IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Cheryl Rusciolelli, Petitioner	:	
v.	:	No. 272 C.D. 2008
	:	Submitted: July 25, 2008
Workers' Compensation Appeal Board (Department of Transportation), Respondent	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE FRIEDMAN FILED: August 28, 2008

Cheryl Rusciolelli (Claimant) petitions for review of the February 5, 2008, order of the Workers' Compensation Appeal Board (WCAB), which affirmed the decision of a workers' compensation judge (WCJ) denying Claimant's reinstatement, review and penalty petitions. We affirm.

On August 25, 2004, while Claimant was working as a clerical supervisor for the Commonwealth of Pennsylvania, Department of Transportation (Employer), Claimant's chair broke and she fell onto her knee. Claimant first saw a panel physician, who treated the knee injury with ice and medication. When Claimant's condition did not improve, she was referred to a panel orthopedist, who treated her knee with injections and arranged for a November 14, 2004, MRI. The MRI revealed a meniscal tear, and Claimant was referred to Leonard A. Brody, M.D., who performed surgery to repair the torn meniscus on December 16, 2004.

On December 30, 2004, Employer issued a notice of compensation payable (NCP) accepting liability for a right knee strain. (R.R. at 1.) Employer paid for Claimant's wage loss and the medical expenses related to Dr. Brody's surgery. Claimant returned to work on January 18, 2005, and benefits were suspended as of that date.

On September 7, 2005, Claimant underwent partial knee replacement surgery, and she was off work from that date through October 24, 2005. Employer filed a notice of workers' compensation denial, asserting that the disability commencing on September 7, 2005, was due to surgery for osteoarthritis and was not related to the August 2004 knee strain. (R.R. at 4.) Claimant subsequently filed a reinstatement/review petition alleging that her condition worsened as of September 7, 2005, and that the NCP contained an incorrect description of her work injury. (R.R. at 5-6.) Claimant also filed a penalty petition alleging that Employer violated the Workers' Compensation Act (Act)[1] by failing to pay outstanding medical bills. Claimant's petitions were consolidated for hearings before the WCJ.

Claimant testified that her knee did not improve after Dr. Brody performed the meniscal repair but, instead, got worse. Claimant stated that her knee "grinded more" and that every step she took was excruciating. Claimant testified that, at her request, Dr. Brody performed a second MRI on April 1, 2005. According to Claimant, Dr. Brody told her she might have to live with the pain. Claimant testified that she subsequently sought treatment from Thomas Mackell,

[1] Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. §§1-1041.4, 2501-2708.

M.D., an orthopedic surgeon. Claimant stated that Dr. Mackell initially drained fluid from her knee and provided injections; when these treatments did not bring about relief, Dr. Mackell performed a unicompartmental knee replacement on September 7, 2005. Claimant stated that her knee has improved greatly since the knee replacement surgery. She explained that her knee sometimes gets stiff and sore, but she experiences much less pain than before. (R.R. at 26-29, 37.)

Claimant submitted into evidence various medical records related to Dr. Mackell's knee replacement surgery. (R.R. at 45-81.) Dr. Mackell's September 7, 2005, report reflects a preoperative diagnosis of osteoarthritis in the medial compartment of Claimant's right knee, (R.R. at 50), and Dr. Mackell's postoperative report confirms that diagnosis. (R.R. at 45.) In addition, a postoperative consultation report states that Claimant underwent an elective unicompartmental knee replacement to remedy osteoarthritis of her right knee. (R.R. at 47-48.)

Claimant also offered into evidence the report of Lynn Yang, M.D., who examined Claimant on December 19, 2005, and obtained a medical history. Dr. Yang reviewed the November 2004 and April 2005 MRIs of Claimant's right knee and the hospital discharge instructions, issued in September 2005, following Claimant's partial knee replacement surgery. Based on her examination and records review, Dr. Yang's diagnoses were: (1) status post-tear of the posterior horn and body of the right knee medial meniscus, status post arthroscopic surgery; and (2) development of extensive chondromalacia of the right knee medial compartment secondary to the fall on the right knee, status post unicompartmental

knee replacement. Dr. Yang stated in the report that Claimant's injuries and two surgeries were causally related to Claimant's August 2004 work injury. (R.R. at 41-44.)

Employer presented the September 18, 2006, report of Dr. Brody, reflecting that his last examination of Claimant, on April 13, 2005, was unremarkable. In the report, Dr. Brody states that, while he cannot exclude the August 2004 work injury as a cause of Claimant's knee replacement surgery, he could not state that the work injury was a substantial contributing factor to the necessity of that surgery. However, Dr. Brody believed that Claimant's pre-existing, non-work-related degenerative changes were a substantial contributing factor to the need for the second procedure. (R.R. at 82-84.)

The WCJ accepted Claimant's testimony as credible to the extent that she was unable to work from September 7, 2005, through October 5, 2005, due to the knee replacement surgery; however, he concluded that medical evidence was necessary to establish a causal relationship between the 2004 work injury and the need for a second surgery. (WCJ's Findings of Fact, No. 9.) The WCJ rejected Dr. Yang's opinion as not persuasive, noting that she is not an orthopedic surgeon and that she examined Claimant only on one occasion. In addition, the WCJ found it significant that Claimant did not submit a report by Dr. Mackell, her treating surgeon,[2] noting that Dr. Mackell's records include only a diagnosis of

[2] We note that where the claim for compensation involves fifty-two weeks or less of disability, section 422(c) of the Act, 77 P.S. §835, expressly permit the use of medical reports to establish facts related to medical issues, including the extent of a claimant's disability.

degenerative disease and contain no mention of a connection to the work injury. (WCJ's Findings of Fact, No. 10.) Finally, the WCJ accepted the opinions of Dr. Brody as credible, noting that Dr. Brody was Claimant's treating physician. (WCJ's Findings of Fact, No. 11.)

Based on his review of the entire record, the WCJ found that Claimant's surgery of September 7, 2005, was not causally related to the August 2004 work injury but, instead, was necessitated by her non-work-related degenerative condition. (WCJ's Findings of Fact, No. 12.) Thus, the WCJ concluded that Claimant failed to meet her burden of proving that her loss of earnings between September 7, 2005, through October 24, 2005, was related to the 2004 work injury, that the description of the accepted work injury should be expanded and/or that Employer violated the Act by refusing to pay medical expenses related to the knee replacement surgery. Accordingly, the WCJ denied Claimant's reinstatement, review and penalty petitions. Claimant appealed to the WCAB, which affirmed the WCJ's decision.[3]

On appeal to this court,[4] Claimant argues that the WCJ erred in denying her reinstatement petition. Claimant correctly states the general principles

[3] On appeal to the WCAB, Claimant argued that the WCJ erred in relying on Dr. Brody's testimony because his opinions were equivocal. (R.R. at 110.) The WCAB addressed only the review petition and held that, even if Dr. Brody's opinions were equivocal, Claimant failed to meet her burden of proving that the knee replacement surgery was causally related to the work injury. (R.R. at 135-38.)

[4] Our scope of review is limited to determining whether an error of law was committed, whether constitutional rights were violated or whether necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704.

governing a claimant's burden on reinstatement,[5] and Claimant asserts that her testimony, along with Dr. Mackell's records and Dr. Yang's report,[6] is sufficient to establish that she is entitled to a reinstatement of benefits. We disagree.

As explained in *Pieper v. Ametek-Thermox Instruments Division*, 526 Pa. 25, 584 A.2d 301 (1990), a claimant who seeks reinstatement following a suspension of benefits must first prove that, through no fault of her own, her earning power is once again adversely affected by her work injury and, second, that the disability which gave rise to her original claim, in fact, continues. *Id.* The claimant need not re-prove that the disability that gave rise to her original claim resulted from a work-related injury, but, because of the passage of time, the claimant must prove that she presently seeks compensation for the same disability that gave rise to her original claim. *Id.*; *Wetterau, Inc v. Workmen's Compensation Appeal Board (Mihaljevich)*, 609 A.2d 858 (Pa. Cmwlth. 1992).

[5] The law governing reinstatement was restated by the court in *Latta v. Workmen's Compensation Appeal Board (Latrobe Die Casting Co.)*, 537 Pa. 223, 642 A.2d 1083 (1994), as follows. Where benefits have been suspended, an employee who seeks to reinstate compensation must demonstrate that, through no fault of her own, her earning power is once again adversely affected by the injury and that the disability that gave rise to the original claim continues. Expert medical evidence is not necessary to establish that the prior work-related injury continues. *Id.* Once a claimant testifies that her prior work-related injury continues, the burden shifts to the employer to prove the contrary. *Id.* Where an employer fails to present evidence to the contrary, the claimant's testimony, if believed by the WCJ, is sufficient to support reinstatement of the suspended benefits. *Id.*

[6] According to Claimant, Dr. Yang's report establishes that Claimant required additional surgery because Dr. Brody did not properly correct her right knee. As laypersons, we cannot confirm or disagree with Claimant's characterization of Dr. Yang's opinion.

In *Wetterau*, the claimant suffered a work-related ankle injury in 1984 and underwent surgery to repair the injury in 1985. Although the claimant returned to his pre-injury duties in November 1986, he continued to complain of pain. The claimant underwent additional ankle surgery in April 1987. Thereafter, the claimant filed two petitions seeking a reinstatement of benefits and an order directing the employer to pay medical expenses related to the second surgery. The referee denied both petitions, finding that the second surgery was not related to the 1984 work injury. The WCAB reversed, for reasons not relevant here; on further appeal, we reversed the WCAB.

We first determined in *Wetterau* that, because the claimant had returned to his pre-injury job duties, he was required to prove that the second surgery was necessary to repair damage from the 1984 work injury. Citing *Borough of Media v. Workmen's Compensation Appeal Board (Dorsey)*, 580 A.2d 431 (Pa. Cmwlth. 1990), we next observed that proof of this fact requires expert medical testimony.[7] Concluding that the testimony of the claimant's medical witness was equivocal, we held that the claimant failed to meet his burden of proving entitlement to a reinstatement of benefits.

The facts here are substantially similar to those before the court in *Wetterau*. Applying the reasoning in *Wetterau*, we agree that Claimant was required to establish that her subsequent disability, i.e., her need for knee

[7] In *Borough of Media* we noted that, where a causal relationship between a claimant's work injury and disability is not obvious, unequivocal medical testimony is necessary to prove such a relationship.

replacement surgery, was caused by the 2004 work injury. However, the WCJ accepted Claimant's testimony only to establish that she was unable to work during the period at issue, and he rejected Dr. Yang's opinion that the knee replacement surgery was necessitated by the work injury. We also note that the operative reports authored by Dr. Mackell, which make no mention of Claimant's work injury, undermine Claimant's testimony. Accordingly, we conclude that the WCJ correctly held that Claimant failed to meet her burden of proof on the reinstatement petition.

Claimant next argues that the WCJ erred in denying her review petition because "the evidence clearly establishes that Claimant suffered an aggravation of the pre-existing (mild to moderate) arthritis of her right knee…." (Claimant's brief at 18.) Claimant correctly states that the WCJ is authorized to modify an NCP that is incorrect or incomplete. Section 413(a) of the Act, 77 P.S. §§771-773. However, as previously indicated, Claimant bore the burden of proof on this petition, and she failed to produce sufficient credible evidence to meet that burden.

For these reasons, we conclude that the WCJ did not err in denying Claimant's reinstatement, review and penalty petitions. Accordingly, we affirm.

_____

ROCHELLE S. FRIEDMAN, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Cheryl Rusciolelli, Petitioner	:	
v.	:	No. 272 C.D. 2008
Workers' Compensation Appeal Board (Department of Transportation), Respondent	:	

O R D E R

AND NOW, this 28th day of August, 2008, the order of the Workers' Compensation Appeal Board, dated February 5, 2008, is hereby affirmed.

ROCHELLE S. FRIEDMAN, Judge