Gaul v. Workers' Compensation Appeal Board

2003 | Cited 0 times | Supreme Court of Pennsylvania | June 18, 2003

Submitted: April 11, 2003

OPINION NOT REPORTED

MEMORANDUM OPINION

Rebecca Gaul (Claimant) petitions for review of the October 28, 2002 order of the Workers' Compensation Appeal Board (Board) that affirmed the order of the Workers' Compensation Judge (WCJ) granting a modification petition on behalf of Great Valley Health (Employer) and modifying Claimant's benefits to partial disability as of May 23, 2000. For the reasons that follow, we affirm.

On May 13, 1998, while working as an emergency medical technician for Employer, Claimant sustained a work-related right shoulder injury when the ambulance in which she was a passenger was involved in a traffic accident. Pursuant to a July 28, 1998 notice of compensation payable (NCP), which described her injury as "right rotator cuff tendonitis," Claimant received total disability benefits in the amount of $307.02 per week based upon an average weekly wage of $480.63.

On July 5, 2000, Employer filed a modification petition alleging that as of May 23, 2000, suitable work was generally available to Claimant in her local geographic area. The WCJ subsequently held hearings on Employer's petition at which both parties presented evidence, including expert medical testimony.

In his decision and order circulated August 17, 2001, the WCJ accepted as credible the testimony of Employer's medical expert, Dr. A. Lee Osterman, an orthopedic surgeon with a subspecialty in hand and upper extremity surgery. Dr. Osterman reviewed Claimant's medical records and examined her on April 21, 1999 and March 13, 2000.

The doctor testified that neither examination revealed any objective findings to support Claimant's multiple complaints and that she had non-anatomic or non-physiological responses, as well as a histrionic reaction, to various tests. Dr. Osterman found that to be indicative of symptom magnification.

Dr. Osterman opined that Claimant's work injury caused a mechanical injury to her right shoulder and possibly some low grade nerve irritation in the right shoulder, which the doctor did not find to be disabling. As such, Dr. Osterman further opined that Claimant was capable of returning to

full-time, sedentary, light-duty work or part-time, medium-duty work with restrictions on lifting and overhead work. The doctor also filled out a physical capacities evaluation and subsequently approved job analyses for three available positions located by Jacqueline Flora, Employer's vocational expert.

The WCJ also accepted as credible Flora's testimony regarding her vocational assessment and labor market survey. On December 30, 1999, Flora interviewed Claimant for purposes of a vocational assessment. After being informed by Employer that it had no available position which could accommodate Claimant's physical restrictions, Flora performed a labor market survey.

Based on Dr. Osterman's restrictions and Claimant's education and transferable skills, Flora identified nine full-time, sedentary, light-duty positions available with wages ranging from $6.00 to $12.00 per hour. Flora completed a job analysis for three of the positions and sent them to Dr. Osterman, who approved them.

Conversely, the WCJ rejected as not credible the testimony of Claimant's treating physician, Dr. Thomas Whalen, Jr., a specialist in internal medicine with a subspecialty in rheumatology. Dr. Whalen diagnosed Claimant as suffering from reflex sympathetic dystrophy (RSD) in the subacute stage, chronic myofascial pain syndrome and post-traumatic fibromyalgia syndrome. The doctor opined that Claimant's condition was causally related to her work injury and that as of her last visit on December 14, 2000, she remained totally disabled.

The WCJ also rejected as not credible testimony from Cheryl Hirst Hodgins, a psychosocial worker who saw Claimant on July 6, 2000 on a referral from Dr. Whalen. Hodgins diagnosed Claimant as suffering from post-traumatic stress disorder, dysthymic disorder, generalized anxiety disorder and acute stress disorder. Hodgins opined that Claimant is totally disabled and that she is not capable of performing the jobs set forth in Employer's labor market survey.

The WCJ also rejected as not credible Claimant's testimony regarding her ongoing pain and disability to the extent that it was inconsistent with the testimony of Dr. Osterman. The WCJ noted that Claimant's demeanor while testifying was less than credible and that her list of numerous complaints nearly three years after the work injury, despite surgical treatment, was especially incredible. Moreover, the WCJ found Claimant's demeanor to be consistent with Dr. Osterman's findings of symptom magnification.

Based on Employer's evidence, the WCJ concluded that as of May 23, 2000, Claimant's disability had changed and that suitable work was generally available to her at wages less than her pre-injury wage. [1] As result, the WCJ further concluded that Employer is entitled to a modification of benefits based on two-thirds of the difference between Claimant's pre-injury weekly wage and her current earning power of $360.00 per week.

The Board affirmed and Claimant's petition for review followed. We are limited to determining

whether the necessary findings of fact are supported by substantial evidence, whether errors of law were made, or whether constitutional rights were violated. Morris Painting, Inc. v. Workers' Compensation Appeal Board (Piotrowski), 814 A.2d 879 (Pa. Cmwlth. 2003).

I.

Claimant's first argument is that the WCJ erred in modifying her benefits despite Dr. Whalen's uncontradicted testimony that Claimant remains totally disabled due to fibromyalgia which is causally related to her May 13, 1998 work injury. Claimant asserts that there is no evidence of record from any source to indicate that she does not have fibromyalgia or that it does not render her disabled.

Initially, we note that Claimant maintains that no NCP was introduced into the record and that, therefore it could not be modified. However, a review of the record reflects that Employer indicated in its modification petition that Claimant was being paid compensation at the rate of $307.02 per week based on a July 28, 1998 NCP. Employer's Modification Petition at 2; R.R. 3a. In addition, Claimant indicated in her answer to Employer's petition that compensation was presently payable under an NCP. Claimant's Answer at 2; R.R. 3a (4).

Moreover, at the February 22, 2001 hearing, the following conversation took place:

WCJ: Is there an original notice of compensation payable or a judge's decision?

Employer's counsel: I, unfortunately, don't have that part of the file with me. But if Your Honor, would like it, I can certainly send it up to you.

WCJ: Do you recall if any documents were attached to the supersedeas exhibits? I'm looking through it now. Employer's counsel: No.

Claimant's counsel: I had a copy of the --

Employer's counsel: The NCP?

Claimant's counsel: No, I don't have that. The affidavit, which I gave you.

WCJ: Well, if you come up with anything, just attach it to one of your briefs.

Employer's counsel: Okay.

Claimant's counsel: Very good.

N.T. 02/22/01 at 6; R.R. 73a.

As reflected by the record, the parties agreed that the NCP would be attached to one of their briefs. A copy of the NCP is attached to Employer's Brief to this Court as Ex. A. Consequently, we do not believe that the WCJ erred in referring to information contained in the parties' NCP.

As discussed above, the NCP described Claimant's injury as right rotator cuff tendonitis. In its decision, the Board noted that Claimant does not dispute that the NCP does not acknowledge fibromyalgia as part of Claimant's work-related condition. Furthermore, the record does not indicate that Claimant ever petitioned for review of the NCP to challenge its description of the injury or to add fibromyalgia as an additional injury.

Instead, the only petition before the WCJ was Employer's modification petition. Where, as here, an employer seeks to modify a claimant's benefits from total to partial, the employer must show that the claimant's disability has decreased. Kurtiak v. Workmen's Compensation Appeal Board (W. Sizzlin' Steak House), 635 A.2d 732 (Pa. Cmwlth. 1993). "This burden is satisfied when the employer shows that the claimant's condition has changed and that other work is available which the claimant is capable of performing." Id. at 735.

In the present case, Employer introduced into evidence the deposition of Dr. Osterman, which the WCJ accepted as credible. Specifically, in Finding of Fact (FF) No. 24, the WCJ stated:

Dr. Osterman has superior credentials and he credibly testified in great detail as to his clinical tests and findings at the time of each examination. Dr. Osterman's testimony is also supported, in part, by the radiologist's reported assessment of the bone scan which showed no evidence of RSD, by the somatic evoked potentials which showed no brachial plexopathy, and by the October 16, 1998 operative report which showed that Claimant's right shoulder injury was repaired. (Exhibit C-Osterman-5D)

WCJ's Decision at 3. As indicated by his decision, the WCJ accepted Dr. Osterman's opinion that Claimant's condition had improved and that she could perform the three available positions located by Flora, Employer's vocational expert.

Nevertheless, Claimant contends that the WCJ erred in rejecting as not credible Dr. Whalen's uncontradicted testimony that Claimant remained totally disabled due to fibromyalgia induced by her work-related accident. To begin, we note that "[t]he WCJ, as the ultimate factfinder, is the sole arbiter of the credibility and weight of the evidence." Rissi v. Workers' Compensation Appeal Board (Tony Depaul & Son), 808 A.2d 274, 278 (Pa. Cmwlth. 2002). "We will not reweigh evidence or substitute our judgment for the credibility determination of the WCJ." Id. at 279.

In addition, the WCJ "may accept or reject any testimony, including the medical opinion of one

expert witness over that of another...." Trimmer v. Workers' Compensation Appeal Board (Monaghan Tp.), 728 A.2d 438, 441 (Pa. Cmwlth. 1999). "If the credited evidence constitutes substantial evidence, the [WCJ's] findings will not be disturbed even though there may be evidence to the contrary." Joy Mining Mach. v. Workers' Compensation Appeal Board (Noggle), 805 A.2d 1279, 1281 (Pa. Cmwlth. 2002).

In the case sub judice, the WCJ clearly indicated that he rejected Dr. Whalen's testimony as not credible. FF No. 24. Inasmuch as the NCP did not acknowledge fibromyalgia, it has not been accepted by Employer as being a part of Claimant's work injury. As a result, it was within the province of the WCJ to reject as not credible Dr. Whalen's testimony that Claimant has work-related fibromyalgia. Rissi; Noggle; Trimmer.

Moreover, the WCJ stated that he rejected Dr. Whalen's testimony because it was contrary to that of Dr. Osterman, which he found to be persuasive. FF No. 24. Hence, we believe that the WCJ adequately explained why he rejected Dr. Whalen's testimony. Lambie v. Workers' Compensation Appeal Board (Curry Lumber Co.), 736 A.2d 67 (Pa. Cmwlth. 1999).

Nonetheless, the crux of Claimant's argument appears to be that unlike rheumatologists such as Dr. Whalen, orthopedists such as Dr. Osterman tend not to diagnose fibromyalgia. Therefore, Claimant apparently contends that Dr. Osterman's testimony regarding Claimant's condition and ability to return to work is not competent.

This Court disagrees. In Kocher v. Workmen's Compensation Appeal Board (B.G. Coon Constr.), 415 A.2d 162 (Pa. Cmwlth. 1980), this Court rejected an argument that an orthopedic specialist was not competent to testify outside his specialty and render an opinion regarding the claimant's liver problem. In Kocher, we noted that such an objection "goes to the weight of the evidence and not its competency." Id. at 163. See also Vital Signs Inst., Inc. v. Workmen's Compensation Appeal Board (Burke), 538 A.2d 617 (Pa. Cmwlth. 1988) (cardiologist competent to testify regarding the claimant's back condition).

In view of the foregoing, we believe that Dr. Osterman's testimony regarding Claimant's medical condition and her ability to return to work is competent and, therefore, provides substantial evidence for the WCJ's determination that Employer met its burden of proof in its modification petition. In short, even though Dr. Osterman is an orthopedist and not a rheumatologist, his failure to diagnose fibromyalgia does not affect the competency of his medical opinion." Burke; Kocher.

II.

Claimant's second argument is that the WCJ erred in modifying her benefits based upon vocational evidence from a vocational counselor not approved by the Department of Labor and Industry (Department) as required by Section 306(b)(2) of the Act, which provides in part that "[i]n order to

accurately assess the earning power of the employe, the insurer may require the employe to submit to an interview by an expert approved by the Department and selected by the insurer."

In Caso v. Workers' Compensation Appeal Board (Philadelphia Sch. Dist.), 790 A.2d 1078 (Pa. Cmwlth.), appeal granted, ___ Pa. ___, 805 A.2d 526 (2002), we determined that Section 306(b)(2) of the Act, 77 P.S. §512(2), requires that a vocational expert "be approved by the Department prior to the time when the insurer requires the employee to submit to an interview by the expert." Id. at 1081. In Caso and Walker v. Workers' Compensation Appeal Board (Temple Univ. Hosp.), 792 A.2d 628 (Pa. Cmwlth. 2002), this Court ruled that a claimant could not be compelled to attend a vocational interview unless the Department approved the expert.

In the case at bar, although Claimant submitted to a vocational interview with Employer's vocational expert, Claimant contends that she preserved her right to appeal by objecting to Claimant's qualifications as a vocational counselor. In Henry v. Workers' Compensation Appeal Board (Keystone Foundry), 816 A.2d 348 (Pa. Cmwlth. 2003), we addressed a similar situation where the claimant neither declined to attend the vocational interview nor challenged it before the WCJ under Section 306(b)(2). In Henry, we determined that by voluntarily attending the interview and not raising a Section 306(b)(2) objection before the WCJ, the claimant waived any challenge based upon Caso or Walker.

Presently, we recognize that Claimant did challenge the vocational expert's qualifications as reflected by the extensive voir dire conducted prior to Flora's deposition testimony. See Flora Deposition at 4-18; S.R.R. 234b-248b. In addition, in her appeal to the Board, Claimant alleged, inter alia, that "Employer's vocational specialist was not qualified to render the opinions she rendered and it was error [for the WCJ] to accept her testimony as credible." Claimant's Appeal From WCJ's Findings of Fact and Conclusions of Law at 2; R.R. 6a.

Nevertheless, Claimant did attend the vocational interview and did not object before the WCJ on the ground that Flora was not approved as a vocational expert under Section 306(b)(2) of the Act. Consequently, we are constrained to conclude that Claimant has waived any Caso or Walker challenge to Employer's vocational evidence. Henry. Accordingly, we affirm.

JESS S. JIULIANTE, Senior Judge

ORDER

AND NOW, this 18th day of June, 2003, the October 28, 2002 order of the Workers' Compensation Appeal Board is hereby AFFIRMED.

JESS S. JIULIANTE, Senior Judge

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1. Pursuant to Section 306(b)(2) of the Workers' Compensation Act (Act), Act of June 2, 1915, P.L. 736, as amended, 77 P.S. §512(2), partial disability shall apply "if the employe is able to perform his previous work or can, considering the employe's residual productive skill, education, age and work experience, engage in any other kind of substantial gainful employment which exists in the usual employment area in which the employe lives within this Commonwealth."