IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Geraldine Steen,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1104 C.D. 2014
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Workers' Compensation Appeal Board (City of Philadelphia/First Judicial District),	:	Submitted: November 21, 2014
	:	
	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER **FILED: February 4, 2015**

Geraldine Steen (Claimant) petitions for review of an Order of the Workers' Compensation Appeal Board (Board) affirming the Workers' Compensation Judge's (WCJ) Decision granting the Termination Petition of the City of Philadelphia – First Judicial District (Employer), and denying, in part, Claimant's three separate Review Petitions (Petitions). The WCJ found that Claimant's work-related injury was limited to bilateral carpal tunnel syndrome, that certain medical treatment was not reasonable and necessary, and that Claimant was fully recovered

from her injury as of November 5, 2010. On appeal, Claimant argues that the WCJ erred in finding that Claimant was fully recovered from all her work-related injuries because Employer's medical expert did not recognize all the injuries listed on the Notice of Compensation Payable (NCP). Claimant further argues that the WCJ erred when it denied her Petition for Review of Utilization Review Determination (UR Petition) based on the finding that Claimant's palliative care was not reasonable and necessary. Discerning no error, we affirm.

Claimant was injured in the course of her employment as an official court reporter on January 28, 2004, when she began to experience "severe weakness, tingling, numbness, pain, and burning in her right hand." (WCJ Decision, Findings of Fact (FOF) ¶ 2(b).) Employer issued a NCP accepting a January 28, 2004 injury "described as carpal tunnel syndrome affecting the right shoulder, elbow, arm and hand." (FOF ¶ 1.)

On November 4, 2010, Claimant filed the UR Petition challenging the determination that certain treatments provided by her treating physician were not reasonable and necessary after May 27, 2010. Employer filed a Termination Petition on January 28, 2011, "alleging that Claimant was fully recovered from her work injury as of November 5, 2010." Claimant denied the averments contained in the Termination Petition and sought counsel fees for an unreasonable contest. Claimant then, on November 16, 2011, filed a Review Petition seeking to amend the NCP to expand the description of her work injury, and Employer filed an answer denying the averments therein. Finally, Claimant filed another Review Petition seeking review of a November 22, 2011 Impairment Rating Evaluation

(IRE) and Employer denied the averments in a timely answer. All four petitions were consolidated and hearings before the WCJ ensued.

In support of her Petitions, Claimant testified in the presence of the WCJ and presented the deposition testimony of Joseph J. Thoder, Jr., M.D., and Steven Mandel, M.D. In support of its Termination Petition, Employer presented the deposition testimony of Jack Abboudi, M.D., an October 28, 2010 Utilization Review Determination report of Thomas DiBenedetto, M.D., and surveillance footage of Claimant taken on November 15th and 17th of 2011.

Claimant testified as follows. Claimant's work duties consisted of taking "testimony during court proceedings on a stenographic machine and" transcribing the testimonies onto her computer. (FOF ¶ 2(a).) In January 2004, Claimant began to experience "severe weakness, tingling, numbness, pain and burning in her right hand," arm, and neck. (FOF ¶ 2(b); Hr'g Tr. at 22, R.R. at 42a.) Claimant received therapy for her right hand and began relying more on her left hand. (FOF ¶ 2(c).) Soon, she began to exhibit symptoms in her left hand and arm. (FOF ¶ 2(c).) Claimant eventually had surgery performed on both hands and received "injections to her right shoulder and neck." (FOF ¶ 2(c).) While the burning in her hands subsided after surgery, Claimant continues to experience all of the remaining symptoms. (Hr'g Tr. 13, R.R. at 33a.)

Claimant testified that she continues to experience pain and takes medication for sleep, pain, and depression, and does not feel that she can return to work as a court reporter. (FOF ¶ 2(d), (e); Hr'g Tr. at 19-21, R.R at 39a-41a.) She maintains

that she cannot type even on her phone, "cannot use her right hand to comb her hair or put on makeup," and cannot tie her shoelaces. (FOF ¶ 2(e).) As a result of her continuing ailments, Claimant has not worked, or searched for work, since sustaining her injury. (Hr'g Tr. at 34, R.R. at 54a.)

Dr. Thoder testified that he is a board-certified orthopedic surgeon with a certification in hand surgery. (FOF ¶ 3(a).) Claimant was initially examined in 2004 where she exhibited arm pain, residual issues related to carpal tunnel surgery, "proximal pain in the elbows, and some pain radiating down her forearms into her hands." (FOF ¶ 3(b).) EMG and MRI studies indicated Claimant suffered from "cervical disc disease, lateral epicondylitis [(tennis elbow)], bilateral carpal tunnel syndrome, and deQuervain's" syndrome. (FOF ¶ 3(e).) The "MRI showed abnormal signal in the right elbow where the tendon attached to the bone and a reactive joint effusion." (FOF ¶ 3(f).) Dr. Thoder opined that these symptoms are consistent with tennis elbow caused by overuse in the course of employment. (FOF ¶ 3(g).) "Claimant was treated with physical therapy, anti-inflammatory medication, steroid injections, and splints." (FOF ¶ 3(i).) Claimant's complaints have stabilized since 2004 for all of her ailments other than her tennis elbow, which is currently being treated with steroid injections every three months that appear to provide Claimant relief for eight to ten weeks. (FOF ¶ 3(i); Thoder's Dep. at 45, R.R. at 108a.) In Dr. Thoder's opinion, Claimant has not fully recovered from her injury. (FOF ¶ 3(k).) Dr. Thoder opined that Claimant will never fully recover and will have to live with her ailments for the rest of her life. (Thoder's Dep. at 34, R.R. at 97a.) According to Dr. Thoder, Claimant is not able to return to work as a stenographer, but may be able to perform other work that

does not "require the same amount of repetitive activity or the same logistical demands." (Thoder's Dep. at 29, 32, R.R. 92a, 95a.)

According to Dr. Mandel's testimony, offered in support of Claimant, he evaluated Claimant on October 26, 2011 for an IRE. (FOF ¶ 4(b).) After a physical exam and reviewing Claimant's medical history, Dr. Mandel diagnosed Claimant as having "median nerve and ulnar tendinitis, brachial plexopathy, and cervical radiculopathy." (FOF ¶ 4(g).) In Dr. Mandel's opinion, "Claimant's whole body impairment was originally [fifty-one] percent," but was lowered to thirty-two percent when told that the only accepted injury was the right arm injury. (FOF ¶ 4(h); Mandel's Dep. at 14-15, R.R. at 125a-26a.)

Dr. Abboudi testified that he is a board-certified orthopedic surgeon "with an added certification in hand surgery." (FOF ¶ 9(a).) According to Dr. Abboudi's testimony, he examined Claimant on November 5, 2010, at which time Claimant complained of numbness and tingling in her fingers, pain in the right elbow and neck, and pain with stiffness in her right shoulder. (FOF ¶ 9(b); Abboudi's Dep. at 9, R.R. at 157a.) Dr. Abboudi did a comprehensive review of Claimant's records and concluded that three EMGs taken between March 2004 and May 2007 showed that Claimant had moderate right and left carpal tunnel syndrome during that time period. (FOF ¶ 9(d), (e), (f).) A physical examination revealed that, other than "tenderness with palpation of the right elbow at the lateral epicondylar eminence" and tenderness of the wrist, Claimant's tests "were negative for brachial plexopathy, and cervical radiculopathy" and he observed normal function of Claimant's shoulder and elbow. (FOF ¶ 9(g).) During the testing, Dr. Abboudi

found that Claimant demonstrated "a significant amount of 'cogwheeling,'"[1] which raised a concern in Dr. Abboudi's mind about whether the Claimant was being cooperative. (FOF ¶ 9(g).) According to Dr. Abboudi, the results of "Claimant's Jamar grip strength testing" also indicated "that there was not a normal cooperative effort." (FOF ¶ 9(g).) Further, on testing of the cubital tunnel, Claimant's expression of numbness struck Dr. Abboudi as too wide of an area to make sense anatomically. (Abboudi's Dep. at 32-33, R.R. at 180a-81a.)

Dr. Abboudi opined "that Claimant does not have cubital tunnel syndrome, a neuroma, bilateral radial tunnel syndrome, brachial plexopathy, bilateral deQuervain's tendinitis, . . . bilateral epicondylitis," or a work-related cervical injury. (FOF ¶ 9(i); Abboudi's Dep. at 45-54, R.R. at 193a-202a.) In Dr. Abboudi's opinion, Claimant's treatment for bilateral carpal tunnel syndrome was

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[1] Dr. Abboudi's described cogwheeling in his deposition, as:

> when someone is asked to perform a maneuver -- for example, straighten out your elbow . . . . I want to see how strong you are at straightening out your elbow. So a person will mount their maximum strength to try to push as hard as they can. Cogwheeling is when the person gives and then pushes, gives and then pushes, and then relaxes then pushes, and relaxes then pushes, and that back-and-forth gives the sensation of a cogwheel, like you're clicking, clicking, clicking through the motions. There is no physiologic reason why that should be the case for Ms. Steen. There's no anatomic or natural explanation for that phenomenon. If a person has pain, then they mount the maximum amount that they can mount and then they stop . . . . If a person doesn't have the ability, let's say the muscle is paralyzed, no matter how much they try, the muscle just doesn't fire strong enough; it's just weak. But to be weak and strong, weak and strong, weak and strong over a range of motion doesn't have any physiological explanation in this case. So that raises great concern as to how cooperative the patient is being with the examination.

(Abboudi's Dep. at 25-26, R.R. at 173a-74a.)

reasonable and necessary up to and including the April 2005 EMG study, but that ongoing office visits and steroid injections are no longer reasonable and necessary. (FOF ¶ 9(k); Abboudi's Dep. at 43-44, R.R. at 191a-92a.) Dr. Abboudi concluded that "Claimant is fully recovered from her 2004 work injury" and "capable of returning to work as a court reporter." (FOF ¶ 9(l), (m).)

Employer also submitted an October 28, 2010 Utilization Review Determination Face Sheet and report of Dr. DiBenedetto. Dr. DiBenedetto reviewed Claimant's treatment with Dr. Thoder and concluded "that office visits and injections every three months [were] not reasonable and necessary because the protocol for these injections is three times per year." (FOF ¶ 8(e).)

Finally, Employer presented surveillance footage of Claimant taken on November 15th and 17th of 2011. The surveillance showed Claimant opening and closing a car door unassisted, carrying items in both hands, and unlocking a car door with a key. (FOF ¶ 10.) Although Claimant appeared at the hearing in front of the WCJ wearing wrist splints, the WCJ found that it appeared Claimant did not wear the splints in the surveillance footage. (FOF ¶ 10.)

After reviewing the evidence, the WCJ made the following relevant findings of fact:

> 12. I observed Claimant's testimony, and have carefully reviewed it again, in conjunction with the other evidence, and find it credible as to the fact that she had both right and left carpal tunnel syndrome as a result of her work duties that culminated in a work injury of January 28, 2004. I do not find credible Claimant's testimony as to the nature and extent of her disability, as it is inconsistent with the many negative testing maneuvers performed by Dr. Abboudi, and also

inconsistent with the surveillance. Her testimony that she has continuing problems with both hands and arms is inconsistent with Dr. Thoder's testimony that he is treating only her right elbow and that her other conditions have been quiescent since 2009.

13. I have carefully reviewed the testimony of Dr. Thoder, Dr. Mandel, and Dr. Abboudi, in conjunction with the other evidence, and find the opinions of Dr. Abboudi to be more credible and persuasive on the issue of the nature of Claimant's work injury and her continuing disability. Dr. Abboudi's opinions are supported by the diagnostic studies, by his clinical findings, and by the fact that Claimant had a number of nonphysiologic responses to his maneuvers.

14. I find that Claimant's work injury included both right and left carpal tunnel syndrome. However, I do not find that any other conditions are work-related. I find that while Claimant may have had shoulder, elbow and arm symptoms as a result of her carpal tunnel syndrome, she did not sustain separate injuries to those body parts. I find that Claimant does not have cubital tunnel syndrome, a neuroma, bilateral radial tunnel syndrome, brachial plexopathy, bilateral deQuervain's tendinitis, bilateral epicondylitis, or a work-related cervical injury.

15. I find that Claimant was fully recovered from her bilateral carpal tunnel syndrome as of November 5, 2010.

16. With regard to the [UR Petition] of Dr. Thoder's treatment, I have carefully reviewed the testimony of Dr. Thoder, Dr. Mandel, and Dr. Abboudi, as well as the opinions of Dr. Di[B]enedetto, and find the opinions of Dr. Di[B]enedetto and Dr. Abboudi to be more credible and persuasive. Dr. Di[B]enedetto's opinion that treatment after May 27, 2010 is not reasonable and necessary is supported by Dr. Abboudi's opinion, based on his review of extensive records and multiple diagnostic studies, that all treatment after the April 2005 EMG study was not reasonable and necessary. Therefore, I find that the treatment of Dr. Thoder on and after May 27, 2010 is not reasonable and necessary.

(FOF ¶¶ 12-16 (footnote omitted).)

Accordingly, the WCJ: (1) denied Claimant's UR Petition because Employer met its burden of proving Dr. Thoder's treatment "on and after May 27, 2010 was not reasonable and necessary," (WCJ Decision, Conclusions of Law (COL) ¶ 5; Order); (2) granted Employer's Termination Petition because Employer "met its burden of proving that Claimant was fully recovered from her" injury as of November 5, 2010, (COL ¶ 4; Order); (3) granted Claimant's Review Petition related to expanding the description of her injury and amended the NCP to include bilateral carpal tunnel syndrome, (COL ¶ 2; Order); and (4) determined that Claimant's Review Petition seeking to challenge Dr. Mandel's IRE was premature because Employer had not filed a modification petition, (COL ¶ 3; Order).

Claimant appealed the WCJ's Decision as it related to her UR Petition and Employer's Termination Petition to the Board. The Board affirmed, and Claimant subsequently filed the instant Petition for Review with this Court.[2]

On appeal, Claimant argues: (1) the Board erred when it affirmed the termination of benefits because the NCP listed injuries beyond carpal tunnel syndrome; and (2) the Board erred in affirming the WCJ's finding that the palliative treatment provided by Dr. Thoder was not reasonable and necessary.

First, Claimant contends that the Board should not have granted Employer's Termination Petition when Employer's medical expert, Dr. Abboudi, specifically

[2] "Our scope of review in a workers' compensation appeal is limited to determining whether necessary finding of fact are supported by substantial evidence, whether an error of law was committed, or whether constitutional rights were violated." Elberson v. Workers' Compensation Appeal Board (Elwyn, Inc.), 936 A.2d 1195, 1198 n.2 (Pa. Cmwlth. 2007).

rejected the notion that Claimant sustained all the injuries listed on the NCP. Claimant contends that the NCP lists injuries to Claimant's right shoulder, elbow, arm, and hand that are separate and apart from her bilateral carpal tunnel syndrome. She further argues that this Court's previous decisions show that a physician's testimony that does not recognize all the injuries listed in the NCP is not sufficient to support a termination of benefits.

NCPs are governed by Section 407 of the Workers' Compensation Act (Act),[3] which provides:

> On or after the seventh day after any injury shall have occurred, the employer or insurer and employe or his dependents may agree upon the compensation payable to the employe or his dependents under this act . . . . All notices of compensation payable and agreements for compensation and all supplemental agreements for the modification, suspension, reinstatement, or termination thereof . . . shall be valid and binding unless modified or set aside as hereinafter provided.

77 P.S. § 731. Further, Section 413(a) of the Act provides:

> A workers' compensation judge may, at any time, review and modify or set aside a notice of compensation payable . . . upon petition filed by either party with the department, or in the course of the proceedings under any petition pending before such workers' compensation judge, if it be proved that such notice of compensation payable . . . was in any material respect incorrect.

77 P.S. § 771.

[3] Act of June 2, 1915, P.L. 736, as amended, 77 P.S. § 731.

Section 407 of the Act "ensure[s] that, when an employer seeks to terminate a claimant's benefits, neither party can re-litigate the nature of the accepted injury at a subsequent proceeding without first following the proper procedure, which is to file a Review Petition and seek to have the description of the injury changed." GA & FC Wagman, Inc. v. Workers' Compensation Appeal Board (Aucker), 785 A.2d 1087, 1092 (Pa. Cmwlth. 2001). Section 413(a) makes it clear that the WCJ may also determine, "in the course of the proceedings under any petition," that the NCP was materially incorrect. 77 P.S. § 771. A NCP remains valid and binding if a modification does not occur through one of these two processes. Wagman, 785 A.2d at 1092.

Claimant cites Wagman in support of her argument that the testimony of an expert that does not embrace the injury accepted on the NCP is insufficient to support a termination petition. In Wagman, the employer issued a NCP that accepted the claimant's injury as "exacerbation of pseudoarthrosis L4-5." Id. at 1088 (internal quotation marks omitted). A WCJ granted the employer's termination petition based on the testimony of a medical expert who concluded that the claimant's pseudoarthrosis was of no consequence, and that the claimant's work-related injury was actually sprained muscle ligaments in his back, from which he had fully recovered. Id. at 1089-90. This Court, relying on Sections 407 and 413(a) of the Act, found that the expert medical testimony was insufficient to support a termination petition because the employer accepted the diagnosis of exacerbation of pseudoarthrosis through issuance of the NCP and the notice was not modified pursuant to the Act. Id. at 1092. This Court held that "in order to

terminate [the c]laimant's benefits, [employer] must submit medical evidence proving that [the c]laimant has recovered from [the accepted] injury." Id.

We conclude that, unlike Wagman, Employer's medical expert's testimony in the present matter was sufficient to prove that Claimant had recovered from her work-related injury as described in the amended NCP. The NCP, before amendment, listed separately the accepted injury suffered by Claimant, "Carpal Tunnel syndrome," and the affected body parts, "Rt Shoulder/rt elbow/arm/right hand." (Notice of Compensation Payable, R.R. at 20a.) The WCJ granted Claimant's Review Petition and amended the NCP to include "bilateral carpal tunnel syndrome." (COL ¶ 2.)

Dr. Abboudi's testimony, which the WCJ found credible, reveals that he reviewed the original NCP and pointed out that the description was "not a very clean medical description." (Abboudi's Dep. at 41, R.R. at 189a.) Dr. Abboudi explained that the description in the original NCP reflects that Claimant suffered from right-sided carpal tunnel syndrome. (Abboudi's Dep. at 41-42, R.R. at 189a-90a.) Dr. Abboudi further explained that:

> It is not uncommon for people who have carpal tunnel syndrome to have pain that is referable from the hand up back up towards the shoulder. So[,] in her case, she presented with right carpal tunnel syndrome. She did have complaints that were involving the upper part of the arm. Again, in keeping with some people's presentation with carpal tunnel syndrome, the carpal tunnel syndrome was treated, and I did not believe that there's any separate entity or problem related to the elbow, the arm, the shoulder, and so forth. I just use that wording to avoid confusion. That was the accepted injury. But again, I think it is more clearly or cleanly stated as right-sided carpal tunnel syndrome.

(Abboudi's Dep. at 42, R.R. at 190a.) Given Dr. Abboudi's credible testimony and the description set forth on the original NCP, which lists separately the accepted injury, carpal tunnel syndrome, and affected body parts, right shoulder, right elbow/arm and right hand, we conclude that Dr. Abboudi's testimony is sufficient to support the WCJ's finding that Claimant was fully recovered from her injury as listed on the original NCP. Dr. Abboudi's testimony also supports the conclusion that Claimant has fully recovered from her work-related injury described as bilateral carpal tunnel syndrome on the amended NCP. Dr. Abboudi "felt that for the same rationale that the right-sided carpal tunnel syndrome was accepted as a work-related injury that the left-sided carpal tunnel syndrome should be the same." (Abboudi's Dep. at 42-43, R.R. at 190a-91a.) But, he also concluded that the April 2005 EMG showed "she had a successful carpal tunnel release for both sides . . . . I would say with successful carpal tunnel releases, she would have no reason why she couldn't go back to work in her normal, usual capacity as a stenographer." (Abboudi's Dep. at 44, R.R. at 192a.)

Accordingly, the Board did not err by affirming the WCJ's grant of Employer's Termination Petition.

We now turn to Claimant's argument related to her palliative care rendered by Dr. Thoder. The WCJ found, in response to Claimant's UR Petition, that Claimant's care provided by Dr. Thoder, which includes steroid injections four times per year, was not reasonable and necessary. (FOF ¶ 16; COL ¶ 5.) Claimant contends that Employer bears the burden throughout the UR process to prove that the treatment is not reasonable and necessary, and that Employer failed to meet this

burden because palliative care is reasonable and necessary if it offers Claimant pain relief.

In Cruz v. Workers' Compensation Appeal Board (Philadelphia Club), 728 A.2d 413, 417 (Pa. Cmwlth. 1999), this Court held that "treatment may be reasonable and necessary even if it is designed to manage the claimant's symptoms rather than to cure or permanently improve the underlying condition." Further, "an employer seeking to avoid payment for medical services in a UR proceeding has a never-shifting burden to prove that the treatments in question are unnecessary or are unreasonable." Id. Finding that a treatment is "merely palliative in nature" is insufficient to prove that a claimant's treatment is not reasonable or necessary. Glick v. Workers' Compensation Appeal Board (Concord Beverage Company), 750 A.2d 919, 921-22 (Pa. Cmwlth. 2000).

Dr. Thoder's treatment of Claimant was based on his conclusion that Claimant's ailments are permanent in nature and steroid injections appear to relieve her pain. (Thoder's Dep. at 46, R.R. at 109a.) Although Dr. Thoder testified that his treatments were reasonable and necessary, the WCJ did not find Dr. Thoder credible with respect to Claimant's ongoing symptoms. (FOF ¶ 13.) Further, the WCJ's finding that Dr. Thoder's treatment was not reasonable and necessary was not due to its palliative nature, but on her acceptance of the opinions of Dr. Abboudi and Dr. DiBenedetto. See Haynes v. Workers' Compensation Appeal Board (City of Chester), 833 A.2d 1186, 1191 (Pa. Cmwlth. 2003) (holding that the claimant's palliative care was not reasonable and necessary based on the credible testimony of a medical expert). Dr. Abboudi opined that Claimant has

recovered from her injury and Dr. Thoder's care was no longer reasonable or necessary. (FOF ¶ 9(k), (l).) Similarly, Dr. DiBenedetto's Utilization Review Determination found that Dr. Thoder's treatments were not reasonable and necessary because the treatments went beyond the accepted practice for Claimant's injury. (FOF ¶ 8(e).) Because the WCJ's determination in regard to Claimant's palliative care rested on the credible testimony of the medical experts, and not a conclusion that palliative care is, in general, not reasonable and necessary, we will not disturb the Board's affirmance of the WCJ's Decision.

For the foregoing reasons, the Board's Order is affirmed.

RENÉE COHN JUBELIRER, Judge

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	:	
Respondent	:	

O R D E R

NOW, February 4, 2015, the Order of the Workers' Compensation Appeal Board entered in the above-captioned matter is **AFFIRMED.**

RENÉE COHN JUBELIRER, Judge