

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Joseph Sapienza, :
Petitioner :
 :
v. : No. 1814 C.D. 2007
 : Submitted: January 11, 2008
Workers' Compensation Appeal Board :
(City of Philadelphia), :
Respondent :

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE JOSEPH F. McCLOSKEY, Senior Judge

NOT REPORTED

MEMORANDUM OPINION
BY JUDGE FRIEDMAN

FILED: April 2, 2008

Joseph Sapienza (Claimant) petitions for review of the August 31, 2007, order of the Workers' Compensation Appeal Board (WCAB) affirming the decision of workers' compensation judge Todd B. Seelig (WCJ Seelig) to deny Claimant's petition to modify/reinstate his workers' compensation benefits (Petition). We affirm.

Claimant was employed by the City of Philadelphia (Employer) as a fire fighter since 1967. On June 9, 1994, Claimant filed a claim petition alleging that, as a result of exposure to smoke, fumes and gasses while fire fighting, he was disabled by heart and lung disease under section 108(o) of the Workers'

Compensation Act (Act).¹ (Findings of Fact, No. 1.) Employer filed an answer denying Claimant’s allegations, and the matter was assigned to WCJ Nancy Goodwin (WCJ Goodwin), who granted Claimant’s claim petition by order circulated September 25, 2001, (2001 Decision). Accepting the testimony of Claimant’s medical expert, Jonathan Gelfand, M.D., over that of Employer’s medical expert, Paul Epstein, M.D., WCJ Goodwin concluded that Claimant was disabled from his job as an active fire fighter as a result of work-related “pulmonary asbestosis.”² WCJ Goodwin determined that Claimant was entitled to receive temporary total disability compensation from January 22, 1994, until July 14, 1994, at which time Claimant’s disability became partial in nature, based on his return to work for Employer as a battalion chief’s driver/aide.³ (Findings of Fact,

¹ Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. §27.1. Section 108(o) of the Act permits an award of compensation for:

[d]iseases of the heart and lungs, resulting in either temporary or permanent total or partial disability or death, after four years or more of service in fire fighting for the benefit or safety of the public, caused by extreme over-exertion in times of stress or danger or by exposure to heat, smoke, fumes or gasses, arising directly out of the employment of any such firemen.

77 P.S. §27.1(o).

² Section 108(l) of the Act permits an award of compensation for “[a]sbestosis and cancer resulting from direct contact with, handling of, or exposure to the dust of asbestos in any occupation involving such contact, handling or exposure.” 77 P.S. §27.1(l).

³ Claimant’s return to work as a battalion chief’s driver/aide did not involve any earnings loss from his fire fighter’s job with Employer. However, Claimant’s work-related condition rendered him unable to perform his concurrent employment with another employer, and Claimant did suffer an earnings loss due to the inclusion of earnings from that concurrent employment in Claimant’s average weekly wage calculation. (Findings of Fact, No. 2.)

No. 2.) The WCAB subsequently affirmed the 2001 Decision, and no further appeal was taken.

On July 13, 2002, Claimant filed his Petition, alleging that, as of June 17, 2001, his work-related condition had worsened to the point that he was no longer able to perform his light-duty position and was again totally disabled. Employer filed a timely answer denying the allegations in Claimant's Petition, and the matter was assigned to WCJ Seelig. (Findings of Fact, No. 3.)

Claimant testified in support of his Petition on August 28, 2002. Claimant stated that, as a battalion chief's driver/aide, his duties mainly consisted of driving the chief to fires and different fire stations, as well as completing office paperwork. According to Claimant, while working in the driver/aide position, his condition gradually began to change, and he began to experience shortness of breath upon exertion and anxiety. (Findings of Fact, Nos. 5-6.) Claimant explained that he left this job because he suffered a mild heart attack in April 2001 and a second "bad heart attack" in June 2001, after which his cardiologist told him not to return to work.⁴ Claimant testified that he stopped working on June 18, 2001, after his second heart attack, and is not physically able to return to his position due to a lack of strength and stamina. (Findings of Fact, Nos. 8-9.)

⁴ Claimant testified that he presently sees a cardiologist, Dr. Berger, approximately once every two to three months, and he also sees an internist, Dr. Dorshimer, once every two to three months for treatment of diabetes. Claimant stated that he takes various heart and diabetes medications prescribed by these doctors. (Findings of Fact, No. 7.) Claimant does not take any medications for treatment of his pulmonary disease. (S.R.R. at 17b, 84b.)

Claimant also presented the deposition testimony of Dr. Gelfand, a specialist in internal medicine and pulmonary disease, who had examined Claimant on December 6, 1995, and testified in connection with the 2001 Decision. Dr. Gelfand testified that he examined Claimant a second time on June 12, 2002, and his re-evaluation included a follow-up medical and occupational history from Claimant, a physical examination, new chest x-rays and new pulmonary function testing. Relating what he learned upon re-evaluation, Dr. Gelfand stated that Claimant had a history of coronary disease, with associated myocardial infarctions in April and June of 2001; further, Claimant complained that his respiratory problems, particularly shortness of breath, increased during the year prior to Dr. Gelfand's 2002 evaluation and made it difficult for Claimant to work. Dr. Gelfand's physical examination revealed no significant findings; Claimant's vital signs were normal and his lungs were clear. Asked to compare the 1995 and 2002 pulmonary function tests and x-rays, Dr. Gelfand found that Claimant's lung function had deteriorated in an amount greater than expected from aging and that Claimant had bilateral pleural thickening and increased interstitial markings bilaterally that had not been apparent at the time of the prior evaluation. However, Dr. Gelfand could not say that Claimant's pulmonary condition was the actual cause for Claimant to stop working. (Findings of Fact, Nos. 23-27.) In this regard, WCJ Seelig found:

Dr. Gelfand diagnosed Claimant with chronic obstructive lung disease and asbestosis, both of which have progressed and deteriorated. Dr. Gelfand testified that Claimant could be employed in a sedentary, dust and smoke free environment without extremes of heat or humidity. Dr. Gelfand testified that, as long as he is not exposed to fumes or smoke, Claimant was not disabled from driving. *Dr. Gelfand testified that he was unsure*

why Claimant left his job as a driver/aide: whether it was for the cardiac problems or his pulmonary condition. Dr. Gelfand stated that he would rather not speculate as to which condition, or to what extent both conditions, caused Claimant's shortness of breath in June 2001. Specifically, when questioned as to whether Claimant left his job in June 2001 because of the heart condition or the lung condition, Dr. Gelfand testified, "That's a difficult question, you're right. And on a simple level I can't say to which problem that – for which problem that determination was made. I can't say. I can say that it was because *his symptoms which could have been produced by either or both were such that he could no longer do the job.*" [S.R.R. at 50b.] Dr. Gelfand acknowledged that Claimant's heart condition could also have caused Claimant's symptoms in June 2001, of shortness of breath.

(Finding of Fact, No. 28) (emphasis added, citations omitted).

In opposition to Claimant's Petition, Employer presented the deposition testimony of William Schweizer, Philadelphia's Deputy Fire Marshal. Schweizer described the duties involved in the job of a battalion chief's driver/aide, and he explained that, in an emergency, the driver is responsible for driving the chief to the location and maintaining communications but does not leave the vehicle. (Findings of Fact, Nos. 10-13.)

Employer also offered the deposition testimony of Dr. Epstein, who is board-certified in internal medicine and pulmonary disease; he had examined Claimant in January 1996 and testified in connection with the 2001 Decision. Dr. Epstein testified that he examined Claimant again in October 2002, at which time Dr. Epstein obtained an interim history, ordered and read new chest x-rays and

interpreted new pulmonary function studies. Dr. Epstein testified that Claimant reported having additional cardiac problems since 1996, most specifically the two heart attacks in 2001. Dr. Epstein further testified that Claimant's physical examination revealed that he was overweight but that the remainder of Claimant's examination essentially was normal. With regard to the pulmonary function studies, Dr. Epstein stated that Claimant's lung capacity was normal for someone of Claimant's age and height, that a decrease in exhaled lung volume was related to Claimant's being overweight, that lung efficiency was mildly decreased due to Claimant's cigarette smoking, that speed of exhalation was normal and that the amount of oxygen in the bloodstream was normal. Dr. Epstein also noted that Claimant's chest x-rays showed no pleural or lung tissue abnormalities. According to Dr. Epstein, it did not really matter what the x-rays revealed regarding the presence or absence of asbestosis because Claimant's pulmonary function was better in 2002 than it was in 1996. (Findings of Fact, Nos. 14-19, 22.) Throughout his testimony, Dr. Epstein was asked if he agreed that Claimant had pulmonary asbestosis, an issue he had refuted in the 2001 Decision. On each occasion, Dr. Epstein responded that, although he found no evidence of asbestosis during his 2002 examination, he accepted that this diagnosis had been judicially established. (See S.R.R. at 89b-90b, 94b-95b, 98b-99b, 104b-05b, 108b-10b.) Most relevantly, WCJ Seelig found:

Dr. Epstein testified, within a degree of reasonable medical certainty, that Claimant had no evidence of any persistent work-related pulmonary abnormality. Dr. Epstein, cognizant and accepting of [WCJ] Goodwin's decision, found that Claimant had no residual pulmonary abnormality as a result of his asbestosis. Dr. Epstein found that Claimant had significant coronary artery disease that prevents him from engaging in employment,

but Claimant was not prevented from working due to his pulmonary condition. Dr. Epstein specifically testified that no pulmonary condition disables Claimant from driving a car or walking up stairs.

(Findings of Fact, No. 21) (emphasis in original, citations omitted).

WCJ Seelig found credible and persuasive Dr. Epstein's testimony that, while Claimant may be prevented from working due to his non-work-related coronary disease, he is not disabled from work due to pulmonary asbestosis, the occupational disease recognized in WCJ Goodwin's 2001 Decision. Noting Dr. Gelfand's equivocal testimony on the subject, WCJ Seelig found neither credible nor persuasive Dr. Gelfand's opinion that Claimant is disabled due to his pulmonary disease and asbestosis. However, WCJ Seelig rejected Dr. Epstein's testimony that Claimant has no pulmonary abnormality and accepted Dr. Gelfand's testimony that Claimant continues to have work-related pulmonary asbestosis. (Findings of Fact, Nos. 29, 31.)

In accordance with Dr. Epstein's testimony, as confirmed by Claimant himself, WCJ Seelig found as fact that Claimant left his job as a battalion chief's driver/aide because of his second heart attack and not because of his pulmonary condition.⁵ In making this finding, WCJ Seelig noted:

⁵ WCJ Seelig found that Claimant's testimony was not credible or persuasive to the extent he attempted to testify that his pulmonary asbestosis caused him to stop working in June 2001, noting Claimant's own testimony that he stopped working due to his non-work-related coronary disease. (Findings of Fact, No. 32.) Claimant presented no evidence from his cardiologist, or any other source, that his heart attack or coronary artery disease was related to his work activities as a fire fighter. (Findings of Fact, No. 30.)

Claimant stopped working immediately after his second heart attack in June 2001. In fact, even Claimant acknowledged in his testimony that when he went to the hospital after his second heart attack, the doctor indicated “this is it,” indicating to Claimant that he was no longer going to be cleared to return to work because of his heart condition. Claimant acknowledged that after his second heart attack, he had shortness of breath and “didn’t have any strength in comparison prior to the last heart attack.” Moreover, Dr. Gelfand could not testify to the reasons Claimant left his employment in June 2001, as Dr. Gelfand conceded that Claimant’s symptoms of shortness of breath could be related to either his heart condition or his pulmonary condition.

(Findings of Fact, No. 29.) Moreover, in making this finding, WCJ Seelig specifically found:

[t]here was no evidence provided by the Claimant that he had any trouble performing the battalion chief’s aide’s position due to pulmonary symptoms from July 1994 until his first heart attack in April 2001 (almost 7 years). There was no evidence presented by Claimant that Claimant consistently treated for his pulmonary problems while he was working the light-duty job as a battalion chief’s aide position from July 1994 until his first heart attack in April 2001. In fact, there does not appear to be any treatment from Dr. Gelfand other than in 1995 and 2002. There was no evidence that Claimant was taking specific medication for his pulmonary symptoms. There was no evidence produced by Claimant that he complained to other fellow employees about pulmonary symptoms from July 1994 until his first heart attack in April 2001.

(Findings of Fact, No. 30.)

Concluding that Claimant did not meet his burden of proving that his earning power was once again adversely affected by his occupational disease, WCJ Seelig denied Claimant's Petition. (Conclusions of Law, Nos. 2-3.) The WCAB affirmed, and Claimant now petitions this court for review of that order.⁶

Claimant first argues that Dr. Epstein's testimony is incompetent and, thus, cannot support WCJ Seelig's determination. Claimant points out that, although Dr. Epstein accepted Claimant's diagnosis as established in the 2001 Decision, and Dr. Epstein acknowledged that pulmonary asbestosis is not curable, he nevertheless opined that Claimant did not have pulmonary asbestosis in 2002 and even completed a physician's affidavit stating that Claimant had fully recovered from his work-related pulmonary asbestosis. (S.R.R. at 129b.) According to Claimant, this renders Dr. Epstein's medical opinion worthless and, therefore, WCJ Seelig erred in relying on that opinion to deny Claimant's Petition. *See State Workmen's Insurance Fund v. Workmen's Compensation Appeal Board (Wagner)*, 677 A.2d 892 (Pa. Cmwlth. 1996) (stating that an expert's opinion based on assumptions contrary to established facts in a workers' compensation proceeding is worthless). We disagree.

Based upon his physical examination, pulmonary function test and chest x-rays of Claimant, Dr. Epstein testified that, while he accepted the diagnosis of pulmonary asbestosis established by WCJ Goodwin's 2001 Decision, he found

⁶ 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.

no current evidence of pulmonary asbestosis. However, importantly, WCJ Seelig *rejected* Dr. Epstein's testimony that Claimant suffered no pulmonary abnormality.⁷ Instead, WCJ Seelig accepted and relied on *only* a portion of Dr. Epstein's testimony, specifically, Dr. Epstein's opinion that Claimant had significant coronary artery disease and that it was this heart condition, not a pulmonary abnormality, that prevented Claimant from working.⁸ This portion of Dr. Epstein's testimony is amply supported by evidence in the record, and, therefore, WCJ Seelig did not err in relying upon it in rendering his decision.

More important, however, is that Claimant overlooks the fact that he bore the burden of proof in his Petition proceeding. Although both medical experts agree that Claimant can no longer engage in employment, to succeed in this Petition, Claimant had the burden of proving that his total inability to work is due to his *work-related* injury, i.e., pulmonary asbestosis. *Dillon v. Workmen's Compensation Appeal Board (Greenwich Collieries)*, 536 Pa. 490, 640 A.2d 386 (1994). Thus, identification of Claimant's work-related injury was not at issue; rather, the issue was whether Claimant's total disability resulted from that accepted

⁷ Claimant contends that, in finding Dr. Epstein more credible than Dr. Gelfand, WCJ Seelig negated WCJ Goodwin's prior determination, which was based on testimony from these same witnesses, that Claimant's pulmonary asbestosis was caused by his employment as a fire fighter. (Claimant's brief at 16.) However, far from negating the determination made in the 2001 Decision, WCJ Seelig reconfirmed that decision by accepting Dr. Gelfand's testimony that Claimant continues to have work-related pulmonary asbestosis and rejecting Dr. Epstein's contrary testimony.

⁸ A WCJ is free to accept or reject, in whole or in part, the testimony of any witness, including medical witnesses. *Greenwich Collieries v. Workmen's Compensation Appeal Board (Buck)*, 664 A.2d 703 (Pa. Cmwlth. 1995).

work injury. Here, however, Claimant's own medical expert, Dr. Gelfand, refused to provide unequivocal testimony that Claimant's pulmonary asbestosis caused his present disability. In addition, as WCJ Seelig noted, Claimant himself testified that he left his position as a battalion chief's driver/aide because of his second heart attack. Therefore, notwithstanding any perceived problem with Dr. Epstein's testimony, Claimant simply did not present evidence sufficient to carry his burden, and he could not succeed in his Petition.⁹

Accordingly, we affirm.

ROCHELLE S. FRIEDMAN, Judge

⁹ Claimant also argues that WCJ Seelig did not issue a reasoned decision, as required by section 422(a) of the Act, 77 P.S. §834, because he did not adequately explain why he made credibility determinations different from those made by WCJ Goodwin, where the same witnesses testified in each proceeding. Claimant contends that a WCJ must provide a reason why, under identical circumstances, a physician once credible is now not credible. (Claimant's brief at 18.) However, as discussed, the issue in the prior litigation was not the same as that presented by Claimant's Petition, and, in fact, WCJ Seelig did credit that part of Dr. Gelfand's testimony that was believed by WCJ Goodwin in the 2001 Decision. Finally, we find absolutely no basis for Claimant's argument because WCJ Seelig provided numerous reasons to explain his credibility determinations.

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Petitioner	:	
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	:	
Workers' Compensation Appeal Board	:	
(City of Philadelphia),	:	
Respondent	:	

ORDER

AND NOW, this 2nd day of April, 2008, the order of the Workers' Compensation Appeal Board, dated August 31, 2007, is hereby affirmed.

ROCHELLE S. FRIEDMAN, Judge