IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Presby Homes & Services, Petitioner	:	
v.	:	No. 26 C.D. 2010
	:	Submitted: May 14, 2010
Workers' Compensation Appeal Board (McKenzie), Respondent	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE BROBSON **FILED:** August 5, 2010

Petitioner Presby Homes & Services (Employer) petitions for review of an order of the Workers' Compensation Appeal Board (Board). The Board affirmed, in part, and reversed, in part, a decision of a workers' compensation judge (WCJ), which granted the reinstatement petition[1] of Kenyetta McKenzie (Claimant) for the period from September 16, 2007, through March 13, 2008, but suspended Claimant's indemnity benefits as of March 13, 2008, based upon his conclusion that Claimant had acted in bad faith by failing to respond to Employer's offer of available work. The Board affirmed the WCJ's granting of the claim petition and reversed the WCJ's suspension of Claimant's indemnity benefits,

[1] Claimant filed a claim petition seeking workers' compensation benefits, which both the WCJ and Board treated as a petition for reinstatement of compensation benefits.

because it concluded that Employer had failed to comply with a requirement of the Workers' Compensation Act[2] that an employer, in order to obtain a suspension of benefits on the basis of availability of suitable work for a claimant, must issue a Notice of Ability to Return to Work. We reverse the Board's Order and reinstate the order of the WCJ.

Below we summarize the facts, as drawn from the WCJ's decision and the record. Claimant worked for Employer, which operates a skilled nursing facility in Philadelphia, as a certified nursing assistant. On September 15, 2007, Claimant was attempting to transfer a resident from a bed to a wheelchair when her left shoulder "popped," causing her to develop pain in her neck, arm, and back. She did not return to work until September 25, 2007, when she attempted to perform a light duty job.[3] Claimant filed a claim petition on October 3, 2007, alleging that she sustained injuries to her left shoulder/upper back and left arm, and that she was totally disabled from September 26, 2007 ongoing.[4]

On October 5, 2007, Employer issued a temporary notice of compensation payable (TNCP), acknowledging that Claimant sustained a non-disabling work-related injury in the nature of a strain/sprain to her left trapezius, thus accepting responsibility solely for the payment of medical bills.

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[2] Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. §§ 1 - 1041.4, 2501-2708.

[3] According to Employer's administrator, Claimant never returned to work after September 25, 2007, and she never called to indicate that she could not work. Employer then sent a termination letter to Claimant.

[4] More specifically, Claimant asserted that the incident of September 15, 2007, caused injuries to her left brachial plexus (cerviobrachial syndrome) and consequential wage loss.

The TNCP ultimately converted to a notice of compensation payable (NCP), pursuant to Section 406.1(d) of the Act.[5]

Employer filed an answer to the claim petition in which it admitted that Claimant had reported the September 15, 2007, work incident to Employer, but that Claimant had abandoned modified work Employer had provided to Claimant for reasons unrelated to her work injury.

The WCJ heard Claimant's testimony regarding her work injury and considered the deposition testimony of Claimant's treating physician, Anthony P. DeEugenio, D.C. The WCJ also considered the deposition testimony of two physicians - Wayne Hentschel, D.O., and Laurie Hirsh, M.D. - who examined Claimant on Employer's behalf. Employer also offered the deposition testimony of its administrator, Sharon Whitaker.

Claimant testified that, when she returned to work on September 25, 2007, performing light duty work handing out food trays and then collecting residents' ten-to-fifteen pound laundry bags, she experienced increasing pain and that her assignment made her injuries worse. That same day she discontinued working when Employer indicated to her that it did not have light duty work to accommodate her needs. On cross-examination, Claimant testified that she could return to work if Employer only assigned to her tasks such as taking vital signs, providing ice to residents, and helping at mealtime.

Claimant's chiropractor, Dr. DeEugenio, who began treating Claimant on October 8, 2007, testified that upon his initial examination of Claimant, he believed Claimant's work-related injuries to include: cerviobrachial syndrome,

[5] 77 P.S. § 717.1(d), added by Section 3 of the Act of February 8, 1972, P.L. 25, *as amended*.

cervical radiculitis, strain/sprain of the acromioclavicular joint, possible disorder of the bursa and tendons of the left shoulder, and muscle spasm. Following the performance of an MRI on Claimant on November 19, 2007, Dr. DeEugenio opined that Claimant had spasm in the cervical region and that the most likely diagnosis for Claimant's injuries was cervicobrachial syndrome. He opined that her condition rendered her incapable of performing her pre-injury duties, but that she could perform some types of work.

Dr. Hentschel examined Claimant on September 19, 2007, at which time he diagnosed Claimant with a strain/sprain of the cervical spine and left trapezius muscle. Dr. Hentschel indicated that, at that time, Claimant could sit, walk, and stand, but should avoid lifting objects with her left arm and lift objects weighing no more than fifteen pounds; he also prescribed physical therapy, but Claimant did not seek such treatment. Dr. Hentschel examined Claimant again on September 26, 2007, at which time he observed spasm in her left trapezius muscle, which he had not observed on his first examination, and tenderness in that area. Nevertheless, he apparently increased the amount of weight he believed she was capable of lifting, as Claimant indicated that she was feeling better and he believed her condition had improved. Dr. Hentschel did not examine Claimant for problems with her brachial plexus during this second examination. Dr. Hentschel scheduled an appointment with Claimant for October 3, 2007, but she did not show up for that appointment.

Dr. Hirsh, an orthopedic surgeon, evaluated Claimant on February 15, 2008. She observed that, although Claimant complained of pain and exhibited some spasm upon palpitation of her trapezius muscle, Claimant had full and symmetric range of motion and had no decreased muscle strength or increased

muscle atrophy. Further, Dr. Hirsh testified that she obtained results of certain tests in which she believed Claimant did not exert effort to a degree she believed Claimant was capable and that she did not believe Claimant was answering her questions in a candid manner. Dr. Hirsh opined that Claimant did not exhibit any symptoms consistent with brachial plexopathy, but rather represented mild spasm of her trapezius. Dr. Hirsh testified that physical therapy and anti-inflammatory medications could help Claimant's condition. Dr. Hirsh released Claimant to work that does not require more than occasional reaching/crawling or lifting, and Dr. Hirsh opined that a job description for a temporary modified position with Employer was within Claimant's physical abilities.

Ms. Whitaker testified that after she received Dr. Hirsh's report, she sent a certified letter dated March 6, 2008, to Claimant. The letter (1) referred to Dr. Hirsh's report releasing Claimant to work with restrictions, and (2) included a job description purporting to satisfy the work restrictions Dr. Hirsh imposed. The letter requested that Claimant respond to Ms. Whitaker by phone no later than March 14, 2008, to confirm her acceptance of the position and return date. Claimant refused to sign for the certified letter; however, Employer sent a copy of the letter to Claimant's counsel. Claimant never returned to work.

Claimant also submitted to the WCJ an undated report issued by Dr. DeEugenio. In that report, Dr. DeEugenio responded to Ms. Whitaker's and Dr. Hirsh's view of Claimant's abilities. Dr. DeEugenio released Claimant to light duty work that does not require repetitive use of her upper left extremity for grasping or fine manipulations, and additionally placing a five-pound limitation on lifting, pushing, pulling, and carrying. In her additional testimony given on August 12, 2008, Claimant asserted that she had contacted Ms. Whitaker by telephone to

inform her that she could only accept a job offer if it complied with her doctor's orders. She stated that she faxed Dr. DeEugenio's report to Ms. Whitaker, but she never heard again from Ms. Whitaker.

The WCJ found Claimant's testimony fully credible only with regard to her testimony concerning her inability to perform the modified duties which Employer had assigned to her on September 25, 2007. The WCJ found Employer's medical evidence more credible than that offered by Claimant. The WCJ further found that Claimant was capable of performing modified work as of February 15, 2008, and that Employer offered Claimant employment within her physical abilities as of March 14, 2008, but Claimant failed to respond in good faith to that offer.

Based upon those findings, the WCJ concluded that the injuries acknowledged in the NCP precluded Claimant's return to work from September 16, 2007, through March 13, 2008, but that existing modified work was offered and available at a pay equal to her pre-injury salary as of March 14, 2008. Claimant, however, failed to respond to Employer's good faith offer of employment.[6] Accordingly, the WCJ awarded indemnity benefits for the closed period of September 16, 2007, through March 13, 2007.

Claimant appealed the WCJ's order to the Board, arguing that the WCJ erred in the manner in which he placed the burden of proof on Claimant with regard to her alleged injuries. Claimant also argued that the WCJ erred in concluding that Employer satisfied its burden to establish that it complied with the

[6] The WCJ also concluded that Claimant failed to establish that the NCP should be amended to include injuries not previously identified in the NCP, but the issue of whether the WCJ improperly declined to amend the description of the work-related injuries acknowledged in the NCP is not presently before the Court.

requirement to issue a notice of ability to return to work as required by Section 306(b)(3) of the Act, 77 P.S. § 512. The Board rejected Claimant's argument regarding the burden of proof issue, but agreed with Claimant's assertion that Employer failed to prove that it sent a notice of ability to return to work. The Board, thus, reversed the part of the WCJ's decision suspending Claimant's indemnity benefits. Employer then filed the subject petition for review with this Court.

On appeal, Employer argues that it satisfied the requirements for providing a notice of ability to return to work when Ms. Whitaker sent the March 6, 2008, letter to Claimant. Employer contends that the letter included a job offer, a copy of Dr. Hirsh's estimated physical capabilities form, a detailed job description and the notice of ability to return to work. Claimant counters that Employer did not satisfy the requirements of Section 306(b)(3) of the Act. Claimant also counters that other grounds exist to support reversal of the WCJ's suspension of benefits.

Section 306(b)(3) of the Act provides:

> (3) If the insurer receives medical evidence that the claimant is able to return to work in any capacity, then the insurer must provide prompt written notice, on a form prescribed by the department, to the claimant, which states all of the following:
>
> (i) The nature of the employe's physical condition or change of condition.
>
> (ii) That the employe has an obligation to look for available employment.
>
> (iii) That proof of available employment opportunities may jeopardize the employe's right to receipt of ongoing benefits.

> (iv) That the employe has the right to consult with an attorney in order to obtain evidence to challenge the insurer's contentions.

In *Allegis Group (Onsite) v. Workers' Compensation Appeal Board (Henry)*, 882 A.2d 1 (Pa. Cmwlth. 2005), this Court held that, where an employer is seeking a suspension of benefits based upon an offer of suitable, available work, the employer bears the "threshold burden" to demonstrate compliance with Section 306(b)(3) of the Act. In *Allegis*, this Court affirmed the Board's decision to reverse a workers' compensation judge's granting of a suspension of benefits where the employer failed to prove that it issued a notice of ability to return to work.

Employer here argues that the record contradicts the Board's conclusion. The Board stated that "Ms. Whitaker did not … testify that [Employer] sent a [notice of ability to return to work] to Claimant upon its receipt of Dr. Hirsh's report. Defendant has therefore not met its burden of establishing compliance with Section 306(b)(3) [of the Act], as required by *Allegis Group*." (R.R. at 56a.) Ms. Whitaker did, in fact, testify regarding a notice of ability to return to work, as indicated in the following colloquy in her deposition:

> Q [by Employer's counsel]: I'm going to show you what is a combined exhibit, seven pages, starting with a letter dated March 6, 2008. I'll direct you to one of the pages that is labeled Estimated Physical Capacities. Is that the document that you are talking about?
>
> A: Yes.
>
> Q: Upon your receipt of that document, what did you do?
>
> A: We created the – you know, we made sure that we had the job description in order, with an attempt to

contact her to let her know that her job was still available. And we clearly stated what she could or could not do based on what was on the physical capacities sheet.

Q: Did you develop the four-page document listed as a Temporary Modified Duty Certified Nursing Assistant Job Description?

A: Yes. Based specifically to her needs.

Q: You generated that job description?

A: Yes.

Q: How was that job description sent to Ms. McKenzie?

A: It would have been certified mail.

Q: Did you write a letter?

A: Yes.

…

Cross-examination by Claimant's counsel:

Q: Now, with regard to the work that she returned to following the work injury, at any point in time after the work injury occurred, before my office filed this petition on [October 3, 2007], did [Employer] ever send [Claimant] a document called a Notice of Ability to Return to Work?

A: Notice of Ability, yes.

…

[Employer's counsel]: *I think we'll stipulate to the fact that the first Notice of Ability to Return to Work that was sent to Ms. McKenzie was dated February 28, 2008,* and there was never one before.

[Claimant's counsel]: *That's fine*.

(R.R. at 351a-355a; emphasis added.)

This passage from Ms. Whitaker's deposition testimony indicates that, on a date following her receipt of Dr. Hirsh's report, Employer developed a job suited to Claimant's abilities. Following her testimony regarding this sequence of events, Claimant's counsel examined Ms. Whitaker to determine if Employer had sent a notice of ability to return to work to Claimant before Claimant filed her claim petition. As reflected in the transcript passage that followed Ms. Whitaker's answer of "Yes," Employer's counsel understood that it had not sent a notice of ability to return to work *before* Claimant filed her petition, but rather afterwards, and then offered the stipulation that Employer first sent a notice of ability to return to work to Claimant dated February 28, 2008. Claimant's counsel agreed to this stipulation by stating "That's fine."

A stipulation on the record is binding on parties who agree to the stipulation. *Centennial Spring Health Care Ctr. v. Dep't of Pub. Welfare*, 451 A.2d 806, 811 (Pa. Cmwlth. 1988). The noted stipulation supports Employer's position that, notwithstanding the absence of testimony regarding whether Ms. Whitaker included a notice of ability to return to work in her March 6, 2008 letter to Claimant, Employer did send notice of ability to return to work dated February 28, 2008—a date after Dr. Hirsh's examination—to Claimant. Further, regardless of the lack of testimony indicating that the notice of ability to return to work was included in Ms. Whitaker's letter, the stipulation together with the actual notice of ability to return to work, which Employer submitted into the record, support the conclusion that Employer did satisfy its burden to prove that it sent a notice of ability to return to work to Claimant.

Based upon this evidence, we disagree with the Board's conclusion that Employer did not satisfy its burden of proof to demonstrate that it complied with Section 306(b)(3) of the Act, and that, therefore, the Board erred in reversing the WCJ's suspension of benefits on those grounds. Our analysis is not, however, complete, because Claimant argues in her brief that other grounds exist to support the Board's decision reversing the WCJ's suspension of her benefits.

Claimant first argues that the WCJ did not issue a reasoned decision because, she argues, his articulation of his basis for finding Dr. Hirsh's testimony more credible than Dr. DeEugnio's is insufficient. Our Supreme Court in *Daniels v. Workers' Compensation Appeal Board (Tristate Transport)*, 574 Pa. 61, 828 A.2d 1043 (2003), in considering whether a workers' compensation judge had issued a reasoned decision under Section 422(a) of the Act,[7] described the degree to which a workers' compensation judge must explain credibility determinations regarding conflicting medical evidence when the evidence is comprised of deposition testimony rather than live testimony, stating that

> absent the circumstance where a credibility assessment may be said to have been tied to the inherently subjective circumstance of witness demeanor, some articulation of the actual objective basis for the credibility determination must be offered for the decision to be a "reasoned" one which facilitates effective appellate review.

Id. at 78, 828 A.2d at 1053. Claimant asserts that the only objective basis the WCJ articulated in this case related to the credentials of the medical experts, and that this is an insufficient justification. In *Ludwikowski v. Workers' Compensation Appeal Board (Dubin Paper Company)*, 910 A.2d 99 (Pa. Cmwlth. 2006), this Court held that the decision of a workers' compensation judge was reasoned with

[7] 77 P.S. § 834.

regard to his credibility determinations relating to two opposing medical experts when the judge articulated the objective factor of one of the doctor's qualifications. As noted by the Court in *Ludwikowski*, the Supreme Court in *Daniels* provided that differences in medical qualifications may constitute an objective criteria upon which to reach a credibility determination. *Daniels*, 574 Pa. at 78, 828 A.2d at 1053.

In reviewing the testimony, the WCJ's reference to the fact that Dr. Hirsh is a Board-certified orthopedic surgeon indicates that he found his opinion more credible than the opinion of Dr. DeEugenio, who is a chiropractor. In accordance with the comments our Supreme Court made in *Daniels*, the WCJ committed no error in relying upon Dr. Hirsh's certification in a field that is related to Claimant's specific injury in reaching his credibility determination. Additionally, the WCJ's discussion provides additional indications of his rationale in reaching his credibility determinations, such as other evidence in the record from Dr. Stark, whose opinion buttressed Dr. Hirsh's. Based upon the foregoing, we conclude that the WCJ's decision satisfied the reasoned decision requirement of the Act and *Daniels*.

Claimant also suggests that, even if the WCJ's decision does not fail the reasoned decision requirement, the WCJ's order is in error because he neglected to address whether Claimant made a good faith effort to return to work. Claimant asserts that the WCJ found Claimant's testimony to be credible. Claimant argues that the WCJ, consequently, should have reflected in his analysis of the good faith issue Claimant's testimony that she faxed to Employer a list of restrictions compiled by her own physician, but never heard again from Employer. Claimant asserts that Employer offered no evidence in response to Claimant's

testimony that she did not outright refuse the job offer and sent her physician's restrictions to Employer. Claimant contends that the WCJ's decision in this regard constitutes a capricious disregard of uncontroverted evidence.

In *Hinkle v. City of Philadelphia, Board of Pensions and Retirement*, 881 A.2d 22 (Pa. Cmwlth. 2005), this Court engaged in an analysis of our standard of review of administrative agency decisions, with particular attention to the question of how this Court should consider whether an agency has capriciously disregarded evidence. Citing our Supreme Court's decision in *Leon E. Wintermyer v. Workers' Compensation Appeal Board (Marlowe)*, 571 Pa. 189, 812 A.2d 478 (2002), we explained that an agency capriciously disregards evidence "when the agency fails to give an indication that it has examined countervailing substantive testimony that had to be considered at arriving at its decision." *Hinkle*, 881 A.2d at 27. Further, "capricious disregard occurs when the agency completely ignores overwhelming evidence without comment." *Id.*

In this case, Employer did not offer any specific testimony contradicting Claimant's testimony that she sent a fax to Employer. Ms. Whitaker testified that she heard from Claimant after she sent the March 6, 2008 letter, but she does not describe the subject matter of the conversation. Claimant testified that she told Ms. Whitaker that she would send to her information regarding limitations her physician placed upon modified employment and testified that she faxed that information to Employer. The WCJ noted that Ms. Whitaker never testified regarding the receipt of such information; however, the record does not indicate that either counsel questioned her regarding such information. Consequently, the only evidence in the record concerning Claimant's alleged fax is her own testimony, and, in reviewing the WCJ's decision, we must consider

whether Claimant is correct in arguing that the WCJ capriciously disregarded this evidence.

We note initially that, contrary to Claimant's assertion, the WCJ did not determine that all of Claimant's testimony was credible. The WCJ's sole credibility determination with regard to Claimant's testimony was that "all testimony of [Claimant] of her *physical inability to perform modified duties provided by [Employer] on September 25, 2007 is credible*." (R.R. at 40a; Finding of Fact No. 14(a); emphasis added.) In fact, the WCJ, in discussing this aspect of the case, determined that "[Claimant's] overall credibility … is suspect on various accounts." (R.R. at 44a.) Further, the WCJ cited examples of instances which he believed demonstrated a lack of candor on the part of Claimant, including (1) manipulation of her symptoms, and (2) her failure to respond to Dr. Hirsh's testing prompts to the degree of her ability. The WCJ also cited the absence of testimony from Claimant regarding details of the alleged facsimile, such as testimony indicating the date Claimant purported to send the fax or a receipt or other indicia that she actually sent such information to Employer. Thus, the WCJ offered several reasons why he did not believe Claimant's testimony in general, and this explanation is sufficient to satisfy the WCJ's duty to explain his rejection of Claimant's argument that she acted in good faith.

Based upon the foregoing, we conclude that the Board erred in reversing the WCJ's suspension of benefits, and we reject Claimant's arguments suggesting that alternative grounds exist to support the Board's reversal of the WCJ's order suspending benefits. Accordingly, we reverse the Board's order.

P. KEVIN BROBSON, Judge

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O R D E R

AND NOW, this 5th day of August, 2010, the order of the Workers' Compensation Appeal Board is REVERSED and the order of the Workers' Compensation Judge is REINSTATED.

P. KEVIN BROBSON, Judge