

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

John Verduce, :
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 Petitioner :
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 v. :
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 Workers' Compensation Appeal Board :
 (County of Allegheny DPW), : No. 1467 C.D. 2007
 Respondent : Argued: February 11, 2008

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE MARY HANNAH LEAVITT, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY

FILED: April 2, 2008

John Verduce (Claimant) seeks this Court's review of the order of the Workers' Compensation Appeal Board (Board) which affirmed the Workers' Compensation Judge's (WCJ) decision to grant the County of Allegheny Department of Public Welfare's (Employer) Petition to Suspend Compensation Benefits (Petition to Suspend) pursuant to the Pennsylvania Workers' Compensation Act (Act).¹

On July 10, 1992, Claimant sustained an injury in the course and scope of his employment described in the Notice of Compensation Payable (NCP) as a "torn meniscus left knee."² NCP, January 8, 1993. On October 11, 2005,

¹ Act of June 2, 1915, P.L. 736, as amended, 77 P.S. §§ 1-1041.4; 2501-2626.

² Claimant was employed as a maintenance and construction manager for Employer. While he descended a metal fire escape, he stepped awkwardly on a piece of concrete, fell, and injured his knee. Claimant Notes of Testimony (N.T.), December 6, 2005, at 10-11; Reproduced Record (R.R.) at 10a-11a.

Employer sought to suspend benefits and alleged that as of August 10, 2005, “Claimant [was] able to return to work in a modified duty capacity on account of his work-related medical condition, but [was] totally disabled as a result of non-work related medical conditions, thus entitling Employer to a suspension of benefits.” Petition to Suspend, October 7, 2005, at 1, 3.

In support of the Petition to Suspend, Employer presented the deposition testimony and medical report of Daniel Kelly Agnew, M.D. (Dr. Agnew), board-certified in orthopedic surgery. Deposition of D. Kelly Agnew, M.D. (Dr. Agnew Deposition), February 23, 2006, at 3; R.R. at 66a. Dr. Agnew examined Claimant on August 10, 2005. Dr. Agnew also conducted a records review and obtained a history of Claimant’s work injury, current condition, and treatment as well as a history of his other medical problems. Dr. Agnew Deposition at 5; R.R. at 68. Claimant complained of “intermittent medial discomfort” in his left knee. Dr. Agnew Deposition at 10; R.R. at 73a. Claimant had “difficulty with balance when trying to walk, but these issues were not related to his [left] knee.” Dr. Agnew Deposition at 10-11; R.R. at 73a-74a.

Dr. Agnew indicated Claimant suffered from multiple non-work related medical conditions, including osteoarthritic complaints about his hands; low back complaints; films showing degenerative change; sacroiliac joint injections; degenerative joint disease; abdominal aortic aneurysm; hypertension; and diabetes with peripheral neuropathy. Dr. Agnew Deposition at 8-9; R.R. at 71a-72a. Dr. Agnew noted Claimant underwent several surgeries, which included a bilateral knee replacement, right total hip replacement, abdominal aortic

aneurysm repair and coronary artery bypass grafting. Dr. Agnew Deposition at 12-13; R.R. at 75a-76a.

Dr. Agnew opined that Claimant was capable of work despite his work-related injury and testified that “were it not for [Claimant’s] multiple medical comorbidities, [Claimant] could be working in a light duty status.” Report of Dr. Agnew, August 10, 2005, at 10; R.R. at 101a. Dr. Agnew explained Claimant was not fully recovered from his work-related injury, but Claimant’s injury resolved to the point that he was capable of working in a light capacity if he was not required to kneel, crawl, squat or climb ladders. Dr. Agnew Deposition at 15-16; R.R. at 78a-79a; Report of Dr. Agnew, August 10, 2005, at 9; R.R. at 100a.

Dr. Agnew added that due to Claimant’s multiple non-work related medical conditions Claimant was “unemployable.” Report of Dr. Agnew, August 10, 2005, at 11; R.R. at 102a. Dr. Agnew was asked to opine whether Claimant was capable of any level of work given his “total physical condition” and he concluded Claimant “would not be a candidate for gainful employment.” Dr. Agnew Deposition at 17; R.R. at 80a. Dr. Agnew, specifically observed Claimant’s unbalanced appearing gait, his reported level of disability and his advanced age of 76 years. Dr. Agnew Deposition at 17-18; R.R. at 80a-81a.

In opposition to the Petition to Suspend, Claimant testified on December 6, 2006. Claimant testified that as to his work-related injury he still experienced “toothache-type” pain in his left knee when walking despite an October 7, 1992, arthroscopy and a January 4, 1993, unicompartmental knee

arthroplasty. N.T. at 11; R.R. at 11a. Claimant had two right knee surgeries prior to his left knee work-related injury, but indicated that his work-related injury was more severe. N.T. at 15-16; R.R. at 15a-16a.

Claimant acknowledged that he had multiple non-work related medical conditions, which he indicated had either resolved or had limited bearing on Claimant's ability to work. However, Claimant had multiple joint osteoarthritis and hip replacement surgery six to seven years before the hearing. N.T. at 13; R.R. at 13a. Claimant indicated that he did not have any residual problems from his joint replacement surgery. N.T. at 13; R.R. at 13a.

Claimant also acknowledged he had an abdominal aortic aneurysm ten or eleven years prior to the hearing with resulting surgery, but Claimant alleged that it had no affect "whatsoever" upon his ability to work. N.T. at 11-12; R.R. at 11a-12a. Claimant also had coronary artery disease, with bypass grafting four years prior to the hearing. However, Claimant alleged the condition had resolved and he had a "clean bill of heath." N.T. at 13-14; R.R. at 13a-14a.

On November 11, 2005, Claimant also admitted he underwent lumbar disc surgery for his back. N.T. at 12; R.R. at 12a. However, Claimant indicated he had diabetic peripheral neuropathy, numbness in his feet, but alleged he had not experienced numbness after his back surgery. N.T. at 13; R.R. at 13a.

According to Claimant there were jobs he could perform. N.T. at 14; R.R. at 14a. Claimant indicated he could perform jobs like "the lady that has to

write down your name” and “the guard that put [briefcases] on the machine.” N.T. at 14; R.R. at 14a. Claimant alleged he could perform the duties required by his former position as court “tipstaff,” however he did not identify the duties required. N.T. at 14; R.R. at 14a.

Claimant also presented the deposition testimony and medical report of David Swan, M.D. (Dr. Swan) as further support that Claimant was capable of working. Dr. Swan, board-certified in family medicine, was Claimant’s treating physician since 1989. Deposition of David Swan, M.D. (Dr. Swan Deposition), April 12, 2006, at 5; R.R. at 32a; Report of Dr. Swan, December 9, 2006; R.R. at 63a.

Dr. Swan testified Claimant had residual problems from his left knee and resulting surgeries which caused Claimant “ongoing pain and that limits his functioning in day-to-day activities” such as “standing, walking and normal daily activities.” Dr. Swan Deposition at 8; R.R. at 35a.

Dr. Swan confirmed Claimant’s multiple joint replacement surgery did not pose any further functional limitations. Dr. Swan Deposition at 11, 13; R.R. at 38a, 40a. Dr. Swan, however, indicated Claimant had right hip limitations because his hip had “really never been right, even with the [1999] surgery.” Dr. Swan Deposition at 18; R.R. at 45a.

Dr. Swan agreed Claimant had no residual problems from his abdominal aortic repair in 1993. Dr. Swan Deposition at 11, 13; R.R. at 38a, 40a.

Dr. Swan added that Claimant's coronary artery bypass surgery in 2003 did not pose any further functional limitations. Dr. Swan Deposition at 11, 13; R.R. at 38a, 40a.

Dr. Swan explained Claimant could neither sit, stand, nor walk, for more than short periods, and his ability to bend on a repeated basis was "very limited" as a result of his lower back. Dr. Swan Deposition at 10-11; R.R. at 37a-38a. He noted Claimant's problem with his lumbar spine restricted Claimant to lifting 25 to 50 pounds occasionally, not regularly, as "he does have ongoing pain from that still" and it impacted his ability to work in any posture for an extended period of time. Dr. Swan Deposition at 10; R.R. at 37a. Dr. Swan indicated Claimant's diabetic neuropathy compounded Claimant's balance and walking problems to some extent. Dr. Swan Deposition at 12; R.R. at 39a.

Dr. Swan was not familiar with the specific duties required of a tipstaff, but suggested the amount of physical activity, such as walking, standing or climbing stairs, would affect whether Claimant could perform the position. Dr. Swan Deposition at 24-28; R.R. at 51a-54a. Dr. Swan then opined that Claimant could work in a sedentary capacity, "never lifting over 15 pounds, never lifting frequently over five pounds ... [and not requiring] maintaining the same position for an eight-hour day ... [but] he could change positions frequently, would have to stay awake for eight hours ... function mentally, deal with people, and talk to people." Dr. Swan Deposition at 13; R.R. at 40a.

The WCJ circulated a Decision and Order on August 21, 2006, and granted Employer's Petition to Suspend. The WCJ credited Dr. Agnew's testimony concerning Claimant's ability to work as more credible than Dr. Swan. Decision of the WCJ (WCJ Decision), Finding of Fact (F.F.) No. 5b at 3. The WCJ discredited Claimant's testimony regarding his ability to work. WCJ Decision, F.F. No. 5c at 4. Claimant appealed to the Board, which affirmed the WCJ's decision.

Claimant contends³ that the WCJ's findings are not supported by substantial, competent evidence. Specifically, Claimant argues Employer failed to sustain its burden of proving Claimant was permanently and totally disabled from his non-work related conditions.

In reviewing the WCJ's determination it is not the function of this Court to reweigh evidence or review credibility of witnesses, which is the exclusive province of the WCJ. Farquhar v. Corning Glass Works, 515 Pa. 315, 528 A.2d 580 (1987). Instead, this Court must ascertain whether, upon consideration of the evidence as a whole, the findings have the requisite measure of support in the record. Bethenergy Mines, Inc. v. Workmen's Compensation Appeal Board (Skirpan), 531 Pa. 287, 612 A.2d 434 (1992).

³ This Court's scope of review is limited to determining whether the necessary findings of fact are supported by substantial evidence, whether errors of law were made, or whether constitutional rights were violated. Universal Cyclops Steel Corp. v. Workmen's Compensation Appeal Board (Krawczynski), 305 A.2d 757 (Pa. Cmwlth. 1973).

The employer has the burden of proving the claimant recovered some or all ability to return to work as a result of a work-related injury and the claimant was offered work within his functional capacity. Kachinski v. Workmen's Compensation Appeal Board (Veeco Construction Co.), 516 Pa. 240, 532 A.2d 374 (1987). However, there is an exception to the job availability requirement. If an employer proves a claimant is permanently and totally disabled from non-work related medical conditions, the employer is nonetheless entitled to a suspension of benefits without the necessity of establishing an actual job offer. Schneider v. Workers' Compensation Appeal Board (Bey), 560 Pa. 608, 747 A.2d 845 (2000).⁴ On the record, this Court agrees with the Board's determination that substantial evidence supported the conclusion of the WCJ that Claimant was permanently and totally disabled from multiple non-work related conditions.

The WCJ's decision was based upon credibility determinations solely within her province and she provided explanations for accepting and rejecting evidence. The WCJ discredited Claimant's testimony that he was capable of working. WCJ Decision, F.F. No. 5c at 4. The WCJ specifically noted Claimant retired in 1993, has not worked or looked for work, has had multiple medical care for non-work related conditions since that time, and only vaguely referenced employment positions he could perform. WCJ Decision, F.F. No. 5c at 4; N.T. at 14; R.R. at 14a. Moreover, Claimant's testimony was inconsistent with that of Dr.

⁴ Employer argues that Claimant was totally disabled from non-work related medical conditions; therefore, application of the job availability requirement would be superfluous and would run contrary to the purpose of the Act. See USX Corp. v. Workmen's Compensation Appeal Board (Hems), 647 A.2d 605, 607 (Pa. Cmwlth. 1994)(stating "if Claimant, admittedly, could not return to his time-of-injury job because of a non-work-related injury, it would be pointless to require Employer to prove that Claimant's time-of-injury job was still available.").

Swan. For example, Claimant indicated he had diabetic peripheral neuropathy, numbness in his feet, but alleged he had not experienced numbness following his back surgery. N.T. at 13; R.R. at 13a. Dr. Swan, however, noted that Claimant's November 2005, back surgery would not have "helped" Claimant's diabetic neuropathy. Dr. Swan Deposition at 17; R.R. at 44a.

The WCJ credited the opinions of Dr. Agnew as more credible than Dr. Swan regarding Claimant's ability to work, specifically, that Claimant was disabled from multiple non-work related conditions, which rendered Claimant permanently and totally disabled. WCJ Decision, F.F. Nos. 5a, 5b at 3.

As set forth, Dr. Agnew explained that although Claimant was not fully recovered from his work-related injury it resolved to the point that he was capable of working in a light duty capacity. Dr. Agnew Deposition at 15-16; R.R. at 78a-79a. Based on the accepted testimony, the WCJ then determined Claimant was disabled due to a combination of non-work related medical conditions, specifically, Claimant's lumbar problem, repaired abdominal aneurysm, multiple joint problems and diabetic neuropathy, which limited Claimant's ability to sit, stand, walk and lift. WCJ Decision, F.F. No. 5a at 3. During cross-examination, Dr. Agnew opined that Claimant was disabled to such an extent that "[p]resumably, if he had a job where he did absolutely nothing, and I've never seen a job like that, where he sat some and stood some and someone delivered him right to the job, I suppose he might be able to function in such a capacity." Dr. Agnew Deposition at 23; R.R. at 86a. Additionally, Dr. Agnew's credited testimony

clearly regarded Claimant's multiple non-work related medical conditions and limitations as permanent:

[Claimant] will not completely recover from any of the diagnoses he carries. He will always be diabetic. There is no cure for peripheral neuropathy. His coronary artery history will never truly recover and will always place him at risk for further coronary events. His lumbar degenerative change, spinal stenosis, and spondylolistheses will never simply go away and will always be a source of limitations which would be expected to progress over time. I would consider all of his medical problems to be permanent.

Dr. Agnew Deposition at 18-19; R.R. at 81a-82a.

Based upon the evidence credited by the WCJ, there existed substantial evidence⁵ to support the WCJ's decision to grant Employer's Petition to Suspend. There was sufficient evidence to meet Employer's burden of proof in showing Claimant was permanently and totally disabled from non-work related medical conditions pursuant to Schneider.⁶

⁵ This Court cannot alter the WCJ's findings where they are supported by substantial evidence. Scher v. WCAB (City of Philadelphia), 740 A.2d 741 (Pa. Cmwlth. 1999).

⁶ Claimant also asserts that the WCJ erred in concluding Claimant's age must be considered in determining Claimant's employability. This Court disagrees. Although the WCJ discussed Claimant's age, the WCJ did not require either medical expert to consider the Claimant's age in rendering an opinion. As set forth, Dr. Agnew observed Claimant's unbalanced appearing gait, his reported level of disability and his advanced age of 76 years. Dr. Agnew Deposition at 17-18; R.R. at 80a-81a. While Dr. Agnew considered Claimant's advanced age it was in conjunction with other factors and in response to a question regarding Claimant's "total physical condition." Similarly, Dr. Agnew also considered Claimant's age when he opined about the appropriateness of ordering a functional capacity evaluation. Dr. Agnew Deposition at 17, 24; R.R. at 80a, 87a-88a. Claimant's age was inherently linked to his **(Footnote continued on next page...)**

Accordingly, this Court affirms.

BERNARD L. McGINLEY, Judge

(continued...)

current physical capabilities and Dr. Agnew appropriately considered all variables in rendering his medical opinion.

