IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Visteon Systems and Gallagher Bassett Services, Inc., Petitioners	:	
v.	:	
Workers' Compensation Appeal Board (Csaszar), Respondent	:	No. 773 C.D. 2013
	:	Submitted: September 6, 2013

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE ANNE E. COVEY, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE COVEY FILED: November 1, 2013

Visteon Systems and Gallagher Bassett Services, Inc. (collectively, Employer) petition this Court for review of the Workers' Compensation Appeal Board's (Board) April 9, 2013 order reversing the Workers' Compensation Judge's (WCJ) decision terminating Fayette Csaszar's (Claimant) benefits.[1] The issues for this Court's review are: (1) whether the Board erred in concluding that Employer's medical evidence was equivocal and, thus, insufficient to support the termination petition; and, (2) whether the Board erred by substituting its credibility determinations for the WCJ's and reweighing evidence. We reverse.

Claimant suffered "bilateral bicep tendinitis and upper extremity radiculopathy as a result of using a chisel and hammer to break open plastic units" while working for Employer on December 19, 2000. Reproduced Record (R.R.) at

[1] The WCJ also denied Claimant's reinstatement petition, but that portion of the WCJ's order is not at issue in this appeal.

7a. Claimant received temporary total disability benefits related to that injury from October 16, 2001 through January 14, 2003. Her benefits were suspended between January 15, 2003 and July 18, 2008 because she returned to work without suffering any wage loss. However, Claimant's wage loss benefits were reinstated from July 19, 2008 through August 23, 2009. In August 2009, her benefits were once again suspended because she returned to work and was making equal or greater than her time-of-injury earnings. Employer closed its plant on January 31, 2010.

On May 6, 2010, Claimant filed a petition to reinstate her benefits as of February 1, 2010, due to a worsening of her disability. Employer opposed the petition. During hearings before the WCJ, Claimant and her physician, Scott M. Fried, D.O. (Dr. Fried) proffered that she had not fully recovered from her work injury. Employer presented its medical expert Dennis McHugh, D.O. (Dr. McHugh) who testified that Claimant had fully recovered from her work injuries effective May 29, 2009 or, at the very least, September 15, 2010. Accordingly, Employer requested termination of Claimant's benefits as of May 29, 2009 or September 15, 2010. On July 8, 2011, the WCJ denied Claimant's reinstatement petition and terminated her benefits effective September 15, 2010. Claimant appealed to the Board. On April 9, 2013, the Board affirmed the WCJ's denial of Claimant's reinstatement petition, but reversed the termination component of the WCJ's order, resulting in Claimant's benefits remaining suspended. Employer appealed from the Board's termination reversal to this Court.[2]

[2] "This Court's scope and standard of review of an order of the Board is limited to determining whether the necessary findings of fact are supported by substantial evidence, whether Board procedures were violated, whether constitutional rights were violated or an error of law was committed." *World Kitchen, Inc. v. Workers' Comp. Appeal Bd. (Rideout)*, 981 A.2d 342, 346 n.5 (Pa. Cmwlth. 2009).

Pending its appeal, Employer sought a stay of its obligation to pay Claimant's medical expenses, which the Board denied on June 10, 2013, and this Court denied on July 24, 2013.

Employer first argues that the Board erred in concluding that Employer's medical evidence was equivocal and, thus, insufficient to support the termination petition. We agree.

Section 413 of the Workers' Compensation Act (Act)[3] authorizes the WCJ to terminate a claimant's benefits due to a change in her disability. "To succeed in a termination petition, an employer bears the burden of proving by substantial evidence that a claimant's disability ceased, or any remaining conditions are unrelated to the work injury." *Westmoreland Cnty. v. Workers' Comp. Appeal Bd. (Fuller)*, 942 A.2d 213, 217 (Pa. Cmwlth. 2008).

> An employer may satisfy its burden by offering unequivocal medical evidence which establishes with a reasonable degree of medical certainty that the claimant has fully recovered, can return to work without restrictions, and there are no objective medical findings which either substantiate the claims of pain or connect them to the work injury.

Elberson v. Workers' Comp. Appeal Bd. (Elwyn, Inc.), 936 A.2d 1195, 1198 n.3 (Pa. Cmwlth. 2007).

> Whether expert testimony is equivocal is a question of law that is fully subject to this Court's review. When making that determination, we must examine the entire testimony of a witness as a whole and not rely upon a fragment of testimony removed from its context. A medical expert's testimony is unequivocal if, after providing a foundation, he testifies that he believes or thinks the facts exist.

Inservco Ins. Servs. v. Workers' Comp. Appeal Bd. (Purefoey), 902 A.2d 574, 579 (Pa. Cmwlth. 2006) (citations omitted). Even where a claimant has complaints of continued pain, if the WCJ credits an employer's unequivocal medical testimony that there are no objective medical findings which either substantiate the complaints or

[3] Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. § 772.

connect them to the work injury, termination is proper. *Udvari v. Workmen's Comp. Appeal Bd. (USAir, Inc.)*, 550 Pa. 319, 705 A.2d 1290 (1997).

The parties stipulated that Claimant suffered "bilateral bicep tendinitis and upper extremity radiculopathy." R.R. at 7a. Before the WCJ, Dr. Fried testified that he sees Claimant approximately every six months. He diagnosed Claimant with bicep tendonitis and bilateral brachial plexopathy causing problems with her cervical area and in her long thoracic nerve. R.R. at 134a, 137a, 140a-141a, 146a-148a, 152a. He stated that until Claimant's job ended, she remained under restrictions related to repetitive and overhead activity, and she continued working despite exacerbations. He claimed that "she continued to have a very slow but definite progression of her cumulative traumas. The radiculopathy has progressed. The involvement of the brachial plexus, upper trapezial area, cervical involvement, median nerve, and radial nerve has progressively deteriorated secondary to her work activities." R.R. at 160a-161a. Dr. Fried explained that he never released Claimant to full-duty work. Claimant also related that she still experiences symptoms related to her original work injury.

Dr. McHugh was offered as an expert in the area of orthopedic surgery. R.R. at 240a-241a. Approximately 20% of his work is related to treatment of upper extremity injuries, including biceps tendon repairs. R.R. at 241a, 244a. He performed physical examinations of Claimant on May 29, 2009 (R.R. at 298a- 303a) and September 15, 2010 (R.R. at 304a-308a). Dr. McHugh reviewed Claimant's medical records, including EMGs and nerve conduction studies, prior to each examination. R.R. at 249a, 251a. He also obtained detailed histories each time. R.R. at 243a-248a. Dr. McHugh noted that the large majority of Claimant's historic complaints about her upper extremities were related to her daily living activities (i.e., vacuuming and driving), rather than work. R.R. at 250a-251a, 254a, 266a-267a. He testified that her medical records revealed that she could perform her regular job as

well as overtime work. R.R. at 251a. Dr. McHugh further reported that Claimant's medical records made evident that she is more symptomatic when she is not working, and does better when she is working. R.R. at 250a-251a, 254a-255a, 266a-267a. He testified that his May 2009 examination revealed no muscle weakness or atrophy, and that she had normal range of motion in her shoulders. R.R. at 257a-258a. Moreover, Dr. McHugh stated that Claimant's deep tendon reflexes were fine. R.R. at 262a. He noted that she complained of numbness and tingling which he could not explain. R.R. at 263a. Dr. McHugh also attested that Claimant's September 2010 exam was completely normal. R.R. at 263a.

Dr. McHugh opined:

> By my physical examination, I could not find any objective criteria. The only positive, true positive findings for [the bilateral bicep tendinitis and upper extremity radiculopathy] diagnoses were not anatomic. Meaning her biceps [were] completely normal. She had great motion. She had no tenderness. Provocative maneuvers at the biceps were normal. When it came to radiculopathy which would be the thoracic outlet syndrome, those tests were negative. And in review of the records, I think it was clearly evident that she was not having work-related issues.

R.R. at 265a. According to Dr. McHugh, as of Claimant's May 2009 examination, she had fully recovered from her accepted work injuries, and the majority of her continued complaints were not related to her work, but rather "deconditioning . . . from the fact that she wasn't working and she wasn't doing anything with [her] arms." R.R. at 277a-278a; *see also* R.R. at 265a, 268a-269a, 282a-283a, 285a-287a. On cross-examination, Dr. McHugh expressed that the brachial plexus inflammation or flare-ups and thoracic complaints Claimant reported to Dr. Fried were related to her pre-existing genetics or anatomy rather than work, and that her condition would return to its baseline with rest from the activities that caused it. R.R at 282a-283a, 285a-287a. He found nothing evident from Claimant's records or his examinations

that support a worsening of Claimant's condition as of February 1, 2010, the date she from which she sought reinstatement. R.R. at 273a. He also reported that the status of her recovery had not changed as of September 2010; she remained completely normal, and would be able to perform her time-of-injury job without restrictions. R.R. at 265a-267a. Dr. McHugh further testified that his opinions were rendered within a reasonable degree of medical certainty. R.R. at 265a, 273a.

The WCJ found that "the testimon[y] of Dr. McHugh . . . [was] clear, coherent, logical and unequivocal," and "was supported by the results of his examinations of Claimant, and his review of Claimant's medical records and diagnostic test results[.]" WCJ Dec. at 7. The Board, on the other hand, deemed Dr. McHugh's testimony contradictory and equivocal because, rather than recognizing the stipulated description of Claimant's accepted work injury, he portrayed her discomfort as a pre-existing condition and, despite declaring that she was fully recovered, he acknowledged that she would have pain if the nerve at her brachial plexus was tapped or compressed.[4]

It is clear from our review of Dr. McHugh's testimony as a whole that he established with a reasonable degree of medical certainty that Claimant "has fully recovered, can return to work without restrictions, and there are no objective medical

[4] Despite these assertions, the Board conceded:

> We realize that Dr. McHugh also testified that Claimant had fully recovered from the accepted work injuries of bilateral tendinitis and upper extremity radiculopathy, and could perform the troubleshooter position she was doing in 2000 at the time of his examinations (McHugh dep. at 34-35, 36). We also concede that [']answers given in cross-examination do not, as a matter of law, destroy the effectiveness of previous opinions expressed by a physician.['] [*Inservco Ins. Servs. v. Workers' Comp. Appeal Bd. (Purefoey)*, 902 A.2d 574, 578-79 n.3 (Pa. Cmwlth. 2006)].

Board Op. at 11-12.

findings which either substantiate the claims of pain or connect them to the work injury." *Elberson*, 936 A.2d at 1198 n.3. Contrary to the Board's interpretation, Dr. McHugh did not fail to recognize the stipulated description of Claimant's injury. Rather, he acknowledged Claimant sustained a bilateral shoulder injury at work in 2000 that caused her nerves and tendons to swell. R.R. at 245a, 284a, 291a. He stated that these were reversible conditions and, after the aggressive treatment she received, the injuries reversed, and she was able to and did return to work. R.R. at 284a-285a. By the time he saw Claimant in 2009-2010, he deemed her recovered from her work-related injuries. Dr. McHugh's disagreement was not with the description of the accepted injuries, nor with Dr. Fried's diagnosis that Claimant currently suffers from brachial plexopathy secondary to thoracic outlet syndrome, but with Dr. Fried's conclusion that her current problems are secondary to her 2000 work injury. R.R. at 284a. It was in the context of the injuries that Claimant purportedly now suffers that Dr. McHugh stated: "As long as you ask them not to do that activity that caused the flare-up, she should go back to baseline." R.R. at 285a. Dr. McHugh explained that Claimant's medical history makes clear that those complaints arose when she was not working, and they related directly to her anatomy as affected by her daily living activities, rather than her original work injury. Finally, when asked how he could state that Claimant was fully recovered from her injury, but then discuss parameters within which she could work, Dr. McHugh responded:

> Because those parameters don't relate to any - - - injuries that occurred on the job. They would be secondary to her pathology, meaning if she truly has thoracic outlet syndrome, that wasn't caused by her job. . . . And so to keep her within her scope so that she would not become symptomatic, I would entail those work restrictions. It's not due to the fact that she did something in 2000 that gave her permanent deficits. . . .

R.R. at 268a. Dr. McHugh's opinions were based on facts and objective testing, were not contradictory, and were rendered within a reasonable degree of medical certainty. Accordingly, Dr. McHugh's testimony was unequivocal, and the Board erred by holding otherwise.

Employer also argues that the Board erred by substituting its credibility determinations for the WCJ's and reweighing the evidence. We agree. It is well established that "[t]he WCJ is the ultimate factfinder and has exclusive province over questions of credibility and evidentiary weight." *Univ. of Pa. v. Workers' Comp. Appeal Bd. (Hicks)*, 16 A.3d 1225, 1229 n.8 (Pa. Cmwlth. 2011). "The WCJ, therefore, is free to accept or reject, in whole or in part, the testimony of any witness, including medical witnesses." *Griffiths v. Workers' Comp. Appeal Bd. (Red Lobster)*, 760 A.2d 72, 76 (Pa. Cmwlth. 2000). Thus, neither the Board nor the Court may review the evidence or reweigh the WCJ's credibility determinations. *Sell v. Workers' Comp. Appeal Bd. (LNP Eng'g)*, 565 Pa. 114, 771 A.2d 1246 (2001). In addition, "Section 422(a) [of the Act, 77 P.S. § 834,] does not permit a party to challenge or second-guess the WCJ's reasons for credibility determinations. Unless made arbitrarily or capriciously, a WCJ's credibility determinations will be upheld on appeal." *Dorsey v. Workers' Comp. Appeal Bd. (Crossing Constr. Co.)*, 893 A.2d 191, 195 (Pa. Cmwlth. 2006) (citation omitted). This Court has stated:

> it is irrelevant whether the record contains evidence to support findings other than those made by the WCJ; the critical inquiry is whether there is evidence to support the findings actually made. We review the entire record to determine if it contains evidence a reasonable mind might find sufficient to support the WCJ's findings. If the record contains such evidence, the findings must be upheld even though the record contains conflicting evidence.

Lahr Mech. v. Workers' Comp. Appeal Bd. (Floyd), 933 A.2d 1095, 1101 (Pa. Cmwlth. 2007) (citations and quotation marks omitted). Moreover, this Court has held:

> Substantial evidence is such relevant evidence as a reasonable person might accept as adequate to support a conclusion. In performing a substantial evidence analysis, this court must view the evidence in a light most favorable to the party who prevailed before the factfinder. Moreover, we are to draw all reasonable inferences which are deducible from the evidence in support of the factfinder's decision in favor of that prevailing party.

3D Trucking Co., Inc., v. Workers' Comp. Appeal Bd. (Fine & Anthony Holdings Int'l), 921 A.2d 1281, 1288 (Pa. Cmwlth. 2007) (citations and quotation marks omitted).

Here, the WCJ found Dr. McHugh more credible and persuasive than Claimant and Dr. Fried. WCJ Dec. at 7. Viewing the evidence in a light most favorable to Employer, who prevailed before the WCJ, and there being evidence to support the WCJ's findings, we hold that the Board erred by reweighing the evidence and substituting its own credibility determinations.

Based upon the foregoing, the Board's order is reversed.

ANNE E. COVEY, Judge

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O R D E R

AND NOW, this 1st day of November, 2013, the Workers' Compensation Appeal Board's April 9, 2013 order is reversed.

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ANNE E. COVEY, Judge