

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Cindy Sheirich, :
Petitioner :
 : No. 2021 C.D. 2009
v. :
 : Submitted: April 23, 2010
Department of Public Welfare, :
Respondent :

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McCULLOUGH

FILED: July 16, 2010

Cindy Sheirich (Sheirich) petitions for review of the September 14, 2009, order of the Department of Public Welfare (DPW), Bureau of Hearings and Appeals (BHA), adopting the recommendation of an administrative law judge (ALJ) to terminate Sheirich’s “Act 534” benefits.¹ We affirm.

Sheirich worked as a residential services aide for the mentally handicapped at DPW’s Hamburg Center (Center). Claimant sustained a work-related injury to her lower back after grabbing a patient under the arms as the

¹ Section 1 of the Act of December 8, 1959, P.L. 1718, as amended, 61 P.S. §951. This Act originally applied to only employees of penal and correctional institutions. However, the Act was amended by the Act of September 2, 1961, P.L. 1224 (Act No. 534), to provide for the payment of full salary, as well as all medical and hospital expenses, to any employee of a State mental hospital who is injured during the course of his/her employment.

patient began to fall inside a bathroom on September 14, 2006.² (ALJ's Finding of Fact No. 4.) Sheirich treated with Sheila Burek, D.C., who diagnosed Sheirich as suffering from a lumbar sprain/strain, disc herniation, sciatica, and myotonia. (ALJ's Finding of Fact No. 5.) After Dr. Burek limited Sheirich to performing light-duty work, DPW reassigned Sheirich to light-duty work at the Center. (ALJ's Finding of Fact No. 6.) Sheirich thereafter underwent electromyography (EMG) tests in June of 2007 and April of 2008, the results of which were normal. (ALJ's Findings of Fact Nos. 7, 8.) DPW terminated Sheirich's light-duty position as of June 30, 2008, and she began receiving Act 534 benefits. (ALJ's Findings of Fact Nos. 9, 10.)

On July 25, 2008, Richard Schmidt, M.D., a board-certified orthopedic surgeon, performed an independent medical examination (IME) of Sheirich at the request of DPW. Dr. Schmidt opined that Sheirich's examination was objectively normal. He concluded that Sheirich had fully recovered from her work-related injury and signed a physician's affidavit of recovery indicating the same. (ALJ's Finding of Fact No. 13.) On August 27, 2008, DPW issued Sheirich a notice of ability to return to work. By letter dated August 28, 2008, DPW directed Sheirich to return to her pre-injury job on September 5, 2008. Sheirich reported to the Center on this date, but after working for several hours, Sheirich advised the director of human resources that she could not perform her pre-injury job and left the facility. (ALJ's Finding of Fact No. 18.)

² Sheirich had received medical treatment for low back pain since 1999. (ALJ's Finding of Fact No. 1.) Sheirich underwent an MRI on June 6, 2006, three months before her work injury, which revealed minimal degenerative disc disease at the L4-5 level. (ALJ's Finding of Fact No. 3.)

DPW subsequently obtained video surveillance of Sheirich filmed on November 3 and 5, 2008, which revealed Sheirich using a cane at Dr. Burek's office, grocery shopping without a cane, and generally functioning like a person without physical limitations. (ALJ's Findings of Fact Nos. 20-23.) DPW thereafter sought to terminate Sheirich's Act 534 benefits. On March 13, 2009, DPW requested a hearing before BHA relating to this termination. (ALJ's Finding of Fact No. 24.) The ALJ conducted a hearing on June 30, 2009.

Sheirich testified that her work injury prevents her from performing the duties of her pre-injury job, noting that she was only able to work for approximately two hours upon her return on September 5, 2008. (R.R. at 271a-272a.) Sheirich also indicated that the work injury has prevented her from engaging in the activities and hobbies she had previously enjoyed with her husband, such as traveling and camping. (R.R. at 272a-273a.)

Sheirich also presented the deposition testimony of Dr. Burek. Dr. Burek first examined Sheirich on September 18, 2006, four days after her work injury. Dr. Burek testified that she diagnosed Sheirich as suffering from a lumbar sprain/strain, disc herniation, sciatica, and muscle spasms at that time. (R.R. at 62a.) Dr. Burek indicated that she later released Sheirich to light-duty work. Dr. Burek opined that Sheirich remained unable to perform her pre-injury job and that she is still limited to light-duty work with a twenty-pound maximum lifting restriction and no squatting or bending. (R.R. at 69a.)

On cross-examination, Dr. Burek acknowledged that, despite ninety office visits and related notes stating that she is improving, Sheirich's abilities and restrictions have remained the same. (R.R. at 78a, 88a.) Dr. Burek agreed with a characterization of Sheirich's low back pain prior to September 2006, as transitory,

indicating that Sheirich had informed her such pain was secondary to her menstrual cycle and that she was otherwise symptom free. (R.R. at 82a, 84a, 86a.)

DPW presented the deposition testimony of Dr. Schmidt. Dr. Schmidt stated that the July 25, 2008, IME was within normal limits, and he opined that Sheirich had fully recovered from her original work injury and could return to full-duty work with no restrictions. (R.R. at 25a, 27a.) Dr. Schmidt indicated that previous MRI reports and EMG studies supported his opinion, noting that the MRI reports revealed degenerative disc disease at the L4-5 level with no herniated discs and the EMG studies were normal. (R.R. at 24a-25a.) Dr. Schmidt described Sheirich's actions on the surveillance video as inconsistent with the description of her abilities she provided during the examination. (R.R. at 26a.)

DPW also presented the testimony of Alana Anthony (Anthony), the private investigator who conducted the surveillance of Sheirich. Anthony testified that Sheirich did not use a cane at the grocery store. (R.R. at 269a.) During this time, Anthony observed Sheirich bending at the waist to retrieve an item from a lower shelf, walking the entire length of the store without a cart to retrieve two half gallons of milk, carrying a half gallon in each hand, loading six plastic bags of groceries into her vehicle, and returning the cart to the front of the store. Id. Anthony indicated that Sheirich showed no signs of discomfort in performing these tasks. Id.

On September 4, 2009, the ALJ issued an adjudication and recommendation to terminate Sheirich's Act 534 benefits. In the adjudication, the ALJ accepted the testimony of Dr. Schmidt and Anthony as credible and rejected the testimony of Sheirich and Dr. Burek as not credible. By order dated September

14, 2009, BHA adopted the recommendation of the ALJ in its entirety. Sheirich then filed a petition for review with this Court.

On appeal to this Court,³ Sheirich argues that DPW's termination of her Act 534 benefits was based on a disregard of critical testimony. We disagree.

Sheirich alleges that the ALJ disregarded her critical testimony that, following her attempted return to work on September 5, 2008, she informed Daniel Floryshak, the Center's human resources director, that she was in a lot of pain and could not continue, at which point he advised her to go home and that her Act 534 benefits would resume. (R.R. at 205a.) However, the ALJ acknowledged in his adjudication that Sheirich had a conversation with the head of human resources before leaving the facility on September 5, 2008. (ALJ's Finding of Fact No. 18). Furthermore, this testimony was not relevant to the ALJ's finding that Sheirich was fully recovered and thus is not relevant to the termination of Sheirich's Act 534 benefits.⁴

Sheirich also alleges that credible medical evidence established that the duties of her pre-injury job were not within her physical capabilities. Sheirich relies on the deposition testimony of Dr. Burek as well as the various diagnostic studies. However, the ALJ rejected the testimony of Dr. Burek as not

³ Our scope of review is limited to determining whether constitutional rights were violated, whether the adjudication is in accordance with the law, and whether necessary findings of fact are supported by substantial evidence. DePaolo v. Department of Public Welfare, 865 A.2d 299 (Pa. Cmwlth. 2005).

⁴ Indeed, DPW acted properly in reinstating Sheirich's Act 534 benefits, as this Court has previously held that due process requires that a claimant be afforded a hearing prior to the termination of Act 534 benefits. Mihok v. Department of Public Welfare, 580 A.2d 905 (Pa. Cmwlth. 1990).

credible and accepted the testimony of Dr. Schmidt.⁵

DPW had the burden to show that Sheirich's work-related disability had ceased and that she was capable of returning to work at a salary equivalent to her pre-injury salary. Brewer v. Department of Public Welfare, 437 A.2d 793 (Pa. Cmwlth. 1981). Dr. Schmidt credibly testified that Sheirich had fully recovered from her original work injury, that she could return to full-duty work without restrictions and that the diagnostic studies supported his opinion, i.e., the MRI reports revealed no herniated discs and the EMG studies were normal. The testimony of Dr. Schmidt satisfied DPW's burden.

Accordingly, the order of DPW is affirmed.

PATRICIA A. McCULLOUGH, Judge

⁵ The ALJ is free to accept or reject the testimony of any witness, including a medical witness, in whole or in part and determinations of credibility and evidentiary weight are within the province of the ALJ and will not be disturbed by this Court. DePaolo; Mihok v. Department of Public Welfare, 670 A.2d 227 (Pa. Cmwlth. 1996).

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ORDER

AND NOW, this 16th day of July, 2010, the September 14, 2009, order of the Department of Public Welfare is hereby affirmed.

PATRICIA A. McCULLOUGH, Judge