidence that he has any new, additional or previously undiscovered condition causally related to his May 3, 2000 industrial injury" and denied Ozuna's second petition to reopen. The ALJ affirmed his decision upon review.

¶13 Ozuna's appeal is timely. This Court has jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(2) (2003), 23-951(A) (1995), and Arizona Rule of Procedure for Special Actions 10.

STANDARD OF REVIEW

¶14 In reviewing findings and awards of the ICA, we defer to the ALJ's factual findings, but review *de novo* questions of law. *Young v. Indus. Comm'n of Ariz.*, 204 Ariz. 267, 270, ¶ 14, 63 P.3d 298, 301 (App. 2003). We consider the evidence in the light most favorable to sustaining the award. *Lovitch v. Indus. Comm'n of Ariz.*, 202 Ariz. 102, 105, ¶ 16, 41 P.3d 640, 643 (App. 2002). We will uphold the ALJ's decision if there is reasonable evidence to support it and we will not reweigh the evidence upon review. *Jaramillo v. Indus. Comm'n of Ariz.*, 203 Ariz. 594, 596, ¶ 6, 58 P.3d 970, 972 (App. 2002).

DISCUSSION

¶15 Essentially, Ozuna's arguments boil down to one allegation properly reviewable by this Court: whether the ALJ erred in adopting Dr. McLean's opinion over Dr. Amrani's.³

³ Ozuna's claim of ineffective assistance of counsel arises from the representation he received during the litigation of his first petition, not the current petition. Ozuna was unrepresented during the current litigation. Because an ICA proceeding is a civil action, the remedy for Ozuna's claim of ineffective assistance of counsel is a malpractice action. See *Glaze v. Larsen*, 207 Ariz. 26, 31, ¶ 20, 83 P.3d 26, 31 (2004) ("In the civil context, a party generally cannot obtain post-judgment relief because of the inexcusable neglect of counsel."); see also *Panzino v. City of Phoenix*, 196 Ariz. 442, 449, ¶ 24, 999 P.2d 198, 205 (2000) (declining to adopt the positive misconduct rule, intended to protect clients from the misconduct of their attorneys, as a basis for relief under Rule 60 of Arizona Rules of Civil Procedure); *but cf. John M. v. Ariz. Dep't of Econ. Sec.*, 217 Ariz. 320, 323-24, ¶¶ 12-13, 173 P.3d 1021, 1024-25 (App. 2007) (noting ineffective assistance of

¶16 An ALJ's responsibility is "to resolve conflicts in the medical evidence," *Gamez v. Indus. Comm'n of Ariz.*, 213 Ariz. 314, 316, ¶ 15, 141 P.3d 794, 796 (App. 2006), and weigh the credibility of witnesses, *Anamax Mining Co. v. Ariz. Dep't Econ. Sec.*, 147 Ariz. 482, 486, 711 P.2d 621, 625 (App. 1985). "[W]e will not disturb that resolution unless it is wholly unreasonable." *Gamez*, 213 Ariz. at 316, ¶ 15, 141 P.3d at 796 (citation and internal quotation marks omitted).

¶17 A prior determination by the ICA to close a claim is final unless a claimant meets her burden to show there is a new, additional, or previously undiscovered condition that supports reopening the case. A.R.S. § 23-1061(H) (Supp. 2010); *Maricopa Cnty. v. Indus. Comm'n of Ariz.*, 134 Ariz. 159, 162, 654 P.2d 307, 310 (App. 1982). If the claimant's request is based on a claim of a new or additional condition, she must establish a change of condition. *Cornelson v. Indus. Comm'n of Ariz.*, 199 Ariz. 269, 271, ¶ 14, 17 P.3d 114, 116 (App. 2001). In a case where the claimant has already sought a petition to reopen that was denied, the issue is whether there is a new, additional, or previously undiscovered condition that arose between the date of the notice of claim denying the first petition and the date of filing the second petition to reopen. *Id.*; *Lovitch*, 202 Ariz.

counsel may be grounds for relief from the termination of one's parental rights).

at 106 n.1, 41 P.3d at 644 n.1. Also, “[a] claim shall not be reopened because of increased subjective pain if the pain is not accompanied by a change in objective physical findings.” A.R.S. § 23-1061(H); *Polanco v. Indus. Comm’n of Ariz.*, 214 Ariz. 489, 494, ¶ 12, 154 P.3d 391, 396 (App. 2007).

¶18 The ALJ did not abuse his discretion in denying Ozuna’s petition to reopen because there was evidence that Ozuna failed to show a change in his condition between the denial of his first petition to reopen and the filing of his current petition.

¶19 The ALJ considered the competing medical testimony from Doctors Amrani and McLean about whether Ozuna’s pain was causally related to his 2000 accident. While Dr. Amrani did causally relate Ozuna’s injury and pain to the 2000 accident, he had not reviewed any of Ozuna’s prior medical records since 2004. Dr. Amrani needed to review those records to discern whether Ozuna’s pain had changed since the denial of Ozuna’s first petition. On the other hand, Dr. McLean had reviewed all of Ozuna’s medical records and determined that his pain was not related to the accident and his condition had not changed since the denial of Ozuna’s first petition. The evidence in the record supports the ALJ’s decision to adopt Dr. McLean’s report over Dr. Amrani’s and find that Ozuna did not meet his burden to prove a change in condition since the denial of his first

petition to reopen. We hold that the ALJ did not abuse his discretion.

CONCLUSION

¶20 For the foregoing reasons, we affirm the ALJ's denial of Ozuna's second petition to reopen.

/s/
DONN KESSLER, Presiding Judge

CONCURRING:

/s/
DIANE M. JOHNSEN, Judge

/s/
SHELDON H. WEISBERG, Judge