

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Emmamay Lilly, :  
 :  
 Petitioner :  
 :  
 : No. 1898 C.D. 2010  
 v. :  
 :  
 : Submitted: December 30, 2010  
 Workers' Compensation Appeal :  
 Board (Family Home Medical), :  
 Respondent :

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge  
HONORABLE PATRICIA A. McCULLOUGH, Judge  
HONORABLE JAMES R. KELLEY, Senior Judge

**OPINION NOT REPORTED**

MEMORANDUM OPINION  
BY JUDGE McCULLOUGH

FILED: August 11, 2011

Emmamay Lilly (Claimant) petitions for review of the August 17, 2010, order of the Workers' Compensation Appeal Board (Board), which affirmed in part, modified in part, and reversed in part the August 13, 2008, decision of a Workers' Compensation Judge (WCJ) granting Claimant's claim petition. For the reasons that follow, we affirm in part and reverse in part.

Claimant worked for Family Home Medical (Employer) as a home health aide. On December 17, 2006, Claimant sustained a work-related injury to her back while assisting a patient into his bed. Claimant reported the injury to Employer the next day. (Findings of Fact Nos. 2, 22.) Claimant sought medical treatment at Shamokin Area Community Hospital, but continued to perform her regular job. (Finding of Fact No. 22.) On January 29, 2007, Claimant slipped and fell as she was

leaving a patient's house, landing on her right shoulder and right hip. Claimant immediately reported this incident, and Employer's scheduling coordinator completed an accident report. (Finding of Fact No. 3.)

On February 12, 2007, Claimant sought medical treatment for her alleged work-related injuries at the emergency room of St. Catherine's Hospital. The emergency room doctor prescribed oral medications and provided Claimant with a note excusing her from work for two to three days. Claimant returned to her regular job with Employer as a home health aide on February 26, 2007, with the restriction that she could not perform any lifting greater than ten pounds for a period of seven days. Claimant continued to work for Employer at her regular job until April 8, 2007, at which time her condition worsened and she stopped working. (Finding of Fact No. 4.) At that time, Claimant was treating with Jason Burgess, D.C. On April 12, 2007, Dr. Burgess issued a note stating that Claimant was restricted from lifting in excess of five pounds and could not bend or twist.

On May 2, 2007, Claimant filed a claim petition alleging that she sustained work-related injuries to her left shoulder, neck, and back on December 17, 2006. Claimant sought partial disability benefits for the period from December 17, 2006, through April 8, 2007, and total disability benefits continuing indefinitely thereafter. Employer filed an answer denying the allegations and the case was assigned to a WCJ for hearings.

While the claim petition was pending, Employer received the April 12, 2007, note from Dr. Burgess. On May 16, 2007, Michael P. Arrigo, a claims adjuster for Employer's workers' compensation insurance carrier, provided Claimant with a Notice of Ability to Return to Work and a copy of Dr. Burgess' note regarding her restrictions. (Findings of Fact Nos. 14, 15.) By letter of the same date, Warren D.

Altomare, Employer's CEO, offered Claimant the opportunity to return to work for Employer, in a position that required her to assemble admission folders for new patients, at its office in Mount Carmel, Pennsylvania. (Findings of Fact Nos. 16, 17.)

On May 21, 2007, Claimant returned to a light-duty job for Employer which required her to sit at a table and put file folders together or count pieces of gauze and put them into plastic bags. Over the course of three weekends in May 2007, Claimant also worked as a waitress. However, Claimant ceased working the light-duty job for Employer on June 28, 2007, citing increasing pain in her shoulders and back. (Findings of Fact Nos. 6, 8, 17.)

Claimant sought medical treatment with Robert W. Mauthe, M.D., who first examined Claimant on June 25, 2007. Based upon his physical examination of Claimant and her complaints, Dr. Mauthe prescribed Claimant a Lidoderm patch and recommended that she undergo an MRI of her thoracic spine. Claimant underwent an MRI which revealed herniations at multiple levels of her thoracic spine. Claimant received an epidural steroid injection to control her pain, but later developed complications. Following an examination on July 27, 2007, Dr. Mauthe advised Claimant not to return to work in any capacity until September 19, 2007, the date of her next appointment. By the time of that appointment, Dr. Mauthe noted that Claimant had received three epidural steroid injections in her thoracic spine, her condition had improved considerably, and she was almost free from pain. Thus, Dr. Mauthe recommended that Claimant undergo a functional capacity evaluation and attempt to return to light-duty work. (Findings of Fact Nos. 9-12.)

Following an examination on October 12, 2007, Dr. Mauthe provided Claimant with a note stating that she could return to work on October 15, 2007. That same day, Claimant presented the note to Altomare at Employer's office. However,

Altomare indicated that he could not accept the note because it did not specify whether Claimant could return to regular-duty or light-duty work. Claimant advised Altomare that Dr. Mauthe indicated that Altomare could call him if he had any questions concerning the note, but Altomare indicated to Claimant that that was not his responsibility. Accordingly, Claimant did not return to work in any capacity. (Finding of Fact No. 7.)

The matter proceeded with hearings before the WCJ. Claimant testified regarding her original work injury, her subsequent medical treatment, her work restrictions, and her various periods of disability. Claimant specifically denied ever receiving a copy of the May 16, 2007, Notice of Ability to Return to Work sent by Arrigo. However, Claimant acknowledged receiving Altomare's May 16, 2007, letter offering her a light-duty job at Employer's office, which she accepted and started on May 21, 2007. Claimant stated that she ceased working this light-duty job in June 2007 because it was her understanding that Dr. Mauthe had written her out of work all together. Claimant further indicated that she did not attempt to return to light-duty work following Dr. Mauthe's release on September 19, 2007, because she believed that she was not cleared to return to work in any capacity. Finally, Claimant discussed Altomare's refusal to accept Dr. Mauthe's October release. (R.R. at 6a-16a, 70a-71a.)

Claimant also presented the deposition testimony of Dr. Mauthe, who is board-certified in physical medicine and rehabilitation, electrodiagnostic medicine, and pain management. Dr. Mauthe described his first examination of Claimant in June 2007 and the results of her MRI. Dr. Mauthe indicated that Claimant had significant degeneration of her thoracic spine prior to her work injury on December 17, 2006, but he believed that the injury caused the discs to either become herniated

or symptomatic. Dr. Mauthe noted that he originally recommended that Claimant refrain from working, but, as of September 19, 2007, he released Claimant to return to light-duty work. Dr. Mauthe stated that he released Claimant to full duty work without any restriction, but only on a trial basis, following his examination on October 11, 2007. (R.R. at 164a, 166a, 172a.) Dr. Mauthe explained that Employer refused to pay for a functional capacity evaluation and, hence, he opted to use her return to work to evaluate her capabilities. (R.R. at 158a-72a.)

In opposition to Claimant's petition, Employer presented the testimony of Altomare. Altomare testified that Employer generally has light-duty work available for its employees who have problems or need assistance. Altomare discussed his May 16, 2007, letter to Claimant offering her a light-duty job. Altomare acknowledged that in October 2007, Claimant provided him with a note from Dr. Mauthe releasing her to return to work on Monday, October 15, 2007; he stated that he informed Claimant that he needed more information because the note did not specify whether she was released to light-duty or regular-duty work. (R.R. at 80a-110a.)

Employer also presented the deposition testimony of claims adjuster Arrigo, who confirmed that, on May 16, 2007, he forwarded to Claimant a Notice of Ability to Return to Work and a copy of Dr. Burgess' April 12, 2007, note placing restrictions on her work. (R.R. 244a-46a.)

Finally, Employer presented the deposition testimony of Sanjiv H. Naidu, M.D., who is board-certified in orthopedic surgery. Dr. Naidu stated that he performed an independent medical evaluation of Claimant on July 13, 2007, which revealed no positive findings, and reviewed her diagnostic studies. Dr. Naidu noted that the 2007 MRI revealed degenerative disc disease at multiple levels of Claimant's

spine. Dr. Naidu opined that Claimant had sustained a left-side trapezius strain and a hip strain, both of which had completely resolved as of the date of his examination. Dr. Naidu further opined that Claimant could return to full-duty work without any restrictions. (R.R. at 189a-97a.)

The WCJ specifically rejected Claimant's testimony that she never received the Notice of Ability to Return to Work dated May 16, 2007, as well as her testimony that she was unable to perform the light-duty work assigned by Employer at any time before her first epidural steroid injection on July 24, 2007. The WCJ noted that such testimony was not supported by the medical witnesses and was not consistent with Claimant's ability to work as a waitress three weekends in May 2007. However, the WCJ accepted Claimant's testimony regarding the occurrence of her work-related injury on December 17, 2006, as competent and credible. (Finding of Fact No. 22.)

The WCJ accepted the testimony of Dr. Mauthe as competent and credible, with the exception of his testimony regarding Claimant's alleged disability prior to her first examination on June 25, 2007. The WCJ accepted the testimony of Arrigo and Altomare as credible, and accepted the testimony of Dr. Naidu as credible to the extent it was not inconsistent with that of Dr. Mauthe. However, the WCJ specifically rejected Dr. Naidu's testimony that Claimant had fully recovered from her work-related injuries as of July 13, 2007, as not credible. (Findings of Fact Nos. 22-23.)

Based upon these credibility determinations, the WCJ concluded that Claimant met her burden of proving that she sustained a work-related injury on December 17, 2006, which injury rendered her totally disabled for the period from July 27, 2007, through September 18, 2007. The WCJ also concluded that Employer

had sustained its burden of proving that Claimant was capable of returning to full-time, light-duty work as of September 19, 2007, and full-time, regular-duty work as of October 15, 2007. Nevertheless, the WCJ noted that Employer failed to establish that it offered Claimant the opportunity to return to work in any job or position, or that Employer made any work available to Claimant, after September 18, 2007. Thus, the WCJ awarded Claimant total disability benefits from July 27, 2007, and continuing into the indefinite future. (R.R. at 271a-72a.)

Employer appealed to the Board, which affirmed in part, modified in part, and reversed in part the decision and order of the WCJ. Specifically, the Board affirmed the WCJ's award of total disability benefits, but modified the award to the closed period from July 27, 2007, through September 18, 2007. The Board reversed the WCJ's award by suspending her benefits as of September 19, 2007, based upon the WCJ's finding that Claimant could return to light-duty work as of that date and Claimant's failure to satisfy her burden of establishing continuing disability after September 18, 2007. The Board also reversed the WCJ's award by terminating Claimant's benefits as of October 15, 2007, based upon the WCJ's conclusion that Claimant was capable of returning to full-duty work without restrictions as of that date.

On appeal to this Court,<sup>1</sup> Claimant argues that the Board erred in suspending her total disability benefits as of September 19, 2007, and in terminating her benefits as of October 15, 2007. We agree.

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<sup>1</sup> Our scope of review is limited to determining whether findings of fact were supported by substantial evidence, whether an error of law was committed or whether constitutional rights were violated. Meadow Lakes Apartments v. Workers' Compensation Appeal Board (Spencer), 894 A.2d 214 (Pa. Cmwlth. 2006).

In an original claim petition, a claimant bears the burden of proving all of the elements necessary to support an award of benefits. Inglis House v. Workmen’s Compensation Appeal Board (Reedy), 535 Pa. 135, 634 A.2d 592 (1993). Accordingly, a claimant must establish that she sustained an injury during the course of her employment and that she is disabled as a result of that injury. Id. For purposes of workers’ compensation benefits, the term disability is synonymous with loss of earning power. Coyne v. Workers’ Compensation Appeal Board (Villanova University), 942 A.2d 939 (Pa. Cmwlth.), appeal denied, 599 Pa. 683, 960 A.2d 457 (2008). The claimant’s burden to prove disability never shifts to the employer but remains with the claimant throughout the pendency of the claim petition. Coyne; Innovative Spaces v. Workmen’s Compensation Appeal Board (DeAngelis), 646 A.2d 51 (Pa. Cmwlth. 1994), appeal denied, 541 Pa. 645, 663 A.2d 696 (1995).

However, even in a claim petition proceeding, the initial burden of proving job availability is generally allocated to the employer once a claimant has established a loss of earnings capacity attributable to a work-related injury. Vista International Hotel v. Workmen’s Compensation Appeal Board (Daniels), 560 Pa. 12, 29 n.11, 742 A.2d 649, 658 n.11 (1999). In Vista, the court addressed the allocation of burden of proof in the context of a claim proceeding, and held that when a claimant proves that a work-related injury keeps her from returning to her time-of-injury job, the claimant establishes a loss of earning capacity. The court further noted that after a claimant has established a loss of earning capacity, the claimant is usually entitled to benefits, “unless the employer can demonstrate that employment is available with in the claimant’s restrictions.” Id. at 657; see also Bey v. Workers’ Compensation Appeal Board (Ford Electronics), 801 A.2d 661 (Pa. Cmwlth. 2002). Bey also involved a claim proceeding. Reviewing the relevant law, the court



observed that benefits may be suspended in the context of a claim proceeding so long as the employer establishes that the claimant has been referred to a then open job that she is able to perform.

Here, the WCJ found that Employer failed to present any evidence that it offered Claimant the opportunity to return to work or that any work was actually available after September 18, 2007. Our review of the record confirms this. Thus, following Vista and Bey, the Board erred in suspending benefits.

We next address the Board's decision to terminate Claimant's benefits as of October 15, 2007. An employer seeking to terminate workers' compensation benefits bears the burden of proving either that the employee's disability has ceased or that any current disability arises from a cause unrelated to the employee's work injury. Campbell v. Workers' Compensation Appeal Board (Antietam Valley Animal Hospital), 705 A.2d 503 (Pa. Cmwlth. 1998). An employer can meet this burden by presenting unequivocal medical testimony that the employee is fully recovered, can return to work without restrictions, and there are no objective medical findings that either substantiate any complaints of pain or connect them to the work injury. Udvari v. Workers' Compensation Appeal Board (US Air, Inc.), 550 Pa. 319, 705 A.2d 1290 (1997).

In the present matter, the Board relied upon the WCJ's conclusion that Claimant was capable of returning to her pre-injury job without restrictions as of October 15, 2007, in terminating Claimant's benefits. The WCJ's conclusion, in turn, was based upon the testimony of Claimant's treating physician, Dr. Mauthe. Although Dr. Mauthe did testify that, as of October 11, 2007, he released Claimant to full-duty work without restrictions, Dr. Mauthe emphasized that he was doing so only on a trial basis. (R.R. at 164a, 166a, 172a.) Dr. Mauthe explained that he was

releasing Claimant to return to work in lieu of a functional capacity evaluation because Employer's workers' compensation insurance carrier would not cover those costs. Furthermore, Dr. Mauthe never testified that Claimant was fully recovered or that all disability associated with her work-related injury had ended. To the contrary, Dr. Mauthe described Claimant as "still slightly symptomatic" following an appointment on December 3, 2007. (R.R. at 165a.) This testimony from Dr. Mauthe does not support the WCJ's conclusion, and, consequently, does not support the Board's termination of benefits.

Accordingly, we affirm the Board's order insofar as it affirmed the WCJ's award of total disability benefits and reverse the Board's order insofar as it suspended Claimant's total disability benefits as of September 19, 2007, and terminated Claimant's benefits as of October 15, 2007.

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PATRICIA A. McCULLOUGH, Judge

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Board (Family Home Medical),	:	
Respondent	:	

**ORDER**

AND NOW, this 11<sup>th</sup> day of August, 2011, the order of the Workers' Compensation Appeal Board (Board), dated August 17, 2010, insofar as it affirmed the Workers' Compensation Judge's award of total disability benefits, is affirmed. The order of the Board, insofar as it suspended the total disability benefits of Emmamay Lilly (Claimant) as of September 19, 2007, and terminated Claimant's benefits as of October 15, 2007, is reversed.

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PATRICIA A. McCULLOUGH, Judge