IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Joseph Yorck, Petitioner	:	
v.	:	No. 961 C.D. 2008
	:	Submitted: August 29, 2008
Workers' Compensation Appeal Board (RTI Mechanical Contractors), Respondent	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE FRIEDMAN FILED: October 23, 2008

Joseph Yorck (Claimant) petitions for review of the May 9, 2008, order of the Workers' Compensation Appeal Board (WCAB), which affirmed the decision of a workers' compensation judge (WCJ) to grant the modification petition filed by RTI Mechanical Contractors (Employer). We also affirm.

Claimant sustained work-related injuries in the nature of a right shoulder fracture, right brachial plexopathy, disc herniation at C6-7, right rotator cuff tear and right reflex sympathetic dystrophy (RSD), and Employer accepted liability for these injuries pursuant to a Notice of Compensation Payable (NCP).[1] Subsequently,

[1] The NCP initially described Claimant's injury as a right shoulder fracture. After several adjudications, the NCP's description of the injury was expanded to include the other injuries named.

pursuant to section 306(a.2)(6) of the Workers' Compensation Act (Act),[2] Employer requested that Claimant undergo an Impairment Rating Evaluation (IRE), which was performed on September 13, 2006, by William R. Prebola, M.D. Dr. Prebola calculated Claimant's whole person impairment rating at eighteen percent. Because Employer's IRE request was made more than sixty days after Claimant received 104 weeks of total disability, Employer could not modify Claimant's benefits unilaterally but had to seek a change in status via the filing of a modification petition pursuant to section 413(a) of the Act.[3] Claimant filed an answer denying Employer's allegations, and the matter was assigned to a WCJ.

Employer presented Dr. Prebola's deposition testimony, as well as his IRE report. Dr. Prebola testified that Claimant had reached maximum medical improvement (MMI) and that Claimant's impairment rating was eighteen percent, as calculated under the Fifth Edition of the American Medical Association (AMA) *Guides to the Evaluation of Permanent Impairment* (AMA Guide). Dr. Prebola stated that, in evaluating Claimant, he recognized all of Claimant's work-related injuries with the exception of the RSD, explaining that he was unaware that RSD was an accepted work injury. However, Dr. Prebola testified that including Claimant's RSD would only have increased the rating by one to three percent because that condition

[2] Act of June 2, 1915, P.L. 736, *as amended*, added by section 4 of the act of June 24, 1996, P.L. 350, 77 P.S. §511.2(6).

[3] 77 P.S. §772. This section authorizes a WCJ to modify a notice of compensation payable at any time upon petition filed by either party and proof that the disability of the injured party has changed.

and its symptoms are similar to the recognized brachial plexopathy, which was part of the IRE evaluation. (WCJ's Findings of Fact, Nos. 4-6; R.R. at 51A-56A, 58A-59A.)

Claimant offered no testimony or other evidence in opposition to Dr. Prebola's testimony. Crediting Dr. Prebola's uncontradicted testimony, the WCJ found that Claimant had reached MMI. Noting that Dr. Prebola did not include the RSD, an accepted injury, in Claimant's impairment rating, the WCJ nevertheless held that Dr. Prebola's testimony was legally competent because he testified that inclusion of Claimant's RSD would have increased the IRE rating only slightly. Based on this testimony, the WCJ found that Claimant's whole person impairment is between eighteen and twenty-three percent, and, therefore, Employer was entitled to modify Claimant's disability status from total to partial as of September 26, 2006.[4] (WCJ's Findings of Fact, Nos. 5-8; WCJ's Conclusions of Law, Nos. 4-6.) Claimant appealed to the WCAB, which affirmed.

On appeal to this court,[5] Claimant first argues that the WCJ erred in relying on Dr. Prebola's testimony because Dr. Prebola's refusal to accept that

[4] As the party seeking to modify a claimant's benefits status, the employer bears the burden of proving, through unequivocal and competent medical evidence, that the claimant has reached MMI and that the claimant's impairment rating is below fifty percent. *Combine v. Workers' Compensation Appeal Board (National Fuel Gas Distribution Corporation)*, 954 A.2d 776 (Pa. Cmwlth. 2008).

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

Claimant suffered from RSD rendered Dr. Prebola's testimony legally incompetent. We disagree.

The question of the competency of the evidence is a one of law and fully subject to appellate review. *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). In order for a medical expert's testimony to be legally sufficient, i.e., competent, to support the modification or termination of benefits on the basis of a change in a claimant's disability, a medical expert must acknowledge the claimant's recognized work-related injuries and base his opinions on those injuries. *GA & FC Wagman, Inc. v. Workmen's Compensation Appeal Board (Aucker)*, 785 A.2d 1087 (Pa. Cmwlth. 2001); *Noverati v. Workmen's Compensation Appeal Board (Newtown Squire Inn)*, 686 A.2d 455 (Pa. Cmwlth. 1996). However, in *Jackson v. Workers' Compensation Appeal Board (Resources for Human Development)*, 877 A.2d 498 (Pa. Cmwlth. 2005), we held that a physician's testimony may be competent even where the physician does not acknowledge the established injury, so long as the physician provides an alternative opinion based on the assumption that the established injury occurred.

In *Jackson*, the employer and the claimant stipulated that the claimant had sustained compensable injuries to her knees, back and arms. In a subsequent termination proceeding, the employer's physician's opined that "if" the claimant sustained a work-related injury to her knees, it was a contusion and had resolved. Accepting that physician's testimony, the WCJ found that the claimant had fully recovered and granted the termination petition. On appeal to this court, the claimant

argued that because the physician used the word "if," the physician based his opinion on an assumption that was contrary to the accepted facts, rendering his testimony incompetent. We rejected this argument and held that, even though the physician may have questioned whether a knee injury had occurred, the physician nevertheless opined that the claimant was recovered from whatever work-related knee injury she may have suffered.

Like the physician in *Jackson*, Dr. Prebola took Claimant's accepted injury into consideration, essentially testifying that "if" Claimant suffered from RSD, Claimant's impairment rating would increase only by one to three percent. Thus, under *Jackson*, Dr. Prebola's credited testimony is legally competent to support the WCJ's finding that Claimant's impairment rating was less than fifty percent, and that finding supports the WCJ's modification of Claimant's benefits from total to partial.

Claimant next argues that the WCJ erred in modifying his benefits retroactively because Employer failed to issue a "Notice of Change in Workers' Compensation Disability Status" (Form LIBC-764) as required by 34 Pa. Code §123.105. Claimant's argument reflects his misunderstanding of the procedural posture of this case.

Sections 306(a.2)(1) and (2) of the Act, 77 P.S. §§511.2(1), (2), authorize an employer to reduce a claimant's benefits automatically where the following criteria are met: (1) the employer has requested an IRE within sixty days of the payment of 104 weeks of compensation; (2) the IRE shows an impairment rating of less than fifty percent; and (3) the employer has given the employee sixty days

notice. The regulation at 34 Pa. Code §123.105(d) supplements and clarifies the requirements for an automatic reduction set forth in sections 306(a.2)(1) and (2) of the Act, stating that the employer must give the employee notice that his benefits "shall be adjusted from total to partial" in sixty days based on an impairment rating of less than fifty percent. 34 Pa. Code §123.105(d).

Here, because Employer did not request Claimant to submit to an IRE within the time period set forth by section 306(a.2)(1) of the Act, Employer could not avail itself of the automatic reduction allowed by that section. Instead, relying on Dr. Prebola's testimony and IRE report, Employer filed a modification petition pursuant to section 413(a) of the Act, and Claimant received notice and defended against that petition. Under these facts, the regulations governing an automatic reduction in benefits do not apply, and Claimant's arguments concerning lack of notice and denial of due process necessarily fail.

Accordingly, we affirm.

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ROCHELLE S. FRIEDMAN, Judge

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O R D E R

AND NOW, this 23rd day of October, 2008, the order of the Workers' Compensation Appeal Board, dated May 9, 2008, is hereby affirmed.

ROCHELLE S. FRIEDMAN, Judge