

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Jose Berdecia-Cortes, :
Petitioner :
 :
v. : No. 742 C.D. 2011
 : Submitted: March 2, 2012
Workers' Compensation Appeal :
Board (Delaware Valley Lift Truck :
and Nationwide Mutual Insurance :
Co.), :
Respondents :

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JAMES GARDNER COLINS, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE LEAVITT

FILED: August 20, 2012

Jose Berdecia-Cortes (Claimant), who is on partial disability, petitions for review of an adjudication of the Workers' Compensation Appeal Board (Board) denying his request for a reinstatement of total disability benefits. The Board agreed with the Workers' Compensation Judge (WCJ) that Claimant's evidence was insufficient to show that his work injuries had worsened, rendering him unable to do a light-duty job. The Board also affirmed the WCJ's decision that Claimant's evidence failed to overcome the conclusion of a utilization review report that Claimant's ongoing medical treatments were neither reasonable nor necessary. Finding no error, we affirm.

Claimant worked for Delaware Valley Lift Truck (Employer) as a forklift mechanic. On May 4, 2005, Claimant slipped and fell at work, injuring his low back. Employer issued a notice of temporary compensation payable and, later, a supplemental agreement accepting liability for a lumbar strain and paying total disability benefits. Because Claimant believed his work injury was more severe than a strain, he filed a claim petition to have a disc herniation and shoulder injury recognized as work-related. Claimant also filed a utilization review (UR) petition seeking to reverse a report that his back surgery was neither reasonable nor necessary. Believing that Claimant was capable of returning to work, Employer filed a modification petition. The petitions were joined for the hearing before a WCJ.

The WCJ granted the claim petition, finding that Claimant's work injury was not merely a strain but, in fact, an aggravation of a degenerated L4-5 disc. The WCJ found that Claimant had possibly injured his right shoulder, but it was irrelevant because Claimant had not given Employer timely notice of that injury. The WCJ found that Claimant's L4-5 disc decompression surgery, a type of experimental surgery that was done on May 4, 2006, was not reasonable and necessary treatment. The WCJ based this finding on the fact that Claimant's consulting neurosurgeon had declined to perform surgery. The WCJ found that Claimant was capable of doing light-duty work cleaning the office and cutting grass that was offered by Employer on August 7, 2006, and that Claimant had unreasonably refused the job. Accordingly, the WCJ modified Claimant's benefits to partial disability, to make up the difference between Claimant's pre-injury wages and his light-duty job. Claimant appealed, and both the Board and this Court affirmed. *Berdecia-Cortes v. Workers' Compensation Appeal Board*

(Delaware Valley Lift Truck and Nationwide Mutual Insurance Company), (Pa. Cmwlth. No. 1636 C.D. 2008, filed December 3, 2008).

In August 2008, Claimant filed the instant petition seeking reinstatement of total disability benefits as of January 18, 2007. Claimant alleged that his May 2006 back surgery had failed, leaving him incapable of doing even the light-duty job that Employer had offered to him. Claimant further alleged that Employer had illegally reduced his total disability payments. Employer filed an answer denying the allegations. Claimant also filed a UR petition seeking review of a UR report that concluded that the ongoing treatment provided to him by David Weiss, D.O., as of October 2, 2008, was not reasonable or necessary. The petitions were consolidated and assigned to a WCJ, who conducted a series of hearings.

Claimant appeared and testified in support of his petitions. Claimant orally amended his requested reinstatement date to April 23, 2007, the first date he was seen by Dr. Weiss. Claimant testified that he has pain in his low back radiating down his left leg. Every four weeks, Dr. Weiss assesses his condition and gives him pain medication. Claimant does not feel capable of performing any work because of his pain.

With respect to the reduction in his disability payments, Claimant testified that he used to receive a workers' compensation total disability check in the amount of \$1,084.66 every two weeks. Then, on March 7, 2008, Employer's insurer started issuing a check in the amount of \$648 every two weeks. Claimant submitted into evidence copies of his check stubs which substantiate this testimony.

Claimant presented the deposition testimony of Dr. Weiss, who is board certified in orthopedic medicine. Dr. Weiss initially examined Claimant on

April 23, 2007, in connection with Claimant's application for Social Security disability benefits. At Claimant's request, Dr. Weiss became his treating physician as of May 2007. Dr. Weiss diagnosed Claimant with a chronic post-traumatic lumbosacral strain and sprain; herniated disc at L4-5; left lumbar radiculopathy; status post percutaneous lumbar discectomy at L4-5; chronic right shoulder subacromial bursitis and chronic right shoulder rotator cuff tendinopathy. Because of Claimant's level of reported pain, Dr. Weiss opined that he was disabled from all gainful employment.

Dr. Weiss explained that he attempted to treat Claimant with epidural injections, but they were unsuccessful. Dr. Weiss examines Claimant on a monthly basis and prescribes pain medication. Dr. Weiss ordered a May 2008 MRI, which the radiologists interpreted as showing no disc herniation. However, Dr. Weiss' review of the MRI film led him to opine that the radiologists were wrong; he believed the film showed that Claimant had a disc herniation at L4-5. Dr. Weiss has sent Claimant for a neurosurgical consultation that may lead to another spinal surgery. Dr. Weiss acknowledged that because he did not order a functional capacity evaluation of Claimant, he was unsure about what activities Claimant can do. Dr. Weiss acknowledged that his medical notes did not note any improvement in Claimant's symptoms.

In opposition to Claimant's petitions, Employer presented the deposition testimony of Menachem Meller, M.D., a board certified orthopedic surgeon who performed two independent medical examinations (IME) of Claimant: on October 11, 2006, and December 9, 2008. The 2006 IME was conducted in the course of the prior litigation. At that time, Dr. Meller diagnosed Claimant's work injury as an aggravation of a pre-existing degenerated disc with

protrusion at L4-5 and opined that he could do light-duty work.¹ At the 2008 IME, Claimant complained of severe pain in his back and legs, but Dr. Meller could not find any objective basis for these complaints.

Dr. Meller noted that the May 2008 MRI report documented only normal age-related changes in Claimant's spine and no disc herniation, which confirmed Dr. Meller's physical examination findings. Dr. Meller concluded that Claimant's condition had improved because he had returned to his pre-injury baseline degenerative condition, leaving Claimant capable of medium-duty work. Dr. Meller also testified that Claimant had reached maximum medical improvement and did not need further medical treatment.

Employer submitted into evidence the May 2008 MRI report by Richard Caswell, M.D. and Joel D. Swartz, M.D. of National Medical Imaging. The MRI showed L5-S1 disc desiccation, with slight bulge and osteoarthritis. Drs. Caswell and Swartz viewed the 2008 MRI as showing "an improvement" in Claimant's condition. Reproduced Record at 224a (R.R. ____).

Employer also presented the January 2, 2009, UR report of Mitchell E. Antin, D.O., a board certified orthopedic surgeon who performed the utilization review of Dr. Weiss' treatment as of October 2, 2008. At that point, the treatment consisted of office visits every four weeks and prescriptions for the drug Avinza, described by Dr. Antin as a "highly addictive narcotic medication." R.R. 113a. Dr. Antin reported that Dr. Weiss' medical notes from October 2, 2008, and thereafter documented continuing and subjective symptoms without improvement. Dr. Antin opined that the May 2008 MRI report did not support either Dr. Weiss'

¹ The WCJ accepted Dr. Meller's opinion as credible in the prior litigation.

diagnosis or Claimant's subjective symptoms. Dr. Antin opined that exercise and non-narcotic medications would be appropriate for Claimant and that Dr. Weiss' treatment was not reasonable or necessary.

After reviewing the evidence, the WCJ accepted as credible the opinions of Dr. Meller and Dr. Antin.² The WCJ rejected Claimant's testimony based on Claimant's demeanor and because it conflicted with the accepted medical evidence. The WCJ rejected Dr. Weiss' testimony because he had never referred Claimant for a functional capacity evaluation; included the right shoulder in the disability determination; opined that the work injury included a herniated disc at L4-5 when it had been established in the prior litigation that the work injury was an aggravation of degenerative disc disease at L4-5; and had not reviewed the light-duty position before giving his opinion of Claimant's work capabilities. Based on these credibility findings, the WCJ concluded that Claimant had failed to prove that his medical condition had deteriorated so that he could no longer perform the light-duty job offered to him in August 2006. The WCJ also found that Claimant was receiving the correct amount of benefits under the WCJ's prior order that modified Claimant's benefits to partial disability. The WCJ further found that Dr. Weiss' treatment was not reasonable or necessary as of October 2, 2008. Accordingly, the WCJ denied Claimant's reinstatement and UR petitions.

Claimant appealed, and the Board affirmed. Claimant then petitioned for this Court's review.³

² The WCJ 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, 385 (Pa. Cmwlth. 1995).

³ This Court's review of an order of the Board is limited to determining whether the necessary findings of fact are supported by substantial evidence, whether Board procedures were violated, **(Footnote continued on the next page . . .)**

On appeal, Claimant raises three issues for our consideration.⁴ First, he argues that his reinstatement petition was erroneously denied because Dr. Meller’s testimony, upon which the WCJ relied, is incompetent. Further, the WCJ failed to make his own determination of Claimant’s credibility and, instead, followed the credibility finding made by the WCJ in the prior litigation. Second, Claimant asserts that Employer should be assessed a penalty for unilaterally reducing his benefits in March 2008. Third, Claimant argues that his UR petition should have been granted because he requires ongoing medical treatment due to his failed back surgery. We address these issues *seriatim*.

We turn first to the denial of Claimant’s requested reinstatement to total disability benefits. To reinstate total disability benefits after they have been modified to partial disability because of the claimant’s refusal of an available job, the claimant must prove that his physical condition changed so that he could no longer perform the light-duty job. *Spinabelli v. Workmen’s Compensation Appeal Board (Massey Buick, Inc.)*, 614 A.2d 779, 780 (Pa. Cmwlth. 1992). The WCJ held that Claimant did not meet this burden.

Claimant argues that Dr. Meller’s testimony is incompetent for several reasons. First, Dr. Meller never read the actual films from the May 2008 MRI even though he had an opportunity to do so. Second, Dr. Meller did not look at the entire three-page MRI report; he only considered the page entitled “addendum.”

(continued . . .)

whether constitutional rights were violated or an error of law was committed. *City of Philadelphia v. Workers’ Compensation Appeal Board (Brown)*, 830 A.2d 649, 653 n.2 (Pa. Cmwlth. 2003).

⁴ Claimant actually lists four separate issues but we have condensed them into three for organizational purposes.

Third, Dr. Meller did not review the records of Dr. Denis Rogers, who performed Claimant's 2006 back surgery. Claimant argues that these are fatal deficiencies in Dr. Meller's testimony, warranting a remand for the WCJ to reassess the evidence without considering Dr. Meller's testimony. We disagree.

This Court has explained that "the mere fact that an expert does not have certain medical records before him or her or even all of the medical records on a given claimant in providing an expert opinion does not render the expert testimony incompetent[.]" *Saville v. Workers' Compensation Appeal Board (Pathmark Stores, Inc.)*, 756 A.2d 1214, 1220 (Pa. Cmwlth. 2000). Instead, the medical records seen or not seen by a doctor "merely goes to the question of the weight to be accorded to such expert testimony, a question wholly entrusted to the factfinder." *Id.* Claimant's attacks on Dr. Meller's testimony go to its weight, not its competency. There is no requirement that a medical expert look at the actual films, as opposed to the report of the radiologist. Likewise, he need not look at every page of a report; here, Dr. Meller acquired all the information he needed from the "addendum" page. Finally, Dr. Meller did not need the records of the doctor who operated on Claimant's back in 2006. Dr. Meller testified that he was familiar with the surgical procedure and could tell if a procedure failed based upon the patient's subsequent clinical presentation and the radiographic test results. Claimant's 2008 MRI did not show a herniated disc but, rather, the degeneration that pre-existed the work injury. In addition, Dr. Meller found no objective evidence to substantiate Claimant's pain complaints. In sum, Dr. Meller's opinion that Claimant's condition has not worsened and he continues to be capable of working light-duty, and now even medium-duty work, is competent.

Claimant argues that the WCJ found Claimant not credible solely because he was found not credible in the prior litigation and failed to make his own independent assessment of Claimant's credibility. Claimant mischaracterizes the WCJ's decision on credibility. The WCJ did not relate his credibility decision to the prior litigation. Rather, the WCJ specified that he rejected Claimant's testimony on the basis of his demeanor and on the fact that it conflicted with the WCJ's accepted medical evidence. This is an independent assessment of Claimant's credibility.

Claimant believes that his May 2006 surgery "failed."⁵ In the prior proceeding, the WCJ found Claimant capable of performing light-duty work offered to him in August 2006, *after* he underwent the surgery, and rejected Claimant's assertion that the surgery had failed, leaving him unable to work. It is Claimant's burden in this proceeding to show that his condition has changed since the modification order was entered, and he did not. Dr. Weiss simply rendered a different opinion that contradicted the already established fact that Claimant could do light-duty work.⁶ Because Dr. Weiss did not order a functional capacity evaluation, he was unable to opine on Claimant's work abilities. It is Claimant's evidence, not Employer's, that is flawed. It did not show a change in Claimant's condition that has left him unable to do the light-duty work offered to him in August 2006.

⁵ Claimant states that his "position presented has been that [his L4-5] disc was ruptured in the original work accident of May 4, 2005 and was materially, significantly and permanently worsened in the failed surgery of May 4, 2006 by Dr. Denis Rogers." Claimant's Brief at 52.

⁶ When a claimant has a burden to show a change in condition, it is not enough to simply present an opinion from a new doctor that a condition is disabling. The doctor must acknowledge established facts and explain how the condition changed. *Upper Darby Township v. Workers' Compensation Appeal Board (Nicastro)*, 23 A.3d 601, 606-07 (Pa. Cmwlth. 2011).

Next, Claimant argues that he is entitled to a reinstatement and an award of penalties because Employer unilaterally reduced the amount of his benefit checks in March 2008 without explanation. Claimant acknowledges that the WCJ found that his benefits conformed to the modification ordered in the prior litigation. However, Claimant argues that the “real issue” is the reduction of benefits on March 7, 2008. Claimant’s Brief at 57.

An employer may not reduce or cease payments to a claimant without following the statutory procedures, such as obtaining a final order from a WCJ modifying, suspending or terminating benefits. *City of Philadelphia v. Workers’ Compensation Appeal Board (Sherlock)*, 934 A.2d 156, 160 (Pa. Cmwlth. 2007). Employer followed the statute by filing a modification petition, which the WCJ granted on November 30, 2007. In accordance with that order, Employer reduced Claimant’s disability from \$1,084.66 biweekly to \$648 biweekly as of March 7, 2008. This was not a unilateral act.⁷ Indeed, Employer could have begun issuing partial disability checks in December 2007, but it took some time, apparently, to process the change in payments from total to partial. Rather than being shortchanged, Claimant actually received several total disability payments from Employer that were in excess of what was actually owed.

Finally, Claimant argues that Employer failed to meet its burden on the UR petition. Claimant points to several medical reports showing that Claimant has suffered a herniated disc and asserts that Dr. Weiss’ treatment is reasonable as

⁷ The light-duty job paid wages of \$206 per week. Subtracting these wages from Claimant’s average weekly wage and then subtracting twenty percent for counsel’s fee leaves a benefit due to Claimant of \$324 per week or \$648 biweekly.

a course of action leading up to possible lumbar fusion surgery, which is currently being contemplated by Claimant's neurosurgeon.

The employer bears the burden of proof throughout the utilization review process to prove that the disputed treatment is not reasonable and necessary. *Topps Chewing Gum v. Workers' Compensation Appeal Board (Wickizer)*, 710 A.2d 1256, 1260-61 (Pa. Cmwlth. 1998). The WCJ credited the UR Report of Dr. Antin that while some treatment may be necessary, Dr. Weiss' ongoing treatment with highly addictive narcotic medication is inappropriate. Claimant is essentially arguing that the WCJ should have credited Dr. Weiss' opinion over Dr. Antin's, but the WCJ is the sole arbiter of credibility and this credibility determination cannot be disturbed on appeal.

Accordingly, the order of the Board is affirmed.

MARY HANNAH LEAVITT, Judge

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ORDER

AND NOW, this 20th day of August, 2012, the order of the Workers' Compensation Appeal Board dated March 31, 2011, in the above captioned matter is hereby AFFIRMED.

MARY HANNAH LEAVITT, Judge