

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Rudy F. Stefanek, :
Petitioner :
v. : No. 673 C.D. 2010
Workers' Compensation Appeal : Submitted: August 6, 2010
Board (Jim Lagana Plumbing :
and Heating, Inc.), :
Respondent :

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY

FILED: September 10, 2010

Rudy F. Stefanek (Claimant) petitions for review of an order of the Workers' Compensation Appeal Board (Board) affirming the Workers' Compensation Judge's (WCJ) decision denying his claim petition. We affirm.

On or about January 17, 2008, Claimant filed a claim petition alleging that he sustained a work-related injury in the nature of osteomyelitis, an infection of the left lower extremity, as well as loss of use of the left lower extremity on August 17, 2005, while employed by Jim Lagana Plumbing & Heating, Inc. (Employer). Employer filed a timely answer denying the material allegations. Hearings before the WCJ ensued.

In support of the claim petition, Claimant testified on his own behalf and presented the deposition testimony of Robert W. Mauthe, M.D., a board

certified physiatrist. In opposition to the claim petition, Employer presented the deposition testimony of Joseph A. Fabiani, M.D., a board certified orthopedic surgeon. Upon review of the evidence and testimony presented, the WCJ found as follows.

Sometime between approximately June 15, 2005, and July 1, 2005, Claimant began having problems with his left foot. Claimant began working for Employer on or about July 18, 2005. Prior to August 17, 2005, Claimant's medical condition included indications that he was a recovering alcoholic and had significant hepatitis and liver disease.

Between approximately Monday, August 1, 2005, and Friday, August 12, 2005, Claimant was working for Employer as a pipe layer at a sewer construction project. While working for Employer during approximately August 3, 2005, and August 12, 2005, Claimant was exposed to raw sewage when the construction crew's efforts to block off the sewage pipes through two manholes were not successful. Claimant was installing pipe by hand and when he would walk through the trench, the water containing sewage would sometimes go up over his boots and would penetrate his leather boots. Claimant complained to his supervisor about the working conditions and asked for rubber boots; however, he was not provided with the rubber boots.

There came a point in time when Claimant's foot was swollen and then subsequently pain set in. Claimant continued to work despite the pain as long as he could and when the pain set in, his foot was red and hot on the top of his foot behind the toes. Sometime between approximately August 3, 2005, and August 12, 2005, Claimant reported his problems to his supervisor and asked to complete an accident report. Claimant was informed that it would be taken care of and that

Employer was working on it. Claimant continued to work until his left great toe got bigger.

After Claimant stopped working at the sewer construction site, he worked a couple days at another location where he was doing landscaping such as mowing grass. Finally, Claimant told Employer that he could not work anymore and that he could smell a “stench to the foot”. On June 4, 2008, Claimant testified that before he began working at the sewer construction project site, he had no problems with his left foot, no sores or cuts or anything like that.

Claimant went to the emergency room at St. Luke’s Hospital on August 17, 2005. The Emergency Nursing Record contains the following under the heading “CHIEF COMPLAINT” – “swollen, sore bleeding foot for 3 weeks very sore 2 months since started...L foot.” The Emergency Nursing Record also indicates that the left foot had active bleeding, was swollen and reddened and that Claimant reported having lost thirty pounds in the last four months with his weight being 201 pounds. The Emergency Nursing Record further contains the word “none” in the block entitled “MECHANISM” in which the following alternatives are listed: “fall, twisting, direct blow/crush, puncture wound, animal bite, GSW (gun shot wound)/stab wound, burn, cut.” The Emergency Nursing Record indicates that the historian of the information contained thereon was the “patient.”

On August 17, 2005, an Emergency Physician Record was completed on which the chief complaint was “pain, swelling...(of the) FOOT”. This report also indicated under the heading “started” the following: “for 6-8 weeks gradual *increase* complaints of left foot pain, swelling, drainage patient last 3 weeks increase complaints of difficulty walking no history of trauma”. The area of the report designated as “location” contains sketches of the lower extremities, and the notations indicate that the area of bleeding is in the top of the left foot, about a

third of the way between the toes and the ankle. The “recent injury?” block of the Emergency Physician Record form, indicates that there was no recent injury and next to the words “How (context)?” the handwritten word appears to be “unsure” and in the same block there are three words preprinted, which words are “Where? Home work” and the word “home” is circled. Although, there is a section in the Emergency Physician Record where an injury at work can be noted, the form indicates that there was “no” recent injury and if there was an injury it occurred at home. The Emergency Physician Record indicates that the historian of the information contained thereon was the “patient.”

Beginning on August 17, 2005, Claimant was hospitalized at St. Luke’s Hospital for eight days. While at the hospital, Claimant had an x-ray that indicated the existence of osteomyelitis as of August 17, 2005, and that there had been a fracture of Claimant’s great left toe. Claimant underwent a triple phase bone scan on August 18, 2005, which also confirmed the existence of osteomyelitis as early as August 18, 2005. Osteomyelitis is a chronic infection of the bone which could not be present as a result of exposure only two to three weeks earlier.

As of July 16, 2008, Dr. Mauthe had seen Claimant on one occasion, July 17, 2007, at which time the doctor took a history but had no medical records to review. As of July 17, 2007, Dr. Mauthe could not give an opinion as to the cause of Claimant’s osteomyelitis until he had seen all of Claimant’s medical records. Dr. Mauthe subsequently reviewed some medical records from Hershey Medical Center for treatment between October 7, 2005, to December 8, 2005, and following this review, issued a letter dated October 29, 2007, in which he concluded:

It is my opinion that the patient underwent amputation of the first ray of the left foot for osteomyelitis. He has been treated with antibiotics. He attributes this to an

exposure while working for [Employer]. There is nothing in the medical records from Hershey which would establish a cause and effect relationship to his employment. Perhaps, the records from St. Luke's Hospital will be more revealing.

A medical record from Hershey Medical Center dated October 7, 2005, indicated that Claimant stated that "he did have a scaling ulcer on the side of his foot before this all began many months ago." When Dr. Mauthe examined Claimant on July 17, 2007, and took a history, this ulcer was never reported to him by Claimant.

Between October 29, 2007, and December 31, 2007, Dr. Mauthe reviewed medical records for the period of August 17, 2005, through August 25, 2005, from St. Luke's Hospital and as of July 16, 2008, he had not reviewed any other records. Following his review of the additional records, Dr. Mauthe issued a letter dated December 31, 2007, in which he wrote:

The medical records do not indicate the source of his infection; therefore, any diagnosis related to causation is based solely on the history and is certainly a tenable one; however, it must be based solely on the history as the records are not indicative of the trauma occurring in such a fashion. This does not preclude the incident from occurring in that fashion, merely that there is no documentation of such and therefore becomes a credibility issue in my opinion.

Dr. Mauthe's review of the St. Luke's Hospital records revealed nothing in those records making any reference whatsoever to any exposure of Claimant to raw sewage. The medical records from St. Luke's Hospital, in Dr. Mauthe's words: "Do not indicate the source of his infection."

Dr. Fabiani testified that Claimant's condition did not result from any exposure to raw sewage in early to mid August 2005. In his report, Dr. Fabiani

wrote: “He would have to have had a bruise and other problems months before this type of infection would occur. It takes a long time before one gets osteomyelitis in a local infection.” Although Dr. Fabiani’s report was available prior to Dr. Mauthe’s deposition, Dr. Fabiani’s report was not discussed by Dr. Mauthe and Dr. Mauthe did not testify that he disagreed with the basic medical opinion of Dr. Fabiani concerning the time which is required for osteomyelitis to develop as a local infection.

Having carefully reviewed the evidence and testimony presented, the WCJ accepted Claimant’s testimony as credible regarding his job duties with Employer. Having carefully reviewed and considered the expert medical testimony and exhibits of Dr. Mauthe and Dr. Fabiani, the WCJ found the testimony of Dr. Fabiani more credible on the issue of causation than the testimony of Dr. Mauthe. The WCJ found Dr. Fabiani’s opinion that Claimant’s osteomyelitis was not related to the exposure he had to bacteria sometime between approximately August 3, 2005, and August 12, 2005, to be credible and persuasive and more persuasive than any contrary opinion of Dr. Mauthe. The WCJ found that Dr. Fabiani’s testimony was supported by his examination of Claimant, his review of the medical records and Claimant’s hospital records and diagnostic studies indicating that the presence of osteomyelitis existed as of August 17, 2005. Additionally, the WCJ found that Dr. Mauthe admitted that the hospital records upon which he relied in reaching his opinion on causation did not support a causal connection between Claimant’s condition and the alleged work-related exposure to raw sewage.

The WCJ found further that although the persuasive portion of Dr. Mauthe’s testimony established that Claimant’s osteomyelitis could be the result of exposure to bacteria associated with raw sewage, Dr. Mauthe also indicated that

there could be many other causes of osteomyelitis. Therefore, the WCJ found that although exposure to bacteria could be the cause of the development of osteomyelitis, for the reasons indicated in the credible and persuasive medical explanation of Dr. Fabiani, Claimant failed to meet his burden of proving that the osteomyelitis condition, with which he was diagnosed on August 17, 2005, was caused or, for that matter, aggravated by the exposure which he had to raw sewage in early August 2005.

Accordingly, the WCJ denied Claimant's claim petition. Claimant appealed to the Board, which affirmed the WCJ's decision. This appeal followed.

Initially, we note that this Court's review of the Board's decision is set forth in Section 704 of the Administrative Agency Law, 2 Pa.C.S. §704, which provides that the Court shall affirm unless it determines that the adjudication is in violation of the claimant's constitutional rights, that it is not in accordance with law, that provisions relating to practice and procedure of the Board have been violated, or that any necessary findings of fact are not supported by substantial evidence. See Lehigh County Vo-Tech School v. Workmen's Compensation Appeal Board (Wolfe), 539 Pa. 322, 652 A.2d 797 (1995). An adjudication cannot be in accordance with the law if it is not decided on the basis of law and facts properly adduced; therefore, appellate review for the capricious disregard of material, competent evidence is an appropriate component of appellate consideration if such disregard is properly before the reviewing court. Leon E. Wintermyer, Inc. v. Workers' Compensation Appeal Board (Marlowe), 571 Pa. 189, 812 A.2d 478 (2002). When determining whether the WCJ capriciously disregarded the evidence, the Court must decide if the WCJ deliberately disregarded competent evidence that a person of ordinary intelligence could not conceivably have avoided in reaching a particular result, or stated another

way, if the WCJ willfully or deliberately ignored evidence that any reasonable person would have considered to be important. Id.

With respect to a claim petition, the claimant bears the burden of proving that his or her injury arose in the course of employment and was related thereto. Krawchuk v. Philadelphia Electric Co., 497 Pa. 115, 439 A.2d 627 (1981). Generally, if there is no obvious relationship between the disability and the work-related cause, unequivocal medical testimony is required to meet this burden of proof. Lewis v. Commonwealth, 508 Pa. 360, 498 A.2d 800 (1985).

The WCJ, as fact finder, has exclusive province over questions of credibility and evidentiary weight, and the WCJ's findings will not be disturbed when they are supported by substantial competent evidence. Northeastern Hospital v. Workmen's Compensation Appeal Board (Turiano), 578 A.2d 83 (Pa. Cmwlth. 1990). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Mrs. Smith's Frozen Foods v. Workmen's Compensation Appeal Board (Clouser), 539 A.2d 11 (Pa. Cmwlth. 1988).

Herein, Claimant raises the following issues for our review: (1) Whether the WCJ erroneously denied Claimant's claim petition in failing to predicate his decision on the substantial and competent evidence of record; and (2) Whether the WCJ erroneously denied Claimant's claim petition in capriciously disregarding competent evidence which supported the causal connection between the work-related injury and Claimant's subsequent disability.

In support of this appeal, Claimant first argues that the WCJ capriciously disregarded credible evidence which clearly established that he suffered from work-related osteomyelitis. Claimant points out that it was unrefuted that he suffered from osteomyelitis which resulted in the partial amputation of his left foot

and a subsequent below the knee amputation to his left lower extremity. Claimant contends that the facts are undisputed that he had no history of prior problems with his left lower extremity, that he was working for Employer for at least a month in raw sewage without the proper protection and that he reported his foot problems to Employer. The only intervening incident to explain Claimant's injuries, particularly given his negative past medical history, is the exposure to raw sewage. Claimant contends that Employer never submitted any evidence to dispute Claimant's testimony or to dispute that Claimant did not have prior problems with his left lower extremity.

Claimant contends that a reasonable person would not have disregarded Claimant's unrefuted testimony or the foregoing facts. Claimant contends further that no reasonable person would have disregarded the fact that Employer failed to present any evidence to contradict Claimant's testimony regarding the mechanism of the injury given the conditions under which he was working and the fact that the boots he was wearing were ineffective at keeping the sewage out.

Next, Claimant argues that the WCJ further erred by relying upon Dr. Fabiani's testimony. Claimant contends that Dr. Fabiani did not have a complete grasp of the medical situation and/or work incident; therefore, his opinions were incompetent and speculative.

Finally, Claimant contends that Dr. Mauthe opined based upon the history provided and the medical records, that Claimant's exposure to raw sewage at work, from which he developed an infection, caused the osteomyelitis and subsequent surgeries. Claimant argues that his uncontradicted testimony relative to the mechanism of the injury and the symptoms thereafter, together with the credible testimony of Dr. Mauthe, established that Claimant suffered a work-related injury in

the nature of osteomyelitis. Therefore, there was substantial competent evidence to support the granting of the claim petition.

Claimant is correct that it is undisputed that he suffered from osteomyelitis, an infection of the bone. However, the issue before the WCJ was not only whether Claimant suffered from osteomyelitis but whether Claimant's condition was work-related. Our review of the record and the WCJ's decision reveals that the Board correctly concluded that the WCJ's decision was based upon substantial evidence and that the WCJ did not capriciously disregard any evidence.

The WCJ found Claimant's testimony credible as to his job duties with Employer but the WCJ did not accept as accurate Claimant's testimony that he had "no problems with his left foot, no sore or cuts or anything like that" before he began working for Employer at the sewer construction project. The WCJ accepted as more accurate the history of Claimant's injury, as provided by Claimant, at St. Luke's Hospital in August 2005 and later in October 2005 at Hershey Medical Center. As set forth previously herein, the WCJ found, based on the St. Luke's Hospital medical records, that Claimant began having problems with his left foot sometime between approximately June 15, 2005, and July 1, 2005, which was a month before he began working for Employer on July 18, 2005. In addition, the WCJ found that Claimant's testimony was equivocal as to when he actually started working on the sewer construction project; however, based on the testimony of Dr. Mauthe, Dr. Fabiani, and the notations contained in Claimant's medical records, the WCJ found that Claimant only worked for Employer as a pipe layer at the sewer construction project site for two weeks from August 1, 2005, to August 12, 2005.

Moreover, the WCJ rejected Dr. Mauthe's opinion that Claimant's medical condition was work-related as not credible because Dr. Mauthe admitted that the hospital records upon which he relied in forming his opinion of causation did not

support a causal connection between Claimant's condition and the alleged exposure to raw sewage. A review of Dr. Mauthe's entire deposition supports the WCJ's finding. Reproduced Record (R.R.) at 72-101. Dr. Mauthe testified that none of medical records he reviewed mentioned that Claimant was exposed to raw sewage and that there was no information in the medical records that established a cause and effect relationship between Claimant's medical condition and his employment. *Id.* at 95-97. In fact, Dr. Mauthe testified that he included in the final December 31, 2007, medical report the statement that "any diagnosis related to causation is based solely on the history and is certainly a tenable one; however, it must be based solely on the patient's credibility and history as the records are not indicative of the trauma occurring in such a fashion." *Id.* at 97. Accordingly, it was well within the WCJ's province to reject Dr. Mauthe's medical opinion that Claimant's osteomyelitis was caused by his exposure to raw sewage during Claimant's employment with Employer.¹

Therefore, we reject Claimant's contentions that the WCJ capriciously disregarded competent evidence. As noted herein, it is well within the province of the WCJ to decide questions of credibility and evidentiary weight and the exercise of such province by the WCJ in this matter does not constitute capricious disregard of competent evidence.

¹ The WCJ, as the ultimate fact finder in workers' compensation cases, has exclusive province over questions of credibility and evidentiary weight, and is free to accept or reject the testimony of any witness, including a medical witness, in whole or in part. General Electric Co. v. Workmen's Compensation Appeal Board (Valsamaki), 593 A.2d 921 (Pa. Cmwlth.), petition for allowance of appeal denied, 529 Pa. 626, 600 A.2d 541 (1991). Determinations as to witness credibility and evidentiary weight are not subject to appellate review. Hayden v. Workmen's Compensation Appeal Board (Wheeling Pittsburgh Steel Corp.), 479 A.2d 631 (Pa. Cmwlth. 1984).

We also reject Claimant's contention that Dr. Fabiani's testimony was not competent.² A review of Dr. Fabiani's entire testimony reveals that the doctor did have a complete grasp of Claimant's medical condition and work situation. R.R. at 103-125. Dr. Fabiani testified that he examined Claimant on June 11, 2008, and obtained a history from Claimant. Id. at 109. Dr. Fabiani testified that Claimant informed him that Claimant was a pipe layer for Employer for five or six days wherein Claimant was working in a large manhole where the sewer line was clogged resulting in water going over the top of Claimant's boots resulting in the swelling and blistering of Claimant's left foot. Id. at 110. Dr. Fabiani also testified that he reviewed Claimant's medical records, hospital records and diagnostic studies indicating the presence of osteomyelitis as early as August 18, 2005. Id. at 116-17. Dr. Fabiani testified unequivocally that based on those medical records and the history provided by Claimant as contained therein, Claimant's condition of osteomyelitis was definitely not work-related. Id. at 120-21. Dr. Fabiani opined that the medical records supported the conclusion that Claimant had a chronic infection prior to his employment with Employer and that osteomyelitis is a medical condition that occurs over a period of weeks or months. Id. Dr. Fabiani explained that

² It is well established that where an expert's opinion is based upon assumptions which are contrary to the established facts, that opinion is worthless in a workers' compensation proceeding. City of Butler v. Workers' Compensation Appeal Board (Botsis), 708 A.2d 1306 (Pa. Cmwlth. 1998); Noverati v. Workmen's Compensation Appeal Board (Newtown Squire Inn), 686 A.2d 455 (Pa. Cmwlth. 1996); State Workmen's Insurance Fund v. Workmen's Compensation Appeal Board (Wagner), 677 A.2d 892 (Pa. Cmwlth. 1996). Thus, in workers' compensation proceedings, a physician's testimony is deemed to be incompetent as a matter of law where it is based upon an inaccurate or incomplete medical history. Newcomer v. Workmen's Compensation Appeal Board (Ward Trucking Corp.), 547 Pa. 639, 692 A.2d 1062 (1997); Chik-Fil-A v. Workers' Compensation Appeal Board (Mollick), 792 A.2d 678 (Pa. Cmwlth. 2002); Thomas Jefferson University Hospital v. Workers' Compensation Appeal Board (O'Hara), 745 A.2d 709 (Pa. Cmwlth. 2000).

because osteomyelitis does not occur quickly, Claimant's exposure to raw sewage two to three weeks prior to August 17, 2005, could definitely not have caused the osteomyelitis that was revealed by diagnostic testing on August 18, 2005. Id. The WCJ accepted Dr. Fabiani's testimony as credible.

Accordingly, the WCJ's decision is supported by substantial evidence of record. Therefore, we conclude that the WCJ did not err by denying Claimant's claim petition. The Board's order is affirmed.³

JAMES R. KELLEY, Senior Judge

³ Based on our disposition of the issues addressed in this opinion, we need not address the issue of whether Claimant sustained a specific loss of his left lower extremity.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Rudy F. Stefanek,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 673 C.D. 2010
	:	
Workers' Compensation Appeal	:	
Board (Jim Lagana Plumbing	:	
and Heating, Inc.),	:	
	:	
Respondent	:	

ORDER

AND NOW, this 10th day of September, 2010, the order of the Workers' Compensation Appeal Board in the above-captioned matter is hereby affirmed.

JAMES R. KELLEY, Senior Judge