

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

James Etheredge,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1108 C.D. 2010
	:	
Workers' Compensation Appeal	:	Submitted: October 8, 2010
Board (Pennsylvania State Police),	:	
	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER**

FILED: February 1, 2011

James Etheredge (Claimant) petitions for review of the order of the Workers' Compensation Appeal Board (Board), which affirmed the determination of a workers' compensation judge (WCJ) that granted the Pennsylvania State Police's (Employer) Petition to Suspend Compensation Benefits (Suspension Petition) and suspended Claimant's workers' compensation (WC) benefits as of March 24, 2008. Claimant argues that the WCJ ignored Claimant's evidence that his medications render him medically unable to work. For the following reasons, we affirm.

Claimant began working for Employer as a state trooper on September 25, 1995. On November 10, 2006, Employer issued a Notice of Compensation Payable (NCP), acknowledging that Claimant sustained a work-related injury on September 17, 2006, in the nature of a cervical and lumbar strain/sprain.¹ Claimant received Heart and Lung benefits in lieu of WC benefits.² On April 29, 2008, Employer filed the Suspension Petition, seeking to suspend Claimant's WC benefits as of March 24, 2008, on the grounds that Claimant refused modified-duty work with Employer. Claimant filed a timely answer denying that the job offered was within his work restrictions. Hearings were held before the WCJ, at which both Employer and Claimant presented evidence. Employer and Claimant stipulated that Claimant received a Notice of Ability to Return to Work, dated February 7, 2008, and a March 20, 2008, letter from Employer offering Claimant a modified-duty job. The duties of the modified position would be administrative in nature and would not involve any critical duties, such as patrol duty, exposure to confrontational situations, duties that entail alertness, reasoning and decision making, and communication/desk duties. The parties also stipulated that the job offer is still open and available to Claimant.

¹ Claimant's injury occurred when he backed his patrol car into a cement median at about 35 to 40 miles per hour while trying to avoid a collision with a speeding vehicle. (WCJ's Findings of Fact (FOF) ¶ 5.) Claimant felt pain in his back and neck, had difficulty gripping things, and had problems with his right hand and wrist. (FOF ¶ 5.)

² Heart and Lung benefits are paid pursuant to the act commonly known as the Heart and Lung Act, Act of June 28, 1935, P.L. 477, as amended, 53 P.S. §§ 637-38. Heart and Lung benefits pay the full rate of salary and are available to certain enumerated classes of government employees, such as state troopers and firefighters, who are injured on the job and whose disability is temporary. Section 1(a) of the Heart and Lung Act, 53 P.S. § 637(a). Any WC benefits received by the employee must be turned over to the governmental entity paying the Heart and Lung benefits. Id.

Employer presented the deposition testimony of Robert A. Smith, M.D., who is board-certified in orthopedic surgery and independent medical examinations. (WCJ's Findings of Fact (FOF) ¶ 11.) Dr. Smith reviewed various medical records of Claimant and examined Claimant on November 26, 2007, obtaining a history of both the September 17, 2006, incident and of Claimant's treatment to date, including the medications Claimant was taking. (Smith Dep. at 7-8, 11, August 12, 2008, R.R. at 81a-82a, 85a.) Dr. Smith stated that Claimant complained of: extreme pain in his neck, mid and low back, and extremities; intermittent numbness and weakness in his left arm; and difficulty performing daily activities. (Smith Dep. at 8-9, R.R. at 82a-83a.) Dr. Smith indicated that Claimant walked normally, needed no aids to ambulate, and wore no braces. (Smith Dep. at 9, R.R. at 83a.) His examination of Claimant revealed no signs of spasms or rigidity upon palpation, no atrophy or scarring or trigger points, normal neurological results, and some deficits about Claimant's spine that were related to Claimant's complaints of pain. (Smith Dep. at 9-10, R.R. at 83a-84a.) Dr. Smith characterized the clinical exam of Claimant as "relatively benign." (Smith Dep. at 12, R.R. at 86a.) Dr. Smith opined that Claimant was capable of performing sedentary work, such as deskwork, paperwork, answering phones, to light-duty work, which he described as work involving lifting less than twenty pounds and some walking around. (FOF ¶ 12; Smith Dep. at 12-13, R.R. at 86a-87a.)

Claimant testified that the majority of his pain had "settled down" except for the pain in his sciatic area, which becomes gripping and unbearable if he performs any activity. (FOF ¶ 6.) Claimant still had neck and other back pains, with his right-sided pain being only ten to twenty percent of his left-sided pain. (FOF ¶ 6.)

This pain prevented Claimant from getting around. (FOF ¶ 6.) Claimant described his activities, which included lying down and watching television. (FOF ¶ 7.) However, Claimant frequently visits his three-story investment property to see how his employees are progressing, but generally stays on the first floor of the building. (FOF ¶ 7.) Claimant's washer and dryer are located in the basement of his home and, although his mother does his laundry once per month, he does his own laundry when he can. (FOF ¶ 7.) Claimant treats with Dr. Manzella, his family physician, and Albert D. Janerich, M.D., about every two or three months each. (FOF ¶ 8.) Each physician prescribes Claimant medications, and Claimant uses a TENS unit and exercises at home. (FOF ¶ 8.) Claimant testified that both Dr. Manzella and Dr. Janerich advised him not to return to work in any capacity, but Claimant stated that if either physician told him to go back and give the job a try, he would follow their orders. (FOF ¶ 9.) Claimant did not try the offered position, and he did not indicate that he did not understand the job duties that were offered to him. (FOF ¶ 10.)

Dr. Janerich, who is board-certified in physical medicine and rehabilitation and chemical dependency, testified by deposition on Claimant's behalf. Dr. Janerich began treating Claimant in October 2007 and testified regarding Claimant's treatment, stating, *inter alia*, that Claimant took the prescription medications Lyrica, Celebrex, Zanaflex, Effexor, and Vicodin ES. (FOF ¶ 14; Janerich Dep. at 13-17, January 21, 2009, R.R. at 116a-20a.) Dr. Janerich opined that Claimant was not capable of returning to work in March 2008 and remains totally disabled. (FOF ¶ 15; Janerich Dep. at 25, R.R. at 128a.) However, Dr. Janerich testified that Claimant was absolutely capable of lifting fifteen to twenty pounds, could sit for periods of no longer than twenty to thirty minutes, and could

stand as long as he would want. (Janerich Dep. at 31-32, R.R. at 134a-35a.) Dr. Janerich believed that, if Claimant could get to the point where he did not have to take the narcotic painkillers, Claimant could return to work in a limited duty capacity. (Janerich Dep. at 36-37, R.R. at 139a-40a.) Dr. Janerich indicated, however, that Claimant would be able to return to limited duty administrative capacity “[p]rovided the medication [Claimant] takes is not interfering with [Claimant’s] cerebration or thinking so much so that would render him incompetent in the cerebral skills he’d be asked to do.” (Janerich Dep. at 39-40, R.R. at 142a-43a.)

The WCJ credited Dr. Smith’s opinions as being logical, internally consistent, persuasive, and supported by his findings on his physical examination of Claimant, as well as by Dr. Janerich’s opinions regarding Claimant’s abilities to lift, sit, and stand. (FOF ¶ 13.) The WCJ did not credit Claimant’s testimony to the extent that it could be read as indicating that he could not do the job Employer offered him. The WCJ noted that Claimant did not actually testify that he could not do the job and stated, in fact, that if his physicians released him, he would follow his physicians’ orders. (FOF ¶ 4.) The WCJ concluded that Claimant seemed to be exaggerating his symptoms during his testimony and noted that Claimant did not testify that he was having any problems with concentration, sleepiness, or dizziness as a result of the medications he was taking. (FOF ¶ 4.) Finally, the WCJ rejected Dr. Janerich’s opinions as not credible, pointing to certain inconsistencies in that testimony, such as Dr. Janerich’s opinion that Claimant was not capable of returning to work despite Claimant’s ability to lift fifteen to twenty pounds, sit for twenty to thirty minutes, and stand as much as he wanted. (FOF ¶ 16.) The WCJ noted that these restrictions were consistent with

Dr. Smith's release of Claimant to sedentary to light-duty work. (FOF ¶ 16.) Additionally, in rejecting Dr. Janerich's opinions, the WCJ indicated that Dr. Janerich did not testify that Claimant had any problems with his medications. (FOF ¶ 16.) In fact, the WCJ pointed out that Dr. Janerich agreed that Claimant could do limited work if the medications did not interfere to the point that the medications rendered Claimant incompetent, and the WCJ found that there was no evidence in the record that the medications had that effect on Claimant. (FOF ¶ 16.)

Based upon the above findings and credibility determinations, the WCJ concluded that the modified-duty position Employer offered Claimant on March 24, 2008, was within Dr. Smith's sedentary to light-duty work restrictions, that Claimant was currently physically capable of performing the modified-duty job, and that he was capable of performing that job on March 24, 2008, the date Claimant was to report for work. (FOF ¶ 17; WCJ's Conclusions of Law (COL) ¶¶ 4-5.) Thus, the WCJ concluded that Employer satisfied its burden of proof, granted the Suspension Petition, and suspended Claimant's WC benefits as of March 24, 2008. (COL ¶ 2; Order.) Claimant appealed to the Board, which affirmed. Claimant now petitions this Court for review.³

³ "Our review is limited to determining whether an error of law was committed, whether necessary findings of fact are supported by substantial evidence and whether constitutional rights were violated." Scott v. Workers' Compensation Appeal Board (Ames True Temper, Inc.), 957 A.2d 800, 803 n.3 (Pa. Cmwlth. 2008).

Claimant argues that the WCJ's determination that Claimant did not present any evidence to support his claim that the medications rendered him incompetent to perform the modified-duty job should be reversed because it is not supported by the record and constitutes a disregard of relevant, competent evidence. According to Claimant, the "necessary and inescapable implication of Dr. Janerich's testimony obviously is that the prescription drugs that Claimant must take due to his work-related injury render Claimant medically incompetent to work even at limited[-]duty police work at this time and when the position was offered in March 2008." (Claimant's Br. at 11.) Thus, Claimant asserts, the WCJ erroneously found that:

Dr. Janerich did not testify that Claimant had any problems with the medication that he was taking. . . . He agreed that Claimant could do limited work if the medication did not interfere to the point that they would render him incompetent. There is no evidence in the record that the medications had that effect on Claimant, either from Claimant's testimony or from Dr. Janerich's testimony.

(Claimant's Br. at 11 (quoting FOF ¶ 16).) In making this finding, Claimant contends that the WCJ failed to consider Dr. Janerich's testimony in its entirety and in context and, by doing so, the WCJ ignored relevant, competent evidence.

Where, as here, an employer seeks to modify or suspend a claimant's benefits based on a specific job offer, the employer must prove, by unequivocal medical evidence, that: (1) the claimant has sufficiently recovered from the work injury to return to work with restrictions; (2) the employer had a job vacancy within the claimant's restrictions; and (3) the employer offered the job to the claimant. South Hills Health System v. Workers' Compensation Appeal Board (Kiefer), 806 A.2d 962, 967-68 (Pa. Cmwlth. 2002). Before making a job offer to

a claimant, the employer must first provide the claimant with written notice of his medical clearance to return to work. Secco, Inc. v. Workers' Compensation Appeal Board (Work), 886 A.2d 1160, 1162 (Pa. Cmwlth. 2005). “The burden of proof then shifts to the claimant to demonstrate that he responded to the job offer in good faith” and, “[i]f the claimant does not exercise good faith, then his benefits can be modified.” Bussa v. Workers' Compensation Appeal Board (Giles & Ransome, Inc.), 777 A.2d 126, 130 (Pa. Cmwlth. 2001). There is no dispute here that Employer sent Claimant written notice of his medical clearance to return to work, Employer had a job vacancy open and available to Claimant beginning on March 24, 2008, which remains open and available to Claimant, Employer offered the position to Claimant, and Claimant did not accept it or attempt to perform the job. Thus, the issues in this case involve whether: (1) Claimant had sufficiently recovered from the work injury to return to modified-duty work; and (2) the job Employer offered fell within Claimant’s restrictions. The WCJ and Board answered these questions in the affirmative, and we agree with their determinations.

Claimant essentially asks this Court to revisit the WCJ’s rejection of Dr. Janerich’s testimony on the basis that the WCJ did not fully consider that testimony or the inference that Claimant asserts could be drawn therefrom when the WCJ found that Claimant did not present evidence that his medications rendered him medically incompetent to perform the modified-duty job offered by Employer. In other words, Claimant asks this Court to draw an inference from Dr. Janerich’s testimony where the WCJ did not do so. However, drawing this inference would require us to disregard the WCJ’s rejection of Dr. Janerich’s

opinions as to Claimant's ability to return to modified-duty work, which we may not do. It is well settled that the WCJ, as fact finder, is the exclusive arbiter of credibility and evidentiary weight determinations and may reject the testimony of witnesses, including medical witnesses, in whole or in part, and that these determinations are not subject to appellate review. Jonathan Sheppard Stables v. Workers' Compensation Appeal Board (Wyatt), 739 A.2d 1084, 1087 (Pa. Cmwlth. 1999). Furthermore, in reviewing a record to see if it contains substantial evidence⁴ to support a WCJ's findings, the appellate court must view the record, and all reasonable inferences deducible therefrom, *in the light most favorable to the prevailing party*. Bussa, 777 A.2d at 129-30. Here, Employer was the prevailing party and, thus, inferences in the record must be drawn in the light most favorable to Employer. The WCJ reviewed Dr. Janerich's testimony, found it not credible, and declined to draw the inference Claimant asserts is clear from that testimony. The WCJ provided multiple, objective reasons for rejecting Dr. Janerich's testimony, not only because of the lack of evidence that the medications affected Claimant's competency. (FOF ¶ 16.) We cannot revisit those credibility and evidentiary weight determinations on appeal. Jonathan Sheppard Stables, 739 A.2d at 1087. Additionally, our review of the record likewise failed to find any specific reference to the effect Claimant's medications have on his competency. The only reference in the record to the effect of the medications is Claimant's statement that "I have[not] been going up to my [physical] therapy. I[am] having difficulty with the driving and things regarding medications and issues and things I use[d] to go to the chiropractor for[.]" (Hr'g Tr. at 10, January 5, 2009, R.R. at

⁴ "Substantial evidence is any relevant evidence that a reasonable mind might consider adequate to support a conclusion." Jonathan Sheppard Stables, 739 A.2d at 1087.

66a.) This statement provides no insight into the particular effect of Claimant's medications, particularly given Dr. Janerich's testimony that, to the extent he restricted Claimant's driving, that restriction was based on the fact that driving placed Claimant's hands above his shoulders for an extended period of time, which was detrimental to Claimant's injury. (FOF ¶ 16; Janerich Dep. at 32, R.R. at 135a.) For these reasons, we reject Claimant's argument that the WCJ erred by finding him capable of performing the sedentary to light-duty position Employer offered him.

Moreover, even if Dr. Janerich's testimony could be interpreted to raise this inference, where both parties submit evidence, "it does not matter that there is evidence in the record which supports a factual finding contrary to that made by the WCJ, rather, the pertinent inquiry is whether there is any evidence which supports the WCJ's factual finding." Bussa, 777 A.2d at 130. After reviewing the record, we conclude that there is substantial evidence to support the WCJ's findings that Claimant could return to sedentary to light-duty work and the position Employer offered Claimant fell within Claimant's work restrictions. The WCJ credited Dr. Smith's testimony that Claimant was sufficiently recovered from his work-related injury that he could perform sedentary to light-duty work. (FOF ¶¶ 12-13; Smith Dep. at 12-13, R.R. at 86a-87a.) Dr. Smith described what this type of work entailed, and the WCJ concluded that the modified-duty job proffered by Employer fell into those categories. (COL ¶ 5; Smith Dep. at 12-13, R.R. at 86a-87a.) Dr. Smith was aware of the medications Claimant was taking but, notwithstanding that awareness, he released Claimant to perform sedentary and light-duty work. (Smith Dep. at 7-8, 11-13, R.R. at 81a-82a, 85a-87a.) Such

credible testimony constitutes substantial evidence that supports the WCJ's pertinent factual findings. Because Claimant rejected suitable modified-duty work, the WCJ properly suspended Claimant's WC benefits. Bussa, 777 A.2d at 130.

Accordingly, we affirm.

RENÉE COHN JUBELIRER, Judge

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Workers' Compensation Appeal	:	
Board (Pennsylvania State Police),	:	
	:	
Respondent	:	

ORDER

NOW, February 1, 2011, the Order of the Workers' Compensation Appeal Board in the above-captioned matter is hereby **AFFIRMED**.

RENÉE COHN JUBELIRER, Judge