

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Pathmark Stores, Inc.,	:	
Petitioner	:	
	:	
v.	:	No. 129 C.D. 2014
	:	Submitted: July 3, 2014
Workers' Compensation Appeal	:	
Board (Mackley),	:	
Respondent	:	

BEFORE: HONORABLE BERNARD L. MCGINLEY, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE P. KEVIN BROBSON, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE BROBSON

FILED: October 22, 2014

Petitioner Pathmark Stores, Inc. (Employer) petitions for review of an order of the Workers' Compensation Appeal Board (Board). The Board affirmed the decision of a Workers' Compensation Judge (WCJ), which granted a Petition to Review Medical Treatment and/or Billing filed by Diane Mackley (Claimant) and denied a Petition to Terminate Compensation Benefits filed by Employer pursuant to the Workers' Compensation Act (Act).¹ On appeal, Employer challenges only the part of the decision granting the review petition. We now reverse.

¹ Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. §§ 1-1041.4, 2501-2708.

Claimant is currently employed by Employer as a manager in the bakery. On February 22, 1998, Claimant worked for Employer as a bakery clerk. On that day, Claimant fell while inside the walk-in freezer and hurt her back. Following her injury, Claimant sought payment of medical expenses by Employer. On March 26, 1999, a WCJ issued an order, requiring Employer to pay “any and all necessary and reasonable medical expenses incurred by the claimant, which have been (or shall be) causally related to the work injury.” (Reproduced Record (R.R.) at 6a.)

On April 13, 2010, Claimant filed her review petition, seeking to add depression to her work injury of February 22, 1998. (R.R. at 10a.) In response, Employer filed its termination petition. The petitions were consolidated, and WCJ Harris conducted a hearing on January 5, 2011. (R.R. at 15a.)

Pertinent to the review petition, Claimant testified that she was injured at work when she fell in the freezer. (R.R. at 18a.) Following the fall, her manager sent her to an in-house doctor. (*Id.*) Claimant stated that the in-house doctor referred her to Sophia Lam, M.D. (*Id.*) She stated that she is still being treated by Dr. Lam, and in 2009 or 2010, Dr. Lam suggested she seek counseling. (R.R. at 19a.) Claimant explained that, at the time, she was going to a bereavement counselor. (*Id.*) When asked if she received counseling at Dr. Lam’s suggestion, she responded, “[n]ot really[,]” but she did see a doctor for a short time, however, they “didn’t speak about [her] pain that much.” (*Id.*) Claimant explained that she recently started seeing Dr. Cohen, a psychiatrist, and that he is treating her for depression. (*Id.*) She testified that Dr. Lam gives her steroid injections and prescribes medication for her back pain. (R.R. at 20a.) Claimant stated that she does not think that she has fully recovered from the injury she

sustained when she fell in the freezer and that she still experiences pain “all the time.” (R.R. at 21a.) On cross-examination, Claimant testified that she met with Timothy Michals, M.D., at Employer’s request. (R.R. at 24a.) She admitted that she told Dr. Michals that she had experienced multiple stressors throughout her life, and Dr. Michals asked her about a number of those stressors. (R.R. at 24a-27a.) Claimant admitted that she does not believe that her pain prohibits her from performing her job duties. (R.R. at 29a.)

Claimant presented the deposition testimony of Dr. Lam, who is board-certified in anesthesiology and the sub-specialty of interventional pain management. (R.R. at 36a.) In addition to testifying regarding Claimant’s physical condition, Dr. Lam also testified that she recommended that Claimant see a psychiatrist for symptoms of depression. (R.R. at 42a.) The full extent of Dr. Lam’s testimony regarding Claimant’s alleged depression may be summarized as follows. Dr. Lam explained that Claimant “exhibited symptoms of severe depression as a result of chronic pain, and [she] believe[d] that [Claimant] would be best served by seeing a psychiatrist.” (R.R. at 42a-43a.) Contrary to Claimant’s testimony, Dr. Lam stated that she made the referral to Claimant in either 2007 or 2008. (R.R. at 43a.) She explained that she routinely refers patients with chronic pain for psychiatric or psychological treatment, because if a patient “exhibits the symptoms of chronic depression as a result of chronic pain, [she] believe[s] they [sic] should be evaluated by the specialist who is most capable to treat this pathology.” (*Id.*) It is her understanding that Claimant sought psychiatric treatment with Dr. Cohen, and she reviewed Dr. Cohen’s records. (R.R. at 43a-44a.) She later opined that, “[w]ithin a reasonable degree of medical

certainty,” she believes Claimant’s “depression is a result of the chronic pain from her work-related accident.” (R.R. at 48a.)

On cross-examination, Dr. Lam acknowledged that she is not providing Claimant with any treatment for depression, because she is “not a board certified psychiatrist. [She has] a suspicion of the diagnosis, and [she] sent [Claimant] to be treated by [an] appropriate doctor.” (R.R. at 66a.) She was aware that Claimant had sought psychiatric or psychological treatment in the past prior to Dr. Lam’s recommendation that she seek such treatment. (R.R. at 67a.) She also testified that she is aware that Dr. Cohen has not made a causal connection between Claimant’s injury and her depression. (R.R. at 67a-68a.)

With regard to Claimant’s claim of depression, Employer presented the deposition testimony of Dr. Michals, who is board-certified in psychiatry and forensic psychiatry. (R.R. at 76a.) He testified that “depression is the most common illness that [he has] treated.” Dr. Michals testified that he examined Claimant on September 14, 2010. (*Id.*) He testified that Claimant was taking Celexa and Xanax and that it is not unusual for these medications to be prescribed together. (R.R. at 80a-81a.) Dr. Michals stated that Claimant informed him of all of the stressors that she was dealing with at the time, and that she had recently been out of work because of the depression and stress. (R.R. at 85a-87a.) When asked whether any one of Claimant’s stressors could be the cause of her depression, Dr. Michals opined:

It varies with the person. She had a number of what we call stressors, life events that are causing distress. And it depends on the person, the type of event, the underlying personality. So, each of us varies uniquely in our response to stress. But some people are more prone to have a negative affect than others.

(R.R. at 88a.) He further testified that Dr. Cohen diagnosed Claimant with major depressive disorder, panic disorder, and agoraphobia. (R.R. at 103a.) Dr. Michals stated that, based on his examination, Claimant had “no cognitive thinking problems or any emotional problems of an affective nature.”² (R.R. at 96a.)

By decision and order dated June 15, 2011, the WCJ denied and dismissed Employer’s termination petition and granted Claimant’s review petition. Relevant to Claimant’s review petition, the WCJ found Claimant’s and Dr. Lam’s testimony credible and persuasive regarding Claimant’s need for psychiatric treatment relating to her work injury and found Dr. Michals’ testimony to the contrary neither credible nor persuasive. (R.R. at 149a-50a.) Based upon these findings, the WCJ determined that Claimant met her burden to prove that the description of her injury was materially incorrect. (R.R. at 150a.) The WCJ ordered that the description of Claimant’s injury be amended to include depression. (R.R. at 151a.)

Employer appealed the WCJ’s decision regarding the review petition to the Board, asserting that the WCJ erred in amending the description of Claimant’s injury to include depression.³ (R.R. at 165a.) The Board affirmed the WCJ’s order. Employer then petitioned this Court for review.

² Employer also presented the deposition testimony of Dr. Mankowitz, who specializes in orthopedic surgery. He testified regarding Claimant’s physical condition and did not address her claim for depression.

³ Employer did not appeal the WCJ’s denial of Employer’s termination petition to the Board.

On appeal,⁴ Employer essentially contends that the Board erred in affirming the decision of the WCJ as to the amendment of Claimant’s work-related injury to include depression, because the WCJ failed to issue a reasoned decision as required under Section 422(a) of the Act.⁵ Specifically, Employer argues that “[the WCJ’s] reasoning and rationale . . . is contrary to the evidence of record,” and that, “at a minimum, the Order of the Board must be vacated and the matter remanded to a WCJ with instructions to issue a reasoned decision within the meaning of the Act.” (Petitioner’s Br. at 15.) Employer also argues that the Board erred in affirming the decision of the WCJ because Claimant “failed to submit competent psychiatric evidence establishing a causal connection between her non-disabling back injury and the depression.” (Petitioner’s Br. at 16.) In support of that argument, Employer contends that no record evidence exists to support a finding that Claimant’s symptoms of depression were caused by her chronic back pain, as opposed to the other personal issues Claimant was experiencing. First, we will address the competency of Dr. Lam’s testimony before considering whether the WCJ issued a reasoned decision.

Unequivocal medical evidence is required where it is not obvious that an injury is causally related to the work incident. *Cromie v. Workmen’s Comp. Appeal Bd. (Anchor Hocking Corp.)*, 600 A.2d 677, 679 (Pa. Cmwlth. 1991). The question of whether expert medical testimony is unequivocal and, thus, competent evidence to support factual determinations, is a question of law subject to our

⁴ This Court’s standard of review is limited to determining whether constitutional rights were violated, whether an error of law was committed, or whether necessary findings of fact are supported by substantial evidence. 2 Pa. C.S. § 704.

⁵ 77 P.S. § 834.

review. *Somerset Welding & Steel v. Workmen's Comp. Appeal Bd. (Lee)*, 650 A.2d 114, 117 (Pa. Cmwlth. 1994), *appeal denied*, 659 A.2d 990 (Pa. 1995). “[M]edical testimony is unequivocal if a medical expert testifies, *after providing foundation for the testimony*, that, in his professional opinion, he believes or thinks a fact exists.” *O’Neill v. Workers’ Comp. Appeal Bd. (News Corp., Ltd.)*, 29 A.3d 50, 58 (Pa. Cmwlth. 2011) (emphasis added). “Taking a medical expert’s testimony as a whole, it will be found to be equivocal if it is based only upon possibilities, is vague, and leaves doubt.” *Kurtz v. Workers’ Comp. Appeal Bd. (Waynesburg College)*, 794 A.2d 443, 449 (Pa. Cmwlth. 2002).

As alluded to above, in addition to this requirement that a medical expert’s testimony be unequivocal, the medical expert’s testimony also must reflect the expert’s adequate understanding of the facts to be competent. *Sears, Roebuck & Co. v. Workmen’s Comp. Appeal Bd.*, 409 A.2d 486, 490 (Pa. Cmwlth. 1979). In reviewing an expert’s testimony on this basis, we must consider whether the expert “had sufficient facts before him upon which to express” his medical opinion. *Id.* An expert is permitted to express an opinion based upon facts of which he has no personal knowledge so long as those facts are supported elsewhere in the record. *Newcomer v. Workmen’s Comp. Appeal Bd. (Ward Trucking Corp.)*, 692 A.2d 1062, 1066 (Pa. 1997). Unless a medical opinion is based upon such personal knowledge or record support, the opinion will be deemed to have no value. *Lookout Volunteer Fire Co. v. Workmen’s Comp. Appeal Bd. (Savercool)*, 418 A.2d 802, 805 (Pa. Cmwlth. 1980). A medical expert’s opinion will be held to be incompetent only when the opinion is based solely on inaccurate or false information; when the record as a whole contains factual support for an expert’s

opinion, the evidence is not incompetent. *Am. Contracting Enter., Inc. v. Workers' Comp. Appeal Bd. (Hurley)*, 789 A.2d 391, 396 (Pa. Cmwlth. 2001).

It is also well settled that in a workers' compensation proceeding, answers given during cross-examination do not, as a matter of law, destroy the effectiveness of the previous opinions expressed by a physician. *Hannigan v. Workmen's Comp. Appeal Bd. (Asplundh Tree Expert Co.)*, 616 A.2d 764, 767 (Pa. Cmwlth. 1992), *appeal denied*, 634 A.2d 1118 (Pa. 1993). Instead, such statements go to the weight, not the competency, of the expert's opinion. *Corcoran v. Workers' Comp. Appeal Bd. (Capital Cities/Times Leader)*, 725 A.2d 868, 872 (Pa. Cmwlth. 1999).

Here, although Dr. Lam testified that she believed "within a reasonable degree of medical certainty" that Claimant's depression was a result of her back pain, (R.R. at 48a), her testimony lacked an adequate foundation. Dr. Lam did not provide any explanation as to what symptoms Claimant exhibited or why she believes that Claimant's depression is causally related to her back pain. Dr. Lam merely testified that Claimant "exhibited symptoms of severe depression as a result of chronic pain," and that she referred her to a specialist. (R.R. at 43a.) Dr. Lam later explained that she only had a "suspicion of the diagnosis," and that she referred Claimant to a psychiatrist, because a psychiatrist is "most capable to treat this pathology" and she is not a board-certified psychiatrist. (R.R. at 43a; 66a.) For these reasons, we conclude that Dr. Lam's testimony was not competent. Thus, the WCJ and Board erred in considering Dr. Lam's testimony as it related to Claimant's claim for depression. Because Claimant failed to produce any competent evidence establishing a causal connection between her non-disabling

back injury and her depression, the Board erred in affirming the decision of the WCJ as to the review petition.

Accordingly, we reverse the order of the Board as it relates to Claimant's review petition.⁶

P. KEVIN BROBSON, Judge

Judge McGinley dissents.

⁶ Because we reverse the Board's order based upon the incompetency of Dr. Lam's testimony as it relates to Claimant's depression, we need not address the issue of whether the WCJ failed to issue a reasoned decision as required under Section 422(a) of the Act.

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ORDER

AND NOW, this 22nd day of October, 2014, the order of the Workers' Compensation Appeal Board (Board) is REVERSED.

P. KEVIN BROBSON, Judge