IN THE COMMONWEALTH COURT OF PENNSYLVANIA

George Kurzdorfer, Petitioner	:	
v.	:	No. 1289 C.D. 2009
	:	Submitted: November 20, 2009
Workers' Compensation Appeal Board (Alcoa and ESIS/CINGA/ACE), Respondents	:	

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge
HONORABLE KEITH B. QUIGLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE FRIEDMAN FILED: January 7, 2010

George Kurzdorfer (Claimant) petitions for review of a June 12, 2009, order of the Workers' Compensation Appeal Board (WCAB), which affirmed the decision of a Workers' Compensation Judge (WCJ) denying his claim petition. We affirm.

Claimant worked as a machinist/press operator for Alcoa (Employer) for twenty years. On September 27, 2005, Claimant awoke and was unable to put on his shoes due to swelling in his legs and feet. Although Claimant attempted to return to work, his last work day was September 30, 2005. In October 2005, Claimant sought medical treatment from Ellen Dillavou, M.D., a board-certified vascular surgeon, who diagnosed Claimant with varicose vein insufficiency and eventually performed multiples surgeries on both of his legs. Claimant also had undergone a number of surgeries for circulation problems in his legs approximately five years earlier. In

September 2006, Claimant filed a claim petition alleging injury to both of his legs caused by standing all day at work for over twenty years. Employer issued an answer denying the allegations, and numerous hearings were held between October 2006 and March 2008.

In support of his petition, Claimant initially testified that his job required him to stand at a machine for eight hours per day, with no opportunity to sit down while operating machinery. He also testified that he received a break for lunch and two other ten-minute breaks during the work day. However, on cross-examination, Claimant eventually admitted that there was one machine he had operated while sitting in a chair. Claimant testified that his job involved heavy lifting about twenty percent of the time.

Claimant also presented the deposition testimony of Dr. Dillavou, who opined that Claimant's employment either directly caused or exacerbated his varicose veins and venous insufficiency. Dr. Dillavou explained her belief that "prolonged time on [Claimant's] feet over years combined with the straining of heavy lifting and pushing has created increased pressure on his valves and that this pressure has broken down the normal valves in his legs and caused his severe venous problems and severe symptoms." (R.R. 291.) Dr. Dillavou further testified that, although it was impossible to know for certain, in her opinion, Claimant would not have had these difficulties but for his job. However, Dr. Dillavou acknowledged that she does not know how much lifting Claimant does in a day. In addition, although Dr. Dillavou initially stated that Claimant did not have a family history of varicose veins, she later admitted that there was such a history.

For its part, Employer presented the testimony of Eileen Kenzevich, Claimant's immediate supervisor, and Darl Boysel, Claimant's prior supervisor, with respect to Claimant's work duties. While there were some inconsistencies between Kenzevich's and Boysel's testimony, both testified that Claimant's job was not as physically strenuous as he claimed and that chairs were available for sitting during the work day.

Employer also presented the testimony of Fredric Jarrett, M.D., board-certified in both general and vascular surgery, who examined Claimant in August 2007. Dr. Jarrett testified that he did not believe that Claimant's work contributed in any way to Claimant's venous insufficiency, stating that the condition is "just something that progresses often even when people are sedentary and not working at all." (R.R. at 334.) Dr. Jarrett further stated that a correlation between work and venous insufficiency is "pretty rare." (R.R. at 345.)

With respect to Claimant's job duties, the WCJ credited the testimony of Kenzevich and Boysel over that of Claimant. Furthermore, the WCJ credited Dr. Jarrett's testimony over that of Dr. Dillavou. The WCJ specifically stated:

> 7. [T]he claimant has failed to meet his burden of proving that he has sustained a compensable work injury and the following is significant:
>
> A. I had the opportunity to observe the claimant on several occasions and I find his testimony in support of his petition to be weak. He admitted that he had problems with his legs prior to 2005 including problems sleeping, contractions in his legs, a "jumping" at night

> and pain. The claimant was often evasive regarding his job duties and overall, I do not believe they were as strenuous as he attempted to portray them.
>
> B. I find the testimony and opinions of Dr. Jarrett to be more persuasive and credible than those of Dr. Dillavou, and therefore as fact, noting:
>
> (1) Dr. Dillavou relied upon the claimant's unsubstantiated description of his job duties. Also, at first she said he had no family history of varicose veins, but later admitted it did exist. Her opinions were not expressed with certainty, particularly with regard to whether or not the claimant would have developed his vein problems in a different line of work. She made several important concessions on cross-examination that weakened her support for the claimant's case.
>
> (2) Dr. Jarrett has impressive curriculum vita [sic] and firmly supported his conclusion that there is no causal relationship of the claimant's complaints to his work. He also reviewed the employer testimony, which I have found to be credible. He credibly resisted efforts on cross-examination to draw a correlation between standing on the job (even *if* the claimant's account was deemed credible) and the development of venous insufficiency.

(Findings of Fact, No. 7, WCJ's op. at 9.)

Concluding that Claimant failed to meet his burden of proving he suffered a compensable work-related injury on September 27, 2005, the WCJ denied Claimant's claim petition.[1] On appeal, the WCAB affirmed. Claimant then filed a petition for review with this court.

[1] In a claim proceeding, the claimant bears the burden of establishing a right to compensation and of proving all of the elements necessary to support an award. *Inglis House v. Workmen's Compensation Appeal Board (Reedy)*, 535 Pa. 135, 634 A.2d 592 (1993). Specifically, a claimant must establish that he suffered an injury during the course and scope of his employment
(Footnote continued on next page…)

Claimant raises the following issues for our review:[2] (1) whether the WCJ's findings of fact accepting Kenzevich's and Boysel's testimony are supported by competent evidence; (2) whether Dr. Jarrett's opinion is competent to support the conclusion that Claimant's injury is not work-related; and (3) whether the WCJ's decision represents a capricious disregard of material and competent evidence. Claimant's argument boils down to the assertion that the WCJ rejected the competent testimony he presented in favor of allegedly incompetent testimony presented by Employer and, in doing so, engaged in a capricious disregard of the evidence.

The law is well settled that decisions as to weight of the evidence and credibility are solely for the WCJ as fact finder. *Watson v. Workers' Compensation Appeal Board (Special People in the Northeast)*, 949 A.2d 949 (Pa. Cmwlth. 2008). A WCJ may accept the testimony of any witness, including a medical witness, in whole or in part. *Id*. Moreover, a WCJ's findings of fact that are supported by substantial evidence are conclusive on appeal, despite the existence of contradictory evidence. *Id.* In addition, our supreme court has explained that

> review for capricious disregard of material, competent evidence is an appropriate component of appellate consideration in every case in which such question is

(continued…)

and that this injury is causally connected to his work. *Watson v. Workers' Compensation Appeal Board (Special People in the Northeast)*, 949 A.2d 949 (Pa. Cmwlth. 2008).

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

> properly brought before the court. As at common law, this review will generally assume a more visible role on consideration of negative findings and conclusions. Even in such context, however, this limited aspect of the review serves only as one particular check to assure that the agency adjudication has been conducted within lawful boundaries—it is not to be applied in such a manner as would intrude upon the agency's fact-finding role and discretionary decision-making authority.

Leon E. Wintermyer, Inc. v. Workers' Compensation Appeal Board (Marlowe), 571 Pa. 189, 203-204, 812 A.2d 478, 487-488 (2002) (footnotes omitted).

Here, Claimant first challenges the testimony of Kenzevich and Boysel as incompetent to support the WCJ's findings with respect to Claimant's job duties. Specifically, Claimant asserts that Kenzevich's and Boysel's testimonies differ as to exactly which machines Claimant operated. Claimant also argues that neither Kenzevich nor Boysel has sufficient first-hand knowledge of Claimant's work-related tasks. Claimant maintains, for example, that Kenzevich is unaware of the physical requirements of Claimant's job; she does not operate the machines; and she spends less than half an hour a day in the shop. Further, Claimant asserts that Boysel has limited knowledge of Claimant's job duties because Boysel spent less than an hour a day observing Claimant or other machinists performing their jobs and because, in 2005, due to Boysel's position, he was out of the office more than he was there.

However, in concentrating on the allegedly incompetent testimony of his supervisors, Claimant's argument completely disregards the fact that the WCJ found Claimant's own testimony to be weak. The WCJ specifically noted that Claimant had suffered from circulatory problems in his legs prior to 2005 and that he was "evasive"

with respect to the physical requirements of his job. In this regard, the WCJ found that Claimant contradicted himself with respect to whether he could operate any machines while sitting in a chair "in complete contrast to his initial testimony." (Finding of Fact No. 5(G).) Moreover, any purported weakness in Kenzevich's and Boysel's testimonies clearly goes to the weight of this evidence, not its competency. Kenzevich testified that she was familiar with Claimant's job duties because she became his supervisor in 2003 and assigned him his work orders. (R.R. at 67, 72.) Further, Boysel testified that he was Claimant's direct supervisor between 1996 and 2003 and that he managed the projects on which Claimant worked. (R.R. 143, 150.) The fact that Claimant's supervisors' testimony may have differed with respect to the precise nature of Claimant's job duties is of little moment, where they both testified that Claimant's job was less strenuous than he portrayed it and that chairs were available for Claimant's use during the work day.

Claimant next argues that the WCJ should have relied on Dr. Dillavou's testimony rather than that of Dr. Jarrett because (1) Dr. Jarrett never testified whether Claimant's work activities exacerbated his pre-existing condition, and (2) Dr. Jarrett relied on the incompetent testimony of Claimant's supervisors to reach his medical conclusion. This argument is wholly unpersuasive. As previously stated, it is *Claimant's* burden to prove that he has a work-related disability. *Inglis House*. The WCJ specifically discredited the testimony of Dr. Dillavou, Claimant's medical expert, because she relied on Claimant's discredited testimony and because the WCJ found Dr. Dillavou's testimony weakened on cross-examination. Simply stated, Dr. Dillavou's testimony did not persuade the fact finder that Claimant's disability was work-related. Our supreme court has explained that according greater credibility to

one witness' testimony than to another witness' testimony is a manifestation of the fact-finding role; it does not constitute a capricious disregard of evidence. *Cinram Manufacturing, Inc. v. Workers' Compensation Appeal Board*, ___ Pa. ___, 975 A.2d 577 (2009). In any event, Dr. Jarrett did in fact testify that Claimant's work was not causally related to his venous insufficiency and that he also considered Claimant's testimony in reaching this conclusion.[3]

Therefore, this is not a case in which a capricious disregard of competent, material evidence has occurred. In fact, if we were to do as Claimant suggests, we would instead intrude upon the WCJ's fact-finding function and inherent discretionary authority, which is beyond our purview and which is certainly not the goal of the capricious disregard of evidence standard of review.

Accordingly, we affirm.

ROCHELLE S. FRIEDMAN, Senior Judge

[3] Dr. Jarrett testified, in pertinent part: "Certainly the standing is not a major issue, in particular if he's able to walk around, just act normally in terms of his walking and activity, movement, all that." (R.R. at 335.)

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O R D E R

AND NOW, this 7th day of January, 2010, the order of the Workers' Compensation Appeal Board, dated June 12, 2009, is hereby affirmed.

ROCHELLE S. FRIEDMAN, Senior Judge