IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Larry Fuller, Petitioner	:	
v.	:	No. 1819 C.D. 2010
Workers' Compensation Appeal Board (Henkels & McCoy), Respondent	:	
Henkels & McCoy, Petitioner	:	
v.	:	No. 2060 C.D. 2010
	:	Submitted: April 15, 2011
Workers' Compensation Appeal Board (Fuller), Respondent	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE FRIEDMAN FILED: May 27, 2011

Larry Fuller (Claimant) petitions for review of the August 31, 2010, order of the Workers' Compensation Appeal Board (WCAB) to the extent that it affirms the decision of the workers' compensation judge (WCJ) to grant the petition for suspension filed by Henkels & McCoy (Employer). Employer petitions for review of the August 31, 2010, order to the extent it affirms the WCJ's denial of Employer's termination petition. We affirm.

On August 10, 2006, Claimant sustained a work injury while working for Employer as a pipeline welder. Claimant received workers' compensation benefits pursuant to a notice of compensation payable that described the work injury as a right knee sprain. In February 2008, Employer filed a termination petition, alleging that Claimant had recovered from the work injury. In July 2008, Employer filed a suspension petition, alleging that Claimant had removed himself from the workforce by retiring. Claimant filed responses, denying the allegations, and the matters were assigned to a WCJ.

At the hearings, Claimant testified as follows. He weighs 346 pounds and suffers from numerous non-work-related medical problems, including: diabetes with neuropathy, foot problems related to gout, back pain, left ankle pain, a prior injury to his medial meniscus, sleep apnea, a lung nodule, chronic obstructive pulmonary disease and congestive heart failure. Except for the heart condition, Claimant's medical problems were diagnosed prior to this work injury. Claimant has used his sleep apnea, diabetes and congestive heart failure as an excuse to be relieved from jury duty. (WCJ's Findings of Fact, Nos. 1-2.)

Claimant receives a pension related to his pipeline work.[1] Claimant applied for the pension because he was close to losing medical insurance for himself

[1] Claimant testified that he receives a union pension and that, on the pension application, he indicated that he was retiring because he was not able to go back to work. (N.T., 5/27/08, at 22-23, R.R. at 32a-33a.) Claimant later testified that he had retired. (N.T., 10/14/08, at 28-29, R.R. at 67a-68a.)

and his wife.[2] Claimant also receives federal social security disability benefits based on the combination of his medical problems. Claimant is willing to return to work if necessary to avoid losing his workers' compensation benefits.[3] Claimant did not begin to apply for jobs until his attorney told him about the requirements of workers' compensation law. However, Claimant did not know if he could actually perform the jobs for which he applied. (WCJ's Findings of Fact, No. 2.)

Employer offered the medical testimony of Douglas Brown, M.D., who examined Claimant on October 2, 2007. Claimant told Dr. Brown that he considered himself to be retired because of his heart problems.[4] Based on his examination of Claimant, Dr. Brown opined that, with respect to the work injury, Claimant had reached maximum medical improvement and Claimant's right knee would never be as it was before the work injury, but that Claimant could return to his pre-injury job without restrictions. (WCJ's Findings of Fact, No. 3.)

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[2] Claimant testified that he was entitled to medical insurance for twelve months after his injury, and he applied for the pension one month before the medical insurance expired. (N.T., 10/14/08, at 50-51, R.R. at 89a-90a.) Taking the pension allowed him to continue having medical insurance. (*Id.*)

[3] Claimant testified that he could only expect to get minimum wages where he lives, and then "I guess you get knocked off Social Security or whatever. Then you wouldn't be drawing – you wouldn't be making [as much] as what you would be losing." (N.T., 10/14/08, at 33, R.R. at 72a.) "[I]t's going to cost you more working minimum wage jobs." (*Id.* at 37, R.R. at 76a.)

[4] Dr. Brown testified that, in giving a patient history, Claimant "told me that he had a bad heart and that because of that he considered himself retired." (Brown Dep., 7/16/08, at 12, R.R. at 170a.)

Claimant offered the medical testimony of David Trettin, M.D., who surgically repaired Claimant's work injury, a torn quadriceps tendon.[5] Dr. Trettin opined that Claimant had reached maximum medical improvement; thus, he ordered a functional capacity evaluation with respect to Claimant's right knee. The evaluation indicated that Claimant could perform sedentary work from the floor to his waist, and a somewhat higher level of work above his waist. Dr. Trettin did not know whether the evaluators considered Claimant's other medical problems. (WCJ's Findings of Fact, No. 4.)

After considering the evidence, the WCJ found that Claimant sustained a work injury to his right knee in the nature of a torn quadriceps tendon, and, as a result, Claimant has small, objective, observable and continuing structural changes to his right leg. The WCJ found that Claimant has not totally recovered from his work injury, but that Claimant was able to perform some level of work, considering only his work injury. (WCJ's Findings of Fact, No. 5.) The WCJ rejected Claimant's testimony to the extent that Claimant claimed he has not abandoned the labor market. The WCJ explained:

> It is apparent from the claimant's testimony, and remarks he made to his doctor . . . , that he considers himself retired because of his heart problems. His applications for work, made on the advice of counsel, were not a genuine search for a job, but solely an attempt to retain his compensation benefits. This is not to imply that he is in any way being lazy or shirking. Rather, his non-work-related medical issues would make it ridiculously burdensome, if not

[5] Dr. Trettin testified that the quadriceps tendon connects to the patella, and some people consider it part of the knee joint. (Trettin Dep., 8/6/08, at 15; R.R. at 112a.)

> impossible, for him to perform work of any kind. This is no doubt why he did not look for work until he learned he was expected to do so. In the absence of his legal requirement, it would have made no sense whatsoever to apply for jobs he could not do and no one would hire him to perform, in light of his other medical issues. Nonetheless, he has abandoned the job market for reasons unrelated to his work injury . . . .

(WCJ's Findings of Fact, No. 6.) Based on the foregoing, the WCJ granted the suspension petition and denied the termination petition. Claimant and Employer appealed to the WCAB, which affirmed. Claimant and Employer now petition this court for review.[6]

I. Claimant's Appeal

Claimant argues that the WCJ and WCAB erred in concluding that Claimant voluntarily removed himself from the entire labor market. We disagree.

In *City of Pittsburgh v. Workers' Compensation Appeal Board (Robinson)*, 4 A.3d 1130, 1138 (Pa. Cmwlth. 2010), *appeal granted*, ___ Pa. ___, ___ A.3d ___ (No. 564 WAL 2010, filed April 6, 2011), this court stated that, to show that a claimant has retired from the workforce, an employer must show, by the totality of the circumstances, that the claimant has chosen not to return to the workforce. The receipt of a retirement pension is one circumstance that could support a holding that a claimant has retired. *Id*.

[6] Our scope of review is limited to determining whether constitutional rights were violated, whether the adjudication is in accordance with the law or whether the necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704.

Here, Claimant took a retirement pension. Moreover, Claimant admitted during his testimony that he had retired because of his heart, which prevented him from working on the pipeline, and because he needed medical insurance. (N.T., 10/14/08, at 28-29, 50-51, R.R. at 67a-68a, 89a-90a.) Claimant even informed Dr. Brown that he considered himself retired because of his heart. (Brown Dep., 7/16/08, at 12, R.R. at 170a.) Under such circumstances, the WCJ and the WCAB properly concluded that Claimant retired.

Claimant next argues that the WCJ and WCAB erred in concluding that Claimant failed to establish his attachment to the labor market by means of his job applications. We disagree.

Once an employer shows that a claimant has voluntarily retired from the workforce, for disability benefits to continue, the claimant must show that he is seeking employment after retirement or that he was forced into retirement because of his work injury. *Robinson*, 4 A.3d at 1134. To show that he is actively seeking employment, a claimant must show that he has engaged in a good-faith job search. *Pennsylvania State University v. Workers' Compensation Appeal Board (Hensal)*, 948 A.2d 907, 910-11 (Pa. Cmwlth. 2008).

Here, the WCJ concluded that Claimant did not engage in a good-faith job search because his job applications were solely an attempt to retain his compensation benefits. Claimant's own testimony supports that conclusion. Indeed, Claimant expressed a desire not to work because of his non-work-related medical

conditions, stating his belief that he would be able to work only minimum wage jobs, which would cause him to lose social security benefits and, ultimately, cause him to lose money.[7] Thus, we cannot conclude that the WCJ and WCAB erred in holding that Claimant did not conduct a good-faith job search.

Finally, Claimant asserts that the WCJ found, without the support of medical evidence, that Claimant's non-work-related medical conditions made it "ridiculously burdensome, if not impossible" for Claimant to perform any work. Claimant apparently construes the WCJ's statement as a finding that Claimant could not perform any work because of his non-work-related medical conditions. However, the WCJ made the "ridiculously burdensome, if not impossible" statement only to express sympathy with Claimant's situation, i.e., to indicate that Claimant was not "lazy or shirking" in failing to seek work after retirement. (WCJ's Findings of Fact, No. 6.) Thus, we construe the "ridiculously burdensome, if not impossible" statement to mean only that Claimant's non-work-related injuries made it extremely difficult for Claimant to find suitable work.

II. Employer's Appeal

Employer argues that the record does not contain substantial evidence to support the finding of the WCJ and WCAB that Claimant had not fully recovered from his work injury. We disagree.

[7] When asked whether he would take an available minimum-wage job, Claimant answered, "Well I guess if I had to I would." (N.T., 10/14/08, at 33, R.R. at 72a.)

Here, Dr. Brown testified that Claimant had fully recovered from his work injury, but Dr. Brown explained that, by full recovery, he meant that Claimant had reached maximum medical improvement. (Brown Dep., 7/16/08, at 18, 21; R.R. at 176a, 179a.) Dr. Brown testified, "He does have evidence of having had an injury and a surgical repair. Therefore, there is some anatomic alteration of his leg that has occurred . . . . He can never be as he was before the injury, but he's as good as he's going to get medically." (*Id.* at 18; R.R. at 176a.)

Dr. Trettin testified that: (1) Claimant's work injury caused atrophy in Claimant's right leg, (Trettin Dep., 8/6/08, at 16-17; R.R. at 113a-14a); (2) although Claimant had reached maximum medical improvement, the strength of Claimant's quadriceps could improve further with time, (*Id.* at 20-21; R.R. at 117a-118a); and (3) based on the functional capacity evaluation that Dr. Trettin requested in connection with Claimant's work injury, Claimant was restricted to sedentary work from floor to waist level, (*Id.* at 23-24; R.R. at 120a-21a).

Viewing the testimony of Dr. Brown and Dr. Trettin in the light most favorable to Claimant, the prevailing party, a reasonable person could conclude that Claimant was not fully recovered from his work injury. *Cinram Manufacturing, Inc. v. Workers' Compensation Appeal Board (Hill),* 601 Pa. 524, 535, 975 A.2d 577, 583 (2009) (stating that substantial evidence is evidence that a reasonable mind would accept as adequate to support a conclusion, and an appellate court conducting substantial evidence review must consider the record in the light most favorable to the prevailing party).

Accordingly, we affirm.

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ROCHELLE S. FRIEDMAN, Senior Judge

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O R D E R

AND NOW, this 27th day of May, 2011, the order of the Workers' Compensation Appeal Board, dated August 31, 2010, is hereby affirmed.

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ROCHELLE S. FRIEDMAN, Senior Judge