IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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| Kathleen Gula, Petitioner | : | |
| v. | : | No. 1215 C.D. 2011 |
| Workers' Compensation Appeal Board (Crozer Chester Medical Center and Phico Insurance Company Compservices, Inc/WCSF), Respondents | : | Submitted: October 14, 2011 |

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY FILED: December 22, 2011

Kathleen Gula (Claimant) petitions for review of an order of the Workers' Compensation Appeal Board (Board) which affirmed the decision of the Workers' Compensation Judge (WCJ) granting a Petition to Modify Workers' Compensation Benefits (Modification Petition) filed by Crozer Chester Medical Center (Employer). We affirm.

On January 10, 1999, Claimant sustained a work-related injury during the course and scope of her employment with Employer. A notice of compensation payable (NCP) was issued on June 7, 1999, which described the injury as a trauma to the left peroneal nerve.

On May 29, 2008, Employer filed a Modification Petition seeking to establish an earning capacity for Claimant by means of a labor market survey. On June 13, 2008, Employer filed a second Modification Petition on the basis of an impairment rating evaluation (IRE) determination. Claimant filed Answers denying the material averments of both petitions. Hearings before the WCJ ensued.

Based upon the testimony and evidence presented, the WCJ found that Employer did not establish that sedentary work within her residual capacity was available to Claimant in the general labor market and denied the first Modification Petition. The WCJ further found that Claimant had a whole person impairment rating of 30% and consequently, granted the second Modification Petition, thereby changing the status of Claimant's disability from Temporary Total Disability to Temporary Partial Disability as of May 14, 2008.

From this decision, Claimant filed an appeal with the Board, which affirmed. Claimant now petitions this Court for review.[1] Claimant presents the following issues for our review:

> 1. Where the impairment rating examiner admits making a medical mistake resulting in an erroneous application of the *Guides to the Evaluation of Permanent Impairment* (5th ed.) (*Guides*), does the IRE statute require the WCJ to correct the error by applying the proper *Guides* grid.

[1] This Court's scope of review is limited to determining whether there has been a violation of constitutional rights, whether errors of law have been committed, whether there has been 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, 642 A.2d 797 (1995).

2. Whether Claimant's award of full social security disability preempts the decisions of the WCJ and the Board under the Supremacy Clause of the U.S. Constitution.

Claimant contends that the WCJ erred in granting Employer's second Modification Petition where the IRE was based on a medical mistake resulting in an erroneous application of the *Guides*. We disagree.

The IRE process is governed by Section 306(a.2)(1) of the Workers' Compensation Act (Act).[2] Gardner v. Workers' Compensation Appeal Board (Genesis Health Ventures), 814 A.2d 884 (Pa. Cmwlth. 2003). Section 306(a.2)(1) of the Act provides, in relevant part, as follows:

> When an employe has received total disability compensation pursuant to clause (a) for a period of one hundred four weeks, unless otherwise agreed to, the employe shall be required to submit to a medical examination which shall be requested by the insurer within sixty days upon the expiration of the one hundred four weeks to determine the degree of impairment due to the compensable injury, if any. The degree of impairment shall be determined based upon an evaluation by a physician who is licensed in this Commonwealth, who is certified by an American Board of Medical Specialties approved board or its osteopathic equivalent and who is active in clinical practice for at least twenty hours per week, chosen by agreement of the parties, or as designated by the department, pursuant to the most recent edition of the American Medical Association "Guides to the Evaluation of Permanent Impairment."

[2] Act of June 2, 1915, P.L. 736, as amended, added by the Act of June 24, 1996, P.L. 350, 77 P.S. §511.2(1).

77 P.S. §511.2(1). If such determination results in an impairment rating that is equal to or greater than 50% impairment under the most recent edition of the American Medical Association *Guides*, the employee shall be presumed to be totally disabled and shall continue to receive total disability compensation benefits. Section 306(a.2)(2) of the Act, 77 P.S. §511.2(2). If the impairment rating is less than 50% impairment under the *Guides*, the employee shall then receive partial disability benefits. Id. The amount of indemnity benefits does not change. Diehl v. Workers' Compensation Appeal Board (I.A. Construction), 607 Pa. 254, 264, 5 A.3d 230, 236 (2010). The significance of the change in benefit status is that the claimant is then subject to the 500-week limit on partial disability benefits. Id.

Employer presented the testimony of Lynn Yang, M.D., who is board certified in physical medicine and rehabilitation. Dr. Yang evaluated Claimant on May 15, 2008. Dr. Yang testified that she is certified to perform impairment ratings. She testified that Claimant had multiple diagnoses: low back pain with radiculopathy, peroneal nerve entrapment, and post-operative reflex sympathetic dystrophy (RSD). Dr. Yang explained that she used the diagnosis-related estimate method for the lumbar spine, which resulted in a 13% whole person impairment. She further explained that for the other injuries, she used the most specific method available and accordingly, calculated a 42% lower extremity impairment under the nerve injury method, along with a 10% lower extremity impairment due to Claimant's sensory dyesthesias. Those values combined for a 19% whole person impairment. Dr. Yang elaborated that using the RSD criteria for the left leg yielded a 19% whole person impairment, and that since the nerve injury diagnosis and RSD diagnosis cannot be combined, she used the 13% whole person

impairment for the left leg injury, resulting in a 30% whole person impairment. The WCJ credited Dr. Yang's testimony in its entirety.

Claimant argues that the IRE was flawed or invalid because Dr. Yang's application of the *Guides* was incorrect. Dr. Yang is certified to perform IREs. Reproduced Record (R.R.) at 471a. The WCJ found that Dr. Yang followed the guidelines and came to an accurate result. Although Dr. Yang admitted on cross examination that she did not note that Claimant wore a short leg brace, Dr. Yang did not recant her testimony that Claimant had a 30% whole person impairment. Dr. Yang placed Claimant in Category E, which requires the use of a "cane, crutch or a *long* leg brace." R.R. at 424a. She testified that Category F requires use of a cane or crutch and a *short* leg brace. Id. While Dr. Yang conceded that Claimant probably belongs in Category F, not E, Dr. Yang explained that wearing a leg brace did not materially impact her impairment rating evaluation of 30%. R.R. at 424a-425a. Dr. Yang testified that she followed the *Guides*, which provide "whenever possible, the evaluator should use a more specific method." R.R. at 424a-425a. Dr. Yang testified that the *Guides* say that the more specific method is utilization of the diagnoses. R.R. at 424a. Claimant was diagnosed with RSD and peroneal nerve injury. R.R. at 424a. Based upon these diagnoses, Dr. Yang determined that Claimant had a 30% whole person impairment. Although Dr. Yang may have missed a detail regarding the short leg brace, such omission was harmless as Dr. Yang credibly and unequivocally testified that it was not material to her rating. While Claimant argues that the impairment rating is a mistake, Claimant did not submit any medical evidence to dispute the rating reached by Dr. Yang. While Claimant's attorney urges us to adopt his interpretation of the *Guides*, unlike Dr. Yang, he is not certified to

perform IREs. We, therefore, conclude that the WCJ did not err in granting Employer's second Modification Petition.

Next, Claimant contends Claimant's award of full social security disability preempts the decisions of the WCJ and the Board under the Supremacy Clause of the U.S. Constitution. We disagree.

The preemption doctrine has its roots in the Supremacy Clause of the United States Constitution, which provides in relevant part that the law of the United States "shall be the supreme law of the land ... anything in the constitution or laws of any state to the contrary notwithstanding." U.S. Constitution, Art. VI, cl. 2.; Toolan v. Trevose Federal Savings and Loan Ass'n, 501 Pa. 477, 482, 462 A.2d 224, 226-227 (1983). There is a three-part test to determine whether a state law is preempted by federal law. First Federal Savings and Loan Ass'n of Hazleton v. Office of State Treasurer, Unclaimed Property Review, 543 Pa. 80, 85, 669 A.2d 914, 916 (1995). The first part of the test requires an express intention of United States Congress to preempt the state law. Id. In the absence of an express intent, there must be an implied intent to preempt evidenced by a pervasive scheme which effectively precludes any governance by state law. Id. Finally, where no express or implied intent to preempt is present, there must exist a conflict between the state and federal laws which makes "compliance with both federal and state regulations a physical impossibility... ." Id. (quoting Fidelity Federal Savings and Loan Association v. de la Cuesta, 458 U.S. 141, 152-153 (1982)). Even where Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law. Toolan, 501 Pa at 482, 462 A.2d at 227.

Claimant does not argue that there is an express or implied intent to preempt. Rather, Claimant asserts that the Act conflicts with the Social Security Act, 42 U.S.C. §301 et seq., because her Social Security award cannot be reconciled with the modification of her workers' compensation benefits. Claimant argues that the award of full Social Security disability benefits preempts the modification of her workers' compensation benefit status to partial. She asserts that her workers' compensation benefits under the Act can never be challenged or modified because the Social Security Administration (SSA) has determined Claimant is fully disabled. Claimant cites no statutory or case law to support this position. While Claimant cites Monaci v. Workmen's Compensation Appeal Board (Ward Trucking), 541 A.2d 60 (Pa. Cmwlth. 1988), and Bailey v. Workmen's Compensation Appeal Board, 431 A.2d 1114 (Pa. Cmwlth. 1981), neither of these cases stand for the proposition that the Act is preempted by the Social Security Act.

In Monaci and Bailey, the claimants were awarded Social Security disability for non-work-related injuries. Both of the claimants argued that the determination of disability by the Social Security Administration (SSA) under the Social Security Act was relevant to a determination of disability in their workers' compensation cases. Monaci; Bailey. We held that the SSA's determination of disability was not relevant to prove whether the claimant's disability resulted from his work-related injury under the Act.[3] Monaci, 541 A.2d at 62; Bailey, 541 A.2d at 1116.

[3] Although the Act and the Social Security Act are similar in that they both address disability, they are by no means identical or interchangeable. A critical distinction is that the cause of the disability under the Act must be work-related to be compensable. "Disability as defined by the Social Security Act … does not include consideration of whether the disability

*(Continued....)*

Unlike Monaci and Bailey, the work-related nature of Claimant's injury is not at issue here. The only issue is the extent of Claimant's disability. The WCJ admitted the SSA award into evidence. Claimant's Exhibit No. 6, R.R. at 787a-793a. The weight to be accorded such evidence is within the exclusive province of the WCJ. Elliott Turbomachinery Co. v. Workers' Compensation Appeal Board (Sandy), 898 A.2d 640 (Pa. Cmwlth. 2006). Contrary to Claimant's assertions, the SSA award is by no means binding on the WCJ. The SSA award is based upon the Social Security Act, not upon the workers' compensation laws of Pennsylvania. The criteria for disability under the Social Security Act and the Act are different. As the federal regulations of the SSA recognize:

> A decision by any nongovernmental agency or any other governmental agency about whether you are disabled or blind is based on its rules and is not our decision about whether you are disabled or blind. We must make a disability or blindness determination based on social

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resulted from an injury at work ... ." Bailey, 431 A.2d at 1116. Under the Social Security Act, a claimant must show an

> inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months ... .

Section 423(d)(1)(A) of the Social Security Act, 42 U.S.C. §423(d)(1)(A); accord Section 416(i) of the Social Security Act, 42 U.S.C. §416(i). Under the Act, a claimant must show that his disability is work related:

> The terms 'injury' and 'personal injury' as used in this act shall be construed to mean an injury to an employee ... arising in the course of his employment and related thereto.

Section 301(c) of the Act, 77 P.S. §411.

> security law. Therefore, a determination made by another agency that you are disabled or blind is not binding on us.

20 C.F.R. §404.1504. Just as the SSA makes a disability determination based upon the Social Security Act and is not bound by the WCJ's determination, the WCJ makes his disability determination based upon the provisions of the Act and is not bound by the SSA's determination. For these reasons, we conclude that the SSA award is neither binding nor preemptive and does not preclude the WCJ from making his own findings based upon all of the evidence presented and modifying the workers' compensation benefits pursuant to the Act.

Accordingly, the order of the Board is affirmed.

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JAMES R. KELLEY, Senior Judge

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**O R D E R**

AND NOW, this 22nd day of December, 2011, the order of the Workers' Compensation Appeal Board at Docket No. A09-1533, dated June 7, 2011, is AFFIRMED.

JAMES R. KELLEY, Senior Judge