

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Forrest Lockley,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 2014 C.D. 2007
	:	Submitted: May 2, 2008
Workers' Compensation	:	
Appeal Board (City of	:	
Philadelphia),	:	
Respondent	:	

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JAMES GARDNER COLINS, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE LEAVITT

FILED: June 17, 2008

Forrest Lockley (Claimant) petitions for review of an adjudication of the Workers' Compensation Appeal Board (Board) affirming the decision of the Workers' Compensation Judge (WCJ) to grant the termination petition of the City of Philadelphia (Employer). The issue before this Court is whether the testimony of Employer's medical expert was equivocal. Finding that it was not equivocal, we will affirm the Board's adjudication.

Claimant was employed as a laborer by Employer in its street and sanitation department. On August 22, 1997, Claimant suffered an injury when he slipped off a sanitation truck, striking his lower left leg against a side step. As a result, Claimant began receiving temporary total disability benefits pursuant to a notice of compensation payable describing the work injury as a "left lower leg contusion." Reproduced Record at 1 (R.R. ____). On July 12, 2004, Employer

filed a termination petition, asserting that Claimant had fully recovered from his work-related injury as of May 26, 2004. Claimant denied the allegations in the termination petition.

At the hearing before the WCJ, Claimant testified that he continues to have knee pain and that his left knee gives out when he walks distances. Claimant testified that his treating physician, Lawrence A. Foster, D.O., referred Claimant for surgery to relieve the pressure caused by a hematoma. Claimant testified that Dr. Thomas Gain, a board-certified general surgeon, performed surgery on September 10, 1997, and prescribed an ankle brace for a condition called foot drop.¹ Claimant stated that he has continued to wear the ankle brace to help prevent his knee from giving out. Claimant testified that between 1997 and 2001 he sought treatment three times for his left leg. In 2001, Claimant suffered a stroke that caused general weakness on his left side. Additionally, in 2005, Claimant suffered a series of mini-strokes.

Employer introduced the deposition testimony of Zachary B. Friedenber, M.D., a board-certified orthopedic surgeon. Dr. Friedenber testified that he examined Claimant on May 26, 2004. Dr. Friedenber reviewed Claimant's medical history, records, and reports in conjunction with the evaluation. Based on the medical history and records, Dr. Friedenber diagnosed Claimant with a work-related injury in the nature of a contusion and ecchymosis² of the left

¹ Foot drop is defined as “[p]artial or total inability to dorsiflex the foot, as a consequence of which the toes drag on the ground during walking unless a steppage gait is used; most often ultimately due to weakness of the dorsiflexor muscles of the foot (especially the tibialis anterior), but has many causes, including disorders of the central nervous system, motor unit, tendons, and bones.” STEDMAN’S MEDICAL DICTIONARY at 698 (27th ed. 2000).

² Ecchymosis is a purplish patch caused by extravasation of blood into the skin. STEDMAN’S MEDICAL DICTIONARY at 561 (27th ed. 2000).

knee and left leg. Dr. Friedenberg opined that Claimant had fully recovered from those injuries as of the date of his examination and stated that no further medical treatment was necessary.

Dr. Friedenberg noted that Claimant's left calf was atrophied and that Claimant was not able to fully straighten out his left knee. However, Dr. Friedenberg attributed these symptoms to Claimant's stroke and to his continued use of the ankle brace, against the advice of Claimant's own treating physician. Dr. Friedenberg did impose work restrictions on Claimant; however, those restrictions were related solely to Claimant's stroke. Dr. Friedenberg testified that, although Claimant's post-operative report contained an initial diagnosis of a foot drop, there was no clinical evidence of a foot drop and, moreover, said diagnosis was inconsistent with the mechanism of Claimant's injury. Finally, Dr. Friedenberg opined that Claimant did not need to wear the ankle brace for the work-related injury.

Employer also introduced the December 11, 1997, discharge summary from Allegheny University Hospital-Hahnemann. In this record, Claimant's treating physician, Dr. Foster, discharged Claimant, opining that Claimant had fully recovered from the contusion and hematoma of the left leg. Dr. Foster concluded that, based on his personal observations and on information gained from a neurological consultation, Claimant did not have foot drop. Dr. Foster added that Claimant continued to wear the ankle brace despite being told that he did not have foot drop or need to wear a brace. Moreover, Dr. Foster questioned how a brace designed to prevent foot drop could prevent Claimant's knee from giving out.

Claimant introduced the testimony of Vincent E. Baldino, D.O., board-certified in family medicine. Dr. Baldino first examined Claimant on June

17, 2004, upon the recommendation of Claimant's counsel. Dr. Baldino testified that Claimant complained of left knee and left hip pain; however, he had not recently been under the care of any physician for these symptoms. Dr. Baldino found that Claimant had atrophy of the left calf, which he stated was probably caused by the continued use of the ankle brace but could have been caused by Claimant's stroke. Dr. Baldino diagnosed Claimant as having persistent pain and left lower extremity atrophy. Dr. Baldino opined that Claimant's work injury was the direct cause of these conditions.

The WCJ issued a decision finding that Employer's evidence established that Claimant had fully recovered from the work-related injury. The WCJ found Employer's medical expert, Dr. Friedenber, to be more credible and persuasive than Claimant's medical expert, Dr. Baldino. The WCJ further found Claimant's testimony on the issue of on-going disability not to be credible. Accordingly, the WCJ granted Employer's termination petition. Claimant appealed to the Board, which affirmed. Claimant now petitions for review.³

Claimant raises one issue for this Court to review: whether Employer's medical expert, Dr. Friedenber, was equivocal. Claimant argues that Dr. Friedenber's testimony was equivocal because he testified that the atrophy in Claimant's left lower leg was due to the stroke and to the use of the ankle brace. Because the brace was prescribed for Claimant's work injury, Claimant argues that his leg atrophy relates to the work injury.

³ This Court's review of an order of the Board is limited to determining whether the necessary findings of fact were supported by substantial evidence, constitutional rights were violated, or errors of law were committed. *Borough of Heidelberg v. Workers' Compensation Appeal Board (Selva)*, 894 A.2d 861, 863 n.3 (Pa. Cmwlth. 2006).

In a termination proceeding, the employer bears the burden of proving that the claimant's disability has ceased or that any current disabilities are unrelated to the work injury. *Gillyard v. Workers' Compensation Appeal Board (Pennsylvania Liquor Control Board)*, 865 A.2d 991, 995 (Pa. Cmwlth. 2005). This burden can be met by the introduction of unequivocal medical evidence of the claimant's full recovery from a work injury. *Koszowski v. Workmen's Compensation Appeal Board (Greyhound Lines, Inc.)*, 595 A.2d 697, 699 (Pa. Cmwlth. 1991). Where a claimant complains of continued symptoms, the employer must produce a medical expert who

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 claims of pain or connect them to the work injury.

Udvari v. Workmen's Compensation Appeal Board (USAir, Inc.), 550 Pa. 319, 327, 705 A.2d 1290, 1293 (1997).

Medical testimony is incompetent if it is equivocal. *Kurtz v. Workers' Compensation Appeal Board (Waynesburg College)*, 794 A.2d 443, 449 (Pa. Cmwlth. 2002). A determination of whether medical testimony is equivocal is a question of law fully reviewable by this Court. *Id.* To decide whether testimony of a medical witness is equivocal, all the expert's testimony must be reviewed, taken as a whole, and a final decision should not rest upon a few words taken out of context of the entire testimony. *Johnson v. Workers' Compensation Appeal Board (Abington Memorial Hospital)*, 816 A.2d 1262, 1268 (Pa. Cmwlth. 2003). Medical expert testimony is equivocal if it is based only upon possibilities, is vague, and leaves doubt. *Kurtz*, 794 A.2d at 449.

With respect to Dr. Friedenbergs testimony, Claimant argues as follows. The brace was initially prescribed after his 1997 surgery for his work-related injury, and he used the ankle brace in good faith. Because using the brace made his injury worse, the resulting atrophy is causally connected to the original event. Claimant argues that Dr. Friedenbergs testimony was equivocal on the extent of his recovery because he testified that the atrophy in Claimants left lower leg was related not only to the stroke but also to the use of the ankle brace.

Claimant is correct that an employee who in good faith seeks medical treatment for a work injury is entitled to disability benefits if the medical treatment results in a new or additional injury. See *Moltzen v. Workmens Compensation Appeal Board (Rochester Manor)*, 646 A.2d 748, 750 (Pa. Cmwlth. 1994). However, Dr. Friedenbergs testimony indicates that the use of the ankle brace was not prescribed for treatment of the work-related injury. Moreover, its use was continued against medical advice given to Claimant.

Dr. Friedenbergs testimony acknowledged that Claimant presented with some atrophy of his left calf, which he attributed to both Claimants stroke and use of the ankle brace.⁴ On cross-examination, Dr. Friedenbergs testimony was as follows:

⁴ Claimant asserts that Dr. Friedenbergs testimony first testified that the atrophy was caused by Claimants stroke and, later, recanted that opinion by testifying that the atrophy was attributable to both the stroke and use of the ankle brace. Claimants argument lacks merit. Although Dr. Friedenbergs testimony indicated that the atrophy was “certainly related to his stroke ... [b]ecause he walked in a favoring gait,” he did not state that the atrophy was attributable solely to Claimants stroke. R.R. at 177. Rather, when taken as a whole, Dr. Friedenbergs testimony indicates that he attributed the atrophy to Claimants “failure to walk on it normally,” which Dr. Friedenbergs testimony opined was caused by both the stroke and use of the ankle brace. R.R. 176. Indeed, despite the attempt on cross-examination to get Dr. Friedenbergs testimony to concede that the atrophy in Claimants left calf was not related to the stroke but only to the use of the ankle brace, Dr. Friedenbergs testimony testified that “I think it was both.” R.R. 189.

Q. Now, you stated that the atrophy in the calf was caused by a combination of using the brace and perhaps the stroke; is that right?

A. Right.

Q. And so whether or not he rightly or wrongly used that brace, whether it's against medical advice or not to use the brace, at least part of his atrophy was caused by that; is that correct? By the use of the brace?

A. Yes.

Q. And the brace was prescribed for a condition caused by the work-related event; is that a fair statement?

A. Not quite.

Q. Why is that?

A. Because originally they thought he had a paralysis and they renigged [sic] on that diagnosis and felt he did not have a paralysis. Meantime, they had given him a brace and told him he didn't need it anymore. But he continued to wear it.

R.R. at 192-193.

Dr. Friedenberg explained that Claimant's records indicated that after his surgery, Claimant was prescribed the ankle brace for the treatment of foot drop. Dr. Friedenberg testified that Claimant's work injury did not cause foot drop because the injury was not near the nerve that controls the muscles that create a foot drop injury.⁵ R.R. at 205. Indeed, at the time of Claimant's post-surgery discharge, three physicians, two neurologists and Claimant's treating physician all found no evidence of foot drop. Accordingly, Claimant's treating physician, Dr. Foster, told Claimant not to wear the ankle brace.

⁵ In fact, Dr. Friedenberg testified that, even if Claimant had foot drop, the ankle brace was the exact opposite of what Claimant would have needed because it was not preventing downward pressure. R.R. 188-189.

In summary, when taken as a whole, Dr. Friedenbergs testimony established that the atrophy in Claimants left calf was not attributable to the work injury but, rather, was the result of Claimants stroke and continued use of the ankle brace for over seven years against medical advice. Contrary to Claimants position, Dr. Friedenbergs did not recant his opinion that the atrophy in Claimants leg was unrelated to the work injury. Indeed, Dr. Friedenbergs repeatedly testified that Claimant had fully recovered from his work injury and was able to return without restrictions that are causally related to the work injury.⁶ The WCJ found Dr. Friedenbergs to be credible and persuasive.⁷

In short, Employers medical evidence was not equivocal; therefore, substantial evidence supported the WCJs finding that Claimant had fully recovered from his work-related injury as of May 26, 2004. Accordingly, the decision of the Board is affirmed.

MARY HANNAH LEAVITT, Judge

⁶ Dr. Friedenbergs acknowledged that Claimant would be unable to return to his pre-injury employment without restrictions related to Claimants stroke.

⁷ The WCJ has exclusive province over questions of credibility and evidentiary weight and is free to accept or reject, in whole or in part, the testimony of any witnesses, including medical witnesses. *Jordan v. Workers' Compensation Appeal Board (Philadelphia Newspapers, Inc.)*, 921 A.2d 27, 37 (Pa. Cmwlth. 2007). This Court will not disturb the finding of a WCJ when it is supported by substantial evidence. *Id.*

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ORDER

AND NOW, this 17th day of June, 2008, the order of the Workers' Compensation Appeal Board, dated September 28, 2007, in the above-captioned matter is hereby AFFIRMED.

MARY HANNAH LEAVITT, Judge