

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Bogdan Kostishak, :  
 : No. 1530 C.D. 2013  
 Petitioner : Submitted: February 7, 2014  
 :  
 v. :  
 :  
 Workers' Compensation Appeal :  
 Board (Pierce Aluminum Co., Inc.), :  
 :  
 Respondent :

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, Judge  
HONORABLE PATRICIA A. McCULLOUGH, Judge  
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY SENIOR JUDGE FRIEDMAN

FILED: March 24, 2014

Bogdan Kostishak (Claimant) petitions for review of the August 14, 2013, order of the Workers' Compensation Appeal Board (WCAB) that affirmed the decision of a workers' compensation judge (WCJ) granting the modification petition filed by Pierce Aluminum Company, Inc. (Employer). We affirm.

Claimant sustained a work-related injury on August 11, 2005. Employer issued a notice of compensation payable describing Claimant's injury as a disc herniation at L4-5. (WCJ's Findings of Fact, No. 1.) Employer filed a modification petition, seeking to change Claimant's benefit status from total to partial disability as of June 22, 2009. (*Id.*, Nos. 2, 3.)

At the WCJ's hearing, Employer offered the deposition testimony of Arnold Berman, M.D., who conducted an impairment rating evaluation (IRE) of Claimant on June 22, 2009. Dr. Berman obtained Claimant's history, including his 2005 work injury and surgeries in 2007 and 2008, which were related to the work injury. (WCJ's Findings of Fact, No. 5d.) An orthopedic examination revealed no spasms or neurological deficits. (*Id.*, No. 5b.)

Dr. Berman determined that Claimant had a 19% whole person impairment under the American Medical Association's Guides to the Evaluation of Permanent Impairment, Sixth Edition (Guides). Although Claimant could have been considered a Class #2 or Class #3, Dr. Berman increased Claimant to a Class #3 due to the two operations and Claimant's complaints of moderate pain and radiculopathy. (*Id.*, No. 5c, d.) At the conclusion of the IRE, Dr. Berman prepared an Impairment Determination Face Sheet, (Face Sheet), which he included with his report to the state. (*Id.*, No. 5f.) After the IRE, but prior to his deposition, Dr. Berman reviewed Claimant's medical records, including post-surgical records and a psychological evaluation. (*Id.*, No. 8b.)

Claimant presented the report of Guy Lee, M.D., who, in 2007, performed an L4-5 fusion on Claimant with pedicle screws. Dr. Lee surgically removed the hardware in 2008 and noted that the spine fusion was solid. (*Id.*, No. 6a, b.)

Claimant also presented the deposition testimony of Guy W. Fried, M.D., who, did not examine Claimant. Rather, Dr. Fried reviewed Dr. Berman's

report and testimony. Dr. Fried testified that in accordance with chapter 2.7 of the Guides, it is important to review medical records before performing an impairment rating. Dr. Fried noted that Dr. Berman did not have Claimant's medical records when he evaluated Claimant and stated that this "is not adequate." Dr. Fried concluded that Dr. Berman's IRE was not valid. (*Id.*, No. 7a, c.)

Dr. Berman responded to Dr. Fried's deposition in a November 11, 2010, report wherein he reiterated that Claimant has a 19% whole person impairment. Dr. Berman stated that an impairment rating is valid in the absence of records and that he ultimately reviewed Claimant's medical records before his deposition. (*Id.*, No. 8a, b.) Dr. Berman noted that Dr. Fried did not examine Claimant and that rendering an opinion without examining the patient violates the Guides. (*Id.*, No. 8f.)

Dr. Fried responded to Dr. Berman's report with his own report dated November 30, 2010. Dr. Fried determined that Claimant had a 50% impairment rating, which he calculated by adding separate scores for Claimant's physical and psychological injuries. (*Id.*, No. 9a.)

The WCJ found the testimony of Dr. Fried, who did not examine Claimant, not credible. The WCJ credited the testimony of Dr. Berman, noting that Dr. Berman reviewed Claimant's medical records before his deposition and incorporated them as a basis for his 19% impairment. Although the Guides prefer a review of medical records before an evaluation, failure to review them does not render a rating invalid. The WCJ also concluded that although Dr. Berman failed to date the Face Sheet, this omission did not invalidate the IRE. The WCJ reduced

Claimant's disability status to partial as of June 22, 2009. Claimant appealed to the WCAB, which affirmed. This appeal followed.<sup>1</sup>

Initially, Claimant argues that the WCJ and the WCAB erred in relying on the IRE because Dr. Berman failed to comply with the Guides. Specifically, Claimant relies on section 9 of the Guides, which provides:

The Guides [are] based on objective criteria. The physician must use all clinical knowledge, skill, and abilities in determining whether the measurements, test results, or written historical information are consistent and concordant with pathology being evaluated. If such findings, or an impairment estimate based on these findings, conflict with established medical principles, they cannot be used to justify an impairment rating.

In accordance with *Combine v. Workers' Compensation Appeal Board (National Fuel Gas Distribution Corporation)*, 954 A.2d 776, 781 (Pa. Cmwlth. 2008), the Guides "delineat[e] the correct procedure for a physician to follow to calculate an individual's impairment rating." In *Combine*, this court concluded that because the IRE physician failed to comply with the Guides' procedures, the WCJ's grant of the modification petition based on the IRE was an error. *Id.* at 781-82.

Here, Claimant argues that the IRE was invalid because Dr. Berman did not obtain and review Claimant's medical records before assigning an impairment

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<sup>1</sup> 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.

rating. We conclude that nothing in the Workers' Compensation Act (Act)<sup>2</sup> or the Guides mandates such an exercise.

Section 2.7a of the Guides provide that it is "important" to review medical records "before" performing an impairment rating so that the examiner may identify and reconcile inconsistencies, if any, and focus on pertinent history. "Review of all available diagnostic studies and laboratory data is critical in this step." However, the Guides do not expressly mandate a physician to review a claimant's medical records before conducting an IRE. Failure to review medical records before conducting an exam goes to the weight of the physician's testimony, not its competency. *See Huddy v. Workers' Compensation Appeal Board (U.S. Air)*, 905 A.2d 589, 593, n.9 (Pa. Cmwlth. 2006) (stating that failure of a medical professional to view all of a claimant's medical records goes to the weight of the professional's testimony, not its competency).

Here, before his examination, Dr. Berman obtained a history from Claimant concerning his work-related injury, his subsequent surgeries, and his present symptoms. Dr. Berman also reviewed Claimant's medical records before his deposition. Despite Claimant's argument to the contrary, nothing in the Act or Guides rendered Dr. Berman's impairment rating invalid.

Claimant next argues that Dr. Berman failed to comply with 34 Pa. Code §123.105(c), which provides:

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

(c) The physician performing the IRE shall complete Form LIBC-767, "Impairment Rating Determination Face Sheet" (Face Sheet), which sets forth the impairment rating of the compensable injury. The physician shall attach to the Face Sheet the "Report of Medical Evaluation" as specified in the AMA "Guides to the Evaluation of Permanent Impairment." The Face Sheet and report shall be provided to the employee, employee's counsel, if known, insurer and the Department [of Labor and Industry] within 30 days from the date of the impairment evaluation.

Here, although Dr. Berman performed the IRE on June 22, 2009, Claimant maintains that Dr. Berman failed to complete the Face Sheet. Specifically, Dr. Berman did not date the front page of the Face Sheet, did not write the date that he examined Claimant, and did not write the amount that he charged to perform the IRE. Additionally, because the first page of the Face Sheet is not dated, Claimant argues that there is no evidence that Dr. Berman sent the Face Sheet within 30 days of the impairment evaluation, as is required by 34 Pa. Code §123.105(c).

At the WCJ's hearing, Claimant did not argue that the form was incomplete or that it was untimely. Claimant first raised the issue after the close of the record in his brief to the WCJ. (N.T. 1/4/11, at 7, 9; WCJ's Decision, at 5.)

Nonetheless, as noted by the WCJ, the Department received the Face Sheet on July 16, 2009, within 30 days of the evaluation. Albeit undated, Dr. Berman did complete the Face Sheet, which set forth Claimant's impairment rating and was attached to Dr. Berman's June 22, 2009, evaluation of Claimant. Accordingly, we find no error.

Finally, Claimant maintains that the WCAB erred in affirming the WCJ's decision to modify Claimant's disability status from total to partial as of the date of Dr. Berman's IRE, rather than the date of the WCJ's adjudication.

Specifically, Claimant argues that the Supreme Court in *Dowhower v. Workers' Compensation Appeal Board (Capco Contracting)*, 591 Pa. 476, 484-85, 919 A.2d 913, 918-19 (2007), held that IREs such as the one here, which do not occur within 60 days from the date that the claimant came into possession of 104 weeks of disability benefits, "require[] an adjudication or agreement before benefits may be modified." We observe, however, that the issue in *Dowhower* was the timeliness of the IRE request, not the effective date of a change in disability. *Id.* at 482, 919 A.2d at 917.

Here, the issue is whether benefits should be modified as of the date of the IRE or 60 days after the date of the WCJ's decision.

In *Ford Motor/Visteon Systems v. Workers' Compensation Appeal Board (Gerlach)*, 970 A.2d 517 (Pa. Cmwlth. 2009), this [c]ourt addressed this precise issue and determined that under [s]ection 306(a.2)(1-2) of the Act, 77 P.S. §511.2, the date for modification based on a petition to modify or review due to an IRE impairment of less than fifty percent is the date of the IRE, not sixty days from the date of the [WCJ's] decision.

*Muir v. Workers' Compensation Appeal Board (Visteon Systems LLC)*, 5 A.3d 847, 854-55 (Pa. Cmwlth. 2010) (footnote omitted).<sup>3</sup> Thus, the WCAB did not err in

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<sup>3</sup> Section 306(a.2)(1-2) was added by the Act of June 24, 1966, P.L. 350.

affirming the WCJ's decision to modify benefits as of June 22, 2009, the date of Dr. Berman's IRE.

Accordingly, we affirm.

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ROCHELLE S. FRIEDMAN, Senior Judge



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ORDER

AND NOW, this 24<sup>th</sup> day of March, 2014, we hereby affirm the August 14, 2013, order of the Workers' Compensation Appeal Board.

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ROCHELLE S. FRIEDMAN, Senior Judge