IN THE COMMONWEALTH COURT OF PENNSYLVANIA

James Henry, Petitioner	:	
v.	:	No. 1721 C.D. 2010
Workers' Compensation Appeal Board (Commercial Testing & Engineering), Respondent	:	Submitted: December 30, 2010

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE P. KEVIN BROBSON, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE SIMPSON **FILED: March 3, 2011**

James Henry (Claimant), representing himself, petitions for review from an order of the Workers' Compensation Appeal Board (Board), affirming the order of the Workers' Compensation Judge (WCJ). The WCJ granted Commercial Testing & Engineering's (Employer) petition to terminate workers' compensation benefits. We affirm.

I. Background

Claimant sustained a work-related back injury in 1996 while working as a drill assistant with Employer. Employer entered a Supplemental Agreement for compensation in 1996.

Employer filed a termination petition in 2007. The WCJ conducted several hearings.

At the first hearing in August 2007, Claimant represented himself. He inquired why he was not given time to get an attorney. Original Record (O.R.), Notes of Testimony (N.T.), 8/2/07, at 5. Claimant then raised several concerns related to the representation by his former attorney. Claimant complained his former attorney did not raise appropriate arguments in prior cases. Also, Claimant questioned whether he could afford a new attorney while his former attorney was still receiving fees. Claimant inquired how to obtain a return of his former attorney's fees so that he could hire a new attorney.

After noting the month and a half that elapsed since filing and service of the termination petition, the WCJ granted Claimant a 60-day continuance to obtain replacement counsel. In addition, the WCJ highlighted some possible problems for an unrepresented claimant defending a termination petition. In particular, the WCJ stated that a claimant would need to depose his doctor to testify that there was not full recovery. As to prior representation issues, the WCJ explained at length that replacement counsel could make an arrangement with the former attorney to address the fees, or replacement counsel could file a review petition to address the fees.

Two months later, in October, 2007, the WCJ conducted the second hearing. Replacement counsel represented Claimant at this hearing. Replacement counsel offered into evidence his fee agreement as well as Claimant's medical records from his treating physician. The WCJ admitted the medical records subject to Employer's right to cross examine Claimant's treating physician.

In addition, Claimant testified at the second hearing. Claimant acknowledged he was not treated by his physician between January 2003 and December 2006. Further, Claimant testified he rode his motorcycle occasionally. However, he testified his physician told him he could ride his motorcycle because his back and leg position while riding was similar to the position needed to relieve back pain.

Employer offered a report of an independent medical examination (IME) of Claimant. The IME physician opined to a reasonable degree of medical certainty that Claimant was fully recovered. Employer's counsel also identified the date for the IME physician's pending deposition.

At the third hearing, Claimant was again unrepresented. Claimant reasserted concerns about his former attorney. Claimant also asked how he should proceed to have his 1996 pre-injury average weekly wage recalculated. Claimant argued that he asked his former attorney to raise this issue in 1996, but his former attorney did not do so. Further, Claimant asked for appointed counsel. O.R., N.T. 5/20/08, at 6.

As at the first hearing, the WCJ explained he could not offer legal advice on how to proceed. The WCJ also explained that he lacked authority to appoint counsel to represent Claimant.

Employer offered the IME physician's deposition. Claimant objected. He argued he was not present for the deposition. He acknowledged receiving

notice of the deposition, but indicated he may have been hospitalized for medical treatment unrelated to his back. He testified he did not inform Employer's counsel of his inability to attend because he did not know he needed to do so.

Claimant asserted the WCJ violated his constitutional right to face his accusers. Id. at 14. Claimant asked to have the IME physician brought into the hearing room so Claimant could ask questions.

The WCJ denied this request. The WCJ admitted the deposition into evidence. He informed Claimant that the confrontation clause did not apply in a civil context. Further, the WCJ informed Claimant he waived any challenge to the deposition, and waived the opportunity to cross examine the IME physician.

Claimant informed the WCJ he could obtain medical records from physicians he saw for his social security administration (SSA) disability claims and from doctors with whom he treated at the Veterans Administration (VA). The WCJ cautioned Claimant that without supporting testimony the records were not admissible.

Additionally, the WCJ apprised Claimant that the record lacked medical evidence from Claimant other than his treating physician's records, which were received subject to Employer's right of cross-examination. As at the first hearing, the WCJ cautioned Claimant that he would need to depose a doctor or arrange for the doctor to attend the next hearing. The WCJ made this point several times before continuing the proceedings for 60 days to give Claimant time to

obtain medical evidence.

At the fourth hearing, Claimant was again unrepresented. Also, he did not have a medical deposition or a medical witness. The WCJ closed the record.

Subsequently, the WCJ granted the termination petition. The WCJ did not make any specific credibility findings in his decision. However, the WCJ indicated in both a finding of fact and a conclusion of law that Claimant failed to offer any medical evidence in defense of the termination petition.[1] Claimant appealed.

In his petition for review filed with the Board, Claimant reasserted

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[1] The WCJ's relevant findings of fact, and the entirety of the WCJ's conclusions of law follow:

FINDINGS OF FACT

* * * *

6. Claimant never presented any medical testimony.

7. Dr. Saltzburg examined [Claimant]. The Claimant gave the doctor a history of being a laborer. He told the doctor he had no prior back injuries. The doctor also performed a physical examination. Based on his examination, the doctor testified with reasonable medical certainty that the Claimant was fully and completely recovered from his work-related injury.

CONCLUSIONS OF LAW

1. The parties are bound by the applicable portion of the Workers' Compensation Act, as amended.

2. The Claimant failed to produce any substantial or probative medical evidence in defense of the Employer's petition.

WCJ Op., 1-2.

issues of representation and cross-examination of the IME physician. Additionally, he averred, "Judge Getty told me that the Constitution of the United States means absolutely nothing to him in his jurisdiction; that I did not have the right to be represented by a competent attorney, and I absolutely did not have the right to face my accusers." O.R., Appeal from Judge's Findings of Fact and Conclusions of Law, Attach. at ¶ 4.

The Board affirmed the WCJ and addressed each of Claimant's arguments at length. Claimant now petitions this Court for review.

Claimant poses five questions for our review. First, "why did [the WCJ] deny my question when I asked him to shut off the ongoing payment of 20% attorney fees to [the former attorney] because he lost the case and he quit in the middle of a petition, so I could retain another attorney?" Petitioner's Br. at 4. Second, why did the WCJ say that the "Constitution of the United States means nothing to him in his jurisdiction" in response to a request for appointed counsel? Id. Third, why did defense counsel attempt to bribe the WCJ in an off-the-record comment? Fourth, why did the WCJ refuse to admit medical records into evidence without a supporting deposition? Id. Fifth, "Why did the WCJ grant the defendant's termination petition when I was not allowed to submit any medical evidence, and he refused to send my subpoena through to get my medical information?" Id. We address these questions in turn.[2]

[2] This Court's review is limited to determining whether the WCJ's findings of fact were supported by substantial evidence, whether an error of law was committed or whether constitutional rights were violated. Minicozzi v. Workers' Comp. Appeal Bd. (Indus. Metal Plating, Inc.), 873 A.2d 25 (Pa. Cmwlth. 2005).

II. Discussion

A. Attorney fees

Claimant argues the WCJ should have determined that Claimant's former attorney was no longer entitled to future attorney fees. Further, Claimant argues the WCJ should have restored to Claimant attorney fees that his prior counsel already received. Claimant cites no authority for his argument.

Section 442 of the Workers' Compensation Act (Act),[3] 77 P.S. §998, requires approval of all attorney fees agreements. Once approved, neither the WCJ nor the Board may reduce the period during which the attorney fee is deducted absent the participation or consent of the attorney entitled to the fees. Gingerich v. Workers' Comp. Appeal Bd. (U.S. Filter), 825 A.2d 788 (Pa. Cmwlth. 2003); Munroe v. Workmen's Comp. Appeal Bd. (H&G Distrib. Co.), 617 A.2d 88 (Pa. Cmwlth. 1992).

As to a change in the former attorney's fee, the WCJ approved the fee in a prior modification proceeding. O.R., Judge's Ex. #2. Without participation or consent of the former attorney, the WCJ lacked the authority to change the approved fee scheme. Moreover, the WCJ thoroughly addressed this concern on the record with Claimant. O.R., N.T. 8/2/07, at 9-15.

Additionally, Claimant cites no authority which allows a WCJ to restore fees that have already been paid to counsel. Accordingly, we discern neither error nor abuse of discretion in the WCJ's handling of this issue.

[3] Act of June 2, 1915, P.L. 736, as amended.

B. Constitutional issues – appointment of counsel and confrontation clause

Claimant argues the WCJ should have appointed counsel. Additionally, he contends the WCJ erred in not allowing cross-examination of the IME physician. Claimant references the United States Constitution. Presumably, his reference is to the Sixth Amendment to the United States Constitution, which provides "In all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense." U.S. CONST. amend. VI.

The Board noted there is a strong presumption against court appointed counsel in civil matters. Fraisar v. Gillis, 892 A.2d 74 (Pa. Cmwlth. 2006). We agree. Like the Board, we are unaware of any authority for a WCJ to appoint counsel for a claimant. Based on the absence of reasoned argument to the contrary, we reject the assignment of error based on failure to appoint counsel.

The cross-examination issue relates to Claimant's failure to attend the deposition of the IME physician. Parties may submit testimony by deposition. Cruz v. Workers' Comp. Appeal Bd. (Phila. Club), 728 A.2d 413 (Pa. Cmwlth. 1999); 34 Pa. Code §§131.62-131.66. Having properly scheduled and conducted a deposition, Employer was permitted to offer the deposition into evidence, and the WCJ did not err in admitting it. Cruz.

Claimant argues that he was in the hospital at the time of the deposition and that he was not aware that he needed to inform anyone that he

would be unable to attend the deposition.

Substantively, the WCJ correctly informed Claimant that the confrontation clauses of the federal and state constitutions refer to criminal cases. Procedurally, there is an approved method for preserving objections to the scheduling of a deposition. Regulations require a party objecting to a deposition to provide notice at least 10 days prior to the date of the deposition. 34 Pa. Code §131.65(a). Claimant did not follow the procedures.

As the Board noted, our Supreme Court allows an emergency treatment exception to forgive a party missing a regulatory deadline because of emergent conditions. Cook v. Unemployment Comp. Bd. of Review, 543 Pa. 381, 671 A.2d 1130 (1996). In Cook, the Supreme Court permitted a party to file an appeal after a deadline when the party missed the deadline by four days because he was hospitalized when the appeal period expired. The Court noted the party did not have his notice of determination with him in the hospital. The Court also noted the discharge summary prepared by the claimant's physician supported the claimant's averment that he was seriously ill.

The emergency treatment exception is not applicable here. Claimant presented no evidence to support his contention that he was in fact hospitalized at the time of the November 27, 2007, deposition. Rather, Claimant testified he was admitted to the hospital in August 2007, that he wore a "bag" around for three months, and "around the end of November was when they changed this surgery around." O.R., N.T. 5/20/08, at 21. Then, in response to direct inquiries from the

WCJ, he stated he was not sure if he was in the hospital on November 27, 2007. Id. This record is significantly different from the record in Cook.

Claimant acknowledged receiving some written notice of the deposition. Id. at 19. Additionally, Claimant was present and was apprised of the date of the deposition by Employer's counsel during the second hearing, when he was represented by replacement counsel. O.R., N.T. 10/11/07, at 5. This hearing occurred during the time period between Claimant's asserted August 2007, hospitalization and the November deposition. In short, Claimant had ample opportunity to seek modification of the deposition date. He failed to do so.

In sum, we conclude Claimant's constitutional issues lack merit.

C. Defense counsel bribing the WCJ

Claimant argues that prior to one of the hearings Employer's counsel stated to the WCJ that "she was an officer in the Allegheny County Bar Association and one of the things that she was going to do was to see that [the WCJ] would get more power." Petitioner's Br. at 7. He indicates that he, his replacement counsel, and the court reporter were present. Claimant writes that after hearing this comment, "I told [replacement counsel] he was not going to represent me." Id. Claimant does not further explain why he dismissed replacement counsel. Claimant identifies the comment as being off-the-record.

A party challenging the impartiality of a hearing officer must raise any objections at a hearing. Savka v. Dep't of Educ., 403 A.2d 142 (Pa. Cmwlth.

1979). Parties may not use factual averments in their briefs to supplement the record. Anam v. Workmen's Comp. Appeal Bd. (Hahnemann & INA), 537 A.2d 932 (Pa. Cmwlth. 1988).

Claimant objected at the first hearing to the WCJ hearing the case. O.R., N.T. 8/2/07, at 6-7; Judge's Ex. #1. This related to the WCJ's ruling in prior modification litigation, which was appealed. However, Claimant abandoned the objection when the WCJ granted a continuance. O.R., N.T. 8/2/07, at 7-9, 14-16.

The record lacks any objection by Claimant to the comment at issue, which allegedly occurred on the day of the second hearing. Any objection to the comment, and to the impartiality of the WCJ, needed to be made on the record, either at the second, third or fourth hearings, or in writing at some point in time before the record closed. Claimant's failure to raise this objection so that the WCJ could address it acts as a waiver.[4]

D. Medical records without a deposition.

Claimant argues he offered the medical records of his treating physician. Claimant also argues he could obtain medical records from physicians he saw for his SSA disability claims. Additionally he could obtain treatment records from VA doctors. Claimant argues that "the law states [the WCJ] is

[4] A careful review of the entire original record reveals that the WCJ thoroughly, accurately and patiently addressed all of Claimant's concerns. In several instances, the WCJ addressed the same issues at multiple hearings. Whether or not Claimant likes the responses offered by the WCJ, it is clear that Claimant was afforded ample opportunity to gather and present evidence to challenge the termination petition. Claimant chose not to do so.

supposed to accept any report from a hospital." Petitioner's Br. at 4.

Section 422(c) of the Act, 77 P.S. § 835, allows medical records to be admitted into evidence in cases involving 52 weeks or less of disability. Further, for periods of disability exceeding 52 weeks, medical records may be admitted, but only if the party against whom the report is offered does not object. In this case, the disability period in question exceeded 52 weeks. Weaver v. Workers' Comp. Appeal Bd. (State of the Art, Inc.), 808 A.2d 604 (Pa. Cmwlth. 2002).

Claimant offered his treating physician's medical records. Employer objected to admissibility of the records on hearsay grounds. The WCJ admitted the records subject to Employer's right of cross-examination, and he informed Claimant that he would need to depose his physician or bring him to testify at a hearing. Claimant did neither. Because Claimant did not afford Employer an opportunity to cross-examine his treating physician, the WCJ properly declined to rely on information in the medical records.

Claimant did not offer records from SSA or VA physicians, and he made no offer of proof as to their contents, so it is impossible to tell whether any prejudice is related to these records. Nevertheless, we discern no error from the manner in which the WCJ handled Claimant's medical records, in the absence of any supporting testimony from a physician who treated Claimant.

E. The termination decision

Lastly, in his challenge to the termination decision Claimant reiterates

previous objections. He also challenges the credibility of the IME physician. Claimant argues the IME physician saw him only 10 minutes.

Claimant also identifies various items of medical evidence he could have offered. Claimant asserts that a neurologist with whom he treated concluded he suffered nerve damage. He noted his treating physician for the workplace injury told him he could ride his motorcycle because the positions of his motorcycle seat were similar to the position Claimant would need to lie in to relieve his back pain. Claimant also writes his doctor also told him he was not an operable case, and that his condition would stay as it is.

Section 413 of the Act, 77 P.S. §772, provides that a WCJ may terminate a claimant's benefits based on a change in a claimant's disability. In a termination proceeding, the employer bears the burden of proving all of the claimant's work-related disability ceased. Westmoreland Cnty. v. Workers' Comp. Appeal Bd. (Fuller.), 942 A.2d 213 (Pa. Cmwlth. 2008). The employer's burden is a considerable one, and it never shifts to the claimant because disability is presumed to continue until proven otherwise. Dana Corp. v. Workers' Comp. Appeal Bd. (Hollywood), 706 A.2d 396 (Pa. Cmwlth. 1998).

An employer meets its burden when its medical expert unequivocally testifies it is his opinion, within a reasonable degree of medical certainty, the claimant is fully recovered, can return to work without restrictions and there are no objective medical findings that either substantiate the claims of pain or connect

them to the work injury. Udvari v. Workmen's Comp. Appeal Bd. (USAir, Inc.), 550 Pa. 319, 705 A.2d 1290 (1997).

In this case, the deposition of the IME physician meets the applicable requirements. The IME physician opined Claimant was fully recovered from the 1996 injury and was able to return to work in a full capacity with no restriction. He opined, "It was my opinion, with a reasonable degree of medical certainty, that Mr. Henry was fully recovered." O.R., N.T. 11/27/07, at 12. The IME physician noted he reached these opinions after conducting a physical examination of Claimant and after reviewing Claimant's medical records from various doctors. Id. Any complaints were related to arthritis and not the work injury. Id. at 13.

Claimant provided no admissible medical evidence in defense of the termination petition. As noted earlier, parties may not use briefs as a means of curing evidentiary deficiencies caused by their failure to offer admissible evidence before the WCJ. Anam.

Additionally, Claimant's arguments related to the IME physician raise credibility issues that are solely in the province of the WCJ as fact-finder. In workers' compensation proceedings, the WCJ is the ultimate finder of fact. Williams v. Workers' Comp. Appeal Bd. (USX Corp.-Fairless Works), 862 A.2d 137 (Pa. Cmwlth. 2004). As fact-finder, matters of credibility and evidentiary weight are within his exclusive province. Id. The WCJ is free to accept or reject the testimony of any witness, including a medical witness, in whole or in part. Id. If the WCJ's findings are supported by substantial evidence, they are binding on

appeal. Agresta v. Workers' Comp. Appeal Bd. (Borough of Mechanicsburg), 850 A.2d 890 (Pa. Cmwlth. 2004). It is irrelevant whether there is evidence to support contrary findings; the relevant inquiry is whether substantial evidence supports the WCJ's necessary findings. Hoffmaster v. Workers' Comp. Appeal Bd. (Senco Prods., Inc.), 721 A.2d 1152 (Pa. Cmwlth. 1998). A single medical expert's testimony is a reasonable basis upon which a WCJ may base a finding of fact despite conflicting evidence. Bethenergy Mines, Inc. v. Workmen's Comp. Appeal Bd. (Skirpan), 572 A.2d 838 (Pa. Cmwlth. 1990), aff'd, 531 Pa. 287, 612 A.2d 434 (1992).

In the present case, the WCJ did not specifically state that he found the IME physician's testimony credible. Like the Board, however, we are able to discern the WCJ's determinations through a fair reading of the decision. Lewistown Hosp. v. Workmen's Comp. Appeal Bd. (Kuhns), 683 A.2d 702, 706 (Pa. Cmwlth. 1996) (acknowledging that while the workers' compensation judge made "no specific credibility determinations, a fair reading of the WCJ's decision inevitably leads to the conclusion that the WCJ credited the testimony of" the claimant and claimant's doctor).

The WCJ had a very limited record to examine: the WCJ's exhibits, the deposition of the IME physician, the IME report, and Claimant's testimony. Given the finding recounting the IME physician's testimony, the lack of any findings based on Claimant's testimony, and the decision in favor of the Employer, we conclude that the WCJ accepted as credible the Employer's evidence and

rejected as not credible Claimant's testimony. We discern no error in the manner in which the Board resolved this issue.

III. Conclusion

For these reasons, we affirm the Board's order which affirmed the WCJ's order terminating workers' compensation benefits.

ROBERT SIMPSON, Judge

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v.	:	No. 1721 C.D. 2010
Workers' Compensation Appeal Board (Commercial Testing & Engineering), Respondent	:	

O R D E R

AND NOW, this 3rd day of March, 2011, the order of the Workers' Compensation Appeal Board is **AFFIRMED**.

ROBERT SIMPSON, Judge