

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Melanie Price, :
Petitioner :
 :
v. : No. 781 C.D. 2008
 : Submitted: October 10, 2008
Workers' Compensation Appeal :
Board (Villanova University), :
Respondent :

BEFORE: HONORABLE DORIS A. SMITH-RIBNER, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE LEAVITT

FILED: December 19, 2008

Melanie Price (Claimant) petitions, *pro se*, for review of an adjudication of the Workers' Compensation Appeal Board (Board) terminating her benefits. In doing so, the Board affirmed the decision of the Workers' Compensation Judge that Claimant had fully recovered from her work-related injury. In this case we consider whether the testimony of the employer's medical expert constituted sufficient, competent evidence to satisfy the burden of proof for a termination of benefits. After review, we affirm.

Claimant was last employed as a security guard by Villanova University (Employer). On August 21, 1991, Claimant slipped and fell in the course and scope of her employment and sustained a strain/sprain of her

lumbosacral and thoracic spine.¹ At the time of her injury, Claimant was 19 years of age and six months pregnant. Because of her pregnancy, Claimant did not undergo any x-rays or aggressive treatment besides occasional physician visits. Claimant was released to work light duty; however, no light-duty work was available and Claimant did not return to work. She began receiving disability benefits.

In 1993, Employer filed a petition to terminate, suspend or modify Claimant's benefits. The parties entered into a commutation agreement which was approved by WCJ Fred J. Troilo on March 16, 1995. The stipulated facts agreed to by the parties and approved by WCJ Troilo stated that Claimant had "sustained injuries to her lumbosacral and thoracic spine while in the course and scope of employment with [Employer]." WCJ Troilo Decision, March 16, 1995, Stipulation of Fact No. 2. Employer agreed to continue to pay all of Claimant's medical expenses related to her work injury.

On June 9, 2006, Employer filed a termination/suspension petition alleging that Claimant was fully recovered from her work injury. The matter was assigned to WCJ Sarah C. Makin (WCJ).

Employer presented testimony from Bong S. Lee, M.D., a board-certified orthopedic surgeon, who examined Claimant on January 4, 2005, and April 13, 2006. During the first examination, Claimant complained of steady pain in her lower back with occasional flare-ups. Dr. Lee took Claimant's history, which revealed severe scoliosis of her thoracolumbar spine, a condition which had

¹ According to the Board, Employer recognized a strain/sprain of the lumbosacral and thoracic spine in a Notice of Compensation Payable (NCP). There is, however, no copy of the NCP in the certified record.

been present since adolescence. Dr. Lee reviewed two MRI films from 2003 and 2004 which revealed scoliosis and what he characterized as “degeneration of ... the entire space of the lumbar spine from L1 through L5 with a lot of bone spur formations and the narrowing of the disc space and also arthritis of the facet joints.” Notes of Testimony (N.T.), September 27, 2006, at 13 (Lee Depo. ___). Based on Claimant’s medical records, Dr. Lee concluded that she had sustained a sprain of the lumbosacral spine when she fell at work in 1991. At the time of his January 4, 2005, examination, Dr. Lee found that Claimant suffered from severe scoliosis of the spine.

At Claimant’s second examination on April 13, 2006, Dr. Lee took an updated history and reviewed an MRI film from 2005. She presented with similar complaints of pain in her lower back and buttocks. Dr. Lee testified that Claimant’s only objectively verifiable condition was severe scoliosis of the thoracolumbar spine, and her physical examination revealed the same curvature of the spine as in 2005. The MRI film showed that Claimant’s degenerated discs and arthritis of the lumbar spine had not changed. Dr. Lee testified that a sprain of the lower back like Claimant suffered in 1991 is not a permanent condition and that even with the presence of severe scoliosis she would have recovered within 6 weeks. Dr. Lee opined that Claimant had fully recovered from her 1991 work injury and did not require any further treatment for that injury. Lee Depo. 21. Dr. Lee further opined that Claimant’s current disability and work limitations are attributable solely to her scoliosis and are not related to the 1991 injury. Lee Depo. 33, 46.

Claimant presented the testimony of Randall N. Smith, M.D., a board-certified orthopedic surgeon. Dr. Smith began treating Claimant shortly after the

work injury in 1991. Dr. Smith diagnosed Claimant with “a lumbar sprain and strain, a lumbosacral contusion, which aggravated some preexisting scoliosis, causing some bulging protruded disc[s] and sciatica.” N.T., January 9, 2007, at 7 (Smith Depo. ___). Since 1991, Dr. Smith has treated Claimant with braces, medications and physical therapy. At her then most recent examination in June 2006, Claimant complained of pain in her mid and lower back radiating into both legs. Dr. Smith reviewed Claimant’s 2005 MRI, which showed protruded discs at L4-L5 and L5-S1 and scoliosis. Dr. Smith opined that the 1991 work injury caused Claimant’s scoliosis to become symptomatic, and resulted in her disc problems and chronic pain condition, including her sciatica. Dr. Smith testified that Claimant had reached maximum medical improvement. He conceded on cross-examination that the normal recovery time from a lumbar sprain/strain is 12 weeks. Dr. Smith also acknowledged that scoliosis alone will cause discs to degenerate prematurely and that Claimant’s scoliosis would in all likelihood have worsened during the 15 years she was his patient.

The WCJ found Dr. Lee’s testimony to be credible and persuasive because he explained that there was no objective evidence that Claimant still suffered from the 1991 work injury and that Claimant’s present disability was attributable to her pre-existing scoliosis. The WCJ rejected Dr. Smith’s opinion because “he failed to point to objective indicators that Claimant is suffering from the work injury.” WCJ Decision, May 4, 2007, at 4, Finding of Fact 11. The WCJ concluded that Claimant had fully recovered from her 1991 work injury as of April 13, 2006, the date of Dr. Lee’s second examination. Accordingly, the WCJ granted Employer’s termination petition effective as of that date. Claimant

appealed. Finding no error by the WCJ, the Board affirmed. Claimant now petitions for this Court's review.

Before this Court,² Claimant identifies several issues which we summarize as follows. Claimant argues that the WCJ erred in granting Employer's termination petition because Employer did not meet its burden of proving that Claimant is fully recovered from her 1991 work-related injury. In asserting this claim, Claimant contends that the WCJ's decision was not reasoned and rests upon credibility determinations not supported by the record. Claimant also argues that the WCJ erred by allowing Employer to litigate the description of the work injury accepted in the parties' 1995 commutation agreement.

It is well established that an employer seeking to terminate workers' compensation benefits bears the burden of proving by substantial evidence 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). When the employer offers medical testimony to meet its burden of proof, the medical expert's opinion must be rendered unequivocally and to a reasonable degree of medical certainty in order to constitute substantial evidence of record. *Jones v. Workers' Compensation Appeal Board (J.C. Penney Co.)*, 747 A.2d 430, 432 (Pa. Cmwlth. 2000).

Claimant argues, first, that Employer failed to offer substantial evidence of full recovery because Dr. Lee's testimony was equivocal. In support,

² Our scope of review in appeals from the Board is limited to determining whether constitutional rights were violated, errors of law were committed, or necessary findings of fact were supported by substantial evidence. *Parker v. Workers' Compensation Appeal Board (Dock Terrace Nursing Home)*, 729 A.2d 102, 104 n.2 (Pa. Cmwlth. 1999).

Claimant claims that contradictions appear in Dr. Lee's testimony. For example, in his deposition, Dr. Lee opined that Claimant's recovery time from a lower back sprain would have been approximately 6 weeks. However, in his earlier IME report dated January 4, 2005, Dr. Lee stated that Claimant was bedridden or wheelchair bound for the duration of her pregnancy following the work injury, or approximately 12 weeks. Lee Depo., Exh. 2, at 1. Citing this statement, Claimant claims that Dr. Lee's report contradicts his deposition testimony on recovery time. Claimant also argues that Dr. Lee provided no evidence that her scoliosis was symptomatic prior to the work injury, nor did he provide a recovery time period for a lower back sprain specific to Claimant. For these reasons, Claimant contends that the WCJ lacked sufficient evidence to find Dr. Lee credible.

We disagree that Claimant's analysis leads to the conclusion that Dr. Lee's testimony was equivocal. Whether Claimant's actual or estimated recovery time from her lower back sprain was 6 or 12 weeks is beside the point, and any discrepancy in this regard does not render Dr. Lee's testimony equivocal. Having carefully reviewed the entire transcript of Dr. Lee's deposition, we conclude that the real import of his testimony was his unequivocal opinion that Claimant was fully recovered from her work injury as of April 13, 2006, nearly 15 years after the work incident. The WCJ credited this testimony and explained her reasons for doing so. It is well established that credibility determinations are within the sole province of the WCJ and the WCJ is free to accept or reject the medical testimony of any witness, in whole or in part. *Broughton v. Workers' Compensation Appeal Board (Disposal Corp. of America)*, 709 A.2d 443, 446 (Pa. Cmwlth. 1998).

Claimant's attempts to challenge the WCJ's credibility determination on appeal are unavailing and beyond the scope of this Court's review.³

Claimant argues, next, that the WCJ failed to issue a reasoned decision in accordance with Section 422(a) of the Workers' Compensation Act (Act), Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. §834.⁴ Claimant contends that, contrary to the WCJ's finding, Dr. Smith *did* point to indicators that Claimant continues to be disabled from the work injury. Claimant maintains that Dr. Smith should have been found credible for a litany of reasons, and that the WCJ failed to discharge her duty under Section 422(a) of the Act because the record does not support the WCJ's findings and credibility determinations. Claimant also suggests that by rejecting Dr. Smith's testimony, the WCJ

³ As stated above, Claimant also directly attacks Dr. Lee's credibility because he failed to offer evidence that her scoliosis was symptomatic prior to the work injury. We remind Claimant that the accepted work injury she negotiated as part of her commutation agreement did not include scoliosis. If Claimant believed her fall at work somehow caused her scoliosis to become symptomatic, she should have filed a review petition to amend the NCP before she commuted her benefits, or negotiated to have scoliosis included as part of the accepted work injury in the 1995 stipulation.

⁴ Section 422(a) provides, in relevant part:

All parties to an adjudicatory proceeding are entitled to a reasoned decision containing findings of fact and conclusions of law based upon the evidence as a whole which clearly and concisely states and explains the rationale for the decisions so that all can determine why and how a particular result was reached. The workers' compensation judge shall specify the evidence upon which the workers' compensation judge relies and state the reasons for accepting it in conformity with this section. When faced with conflicting evidence, the workers' compensation judge must adequately explain the reasons for rejecting or discrediting competent evidence. Uncontroverted evidence may not be rejected for no reason or for an irrational reason; the workers' compensation judge must identify that evidence and explain adequately the reasons for its rejection. The adjudication shall provide the basis for meaningful appellate review.

77 P.S. §834.

impermissibly shifted the burden to Claimant to prove that she continues to be disabled from the work injury.

Claimant's reasoned decision challenge is nothing more than an attempt to revisit the WCJ's credibility determinations. As stated above, the WCJ explained her reasons for crediting Dr. Lee's opinion that Claimant was fully recovered from a lower back sprain that occurred 15 years earlier. The WCJ rejected Dr. Smith's contrary testimony that Claimant continues to suffer from her work injury. The so-called "indicators" that Claimant attributes in her brief to Dr. Smith are simply a rehash of Dr. Smith's direct testimony. The WCJ rejected this testimony as not credible, and we will not revisit that determination. We also reject Claimant's claim that the WCJ impermissibly shifted the burden to her to prove that she continues to be disabled from her work injury. The WCJ simply concluded that Claimant did not refute Employer's credible expert testimony that Claimant was fully recovered. This is not burden-shifting.

Finally, Claimant argues that the WCJ erred by allowing Employer to litigate the description of the accepted work injury. Claimant asserts that she was originally diagnosed with "lower back sprain/strain" because she was pregnant at the time of her work injury and could not undergo complete diagnostic testing. Claimant's Brief at 25. She notes that the diagnosis was changed to "injuries to her lumbosacral and thoracic spine" in the 1995 stipulation to the commutation agreement. Claimant avers that this change in diagnosis expanded the injury from a lumbar sprain/strain, which is a single area of the lower back, to a much larger area of the back and a more extensive injury. Thus, Dr. Lee's opinion that Claimant was fully recovered from her work injury was based on a diagnosis that was not agreed to by the parties and accepted by WCJ Troilo in 1995.

In addressing this argument, the Board noted that the original NCP identified Claimant's work injury as a "lumbosacral and thoracic strain/sprain." Board Opinion at 9.⁵ Accepting the Board's representation as accurate, we conclude that the parties' 1995 stipulation describing Claimant's work injury as "injuries to the lumbosacral and thoracic spine" did not constitute an expansion of the injury identified in the NCP. Thus, there is no basis for challenging Dr. Lee's conclusion that Claimant was fully recovered from the work injury, which he identified as a sprain of her lumbosacral spine. Lee Depo. 13.

In sum, Employer sustained its burden of proof for a termination of benefits by establishing that Claimant was fully recovered from her work injury and that her current disability arises from a cause unrelated to that injury. Employer satisfied its burden through Dr. Lee's credible expert testimony that Claimant had recovered from her work injury long before his April 13, 2006, examination, and that her only objectively verifiable condition was pre-existing severe scoliosis of the thoracolumbar spine.

Accordingly, we affirm the Board's adjudication granting Employer's termination petition.

MARY HANNAH LEAVITT, Judge

⁵ It is impossible to verify the Board's statement since the original NCP is not contained in the certified record. We shall defer to the Board's representation.

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ORDER

And now this 19th day of December, 2008, the order of the Workers' Compensation Appeal Board in the above-captioned matter, dated March 5, 2008, is hereby AFFIRMED.

MARY HANNAH LEAVITT, Judge