

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Betty Jean Smith, :  
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 Petitioner :  
 :  
 v. : No. 1022 C.D. 2007  
 : Submitted: December 14, 2007  
 Workers' Compensation Appeal :  
 Board (Weiss Furniture Co., Inc.), :  
 Respondent :

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge  
HONORABLE ROCHELLE S. FRIEDMAN, Judge  
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY JUDGE FRIEDMAN

FILED: February 12, 2008

Betty Jean Smith (Claimant) petitions for review of the April 30, 2007, order of the Workers' Compensation Appeal Board (WCAB), which affirmed the decision of a workers' compensation judge (WCJ) denying Claimant's review and modification petitions and granting the suspension petition filed by Weiss Furniture Company, Inc. (Employer). We affirm.

On August 21, 2001, Claimant was injured in a motor vehicle accident during the course of her employment. Pursuant to a notice of compensation payable (NCP), Employer accepted liability for an injury described as lumbar and cervical strains. On October 25, 2002, Employer filed a petition seeking a suspension of compensation effective October 14, 2002, based on allegations that Claimant had been released to modified work and that suitable work was available. Thereafter, on December 3, 2002, Claimant filed a review petition seeking to add

new injuries, including post-traumatic myofascial pain, low back injury with sciatica and mild root impingement, internal derangement of the right knee and aggravation of pre-existing depression, to the NCP's description of the work injury. The two petitions were assigned to WCJ Irving L. Bloom.

On October 3, 2003, while these petitions were pending, Claimant underwent an impairment rating evaluation (IRE) performed by S.P. Barua, M.D.<sup>1</sup> Dr. Barua determined that Claimant's work-related lumbar injury resulted in an impairment rating of eight per cent and that her work-related cervical injury resulted in an impairment rating of five per cent, for a total impairment rating of thirteen per cent. (R.R. at 13a-19a.) Based on Dr. Barua's IRE report, and pursuant to section 306(a.2) of the Workers' Compensation Act (Act),<sup>2</sup> Claimant's status was changed from total to partial disability. On November 12, 2003, Claimant filed a modification petition seeking to change her status back to total disability; Claimant asked the WCJ to dismiss the IRE on the basis that Dr. Barua did not rate Claimant's chronic pain syndrome or her knee. The modification petition also was assigned to WCJ Bloom, although it was not consolidated with the two petitions previously filed.

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<sup>1</sup> The WCJ's Findings of Fact, No. 5 incorrectly states the date of this examination as October 24, 2003, which is the date of Dr. Barua's report.

<sup>2</sup> 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. Section 306(a.2) of the Act allows an employer to obtain a unilateral modification of a claimant's benefits status from total to partial disability based upon an IRE impairment rating of less than fifty per cent impairment under the most recent edition of the American Medical Association (AMA) "Guides to the Evaluation of Permanent Impairment."

By decisions dated May 3, 2004, and August 3, 2004, WCJ Bloom granted Claimant's review petition in part, adding an aggravation of pre-existing depression to the NCP's description of the work injury, granted Claimant's petition for modification and granted Employer's suspension petition. On appeal, the WCAB vacated and remanded both of WCJ Bloom's decisions,<sup>3</sup> and the remanded cases were assigned to WCJ Paul J. Costelnock, who reviewed the record made before WCJ Bloom and heard additional testimony from Claimant.

Employer offered the testimony of Richard Dunhoff, Employer's advertising manager, sales manager and treasurer, the deposition testimony of Jack D. Smith, M.D., a certified orthopedic surgeon who examined Claimant in August 2002, and the medical reports of Dr. Barua, who performed the IRE. In support of her review and modification petitions, Claimant testified before the WCJ, and she also submitted the deposition testimony of A. Roger Wigle, M.D., Bernard C. Scherer, M.D., and James Richards, D.C.

The WCJ accepted the testimony of Dunhoff concerning a position offered to Claimant in October 2002, as well as Dr. Smith's testimony that Claimant was capable of performing the work described, as credible and persuasive. (WCJ's Findings of Fact, No. 22.) Relying on their testimony, the WCJ granted Employer's suspension petition effective October 14, 2002.

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<sup>3</sup> The WCAB determined that remand was warranted where WCJ Bloom failed to address any of Claimant's testimony and failed to address all of the additional injuries she claimed in the review petition.

The WCJ rejected Claimant's testimony regarding her current physical condition and her inability to work in any capacity as neither credible nor convincing. (WCJ's Findings of Fact, No. 22.) The WCJ also discredited and found unpersuasive the testimony of Drs. Wagle, Scherer, and Richards. Based on these findings, the WCJ concluded that: (1) Claimant failed to meet her burden of proving that she suffers from the additional injuries claimed in the review petition and/or that such injuries are causally related to the work injury; and (2) Claimant failed to meet her burden of establishing that she is entitled to a modification of her status to total disability. Accordingly, the WCJ denied Claimant's petitions for review and modification. Claimant appealed to the WCAB, which affirmed the WCJ's decision.

On appeal to this court,<sup>4</sup> Claimant first argues that, in rejecting the testimony of Dr. Scherer, the WCJ failed to consider the opinion of Thaddeus Osial, M.D., upon which Dr. Scherer's diagnosis of post-traumatic myofascial pain was based, and, therefore, the WCJ erred in denying Claimant's review petition and failed to issue a reasoned decision. We disagree.

Addressing the evidence in the specific context of Claimant's review petition, the WCJ noted that none of Claimant's medical witnesses ever diagnosed Claimant with myofascial pain *throughout their course of treatment*. (WCJ's

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<sup>4</sup> Our scope of review is limited to determining whether constitutional rights were violated, whether the adjudication is in accordance with the law and whether necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704.

Findings of Fact, No. 22.) The record supports this finding. Indeed, in its entirety, Dr. Scherer's testimony describes a continuing search for a working diagnosis. Dr. Scherer began treating Claimant for the work injury on August 24, 2001. He stated that he referred Claimant to Dr. Osial in the latter part of 2002 because Claimant had a rather diffuse pain syndrome involving the neck and back that was difficult to treat, and various modalities had been tried with limited, if any, improvement. "At some point I wanted an opinion from a rheumatologist as to what was going on, and that's why Dr. Osial was consulted." (N.T. at 12.) On cross-examination, Dr. Scherer acknowledged that, as of October 31, 2002, he was not sure whether or not Claimant's neck and back complaints were triggered by the work injury. (N.T. at 49-50.)

Dr. Osial examined Claimant on October 22, 2002, and diagnosed Claimant as suffering from myofascial pain; he summarized his findings in a November 5, 2002, report to Dr. Scherer. (Deposition exhibit 1.) Dr. Scherer testified that, as of his July 16, 2003, examination of Claimant, he diagnosed Claimant with myofascial syndrome related to the motor vehicle accident, (N.T. at 23-24), but the WCJ found that opinion unpersuasive in light of Dr. Scherer's testimony as a whole. Because the WCJ is the final arbiter of witness credibility and evidentiary weight, *Sherrod v. Workmen's Compensation Appeal Board (Thoroughgood, Inc.)*, 666 A.2d 383 (Pa. Cmwlth. 1995), Claimant's contention that the WCJ failed to adequately consider the opinion of a physician who did not testify in this case necessarily fails.

Claimant next argues that the WCJ erred in rejecting Dr. Scherer's testimony that the work injury was a contributing factor in Claimant's depression. However, Dr. Scherer acknowledged that he was treating Claimant for depression prior to the work injury, and, as the WCJ explained in his Finding of Fact No. 22, Dr. Scherer did not state that Claimant's symptoms of depression changed in any way from those she experienced prior to the work injury, nor did he indicate that there was a need for a change in the treatment of Claimant's depression following the work injury. Because the WCJ's findings accurately characterize Dr. Scherer's testimony, we conclude that the WCJ did not err in determining that the evidence was insufficient to establish a causal relationship between Claimant's work injury and her depression.

Claimant's final argument is that the WCJ erred in denying her modification petition on the grounds that Claimant failed to meet her burden of re-establishing total disability after her status was changed to partial disability in reliance on Dr. Barua's IME. According to Claimant, the IRE is not supported by substantial competent evidence because Dr. Barua's diagnoses of Claimant included conditions that are not recognized in the description of Claimant's work injury.<sup>5</sup>

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<sup>5</sup> Dr. Barua's diagnoses included the following: 1) chronic myofascial pain with chronic cervical and lumbar strain; 2) mild degenerative arthritis of the lumbar spine; 3) no radiculopathy; 4) chondromalacia of patella; 5) torn medial and lateral meniscus according to MRI report; 6) chronic pain syndrome; 7) obesity; 8) deconditioned muscles; and 9) anxiety. (R.R. at 18a.) Section 306(a.2) of the Act provides that the percentage rating for impairment shall represent only that impairment that is the result of the compensable injury. Here, the NCP recognizes Claimant's injury as lumbar and cervical strains, and Dr. Barua's IRE report reflects that he evaluated and rated only Claimant's lumbar and cervical spine. (R.R. at 18a.)

However, in her modification petition, Claimant argued only that Dr. Barua failed to rate her chronic pain and her knee injury; accordingly, Claimant's argument concerning Dr. Barua's diagnoses is waived on appeal.<sup>6</sup> Pa. R.A.P. 1551(a).

Accordingly, we affirm.

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ROCHELLE S. FRIEDMAN, Judge

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<sup>6</sup> We note that the WCJ did not find Claimant's knee condition to be a compensable injury. In addition, the disabling effects of certain compensable injuries, such as purely mental injuries and psychogenic overlays and chronic pain that follow the suffering of traumatic injuries, are not susceptible to impairment ratings, and formulae do not exist in the AMA guidelines for such maladies. *See* 8 David B. Torrey & Andrew E. Greenberg, *Workers' Compensation: Law and Practice* 15:32 (2000). Most important, with respect to the modification petition, Claimant bore the burden of establishing total disability; because the WCJ rejected the testimony of Claimant and her medical witnesses, Claimant could not meet that burden.

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Board (Weiss Furniture Co., Inc.),	:	
Respondent	:	

ORDER

AND NOW, this 12th day of February, 2008, the order of the Workers' Compensation Appeal Board, dated April 30, 2007, is hereby affirmed.

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ROCHELLE S. FRIEDMAN, Judge