

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Donna DiMezza,	:
Petitioner	:
	:
v.	: No. 2349 C.D. 2011
	: Submitted: May 18, 2012
Workers' Compensation Appeal	:
Board (Prison Health Care Services),	:
Respondent	:

BEFORE: HONORABLE DAN PELLEGRINI, President Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE JAMES GARDNER COLINS, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
PRESIDENT JUDGE PELLEGRINI

FILED: June 4, 2012

Donna DiMezza (Claimant) appeals from an order of the Workers' Compensation Appeal Board (Board) denying her Petition for Rehearing/Reconsideration (Rehearing Petition) and affirming the Workers' Compensation Judge's (WCJ) grant of Prison Health Care Services' (Employer) Petition for Termination of Compensation (Termination Petition). For the reasons that follow, we affirm the Board.

On September 22, 2007, Claimant was injured when she slipped and fell on a wet floor while working as a nurse for Employer. Employer issued a

Notice of Compensation Payable describing the injury as a hip contusion¹ and providing for workers' compensation benefits.

On June 24, 2008, Employer filed a Termination Petition alleging that Claimant had fully recovered from her work-related injury. Before the WCJ, Claimant testified that her job required her to walk several miles per day, push a medication cart weighing at least 150 pounds and lift patients. She stated that she suffered from pain and spasms in her lower back and hip as a result of the work injury, which impaired her ability to stand or sit for long periods of time. Claimant testified that when she went to be examined by Employer's medical expert, she suffered severe spasms and pain while walking through the parking lot. Claimant also testified that she had suffered an injury to her back several years earlier that required her to undergo a laminectomy and fusion.

Claimant also submitted the deposition testimony of Sofia Lam, M.D. (Dr. Lam), a board-certified anesthesiologist with a subspecialty in interventional pain management. Dr. Lam examined Claimant on April 28, 2008, and testified that Claimant complained of significant lower back pain and pain radiating to both lower extremities at the time of the examination. She testified that the physical examination revealed a significant decrease in Claimant's range of motion of the lumbosacral spine; irritation of the nerve root from the lumbar spine to the leg; significant involvement in the posterior compartment of the lumbosacral spine;

¹ The parties later stipulated at the December 9, 2008 WCJ hearing that Claimant also sustained a lower back injury as a result of the accident.

tenderness over the lumbar facet and sacroiliac joints; and no symptom magnification. Dr. Lam further testified that her review of a prior MRI revealed significant central disc bulge and prominent narrowing at L5-S1. Dr. Lam testified that she examined Claimant again on November 20, 2008, at which time she diagnosed Claimant with lumbar radiculopathy due to disc bulge at L5-S1 level producing radicular component in the right L5-S1 nerve root distribution; mechanical low back symptomatology with facet arthropathy; aggravation of post-laminectomy syndrome with trauma to the scar tissue; and myofascial pain symptomatology. Based on those findings, Dr. Lam opined that Claimant was incapable of returning to her position as a nurse with Employer. She further opined that Claimant's symptoms were the result of the work-related injury Claimant sustained on September 22, 2007.

In support of its Termination Petition, Employer submitted the deposition testimony of Richard Jay Levenberg, M.D. (Dr. Levenberg), a board-certified orthopedic surgeon. Dr. Levenberg testified that he examined Claimant on March 27, 2008, and the examination revealed a well-healed, midline lumbar wound with no evidence of infection, cerebrospinal fluid leak, or spasm in the spine. He testified that Claimant displayed multiple Waddell's signs, which are instances in which Claimant reported pain in response to certain maneuvers despite the lack of an anatomical or physiological explanation for the pain. Dr. Levenberg explained that the presence of several Waddell's signs can be interpreted as symptom exaggeration, and that he interpreted them as such during his examination of Claimant. He testified that he also reviewed Claimant's prior X-ray, MRI and EMG studies, which revealed a history of a prior fusion and mild

degenerative changes but no evidence of any acute injury or nerve root compression. He stated that he diagnosed Claimant with “a sprain and strain and contusion of the spine” (September 4, 2008 Dr. Levenberg Deposition Transcript at 13), and opined that Claimant had fully recovered from the injury as of the date of his evaluation. Dr. Levenberg further opined that, based upon his review of Claimant’s job description, she could return to her position without restriction.

Finding the testimony of Dr. Levenberg to be credible and the testimony of Claimant and Dr. Lam to be not credible, the WCJ granted Employer’s Termination Petition and terminated Claimant’s benefits as of March 27, 2008. Claimant then appealed to the Board. However, on January 20, 2010, prior to the Board issuing its decision, Claimant filed a Rehearing Petition in which she sought to introduce after-acquired medical evidence. Specifically, Claimant sought to introduce an MRI taken in March 2009, an examination in June 2009 by William Anderson, M.D. (Dr. Anderson), who diagnosed her with post-laminectomy syndrome and lumbar radiculopathy, and records from spinal implant surgery that she underwent in November 2009. That evidence, Claimant alleged, conclusively established that she was still suffering from her work-related injury as of the date of the WCJ hearing.

Without addressing Claimant’s prematurely filed Rehearing Petition, the Board affirmed the decision of the WCJ on August 26, 2010, finding that the decision was supported by substantial, competent evidence. Claimant did not file an appeal of the Board’s decision. Instead, she filed another Rehearing Petition on June 13, 2011, in which she also sought to introduce records of a spinal fusion at

L2-3 and L4 that she underwent on April 26, 2011. The Board then issued an order stating, in relevant part:

We hereby procedurally **GRANT** the Claimant's Petition for Rehearing and direct that the Secretary of this Board list this case for oral argument during the Board's next sitting in Philadelphia, PA. We do not grant the relief requested on the substantive merits, but the Board will hear argument on the merits on the assigned date.

(July 20, 2011 Board Order). After the hearing, the Board denied Claimant's request for a remand and rehearing, explaining that the evidence that Claimant sought to introduce appeared to be nothing more than an "attempt to strengthen weak proofs already presented, particularly as it does not appear that this evidence would refute the WCJ's finding that Claimant was fully recovered from her work injury in 2008." (December 12, 2011 Board Opinion at 2-3). This appeal by Claimant followed.²

On appeal, Claimant argues that she was entitled to a remand and rehearing before the WCJ based upon the after-acquired evidence of her spinal implant surgery and fusion. That evidence, Claimant contends, conclusively establishes that Dr. Lam's opinion was credible, that Dr. Levenberg's opinion was equivocal, and that Claimant was still suffering from her work-related injury as of the date of the WCJ hearing. Claimant alleges that the Board erred and abused its

² This Court may not disturb a determination to grant or deny a rehearing absent a clear abuse of discretion. *City of Philadelphia v. Workers' Compensation Appeal Board (Harvey)*, 994 A.2d 1, 5, n.4 (Pa. Cmwlth. 2010).

discretion in failing to grant her Rehearing Petition where the “interests of justice” required it to do so. Employer argues that the Board did not abuse its discretion in denying the Rehearing Petition because Claimant’s after-acquired evidence is merely cumulative and does not demonstrate any connection to the work injury.³

Regarding rehearing petitions, Section 426 of the Pennsylvania Workers’ Compensation Act⁴ (Act) provides, in relevant part:

The board, upon petition of any party and upon cause shown, may grant a rehearing of any petition upon which the board has made an award or disallowance of compensation or other order or ruling, or upon which the board has sustained or reversed any action of a referee; but such rehearing shall not be granted more than eighteen months after the board has made such award, disallowance, or other order or ruling, or has sustained or reversed any action of the referee.

77 P.S. §871. The Board has broad powers to grant a rehearing “when justice requires.” *Puhl v. Workers’ Compensation Appeal Board (Sharon Steel Corp.)*, 724 A.2d 997, 1001 (Pa. Cmwlth 1999).⁵ The purpose of granting a rehearing is to

³ Employer also filed a Motion to Quash Claimant’s appeal pursuant to Pa. R.A.P. 1972 for inclusion of alleged non-record material in her reproduced record. Its Motion to Quash is denied.

⁴ Act of June 15, 1915, P.L. 736, *as amended*, 77 P.S. §871.

⁵ We note that because Claimant’s initial Rehearing Petition was filed prematurely, her request to present new evidence was properly considered a Petition for Remand under Section 419 of the Act, 77 P.S. §852. We held in *Puhl* that the distinction between these petitions makes little difference in our analysis, explaining that “even without a formal filing, a request for remand accompanied by relevant, newly discovered medical evidence...constitutes the **(Footnote continued on next page...)**

allow a party to present newly-discovered, non-cumulative evidence, and will not be granted to permit the party to strengthen weak proofs already presented. *Paxos v. Workers' Compensation Appeal Board (Frankford-Quaker Grocery)*, 631 A.2d 826, 831 (Pa. Cmwlth. 1993).

Although the evidence Claimant seeks to introduce here may demonstrate that she suffers from serious back problems, it would not conclusively establish that she was still suffering from her work-related injury as of the date of the WCJ hearing. The spinal implant and fusion procedures that Claimant underwent were not necessarily the direct result of Claimant's work injury and could be attributed to other injuries or pre-existing conditions. As the Board recognized, the evidence Claimant seeks to introduce fails to refute the opinion of Dr. Levenberg that Claimant had fully recovered from her injury as of March 27, 2008, which the WCJ found credible and accepted as fact.⁶ Because the evidence Claimant seeks to introduce merely reinforces her previous position and would not disprove the WCJ's findings, a remand and rehearing based on that new evidence would yield the same outcome as the initial WCJ hearing. Therefore, the Board did not abuse its discretion in denying Claimant's Rehearing Petition.

(continued...)

equivalent of a formal petition for rehearing under section 426 of the Act." *Puhl*, 724 A.2d at 1001, n.4.

⁶ "It is well-established that the WCJ is the ultimate fact finder and is empowered to determine witness credibility and evidentiary weight." *Shannopin Mining Company v. Workers' Compensation Appeal Board (Sereg)*, 11 A.3d 623, 627 (Pa. Cmwlth. 2011).

Accordingly, the order of the Board is affirmed.

DAN PELLEGRINI, President Judge

Judge McCullough did not participate in the decision in this case.

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ORDER

AND NOW, this 4th day of June, 2012, the order of the Workers' Compensation Appeal Board, dated December 12, 2011, at No. A09-0971, is affirmed. Respondent's Motion to Quash is denied.

DAN PELLEGRINI, President Judge