

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Wayne Publishing, :
Petitioner :
 :
 v. : No. 404 C.D. 2008
 : Submitted: September 12, 2008
Workers' Compensation Appeal Board :
(Bain), :
Respondent :

BEFORE: HONORABLE DORIS A. SMITH-RIBNER, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE SMITH-RIBNER

FILED: November 19, 2008

Wayne Publishing (Employer) petitions for review of an order of the Workers' Compensation Appeal Board (Board) affirming the decision of the Workers' Compensation Judge (WCJ) denying Employer's termination petition. Employer in its petition claimed that Stanley Bain (Claimant) had fully recovered from his work injury that occurred on May 7, 1993. Employer questions whether the WCJ erred in denying the termination petition because he failed to analyze the restrictions on Claimant's work ability from his unrelated medical conditions.

The WCJ found that Claimant, a printer, injured his lower back in 1993 while lifting a large press roll at work. Claimant has a pre-existing degenerative back disease. John Dagher, M.D., board certified in family practice, treated Claimant from 1994 to 2006 for numerous conditions unrelated to his work injury, including severe emphysema, osteoporosis, avascular necrosis of the hips, polyneuropathy, carpal tunnel syndrome, depression and a neck injury from a car

accident in 1994. WCJ Decision, Exhibit A, Summary of Testimony Prepared by Employer. Claimant has received total disability benefits since 1995. A report of the independent medical evaluation (IME) conducted at Employer's request in 2005 by David N. Bosacco, M.D., board certified in orthopedic surgery, described the work injury as a "[l]umbar sprain and strain superimposed on preexisting lumbar disc disease and spinal stenosis." Reproduced Record (R.R.) at 4.

Based on the 2005 IME, Employer filed a notice of ability to return to work and a termination petition claiming that Claimant was recovered fully from his work injury. It provided Dr. Bosacco's deposition, which had attached a 1998 IME report from Robert E. Mannherz, M.D. Dr. Bosacco's Deposition, Exhibit 1; Supplemental R.R. at 23. Claimant testified and provided Dr. Dagher's deposition. The WCJ denied Employer's petition after hearings in the matter, and he found in relevant part as follows:

2. Attached hereto as Exhibit "A." is a Summary of Testimony as submitted by Frank T. Troilo, Esquire, Attorney for the Employer, in post-hearing submissions, covering the testimony of [Dr. Bosacco, Claimant and Dr. Dagher].
3. Upon review, it is found that Claimant has not fully recovered from his 1993 work related back injury. The testimony of the Claimant and his treating doctor, Dr. Dagher, is found credible and persuasive.... The opinions of Dr. Dagher are likewise accepted over those of Dr. Bosacco, as there is a conflict. As a treating physician, with a long course of dealing with the Claimant over many years ..., he was in an excellent position to express opinions about his patient, in contrast to the one time examination by Dr. Bosacco in 2004. It was his unequivocal opinion that Claimant had not fully recovered from his work related back condition. Further, he testified that there has been a decline in the "functioning modality" of Claimant's back.

4. In arriving at his opinions, Dr. Daghir relied on the complaints of the Claimant as to his continuing back pain. In that connection, the Claimant testified to continuing pain with his back since the work injury, and upon full review of the record, the undersigned finds the Claimant fully credible. It is of note in this connection that while he found a full recovery, Dr. Bosacco observed Claimant had mild lumbar spasm at his examination, and he candidly acknowledged this as an objective finding....
5. In measure, a prior independent medical examination on behalf of the Employer also serves to undermine the opinions of Dr. Bosacco. ... While he testified that he was finding a full recovery only as of his date of examination in September 2004, he noted that he would have expected a full recovery within 6 to 12 weeks, and no later than six months after the work injury. The noted independent medical examination, conducted in 1998 by a Dr. Mannherz, however, had determined that the relevant work injury had resulted in an aggravation of Claimant's pre-existing lumbar spinal stenosis, which caused an ongoing condition for which Claimant required medical treatment. Dr. Bosacco was unable to point to any medical documentation since the 1998 IME to indicate Claimant had returned to his baseline pre-injury condition.

Findings of Fact at 2 - 5 (citations omitted). The WCJ concluded that Employer failed to meet its burden to establish that Claimant had recovered fully from his work injury. The Board rejected Employer's arguments on appeal, reasoning:

Defendant argues on appeal that the Judge ... misconstrued Dr. Bosacco's testimony, failed to acknowledge Dr. Daghir's testimony which indicated that Claimant had unrelated medical conditions that affect his work and failed to set forth sufficient reasons for finding Dr. Daghir more credible than Dr. Bosacco. We disagree.

An employer petitioning for a termination of benefits must prove that a claimant's disability has ceased or that any remaining disability is no longer the result of

a work-related injury. McFaddin v. Workmen's Compensation Appeal Board (Monongahela Valley Hosp.), 620 A.2d 709 (Pa. Cmwlth. 1993). An employer can meet the burden of proving that a claimant's disability has ceased by presenting unequivocal medical evidence of a claimant's full recovery from a work-related injury or that an existing disability is not work-related. Koszowski v. Workmen's Compensation Appeal Board (Greyhound Lines, Inc.), 595 A.2d 697 (Pa. Cmwlth. 1991).

The Judge has complete authority over questions of credibility, conflicting medical evidence and evidentiary weight, Sherrod v. Workmen's Compensation Appeal Board (Thoroughgood, Inc.), 666 A.2d 383 (Pa. Cmwlth. 1995)....

On exam, Dr. Bosacco noted mild lumbar spasm on the right in the lumbosacral area and the sacroiliac area. On cross-examination, he agreed that mild lumbar spasm is an objective finding and that Claimant had symptoms and positive findings based on his examination. Dr. Bosacco opined that the diagnosis referable to the work injury was a lumbar sprain and strain superimposed on pre-existing lumbar disc disease and spinal stenosis.... [H]e stated that the sprain and strain probably resolved 6 to 12 weeks after his injury but he did not say it resolved until after he had seen [Claimant]. Dr. Bosacco opined that based on his work injury of 1993, there were no restrictions or limitations on Claimant's return to work....

Dr. Dagher stated that an EMG performed by Dr. Margolies this past year showed a right L4-L5 radiculopathy and this is consistent with what he found on his physical exams over the year. Dr. Dagher opined that Claimant had not fully recovered from his work injury to his low back. ... He stated that of [the non-work-related conditions], the emphysema would be disabling and would limit him to sedentary work. [Dr. Dagher] stated that ... there has been a steady decline in the functioning modality of his back. [Dr. Dagher] stated that if Claimant [holds] one position too long, ... he gets pain and so he would not consider him to have any work capacity. He also stated that this is based solely on his orthopedic and back conditions.

....
Defendant argues that the Judge failed to consider the fact that Claimant was disabled as a result of his non-work-related conditions.... However, the Judge did mention these conditions in his findings. Thus, he did consider them. In addition, Defendant has the burden on a termination and that burden is to establish that the Claimant has fully recovered from the work injury, not just that he is no longer disabled due to the work injury. Since the Judge rejected Defendant's medical evidence, Defendant failed to satisfy that burden.

Board Opinion, pp. 3 - 5 (citations omitted). The Court review is confined to deciding if constitutional rights have been violated, errors of law have been committed, a Board practice or procedure was not followed or whether necessary findings were supported by substantial evidence. *Helvetia Coal Co. v. Workers' Compensation Appeal Board (Learn)*, 913 A.2d 326 (Pa. Cmwlth. 2006).

Employer argues that the WCJ's determination was not supported by substantial evidence of record and was incorrect as a matter of law. It claims that the WCJ did not consider Claimant's unrelated conditions that restrict his ability to work. Under *Saville v. Workers' Compensation Appeal Board (Pathmark Stores, Inc.)*, 756 A.2d 1214, 1219 (Pa. Cmwlth. 2000), "any restrictions placed upon a claimant which are not causally related to the work injury do not preclude the grant of an employer's termination petition." Employer asserts that the record shows Claimant's inability to work due to medical conditions unrelated to the work injury. Further, notwithstanding the attached summary of testimony, the WCJ's decision is not reasoned because it does not refer to nor integrate the unrelated conditions such as chronic emphysema, which restricts Claimant's ability to work.

Employer admits that it has the burden of proof, but it asserts that the testimony of Claimant and Dr. Dagher must be examined for sufficiency to support the WCJ's findings: Dr. Dagher treated Claimant a year after the work injury for

emphysema and other conditions, and he relates all back pain to the work injury without considering those conditions. Without pointing to a location in the record, Employer states that Dr. Dagher conceded that Claimant's emphysema prohibits his engagement in physical activities and that his neuropathy affects his ability to walk and stand. Also, Dr. Dagher is a family physician who never tested Claimant's range of motion and relied only on his subjective complaints. Citing *Newcomer v. Workmen's Compensation Appeal Board (Ward Trucking Corp.)*, 547 Pa. 639, 692 A.2d 1062 (1997) (holding that expert's opinion unsupported by the medical record is incompetent), Employer complains that an expert's opinion based upon an incomplete medical history is incompetent and that Dr. Bosacco's findings were dismissed because he saw Claimant only once. Employer argues that the WCJ's decision is not reasoned because he fails to acknowledge Claimant's pre-existing or unrelated conditions in his findings. Citing *Lewis v. Workers' Compensation Appeal Board (Giles & Ransome, Inc.)*, 591 Pa. 490, 919 A.2d 922 (2007) (holding that an employer seeking termination must show change in claimant's physical condition since last disability determination), Employer submits that the WCJ's unclear findings make it practically impossible to determine in the future whether Claimant has recovered fully from his work injury.

Claimant counters that the WCJ's decision is supported by the record, which shows that Claimant suffered low back pain and radicular symptoms in his right leg since 1993 and that even Dr. Bosacco's examination documented positive objective findings. Although Dr. Bosacco opined that the work injury would have resolved within six months of the occurrence and all ongoing back problems therefore were unrelated to it, the WCJ found his opinion not credible, noting an aggravation of a pre-existing degenerative condition indicated in Dr. Mannherz'

report. The WCJ credited Dr. Dagher's unequivocal testimony, in which he stated that the work injury was ongoing and referred to an EMG report indicating a right radiculopathy at L4-5 level of the lumbar spine and a myelogram indicating a bulging annulus at L4-5. *See* Dr. Dagher's deposition, March 23, 2006; R.R. at 58, 64. This testimony was supported by Dr. Mannherz' report finding that Claimant's lower back has never returned to his pre-injury level; Dr. Bosacco agreed that no record establishes Claimant's return to a pre-injury level.

Claimant emphasizes that Employer offers no reason or authority for assessing the unrelated conditions where there has been no recovery from the work injury. He further stresses that Employer is wrong in asserting that the unrelated conditions are disabling and that the WCJ failed to address them. Dr. Dagher opined that Claimant's emphysema would limit his employment to sedentary work but that the work injury would prevent him from performing even sedentary work; the WCJ observed that Dr. Dagher had been treating Claimant for many conditions, the enumeration of which is found in the summary of testimony attached to the WCJ's decision. The record therefore does not support Employer's assertions.

As the Board stated, an employer bears the burden in a termination petition to prove "either that the employee's disability has ceased, or that any current disability arises from a cause unrelated to the employee's work injury." *Parker v. Workers' Compensation Appeal Board (Dock Terrace Nursing Home)*, 729 A.2d 102, 104 (Pa. Cmwlth. 1999). This burden, which is considerable, is met "by presenting unequivocal and competent medical evidence of a claimant's full recovery from a work-related injury." *Koszowski*, 595 A.2d at 699. The WCJ's authority over questions regarding witness credibility, conflicting medical evidence

and evidentiary weight is unquestioned, and the WCJ's findings with regard to these matters are binding on appeal. *Sherrod*.

Having reviewed the record, the Court agrees with the Board that the WCJ's findings were supported by substantial evidence and that Employer failed to meet its burden of proof. Dr. Bosacco's testimony failed to persuade the WCJ that Claimant fully recovered from the work injury. The WCJ credited the testimony of Claimant and Dr. Dagher that the work injury is ongoing, and he determined that Employer failed to prove that Claimant's pre-existing spinal stenosis had returned to its baseline pre-injury status. Further, Employer's claim that the WCJ's decision was not reasoned lacks merit where he addressed Claimant's pre-existing condition as discussed in Dr. Mannherz' report and relied upon Employer's summary of testimony, which included medical findings of Claimant's unrelated conditions. Contrary to Employer's claim that the emphysema is totally disabling, Dr. Dagher stated only that it would restrict Claimant to sedentary work. Lastly, Employer's request for a remand is unwarranted where nothing precludes it from seeking a termination in the future if it can establish full recovery. As the WCJ's findings are supported by substantial evidence and his decision allows for adequate appellate review, *see Daniels v. Workers' Compensation Appeal Board (Tristate Transport)*, 574 Pa. 61, 828 A.2d 1043 (2003), the Court affirms the Board's order.

DORIS A. SMITH-RIBNER, Judge

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	:	
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ORDER

AND NOW, this 19th day of November, 2008, the Court affirms the orders of the Workers' Compensation Appeal Board.

DORIS A. SMITH-RIBNER, Judge