IN THE COMMONWEALTH COURT OF PENNSYLVANIA

WAWA,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 536 C.D. 2009
	:	
Workers' Compensation Appeal Board (Langdon),	:	Submitted: December 11, 2009
	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER **FILED: February 24, 2010**

WAWA (Employer) petitions for review of the order of the Workers' Compensation Appeal Board (Board), which affirmed the determination of a Workers' Compensation Judge (WCJ) denying Employer's Petition to Modify/Suspend (Petition) William Langdon's (Claimant) workers' compensation benefits. On appeal, Employer argues that the Board erred because the WCJ's decision was not reasoned or based on substantial evidence and because Claimant voluntarily removed himself from the entire work force.

Claimant sustained an injury to his right shoulder on April 29, 2004 while working for Employer as a certified first class diesel mechanic, a heavy-duty position. Employer accepted liability in a Notice of Compensation Payable (NCP), which described the injury as a right shoulder strain/sprain. The description of the injury was later amended by stipulation to include a right rotator cuff tear and impingement syndrome. Claimant underwent shoulder surgery and physical therapy for his rotator cuff tear. Claimant returned to light-duty work for approximately nine months, until April 26, 2005, when he had to leave the position due to the terms of the collective bargaining agreement between Employer and Claimant's union.[1] Claimant has not worked since April 26, 2005.

On April 16, 2006 and June 16, 2006, Claimant underwent a functional capacity evaluation (FCE), which revealed that Claimant could perform medium-duty work. Subsequently, Claimant underwent a vocational evaluation on July 16, 2006 and, based on that evaluation, Employer sent Claimant a Notice of Ability to Return to Work in August 2006. On February 22, 2007, Employer filed the Petition, averring that, as of August 29, 2006, work was generally available to Claimant and that Claimant had an earning capacity according to an earning power assessment. Claimant filed a timely answer denying Employer's averments, and the matter was assigned to a WCJ for hearings. At the last hearing Employer orally amended its Petition, alleging that Claimant had voluntarily removed himself from the work force, an allegation Claimant denied.

[1] According to Claimant, the collective bargaining agreement provides that if an employee cannot return to his prior position without restrictions within one year, the employee can no longer work for Employer. (Claimant Dep. at 11-12, R.R. at 24a-25a.)

In support of the Petition, Employer offered the deposition testimony of Leslie Rice, a certified case manager for Coventry Workers' Compensation Services, formerly Concentra Integrated Services, and a vocational expert approved by the Department of Labor and Industry. (Rice Dep. at 3-5, R.R. at 137a-39a.) Ms. Rice testified that she was hired to perform an earning power assessment and that she conducted an initial vocational evaluation with Claimant on July 16, 2006. (Rice Dep. at 14, R.R. at 148a.) Ms. Rice stated that Claimant described his work history as a diesel mechanic, but told her that he was "retired from the work force." (Rice Dep. at 16-17, R.R. at 150a-51a.) Ms. Rice indicated that she performed on-site analyses of three jobs she believed were appropriate for Claimant based on his physical abilities, his vocational history, his education, the FCE, and the opinions of Claimant's treating physician, David Rubenstein, M.D. (Rice Dep. at 17-20, R.R. at 151a-54a.) Ms. Rice testified that those positions were as a teacher at a vocational school, a service manager at a retail auto-repair shop, and an auto-parts store clerk. (Rice Dep. at 20-24, 44, R.R. at 154a-58a, 178a.) She explained that, to the extent that these positions required any overhead reaching, Claimant could use his left hand or both hands and that the reaching would not be repetitive. (Rice Dep. at 47-49, R.R. at 181a-83a.) Ms. Rice further testified that the tires that Claimant would be required to lift in the service manager position weighed twenty-five pounds, which she calculated by "simply tr[ying] to lift [the tire herself] and [she] was able to lift it . . . [s]o it felt like 25 pounds to [her] . . . based on [her] experience." (Rice Dep. at 45-46; R.R. at 179a-80a.) In addition to Ms. Rice's testimony regarding these jobs, Employer presented the job description for the three positions Ms. Rice recommended. (Earning Power Evaluation, Ex. D-Rice-2, at 10-12, R.R. at 197a-99a; Job Analysis (Service Manager), R.R. at 213a-16a; Job Analysis (Teacher), R.R. at 217a-20a; Job Analysis (Parts Clerk), R.R. at 221a-24a.) Ms. Rice acknowledged

that, despite identifying these positions, she never notified Claimant of the availability of these positions and that she works solely on behalf of insurers or employers. (Rice Dep. at 9, 40, R.R. at 143a, 174a.)

Employer also presented the deposition testimony of Dr. Rubenstein, a board-certified orthopedic surgeon who treated Claimant for his work-related injuries. (Rubenstein Dep. at 5-7, R.R. at 56a-58a.) Dr. Rubenstein testified that the June 16, 2006 FCE revealed that Claimant could perform medium-duty work. (Rubenstein Dep. at 15-16, R.R. at 66a-67a.) Dr. Rubenstein stated that he approved the teaching position and the service manager position recommended by Ms. Rice. (Rubenstein Dep. at 17-18, R.R. at 68a-69a.) However, Dr. Rubenstein testified that Claimant's shoulder tissue was marginal, which was a concern, and that Claimant's ability to lift items was limited to thirty to thirty-five pounds with no repetitive overhead lifting. (Rubenstein Dep. at 12-13, 20, R.R. at 63a-64a, 71a.)

Claimant testified in opposition to the Petition, describing how he was injured, his medical treatment, and his ongoing symptoms of throbbing pain. (Claimant Dep. at 8-10, May 16, 2007, R.R. at 21a-23a; WCJ Hr'g Tr. at 11-13, 18-20, R.R. at 253a-55a, 260a-62a.) Claimant indicated that performing daily activities aggravates his shoulder pain. (Claimant Dep. at 21, R.R. at 34a; WCJ Hr'g Tr. at 11-13, 15-16, R.R. at 253a-55a, 257a-58a.) Claimant testified that, since his last day with Employer, Employer has not offered him any light-duty work. (Claimant Dep. at 12, R.R. at 25a.) Claimant stated that he met with Ms. Rice, but that he was never contacted about any available positions. (Claimant Dep. at 13, R.R. at 26a.) Claimant testified that he told Ms. Rice that he was retired from any mechanic work. (Claimant Dep. at 28, R.R. at 41a.) Claimant described his education and vocational skills, explaining

that: (1) he did not graduate from high school, but earned his GED in 1976; (2) at the age of 22, he began working as a diesel mechanic while in the Army; (3) he holds a Commercial Driver's License (CDL) so that he could move and test drive the trucks he was working on; (4) he has never worked as a teacher; (5) he has no computer experience or typing skills; (6) he has never worked in a retail setting or in an office, other than his light-duty job answering telephones for Employer; and (7) he has never managed people before. (Claimant Dep. at 15-18, 20, R.R. at 29a-31a, 33a.) Claimant disagreed that he could teach a CDL class at a vocational school because the skills that he would be required to demonstrate to students, such as making quick turns and coupling and uncoupling a tractor-trailer's fifth wheel, would be difficult and painful to perform with his shoulder. (Claimant Dep. at 18-19, R.R. at 31a-32a.) Claimant further disagreed that he could work as a service manager because, having observed that work while shopping, there are many things he could not do. (Claimant Dep. at 19-20, R.R. at 32a-33a.) Claimant testified that, in July 2006, he began receiving Social Security Disability Benefits, that he had not looked for work because he did not want to make his shoulder worse, and that he would still be working had he not injured his shoulder. (Claimant Dep. at 25, 29, R.R. at 38a, 42a; WCJ Hr'g Tr. at 13-14, 26, R.R. at 255a-56a, 268a.)

Claimant also submitted the deposition testimony of Maxwell Stepanuk, D.O., a board-certified orthopedic surgeon who examined Claimant on October 2, 2007. (Stepanuk Dep. at 7, R.R. at 235a.) Dr. Stepanuk stated that, as a part of his examination of Claimant, he took a history of Claimant's injury and reviewed Claimant's medical records. (Stepanuk Dep. at 7-9, R.R. at 235a.) Dr. Stepanuk testified that he initially diagnosed Claimant with "post-rotator cuff repair [of the] right shoulder and probably [a] recurrent right rotator cuff tear." (Stepanuk Dep. at 9-

10, R.R. at 235a-36a.) After reviewing the report of a November 7, 2007 MRI arthrogram, Dr. Stepanuk noted that, although there was not a complete tear, Claimant did have a partial thickness tear on both surfaces of Claimant's right rotator cuff, which could be painful and predispose Claimant to further right rotator cuff tears. (Stepanuk Dep. at 10-12, R.R. at 236a.) Dr. Stepanuk indicated that Claimant could not return to regular duty, but could return to lighter duties with no lifting over ten pounds, no overhead use of the right arm, and no repetitive use of the right arm. (Stepanuk Dep. at 10, R.R. at 236a.) Dr. Stepanuk associated these restrictions with Claimant's work-related injury. (Stepanuk Dep. at 10, R.R. at 236a.) Dr. Stepanuk testified that, after reviewing the two job analyses provided by Ms. Rice and approved by Dr. Rubenstein, he concluded that Claimant could not perform either job. (Stepanuk Dep. at 13-15, R.R. at 236a-37a.) Dr. Stepanuk explained that Claimant could not perform the teaching job because Claimant would have to use his arms to climb in and out of the truck and would find it "difficult to back up a tractor trailer with a repaired rotator cuff." (Stepanuk Dep. at 13-14, R.R. at 236a-37a.) Dr. Stepanuk rejected the service manager job because Claimant could not lift automobile tires, which Dr. Stepanuk believed were more than twenty-five pounds, contrary to Ms. Rice's estimate. (Stepanuk Dep. at 14-15, R.R. at 237a.) Dr. Stepanuk acknowledged that, because he examined Claimant in 2007, he was not in a position to question Dr. Rubenstein's 2006 restrictions on Claimant; however, after reviewing additional medical records from Dr. Rubenstein, Dr. Stepanuk indicated that Dr. Rubenstein would allow Claimant to lift more than he would. (Stepanuk Dep. at 20-22, R.R. at 238a-39a.)

After considering the testimony and evidence, the WCJ credited Claimant's testimony in its entirety based on Claimant's demeanor and because it was

corroborated by Dr. Stepanuk's testimony and the results of the November 7, 2007 MRI arthrogram. (WCJ Decision, Findings of Fact (FOF) ¶ 10.) The WCJ found Dr. Stepanuk's testimony credible in its entirety, pointing out that his testimony was consistent with Claimant's description of his physical symptoms and "ability to perform the tasks required" regarding the positions identified by Ms. Rice. (FOF ¶ 13(a).) The WCJ further noted that Dr. Stepanuk's testimony was corroborated by the November 7, 2007 MRI arthrogram and that Dr. Stepanuk's opinions regarding Claimant's work restrictions were more reasonable than Dr. Rubenstein's when considering Claimant's testimony and Dr. Rubenstein's testimony that Claimant had marginal-quality tissue in the right shoulder area. (FOF ¶ 13(b)-(c).) The WCJ credited Dr. Rubenstein's testimony, except for his opinion that Claimant was physically capable of performing the jobs identified by Ms. Rice. (FOF ¶ 11.) In doing so, the WCJ noted that: (1) Dr. Rubenstein testified that, at the time of Claimant's surgery, "Claimant's tissue was of marginal quality," a factor about which he had concerns; (2) Dr. Rubenstein's opinion about Claimant's ability to perform these jobs was not consistent with Claimant's credited testimony; and (3) Dr. Rubenstein "admitted that he was relying on the accuracy" of Ms. Rice's reports and analyses of whether Claimant could perform the identified positions. (FOF ¶ 11(a)-(d); Rubenstein Dep. at 12-13, 29, R.R. at 63a-64a, 80a.)

The WCJ rejected Ms. Rice's testimony as not credible, noting that Ms. Rice: (1) worked only on behalf of insurance companies or employers; (2) admitted that she never notified Claimant of these positions;[2] and (3) admitted that, in the letter she sent

[2] On June 23, 2007, the Bureau of Workers' Compensation promulgated Section 123.204(c) of the General Provisions of the Bureau of Workers' Compensation regulations. Pursuant to 34 Pa. Code § 123.204(c), a vocational expert, like Ms. Rice, is required to provide claimants and *(Continued…)*

Claimant on August 22, 2006, she referred to the opinion of a physician to whom she never sent the job analyses for approval. (FOF ¶ 12(a)-(c), (g); Rice Dep. at 9, 29-31, 40, R.R. at 143a, 163a-65a, 174a.) The WCJ specifically rejected Ms. Rice's testimony that Claimant "said he was 62 years old and felt he was retired from the workforce," because it was unlikely that this "unsophisticated Claimant would use the term *retired from the work force*, which has become a term of art in workers' compensation matters" and because it contradicted Claimant's credited testimony. (FOF ¶ 12(d), (g) (emphasis in the original); Rice Dep. at 17, R.R. at 151a.) Finally, the WCJ noted that Ms. Rice:

> failed to credibly show that Claimant had previous experience in teaching, management, sales, office work, computer use and customer service or that he had transferable skills to perform jobs requiring such tasks. (The [WCJ] would note that a person's ability to perform a task does not automatically translate into an ability to teach others how to perform the same task.)

(FOF ¶ 12(f).)

The WCJ held that Employer failed to meet its burden of proving by "a preponderance of competent, credible evidence of record that the jobs identified by [Ms. Rice were] suitable for the Claimant" given Claimant's "productive skills, education, age, work experience and physical disability caused by the work injury." (WCJ Decision, Conclusions of Law (COL) ¶ 1.) The WCJ further concluded that Employer did not establish that Claimant had retired from the entire work force.

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claimants' counsel with copies of the labor market surveys at the same time the expert provides them to the employer. However, Claimant's vocational interview with Ms. Rice occurred before June 23, 2007 and, therefore, the requirement to provide Claimant with a copy of Ms. Rice's labor market survey was not yet in effect.

(COL ¶ 1.) Accordingly, the WCJ dismissed the Petition. Employer appealed to the Board, which affirmed. Employer now petitions this Court for review.[3]

On appeal, Employer first argues that the WCJ's decision was not well reasoned, which we reject. A decision is "reasoned for purposes of section 422(a) [of the Workers' Compensation Act (Act)[4]] if it allows for adequate review by the [Board] without further elucidation and if it allows for adequate review by the appellate courts under applicable review standards." Daniels v. Workers' Compensation Appeal Board (Tristate Transport), 574 Pa. 61, 76, 828 A.2d 1043, 1052 (2003). Here, the WCJ summarized the testimony of the witnesses, made credibility determinations, and gave express reasons for those credibility determinations. Accordingly, the WCJ's decision allows for adequate appellate review and, therefore, is reasoned pursuant to Section 422(a) and Daniels.

Next, Employer argues that the WCJ erred in denying the Petition because Employer proved its "vocational case" based on Ms. Rice's unrebutted labor market survey. (Employer's Br. at 13.) Employer further implies that Dr. Stepanuk's opinions were not competent because Dr. Stepanuk testified that he was not in a position to challenge Dr. Rubenstein's opinions pertaining to the time the labor

[3] This Court's standard of review is limited to determining whether there has been a violation of constitutional rights, an error of law, or whether necessary findings of fact are supported by substantial evidence. Allied Products and Services v. Workers' Compensation Appeal Board (Click), 823 A.2d 284, 287 n.5 (Pa. Cmwlth. 2003). "Substantial evidence is such relevant evidence as a reasonable person might accept as adequate to support a conclusion." Id.

[4] Act of June 2, 1915, P.L. 736, as amended, 77 P.S. § 834.

market survey was done.[5] However, even if Dr. Stepanuk's medical opinions regarding Claimant's physical ability in 2006 to perform those positions were not competent,[6] we conclude that Employer still failed to satisfy its burden of proving that the positions were actually available to Claimant.

Because Claimant's injury occurred after the effective date of the amendments made to the Act by the Act of June 24, 1996, P.L. 350 (Act 57), Employer's burden of proving an entitlement to modify Claimant's benefits based on increased earning power is governed by the standards set forth in Section 306(b)(2) of the Act, 77 P.S. § 512(2). Pursuant to Section 306(b)(2), "an employer must either: (i) offer to a claimant a specific job that it has available, which the claimant is capable of performing, or (ii) establish 'earning power' through expert opinion evidence including job listings with employment agencies, agencies of the Department of Labor and Industry, and advertisements in a claimant's usual area of employment." Allied Products v. Workers' Compensation Appeal Board (Click), 823 A.2d 284, 287 (Pa. Cmwlth. 2003) (footnote omitted). Pursuant to the Act, "earning power" is:

> determined by the work the employe is capable of performing and shall be based upon expert opinion evidence which includes job listings with agencies of the department, private job placement agencies and

[5] To the extent that Employer asserts that Dr. Stepanuk was never asked about the labor market survey, we disagree. It is clear in the record that Dr. Stepanuk was asked to review, and in fact reviewed, the positions that Employer asserted were appropriate for Claimant. (Stepanuk Dep. at 13-15, R.R. at 236a-37a.)

[6] We note that Dr. Stepanuk's opinions regarding Claimant's abilities in 2007 were competent because they were not vague and they left no doubt regarding Claimant's restrictions. Reinforced Molding Corp. v. Workers' Compensation Appeal Board (Haney), 717 A.2d 1096, 1098 (Pa. Cmwlth. 1998) (stating that "[m]edical evidence is . . . equivocal if it is vague and leaves doubt").

> advertisements in the usual employment area. Disability partial in character shall apply if the employe is able to perform his previous work or can, *considering the employe's residual productive skill, education, age and work experience*, engage in any other kind of substantial gainful employment which exists in the usual employment area in which the employe lives within this Commonwealth.

77 P.S. § 512(2) (emphasis added). Under Act 57, the employer is no longer required to "establish the existence of actual job referrals." Allied Products, 823 A.2d at 287.

Although an employer's burden of proof under Act 57 is not as "structured," the employer "must still convince the fact-finder that positions within the injured worker's residual capacity are *actually available*." Id. (emphasis added). Actual availability encompasses two considerations: whether the position is medically, or physically, suitable for the claimant, and whether the position is vocationally suitable for the claimant. 77 P.S. § 512(2) (indicating that factors such as a claimant's "education, age and work experience" should be considered when determining whether the claimant can engage in another kind of substantial gainful employment). The question of whether a claimant can perform a job at issue is a question of fact. Titusville Hospital v. Workmen's Compensation Appeal Board (Ward), 552 A.2d 365, 366 (Pa. Cmwlth. 1989).

Here, Employer relied on Ms. Rice's testimony and her labor market survey to support its assertion that the teaching and service manager positions approved by Dr. Rubenstein were actually available to Claimant. Despite acknowledging that Claimant had no prior teaching, office, sales, or computer experience, Ms. Rice nevertheless opined that those positions were within Claimant's educational and vocational "restrictions." (Rice Dep. at 26, 32-33, 40, R.R. at 160a, 166a-67a, 174a.)

However, the WCJ specifically rejected Ms. Rice's testimony that Claimant had the necessary vocational skills to perform these positions.[7] (FOF ¶ 12(f).) Thus, Employer failed to convince the fact finder that these positions were actually available to Claimant as required by Section 306(b)(2). Moreover, although an "employer need not submit the alternate positions to an injured worker," this Court has noted that the employer still must "persuade the fact-finder that the positions are actually available" and has indicated that "[s]ecretive and guarded conduct may be among the circumstances indicating a vocational expert is conscious of her failure to muster credible proof of availability." Allied Products, 823 A.2d at 288. Here, the WCJ noted that: (1) notwithstanding Ms. Rice's belief that these positions were suitable for Claimant, she never advised Claimant of the availability of the positions (FOF ¶¶ 5(e), 12(b)); and (2) in the letter Ms. Rice sent Claimant on August 22, 2006, she referred to the opinion of a physician to whom she never sent the job analyses for approval (FOF ¶ 12(c)). Accordingly, because the WCJ did not credit *any* of Employer's evidence, Employer could not prove that Claimant had "earning power" as set forth in Section 306(b)(2).

Next, Employer argues that the WCJ erred in denying its Petition because Claimant removed himself from the entire work force. Relying on this Court's decision in Pennsylvania State University v. Workers' Compensation Appeal Board (Hensal), 948 A.2d 907 (Pa. Cmwlth. 2008), Employer argues that Claimant's

[7] In a workers' compensation proceeding, the WCJ is the fact finder and is entitled to "accept or reject the testimony of any witness . . . in whole or in part." Minicozzi v. Workers' Compensation Appeal Board (Industrial Metal Plating, Inc.), 873 A.2d 25, 28 (Pa. Cmwlth. 2005). "The WCJ's authority over questions of credibility, conflicting evidence and evidentiary weight is unquestioned," and this Court is "bound by the WCJ's credibility determinations." Id. at 28-29.

voluntary withdrawal from the entire work force is presumed because Claimant is accepting a pension. Thus, according to Employer, Claimant's benefits should be suspended pursuant to Hensal because Claimant testified that he has not looked for employment since April 2005 and both Dr. Rubenstein and Dr. Stepanuk agree that Claimant is physically capable of working in some capacity. We disagree.

As noted above, to establish earning capacity, an employer normally must demonstrate that suitable employment is available to the claimant. Hensal, 948 A.2d at 910. However, where the claimant has voluntarily left the work force with no intent of working again, the employer is not required to demonstrate suitable alternative employment "because the claimant would not accept it when proffered." Id. When a claimant voluntarily accepts a pension, "the claimant is presumed to have left the work force" unless the claimant proves that: "(1) he is seeking employment or (2) the work-related injury forced him to retire." Id.

Contrary to Employer's argument, the presumption of a voluntary withdrawal from the work force stated in Hensal is inapplicable here. As pointed out by Claimant, there is no evidence in the record, as there was in Hensal, that Claimant has accepted pension benefits.[8] Rather, the credible evidence of record establishes that Claimant receives Social Security Disability Benefits, which benefits are not

[8] For this same reason, Employer's reliance on Southeastern Pennsylvania Transportation Authority v. Workmen's Compensation Appeal Board (Henderson), 543 Pa. 74, 669 A.2d 911 (1991), and Mason v. Workers' Compensation Appeal Board (Joy Mining Machinery), 944 A.2d 827 (Pa. Cmwlth. 2008), is misplaced. In both Henderson and Mason, the claimants accepted pensions from their employers, but failed to prove a continued entitlement to workers' compensation benefits because they did not engage in a good faith effort to search for jobs or establish that their injuries forced them to retire.

equivalent to a pension.[9] Moreover, Employer relies on Ms. Rice's testimony that Claimant told her that he had retired from the work force in support of its contention that Claimant has removed himself from the work force. However, the WCJ expressly rejected Ms. Rice's testimony as not credible, accepting Claimant's contrary testimony that he only was retired from mechanic work. Having failed to produce credible evidence that Claimant was retired from the entire work force, Employer failed to establish its entitlement to a suspension of benefits on that basis.

Accordingly, the Board's order is affirmed.

RENÉE COHN JUBELIRER, Judge

[9] Unlike pensions, which are paid as retirement benefits, see Black's Law Dictionary 1248 (9th ed. 2009) (defining a pension as "[a] fixed sum paid regularly to a person . . . esp. by an employer as a retirement benefit"), Social Security Disability Benefits are paid on the basis of disability, and a person is eligible to receive these benefits so long as the person is unable to engage in any kind of gainful employment considering the person's age, education, and work experience due to the person's disability. See Social Security Act §§ 423(d)(2)(A) and 423(f), 42 U.S.C. §§ 423(d)(2)(A), (f) (2004) (defining disability and stating, *inter alia*, that disability benefits will be terminated if the person is able to engage in any substantial gainful activity).

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

WAWA,	:	
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Petitioner	:	
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v.	:	No. 536 C.D. 2009
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Workers' Compensation Appeal Board (Langdon),	:	
	:	
Respondent	:	

O R D E R

NOW, February 24, 2010, the order of the Workers' Compensation Appeal Board in the above-captioned matter is hereby **AFFIRMED**.

RENÉE COHN JUBELIRER, Judge