

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Robert Chernesky, :
Petitioner :
v. : No. 1209 C.D. 2007
Workers' Compensation Appeal : Submitted: November 30, 2007
Board (Leber & Bonham), :
Respondent :

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY

FILED: March 5, 2008

Robert Chernesky (Claimant) petitions for review of an order of the Workers' Compensation Appeal Board (Board), which affirmed the decision of a workers' compensation judge (WCJ) granting Claimant's Claim Petition in part. We affirm.

On November 14, 2005, Claimant filed a Claim Petition alleging that he sustained work-related injuries to his neck, midback, low back, right knee, and right shoulder on March 24, 2004, while in the course and scope of his employment with Leber & Bonham Electrical (Employer). The Claim Petition sought payment of medical bills as well as full disability from October 21, 2005 and ongoing. In response, Employer filed an answer denying the material

allegations contained therein. A hearing on the Claim Petition then ensued before the WCJ.

Before the WCJ, Claimant testified and presented the testimony of Ralph Leber, his employer. Claimant also presented the deposition testimony of Alan Gillick, M.D., a board-certified orthopedic surgeon, and Michael Stachacz, D.C., a chiropractor. Employer presented the deposition testimony of Mark Scinico, M.D., board-certified in internal medicine. Based upon the testimony and evidence presented, the WCJ made the following relevant findings.

The WCJ found that Claimant and all the doctors in the case are in agreement that Claimant suffered an injury to his lumbar area on March 24, 2004. The undisputed record establishes that this injury was not disabling in nature since Claimant continued to work following the injury. As for Claimant's neck injury, the WCJ did not find the evidence credible that Claimant suffered a work-related injury to his neck. Claimant testified that he complained to all doctors of neck pain following the injury, yet there is no record indicating that any treatment was provided to Claimant's neck prior to July 2005.

Ultimately, the WCJ found that Claimant sustained a lumbar injury in the form of an aggravation of pre-existing degenerative disc disease and disc protrusions when he fell in the course and scope of his employment on March 24, 2004. At no time material to this action was this lumbar condition disabling in nature. Claimant subsequently developed cervical disc problems which necessitated surgery as well as complaints referable to his right shoulder; these conditions are unrelated to Claimant's March 24, 2004 work injury.

The WCJ concluded that Claimant, while proving that he sustained a work-related aggravation to his lumbar condition, failed to prove that he was disabled as of result of this injury. The WCJ further concluded that Claimant failed to prove

by sufficient, competent, and credible evidence that his cervical disc injuries and subsequent cervical and shoulder treatment was in any way related to the March 24, 2004 injury. By order dated November 30, 2006, the WCJ granted Claimant's Claim Petition as to his lumbar spine injury only.

From this decision, Claimant filed an appeal with the Board on December 20, 2006, alleging that findings of fact are not supported by substantial evidence. On February 16, 2007, Claimant filed an amended appeal alleging that in addition to the errors in the findings of fact, issues exist as to whether the medical evidence relied upon by the WCJ was unequivocal and whether the adverse inference drawn by the WCJ over Claimant's failure to call Dr. Prahalad as a witness is not supported by case law. Employer filed a timely motion to quash Claimant's amended appeal alleging that Claimant failed to file his appeal in a timely manner. Upon determining that the amended appeal was untimely, the Board granted Employer's motion to quash. The Board reviewed Claimant's initial appeal, as this appeal was timely, and affirmed. This appeal now follows. Claimant raises the following issues for our review:

1. Whether the Board failed to review the WCJ's decision for "capricious disregard" of material competent evidence, and issued an opinion that was not supported by substantial, competent evidence of record.
2. Whether the Board conducted meaningful appellate review of Claimant's appeal of the denial of his Claim Petition.
3. Whether the Board failed to reverse the unnecessary and improper adverse inference drawn by the WCJ regarding Claimant's decision not to present testimony from Dr. Prahalad.

First, Claimant contends that the WCJ capriciously disregarded material, competent evidence when he failed to credit testimony that Claimant injured his neck and shoulder as a result of the work injury. We disagree.

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. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704; Lehigh County Vo-Tech School v. Workmen's Compensation Appeal Board (Wolfe), 539 Pa. 322, 652 A.2d 797 (1995). “[R]eview for capricious disregard of material, competent evidence is an appropriate component of appellate consideration in every case in which such question is properly brought before the court.” Leon E. Wintermyer, Inc. v. Workers’ Compensation Appeal Board (Marlowe), 571 Pa. 189, 203, 812 A.2d 478, 487 (2002). When determining whether the WCJ capriciously disregarded the evidence, the Court must decide if the Board deliberately disregarded competent evidence that a person of ordinary intelligence could not conceivably have avoided in reaching a particular result, or stated another way, if the WCJ willfully or deliberately ignored evidence that any reasonable person would have considered to be important. Id.

In the case before us, the WCJ reviewed and summarized the testimony and evidence presented by both parties. The WCJ reviewed Claimant’s testimony that he had advised every doctor he saw following the work injury of his cervical and shoulder injuries. The WCJ did not find this testimony credible because the medical evidence did not support this contention. The WCJ found it incredible that all of the physicians seen by Claimant chose to ignore his neck problems for more than a year after the injury. The WCJ also noted that

Claimant's testimony in this regard was impeached by a statement that he gave the insurance adjustor that the only thing bothering him was his lumbar spine.

While Claimant's chiropractor, Dr. Stachacz, testified that Claimant complained of neck pain on more than one occasion, Dr. Stachacz's treatment of Claimant focused on the low back. Reproduced Record (R.R.) at 220-221. Dr. Stachacz testified that Claimant did not tell him that he injured his neck in the work incident. R.R. at 232. Dr. Stachacz testified that he did treat Claimant's neck, but then explained that when treating a patient who complains of pain in more than one region, he would focus on the acute injury first, i.e. the lower back, and then follow up with working on the rest of the spine if there's any trouble. R.R. at 220-221. On cross examination, Dr. Stachacz clearly testified that there was no treatment provided to Claimant's cervical spine. R.R. at 230-232. Contrary to Claimant's assertions, the WCJ did not ignore or disregard Dr. Stachacz's testimony, but simply did not find Dr. Stachacz's testimony credible that he treated the neck injury. Finding of Fact (F.F.) No. 15. The WCJ declined to infer from Dr. Stachacz's testimony that the neck complaints arose from the work injury. Id.

Claimant also contends that the WCJ failed to render a "reasoned decision" as required under Section 422(a) of the Workers' Compensation Act (Act).¹ We disagree.

Section 422(a) of the Act provides, in pertinent part, that "[a]ll parties to an adjudicatory proceeding are entitled to a reasoned decision containing findings of fact and conclusions of law based upon the evidence as a whole which clearly and concisely states and explains the rationale for the decisions so that all

¹ Act of June 2, 1915, P.L. 736, as amended, 77 P.S. §834.

can determine why and how a particular result was reached...”, and “[t]he adjudication shall provide the basis for meaningful appellate review... .” 77 P.S. §834.

In Daniels v. Workers’ Compensation Appeal Board (Tristate Transport), 574 Pa. 61, 828 A.2d 1043 (2003), our Supreme Court held that a WCJ’s decision is “reasoned” for purposes of Section 422(a) of the Act if it allows for adequate review by the Board without the need for further elucidation, and if it allows for adequate review by the appellate courts under their standards of review. Daniels, 574 Pa. at 76, 828 A.2d at 1051. The Supreme Court held that Section 422(a) requires that when the testimony is presented by way of deposition, the WCJ must articulate the reasons why one witness’s testimony was credited over another’s. Id. Thus, it is no longer sufficient for a reviewing body, after reviewing the record, to “imagine” why the WCJ may have determined one witness to be more credible than another. Id.; O’Donnell v. Workers’ Compensation Appeal Board (United Parcel Service), 831 A.2d 784, 790 (Pa. Cmwlth. 2003). The WCJ must clearly state his or her reasons for the credibility determinations on deposition testimony so that the reviewing body may determine whether those reasons are set forth in the record. Id. Conversely, the Supreme Court held that when the WCJ is present for the live presentation of a witness’s testimony, the WCJ may merely articulate his or her credibility findings with regard to that witness’s testimony, without further elaboration. Id.

Here, the WCJ was presented with conflicting evidence and was required to make credibility determinations. The WCJ found Employer’s witnesses to be more credible than Claimant’s witnesses. Contrary to Claimant’s assertions, the WCJ adequately set forth his reasons for rejecting or discrediting the evidence. The WCJ had the opportunity to observe Claimant’s demeanor as he

testified and did not find his testimony credible. While Claimant testified that he informed doctors that he also injured his neck in the fall, the WCJ found that the medical records do not reflect that Claimant was treated for a neck injury prior to July 2005 – over a year after the fall. While Dr. Gillick testified that Claimant’s neck injury occurred in the fall, the WCJ discredited this testimony as to causation explaining that Dr. Gillick did not see Claimant for many months after the injury and based his causation opinion on the history provided to him by Claimant. The WCJ further noted that Dr. Gillick himself did not provide any treatment to Claimant for neck complaints until July 2005. Based upon our review, the WCJ issued detailed findings adequately explaining the credibility or lack thereof of the fact witnesses. We, therefore, conclude that the WCJ rendered a reasoned decision in this matter.

Claimant further contends that the Board failed to conduct meaningful appellate review of relevant medical evidence, including the testimony of Claimant’s treating surgeon, Dr. Gillick, and Dr. Scinico. We disagree.

Like this Court, the Board’s scope of review is limited. It is not the function of this Court or the Board to reweigh evidence and to substitute its judgment for that of the WCJ. Vitelli v. Workmen’s Compensation Appeal Board (St. Johnsbury Trucking Co.), 630 A.2d 923 (Pa. Cmwlth. 1993), petition for allowance of appeal denied, 537 Pa. 627, 641 A.2d 591 (1994). Rather, the function of the Board and this Court is to determine, upon consideration of the evidence as a whole, whether the WCJ’s findings have the requisite measure of support in the record. Bethenergy Mines v. Workmen’s Compensation Appeal Board (Skirpan), 531 Pa. 287, 612 A.2d 434 (1992).

The WCJ, as fact finder, has exclusive province over questions of credibility and evidentiary weight, and the WCJ’s findings will not be disturbed

when they are supported by substantial, competent evidence. Northeastern Hospital v. Workmen's Compensation Appeal Board (Turiano), 578 A.2d 83 (Pa. Cmwlth. 1990). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Mrs. Smith's Frozen Foods Co. v. Workmen's Compensation Appeal Board (Clouser), 539 A.2d 11 (Pa. Cmwlth. 1988). The WCJ is free to accept or reject the testimony of any 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).

Here, the WCJ was presented with conflicting evidence with regard to the work-relatedness of Claimant's injuries. As to Claimant's lumbar condition, the WCJ accepted Dr. Gillick's testimony and rejected Dr. Scinico's testimony. Conversely, the WCJ accepted the opinion of Dr. Scinico that Claimant's neck complaints are unrelated to his work injury and rejected Dr. Gillick's opinion that this injury is work-related. While Claimant contends that these findings completely contradict each other, the WCJ is free to accept the testimony of any witness in whole or in part. Simply because the WCJ accepted Dr. Gillick's opinion regarding Claimant's lumbar injury, does not mean the WCJ was required to accept all opinions expressed by this expert. As set forth above, the WCJ adequately explained his reasons for rejecting Dr. Gillick's opinion on the neck injury in a reasoned opinion.

Claimant also argues that Dr. Scinico's opinion should not have been accepted as fact because his opinion was not based upon facts contained within the medical record, Dr. Scinico only saw Claimant on one occasion, and greater credence should have been given to Claimant's treating physician. Claimant's challenge in this regard is nothing more than a thinly veiled attempt to challenge

the credibility determinations of the WCJ. The burden was upon Claimant, not Employer, to prove with unequivocal medical testimony that his neck injury arose in the course of employment and was related thereto. The WCJ found that the testimony of Claimant's medical witnesses failed to establish causation for the neck injury. Based upon our review, the WCJ's findings are supported by substantial evidence in the record. The WCJ's decision is sufficiently detailed to permit meaningful appellate review. As we can find no error on the part of the WCJ in this regard, we can find no basis upon which to conclude that the Board failed to conduct meaningful appellate review.

Lastly, Claimant contends that the Board erred by failing to reverse the unnecessary and improper adverse inference drawn by the WCJ regarding Claimant's decision not to present testimony from Dr. Prahalad, who was the first doctor to treat Claimant following the injury. We disagree.

While this issue was raised in Claimant's petition for review with this Court, it was not raised in a timely manner before the Board and is therefore waived. Pa. R.A.P. 1551²; Coombs v. Workmen's Compensation Appeal Board

² Rule 1551 provides:

(a) Review of quasijudicial orders. Review of quasijudicial orders shall be heard by the court on the record. No question shall be heard or considered by the court which was not raised before the government unit except:

(1) Questions involving the validity of a statute.

(2) Questions involving the jurisdiction of the government unit over the subject matter of the adjudication.

(3) Questions which the court is satisfied that the petitioner could not by the exercise of due diligence have raised before the government unit. If, upon hearing before the court, the court is satisfied that any such additional question within the scope of this

(Continued....)

(Philadelphia Electric Co.), 689 A.2d 996 (Pa. Cmwlth. 1997) (issue waived if not raised before the Board). Nevertheless, we note that the WCJ is permitted to draw an adverse inference based upon a claimant's failure to call attending physicians. William Penn School District v. Workers' Compensation Appeal Board (Westerman), 717 A.2d 589 (Pa. Cmwlth. 1998), petition for allowance of appeal denied, 568 Pa. 652, 794 A.2d 365 (1999).

Accordingly, the order of the Board is affirmed.

JAMES R. KELLEY, Senior Judge

paragraph should be so raised it shall remand the record to the government unit for further consideration of the additional question.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Robert Chernesky, :
 :
 Petitioner :
 :
 v. : No. 1209 C.D. 2007
 :
 Workers' Compensation Appeal :
 Board (Leber & Bonham), :
 Respondent :

ORDER

AND NOW, this 5th day of March, 2008, the order of the Workers' Compensation Appeal Board, at No. A06-2898, dated June 1, 2007 is AFFIRMED.

JAMES R. KELLEY, Senior Judge