

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Walter T. Currie,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 2079 C.D. 2007
	:	
Workers' Compensation Appeal Board	:	Submitted: February 8, 2008
(Wheatland Tube Co.),	:	
	:	
Respondent	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER**

FILED: May 7, 2008

Walter T. Currie (Claimant) petitions for review of an order of the Workers' Compensation Appeal Board (Board) affirming the Decision and Order of the Workers' Compensation Judge (WCJ) denying Currie's Reinstatement Petition and granting the Termination Petition of Wheatland Tube Company (Employer). Claimant argues that the WCJ's decision was not supported by substantial evidence and that the WCJ capriciously disregarded relevant evidence.

The WCJ's decision includes the following findings of fact:

3. Claimant testified that he was working in the testing department when he injured his low back on February 1, 1994. Claimant was struck in the back by some pipes. Claimant currently treats with Dr. Wassil. Claimant stated that he has sustained intervening injuries to his back since the work injury of 1994. Claimant has not worked since June of 2001.

On cross-examination, claimant acknowledged that he worked until May 24, 1995, following his February 1, 1994, work injury. Claimant was off work on May 25, 1995 and returned to work on June 12, 1995. Claimant went off work again on October 19, 1995, and returned to work on March 10, 1996. Claimant stopped working in June of 2001 because of non-work related heart problems. Claimant last worked in June of 2001 as a pipe counter. This job was sedentary in nature.

Claimant further testified that he also treats with Chiropractor Panin.

Claimant further testified that he did not think he could perform sedentary duty because of his pain levels.

4. Victor J. Thomas, M.D., a Board-certified orthopedic surgeon, testified on behalf of the employer on November 29, 2005. Dr. Thomas evaluated claimant at the request of the employer initially on July 24, 2001, and more recently on May 3, 2005. Dr. Thomas took a history, reviewed records and conducted a physical examination. Dr. Thomas felt that claimant had degenerative changes which were shown on diagnostic studies which would be consistent with his complaints of pain. Claimant also had evidence of degenerative disk disease in the cervical spine as well as his knees. Dr. Thomas did not think that these degenerative changes were causally related to the February 1, 1994, work related injury. Dr. Thomas thought that claimant had fully recovered from his lumbar strain and lumbar herniated disk as of the date of evaluation.

On cross-examination, Dr. Thomas stated that it was common for there to be findings of degenerative changes in both the cervical and lumbar spine.

5. John G. Wassil, III, M.D., a Board-certified physiatrist, testified on behalf of the claimant on April 7, 2006. Dr. Wassil first saw claimant on July 17, 2001. Dr. Wassil has continued treating claimant since that time. Dr. Wassil treats claimant for a variety of complaints which lead [sic] him to consider a diagnosis of fibromyalgia. Dr. Wassil eventually diagnosed claimant with lumbar disk displacement which he said means disk herniation. Dr. Wassil also diagnosed lumbar degenerative disk disease and lumbar degenerative joint disease with myofascial pain syndrome. Dr. Wassil related these diagnoses to the February 1, 1994, work injury. Dr. Wassil thought that claimant's symptoms progressed between the fall of 2004 and January of 2005. Dr. Wassil did not think that claimant had recovered from his work injury. Dr. Wassil did not think that claimant was capable of performing any work activities.

On cross-examination, Dr. Wassil admitted that he had not reviewed any of the records of any of claimant's prior treating physicians, although he received a couple of records from Dr. Multari [Claimant's primary care physician]. Dr. Wassil was aware that claimant has heart problems but did not know that claimant had been removed from work because of those heart problems.

6. The employer has sustained its burden of proof that claimant was fully recovered from his February 1, 1994, work related injury as of May 8, 2005. The opinions expressed by Dr. Thomas are found to be more reliable and persuasive than the contrary opinions of Dr. Wassil. Dr. Thomas credibly opined that claimant had recovered from his herniated lumbar disk as well as the lumbar strain and that claimant's ongoing symptoms were due to non-work related degenerative conditions which claimant has in various areas of his body, not only at the site of the work injury. The opinions of Dr. Wassil are less credible than those of Dr. Thomas inasmuch as Dr. Wassil initially diagnosed claimant with fibromyalgia and acknowledged that when he first saw claimant there was no evidence of ongoing lumbar strain or disk herniation. The claimant testified in a general, credible manner and his testimony is insufficient to resolve the medical issues raised in both of the petitions. Dr. Thomas credibly opined that claimant has a variety of non-work related medical conditions and Dr. Wassil credibly opined the same. Dr. Wassil was unable to explain satisfactorily how claimant's work injury may have recurred after the strain and herniated disk had resolved by the summer of 2001.

7. Claimant has failed to sustain his burden of proof that his work related injury worsened which resulted in a loss of earning capacity. Claimant was disabled totally due to non-work related conditions as of 2001. Claimant's work related injury has had no impact on claimant's ongoing non-work related disability. Regardless of that, claimant failed to sustain his burden of proof that his work injury continues or that it has worsened. The opinions of Dr. Thomas have been found more persuasive than those of Dr. Wassil which results in a finding that claimant had fully recovered as of May 8, 2005. There was no change or worsening of his work related injury on or after that date.

(WCJ Decision, Findings of Fact (FOF) ¶¶ 3-7.) The WCJ concluded that Employer had met its burden of proving that Claimant had fully recovered from his work-related injury and that Claimant had failed to meet his burden of proving that his work-related injury had worsened. (WCJ Decision, Conclusions of Law ¶¶ 1-2.)

Claimant appealed to the Board, arguing that the WCJ's findings were not supported by substantial evidence and that the WCJ had failed to take into account workplace falls Claimant had suffered in May 1996 and March 1997. The Board affirmed the WCJ's decision and Order. Claimant now appeals to this Court.

In his brief to this Court, Claimant asks us broadly to determine whether the WCJ erred and to give no deference to the WCJ's determinations. This is not the standard of review in a workers' compensation case. When considering a petition for review of an order of the Board, our review is limited to determining "whether there has been a violation of constitutional rights, whether an error of law has been committed, or whether all necessary findings of fact are supported by substantial evidence." Gregory v. Workers' Compensation Appeal Board (Narvon Builders), 926 A.2d 564, 566 n.5 (Pa. Cmwlth. 2007). The WCJ, not this Court, has the duty of

determining which evidence to credit and how much weight to accord such evidence. Verizon Pennsylvania, Inc. v. Workers' Compensation Appeal Board (Alston), 900 A.2d 440, 443 n.5 (Pa. Cmwlth. 2006). The WCJ “may accept or reject the testimony of any witness, in whole or in part.” Id. In his brief, Claimant also asks us to consider approximately 19 exhibits attached to his brief. In determining whether the factual findings of the WCJ are supported by substantial evidence, we are limited to the evidence in the certified record, and may not consider additional documents which do not appear in the certified record. Budd Co. v. Workers' Compensation Appeal Board (Kan), 858 A.2d 170, 182 (Pa. Cmwlth. 2004); Novak v. Workmen's Compensation Appeal Board, 430 A.2d 703, 706 n.3 (Pa. Cmwlth. 1981). Having established the proper standard of review in this matter, we now turn to Claimant's arguments.

Claimant appears to argue that the WCJ lacked substantial evidence to find that Claimant was fully recovered from his lumbar strain and herniated disc. “An employer seeking to terminate workers' compensation benefits bears the burden of proving either that the employee's disability has ceased, or that any current disability arises from a cause unrelated to the employee's work injury.” Campbell v. Workers' Compensation Appeal Board (Antietam Valley Animal Hospital), 705 A.2d 503, 506-07 (Pa. Cmwlth. 1998). An employer may meet this burden with unequivocal medical testimony that the claimant has fully recovered from his work-related injury, or that the claimant's existing disability is not work-related. Indian Creek Supply v. Workers' Compensation Appeal Board (Anderson), 729 A.2d 157, 160 (Pa. Cmwlth. 1999). An expert's medical testimony is unequivocal when, considered as a whole, it expresses that expert's professional opinion that a medical fact exists or does not exist. Martin v. Workers' Compensation Appeal Board (Red Rose Transit Auth.), 783 A.2d

384, 389 (Pa. Cmwlth. 2001). Taken as a whole, Dr. Thomas's testimony, which the WCJ credited, constitutes unequivocal evidence that Claimant is fully recovered from his lumbar strain and herniated disc, and that any remaining disability is not related to his February 1, 1994 work injury. Specifically, Dr. Thomas stated that Claimant "had recovered from his work injury, including any lumbosacral strain or lumbar disc herniation," and that Claimant "did have degenerative changes of both his low back and his hips, but those are not related to his work injury." (Thomas Dep. at 14-15.) Dr. Thomas also testified that:

any lumbar strain and lumbar herniated disc that he had sustained as a result of his work injury of February 1st, 1994 was resolved, and that his current complaints in multiple areas, including his neck, low back and knees could be explained by his degenerative changes. However, these were not a result of his work injury.

....

... It was my opinion that he had maintained his full recovery.

(Thomas Dep. at 21-22.) Dr. Thomas also stated that, even with Claimant's non-work-related disabilities, he was still capable of performing his job as a pipe counter. (Thomas Dep. at 23-24.)

Claimant argues that the WCJ should not have relied on Dr. Thomas's testimony because Dr. Thomas did not have Claimant's x-rays and other diagnostic test results, and because Dr. Thomas's testimony was contradicted by Dr. Wassif's testimony. In fact, Dr. Thomas did review Claimant's x-rays and MRI scans in forming his opinion. (Thomas Dep. at 11-12.) Regarding the conflict between the experts' opinions, we note that "the testimony of a single medical expert is a reasonable basis upon which a WCJ may arrive at a finding of fact *despite conflicting evidence*."

Robertshaw Controls Co. v. Workers' Compensation Appeal Board (Raffensperger), 710 A.2d 1232, 1234 (Pa. Cmwlth. 1998) (emphasis added). As discussed above, it is within the WCJ's discretion whether to credit a witness. Here, the WCJ specifically credited the testimony of Dr. Thomas over that of Dr. Wassil. Because Dr. Thomas's testimony was unequivocal, we may not overturn the WCJ's decision on this point.

Claimant also argues that the WCJ failed to take into account Claimant's other work-related injuries, which Claimant says occurred on May 16, 1996 and March 4, 1997, and which Claimant argues exacerbated his 1994 work injury. Claimant attaches to his appellate brief a number of documents involving treatment for or references to these injuries. However, these documents are not in the certified record in this matter and, as discussed above, this Court's review is limited to evidence in the certified record. By examining the comments regarding these injuries that do appear in the certified record, it seems that these injuries are the subjects of other, separate claims and were not presented to the WCJ for consideration. (See Wassil Dep. at 95 ('There are some complicating factors here because [Claimant]'s off work for other reasons as well, or for other claims independent of this claim?').) While Claimant testified about these additional injuries, Claimant's medical expert did not testify that these injuries exacerbated Claimant's original 1994 work-related injury. Therefore, even assuming the argument that these injuries exacerbated Claimant's condition was properly before the WCJ, Claimant failed to adduce sufficient medical evidence for the WCJ to find that these injuries did, in fact, exacerbate Claimant's condition.

Finally, Claimant argues that the WCJ and the Board erred in finding that he was disabled from work due to his heart condition rather than his 1994 work-related back injury. We disagree with Claimant's characterization of the decisions by the

WCJ and the Board. The WCJ based his conclusions regarding whether the parties satisfied their relative burdens of proof on the testimony of Dr. Thomas and Dr. Wassil. (FOF ¶¶ 6-7.) While the WCJ acknowledged that Claimant himself testified that he was out of work due to his heart condition, the WCJ did not cite this as a basis for his decision.¹ (FOF ¶¶ 3, 6-7; see also WCJ Hr’g Tr. at 18, September 1, 2005.) Likewise, the Board, while it acknowledged in its summary of Claimant’s testimony that Claimant testified he was out of work due to his heart problems, did not cite this as support for its conclusion that termination of Claimant’s benefits was proper.

For these reasons we find no error in the decision of the Board and, therefore, affirm.

RENÉE COHN JUBELIRER, Judge

¹ The WCJ did state that “Claimant stopped working in June of 2001 because of non-work related heart problems,” and “Claimant was disabled totally due to non-work related conditions as of 2001.” (FOF ¶¶ 3, 7.) However, the WCJ appears to have based his decision regarding whether Claimant’s benefits should be terminated wholly on Dr. Thomas’s testimony. (See FOF ¶ 6.) Additionally, the WCJ terminated Claimant’s benefits as of 2005, shortly after Claimant was last examined by Dr. Thomas, not as of 2001. (COL ¶ 1.) Moreover, even had the WCJ relied on Claimant’s non-work-related heart condition in terminating Claimant’s benefits, Claimant himself admitted that he was out of work due to his heart condition. (WCJ Hr’g Tr. at 18, September 1, 2005.)

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(Wheatland Tube Co.),	:
	:
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ORDER

NOW, May 7, 2008, the order of the Workers' Compensation Appeal Board in the above-captioned matter is hereby **AFFIRMED**.

RENÉE COHN JUBELIRER, Judge