

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Clarissa Flemming :
 :
 v. : No. 1084 C.D. 2010
 : SUBMITTED: December 23, 2010
 City of Philadelphia Board of :
 Pensions and Retirement, :
 Appellant :

**BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge**

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER**

FILED: April 5, 2011

City of Philadelphia Board of Pensions and Retirement (Board) appeals from the order of the Court of Common Pleas of Philadelphia County (trial court) which reversed the Board’s decision to deny the application of Clarissa Flemming (Flemming) for service-connected disability benefits pursuant to Section 22-401 of the Philadelphia Code, Title 22, Public Employees Retirement Code (Retirement Code).¹ After review, we reverse the trial court and reinstate the decision of the Board.

¹ Section 22-401, Service-Connected Disability Retirement Benefits, provides:

(Footnote continued on next page...)

Flemming worked as a court reporter for the City of Philadelphia for approximately fifteen years from July 2, 1990 through May 26, 2006. In July 2005, Flemming reported wrist pain bilaterally and worked a light-duty job from that point on until January, 2006. On August 23, 2006, Flemming applied for service-connected disability benefits based on her diagnosis of bilateral carpal tunnel syndrome, a condition she alleged was aggravated by the repetitive nature of her court reporting duties. By letter dated September 24, 2007, the Board denied Flemming's application. Flemming appealed the Board's decision and a hearing was held before a panel of the Board on December 11, 2008, at which Flemming and her treating physician, Dr. William Murphy, testified.

Flemming testified that prior to her work as a court reporter, she had no symptoms of any carpal tunnel in either hand. Flemming testified that at some point over the course of her fifteen years working as a court reporter, her hands would bother her and that she would take pain or an anti-inflammatory medication. Flemming stated that the pain in her hands was causing her to lose speed in her typing and as well as some strength in her fingers. After a particularly difficult assignment in July 2005, Flemming felt that the pain in her hands would not even

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Any member found by the board to be permanently incapacitated from further performance of duty, which incapacity resulted solely from the performance of the duties of the member's position and was not caused by the member's own wrongful conduct, shall be retired and shall receive service-connected disability retirement benefits. To approve an application for such benefits, the Board must find that:

- (a) the member is mentally or physically totally incapacitated from the further performance of the duties of the member's position;
- (b) such disability is likely to be permanent;
- (c) such disability existed while the member was still in the employ of the City;
- (d) an application for service-connected disability retirement benefits is filed within one (1) year after separation from service

allow her to brush her hair and so she called out sick and went to see a doctor. Flemming testified that initially she was told to wear splints and to rest her hands, and during this time she was on restricted duty with the City proofreading transcripts and training other court reporters. Flemming stated that she eventually had carpal tunnel release surgery on her left hand, which did give her some relief. Flemming testified, however, that the surgery was not successful in her mind because she still could not get back to level she felt she needed in order to return to work. On cross-examination, Flemming explained: “I chose to do the left one first to see [what] happened. And when I didn’t get that 100 percent relief, that I had hoped for, I didn’t want to try it on my right hand.” Notes of Testimony (N.T.) at 43.

Dr. William Murphy, board-certified in osteopathic medicine, physical medicine, and rehabilitation, testified that Flemming came to him complaining of pain in both of her wrists and hands, including numbness and tingling. Dr. Murphy took a history from Flemming and performed a physical exam, which revealed positive findings of carpal tunnel and tendonitis. He also performed an EMG study that same day, from which he determined “there was an abnormality that was consistent with carpal tunnel syndrome on both sides.” N.T. at 54. Dr. Murphy further testified that the EMG studies “are not 100 percent . . .” and that what “the current medical literature states is that EMG tests [are] 85 to 90 percent accurate for diagnosing carpal tunnel syndrome from an electrical standpoint.” *Id.* at 58-59. Dr. Murphy explained that while an “EMG will help confirm your clinical diagnosis in 85 to 90 percent of the cases . . . there is a false-negative rate of 10 to 15 percent. So you have to take that into consideration when treating a patient.” *Id.* at 60. Dr. Murphy opined that Flemming’s carpal tunnel

syndrome was a direct consequence of her work as a court reporter and the cause of her disability.

The Board's panel physicians, Dr. Wilhemina Korevaar and Dr. Brent Weinerman, both submitted reports as did Dr. David Steinberg, a hand specialist. Dr. Korevaar's report stated, in part:

[B]ased on the reported excellent results from the left-sided surgery and the fact that Ms. Fleming [sic] elected not to return to work and also apparently not to undergo right carpal tunnel release, it is my opinion to a reasonable degree of medical certainty that this permanent partial disability is not solely due to the work injury of 07/08/05. Moreover, her EMG/NCS studies worsened during the period of time she was not working as a court reporter, which strongly suggests that the carpal tunnel progressed as a result of non-work activities.

Medical Pension Review, Dr. Wilhelmina C. Korevaar, Original Record (O.R.) Exhibit FF, at 104. The Board also had before it the report of Dr. Brent Weinerman, who conducted an independent medical examination of Flemming on November 14, 2006. In his report, Dr. Weinerman stated that:

It is my medical opinion in view of the fact that Ms. Fleming [sic] show[s] a progression of carpal tunnel syndrome unrelated to her work activity that her carpal tunnel syndrome is unrelated to her work activity in part, although it is likely that the repetitive nature of her work cause[d] an aggravation of this condition. Her bilateral wrist impairment is not due solely to her work related injury.

Report of Dr. Weinerman, O.R. Ex. FF, at 108. Dr. Weinerman also testified by deposition that while he believed Flemming had bilateral carpal tunnel syndrome, it was not solely caused by her work as a court reporter. Dr. Weinerman explained

that an EMG nerve conduction study performed on September 7, 2005 was “unremarkable” and did not show evidence of carpal tunnel syndrome. Dr. Weinerman’s Deposition at 21; O.R. Ex. XX at 316. A later EMG performed in January 2006, after Flemming had been on light duty, showed findings that were consistent with mild carpal tunnel syndrome. Dr. Weinerman testified that he disagreed with Dr. Murphy’s opinion as to causation, because “if a particular activity is causing a particular problem, eliminating that activity should result in an improvement of the problem and that didn’t happen here. In fact, there was a progression of the condition [Flemming’s carpal tunnel syndrome] unrelated to performance of the activity that caused her symptomology.” *Id.* at 28-29; O.R. at 323-324.

Finally, the Board had the report of Dr. David Steinberg, an orthopedic hand surgeon, who conducted an independent medical evaluation of Flemming on January 11, 2007. Dr. Steinberg stated that:

While initial electrodiagnostic testing at the time of the reported work incident was normal, follow-up study after the patient had been out of work showed progression of the disease for which she ultimately underwent endoscopic carpal tunnel release on the left. Based on her surgeon’s medical records, there appeared to be improvement although the patient claims that any attempts to go back to stenography work or typing caused recurrence of symptoms after 5 – 10 minutes. She never proceeded with the recommended surgery on the right side. Based on her current examination there are no objective findings of nerve dysfunction such as motor weakness or altered sensibility testing. Provocative subjective testing for carpal tunnel compression including Phalen’s and median nerve compression are positive.

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It is my opinion that she is partially disabled from returning to her work as a court reporter based on her current condition. Given that the carpal tunnel progressed after the patient stopped work, (while her occupation may have aggravated the condition) her partial disability from the carpal tunnel is not solely due to the work injury of July 2005. However she has not undergone the suggested surgical release on the right. Given the lack of objective findings on the left, it is not clear if a formal course of therapy including work conditioning might not alter her subjective symptoms on the left. Therefore it is difficult to comment on the permanency of her subjective complaints given that additional intervention might be beneficial.

Dr. Steinberg's Report, O.R. Ex. FF at 111-112. In a follow-up to this report, Dr. Steinberg clarified his opinion as to whether Flemming's incapacity was solely due to her work duties:

[T]he patient stopped working on a regular basis in July 2005 due to her symptoms. Electrodiagnostic testing performed on September 7, 2005 was normal. It was on follow-up electrodiagnostic tests in January 2006 which showed very mild carpal tunnel syndrome. Since the patient had not worked for the city since July, any progression of changes in electrodiagnostic testing obviously occurred in the absence of work related activities and therefore is due to causation other than her work for [t]he City of Philadelphia as a court reporter.

Letter of Dr. Steinberg, O.R. Ex. FF at 113.

At its regular meeting held on January 15, 2009 the Board denied Flemming's application for service-connected disability benefits. The Board found that Flemming did not demonstrate that she was permanently incapacitated from the further performance of her duties and that she had not established that her incapacity resulted solely from the performance of the duties of her position.

Accordingly, the Board concluded that Flemming was not entitled to service-connected disability benefits.

Flemming appealed the Board's denial to the trial court which, without taking additional evidence, granted Flemming's appeal and reversed the Board. The trial court determined that the Board's finding that Flemming failed to prove that her carpal tunnel syndrome was solely caused by her duties as a court reporter was "based largely upon the difference in the electrodiagnostic test results in September 2005 and in January 2006." Trial Court's Opinion at 2-3. The trial court further determined that the Board based this finding on the testimony of its experts, Dr. Weinerman and Dr. Steinberg, who opined that because the first test was normal and the second test showed carpal tunnel, indicating that Flemming's condition worsened during a time when she was not working as a court reporter, her carpal tunnel syndrome was not solely caused by her court reporting duties. The trial court noted Dr. Murphy's testimony that electrodiagnostic tests have a 10 to 15 percent chance of producing a false-negative result when the patient actually has carpal tunnel on clinical examination and that carpal tunnel symptoms do not necessarily improve once the activity that causes it stops, established that Flemming's disability was solely caused by the performance of her court reporting duties. The trial court concluded that the Board erred in failing to consider the testimony of Dr. Murphy, and further, that because there was "no evidence of any intervening injury or problem that might have occurred besides carpal tunnel syndrome as a result of [Flemming's] employment as a Court Reporter," the finding of the Board was not supported by substantial evidence. Trial Court's Opinion at 3-4. The Board now appeals to this court.

The Board presents two issues on appeal: whether the trial court exceeded its scope of review by making its own credibility determinations and reweighing the evidence presented to the Board; and whether the trial court erred in ignoring the Board's finding that Flemming's condition was not permanent.

On appeal from an administrative agency's decision, the court may review whether the agency violated constitutional rights, whether it committed an error of law and whether its necessary findings of fact are supported by substantial evidence in the record. Section 754(b) of the Local Agency Law, 2 Pa. C.S. §754(b); *Merlino v. Philadelphia Bd. of Pensions and Retirement*, 916 A.2d 1231 (Pa. Cmwlth. 2007). "As the ultimate fact finder, the Board has the authority to resolve evidentiary conflicts and to make all necessary credibility determinations." *Id.* at 1234 n. 5 [citing *Dale v. Philadelphia Bd. of Pensions and Retirement*, 702 A.2d 1160 (Pa. Cmwlth. 1997)]. As a reviewing court, the trial court "must accept the credibility determinations made by the local agency which hears the testimony, evaluates the credibility of the witnesses and serves as fact-finder." *In Re: Appeal of Nevling*, 907 A.2d 672, 674 (Pa. Cmwlth. 2006) [citing *Hinkle v. Bd. of Pensions & Retirement*, 881 A.2d 22 (Pa. Cmwlth. 2005)]. Accordingly, the trial court cannot consider the existence of testimony which might support factual findings other than those made by the fact-finder, but instead must examine the entire record to determine if it contains evidence a reasonable person might find sufficient to support *the findings actually made by the fact-finder*.

In the matter *sub judice*, it is clear that the trial court exceeded its role in reviewing the findings of the Board. By engaging in its own evaluation of the testimony of Flemming's doctor, Dr. Murphy, and discounting the weight placed on the testimony of Drs. Weirnerman and Steinberg, found credible by the Board,

the trial court impermissibly reweighed the evidence to reach a different result. The trial court apparently discounted Dr. Weirnerman's and Dr. Steinberg's opinions because while Dr. Murphy testified that EMG tests have a 10 to 15 percent chance of being false-negative, "Dr. Weirnerman and Dr. Steinberg based their conclusions solely on the two different test results, with out [sic] accounting for or acknowledging the potential for false [negatives]." Trial Court's Opinion at 3. The Board correctly asserts that Dr. Murphy's evaluation of the objective test results did not vitiate the opinions of Drs. Weirnerman and Steinberg in that regard, but created issues of fact to be resolved by the Board. As the Board was clearly presented with conflicting testimony in this regard, it was for the Board alone to determine its credibility and relative weight to be given to the testimony.

Our review of the record shows that both Dr. Weirnerman and Dr. Steinberg based their opinions not only on the objective test results, but on their findings on physical examination of Flemming, as well as their review of her medical records. As such, their testimony constitutes substantial evidence to support the Board's finding that Flemming failed to prove that her incapacity is solely the result of the performance of her court reporting duties and that her condition was permanent. *See DeBerry v. Bd. of Pensions & Retirement Municipal Pension Fund*, 585 A.2d 616 (Pa. Cmwlth. 1991). Accordingly, Flemming did not meet her burden under Section 22-401 of the Retirement Code and the Board did not err in denying her application for service-connected disability retirement benefits.²

² The Board also contends that the trial court erred in placing the burden on it to prove a specific alternative cause of Flemming's carpal tunnel syndrome in order to successfully rebut Dr. Murphy's opinion that her incapacity resulted "solely" from the performance of her court reporting duties. In all service-connected disability cases, however, the burden is on the claimant **(Footnote continued on next page...)**

The trial court's order is reversed.³

BONNIE BRIGANCE LEADBETTER,
President Judge

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to prove that the disability is related to the performance of duty by the required causal nexus as set forth in the relevant ordinance. Section 22-401 of the Philadelphia Code requires that the claimant prove that the “incapacity resulted solely from the performance of the duties of the member’s position” § 22-401; *see also Drennan v. Philadelphia Bd. of Pensions & Retirement*, 525 A.2d 1265 (Pa. Cmwlth. 1987). Where the Board finds, as in the matter *sub judice*, that the claimant has not met her burden of proof, then benefits must be denied. *In Re: Appeal of Nevling; Hinkle*.

³ In reversing the trial court, we also reject Flemming’s argument that a workers’ compensation judge’s finding that her carpal tunnel injury arose out of her employment precludes a contrary finding in this matter. Claimant points this court to the September 30, 2010 Decision by a Workers’ Compensation Judge (WCJ) regarding Flemming’s penalty petition, which he treated as both a reinstatement petition and a penalty petition. In that decision, the WCJ found that while Flemming continued to be disabled from returning to her pre-injury job as a court reporter due to her accepted injury of bilateral carpal tunnel syndrome, benefits were suspended as of January 1, 2007, because her self-income exceeded her pre-injury earnings. Flemming argues that we are bound by the WCJ’s determination as to causation and that the Board is barred from challenging “whether the carpal tunnel syndrome is caused by activity in the course of Ms. Flemming’s employment.” Claimant’s Brief at 14. We disagree.

Collateral estoppel is properly applied where: 1) the issue decided in the prior action was identical with the one presented in the later action; 2) there was a final judgment on the merits; 3) the party against whom the plea is asserted was a party or in privity with a party to the prior adjudication; and 4) the party against whom the plea is asserted has had a full and fair opportunity to litigate the issue in question in a prior action. *Plaxton v. Lycoming Cty. Zoning Hearing Bd.*, 986 A.2d 199 (Pa. Cmwlth. 2009). Regardless of whether the WCJ’s decision is a final adjudication, it cannot be considered a prior adjudication that is binding on either the Board or the trial court, because it was rendered after the Board’s decision on January 16, 2009, and the trial court’s opinion on April 20, 2010. Accordingly, the WCJ’s finding cannot have collateral estoppel effect in this case. Finally, we note that the WCJ’s decision is *de hors* the record.

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ORDER

AND NOW, this 5th day of April, 2011, the order of the Court of Common Pleas of Philadelphia County in the above captioned matter is hereby REVERSED, and the order of the Board is reinstated.

BONNIE BRIGANCE LEADBETTER,
President Judge