IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Linda Townsend-Graham, Petitioner	:	
v.	:	No. 929 C.D. 2008
	:	Submitted: September 19, 2008
Workers' Compensation Appeal Board (Delaware County and Brokerage Professionals, Inc.), Respondents	:	

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JOSEPH F. McCLOSKEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE McCLOSKEY FILED: October 23, 2008

Linda Townsend-Graham (Claimant) petitions for review of an order of the Workers' Compensation Appeal Board (Board), affirming the decision of a Workers' Compensation Judge (WCJ) that Delaware County (Employer) presented a reasonable contest pursuant to the provisions of the Pennsylvania Workers' Compensation Act (Act).[1] We affirm.

On September 28, 1991, Claimant sustained an injury to her back while working as a nurse's assistant for Employer. Employer issued a notice of compensation payable (NCP) acknowledging that Claimant had sustained a work-related back injury and was to be paid total disability benefits of $218.00 per week. In 1996, the NCP was

[1] Act of June 2, 1915, P.L. 736, as amended, 77 P.S. §§ 1-1041.4, 2501-2708.

amended to accept that Claimant had also sustained "psychological injuries" and physical injuries to her neck and left shoulder. (R.R. at 14a).

In 2003, Employer filed a petition to terminate, alleging that Claimant had fully recovered from her physical and psychological injures. A hearing was held before the WCJ. At the hearing, Employer presented the testimony of Christopher Gerdvil, a private investigator. Mr. Gerdvil testified that he conducted surveillance of the Claimant in 2003 and 2004. He submitted videotaped evidence of Claimant playing tennis and dancing.

Employer also presented the testimony of Joseph E. Rojas, M.D., an orthopedic surgeon. Dr. Rojas testified that he first examined Claimant in 2002. At that time, he determined that Claimant had a herniated disk at C6-7, postsurgical treatment with residuals and a lumbosacral sprain. He examined her again in 2003. Following that examination, he determined that Claimant had reached "maximum medical improvement." (Original Record, deposition of Dr. Rojas at 14). He also concluded that Claimant remained totally disabled.

After issuing his 2003 report, Dr. Rojas was asked to review the videotaped surveillance evidence provided by Mr. Gerdvil. Following review of the videotape, Dr. Rojas opined that if Claimant could play tennis and move her neck while dancing, she could return to work without restrictions. Dr. Rojas determined that, based on the videotape, Claimant had fully recovered from her work-related physical injuries.

Dr. Rojas stated that his determination that Claimant had fully-recovered did not conflict with his earlier determination that she had reached maximum medical improvement. He claimed that his statement that she had reached maximum medical improvement merely meant that her physical complaints did not require further medical treatment.

Employer further presented the testimony of Paul S. Beighley, M.D., a psychiatrist. Dr. Beighley examined Claimant and viewed the videotaped surveillance evidence. He then opined that Claimant did not exhibit any evidence of a psychiatric illness. He stated that her physical injuries may have caused an adjustment disorder at one point in time; however, her symptoms now appeared to be in remission. Dr. Beighley stated that Claimant did continue to have an underlying psychiatric condition and need to continue taking Zyprexa, a mood stabilizer.

Claimant testified on her own behalf. She claimed that she still had pain as a result of her work injury. She stated that she has applied for work, but has not been offered employment. She agreed that she plays tennis several times a week and also occasionally dances.

Claimant also presented the testimony of Abdul Amir Mirsajadi, M.D., her treating psychiatrist. He stated that he prescribed Claimant Klonipin and Zyprexa due to her psychiatric disability and bipolar disorder. He stated that Claimant would probably remain on the medications for the rest of her life. He also opined that these medications were necessary, at least in part, due to Claimant's work-related injury.

The WCJ found Claimant and Dr. Mirsajadi to be credible and concluded that Employer failed to establish that Claimant was fully recovered from her work-related injury. The WCJ also awarded Claimant counsel fees.

Employer appealed to the Board. Employer argued that the WCJ failed to issue a reasoned decision, as he failed to provide rationale in support of his credibility determinations. Employer also argued that the WCJ erred in awarding Claimant counsel fees, as his decision did not contain a specific finding that Employer's contest was unreasonable.

The Board affirmed the denial of Employer's termination petition. However, the Board agreed that the WCJ had not made a finding as to the reasonableness of Employer's contest. Therefore, the Board remanded the matter to the WCJ to make findings of fact and conclusions of law as to that issue.

On remand, the WCJ determined that Employer presented sufficient evidence to support its allegation that Claimant was fully recovered. As such, the WCJ found Employer's contest to be reasonable and denied Claimant's claim for attorney fees. Claimant then appealed to the Board. Claimant argued that the WCJ erred in determining that Employer's contest was reasonable. The Board disagreed and affirmed the decision of the WCJ.

Claimant now appeals to this Court.[2] Claimant alleges that the evidence presented by Employer cannot be construed to support a termination of Claimant's benefits, because the testimony of Dr. Beighley and Dr. Rojas does not support a finding that Claimant was fully recovered from her work-related injuries. Claimant asserts that Employer's contest was therefore unreasonable and that she should be awarded attorney fees pursuant to Section 440 of the Act, 77 P.S. § 996.

[2] Our scope of review is limited to determining whether there has been a violation of constitutional rights, an error of law or whether necessary findings of fact are supported by substantial evidence. Tri-Union Express v. Workers' Compensation Appeal Board (Hickle), 703 A.2d 558 (Pa. Cmwlth. 1997). We also acknowledge our Supreme Court's decision in Leon E. Wintermyer, Inc. v. Workers' Compensation Appeal Board (Marlowe), 571 Pa. 189, 812 A.2d 478 (2002), wherein the Court held that "review for capricious disregard of material, competent evidence is an appropriate component of appellate consideration in every case in which such question is properly brought before the court." Leon E. Wintermyer, Inc., 571 Pa. at 203, 812 A.2d at 487.

Section 440(a) of the Act provides, in pertinent part, as follows:

> (a) In any contested case where the insurer has contested liability in whole or in part, including contested cases involving petitions to terminate, reinstate, increase, reduce or otherwise modify compensation awards, agreements or other payment arrangements or to set aside final receipts, the employe or his dependent, as the case may be, in whose favor the matter at issue has been finally determined in whole or in part shall be awarded, in addition to the award for compensation, a reasonable sum for costs incurred for attorney's fee, witnesses, necessary medical examination, and the value of unreimbursed lost time to attend the proceedings: Provided, That cost for attorney fees may be excluded when a reasonable basis for the contest has been established by the employer or the insurer.

77 P.S. § 996(a).

Whether an employer's contest of liability is reasonable is a question of law reviewable by this Court. Elite Carpentry Contractors v. Workmen's Compensation Appeal Board (Dempsey), 636 A.2d 250 (Pa. Cmwlth. 1993). "This court has often stated that the reasonableness of an employer's contest depends upon whether the contest was prompted to resolve a genuinely disputed issue or merely to harass the claimant." Id. at 252. It is the employer's burden to establish that there was a reasonable basis for contesting liability. Majesky v. Workmen's Compensation Appeal Board (Transit America, Inc.), 595 A.2d 761 (Pa. Cmwlth.), petition for allowance of appeal denied, 529 Pa. 653, 602 A.2d 862 (1991).

Claimant notes that Dr. Rojas evaluated Claimant in 2003 and found she was disabled as a result of her work-related injuries. Then, upon viewing the videotape of Claimant playing tennis and dancing, he concluded she was fully recovered. Claimant argues that it was unreasonable for Employer to accept this change of opinion, as Dr. Rojas did not re-examine the Claimant.

Employer argues that Dr. Rojas adequately explained why he changed his opinion. Dr. Rojas testified that he examined Claimant in 2003. At that time, she claimed to have pain that was aggravated by exercise, throwing, running, standing, bending, twisting, lifting and sitting. Claimant informed him that she could only drive a car at a slow speed and that she had to lay down several times a day due to pain. Dr. Rojas explained that he had found Claimant unable to work based on her limited ability to complete her daily activities due to pain. However, upon reviewing the videotape of Claimant play tennis and dancing, he determined that Claimant's actual physical abilities conflicted with her claimed medical condition. He stated that, "if she could play tennis four days in an eight-day period and move her neck the way she did dancing, that she could return to work with no restrictions." (R.R. at 32a).

In Fye v. Workers' Compensation Appeal Board (Super Moche), 762 A.2d 428 (Pa. Cmwlth. 2000), petition for allowance of appeal denied, 565 Pa. 678, 775 A.2d 810 (2001), a doctor diagnosed a claimant with cervical radiculitis and recommended she undergo a surgical procedure. The employer then hired an investigator to videotape the claimant. After viewing the videotape, the doctor revised his medical opinion, determining that the claimant's neck pain was not disabling and she could return to work without restrictions. The WCJ accepted the doctor's opinion and the Board affirmed.

On appeal to this Court, the claimant alleged that the doctor's opinion was equivocal. We disagreed, finding that "[t]he evolution of a professional opinion, especially in the wake of previously unknown pertinent facts about a claimant's physical abilities, does not constitute equivocality." Id. at 430. As such, in the present case, we conclude that the Board did not err in finding that it was reasonable for Employer to rely on the revised opinion of Dr. Rojas.

Claimant also alleges that Dr. Beighley's testimony did not establish that Claimant had fully recovered from her psychiatric condition, because he admitted that Claimant still needed to take medication to prevent mood swings.

In 1994, Claimant sought to amend the NCP to include psychological injuries. At that time, Jenaro Fernandez, M.D., testified that Claimant had a prior history of anger, mood swings and depression and that the work-related injury exacerbated Claimant's psychological condition. Additionally, she opined that Claimant had an adjustment disorder. The WCJ accepted Dr. Fernandez's opinion and amended the NCP to include "psychological injuries." (R.R. at 14a).

Dr. Beighley testified that based on his evaluation of Claimant and his review of the surveillance videotape, he believed that Claimant no longer had an adjustment disorder. He further opined that Claimant no longer suffered from an exacerbation of the psychological condition, stating that Claimant appeared asymptomatic and that her symptoms were in remission. However, Dr. Beighley explained that Claimant did have a pre-existing psychological condition known as schizo-affective disorder and needed to take medication to treat it.[3]

We disagree with Claimant that Dr. Beighley's admission that Claimant continues to need psychological medication precludes a finding that she was fully recovered from her work-related injury. Dr. Beighley testified that Claimant needs medication due to a pre-existing psychological condition and that Claimant informed

[3] Dr. Beighley testified that Claimant "meets the criteria for a diagnosis of what's called schizo-affective disorder, which means she has periods of mood instability and mood swings and also periods where she can actually have psychosis and be impaired in her reality." (R.R. at 18a). Dr. Beighley testified that the Claimant had informed him she was prescribed numerous medications for mood swings, mood instability and psychosis prior to her work-related injury.

him she was taking mood stabilizers prior to her work-related injury.[4] Employer does not have to present testimony that the psychological condition that Claimant admits to having prior to her work-related injury no longer exists. Employer only needs to present evidence that the exacerbation of Claimant's psychological condition, which occurred as a result of the work-related injury, has ended. As Employer presented such evidence through the testimony of Dr. Beighley, we find that the Board did not err in concluding that Employer's contest was reasonable.

Accordingly the order of the Board is affirmed.[5]

JOSEPH F. McCLOSKEY, Senior Judge

[4] Claimant's expert witness, Dr. Mirsajadi, testified that Claimant had been receiving psychiatric treatment since 1986 and had three psychiatric hospitalizations. Claimant also reported to him that she had a history of depression, thought disorder and delusional thinking. She informed him that she had taken a number of psychological medications prior to her work-related injury.

[5] Claimant also alleges that if this Court finds that Employer's contest was unreasonable, Claimant's counsel should be given leave to submit a request for counsel fees. As we have determined that Employer's contest was reasonable, we need not reach this issue.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Linda Townsend-Graham, Petitioner	:	
v.	:	No. 929 C.D. 2008
Workers' Compensation Appeal Board (Delaware County and Brokerage Professionals, Inc.), Respondents	:	

O R D E R

AND NOW, this 23rd day of October 2008, the order of the Workers' Compensation Appeal Board is affirmed.

JOSEPH F. McCLOSKEY, Senior Judge