IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PPL,	:	
Petitioner	:	
	:	
v.	:	No. 1862 C.D. 2010
	:	Submitted: June 10, 2011
Workers' Compensation	:	
Appeal Board (Campbell),	:	
Respondent	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE LEAVITT FILED: October 14, 2011

PPL (Employer) petitions for review of an adjudication of the Workers' Compensation Appeal Board (Board) granting Jeffrey Campbell (Claimant) partial disability benefits. In doing so, the Board affirmed the decision of the Workers' Compensation Judge (WCJ) that Employer did not prove its case that medical benefits should be terminated and that Claimant proved his entitlement to partial disability benefits. In its appeal, Employer asserts that the Board erred because Claimant did not present unequivocal medical evidence and because the WCJ incorrectly calculated Claimant's lost overtime hours. We affirm.

At the time of the relevant work injury, Claimant had been working four years for Employer as a full-time nuclear plant operator at an hourly wage of $37.04. He worked overtime every week. On April 1, 2007, he hit his head on a

metal support beam. Employer issued a medical-only notice of compensation payable, acknowledging a cervical sprain/strain injury. On October 11, 2007, Claimant filed a claim petition alleging pain in his neck, back and arms; headaches; cervical disc displacement; and compression of the brain. On December 12, 2007, Employer filed a petition to terminate benefits as of September 12, 2007, based on an independent medical examination (IME) conducted by William R. Prebola, Jr., M.D. The WCJ conducted a hearing on both petitions.

At the hearing, Claimant testified about his injury and subsequent medical treatment. He explained that he was doing surveillance in a confined space when he was startled by a co-worker. This caused him to stand up quickly and hit his head on a metal beam. Immediately, he felt pain in his neck that radiated down his left arm. He saw a doctor approximately ten days later, by which point Claimant was experiencing pain, headaches and difficulty turning his head. Claimant's doctor, Michael C. Marino, D.O., directed Claimant to work no more than eight hours a day and not to lift more than 25 pounds. Dr. Marino ordered Claimant to undergo physical therapy and referred him to a neurologist. On April 1, 2008, Dr. John Carlson, a neurologist, diagnosed Claimant with multiple sclerosis (MS).

Claimant testified that prior to the work-related injury he had sustained cervical disc herniations for which he had been receiving injections since 2005. These disc problems did not render him unable to do his regular job or to work overtime. In February, 2007, he underwent a physical examination at work, which he passed.

Employer accommodated the restrictions ordered by Dr. Marino, and this reduced Claimant's overtime income. Before the injury, Claimant worked approximately 15 to 20 hours of overtime per week and received "either time and a half or double time, just depending." Reproduced Record at 49a (R.R. __). Claimant testified that he was able to do his job within the restrictions imposed by Dr. Marino.

Claimant offered the deposition testimony of Dr. Marino, who is board certified in internal medicine. He first saw Claimant on April 18, 2007, and found Claimant to be honest about his symptoms, which included neck and left arm pain as well as numbness and weakness in the left arm and hand. Dr. Marino noted that prior to the work-related injury, Claimant had been receiving injections for his cervical disc herniation. However, Claimant's doctors had not restricted him from work. Dr. Marino reviewed an MRI done prior to his work injury and one done after the work injury, as well as a radiological report comparing the two MRIs. Dr. Marino found a worsening of the disc herniation between the first and second MRI, as did the radiologist. Dr. Marino opined that Claimant's pre-existing disc herniation had been exacerbated by the work-related injury.

To treat the work injury, Dr. Marino prescribed anti-inflammatories, epidural injections, electrical stimulation and physical therapy. Fusion surgery of the neck was discussed with Claimant, in the event the more conservative treatments would prove not successful. Dr. Marino imposed work restrictions relating to pushing, pulling, bending and lifting and limited Claimant to an 8-hour work day. Dr. Marino stated that Claimant must continue to follow these restrictions.

In January, 2008, an MRI was done on Claimant's brain, and it detected a lesion. Dr. Marino stated that a diagnosis had not yet been made, but the lesion indicated MS. Dr. Marino agreed that MS can cause pain, numbness or tingling in the upper and lower extremities. However, Dr. Marino reiterated that he believed Claimant's symptoms had been caused by the work injury.

Claimant then offered his cross-examination of Dr. Prebola, Employer's IME physician, into evidence. Dr. Prebola is board certified in pain medicine and physical medicine and rehabilitation.

On September 12, 2007, Dr. Prebola did an IME of Claimant that lasted 55 minutes. Dr. Prebola found Claimant to be cooperative. Dr. Prebola agreed that Claimant suffered a work-related injury when he bumped his head on a steel beam. However, he did not believe that this injury aggravated Claimant's pre-existing cervical disc herniation. He also opined that the MRI taken after the work injury did not show a worsening of the cervical disc herniation. When asked to review the radiology report that indicated a progression of the disc herniation after the work injury, Dr. Prebola reiterated his belief that Claimant was fully recovered. He based this opinion on his examination of Claimant and Claimant's medical records.

In response to Claimant's evidence, Employer presented the remainder of Dr. Prebola's deposition testimony. Dr. Prebola stated that Claimant reported that he first developed neck pain three years before the April 2007 injury when he fell in Employer's parking lot. Claimant's 2006 MRI showed discogenic abnormalities. Another MRI was done after the April 2007 incident. Dr. Prebola stated that the two MRIs showed similar findings and that Claimant's symptoms after the 2007 injury were similar to those suffered before the work injury. Dr.

Prebola concluded that Claimant was fully recovered from his work injury and able to return to work without restrictions. He opined that Claimant did suffer a head contusion, from which he had fully recovered. Dr. Prebola opined that Claimant's continuing disc pathology resulted from the 2004 injury and was not aggravated by the 2007 work injury.

The WCJ found Claimant and his medical expert, Dr. Marino, to be credible. The WCJ rejected the testimony of Dr. Prebola as not supported by the objective evidence of record, *i.e.*, the MRI taken before the work-related injury and the MRI taken after the work-related injury. The WCJ determined that an objective reading of the second MRI established an aggravation of Claimant's pre-injury cervical disc herniation.

The WCJ then reviewed Claimant's overtime compensation prior to the injury and calculated Claimant's 2007 overtime pay to be $823.48 per week. Because Claimant was found partially disabled and unable to work overtime after April 1, 2007, the WCJ awarded Claimant partial disability benefits to cover his lost overtime wages. The WCJ denied Employer's termination petition.

Employer appealed. The Board rejected Employer's challenge to the WCJ's factual finding that Claimant and Dr. Marino were credible, noting that such credibility findings are not subject to Board review. The Board rejected Employer's next claim that Dr. Marino's testimony was equivocal on causation of Claimant's pain. The Board explained that medical testimony is unequivocal where the expert testifies that there is a relationship between the work incident and the resulting injury, and Dr. Marino did so testify. The Board reviewed all of Dr. Marino's deposition testimony and concluded that his opinion was not equivocal.

Employer petitioned for this Court's review and raises two issues.[1] Employer argues that Claimant did not meet his burden of proving a work injury through competent factual and medical evidence. Employer next argues that the WCJ incorrectly calculated the average weekly overtime wages and failed to consider Employer's evidence of wages.

Generally, it is the claimant's burden to demonstrate that he has sustained a compensable injury and that the disability continues. *Somerset Welding and Steel v. Workmen's Compensation Appeal Board (Lee)*, 650 A.2d 114, 119 (Pa. Cmwlth. 1994). Where a claimant alleges an aggravation of a pre-existing condition, he must prove that the aggravation occurred in the course of employment and resulted in a disability. *Povanda v. Workmen's Compensation Appeal Board (Giant Eagle Markets, Inc.)*, 605 A.2d 478, 481 (Pa. Cmwlth. 1992).

Here, Employer argues that under the principles established in *Newcomer v. Workmen's Compensation Appeal Board (Ward Trucking Corp.)*, 547 Pa. 639, 692 A.2d 1062 (1997) and *Chik-Fil-A v. Workers' Compensation Appeal Board (Mollick)*, 792 A.2d 678 (Pa. Cmwlth. 2002), Claimant failed to meet his burden. Employer contends that Dr. Marino lacked knowledge of Claimant's medical history prior to the incident that caused the alleged aggravation. Claimant counters that Dr. Marino reviewed Claimant's medical

[1] Our scope of review of an order of the Board is limited to determining whether the necessary findings of fact are supported by substantial evidence, whether constitutional rights were violated or an error of law was committed. *City of Philadelphia v. Workers' Compensation Appeal Board (Brown)*, 830 A.2d 649, 653 n.2 (Pa. Cmwlth. 2003). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Mrs. Smith's Frozen Foods Company v. Workmen's Compensation Appeal Board (Clouser)*, 539 A.2d 11, 14 (Pa. Cmwlth. 1988).

records and took a history from Claimant. He also notes that the WCJ found Claimant to be "extremely credible." R.R. 324a.

In *Newcomer*, the claimant's total disability benefits had been reduced to partial disability. Thereafter, the claimant sought a reinstatement of total disability. He claimed to have developed a new shoulder injury that was related to his earlier work injury. Claimant's doctor opined that the claimant's shoulder pain was caused by the earlier work injury. The doctor admitted, however, that he had not reviewed the claimant's prior medical records and did not know the extent of the claimant's earlier injury. The WCJ reinstated benefits, and the Board reversed, finding that the doctor's testimony was incompetent because it was based on a false medical history.

The Supreme Court held that the testimony of claimant's doctor was incompetent because the claimant had provided his doctor with a description of the prior work injury that was patently different from the description set forth in his medical records. A medical expert's opinion must be supported by the facts of record. If not, the doctor's testimony will be deemed incompetent.

In *Chik-Fil-A*, the claimant alleged that she sustained a lower back injury at work. Two years earlier, she had fallen on ice while working for another employer and had sustained a back injury. The claimant admitted that she had suffered back pain for over ten years and had treated with several chiropractors over the years. The claimant's medical expert testified that he had released the claimant to light duty work but when her subjective complaints of pain persisted, he concluded that she was totally disabled. When asked about the claimant's history, he stated that he was aware of two prior injuries to the claimant's back, but

acknowledged that he had not reviewed her prior medical records. On the basis of the medical evidence, the WCJ awarded benefits, and the Board affirmed.

This Court reversed. The claimant's medical expert based his opinion upon the claimant's incomplete and inaccurate medical history, and he did not review the claimant's prior medical records. Accordingly, we held that his opinion was incompetent as to causation, citing *Newcomer*.

Here, Employer argues that Dr. Marino's testimony is incompetent because he relied on Claimant's medical history and did not examine all of Claimant's medical records. *Newcomer* does not stand for the proposition that a physician cannot rely on the medical history as given by a claimant. We explained in *EMI Company v. Workers' Compensation Appeal Board (Rathman)*, 738 A.2d 33, 36 (Pa. Cmwlth. 1999), that *Newcomer* did not so hold. Rather, *Newcomer* established that the medical opinion cannot be "based on a *false medical history* provided by the claimant." *Id*. (emphasis in original).

Employer's evidence has not established that there was anything false or inaccurate in the history presented by Claimant to his doctors. Further, Dr. Marino did examine a cervical MRI conducted in 2006 as well as a cervical MRI taken after the work-related injury. The second MRI and its accompanying report established that Claimant's disc herniation had progressed. Dr. Marino found that this progression was responsible for the pain Claimant was experiencing and was caused by Claimant's April 2007 work injury. Dr. Marino admitted that he had not examined all of Claimant's prior medical records. However, a review of medical records need not be exhaustive: "'the fact that a medical expert does not have all of a claimant's medical records goes to the weight given the expert's testimony, not its competency.'" *Huddy v. Workers' Compensation Appeal Board (U.S. Air),*

905 A.2d 589, 593 n.9 (Pa. Cmwlth. 2006) (quoting *Marriott Corporation v. Workers' Compensation Appeal Board (Knechtel)*, 837 A.2d 623, 631 n.10 (Pa. Cmwlth. 2003)). In sum, the Board did not err in accepting Dr. Marino's opinion.[2]

Employer next argues that the WCJ incorrectly calculated Claimant's average weekly overtime wage benefits. Employer has not provided its own calculations or identified the error. Instead, Employer simply asserts that the WCJ's opinion is not well-reasoned because it did not use the wage records offered into evidence by Employer.

The WCJ did not ignore Employer's wage records. In calculating Claimant's rate of overtime pay the WCJ specifically cited to "Employer's Exhibit Number Two." R.R. 340a. This exhibit of Employer, marked "ER2" in the certified record, reports Claimant's reported daily wages from March 29, 2006, through March 31, 2007.

More importantly, Employer appears not to have preserved this issue. Employer's appeal to the Board alleged errors in Findings of Fact 8-12, 14-21 and 26, but it did not assert any error in the calculation of Claimant's average weekly overtime benefits. The only mention of overtime in its appeal to the Board is a statement that the WCJ erred because "there is no evidence that Claimant missed overtime because of the work related injury." Certified Record, Employer's Notice

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[2] Throughout its brief, Employer makes mention of Claimant's MS diagnosis and argues that Dr. Marino made no effort to reconcile this diagnosis with the alleged work-related injury. There is no mention of the MS diagnosis by the WCJ or the Board. However, Employer did not raise the MS issue in its appeal to the Board. Issues not raised before the Board are waived on appeal to this Court. *Riley v. Workers' Compensation Appeal Board (DPW/Norristown State Hospital)*, 997 A.2d 382, 388 (Pa. Cmwlth. 2010). Thus, this issue is waived. At the time Dr. Marino's deposition testimony was taken Claimant was being evaluated for MS, but a diagnosis had not yet been made. In any case, Dr. Marino testified that regardless of the potential MS diagnosis, he believed Claimant's aggravation caused his work restrictions and loss of wages.

of Appeal Form. This is not specific enough to raise a challenge to the calculation of the amount awarded. Employer must list "its claims of error with some degree of specificity." *Riley v. Workers' Compensation Appeal Board (DPW/Norristown State Hospital)*, 997 A.2d 382, 387 (Pa. Cmwlth. 2010). Further,

> Section 111.11(a)(2) of the WCAB Rules provides that the Notice of Appeal filed with the Board shall contain "[a] statement of the particular grounds upon which the appeal is based, including reference to the specific findings of fact which are challenged and the errors of the law which are alleged. General allegations that do not specifically bring to the attention of the Board the issues to be decided are insufficient for appeal purposes." 34 Pa. Code § 111.11(a)(2). An issue is waived unless it is preserved at every stage of the proceedings.

Id. at 387-88. In short, Employer's challenge to the WCJ's calculation of partial disability has not been preserved.

For these reasons, we affirm the Board's order.

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MARY HANNAH LEAVITT, Judge

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O R D E R

AND NOW, this 14th day of October, 2011, the order of the Workers' Compensation Appeal Board, dated August 12, 2010, is hereby AFFIRMED.

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MARY HANNAH LEAVITT, Judge