

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

The Salvation Army, :
 :
 Petitioner :
 :
 v. : No. 85 C.D. 2008
 : Submitted: May 2, 2008
 Workers' Compensation Appeal Board :
 (Kuller), :
 Respondent :

BEFORE: HONORABLE DORIS A. SMITH-RIBNER, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE SMITH-RIBNER

FILED: August 5, 2008

The Salvation Army (Employer) challenges the order of the Workers' Compensation Appeal Board (Board) affirming a Workers' Compensation Judge's (WCJ) decision to deny Employer's termination and modification/suspension petitions and to grant in part Mary E. Kuller's (Claimant) review petition to add injuries to the notice of compensation payable (NCP) under Section 408 of the Workers' Compensation Act, Act of June 2, 1915, P.L. 736, *as amended*, added by the Act of June 26, 1919, P.L. 642, 77 P.S. §732, and Section 413(a), 77 P.S. §§771 - 772. Employer's statement of questions presented is whether the WCJ's decision constitutes an error of law where it was not based on substantial evidence.

On February 5, 2004, Claimant fell down a flight of stairs injuring her neck, back, left shoulder and arm while working for Employer. She worked as a residential direct support professional, which involved nursing assistant tasks and housekeeping chores. On October 7 the parties stipulated to Claimant's injuries, including left shoulder sprain with possible impingement and possible partial tear

of the supraspinatus tendon; lumbar sprain with possible disc protrusions; and cervical strain/sprain with possible radiculopathy. Pursuant to an NCP, Claimant received benefits for total disability.

Employer filed its termination petition on February 4, 2005 alleging that as of December 9, 2004 Claimant had recovered fully from her injuries. After filing a notice of ability to return to work, Employer offered Claimant her pre-injury job with a two percent wage increase. On March 9, 2005, Employer filed its modification/suspension petition alleging that Claimant refused the offered job for which she was medically approved; on April 11, 2005 Claimant filed her review petition seeking to amend the NCP to include bilateral brachial plexopathy, left radial nerve, left ulnar nerve and ganglion cyst of the left wrist.

To support the review petition, Claimant presented her own deposition testimony and the deposition testimony of board-certified orthopedic surgeon Scott H. Jaeger, M.D., who treated Claimant for her arm and shoulder injuries and examined her on February 28, May 18 and September 7, 2005 and on March 22, 2006. Employer presented deposition testimony of board-certified orthopedic surgeon Noubar A. Didizian, M.D., who examined Claimant on December 9, 2005 and September 6, 2006. The WCJ credited the testimony of Claimant and Dr. Jaeger, but she rejected Dr. Didizian's testimony and on that basis denied Employer's petitions and granted in part Claimant's review petition.

In reaching her decisions, the WCJ made the following findings:

30. [On March 14, 2006, Claimant] testified she still had pain in her neck, lower back, down her left arm to her hand, in her right shoulder and arm. She testified she cannot lift or grasp anything.... She has had no other injuries since this work injury occurred.

....

36. Dr. Jaeger's physical exam findings on March 22, 2006 were crepitus in the AC joint, impingement, paravertebral muscle spasm and a positive sitting root and straight leg raising test. ... He disagreed that Claimant had ever recovered from the work injury such that she could return to any occupational use of her left hand or her pre-injury job....

....

46. The testimony of Claimant is credible. Her testimony regarding continuing symptoms since the work injury is credible because there are findings on the objective studies which could substantiate her complaints of pain. ... She has had pain in her neck, lower back, left shoulder and hand since February 5, 2004, which prevents her from returning to work.

47. The testimony and opinions of Dr. Jaeger are credible. To the extent that they differ with those of Dr. Jaeger, the testimony and opinions of Dr. Didizian are not credible. ... Dr. Jaeger has a practice in which he deals primarily with hands and arms. ... Further, Dr. Jaeger's testimony that Claimant is not capable of any work, including her pre-injury job, is credible because Claimant is left-hand dominant and her regular-duty job required her to use both of her arms.

Regarding Claimant's review petition, the WCJ found that a March 2005 EMG study showed brachial plexopathy and that Dr. Jaeger's September 2005 examination revealed, *inter alia*, "Tinel's sign of the ulnar nerve at the elbow and of the radial nerve at the forearm." Findings of Fact at 33 - 34. In his March 2006 examination, Dr. Jaeger diagnosed "an impingement syndrome of the left shoulder, cervical spondylosis and radiculopathy, lumbar spondylosis and radiculopathy and brachial plexopathy as a result of the work injury." *Id.* at 36. Although June 2004 MRI and EMG studies indicated pre-existing degenerative disc disease and no signs of lumbar radiculopathy, brachial plexopathy or median or ulnar nerve problems, Dr. Jaeger opined that two nerve roots involved at the C5

and C6 levels were more likely caused by brachial plexopathy than herniated discs. *Id.* at 37. The WCJ determined that Claimant's symptoms were related to the work injury based on the following findings:

38. [Dr. Jaeger] explained that Claimant was performing mild to heavy work activities without any difficulty or evidence of impingement syndrome prior to the work injury and the changes in the AC joint were not impinging prior to the work injury. After the work injury, the changes progressed to tendinosis and a partial tear in the left shoulder....

39. Dr. Jaeger also commented about the MRI studies ... which admittedly showed degenerative changes but also noted acute changes.... In his opinion, had she not had this fall, her cervical spine probably would not hurt her now because it had not hurt her for many years.

48. ... [T]he 2006 left shoulder MRI when compared with the one from 2004 showed that the work injury disrupted the left AC joint which initiated a very rapid acceleration of Claimant's post-traumatic arthropathy. These changes were not just the natural progression of the degenerative process but were post-traumatic and consistent with Claimant's credible testimony that her condition was worsening. Dr. Didizian's testimony that the 2004 MRI study was of the right shoulder is not credible because Claimant was not complaining of her right shoulder at that time and she knew she was having a study performed on ... her left shoulder.

The WCJ concluded that Employer failed to prove that Claimant had recovered fully from her work injury and had refused work that she could perform. Furthermore, Claimant met her burden on the review petition to amend the NCP to include "left brachial plexopathy, an impingement syndrome of the left shoulder, including partial tear and tendinopathy, cervical spondylosis and radiculopathy, lumbar spondylosis and radiculopathy as well as ulnar nerve, radial nerve and median nerve problems down the left arm...." Conclusion of Law at 3.

The Board affirmed the WCJ, concluding that her grant of the review petition was supported by substantial, competent evidence. Specifically, the Board noted that the WCJ accepted as credible the unequivocal medical testimony of Dr. Jaeger, who connected Claimant's various medical conditions to her work injury. Contrary to Employer's claims, the Board determined that Dr. Jaeger did address Claimant's radial nerve and ulnar problems in his testimony, and as a result it rejected Employer's contention that Dr. Jaeger's testimony was incompetent. Also, the fact that Dr. Jaeger did not treat Claimant for her neck and back problems did not render incompetent his testimony on the matter.

Rejecting Employer's challenge to the denial of a modification, the Board referred to the procedures governing the modification of benefits as set forth in *Kachinski v. Workmen's Compensation Appeal Board (Vepco Constr. Co.)*, 516 Pa. 240, 532 A.2d 374 (1987).¹ The Board pointed out that the WCJ accepted as credible Claimant's testimony in connection with her constant pain and inability to return to work, along with Dr. Jaeger's testimony as to Claimant's lack of recovery to allow for her return to any occupational use of her left hand and disability with regard to her pre-injury job. Hence, the Board's conclusion that Employer failed to meet its burden under *Kachinski*. Regarding the termination petition, the Board reasoned that because the WCJ did not believe Dr. Didizian's testimony, Employer

¹In *Kachinski* the court set forth the employer's burden as follows:

1. The employer who seeks to modify a claimant's benefits on the basis that he has recovered some or all of his ability must first produce medical evidence of a change in condition.
2. The employer must then produce evidence of a referral (or referrals) to a then open job (or jobs), which fits in the occupational category for which the claimant has been given medical clearance, *e.g.*, light work, sedentary work, etc.

Id., 516 Pa. at 252, 532 A.2d at 380.

failed to meet the burden explained in *Udvari v. Workmen's Compensation Appeal Board (USAir, Inc.)*, 550 Pa. 319, 705 A.2d 1290 (1997), *i.e.*, termination is proper where the WCJ credits the opinion of an employer's medical expert who testifies unequivocally that the claimant is recovered fully from the work injury, that she can return to work without restrictions and that there are no objective findings to substantiate the claims of pain or to connect them to the work injury.

Employer first argues that the WCJ's decision to grant the review petition was not based upon substantial, competent evidence. Claimant failed to meet her burden because Dr. Jaeger's incompetent testimony failed to establish that the new conditions were related to her work injury. Citing *Long v. Workers' Compensation Appeal Board (Integrated Health Serv., Inc.)*, 852 A.2d 424 (Pa. Cmwlth. 2004), Employer asserts that a medical opinion may be incompetent when it is rendered without a complete grasp of the claimant's medical condition and that Dr. Jaeger did not understand Claimant's condition since he did not treat her back and neck symptoms and did not know about her diabetes. He acknowledged Claimant's degenerative disc disease and that 2004 EMG and MRI studies did not support his findings, and he failed to address the radial and ulnar nerve issues.

Next, Employer argues that denial of its termination petition was not based upon substantial evidence where Dr. Didizian unequivocally testified that Claimant fully recovered and the 2004 MRI studies and two physical examinations revealed no impairment in the lumbar and cervical spine or in the shoulders. As of September 6, 2005, Claimant had no trigger points over the AC joint and normal shoulder joints. Claimant's complaints were not supported by medical evidence, and she presented with no radial or ulnar problems. The June 2004 EMG study indicated normal tendon reflexes, sensation and muscle strength, and the 2004 MRI

could not be of the left shoulder given all of the discrepancies from the 2006 MRI. The partial tear is related to the aging process, not the injury.

Lastly, regarding its modification/suspension petition, Employer cites *Titusville Hosp. v. Workmen's Compensation Appeal Board (Ward)*, 552 A.2d 365 (Pa. Cmwlth. 1989), and argues that Claimant's physical limitations are only one factor in determining work availability under *Kachinski*. Citing *Sheehan v. Workmen's Compensation Appeal Board (Supermarkets Gen.)*, 600 A.2d 633 (Pa. Cmwlth. 1991), it maintains that the physical limitations do not include those that are not causally connected to the work injury. Employer demonstrated that Claimant's medical condition had changed; it filed a notice of ability to return to work; and Claimant was advised of a position for which she was medically cleared. Under these facts, Employer argues, it met its burden under *Kachinski*.

In response Claimant refers to the WCJ's authority over questions of credibility, conflicting medical evidence and evidentiary weight, citing *Sherrod v. Workmen's Compensation Appeal Board (Thoroughgood, Inc.)*, 666 A.2d 383 (Pa. Cmwlth. 1995), and she submits that it is irrelevant whether the record here contains evidence to support findings other than those that were made by the WCJ. Dr. Jaeger's testimony established a direct relationship between the new diagnoses and her work injury and that she has not recovered from any of the injuries. Regarding the WCJ's failure to address any alleged inconsistency created by the fact that Dr. Jaeger does not treat Claimant's back and neck problems, she offers that the WCJ need not address every evidentiary issue, citing *Pistella v. Workmen's Compensation Appeal Board (Samson Buick Body Shop)*, 633 A.2d 230 (Pa. Cmwlth. 1993). Essentially, Claimant argues in support of the Board's reasons for affirming the WCJ's decision to deny Employer's petitions.

The Court's review is limited to determining whether constitutional rights were violated, whether an error of law was committed or whether necessary findings of fact are supported by substantial evidence. *See Dow v. Workers' Compensation Appeal Board (Household Fin. Co.)*, 768 A.2d 1221 (Pa. Cmwlth. 2001). The WCJ is free to resolve any conflicts in the evidence and to determine the credibility of the witnesses, and the WCJ's findings are conclusive upon appeal so long as the record, when viewed as a whole, contains substantial evidence to support the findings. Viewing the record in its entirety, the Court's decision is that the Board was correct in affirming the WCJ's decision to deny Employer's petitions and to grant in part Claimant's review petition. The WCJ's findings and conclusion regarding the review petition were supported by Claimant's credible testimony and Dr. Jaeger's unequivocal medical testimony that the WCJ likewise credited. *Dow*.

Employer failed to meet its burden of proof on its petitions, where the WCJ did not credit Employer's medical testimony that Claimant had recovered fully from the work injury and that she could return to her pre-injury job. *Udvari; Kachinski*. The Court agrees with the Board's reasoning in rejecting Employer's claim that Dr. Jaeger's testimony was incompetent, and the Court accepts that the WCJ finding regarding the 2004 MRI is conclusive upon appeal. *Dow*. Because the Board committed no error of law or abuse of discretion in affirming the WCJ's decision, the Court affirms the Board's order.

DORIS A. SMITH-RIBNER, Judge

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	:	
Workers' Compensation Appeal Board	:	
(Kuller),	:	
	:	
Respondent	:	

ORDER

AND NOW, this 5th day of August, 2008, the order of the Workers' Compensation Appeal Board is affirmed.

DORIS A. SMITH-RIBNER, Judge