

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Richard Boezi,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1641 C.D. 2010
	:	Submitted: November 24, 2010
Workers' Compensation Appeal	:	
Board (City of Scranton),	:	
Respondent	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE P. KEVIN BROBSON, Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE SIMPSON**

FILED: January 5, 2011

Richard Boezi (Claimant) petitions for review from an order of the Workers' Compensation Appeal Board (Board) that affirmed a Workers' Compensation Judge's (WCJ) modification of Claimant's benefits based on a determination that Claimant could perform five sedentary jobs identified in a labor market survey. Claimant contends the WCJ's decision is not a "reasoned decision" as required by Section 422(a) of the Workers' Compensation Act (Act)¹ for two reasons. First, it lacks essential findings as to whether the identified jobs would permit Claimant to alternate between sitting and standing. Second, it includes a credibility determination based on an impermissible inference that to apply for a job is an admission of an ability to perform that job. Upon review, we affirm.

¹ Act of June 2, 1915, P.L. 736, as amended, added by the Act of July 2, 1993, P.L. 190, 77 P.S. §834.

Background

Claimant worked for the City of Scranton (Employer) as a police officer. In 2002, while on motorcycle patrol duty, Claimant sustained serious injuries in an intersectional collision with a pick-up truck, including a crush injury to his lower left leg. Employer filed a notice of compensation payable (NCP) accepting the left leg injury.

In 2005, Employer filed a petition to modify or suspend Claimant's benefits alleging that, as of November 2004, work was generally available within Claimant's restrictions and that he failed to follow through on valid job referrals. In November 2005, Claimant filed two petitions. In a reinstatement petition, amended to a review petition, Claimant sought to add an aggravation of a diabetic condition to the work injury. In a second review petition, Claimant sought to expand the work injury to include rib fractures and cervical and lumbar injuries.

In his 2007 decision, the WCJ determined Claimant established additional work injuries related to the motorcycle accident, including, among other conditions, rib fractures and lumbar and cervical injuries.² WCJ Dec., 01/24/07

² The WCJ determined Claimant sustained the following injuries as a result of the motorcycle accident: "left radial head fracture [broken elbow], left lower extremity crush injury with contusion and hematoma involving the medial gastrocnemius and anterior lateral compartment resulting in a two thirds compartment syndrome, resulting in a left ankle osteochondral defect and split thickness skin grafting, an [sic] to the left peroneal nerve, a lumbosacral strain with aggravation to the previous left L3-4 and L4-5 disc protrusions/herniations with lower extremity radiculopathy, cervical strain with right C6-7 disc protrusion with radiculopathy, right lower rib fractures and a significant myofascial pain syndrome" WCJ Dec., 01/04/07 (First WCJ Dec.), Conclusion of Law No. 2.

(First WCJ Dec.), Conclusion of Law (C.L.) No. 2. Accordingly, the WCJ granted Claimant's review petition to include these injuries. However, Claimant did not establish the accident caused or contributed to his diabetic condition. Id., C.L. No. 3.

The WCJ also found Claimant physically and vocationally capable of performing five sedentary, entry-level positions identified in a labor market survey by Employer's vocational expert, Karen Kane (Employer's Vocational Expert).³ Following an independent medical examination in 2004, Dr. Dale Federico (IME Physician), an orthopedic surgeon, approved these positions for Claimant. Claimant's treating physiatrist, Dr. Michael Wolk (Claimant's Physiatrist), also approved these positions subject to the condition that Claimant may alternate at will between sitting and standing to accommodate his multiple diagnoses. Based on the "average" average weekly wage of the five positions, the WCJ determined Claimant had an earning capacity of \$242.80 per week commencing in July 2004 and continuing thereafter. Therefore, the WCJ modified Claimant's weekly compensation rate, subject to any offset for retirement benefits received. First WCJ Dec., Finding of Fact (F.F.) No. 27, C.L. No. 4.

³ Employer's Vocational Expert obtained the following five positions through the classified section of a newspaper and through PA Career Link. First WCJ Dec., Finding of Fact (F.F.) No. 9. These positions included: security officer with U.S. Security at Cinram (40 hours per week at \$7.00 per hour, available July 13, 2004); dispatcher at Carbondale Concrete (40 hours per week at \$8.00-\$9.00 per hour, available July 15, 2004); dispatcher at University of Scranton (part-time at \$7.80 per hour, available July 15, 2004); bank teller at North Penn Bank (20-25 hours per week at \$7.50-\$8.00 per hour, available August 4, 2004); and telephone sales representative at Dial America (25-35 hours per week at \$7.00 per hour for the day shift and \$8.00 per hour for the evening shift, available August 12, 2004). Id.

Claimant appealed, and the Board affirmed in part and remanded in part for additional credibility determinations, and new findings and conclusions with respect to Employer's modification petition. See Bd. Op., 10/23/07, at 8. In particular, the Board noted the WCJ failed to accept or reject Dr. Michael Alocci's (Claimant's Internist) opinion that Claimant could not perform any type of work. Id. The Board further noted the WCJ did not provide any objective reasons for accepting the testimony of Employer's Vocational Expert or rejecting the testimony of Calvin Anderson (Claimant's Vocational Expert).

On remand, the WCJ again found Claimant physically and vocationally capable of performing the five sedentary positions identified in Employer's Vocational Expert's labor marker survey, which yielded an average weekly earning capacity of \$242.80, commencing July 14, 2004. See WCJ Dec., 10/24/08 (Second WCJ Dec.), F.F. No. 23. The WCJ credited IME Physician's and Claimant's Psychiatrist's testimony that Claimant could perform these jobs. Id., F.F. Nos. 12, 17.

Conversely, the WCJ specifically rejected as not credible Claimant's Internist's opinion that Claimant could not perform any type of work. Id., F.F. No. 16. The WCJ found Claimant's Internist less credible than IME Physician. Id. He also noted Claimant's Internist did not testify regarding Claimant's ability to perform the jobs approved by Employer's Vocational Expert. Id.

Upon reviewing the testimony of the parties' vocational experts, the WCJ found Employer's Vocational Expert credible based on her preparation of the

job analyses, her personal observation of these jobs being performed, her educational assessment and work history of Claimant, and the medical approvals by IME Physician and Claimant's Physiatrist. Id., F.F. No. 20. The WCJ rejected as not credible Claimant's Vocational Expert's testimony that Claimant could not perform any of the approved positions in the labor market survey. Id. In so doing, the WCJ noted Claimant's Vocational Expert knew that IME Physician and Claimant's Physiatrist approved these jobs for Claimant. Id. However, Claimant's Vocational Expert took the position that given Claimant's medical limitations, he did not have the residual productive skills, education or work experience to perform these jobs. Id. The WCJ further noted Claimant's Vocational Expert did not prepare or produce job descriptions for the jobs approved by Employer's Vocational Expert. Id.

Claimant again appealed to the Board, which affirmed. The Board determined the WCJ, on remand, articulated an objective basis for accepting Employer's Vocational Expert's testimony and opinions. See Bd. Op., 07/14/10, at 8. The Board rejected Claimant's contention that the WCJ did not make an essential finding as to whether the jobs approved by Employer's Vocational Expert allowed Claimant the option of sitting or standing. Id. at 9. It noted Employer's Vocational Expert testified all of the jobs could be performed while sitting or standing. Id. Claimant petitions for review.⁴

⁴ This Court's review is limited to determining whether the WCJ's findings of fact were supported by substantial evidence, whether Board procedures were violated, whether an error of law was committed or whether constitutional rights were violated. Hall v. Workers' Comp. Appeal Bd. (Am. Serv. Group), 3 A.3d 734 (Pa. Cmwlth. 2010).

Issues

Claimant advances two arguments as to why the WCJ's decision does not meet the "reasoned decision" requirements of Section 422(a) of the Act. First, Claimant argues the WCJ's decision to modify his benefits is not supported by substantial evidence and does not include findings necessary to support the conclusion that Claimant could perform the five approved jobs. Specifically, Claimant asserts the WCJ failed to find whether these jobs would allow him to alternate between sitting and standing to accommodate his symptoms. Second, Claimant argues the WCJ's decision is not reasoned because it is based on a credibility determination drawn from an impermissible inference that to apply for a job is an admission of an ability to perform that job.

Discussion

Section 422(a) of the Act requires a WCJ to issue a "reasoned decision containing findings of fact and conclusions of law based upon the evidence as a whole which clearly and concisely states and explains the rationale for the decisions" 77 P.S. §834. "A decision is 'reasoned' if it allows for adequate review by the appellate courts under the applicable review standards." Pryor v. Workers' Comp. Appeal Bd. (Colin Serv. Sys.), 923 A.2d 1197, 1202 (Pa. Cmwlth. 2006). However, "the 'reasoned decision' requirement does not require the WCJ to discuss all evidence presented; rather, the WCJ must make findings that are necessary to resolve the issues presented by the evidence and that are relevant to the decision." Id.

Claimant first argues the WCJ's decision is not reasoned or supported by substantial evidence because it lacks any findings concerning the critical issue of whether the jobs identified by Employer's Vocational Expert as being within Claimant's capabilities would allow him to alternate between sitting and standing. Although the WCJ found Employer's Vocational Expert prepared job descriptions for these positions that stated Claimant could change positions as needed, Claimant asserts the WCJ did not make a finding regarding the accuracy of these job descriptions. As the WCJ found, Claimant's Psychiatrist conditioned his approval of these five jobs on the accuracy of the job descriptions on this issue. See Second WCJ Dec., F.F. No. 17.

If a WCJ's findings are supported by substantial evidence, this Court will not disturb them on appeal. Minicozzi v. Workers' Comp. Appeal Bd. (Indus. Metal Plating, Inc.), 873 A.2d 25 Pa. Cmwlth. 2005). Substantial evidence is such evidence a reasonable person would find sufficient to support the WCJ's findings. Id. Whether the record contains evidence to support findings other than those made by the WCJ is irrelevant. Id. The critical inquiry is whether the evidence supports the findings actually made. Id. In conducting a substantial evidence analysis, we view the evidence, and every reasonable inference deducible from the evidence, in a light most favorable to the party who prevailed before the fact-finder. WAWA v. Workers' Comp. Appeal Bd. (Seltzer), 951 A.2d 405 (Pa. Cmwlth. 2008).

In Finding of Fact No. 19, the WCJ states (with emphasis added):

[Employer's Vocational Expert] prepared five remaining positions for the labor market survey This WCJ refers to the testimony of the witness in which she initially observed all of the positions being performed and forwarded the job analysis to [Claimant's Physiatrist], who approved all of them as did [IME Physician]. In her opinion [Claimant] was vocationally capable of performing those position. [sic] [Employer's Vocational Expert] also had prepared a job description as set forth in those job descriptions [sic] would permit [Claimant] to change positions as needed and at his discretion.

Second WCJ Dec., F.F. No. 19. Employer's Vocational Expert's testimony provides substantial evidence for Finding of Fact No. 19. In particular, she testified on cross-examination that all five job descriptions indicated Claimant could change positions, as needed, at will. Dep. of Karen Kane, 11/14/05 (Kane Dep.), at 70; Reproduced Record (R.R.) at 75a. Employer's Vocational Expert further testified these jobs could be performed sitting or standing, regardless of whether the person is busy. See id. at 70-77; R.R. at 75a-82a.

Moreover, the WCJ's decision on remand complies with the reasoned decision requirement in Section 422(a) of the Act. As discussed above, the WCJ provided a number of objective reasons for accepting Employer's Vocational Expert's opinions as more credible than those of Claimant's Vocational Expert. See Second WCJ Dec., F.F. Nos. 18-22. As fact-finder, the WCJ may accept or reject the testimony of any witness, including an expert witness, in whole or in part. Minicozzi.

Claimant next contends the WCJ's decision is not reasoned because it is based on a credibility determination drawn from an impermissible inference that

to apply for a job is an admission of an ability to perform that job. In Finding of Fact No. 22, the WCJ found (with emphasis added):

This WCJ reiterates that he was more impressed and persuaded by the testimony of [Employer's Vocational Expert], whose testimony will be accepted as credible, persuasive and convincing as found in [First WCJ Dec., F.F. No. 26] that the jobs set forth in the labor market survey were vocationally suitable for [Claimant] and were medically approved by [IME Physician] and [Claimant's Psychiatrist]. This WCJ also pointed out in [First WCJ Dec., F.F. No. 26] that [Claimant] believed that he was physically and vocationally capable of performing a bank teller position as he applied for a position at Penn East Federal Credit Union. Therefore, how can [Claimant] claim and [Claimant's Vocational Expert] accept [Claimant] could not physically and vocationally perform the bank teller position at North Penn Bank when he applied for a bank teller position at Penn East Federal Credit Union?

Second WCJ. Dec., F.F. No. 22.

Claimant contends this credibility determination is irrational, contrary to law and supports a reversal of the WCJ's decision. Claimant asserts Employer's Vocational Expert instructed him to apply for the bank teller position at the Penn East Federal Credit Union. Claimant did so, but did not get the job. He therefore argues his application for the bank teller position at Penn East cannot legally support an inference that he could perform a similar position elsewhere.⁵ See

⁵ Although Employer's Vocational Expert referred Claimant to bank teller position at Penn East Federal Credit Union (40 hours per week at \$7.50 per hour, available November 2004), Employer's Vocational Expert did not include this position as one of the five positions used to determine Claimant's earning capacity. See First WCJ Dec., F.F. Nos. 8-9, Second WCJ Dec., F.F. Nos. 18-19.

Kachinski v. Workmen's Comp. Appeal Bd. (Vepco Constr. Co.), 516 Pa. 240, 532 A.2d 374 (1987) (if a job referral fails to result in a job; employer not entitled to a modification); Piper Aircraft Corp. v. Workmen's Comp. Appeal Bd. (Bibey), 485 A.2d 906 (Pa. Cmwlth. 1985) (same).

Employer counters Claimant's attempt to obtain the bank teller position at Penn East Federal Credit Union is irrelevant; it is not one of the five approved jobs included in the labor market survey. What is relevant, Employer argues, are the WCJ's findings that Employer's Vocational Expert, IME Physician and Claimant's Psychiatrist all credibly testified that Claimant could perform the five jobs identified as generally available in the labor market survey, including the bank teller position at North Penn Bank.

As indicated by the first sentence in Finding of Fact No. 22, the WCJ accepted as credible Employer's Vocational Expert's opinion that Claimant could perform the five jobs identified in the labor market survey and medically approved by IME Physician and Claimant's Psychiatrist. The WCJ rejected testimony to the contrary from Claimant and his Vocational Expert.

We reject Claimant's position for two reasons. First, we interpret the finding differently than Claimant. The WCJ made the credibility determination based on several factors. These included the fact that the Employer's opinion evidence was consistent with the Claimant's past conduct of applying for a credit union teller position, while Claimant's contrary evidence was inconsistent with this conduct. There is nothing illegal or irrational about this reasoning.

Second, the WCJ's reference to the East Penn Federal Credit Union teller position is not vital to the WCJ's essential finding that Claimant could perform the five approved positions identified in the labor market survey. Instead, the WCJ primarily relied on the fact that the opinion of Employer's Vocational Expert was consistent with and supported by opinions of other expert witnesses. See Casne v. Workers' Comp. Appeal Bd. (Stat Couriers, Inc.), 962 A.2d 14 (Pa. Cmwlth. 2008) (in reviewing a WCJ's credibility determinations, substantial deference is due; the court must view the reasoning as a whole and overturn the credibility determination only if it is arbitrary or capricious, fundamentally dependent on a misapprehension of material facts, or so otherwise flawed).

Therefore, we hold the WCJ's decision, which is supported by expert medical and vocational evidence, is "reasoned" within the meaning of Section 422(a) of the Act, 77 P.S. §834. For the above reasons, we affirm the Board.

ROBERT SIMPSON, Judge

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Workers' Compensation Appeal	:	
Board (City of Scranton),	:	
Respondent	:	

ORDER

AND NOW, this 5th day of January, 2011, the order of the Workers' Compensation Appeal Board is **AFFIRMED**.

ROBERT SIMPSON, Judge