IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Gerald Fleming,	:	
Petitioner	:	
	:	
v.	:	No. 685 C.D. 2009
	:	Submitted: November 13, 2009
Workers' Compensation Appeal	:	
Board (Upper Main Line YMCA),	:	
Respondent	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JOSEPH F. McCLOSKEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE McCLOSKEY FILED: December 15, 2009

Gerald Fleming (Claimant) petitions for review of an order of the Workers' Compensation Appeal Board (Board) that affirmed in part and reversed in part a decision of Workers' Compensation Judge Sarah C. Makin (WCJ Makin) that denied a petition to review medical treatment and/or billing filed by the Upper Main Line YMCA (Employer). The only aspect of the Board's decision Claimant challenges relates to the Board's reversal of that aspect of the WCJ's decision concluding that Employer's contest was not reasonable. We now affirm.

On April 7, 1998, Claimant sustained a work-related injury described in a Notice of Compensation Payable (NCP) as a cervical/thoracic sprain.[1] On March 9,

[1] According to the February 1, 2006, decision of WCJ Carl Lorine addressing Employer's first medical review petition, Claimant reported to Dr. Wilhelmina Korevaar (Employer's expert in the first review petition) that he "fell six feet into a tank when the floor beneath him collapsed and he was suspended by his armpits." (Finding of Fact No. 6(b)).

2001, Workers' Compensation Judge John Liebau approved a compromise and release the parties executed which included a description of Claimant's injuries as cervical and thoracic sprain, brachial plexus of the left arm and hand. However, on November 6, 2002, the same WCJ granted a review petition Claimant had filed and thereby added "major depression and chronic pain syndrome" as part of his work-related injuries.

In November, 2002, Employer filed its first petition to review medical treatment, asserting that medical bills Claimant incurred beginning September 14, 2004, were not related to his work-related injury. In that proceeding, WCJ Lorine found the testimony of Claimant and his medical expert credible, found the testimony of Employer's expert not credible and ultimately denied Employer's medical review petition.

Employer filed a second medical review petition on November 6, 2006, in which it asserted that Claimant's medical bills, as of October 17, 2006, were not related to his work injury. In this review petition, Employer submitted the deposition testimony of Guy Fried, M.D., who examined Claimant on October 13, 2006, and reviewed Claimant's records. As summarized by WCJ Makin, Dr. Fried opined that Claimant can expect no further recovery for his work-related brachial plexopathy and that further therapy, injections, surgery and medications will not provide any benefit to Claimant. Dr. Fried also expressed his opinion that Claimant has become addicted to the medications. Further, Dr. Fried opined that, following a detoxification period, Claimant's depression would improve.

Claimant submitted the deposition testimony of Erlinda Sabili, M.D., who had also provided testimony in the first medical review petition. Dr. Sabili testified that the medications she prescribes for Claimant address his quality of life, decrease his pain,

improve his function and help prevent him from harming himself. WCJ Makin summarized Dr. Sabili's prescriptions and their purposes as follows:

> Focusing on her treatment as of October 2006, Dr. Sabili has prescribed OxyContin, which has been reduced to 50 milligrams three times per day, Oxycodone for break through pain, Namenda to treat neuropathic pain, and Exanidine for spasm. She has also prescribed Arthrotek, an anti inflammatory medication. [Claimant's psychiatrist] currently prescribes Wellbutrin XL for his depression and Claimant is off Cymbalta and Pazil. He also takes Risperdal, which is for severe depression and severe anxiety and to help with his hallucination [sic] he gets from pain medication. The Risperdal has decreased by 75%. All these medications are to treat his April 1998 work injury.

(Finding of Fact No. 6(c)).

Dr. Sabili also opined, in contrast to Dr. Fried, that Claimant is not addicted to the medications because there is a medical reason for him to take the same and also, because in her view, he has not "demonstrated the behavior that would qualify him as an addict. Claimant is dependent on his medications and this dependency is related to the work injury." (Finding of Fact No. 6(d)) (Emphasis deleted). Dr. Sabili also expressed her belief that, if Claimant did not take the medications prescribed, there is a great likelihood he would consider suicide, based upon the effect chronic pain has upon depression and anxiety.

WCJ Makin, like WCJ Lorine in the first medical review petition, found Claimant's and Dr. Sabili's testimony to be credible. WCJ Makin found the testimony of Dr. Fried as neither credible nor competent. As to competency, WCJ Makin reasoned that Claimant's identified work-related injuries included cervical and thoracic sprain, brachial plexus of the left arm and hand and major depression and chronic pain syndrome, but that Dr. Fried, in expressing his opinion, only identified Claimant's work

injury as "minimal brachial plexopathy." In addition to this finding of incompetency, WCJ Makin also indicated that, even if Dr. Fried's testimony was competent, several substantive reasons existed why she did not find him credible.

Based upon these findings, WCJ Makin concluded that Employer failed to sustain its burden of proof with regard to the medical necessity of Claimant's treatment. Further, WCJ Makin awarded Claimant counsel fees based upon her conclusion that Employer's contest was not reasonable:

> The Employer failed to prove that it presented a reasonable contest because the opinion from its medical expert, Dr. Fried, regarding the nature of the work injury is contrary to the recognized work injury. His understanding of the work injury is that it is minimal brachial plexopathy. (Fried NT.31) Therefore, his opinion cannot as a matter of law, sustain the Employer's burden of proving that treatment is not causally related to the April 7, 1998 work injury. Additionally, although he testified that Claimant's treatment as of October 13, 2006 including all prescription medications is not related to the work injury, this opinion is so untenable that it cannot support Employer's decision to contest its liability for Claimant's medical treatment. There is no dispute that the medications were initially prescribed to treat Claimant's work injury. Even Dr. Fried admitted this fact. There was no evidence presented to establish that these prescriptions were prescribed for anything other than the work injury. Consequently, pursuant to Section 440 of the Act, Claimant is entitled to an award of unreasonable contest attorney's fees.

(Finding of Fact No. 13).

Employer appealed asserting that the WCJ had erred in denying its review petition, in finding Dr. Fried's testimony incompetent and in concluding that its contest was not reasonable. The Board agreed with Employer that Dr. Fried's testimony was not incompetent. The Board reasoned that Dr. Fried's testimony revealed that he

understood that Claimant's injuries included brachial plexopathy and some nerve damage radiating from his neck. The Board also noted that Dr. Fried testified to the effect that Claimant's depression would improve if he no longer took the prescribed medications. Nevertheless, the Board concluded that WCJ Makin had made credibility determinations relating to the substance of Dr. Fried's testimony and, hence, it found no error with respect to the WCJ's denial of the medical review petition.

However, the Board opined that the WCJ had erred in concluding that Employer had brought a reasonable contest. Based upon its conclusion that Dr. Fried's testimony was competent, it reasoned that Employer had presented evidence, albeit non-credible evidence, that Claimant's bills were not causally related to his work-related injury. Claimant now appeals the Board's reversal of the WCJ's unreasonable contest conclusion asserting that the Board erred in concluding that Dr. Fried's testimony was competent and that Employer's contest was reasonable.[2]

Section 440(a) of the Pennsylvania Workers' Compensation Act[3] provides for the award of attorney's fees if an employer fails to demonstrate that its contest was reasonable. An employer establishes that its contest is reasonable when it shows that the medical evidence in the case is conflicting and there is no evidence to show that the employer brought a frivolous claim or brought a claim solely to harass the claimant.

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[2] This Court's standard of review of a decision of the Board is limited to considering whether the WCJ's factual findings are supported by substantial evidence, whether an error of law occurred or whether Claimant's constitutional rights were violated. We also note that, when appropriate, we may review an adjudication to determine whether the WCJ capriciously disregarded competent evidence. 2 Pa. C.S. §704; Ostrawski v. Workers' Compensation Appeal Board (UPMC Braddock Hospital), 969 A.2d 15 (Pa. Cmwlth. 2009).

[3] Act of June 2, 1915, P.L. 736, added by the Act of February 8, 1972, P.L. 25, as amended, 77 P.S. §996(a).

United States Steel Corp. v. Workers' Compensation Appeal Board (Luczki), 887 A.2d 817, 821 (Pa. Cmwlth. 2005), petition for allowance of appeal denied, 587 Pa. 726, 899 A.2d 1125 (2006).

In this case, the medical evidence was conflicting. Claimant bases his appeal on two different theories: (1) the Board erred in concluding that Dr. Fried provided competent testimony; and (2) the Board erred because Employer was required, before bringing a second medical review petition, to demonstrate that Claimant's physical condition had changed in such a manner as to justify a renewed request to stop paying compensation or medical bills, just as in a subsequent termination or modification petition. See Lewis v. Workers' Compensation Appeal Board (Giles & Ransome, Inc.), 591 Pa. 490, 919 A.2d 922 (2007).

With regard to the first question of whether Dr. Fried's testimony was competent, Claimant refers us to GA & FC Wagman, Inc. v. Workers' Compensation Appeal Board (Aucker), 785 A.2d 1087 (Pa. Cmwlth. 2001). In that case, we concluded that a medical expert's testimony was insufficient to support an employer's termination petition because his testimony failed to acknowledge, and was inconsistent with, the claimant's injuries as identified in an NCP.

As stated above, Claimant's identified injuries included: cervical and thoracic sprain, brachial plexus of the left arm and hand, major depression and chronic pain syndrome. In this case, Claimant's depression was the result of the pain associated with his physical work injuries. Dr. Fried's testimony essentially suggests that, if Claimant stopped taking his prescribed medication, his depression would improve. Had Dr. Fried stated that Claimant had no depression with or without the treatment, we would tend to agree with Claimant that Dr. Fried had rejected the identified injury of depression. However, his testimony indicates that he understood that the depression is

related to his injury, but that, if Claimant stopped taking the medications, his depression would improve. Hence, the inference we draw from the testimony is that Dr. Fried recognized Claimant's underlying depression, but believed that, at the time of his examination, the medications were not helping him. Similarly, he acknowledged Claimant's back sprain and strain and related nerve issues, but that Claimant had achieved maximum medical improvement and that his continued use of the medications would provide no benefit.[4] Based upon the foregoing, we conclude that the Board did not err in concluding that Dr. Fried's testimony is competent.

Claimant, citing Lewis, also asserts that, even if Dr. Fried's testimony is competent, Employer's contest was not reasonable because it did not establish that Claimant's physical condition had changed from the time of the first medical review petition. In Lewis, our Supreme Court held that an employer that had previously sought modification or termination of benefits must demonstrate that a claimant's physical condition had changed in order to succeed in a subsequent modification or termination petition. Lewis overruled in part the earlier holding of our Supreme Court in King v. Workmen's Compensation Appeal Board (K-Mart Corp.), 549 Pa. 75, 700 A.2d 431 (1997), where the Court had held that collateral estoppel did not bar an employer from bringing a second termination petition involving the same issue.

Thereafter, decisions of this Court have considered the question of whether collateral estoppel applies when an employer brings subsequent challenges to medical

[4] We also note that Dr. Fried, upon being questioned by Claimant's counsel as to how he could arrive at the conclusion that Claimant had become addicted to the medications only eight months after WCJ Lorine's decision holding that Claimant was not addicted to the medications, responded that "I can point to Dr. Sabili's notes where she is describing his pain as moderate from six to nine when she first started treating him and during her treatments it remained six to nine despite her escalating the medication requirements." (N.T. at 28).

treatment when the issue has already been adjudicated and the employer fails to demonstrate a change in a claimant's condition.

For example, in C.D.G., Inc. v. Workers' Compensation Appeal Board (McAllister), 702 A.2d 873 (Pa. Cmwlth. 1997), the employer challenged a Board decision denying its utilization review petition and directing it to pay certain medical bills associated with the claimant's work-related injury. The employer initially had filed a petition to review medical treatment. While that petition was pending before a WCJ, our General Assembly enacted an amendment to the Act, commonly known as Act 44. This amendment created the utilization review process, which is not at issue in this case, but which similarly provides a process by which an employer can challenge a claimant's medical treatment. The employer then filed a utilization review request asserting similarly that the claimant's medical treatment was not reasonable or necessary. The reviewer determined that the treatment was not necessary and the claimant sought review of the utilization review determination. Before the WCJ assigned to consider the utilization review petition acted on the same, the WCJ who conducted hearings relating to the employer's petition to review medical treatment rendered a decision concluding that the treatments were unreasonable and unnecessary.

The employer then argued before the WCJ considering the utilization review petition that the decision of the WCJ constituted a final adjudication on the merits of the reasonableness of the treatments and, hence, Claimant's utilization review petition was precluded on collateral estoppel grounds. The WCJ rejected that argument and reviewed the parties' experts' reports, ultimately concluding that the treatment was reasonable and necessary. The employer appealed to the Board, which concluded that collateral estoppel did not apply. The Board affirmed the decision and order of the WCJ.

However, on appeal to this Court, we reversed the Board. We reasoned that collateral estoppel could preclude a reconsideration of an identical challenge to medical treatment that had already been litigated, when the party seeking to re-litigate the issue has not established a change in a claimant's physical condition. We stressed that the utilization review provisions under the Act did not "change the general rule that there has to be a change in claimant's physical condition from the last proceeding for collateral estoppel not to apply." C.D.G., Inc., 702 A.2d at 877. Moreover, we indicated that those provisions did not "vitiate the application of the doctrine of collateral estoppel to allow a constant stream of utilization requests where the treatment and claimant's condition remain the same even though time has past." Id.

In the context of the question presently before this Court, i.e., whether Employer's contest was reasonable, Claimant argues that Employer was required to show a change in his condition subsequent to the first medical review petition. One of the primary components in pursuing a collateral estoppel defense is to establish that a matter has been previously adjudicated.

In contrast to C.D.G., Inc., this Court in Paul v. Workers' Compensation Appeal Board (Integrated Health Services), 950 A.2d 1101 (Pa. Cmwlth.), petition for allowance of appeal denied, 599 Pa. 696, 960 A.2d 842 (2008), which involved an employer's first termination petition, held that the employer did not have to establish a change in a claimant's condition where there had been no previous litigation and adjudication of a termination petition. Specifically, the Court rejected the claimant's assertion that the WCJ erred by failing to address the earlier medical opinions of the claimant's physicians in order to determine whether the testimony of employer's medical expert demonstrated a change in her condition such as to permit litigation of the termination petition.

In Krouse v. Workers' Compensation Appeal Board (Barrier Enterprises), 837 A.2d 671 (Pa. Cmwlth. 2003), the claimant had sustained a work-related carpel tunnel syndrome injury. Before the claimant had filed a claim petition, the employer filed a utilization review request relating to her treatment. The reviewer determined that the treatment was not medically necessary or reasonable. Although the claimant had filed a petition to review that determination, she later withdrew the petition after she and the employer reached an agreement whereby the employer would pay her treatment bills.

The employer filed a second utilization review petition, also before the claimant filed a claim petition, requesting a determination of the necessity for chiropractic treatment. This second review determined that the chiropractic treatment received by claimant was not reasonable or necessary. The claimant never appealed that decision. Shortly thereafter, Claimant filed a claim petition which was ultimately granted by a WCJ. Two years after that determination, the claimant filed a review petition asserting that the employer had stopped paying her medical bills approximately four years earlier. The WCJ who acted on the petition regarded the petition as a utilization review request and granted the petition. The employer appealed and the Board, relying upon the doctrines of res judicata and collateral estoppel, reversed the WCJ's decision. The Board concluded that the claimant was seeking payment for treatment that had been found to be unnecessary and unreasonable in the earlier utilization review determination.

In reviewing the Board's decision, this Court affirmed, disagreeing with the claimant's argument that there was no identity of the cause of action or the thing sued upon (both necessary elements for the doctrine of res judicata to apply). Further, the Court opined, even if res judicata didn't apply, collateral estoppel would act

preclusively because the "simple fact remains that the UR petition was properly filed and disposed of by a forum that had jurisdiction over the claim. It was, thus, final and binding." Krouse, 837 A.2d at 676. Thus, the fact that the claimant did not seek review before a WCJ of the utilization reviewer's determination was not a factor in concluding that a final and binding decision existed. This outcome suggests that, if an employer has no reasonable belief that a change in a claimant's condition has occurred, there is no support for the filing of a subsequent utilization review request.

Collateral estoppel, or issue preclusion, will apply to bar an attempt to litigate an issue a second time when the second litigation seeks to address an issue that is identical to one raised in the first litigation, was actually litigated, and was necessary to the litigation and material to the ultimate adjudication. Krouse, 837 A.2d at 675-6. Nevertheless, we conclude that neither the requirement of showing a change in physical condition nor the doctrine of collateral estoppel apply in this case.

Although there may be circumstances in which a claimant's actual physical condition has not changed, but a change in circumstances related to the treatment supports an employer's position that the present treatment is not causally related to a claimant's work-related injury, we believe that the Board in this case properly concluded that Employer's contest was reasonable. While the WCJ did not find Dr. Fried's testimony credible, Employer had a reasonable basis to challenge the treatment based upon his opinion. Dr. Fried testified that he believed that Claimant had reached maximal medical recovery. He also testified that he believed Claimant was not only dependent on the medications, but also addicted to them. He based this belief upon his review of Dr. Sabili's records indicating no change in the level of Claimant's pain, but an increase in the dosage she prescribed. Although Claimant's physical condition related to his work-related injuries may not have changed, Dr. Fried's testimony

suggests a change in circumstances that supported Employer's decision to renew its challenge to the medications prescribed to Claimant. Consequently, we conclude that the Board did not err in its decision reversing the WCJ as to the reasonableness of Employer's contest.

Accordingly, we affirm the Board's order.

JOSEPH F. McCLOSKEY, Senior Judge

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Workers' Compensation Appeal Board (Upper Main Line YMCA),	:	
Respondent	:	

O R D E R

AND NOW, this 15th day of December, 2009, the order of the Workers' Compensation Appeal Board is affirmed.

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JOSEPH F. McCLOSKEY, Senior Judge