IN THE COMMONWEALTH COURT OF PENNSYLVANIA

City of Philadelphia, Petitioner	:	
v.	:	No. 1061 C.D. 2009
Workers' Compensation Appeal Board (Crossfield), Respondent	:	Submitted: October 2, 2009

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY FILED: November 16, 2009

The City of Philadelphia (Employer) petitions for review of an order of the Workers' Compensation Appeal Board (Board) affirming the Workers' Compensation Judge's (WCJ) decision granting Robert Crossfield's (Claimant) claim petition. We affirm.

Claimant was employed by Employer as firefighter since 1985. Claimant filed a claim petition on or about January 3, 2006, alleging the occurrence of a compensable hearing loss pursuant to Section 306(c)(8) of the Workers' Compensation Act (Act).[1] Claimant alleged that he sustained work-related

[1] Act of June 2, 1915, P.L. 736, as amended, 77 P.S.§513(8). Section 306(c)(8) provides, in pertinent part, as follows:

(Continued....)

The following schedule of compensation is hereby established:

For all disability resulting from permanent injuries of the following classes, the compensation shall be exclusively as follows:

(8)(i) For permanent loss of hearing which is medically established as an occupational hearing loss caused by long-term exposure to hazardous occupational noise, the percentage of impairment shall be calculated by using the binaural formula provided in the Impairment Guides. The number of weeks for which compensation shall be payable shall be determined by multiplying the percentage of binaural hearing impairment as calculated under the Impairment Guides by two hundred sixty weeks. Compensation payable shall be sixty-six and two-thirds per centum of wages during this number of weeks, subject to the provisions of clause (1) of subsection (a) of this section.

. . . .

(iii) Notwithstanding the provisions of subclauses (i) and (ii) of this clause, if there is a level of binaural hearing impairment as calculated under the Impairment Guides which is equal to or less than ten per centum, no benefits shall be payable. Notwithstanding the provisions of subclauses (i) and (ii) of this clause, if there is a level of binaural hearing impairment as calculated under the Impairment Guides which is equal to or more than seventy-five per centum, there shall be a presumption that the hearing impairment is total and complete, and benefits shall be payable for two hundred sixty weeks.

. . . .

(vi) An employer shall be liable only for the hearing impairment caused by such employer. If previous occupational hearing impairment or hearing impairment from nonoccupational causes is established at or prior to the time of employment, the employer shall not be liable for the hearing impairment so established whether or not compensation has previously been paid or awarded.

. . . .

(x) Whether the employe has been exposed to hazardous occupational noise or has long-term exposure to such noise shall be affirmative defenses to a claim for occupational hearing loss and not a part of the claimant's burden of proof in a claim.

binaural hearing loss on January 3, 2006. Employer filed a timely answer to the claim petition denying the material allegations contained therein. Hearings before a WCJ ensued.

In support of the claim petition, Claimant testified on his own behalf and presented two depositions of the testimony of board certified Otolaryngologist Jeffrey Cooper, M.D.: (1) a global deposition regarding the issue of noise induced hearing loss of Employer's firefighters; and (2) a trial deposition taken on August 16, 2006, after Dr. Cooper had personally evaluated Claimant on June 15, 2005. Claimant also presented the global deposition of Audiologist Rhonda Schuman that was to be submitted in all of the hearing loss cases pending against Employer.

In opposition to the claim petition, Employer submitted two depositions of the testimony of board certified Otolaryngologist Allen Miller, M.D.: (1) a global deposition regarding the issue of noise induced hearing loss of Employer's firefighters; and (2) a trial deposition taken on November 29, 2006, after Dr. Miller had personally evaluated Claimant on September 28, 2006. Employer also submitted the June 20, 2003, global deposition testimony of John Barry, Senior Industrial Hygienist for the Occupational Safety and Health Administration, and the October 24, 2004, global deposition testimony of Colin Brigham, who holds certifications as an industrial hygienist, safety professional, professional ergonomist, and professional environmental auditor, as well as documentary evidence.

Based on the evidence presented, the WCJ stated that she was impressed with the precision and expertise of Claimant's lay and medical evidence and accepted the same as facts in this matter. The WCJ stated further that she was entirely persuaded by Claimant's evidence and found as fact that Claimant sustained a hearing loss impairment directly related to his employment with Employer as a firefighter.

The WCJ found the following testimony rendered by Claimant to be competent, credible and persuasive: (a) prior to joining the fire department twenty-one years ago, he did not have any problems with his hearing; (b) over his twenty-one years of service with Employer, Claimant's ears, unprotected, were exposed to noise generated by firehouse equipment, sirens, air horns, diesel engines, radio apparatus, water pumps, power saws, breaking glass, jackhammers, and drills; (c) he is currently having problems hearing conversations in crowds or with background noise; (d) he underwent a hearing test for his problem; and (e) he purchased a hearing aid to assist him in hearing normal conversations. The WCJ found further that Claimant's testimony was reasonable and consistent and that it established that: (1) he had no problems before joining the fire department; (2) for twenty-one years, he was exposed to loud noise at work; (3) no other environmental or situational factors have been established to explain Claimant's problem; and (4) he currently has problems hearing.

The WCJ found the testimony of Claimant's medical expert, Dr. Cooper, competent, credible and persuasive because: (1) his credentials establish him as an expert in the area of hearing loss; (2) he explained persuasively that Claimant's physical examination conclusively ruled out a conductive, or blocked, hearing problem and that the problem that Claimant has is due to loss of hair fibers or nerve damage; (c) the diagnosis is supported by an autologic evaluation with a certified otologist, using equipment that is manufactured to industry standards; and (d) the type of hearing loss Claimant has is consistent with a long exposure to loud noise. The WCJ found the medical opinions of Dr. Cooper as fact because they were rendered by an individual competent to render expert opinions, and are based upon an undisputed history of Claimant's exposure to occupational noise, and an objective evaluation of Claimant's hearing complaints. Dr. Cooper opined that Claimant

suffered a permanent 33.4 percent binaural sensory neural hearing loss and that the loss was caused by Claimant's noise exposure while employed by Employer as a fire fighter.

The WCJ found that the conclusions of Employer's experts were without merit because they were based upon insufficient or faulty foundations of fact. With respect to Dr. Miller's opinion, the WCJ found his opinion competent and credible to establish that he performed a physical examination of Claimant's ears and ruled out a conductive hearing problem and that he agrees with the diagnosis that Claimant's hearing loss is neurosensory in nature. The WCJ was less persuaded with Dr. Miller's conclusion that Claimant's occupation as a fire fighter did not cause or contribute to Claimant's hearing loss for the reason that Claimant's history to Dr. Miller of his exposure to loud noise over a twenty-one period with the fire department is consistent with Claimant's testimony and the history given to Dr. Cooper. In addition, the WCJ noted that Dr. Miller placed great weight on a study conducted by John Barry in 1994; however, Mr. Barry specifically admitted that his findings were never intended to be conclusive in individual claims arising out of exposure to noise.

The WCJ found that the testimony of Dr. Barry, Colin Brigham and Rhonda Schuman was only partly dispositive of Claimant's claim. The WCJ put greater weight and credence on Claimant's testimony of his personal contact with the noise at work and the physicians who personally examined Claimant. The WCJ found that the studies conducted by Mr. Barry and Colin Brigham were generic in nature and were not dispositive of Claimant's individual situation. The WCJ found Ms. Schuman's testimony credible to the extent that it corroborated the WCJ's conclusion that Claimant was exposed to hazardous noise during his twenty-one year tenure as a fire fighter for Employer.

Therefore, to the extent to which Employer's evidence was contrary or inconsistent with Claimant's evidence, the WCJ rejected Employer's evidence. Accordingly, by decision and order circulated on June 30, 2008, the WCJ granted Claimant's claim petition and awarded 86.84 weeks of compensation due to a 33.4 percent binaural hearing loss.[2]

Employer appealed the WCJ's decision and the Board affirmed. This appeal followed.[3]

In this appeal, Employer first argues that the Board and the WCJ erred in failing to hold Claimant to the correct burden of proof. Employer contends that Claimant's own evidence established a pre-existing hearing loss prior to his becoming a fighter; therefore, Employer contends, it was incumbent upon Claimant to adduce unequivocal medical evidence to show that neither his hearing loss nor a portion thereof was attributable to the progression of any pre-existing loss. Employer points out that an employer is only liable for the hearing impairment that was allegedly caused by a claimant's employment. Employer contends that the evidence shows that Claimant suffered a pre-existing hearing loss of 17.8 percent prior to his

[2] The WCJ originally circulated a decision and order on May 27, 2007, from which Employer and Claimant filed cross appeals. However, the May 27, 2007, decision and order did not contain any findings of fact resolving the credibility issues presented by the parties. Therefore, after Claimant and Employer filed a stipulation of facts with the Board wherein they both agreed that the WCJ's decision was not reasoned, the Board vacated the WCJ's May 27, 2007, and remanded this matter to the WCJ to make credibility determinations based on the existing record and to circulate a new decision. Accordingly, the WCJ circulated the June 30, 2008, decision and order which contains the required credibility findings and incorporates/reaffirms the May 27, 2007 decision.

[3] This Court's scope of review is limited to determining whether there has been a violation of constitutional rights, errors of law committed, or a violation of appeal board procedures, and whether necessary findings of fact are supported by substantial evidence. Lehigh County Vo-Tech School v. Workmen's Compensation Appeal Board (Wolfe), 539 Pa. 322, 652 A.2d 797 (1995).

employment as a firefighter in 1985 and that Claimant's evidence did not prove that this previous hearing impairment was not the cause of his alleged current hearing loss of 33.4 percent.

As noted previously herein, the requirements to establish a claim to benefits for a work-related hearing loss are set forth in Section 306(c)(8) of the Act. The burden of proof is on a claimant to establish that he suffers from a permanent hearing loss of 10 percent or greater that is medically established to be work-related and caused by the long-term exposure to hazardous occupational noise. Pursuant to Section 306(c)(8)(x) of the Act, "[w]hether the [claimant] has been exposed to hazardous occupational noise or has long-term exposure to such noise shall be affirmative defenses to a claim for occupational hearing loss and not a part of the claimant's burden of proof in a claim." 77 P.S. §513(8)(x). In short, an employer may assert an affirmative defense that the claimant's exposure to such noise was not hazardous or long-term.

With regard to an employer's liability for occupational hearing losses, Section 306(c)(8)(vi) of the Act states:

> [a]n employer shall be liable only for the hearing impairment caused by such employer. If previous occupational hearing impairment or hearing impairment from nonoccupational causes is established at or prior to the time of employment, the employer shall not be liable for the hearing impairment so established whether or not compensation has previously been paid or awarded.

77 P.S. §513(8)(vi). This Court has established that the employer bears the burden of proving that the claimant's hearing loss is the result of the claimant's prior employment or from non-occupational causes. USX Corporation v. Workers' Compensation Appeal Board (Rich), 727 A.2d 165 (Pa. Cmwlth. 1999), aff'd, 526

Pa. 205, 754 A.2d 666 (2000); Anchor Hocking Packaging Company v. Workers' Compensation Appeal Board (Martin), 735 A.2d 157 (Pa. Cmwlth. 1999).

Accordingly, while Claimant admitted that he was told while serving in the Air Force in 1981 and 1982 that he had a hearing problem with his right ear, it was Employer's burden to prove that Claimant's current hearing loss of 33.4 percent was partly or wholly the result of an alleged 17.8 percent pre-existing hearing loss. To prove that Claimant suffered from a 17.8 percent pre-existing hearing loss, Employer submitted into evidence copies of Claimant's military medical records which included two hearing tests purportedly performed by the military in 1981 and 1982. However, the WCJ rejected this evidence as proof that Claimant was suffering from a pre-existing hearing loss at the time Claimant was hired by Employer as a firefighter.

The WCJ found that Claimant was not provided bilateral hearing aides after the 1981 and 1982 hearing tests purportedly performed during Claimant's military service. The WCJ pointed out that Claimant was not restricted by the Air Force and that he was not followed by a doctor while in the military for a hearing loss. The WCJ found that the 1981 and 1982 notes are the only reference to a hearing issue in Claimant's military file. The WCJ noted Dr. Miller's testimony that there was no way for the doctor to tell whether the hearing loss shown on the medical records from 1981 and 1982 was a temporary conductive loss due to blockage in the ear as compared to Claimant's current permanent sensory neural hearing loss. The WCJ also pointed out that Dr. Miller admitted that an audiogram performed when Claimant was hired by Employer in 1985 shows no sensory neural loss.[4]

[4] The results of the April 10, 1985, audio logical evaluation sent to Employer by the *(Continued....)*

In addition, the WCJ accepted Claimant's testimony as credible and that it established that Claimant had no problems with his hearing before joining the fire department twenty-one years ago. Claimant testified that prior to joining the fire department in 1985, he underwent a hearing test and was cleared for duty. Claimant testified that his hearing was perfect when he entered the military and that the hearing problem came on all of a sudden. The WCJ accepted as credible Claimant's testimony that although he was prescribed one hearing aid after he underwent a hearing test in the military, he stopped using it because it did not seem to help him and he did not think he needed to wear a hearing aid. The WCJ also accepted Claimant's testimony that between 1982, when he was discharged from military service, and 1985, when he began his employment with Employer, he was not treated or evaluated for a hearing loss. The WCJ accepted as credible Claimant's testimony that he was not using a hearing aid or having problems hearing when he joined the fire department in 1985.

The WCJ also accepted Dr. Cooper's testimony as credible that the audiogram performed in 1985 when Claimant joined the fire department was read as normal. Dr. Cooper opined that the 1985 baseline test confirms that Claimant's permanent 33.4 percent sensory neural hearing loss occurred during his career with Employer.

Based on the credibility determinations, the WCJ chose not to give any evidentiary weight to the 1981 and 1982 military records purportedly showing that Claimant had a hearing problem while serving in the military. Nothing in Section 306(c)(8) precludes a WCJ from exercising his or her fact-finding

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audiologist performing the evaluation showing that Claimant's hearing was normal and the April 12, 1985, report of medical re-examination by Employer's examining physician finding that

(Continued....)

authority and rejecting Employer's evidence and accepting Claimant's evidence to establish a claimant's pre-employment baseline hearing. Moreover, it was well within the WCJ's province to accept the audiogram that was performed by Employer immediately prior to Claimant's employment in 1985, which states that Claimant's hearing was normal, as the baseline test.

It is well settled that the WCJ, as the ultimate fact finder in workers' compensation cases, has exclusive province over questions of credibility and evidentiary weight, and is free to accept or reject the testimony of any witness, including a medical witness, in whole or in part. General Electric Co. v. Workmen's Compensation Appeal Board (Valsamaki), 593 A.2d 921 (Pa. Cmwlth.), petition for allowance of appeal denied, 529 Pa. 626, 600 A.2d 541 (1991). Since questions of credibility, conflicting evidence and evidentiary weight are solely in the province of the WCJ, the same may not be reweighed or reviewed on appeal. Hayden v. Workmen's Compensation Appeal Board (Wheeling Pittsburgh Steel Corp.), 479 A.2d 631 (Pa. Cmwlth. 1984).

Because the WCJ did not give any evidentiary weight to Employer's evidence and accepted Claimant's evidence including the 1985 pre-employment audiogram, Employer could not satisfy its burden of proving Claimant's pre-employment hearing status and, thus, was not entitled to the affirmative defense set forth in section 306(c)(8)(vi) of the Act. Anchor Hocking Packaging Company.

Next, Employer argues that Dr. Cooper's opinion attributing a binaural hearing impairment of 33.4 percent to noise exposure with Employer is lacking in an adequate foundation and was therefore equivocal. Employer contends that Dr. Cooper's opinions were equivocal and not competent because the

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Claimant met the medical standards for the position of firefighter were submitted into evidence.

doctor admitted at the time he evaluated Claimant that he had not reviewed any of Claimant's military records but only the audiogram by Ms. Schuman. Employer argues further that Dr. Cooper admitted that when he reviewed the report of the April 1985 audiogram, no actual audiogram was included. Employer contends that Dr. Cooper's reliance on a report of an audiogram conveying criteria which is not utilized in the evaluation of hearing loss under the AMA Guides, as required by Section 306(c)(8) of the Act, results in the conclusion that the foundation for Dr. Cooper's opinion regarding the percentage of impairment attributable to Employer was insufficient. We disagree.

The equivocality of a medical opinion is a question of law and fully reviewable by this Court. Carpenter Technology v. Workmen's Compensation Appeal Board (Wisniewski), 600 A.2d 694 (Pa. Cmwlth. 1991). Equivocality is judged upon a review of the entire testimony. Id. In conducting this review, we are mindful of our admonition in Philadelphia College of Osteopathic Medicine v. Workmen's Compensation Appeal Board (Lucas), 465 A.2d 132 (Pa. Cmwlth. 1983), that to be unequivocal, every word of medical testimony does not have to be certain, positive, and without reservation or semblance of doubt. It is an established principle that medical testimony is unequivocal if a medical expert testifies, after providing a foundation for the testimony, that, in his or her professional opinion, he or she believes or thinks a fact exists. Shaffer v. Workmen's Compensation Appeal Board (Weis Markets), 667 A.2d 243 (Pa. Cmwlth. 1995), petition for allowance of appeal denied, 544 Pa. 618, 674 A.2d 1079 (1996). Even if a medical expert admits to uncertainty, reservation or lack of information with respect to medical details, the testimony remains unequivocal so long as the expert expresses a belief that, in his or her professional opinion, a fact exists. Id.

Our review of Dr. Cooper's entire testimony reveals that it is competent and unequivocal. Initially, we point out that while Dr. Cooper testified on cross-examination that he was not aware that Claimant was prescribed a hearing aid while serving in the Air Force, the doctor did testify that he was aware at the time he examined Claimant that Claimant had served in the Air Force from 1979 to 1982. As the Board pointed out, the WCJ found that Dr. Cooper did review what were alleged to be audiograms from 1978 and the 1980s and Dr. Cooper's testimony supports this finding.

Employer's assertion that Dr. Cooper's reliance on the report of the April 1985 audiogram rendered his opinion incompetent because he did not review the actual audiogram is misleading. Dr. Cooper unequivocally testified on cross-examination that the April 12, 1985, report did include the results of the audiogram. We do recognize that the April 12, 1985, report also included discrimination scores, which Dr. Cooper admitted are not used by the AMA Guides to calculate a binaural hearing impairment; however, Dr. Cooper also testified on cross-examination that the April 12, 1985, audiogram report indicated Claimant's pure tone averages, which is how an audiogram is conducted, were within normal limits bilaterally, meaning right and left side. Dr. Cooper explained further that audiometric information is often described in verbal terminology and when they are using the words pure tone average within normal limits, there is an understanding that it is a normal test. As such, the fact that Dr. Cooper only reviewed the report of the April 12, 1985, audiogram and not the actual audiogram did not render his opinion equivocal and incompetent.

Finally, the fact that Dr. Cooper agreed that if it was assumed that Employer's counsel's calculations were correct and if it was assumed that what is purported to be audiograms from 1981 and 1982 were correct, Claimant would

have had about a 17.8 percent binaural hearing impairment at that time did not establish, as argued by Employer, that Claimant actually suffered from a 17.8 percent pre-existent binaural hearing loss which would have progressed regardless of subsequent noise exposure in the fire department. Dr. Cooper made it clear, when answering Employer's counsel's questions on cross-examination, that the doctor was rendering his opinion based on assumptions and possibilities provided by counsel. A review of Dr. Cooper's entire testimony reveals that he consistently testified unequivocally that Claimant suffered a 33.4 percent binaural hearing loss and that such loss was caused by long term exposure to hazardous noise while employed by Employer as a firefighter.

We remind Employer that answers given on cross-examination do not, as a matter of law, destroy the effectiveness of previous opinions by a physician. Hannigan v. Workmen's Compensation Appeal Board (Asplundh Tree Expert Company), 616 A.2d 764 (Pa. Cmwlth. 1992), petition for allowance of appeal denied, 535 Pa. 670, 634 A.2d 1118 (1993). The evidence is to be assessed as a whole in determining the weight to be given to the expert opinion. Id.

Next, Employer argues that the WCJ erred by mischaracterizing Dr. Miller's testimony which had the critical effect of rendering the findings unsupported by substantial evidence. Employer argues that although it recognizes that credibility findings are within the province of the WCJ, its appeal cannot be dismissed as a mere matter of credibility. Employer contends that the record in this case demonstrates that substantial competent evidence simply did not exist to support the WCJ's finding that Dr. Miller admitted to a normal audiogram in 1985. Employer contends further that there is no substantial evidence to support the finding that Claimant suffered a 33.4 percent hearing loss which was causally related to noise exposure in the fire department.

Specifically, Employer is challenging the WCJ's finding that Dr. Miller "admits that the audiogram performed when Claimant was hired by [Employer] shows no sensorineural loss" as unsupported by substantial evidence. See Finding of Fact 6(i). Our review of Dr. Miller's deposition testimony reveals that Employer is correct that the doctor did not actually testify that the 1985 audiogram did not show any sensory neural loss. See Reproduce Record (R.R.) at 144a-144a. Dr. Miller simply agreed with the following question posed by Claimant's counsel on cross-examination: "In '85, when he was hired, you haven't seen any medical evaluation notes or anything from the audiologist from Lisa Blackman to suggest any percentage of loss was found in this evaluation?" Id. at 144a. However, even if the WCJ's finding of fact 6i is in error, it still stands that the WCJ credited the testimony of Claimant and his medical expert, Dr. Cooper, over that of Dr. Miller. The WCJ clearly explained why she found Claimant's evidence more credible and persuasive and that credible evidence amply supports the finding that Claimant suffered a 33.4 percent hearing loss which was causally related to noise exposure in the fire department.

Finally, Employer argues that the WCJ and the Board erred because Section 306(c)(8)(vi) of the Act was not followed where the competent medical evidence of both parties established a pre-existing hearing loss of 17.8 percent which was not caused by Employer. As we have previously concluded that Employer did not satisfy its burden of proving Claimant's pre-employment hearing status and, thus, was not entitled to the affirmative defense set forth in section 306(c)(8)(vi) of the Act, we reject Employer's argument.

Accordingly, the Board's order is affirmed.

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JAMES R. KELLEY, Senior Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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v.	:	No. 1061 C.D. 2009
Workers' Compensation Appeal Board (Crossfield), Respondent	:	

O R D E R

AND NOW, this 16th day of November, 2009, the order of the Workers' Compensation Appeal Board in the above-captioned matter is affirmed.

JAMES R. KELLEY, Senior Judge