

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Pennsylvania Liquor Control Board,	:	
Petitioner	:	
	:	
v.	:	No. 2266 C.D. 2008
	:	Submitted: March 13, 2009
Workers' Compensation Appeal	:	
Board (Martinez),	:	
Respondent	:	

BEFORE: HONORABLE DAN PELLEGRINI, Judge
 HONORABLE ROBERT SIMPSON, Judge
 HONORABLE JOSEPH F. McCLOSKEY, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE SIMPSON**

FILED: May 28, 2009

The Pennsylvania Liquor Control Board (Employer) petitions for review from an order of the Workers' Compensation Appeal Board (Board) that denied its modification/suspension petition and granted Irma Martinez's (Claimant) review petition, which sought to amend a notice of compensation payable (NCP). Employer argues the Workers' Compensation Judge (WCJ) erred in: failing to issue a reasoned decision; making unsupported factual findings; and, relying on equivocal medical testimony in amending the NCP. We affirm as modified.

In 2003, Claimant sustained a work injury when a case of wine she was unloading slipped backwards, turning its weight on her hand and arm while forcefully rotating her elbow back in a flexed position. WCJ Op., Finding of Fact

(F.F.) No. 12. Employer issued an NCP accepting liability for a “right long finger (3rd MCP) strain.” Reproduced Record (R.R.) at 1a.

In 2006, Employer filed a modification/suspension petition based on its physician’s reports releasing Claimant to return to work and the results of a labor market survey indicating work was available within Claimant’s restrictions. Claimant subsequently filed a review petition seeking to expand the scope of the NCP to include “hyper extension injury, right second and third digit at MCP joint with possible ligamentous injury or tear, chronic epicondylitis right elbow, spigelian hernia and depression.” R.R. at 12a. The petitions were consolidated; hearings ensued before a WCJ.

In support of its modification/suspension petition, Employer presented the deposition testimony of Dr. Ronald Krasnick, M.D., who is board-certified in orthopedic surgery (Employer’s Physician). Based on his physical examination of Claimant and a review of her medical records, Employer’s Physician opined Claimant was capable of returning to light duty work.

In addition, Employer presented the deposition testimony of Dr. Gladys Fenichel, M.D., who is a board-certified psychiatrist (Employer’s Psychiatrist). Based on her examination of Claimant, Employer’s Psychiatrist opined Claimant did not suffer from a psychiatric disorder caused by her work injury.

In response, Claimant presented the deposition testimony of Dr. John Eshleman, D.O., a board-eligible family practitioner (Claimant's Physician). Claimant's Physician diagnosed a hyperextension injury to the right, second and third digits at the MCP joint with possible ligamentous injury or tear, chronic epicondylitis right elbow, spigelian hernia and depression. Of significance, he also diagnosed "the possibility" of reflex sympathetic dystrophy (RSD) in the right upper extremity. Claimant's Physician opined all of his diagnoses were caused by Claimant's work injury and Claimant's conditions rendered her unable to return to work.

Ultimately, the WCJ granted Claimant's review petition and denied Employer's suspension/modification petition. Crediting Claimant's Physician's testimony, the WCJ amended the NCP consistent with his diagnoses. Specifically, the WCJ amended the NCP as set forth in findings of fact 14 and 19. There, the WCJ summarized Claimant's Physician's diagnoses as follows:

14. [Claimant's Physician's] diagnoses included the following: hyperextension injury to the right third digit of the metacarpophalangeal joint with possible ligamentous injury or tear; chronic epicondylitis right elbow; rectus tear versus hernia right abdominal region; and depression. He opined that all four diagnoses were caused by the January 9, 2003 work injury and, in his opinion, Claimant was not employable, particularly due to the right upper extremity injury, which he felt would keep Claimant from being employed in any type of productive work environment. [Claimant's Physician] testified that it was probable that the diagnoses also included right hand synovitis, which was diagnosed by Employer's [P]hysician.

* * * *

19. As of his last examination of Claimant, [Claimant's Physician] modified his diagnoses slightly to include the following: he included the second digit phalangeal joint as part of his first diagnosis; he stated the right elbow injury was resolving; he included a rectus hernia right abdominal region, also known as a Spigelian hernia, under repair as of September 20, 2006; he included depression; and he included the possibility of [RSD] in the right upper extremity. In his opinion, all of his diagnoses continued to be the result of the work injury of January 9, 2003.

F.F. Nos. 14, 19.¹

On Employer's appeal, the Board affirmed the WCJ's grant of Claimant's review petition and the denial of Employer's modification/suspension petition. Employer now appeals to this Court.

On appeal,² Employer argues the WCJ erred in determining Claimant met her burden of proof on the review petition and the WCJ failed to issue a reasoned decision. Employer's arguments to this Court address only the grant of Claimant's review petition; Employer does not challenge the denial of its modification/suspension petition.

¹ The WCJ also awarded Claimant unreasonable contest attorney's fees. On Employer's appeal, however, the Board reversed the award of attorney's fees. In her brief to this Court, Claimant does not challenge the Board's decision to reverse the WCJ's grant of attorney's fees. Thus, this issue is waived. Bingnear v. Workers' Comp. Appeal Bd. (City of Chester), 960 A.2d 890 (Pa. Cmwlth. 2008).

² Our review is limited to determining whether the WCJ's findings of fact were supported by substantial evidence, whether an error of law was committed or whether constitutional rights were violated. Griffiths v. Workers' Comp. Appeal Bd. (Seven Stars Farm, Inc.), 596 Pa. 317, 943 A.2d 242 (2008).

A claimant seeking to review the description of an injury and to include additional injuries must file a review petition within three years of the date of the most recent payment of compensation. Westinghouse Elec. Corp/CBS v. Workers' Comp. Appeal Bd. (Korach), 584 Pa. 411, 883 A.2d 579 (2005). A review petition is appropriate where the claimant seeks to amend an NCP to reflect further injuries and functions as a claim petition. Id. When such a petition is filed the WCJ must treat the respective burdens of the parties as if the review petition were an original claim petition. Id.

I.

Employer first argues the WCJ failed to issue a reasoned decision because she did not adequately explain her bases for crediting Claimant's Physician testimony over that of Employer's Physician and Employer's Psychiatrist with regard to the diagnosis of Claimant's depression. We disagree.

The "reasoned decision" requirement is found in Section 422(a) of the Workers' Compensation Act (Act),³ which states, in relevant part:

All parties to an adjudicatory proceeding are entitled to a reasoned decision containing findings of fact and conclusions of law based upon the evidence as a whole which clearly and concisely states and explains the rationale for the decisions so that all can determine why and how a particular result was reached. The [WCJ] shall specify the evidence upon which the [WCJ] relies and state the reasons for accepting it in conformity with this section. When faced with conflicting evidence, the [WCJ] must adequately explain the reasons for rejecting

³ Act of June 2, 1915, P.L. 736, as amended, 77 P.S. §834.

or discrediting competent evidence. ... The adjudication shall provide the basis for meaningful appellate review.

77 P.S. §834.

In Daniels v. Workers' Compensation Appeal Board (Tristate Transportation), 574 Pa. 61, 828 A.2d 1043 (2003), our Supreme Court considered the proper construction of Section 422(a)'s reasoned decision requirement in a case with conflicting evidence. In considering what constitutes an adequate explanation for resolving conflicting testimony, the Court distinguished between live testimony and deposition testimony. Specifically, the Court stated:

[I]n a case where the fact-finder has had the advantage of seeing the witnesses testify and assessing their demeanor, a mere conclusion as to which witness was deemed credible, in the absence of some special circumstance, could be sufficient to render the decision adequately "reasoned."

Id. at 77, 828 A.2d at 1053. Where witnesses provide conflicting testimony by way of deposition, however, a WCJ must articulate some objective basis for her credibility determination. Id.

However, the reasoned decision requirement does not divest the WCJ of substantial discretion in making credibility determinations, even on the basis of deposition testimony. Instead, "[w]e must view the reasoning as a whole and overturn the credibility determination only if it is arbitrary and capricious or so fundamentally dependent on a misapprehension of material facts, or so otherwise flawed, as to render it irrational." Casne v. Workers' Comp. Appeal Bd. (Stat Couriers, Inc.), 962 A.2d 14, 19 (Pa. Cmwlth. 2008).

Here, the WCJ complied with the reasoned decision requirement by providing several objective reasons for her credibility determinations concerning the experts' conflicting opinions regarding Claimant's depression.

More specifically, Employer's Psychiatrist testified Claimant did not suffer from depression, noting that during her examination, Claimant was neatly groomed, wore makeup and had a friendly and engaging manner. Employer's Psychiatrist opined there was nothing in Claimant's presentation to suggest a clinical diagnosis of depression. F.F. No. 38. However, during cross-examination, Employer's Psychiatrist admitted that chronic pain and long-term unemployment can cause depression. F.F. No. 39. Ultimately, the WCJ discredited the testimony of Employer's Psychiatrist because her opinions did not account for Claimant's ongoing suffering from a permanent work injury, chronic pain, and three years of unemployment. F.F. No. 40.

Employer also attacks the WCJ's stated reasons for her credibility determinations. Employer cites Higgins v. Workers' Compensation Appeal Board (City of Philadelphia), 854 A.2d 1002 (Pa. Cmwlth. 2004) for the proposition that where a WCJ's basis for crediting one witness over another is not supported by the record, the WCJ's decision is not reasoned. Employer asserts the WCJ's stated reason for crediting Claimant's Physician over Employer's Psychiatrist is not supported by the record.

In particular, Employer attacks the finding that Claimant's Physician was more credible because he considered Claimant's permanent injury, chronic

pain and extended unemployment, while Employer's Psychiatrist did not. See F.F. No. 40. Employer asserts that Claimant's Physician did not identify permanent injury or extended unemployment as a basis for his diagnosis of depression. Employer quotes one line of Claimant's Physician's testimony where he states the basis for Claimant's depression as she is "discouraged about her condition and her future." See R.R. at 248; Petitioner's Br. at 24.

Employer's out-of-context quotation of Claimant's Physician's testimony fails to take into account the totality of his testimony. Claimant's Physician also testified:

[Claimant] has not returned to work since [the work injury], and remains in pain in her right hand, right elbow, and right abdominal area. She is becoming increasingly depressed over her situation, and her activities of daily living are adversely affected by her inability to use her right hand and upper extremity without pain.

R.R. at 236a-37a. This credited testimony clearly reveals the WCJ's credibility determination is supported by the record. As such, Employer's reliance on Higgins is misplaced.

The WCJ also complied with the reasoned decision requirement by articulating objective bases for crediting Claimant's witnesses. More particularly, the WCJ credited Claimant's Physician's testimony that Claimant's depression was caused by sadness and hopelessness regarding her permanently disabling work injury. F.F. No. 17. Also, the WCJ credited Claimant's testimony that she is

depressed as a result of long-term unemployment and chronic pain caused by her work injury. F.F. No. 51.

In short, the WCJ's explanations are adequate to provide the basis for meaningful appellate review and do not constitute an abuse of discretion. Therefore, Employer's argument fails.⁴

II.

Employer next contends the WCJ's finding that Claimant sustained her burden of proving the NCP should be amended to include depression is not supported by substantial, competent evidence. We disagree.

When reviewing witness testimony, determinations as to weight and credibility are solely for the WCJ as fact-finder. Cittrich v. Workmen's Comp. Appeal Bd. (Laurel Living Ctr.), 688 A.2d 1258 (Pa. Cmwlth. 1997). A WCJ may accept or reject the testimony of any witness, including a medical witness, in whole or in part. Lombardo v. Workers' Comp. Appeal Bd. (Topps Co., Inc.), 698 A.2d 1378 (Pa. Cmwlth. 1997). If supported by substantial evidence, the WCJ's findings are conclusive on appeal, despite the existence of contrary evidence. Grabish v. Workmen's Comp. Appeal Bd. (Trueform Founds., Inc.), 453 A.2d 710 (Pa. Cmwlth. 1982).

⁴ We also reject Employer's contention that the WCJ failed to render a reasoned decision on the ground that she failed to define and describe Claimant's injuries in her order amending the NCP. The WCJ amended the NCP incorporating by reference two findings of fact listing Claimant's physician's diagnoses. Thus, the WCJ's decision clearly enumerates Claimant's newly-included diagnoses and presents no obstacle to effective appellate review.

Here, Employer emphasizes the opinions and testimony of its two medical experts, both of whom opined Claimant does not suffer from depression. On the other hand, Employer notes, Claimant's Physician is a family doctor with limited experience in treating patients with psychiatric disorders. As such, Employer asserts the WCJ erred in crediting the testimony and opinions of Claimant's Physician over those of Employer's Psychiatrist. We disagree.

Generally, a physician is competent to testify in specialized areas of medicine even though that physician is not a specialist in, or certified in, those fields. Marriott Corp. v. Workers' Comp. Appeal Bd. (Knechtel), 837 A.2d 623 (Pa. Cmwlth. 2003). The level of qualification goes to the expert witness's credibility, a matter to be resolved by the fact-finder. Grube v. Workers' Comp. Appeal Bd. (Consol. Specialties), 667 A.2d 1224 (Pa. Cmwlth. 1995).

Here, Claimant's Physician, who treats approximately 10% of his patients for psychiatric disorders, is competent to testify regarding Claimant's depression. Marriott Corp. The WCJ's decision to credit the testimony of Claimant's Physician over that of Employer's Psychiatrist goes to the weight of the evidence, not its competency. Grube. The WCJ, as fact-finder, resolved credibility determinations in favor of Claimant's Physician, and we may not disturb this determination. Id. In short, the WCJ's finding that Claimant suffers from depression caused by her work injury is supported by the testimony of Claimant's Physician. See R.R. at 248a.

III.

As a final issue, Employer argues the WCJ erred in amending the NCP to include the “possibility of RSD” because it is based on an equivocal diagnosis. F.F. No. 19. We agree.

Whether medical testimony is unequivocal is a question of law fully reviewable on appeal. Terek v. Workmen’s Comp. Appeal Bd. (Somerset Welding & Steel, Inc.), 542 Pa. 453, 668 A.2d 131 (1995). Unequivocal medical testimony is testimony that in the opinion of the medical expert, the claimant’s condition, in fact, resulted from the work experience. Johnson v. Workers’ Comp. Appeal Bd. (Abington Mem’l Hosp.), 816 A.2d 1262 (Pa. Cmwlth. 2003). In determining whether medical testimony is unequivocal, we must view the medical testimony as a whole, recognizing questions of credibility and the resolution of conflicting testimony of two or more witnesses are within the province of the WCJ. Id.

A medical expert’s testimony “will be found to be equivocal if it is based only upon possibilities, is vague, and leaves doubt.” Kurtz v. Workers’ Comp. Appeal Bd. (Waynesburg Coll.), 794 A.2d 443, 449 (Pa. Cmwlth. 2002). “[T]he requirement that medical evidence be unequivocal cannot reasonably be viewed as a demand for perfect testimony from members of the medical profession.” Children’s Hosp. of Phila. v. Workmen’s Comp. Appeal Bd. (Washington), 547 A.2d 870, 872 (Pa. Cmwlth. 1988).

Here, Claimant’s Physician described his diagnosis as “a possibility of [RSD] in the right upper extremity.” R.R. at 252a. This testimony refers only to

the possibility of this condition; therefore, this opinion is equivocal and cannot support the WCJ's amendment of the NCP in this respect.

Accordingly, we modify the WCJ's order by deleting the diagnosis of possible RSD. We affirm the Board's order in all other respects.

ROBERT SIMPSON, Judge

