IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Occidental Chemical and Gallagher Bassett Services, Inc., Petitioners	:	
v.	:	No. 94 C.D. 2008
	:	Submitted: April 18, 2008
Workers' Compensation Appeal Board (Grain), Respondent	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE JOSEPH F. McCLOSKEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE FRIEDMAN FILED: June 11, 2008

Occidental Chemical and Gallagher Bassett Services, Inc. (together, Employer) petition for review of the December 20, 2007, order of the Workers' Compensation Appeal Board (WCAB), which affirmed the decision of a workers' compensation judge (WCJ) granting the review petition filed by Edward Grain (Claimant) and denying Employer's termination petition. We also affirm.

On June 28, 2004, Claimant sustained a work-related injury, for which Employer accepted liability in a Notice of Compensation Payable (NCP) that described the injury as tendonitis in Claimant's buttocks. On May 5, 2006, Employer filed a termination petition alleging that Claimant had fully recovered from his work injury as of April 6, 2006, and Claimant filed a timely answer denying Employer's allegations. Thereafter, Claimant filed a review petition

alleging that the NCP contained an incorrect description of his work injury, and Employer filed a timely answer denying Claimant's allegations. The petitions were consolidated, and hearings were held before a WCJ.

In support of its termination petition, Employer introduced the deposition testimony of William H. Spellman, M.D., a board-certified orthopedic surgeon, who examined Claimant on April 6, 2006, and November 2, 2006. Dr. Spellman testified that Claimant initially presented with complaints of pain in the trochanteric prominence of his right hip. Based upon his April 6, 2006, examination of Claimant, his review of the relevant medical records and the history related to him by Claimant, Dr. Spellman opined that: (1) Claimant's work-related injury was trochanteric bursitis in the right hip, from which he had fully recovered; (2) Claimant was capable of returning to his position as a fork lift operator as of April 6, 2006; and (3) Claimant required no further medical treatment related to his work injury. Dr. Spellman testified that these opinions did not change following his November 2, 2006, examination of Claimant. (WCJ's Findings of Fact, Nos. 2(a)-2(d).)

Testifying in support of his review petition, Claimant stated that due to non-work-related problems, he underwent spinal surgery in January 2004. Claimant testified that he felt much improved after the surgery and had returned to work without difficulty; however, while at work on June 28, 2004, the stool he was sitting on broke, and he fell to the concrete floor, landing on his right hip. Claimant explained that since the fall, he has experienced problems with his right hip and leg and must limit his sitting, standing and walking. Claimant testified that

these limitations and the persistent pain in his right hip prevent him from returning to his pre-injury job. (WCJ's Findings of Fact, Nos. 5(a)-5(d).)

Claimant also presented the deposition testimony of Gregory Chapis, M.D., who is board-certified in physical medicine and rehabilitation and in pain medicine. Dr. Chapis testified that he first examined Claimant in April 2003, prior to the work injury, and Claimant complained of intermittent right leg pain and pain over his right hip laterally. Dr. Chapis explained that, after conservative treatments failed to improve Claimant's condition, he referred Claimant to Jeffrey Yablon, M.D., who performed a multilevel laminectomy, discectomy and foraminotomy.

Dr. Chapis testified that when he next saw Claimant on January 18, 2006,[1] Claimant reported that the low back surgery had resolved approximately 90% of his symptoms and he had returned to work, but Claimant explained that he fell at work, landing on his right hip, and now he experiences persistent pain in the right hip that is aggravated by walking. Dr. Chapis stated that a March 13, 2006, EMG revealed that Claimant had bilateral L5 radiculopathy with severe changes on the right side. Based on the history provided to him by Claimant, his examinations of Claimant and his review of the relevant medical reports and studies, Dr. Chapis opined that Claimant suffers primarily from L5 radiculopathy with right sacroiliac joint dysfunction and piriformis pain and that the June 28, 2004, fall aggravated Claimant's radiculopathy causing his disability. Finally, Dr. Chapis opined that Claimant had been misdiagnosed by his prior physicians, and he never had

[1] Up until this date, Employer's panel physicians treated Claimant for his work injury. (WCJ's Findings of Fact, No. 6(b); R.R. at 54a-56a.)

trochanteric bursitis. (WCJ's Findings of Fact, Nos. 4(a)-4(f); R.R. at 113a-14a, 122a-23a, 131a.)

After considering the evidence, the WCJ credited Claimant's testimony in its entirety. The WCJ also accepted the testimony and opinions of Dr. Chapis as more competent, credible and persuasive than those of Dr. Spellman, which the WCJ rejected.[2] Accordingly, the WCJ denied Employer's termination petition, concluding that Employer failed to prove that Claimant had fully recovered from his work injuries. In addition, the WCJ held that Claimant had established that the NCP's description of the injury was incorrect; thus, the WCJ granted the review petition and amended the description of Claimant's injury to include an aggravation of Claimant's right L5 radiculopathy. (WCJ's Conclusions of Law, Nos. 2-3.) Employer appealed to the WCAB, which affirmed. Employer now petitions this court to review the WCAB's determination.[3]

[2] In crediting Dr. Chapis' testimony, the WCJ noted that: (1) Dr. Chapis is Claimant's treating physician and has had many opportunities to examine, assess and compare Claimant's condition and symptoms during the course of Claimant's treatment, both before and after the June 28, 2004, incident; and (2) Dr. Chapis' opinions and conclusions are consistent with the history, complaints and symptomology credibly testified to by Claimant. (WCJ's Findings of Fact, Nos. 6(a)-6(c).)

[3] Our scope of review is limited to determining whether constitutional rights were violated, whether the adjudication is in accordance with the law or whether the necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704.

Employer first argues that the denial of its termination petition was erroneous because Employer satisfied its burden of proof through Dr. Spellman's "unrefuted and unrebutted" testimony.[4] We disagree.

Initially, we reject Employer's assertions that Dr. Spellman's testimony was unrefuted and unrebutted. To the contrary, Dr. Chapis credibly testified that Claimant's work injury had been **misdiagnosed** as trochanteric bursitis by Claimant's other physicians, including Dr. Spellman. (R.R. at 113a-14a, 123a, 130a-31a.) More importantly, the WCJ rejected Dr. Spellman's testimony and, instead, accepted Claimant's testimony and the opinions of Dr. Chapis. The WCJ, as the ultimate fact finder, may accept or reject the testimony of any witness, including medical witnesses, in whole or in part, and, on appeal, we are bound by the WCJ's credibility and evidentiary determinations. *Williams v. Workers' Compensation Appeal Board (USX Corporation-Fairless Works)*, 862 A.2d 137 (Pa. Cmwlth. 2004). Accordingly, because Employer presented no credible evidence to support termination, it could not satisfy its burden of proof.

Employer next argues that Dr. Chapis' testimony is not legally competent and, therefore, could not support the WCJ's decision to amend the NCP

[4] In a termination petition proceeding, the employer bears the burden of proving that all disability related to a compensable injury has ceased or that any current disability is unrelated to the claimant's work injury. *Jackson v. Workers' Compensation Appeal Board (Resources for Human Development)*, 877 A.2d 498 (Pa. Cmwlth. 2005). The employer may satisfy this burden by presenting credible, unequivocal and competent medical evidence of the claimant's full recovery from his work-related injuries. *Id.*

to include a work-related aggravation of right L5 radiculopathy.[5] In this regard, Employer first asserts that Dr. Chapis disregarded and/or ignored Claimant's medical history and the medical opinions of the physicians who previously had treated Claimant for this injury.[6] However, it is apparent from the record that Dr. Chapis did **not** disregard or ignore this information. In fact, Dr. Chapis recognized that Claimant's other physicians diagnosed Claimant with work-related trochanteric bursitis of the right hip, but Dr. Chapis testified that, after examining and treating Claimant for months, he **disagreed** with that diagnosis. (R.R. at 113a-14a, 122a-23a, 131a.) Moreover, Dr. Chapis certainly was aware of Claimant's prior medical history, having treated Claimant for low back and leg problems before the June 28, 2004 work incident; he recognized that Claimant's right L5 radiculopathy was pre-existing, and he credibly testified that Claimant's fall on June 28, 2004, aggravated that pre-existing radiculopathy. (R.R. at 115a, 119a, 130a.)

[5] Pursuant to section 413(a) of the Workers' Compensation Act (Act), act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. §§771, a WCJ may amend an NCP if it was materially incorrect at the time it was issued. *Jeanes Hospital v. Workers' Compensation Appeal Board (Hass)*, 582 Pa. 405, 872 A.2d 159 (2005). An NCP is materially incorrect if the accepted injury does not reflect all of the injuries sustained in the initial work incident. *Id.* The claimant bears the burden of proving that there is a material mistake in an NCP. *Id.*

[6] Employer relies on *Newcomer v. Workmen's Compensation Appeal Board (Ward Trucking Company)*, 547 Pa. 639, 692 A.2d 1062 (1997), in support of this position; however, *Newcomer* is easily distinguishable from the present case. In *Newcomer*, the physician's opinions were deemed legally incompetent because they were based **solely** and **expressly** on an **incorrect** medical and factual history of the injury provided by the claimant, whereas, here Dr. Chapis reviewed Claimant's medical records and based his opinions on a correct understanding of the factual history of the June 28, 2004, incident. (R.R. at 92a-95a.)

Second, Employer contends that Dr. Chapis' testimony was not legally competent because it was equivocal; Employer maintains that Dr. Chapis "never made a definitive diagnosis that related [C]laimant's low back condition to his 2004 work injury."[7] (Employer's brief at 16.) However, a review of the record establishes that Dr. Chapis made this connection unequivocally. Dr. Chapis testified that he considered several differential diagnoses for Claimant's work injury and, ultimately, concluded that Claimant's fall on June 28, 2004, aggravated Claimant's pre-existing right L5 radiculopathy, causing Claimant's hip pain. (R.R. at 112a-15a, 123a, 130a-31a.) Accordingly, Dr. Chapis' credited, competent testimony provides ample support for the WCJ's findings and conclusions.

Finally, Employer argues that the WCJ's decision must be reversed because the WCJ failed to rule on Employer's ongoing hearsay objection to Dr. Chapis' use and/or reliance on the opinions and records of Dr. Yablon. We disagree.

To constitute reversible error, an evidentiary ruling must not only be erroneous, but also harmful or prejudicial to the complaining party. *Lock v. City of Philadelphia*, 895 A.2d 660 (Pa. Cmwlth. 2006). Moreover, where there is other

[7] Competency, when applied to medical evidence, is merely a question of whether a witness's opinion is sufficiently definite and unequivocal to render it admissible. *Cerro Metal Products Company v. Workers' Compensation Appeal Board (PLEWA)*, 855 A.2d 932 (Pa. Cmwlth. 2004), *appeal denied*, 582 Pa. 678, 868 A.2d 1202 (2005). The question of the competency of the evidence is one of law and fully subject to appellate review. *Id.* Medical evidence is unequivocal as long as the medical expert, after providing a foundation, testifies that in his professional opinion he believes or thinks the facts exist. *Id.*

competent evidence in the record, which standing alone supports the decision, the admission of objected to hearsay is harmless. *Benson*. Because our review of the record establishes that such is the case here,[8] we will not reverse on this basis.[9]

Accordingly, we affirm.

ROCHELLE S. FRIEDMAN, Judge

[8] Employer asserts that the WCJ improperly relied on Dr. Chapis' testimony about the contents of Dr. Yablon's records and notes for their truth. As an example, Employer points to Findings of Fact, No. 4(c), in which the WCJ found that Claimant had undergone a multilevel laminectomy, discectomy and foraminotomy and that Claimant had recovered well from that surgery. However, the WCJ makes no mention of Dr. Yablon's report or opinions in his decision. Indeed, with respect to Findings of Fact, No. 4(c), Dr. Chapis testified that **Claimant** stated that he had undergone a multilevel lumbar laminectomy and microdiscectomy, that he was doing well and that he had returned to work, (R.R. at 92a-93a, 119a-20a), and Claimant himself credibly testified about the surgery, his recovery and his return to work. (R.R. at 50a-52a.) Moreover, we note that both Dr. Spellman and the impairment rating physician, Scott Epstein, M.D., reviewed Dr. Yablon's records as a part of their records review and referred to those records in their respective reports. (R.R. at 142a-44a, 167a, 172a-73a, 185a.)

[9] We also reject Employer's assertions that the WCJ's decision was not reasoned, as required by section 422(a) of the Act, 77 P.S §834, because the WCJ did not make specific findings of fact regarding certain medical opinions. To satisfy section 422(a) of the Act, a WCJ's decision must permit adequate appellate review. *Pryor v. Workers' Compensation Appeal Board (Colin Service Systems)*, 923 A.2d 1197 (Pa. Cmwlth. 2006). Section 422(a) does **not** require the WCJ to discuss **all** of the evidence presented; rather, the WCJ is only required to make the findings necessary to resolve the issues raised by the evidence and **relevant** to the decision. *Id.* Here, the absence of findings relating to other medical opinions does not preclude our appellate review. Importantly, those opinions essentially were the same as Dr. Spellman's, which were rejected by the WCJ in favor of Dr. Chapis' opinion regarding the nature of Claimant's injury. Accordingly, because the additional opinions were not relevant to the WCJ's decision, the requirements of section 422(a) of the Act were met.

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O R D E R

AND NOW, this 11th day of June, 2008, the order of the Workers' Compensation Appeal Board, dated December 20, 2007, is hereby affirmed.

ROCHELLE S. FRIEDMAN, Judge