

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

David Jenkins, :
Petitioner :
 :
v. : No. 389 C.D. 2011
 : Submitted: July 22, 2011
Workers' Compensation Appeal :
Board (Oaks Poultry Co., Inc.), :
Respondent :

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE PELLEGRINI

FILED: August 12, 2011

David Jenkins (Claimant) appeals from an order of the Workers' Compensation Appeal Board (Board) affirming the decision of the Workers' Compensation Judge (WCJ) granting the modification petition filed by Oaks Poultry Company, Inc. (Employer) because Claimant was capable of returning to modified work and performing light or sedentary jobs. For the reasons that follow, we affirm the Board's decision.

Claimant was employed as a truck driver who loaded and delivered fresh and frozen chickens to restaurants and other locations for Employer. He hurt his low back on May 4, 2005, while he was loading one of Employer's trucks.

Employer acknowledged a “lumbar strain” on the notice of compensation payable. On June 6, 2006, Employer filed a petition to modify and/or suspend compensation benefits alleging that Claimant was capable of returning to work with restrictions.¹ Claimant filed a petition to review compensation benefits alleging an incorrect description of the injury stating that the description of the injury should be amended to include “low back pain, including but not limited to far lateral right L3-4 disc herniation and L3, L4, L5-S1 bulging and/or herniation.”²

Before the WCJ, Employer presented the expert testimony of Gregory Lauro, M.D. (Dr. Lauro), a board-certified orthopedic surgeon, who evaluated Claimant on November 22, 2005, and again on April 20, 2006. He stated that he obtained Claimant’s history of his work injury and his course of treatment and reviewed an MRI revealing a large disc bulge at L3-4 along with two sets of nerve conduction studies showing nerve root irritation in the lumbar spine. Based on this history, Dr. Lauro believed Claimant’s condition was back pain. During both exams, however, Claimant had complained of pain and numbness down the right leg, but his physical exams revealed hypersensitivity of the low back which was not consistent with nerve entrapment which indicated to him that Claimant was magnifying some of his complaints. He stated that surgery would have a less than 50/50 chance of relieving Claimant’s pain because Claimant smoked a pack of cigarettes per day, drank a six pack every two days and had a pre-existing

¹ Employer also alleged that Claimant had failed to undergo reasonably requested treatment.

² Claimant also filed petitions to review medical treatment and/or billing.

degenerative condition. Dr. Lauro stated that he prepared a physical capacities checklist and concluded that Claimant was capable of performing sedentary work and was capable of standing, sitting, sitting to stand, walking and driving a car, each one to three hours per day, and had no limitations with regard to light activities of the upper extremities such as grasping and fine manipulation, and he could reach above shoulder level and could use his feet occasionally for foot control maneuvers. However, Dr. Lauro believed that Claimant should avoid bending at the waist, squatting, climbing, kneeling and crawling. Dr. Lauro also stated that he had reviewed a labor market survey that had six job descriptions consisting of four clerical front desk positions at hotels, a job at Sears as a salesperson, and a job at Burger King working the registers and taking orders. He believed they were all appropriate and within Claimant's physical limitations as long as they did not require Claimant to stand more than as outlined in his restrictions.

Employer also presented a labor market survey and earning power assessment report prepared by G. Drexel Brown (Brown), a vocational case manager for Procura Management, Inc. In the report, Brown identified the six current job openings mentioned by Dr. Lauro that were within the work restrictions outlined by Dr. Lauro. Brown believed that Claimant was capable of returning to the work force and obtaining employment with earning power of \$172.50 per week.

In support of his review petition, Claimant presented the expert medical testimony of David Oliver-Smith, M.D. (Dr. Smith.), a board-certified

neurologist who evaluated Claimant on September 22, 2006. Dr. Oliver-Smith stated that Claimant came to him seeking another opinion on having surgery. Dr. Oliver-Smith also obtained a history, performed a physical exam of Claimant and reviewed his diagnostic studies. Claimant complained of pain in the lower back with radiation into the right leg. The majority of his pain was in the lower back with some numbness and tingling in the right leg. He believed that Claimant's radicular symptoms of pain in his right leg were related to a disc herniation at the L3-4 level and that additional treatment, but not surgery, was warranted. He stated that with disc herniations that caused back and leg pain, surgery provided a 90% chance of relief of the leg pain but only a 50% chance with the back pain. Because most of the pain was in Claimant's back, surgery had only a 50% chance of relieving his pain. He also believed that it was reasonable to consider Claimant a candidate for consistent light-duty work per the physical capabilities checklist and agreed with the limitations that Dr. Lauro had placed on Claimant. He felt that if work could be found within those limitations, Claimant would be capable of performing such work.

Claimant testified that his pre-injury job required him to load and unload trucks with boxes of fresh and frozen chicken weighing between 100 and 140 pounds. He hurt his back when he lifted a box of chicken from a loading dock into a pickup truck, turned and felt pain in his back. He was sent by Employer to treat with a chiropractor and when that did not help, he was referred to a Dr. Yardley who prescribed physical therapy. He attended physical therapy 31 times, had been recommended for surgery, had taken various medications, but none of the treatment was relieving the pain in his back. Claimant believed that his condition

was getting worse because he was getting numbness down his right leg, and the pain in his back was interfering with his sleep. He decided that he wanted to get a second opinion regarding surgery from Dr. Smith, but needed a referral and he had no private health insurance. Claimant stated that he did not believe that he could return to his pre-injury job today because he had pain constantly whenever he moved. He was in pain driving to the hearing; he had difficulty standing; he had numbness down his right leg “like needles going down through my leg and my back and stuff” (June 30, 2006 Hearing at 17); he had trouble sitting in a truck; and he got muscle spasms daily. On cross-examination, Claimant stated that he did not feel that he could do some kind of sedentary or light-duty job even as a sales person at Sheetz or someplace like that because he could not stand for long and move around much. When asked if he could perform a job that allowed him to sit down and did not require him to stand or sit for any period of time, Claimant stated “No, I couldn’t.” (June 30, 2006 Hearing at 19.) When asked if he disagreed with Dr. Lauro that he could do any kind of sedentary or light-duty job, Claimant stated that he disagreed but did not explain further why he could not perform the jobs which had been provided in the labor market survey. Claimant also indicated that he was now interested in having surgery.

The WCJ found Claimant’s testimony credible that he was unable to perform his time-of-injury job but did not find Claimant credible that he was unable to perform any of the jobs produced as a result of the labor market survey because his testimony was inconsistent with the medical evidence of record, in particular that of Dr. Lauro, who testified that Claimant was a candidate for the sedentary-duty work; Claimant’s testimony was generally inconsistent with all of

the other evidence of record; Claimant's testimony was uncorroborated by other evidence of record; and Claimant's testimony was evasive and uncertain with respect to his personal assessment of his physical capabilities. The WCJ noted that no evidence was introduced by Claimant to rebut the findings and opinions set forth in the earning power assessment, so he accepted the opinion of the vocational expert in full. The WCJ further found that Dr. Lauro's testimony was accepted in full because it was more logical and internally consistent than that of Dr. Smith's, but the WCJ noted that Dr. Smith's testimony was accepted to the extent that it supported Dr. Lauro's testimony that Claimant was capable of light-duty work with restrictions that were within the jobs presented in the labor market survey.

Because the WCJ found that Employer met its burden of proving that there was work generally available in the community within Claimant's physical restrictions, the WCJ granted Employer's modification petition effective June 6, 2006.³ Claimant appealed the WCJ's decision regarding the modification petition to the Board, which affirmed the WCJ's decision,⁴ and this appeal by Claimant followed.⁵

³ The WCJ also found that Employer did not meet its burden of proving that Claimant had refused reasonable medical treatment and did not meet its burden of proving that Claimant was capable of returning to full-time work without restrictions, so he denied Employer's suspension petition. However, because the parties stipulated that Claimant's injury had changed from a lumbar strain to a herniated disc at L3-4, the WCJ found that Claimant had met his burden of proving an incorrect description of his injury and granted Claimant's review petition.

⁴ The only issues raised before the Board were as follows: 1) there was not substantial evidence to support the WCJ's finding that Dr. Lauro agreed that Claimant could perform light-duty, sedentary work; 2) the WCJ erred in finding that Claimant was capable of performing light-duty or sedentary work because this conflicted with Claimant's testimony; and 3) the WCJ erred **(Footnote continued on next page...)**

On appeal, Claimant now raises the following two issues: whether the Board abused its discretion in affirming the WCJ because 1) the findings of the WCJ “were inconsistent regarding both the doctor’s complaint of pain and the Claimant/Employee’s complaint of pain;” and 2) “the decision of the [WCJ] was not well reasoned and the affirmation of the [Board] was a continued error and abuse of discretion?” (Claimant’s Brief at 6.) Because Claimant did not raise the second issue before the Board below, he may not raise it for the first time on appeal, and we will not address that issue as it is waived. *See* Pa. R.A.P. 1551.

As to his remaining argument, Claimant contends that the WCJ ignored his testimony that he continues to suffer from pain and could not perform any work.⁶ Claimant relies on *Campbell v. Workers’ Compensation Appeal Board*

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in finding that Claimant’s testimony was not credible that he was not able to work because of pain.

⁵ Our scope of review of the Board’s decision is limited to determining whether constitutional rights were violated, whether the adjudication is in accordance with the law or whether the necessary findings of fact are supported by substantial evidence. *Milner v. Workers’ Compensation Appeal Board (Main Line Endoscopy Ctr.)*, 995 A.2d 492, 495 n.2 (Pa. Cmwlth. 2010).

⁶ We note that the WCJ is the determiner of evidence and credibility over conflicting medical evidence. *City of Philadelphia v. Workers’ Compensation Appeal Board (Smith)*, 946 A.2d 130, 135 n.9 (Pa. Cmwlth. 2008). This Court may not reweigh the evidence or review the credibility of witnesses. *Lehigh County Vo-Tech School v. Workmen’s Compensation Appeal Board (Wolfe)*, 539 Pa. 322, 652 A.2d 797 (1995). Instead, we must determine whether, upon consideration of the evidence as a whole, the WCJ’s findings are supported by substantial evidence. *Id.* In reviewing a decision for substantial evidence, we must review the evidence in the light most favorable to the party who prevailed below and draw all reasonable inferences from the evidence in favor of the prevailing party. *Wieczorkowski v. Workers’ Compensation Appeal Board (LTV Steel)*, 871 A.2d 884 (Pa. Cmwlth. 2005). It is irrelevant whether the record

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(*Antietam Valley Animal Hospital*), 705 A.2d 503 (Pa. Cmwlth. 1998), for the proposition that the WCJ can choose a claimant’s testimony as credible over that of a medical witness. However, *Campbell* is not helpful to Claimant because it is factually different.

At issue in *Campbell* was a termination petition that was granted by the Board which we reversed. The Board had reversed the WCJ’s credibility determination finding the claimant more credible that she suffered from “persistent diffuse joint and soft tissue pain and weakness secondary to a series of prophylactic rabies shots” related to her work injury of an animal bite and discounted the medical expert’s opinion that the claimant had fully recovered from her work injury. We held that the WCJ, in a proper exercise of his discretion, credited the claimant’s testimony regarding the continued pain that prevented her return to work. “[T]estimony of such pain, if accepted by the WCJ, can support a finding of continued disability, thus defeating an employer’s termination petition based on a cessation of the claimant’s disability.” *Id.*, 705 A.2d at 507.

In this case, the WCJ found that Claimant’s testimony was inconsistent with all of the other evidence of record. Both Employer’s physician, Dr. Lauro, and Dr. Smith, who Claimant sought a second opinion from, did not

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reveals evidence that would support a contrary finding; the relevant inquiry is whether the record contains substantial evidence supporting the actual findings that were made. *Williams v. Workers’ Compensation Appeal Board (USX Corp.-Fairless Works)*, 862 A.2d 137 (Pa. Cmwlth. 2004).

discount that Claimant still suffered from pain but believed that Claimant could at least perform sedentary work. The WCJ also found Dr. Lauro most credible when he testified that Claimant magnified some of his symptoms. Further, the WCJ in this case did not find Claimant credible regarding his own assessment of his physical capabilities, unlike in *Campbell*, where the WCJ found the claimant credible. Consequently, *Campbell* does not support Claimant's argument.⁷

Because the WCJ did not find Claimant's testimony that his pain was so debilitating that he could not perform any work credible and found Dr. Lauro most credible that Claimant was able to perform sedentary work, the WCJ properly modified benefits. Accordingly, the order of the Board is affirmed.

DAN PELLEGRINI, JUDGE

⁷ Claimant also argues that the WCJ ignored the "substantial issue of Claimant's condition of pain." (Claimant's Brief at 9.) However, the WCJ did not ignore that Claimant had pain, but based on the testimony of both Employer's and Claimant's medical witnesses, found that he was capable of performing light-duty work even with that pain.

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ORDER

AND NOW, this 12th day of August, 2011, the order of the Workers' Compensation Appeal Board, dated February 11, 2011, at No. A.09-1017, is affirmed.

DAN PELLEGRINI, JUDGE