IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Flying J Country Market, Petitioner	:	
v.	:	No. 1842 C.D. 2007
	:	Submitted: December 21, 2007
Workers' Compensation Appeal Board (Hartzell), Respondent	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE FRIEDMAN FILED: February 12, 2008

Flying J Country Market (Employer) petitions for review of the August 31, 2007, order of the Workers' Compensation Appeal Board (WCAB), which affirmed the decision of a workers' compensation judge (WCJ) denying Employer's petition to terminate Tammy Hartzell's (Claimant) workers' compensation benefits. We affirm.

On May 4, 1999, Claimant sustained work-related injuries to her low back, hip and right leg while working as a waitress for Employer, and she was awarded workers' compensation benefits pursuant to an order dated February 7, 2001. Claimant's wage loss benefits subsequently were suspended when she returned to work for a different employer at no loss of wages. In March 2006, while two Utilization Review (UR) petitions were pending, Employer filed a termination petition, alleging that, as of January 24, 2006, Claimant had fully

recovered from her work-related injuries. Claimant filed an answer denying the allegations, and hearings were held before a WCJ.

In support of its termination petition, Employer presented the deposition testimony of John S. Rychak, M.D., who examined Claimant on January 24, 2006. Dr. Rychak testified that, as a part of the examination, he obtained a medical history from Claimant and reviewed her medical records, which revealed that Claimant had a prior history of low back pain and hip problems and had received treatment from David E. Tanner, D.O, Claimant's family physician. Dr. Rychak testified that a November 18, 2005, MRI showed only degenerative changes in Claimant's back at the L1-2 level and that there were no objective findings to support Claimant's subjective complaints of pain. Finally, based on his examination of Claimant and her medical records, Dr. Rychak opined that Claimant had recovered from any work-related injuries and that Claimant could return to work without any restrictions related to that work injury. (Findings of Fact, Nos. 27-31.)

Claimant testified that, on May 4, 1999, she slipped and fell while working and injured her low back and hips. Claimant stated that she began treatment with Dr. Tanner immediately, and, in November 1999, she also sought treatment from Jay J. Cho, M.D., a pain specialist. Claimant testified that monthly treatments from Dr. Cho and Dr. Tanner help reduce the pain from her work-related injuries and enable her to perform her daily activities, such as going to work and doing housework, but that she is not fully recovered from her work-related injuries and continues to experience constant pain in her low back and

hips.[1] Finally, Claimant testified that her current job allows her to change positions as needed, but she could not return to her pre-injury job as a waitress because it requires too much walking, standing and running around. (Findings of Fact, Nos. 7-11; 8/2/2006 N.T. at 8-14.)

Claimant also presented a December 16, 2005, narrative report and a June 27, 2006, note by Dr. Cho. In his December 16, 2005, report, Dr. Cho stated that, on November 26, 1999, he began treating Claimant for low back, leg and hip pain related to her May 4, 1999, work injuries. Dr. Cho indicated that he sees Claimant monthly and, over the years, has prescribed numerous treatments for Claimant's injuries, including physical therapy, therapeutic exercise and medications, such as muscle relaxants, a TENS unit and anti-inflammatory and pain medications. Dr. Cho diagnosed Claimant with low back pain with degenerative disc disease, and he indicated that Claimant would require ongoing care to adjust her medications and to ensure that she does not develop further complications in her back. Dr. Cho indicated that Claimant currently is suffering back, leg and hip pain as a result of the May 4, 1999, work injuries to her low back, hip and leg.[2] (R.R. at 76a.) In his June 27, 2006, note, Dr. Cho stated that he

[1] Claimant listed the medications she currently uses to control her low back and hip pain and symptoms, including: (1) a TENS unit two to three times a week for her pain; (2) Soma, a muscle relaxer; (3) Methadone for her pain; (4) Ritalin, which counteracts the sleepiness caused by the Methadone; (5) Ibuprofen, an anti-inflammatory; and (6) Percocet, a pain reliever.

[2] Dr. Cho opined that, due to her ongoing pain, Claimant only was capable of performing a sedentary job that would allow her to change positions as needed. She also needed to use correct body mechanics, pace herself and take her pain medication regularly. (R.R. at 75a.)

continues to treat Claimant monthly for her work-related low back problems and that Claimant is not completely recovered.[3] (Findings of Fact, Nos. 18-25.)

Citing Claimant's demeanor, the WCJ found Claimant's testimony credible and accepted it as fact. He also accepted Dr. Cho's and Dr. Tanner's opinions as credible and persuasive. The WCJ rejected Dr. Rychak's opinion that Claimant is fully recovered from her work injuries and can return to work without any restrictions, noting that Drs. Tanner and Cho have a long-standing relationship with Claimant, and, as Claimant's treating physicians, are more familiar with her condition than Dr. Rychak, who examined Claimant only once. (Findings of Fact, Nos. 12, 17, 26, 31.) The WCJ concluded that Employer failed to present credible evidence to satisfy its burden of proving that Claimant has fully recovered from her work injury, and he denied Employer's termination petition. Employer appealed to the WCAB, which affirmed, and Employer now petitions this court for review.[4]

Employer first argues that the WCAB erred in affirming the denial of its termination petition because, contrary to the conclusion drawn by the WCJ, Employer satisfied its burden of proof. We disagree.

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[3] Claimant also offered a January 27, 2005, narrative report by Dr. Tanner. Dr. Tanner's report indicated that he treats Claimant for ruptured discs at L4-5 and L5-S1 and lumbar degenerative disc disease with osteopathic manipulative therapy and various medications. According to Dr. Tanner, these treatments allow Claimant to perform her daily activities. (Findings of Fact, Nos. 13-14.)

[4] Our scope of review is limited to determining whether constitutional rights were violated, whether the adjudication is in accordance with the 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.

In a termination proceeding, the employer bears the burden of proving that all disability related to a compensable injury has ceased. *Udvari v. Workmen's Compensation Appeal Board (USAir, Inc.)*, 550 Pa. 319, 705 A.2d 1290 (1997). This burden is considerable, for disability is presumed to continue until demonstrated otherwise. *Campbell v. Workers' Compensation Appeal Board (Antietam Valley Animal Hospital)*, 705 A.2d 503 (Pa. Cmwlth. 1998). In essence, to prevail in a termination petition, the employer must disprove the claimant's existing, continuing right to benefits for the injury already established to be work-related. *Id.* The claimant has no burden to prove anything. *Id*. In a case where, as here, a claimant complains of continued pain, the employer's burden is met when the employer's medical expert *credibly* and unequivocally testifies that it is his opinion, within a reasonable degree of medical certainty, that the claimant is fully recovered, can return to work without restrictions and that there are no objective medical findings which either substantiate the complaints of pain or connect them to the work injury. *Udvari.*

Here, Employer sought to satisfy its burden of proof by introducing Dr. Rychak's testimony, which, if believed, would have supported a termination of benefits. However, the WCJ rejected that testimony as neither credible nor persuasive and, instead, accepted Claimant's testimony and the opinions of Dr. Cho and Dr. Tanner. The WCJ is the ultimate fact finder and is entitled to accept or reject the testimony of any witness, including medical witnesses, in whole or in part. *Williams v. Workers' Compensation Appeal Board (USX Corporation-Fairless Works)*, 862 A.2d 137 (Pa. Cmwlth. 2004). The WCJ's authority over questions of credibility, conflicting evidence and evidentiary weight is

unquestioned, and, on appeal, we are bound by the WCJ's credibility and evidentiary determinations. *Id.*

Nevertheless, Employer asserts that the WCJ abused his discretion in crediting the opinions of Claimant's medical experts over those of Dr. Rychak. According to Employer, the reports of Drs. Cho and Tanner are legally incompetent in that the medical opinions expressed therein were not based upon the complete medical record, diagnostic tests or objective evidence, did not take into account Claimant's prior back complaints and were not based on the accepted injuries to Claimant's low back, hip and right leg. We disagree.

Competency, when applied to medical evidence, is merely a question of whether a witness's opinion is sufficiently definite and unequivocal to render it admissible, *Pryor v. Workers' Compensation Appeal Board (Colin Service Systems)*, 923 A.2d 1197 (Pa. Cmwlth. 2006), and Employer does not assert that Dr. Cho's opinions are indefinite or equivocal.[5] Moreover, to the extent that Employer challenges the competency of these opinions because they are based on an incomplete medical record, did not cite diagnostic studies or consider Claimant's previous complaints of pain, these challenges go to the weight given to the expert testimony, *id.*, a determination within the sole discretion of the WCJ.

[5] Here, Dr. Cho's reports definitively and unequivocally indicate that Claimant: continues to experience pain as a result of the work-related injuries she sustained to her low back, hip and leg, the injuries for which Claimant was awarded benefits; has not recovered from those injuries; and still requires treatment for those injuries.

Williams.[6] Because the WCJ, in a proper exercise of his discretion as fact finder, rejected Dr. Rychak's testimony, Employer could not sustain its burden of establishing that Claimant is fully recovered or that her current disability is not work-related.

Moreover, in making its argument, Employer ignores Claimant's own testimony that she continues to suffer pain related to her work injury. This testimony alone, if credited, as it was here, is sufficient to defeat Employer's termination petition. *Campbell* (holding that a claimant's testimony regarding incapacitating pain, if accepted, can support a finding of continued disability).

We could end our analysis here, but for the sake of completeness, we will address the remaining three issues raised by Employer. Employer argues that the WCAB erred in affirming the denial of its termination petition because the WCJ's finding that Claimant is *not* fully recovered is not supported by substantial evidence. However, the WCJ made no such finding but, instead, found Employer's evidence not credible, and, therefore, insufficient to support Employer's burden of proof. Employer further asserts that the WCJ erred in relying on his prior decision on Claimant's UR petitions. We observe that the WCJ "relied" on that decision

[6] To the extent that Employer asserts that the WCJ capriciously disregarded Dr. Rychak's testimony, we disagree. Capricious disregard of evidence occurs only when the fact finder deliberately ignores relevant, competent evidence. *Williams*. However, once the fact finder has *considered* that evidence, the fact finder remains free to accept or reject it on credibility grounds. *Campbell*. Here, it is evident that the WCJ considered Dr. Rychak's testimony but rejected that testimony on credibility grounds. Such an express consideration and rejection, by definition, is not capricious disregard. *Williams*.

only to summarize the reports of Claimant's medical experts, and, because those reports were entered into evidence in the termination proceeding, we reject this assertion. Employer's final argument is that the WCAB should have remanded the matter for the submission of a Bureau document that provides an exact description of Claimant's work injuries. Because Employer did not raise that issue on appeal to the WCAB, it is waived on appeal. Pa. R.A.P. 1551(a).

Accordingly, we affirm.

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ROCHELLE S. FRIEDMAN, Judge

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O R D E R

AND NOW, this 12th day of February, 2008, the order of the Workers' Compensation Appeal Board, dated August 31, 2007, is hereby affirmed.

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ROCHELLE S. FRIEDMAN, Judge