IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Paulette Freeman, Petitioner	:	
v.	:	No. 1278 C.D. 2009
	:	Submitted: November 13, 2009
Workers' Compensation Appeal Board (Norristown Area School District), Respondent	:	

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge
HONORABLE KEITH B. QUIGLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE QUIGLEY FILED: February 1, 2010

Paulette Freeman (Claimant) petitions for review of the June 9, 2009 order of the Workers' Compensation Appeal Board (WCAB), which affirmed the decision of a workers' compensation judge (WCJ) to grant the suspension petition filed by Norristown Area School District (Employer). We affirm.

On May 2, 2005, Claimant sustained a low back strain, a fracture of the left great toe and bilateral knee contusions in the course and scope of her employment with Employer. In a January 9, 2007 decision, a WCJ expanded Claimant's work injury to include a herniated disc at L4-5, which required fusion surgery. Employer filed a petition to suspend Claimant's benefits as of May 7, 2007, alleging that Employer offered Claimant a light duty job and that Claimant failed to respond to the offer. Hearings on the matter were held before a WCJ.

In support of its petition, Employer presented the deposition of Robert Cohen, M.D., a neurological surgeon who examined Claimant on March 6, 2007. Based on his examination and review of Claimant's medical records, Dr. Cohen opined that Claimant was capable of driving an automobile and returning to work in a light duty non-physical capacity. Dr. Cohen reviewed accommodations that Employer would provide to Claimant in conjunction with the position of "building substitute teacher" and opined that Claimant was capable of returning to work in that position.

Employer also presented the testimony of Eugene Mayo, Director of Human Resources for Employer, who testified as follows. After he received a Work Capacities Form executed by Dr. Cohen, he contacted Claimant by phone on April 26, 2007 and told Claimant about the availability of the "building substitute teacher" position. Mayo then sent Claimant a letter offering Claimant the light duty job at the middle school. The job is a floating teaching position that does not involve lifting, bending or carrying. The middle school is wheelchair accessible, and there would be no problem with Claimant sitting, standing or changing her position at her leisure, or with Claimant taking breaks to lie down.

In opposition to Employer's suspension petition, Claimant testified on her own behalf as follows. After being examined by Dr. Cohen, she received an offer to work at the middle school as a substitute teacher. The job duties were not explained to her, but Claimant was familiar with the job duties. Claimant did not respond to the job offer. Claimant had stopped driving because of spasms in her legs and did not believe she could drive to the middle school. Moreover, she did not believe she could do the offered job because pain all over her body interferes with

her ability to think and focus. As for walking, she uses a cane for short trips and a wheelchair for going more than half a block.

Claimant admitted that she had injured her back in a motor vehicle accident in 1985 and had filed a lawsuit that settled. Claimant initially denied that she received nine years of treatment for her injury, then changed her testimony to six to nine years, but finally stated that she treated from 1985 to 1990. Despite the fact that Claimant filed another lawsuit that settled as a result of a 1994 motor vehicle accident, she vaguely remembered the incident and did not remember how long she received treatment for her injury, testifying that perhaps it was for less than a year. Claimant stated that she told Todd Albert, M.D., one of her treating physicians, about both accidents and that she had been diagnosed with a herniated disc in 1985.

However, Dr. Albert, a board certified orthopedic surgeon who first examined Claimant on April 27, 2006, testified that Claimant did **not** inform him about prior problems with her low back or that she had been involved in a motor vehicle accident in 1985 that caused lumbosacral problems. Dr. Albert performed surgery on Claimant on May 15, 2006, but he did not consider it to be a success. Dr. Albert last saw Claimant on May 17, 2007, and, based on her complaints of pain in her low back, Dr. Albert did not believe that Claimant was able to return to work or to drive a car. Although Dr. Albert admitted that there were no objective indications of a problem in her low back, he did not think that Claimant could do the "building substitute teacher" job.

After considering the evidence, the WCJ did not find Claimant's testimony credible regarding her physical complaints and inability to drive. The WCJ explained:

> Detracting from Claimant's credibility is her attempt to down play the length of time she treated for her 1985 low back injury. She also attempted to down play her 1994 low back injury by stating her recollection of the same was vague. However, both injuries resulted in lawsuits and ultimately settlements. Also significant in rendering this credibility determination is this Judge's observation of Claimant's demeanor while testifying and hearing her testimony first hand. Based on this and the review of her deposition testimony, the Judge finds that Claimant was able to focus, process information, fully participate and provide responsive answers. This Judge has also taken into consideration the medical evidence in rendering this credibility determination. Notably, while Claimant testified that she told Dr. Albert about her 1985 low back injury and that she was diagnosed with a herniated disc, Dr. Albert's testimony does not support this.

(WCJ's Findings of Fact, No. 12.) The WCJ found Dr. Cohen's expert opinion more credible and persuasive than that of Dr. Albert. Thus, the WCJ suspended Claimant's benefits because Claimant failed to follow up in good faith on a job offer that was within her physical restrictions.

Claimant appealed to the WCAB, which affirmed. Claimant now petitions this court for review.[1]

Claimant argues that the WCJ's reasons for rejecting her testimony were improper. Claimant asserts that the WCJ improperly rejected her testimony based on statements she made about the 1985 and 1994 motor vehicle accidents because a different WCJ previously decided that these accidents were irrelevant. We reject this argument.

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

The WCJ not only rejected Claimant's testimony based on her inability to recall information about her treatment following the 1985 and 1994 accidents. The WCJ also rejected Claimant's testimony because: (1) Claimant contradicted Dr. Albert's testimony that Claimant did not fully inform him about her history of back problems; and (2) Claimant's demeanor conflicted with her testimony that her pain affected her ability to think and focus. Thus, even if the WCJ should not have considered any testimony about the 1985 and 1994 accidents, the WCJ gave valid reasons for rejecting Claimant's testimony.

Claimant also argues that Employer's April 27, 2007 job offer letter did not provide sufficient notice to Claimant regarding the accommodations that Employer was willing to make for Claimant. We disagree.

Our supreme court has stated that an employer's job referral should be reviewed in a common sense manner in order to determine whether a suitable position has been made available to a claimant. *Eidem v. Workers' Compensation Appeal Board (Gnaden-Huetten Memorial Hospital)*, 560 Pa. 439, 746 A.2d 101 (2000). First, the claimant must be reasonably apprised of the job duties and classification, either through her prior work experience or through the employer's expressly delineating those factors in the letter. *Id.* Second, the claimant must be given sufficient information in order to determine whether the available position is within her physical restrictions. *Id.* Only then has the claimant been provided with sufficient information to make an informed decision regarding whether the available position is within her capabilities. *Id.*

Here, Employer's letter stated that "Dr. Cohen has approved a Light Duty job [that Employer] … is offering for your return to work based on your restrictions." (R.R. at 120a.) The letter then refers to an enclosure, which is Dr.

Cohen's completed Functional Capacities Form. (R.R. at 122a.) The letter continues:

> You will be assigned to the [Middle School] as a Building Substitute Teacher which will consist of performing floating instructional duties. In this position, you will have access to the school's elevator and will not be assigned to any Physical Education classes. This position will begin on Monday, May 7, 2007. Your work day will be Monday-Friday from 8:00 am to 3:30 pm.
>
> You are to report to Kelly Brodoski, Secretary III at [the Middle School] for teaching assignments. [Principals at the Middle School] will ensure that they accommodate your restrictions.

(R.R. at 120a.)

This letter apprises Claimant of the job duties and the job's light duty classification. Moreover, Claimant admitted that she was familiar with the job duties. The letter includes Dr. Cohen's restrictions and assures Claimant that they will be accommodated. The letter specifically mentions the availability of an elevator and that she would have no responsibilities for physical education classes. Although the letter does not provide information about other accommodations that Employer might have made as a result of Claimant's restrictions, an employer cannot be expected to anticipate a claimant's every need and list in a job offer letter every accommodation that the employer might make. Having assured Claimant that the middle school Principals would accommodate her restrictions, Claimant only had to make her needs known to them. Thus, we conclude that the letter contains sufficient information to enable Claimant to make an informed decision about whether the position is within Claimant's capabilities.

Accordingly, we affirm.[2]

KEITH B. QUIGLEY, Senior Judge

[2] Employer filed a Motion to Strike Portion of Reproduced Record on September 28, 2009. Because we affirm the WCAB, Employer's motion is dismissed as moot.

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O R D E R

AND NOW, this 1st day of February, 2010, the order of the Workers' Compensation Appeal Board, dated June 9, 2009, is hereby affirmed. The motion to strike filed by Norristown Area School District is dismissed as moot.

KEITH B. QUIGLEY, Senior Judge