IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Boscov's Department Stores, Petitioner	:	
v.	:	
Workers' Compensation Appeal Board (Basham), Respondent	:	No. 1699 C.D. 2009
	:	Submitted: January 8, 2010

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE JOHNNY J. BUTLER, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE BUTLER FILED: February 16, 2010

Boscov's Department Stores (Employer) petitions for review of the July 30, 2009 order of the Workers' Compensation Appeal Board (Board) affirming a Workers' Compensation Judge's (WCJ) order granting Thomas Basham's (Claimant) petition to reinstate benefits as of December 21, 2006. The issues before this Court are: 1) whether Claimant's intention to retire at age 65 entitles Employer to continued suspension of Claimant's benefits, and 2) whether Claimant's medical expert's testimony is insufficient as a matter of law to support a continuation of the suspension of Claimant's medical benefits. For the following reasons, we affirm the decision of the Board.

Claimant suffered a lumber strain/sprain at work in May of 1996, and received benefits until they were suspended as of March 13, 2000 because Claimant failed to make a good faith effort to follow up on a job offer by Employer. Claimant

initially sought reinstatement of his benefits in July of 2005, but was ultimately unsuccessful when this Court determined that there was no change in his condition since the March 13, 2000 suspension order. Claimant has not worked since his benefits were suspended in March of 2000, but has been receiving social security disability benefits. On January 8, 2007, Claimant filed another petition to reinstate benefits as of December 1, 2006, alleging a worsening of his back condition and decreased earning power.

Claimant testified at a hearing on June 21, 2007 that his back pain was more frequent and lasted longer, his medications were less effective in controlling his pain, and he was having difficulty walking and driving. The WCJ found Claimant's testimony credible. Employer presented a copy of the June 26, 2003 hearing transcript as evidence, which contained a statement by Claimant that his goal was to work until he was 65 years of age, since he had been setting aside money and had been doing well. Claimant was 66 years of age at the time of the June 21, 2007 hearing.

Both parties presented deposition testimony from medical experts. Claimant's expert and primary care physician, Dr. John Carey, testified that he had been treating Claimant for his work-related back pain since August of 1996, and that he had increased Claimant's pain medication at least four times in 2006 and 2007. Dr. Carey opined that Claimant was totally disabled from his work-related injury, an aggravation of a pre-existing low back condition and lumber discongenic syndrome, as of December 21, 2006. Employer's medical expert, Dr. Joseph Fabiani, examined Claimant on two occasions, in July of 2003 and May of 2007. Dr. Fabiani opined that Claimant was suffering from chronic degenerative low back disk disease, but felt that the work injury was limited to low back strain. Dr. Fabiani agreed that

Claimant's underlying back condition had worsened between the July of 2003 and May of 2007 examinations, but did not agree that the work-related injury continued or worsened.

The WCJ reinstated benefits on the basis that there was no evidence that Claimant had voluntarily removed himself from the workforce, but that there was evidence that Claimant's work-related injury had worsened to a point where Claimant was totally disabled from work. Employer appealed to the Board, which affirmed the WCJ.[1] Employer appealed to this Court.[2]

"A claimant seeking a reinstatement of suspended benefits has the burden of proving that the disability which gave rise to her original claim continues and that, through no fault of her own, her earning power is once again adversely affected by her disability." *Shop Vac Corp. v. Workers' Comp. Appeal Bd. (Thomas)*, 929 A.2d 1236, 1240 (Pa. Cmwlth. 2007). Our Supreme Court has determined that "benefits must be suspended when a claimant voluntarily leaves the labor market upon retirement." *Southeastern Pennsylvania Transp. Auth. v. Workmen's Comp. Appeal Bd. (Henderson)*, 543 Pa. 74, 79, 669 A.2d 911, 913 (1995) (*Henderson*). This same theory of law may be applied in cases where a claimant seeks reinstatement of benefits after voluntary retirement. In either case, "[a]n employer need not prove the availability of employment where a claimant states unequivocally that he has no intention of seeking future employment." *Dugan v.*

---

[1] The July 30, 2009 order of the Board stated: "The Decision of the Judge is AFFIRMED. Claimant's appeal is DISMISSED." We note, however, that it was Employer who appealed from the WCJ Decision.

[2] The Court's review of the Board's order is limited to determining whether Claimant's constitutional rights have been violated, whether an error of law has been committed or whether the necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa.C.S. § 704; *Visteon Sys. v. Workers' Comp. Appeal Bd. (Steglik)*, 938 A.2d 547 (Pa. Cmwlth. 2007).

Workmen's Comp. Appeal Bd. (Fuller Co. of Catasauqua), 569 A.2d 1038, 1040 (Pa. Cmwlth. 1990). "For disability compensation to continue following retirement, a claimant must show that he is seeking employment after retirement or that he was forced into retirement because of his work-related injury." *Henderson*, 543 Pa. at 79, 669 A.2d at 913.

In the present case, Employer argues that Claimant voluntarily removed himself from the labor market when he testified in June of 2003 that his goal or intention was to work until he was 65 years of age. Reproduced Record (R.R.) at 66a. However, based on the evidence presented and the WCJ's findings of fact, it does not appear that Claimant actually removed himself from the labor force. Claimant was asked whether he would have intended to retire at 62 or 65 had he taken a job previously offered by Employer. R.R. at 66a. He responded: "No. Sixty-five (65) being in sales, I was starting to put more money into my retirement than I was taking home. I was doing quite well. But my goal was to work until 65, yeah." R.R. at 66a. Reviewing previous cases where it was determined by the Pennsylvania Supreme Court and the Commonwealth Court that a claimant had voluntarily removed him/herself from the labor force through retirement, it is readily apparent that in each of those cases the claimant had taken some type of action towards actual retirement, or retirement was forced upon the claimant because of his/her injury. *See Henderson* (where the claimant applied for pension benefits from his employer and testified he was not looking for work)*; Republic Steel Corp. v. Workmen's Comp. Appeal Bd. (Petrisek)*, 537 Pa. 32, 640 A.2d 1266 (1994) (where the claimant actually retired from the coal industry, and unequivocally stated that he had no plans to re-enter the workforce); *The Alpine Group v. Workers' Comp. Appeal Bd. (DePellegrini),* 858 A.2d 673 (Pa. Cmwlth. 2004) (where the claimant credibly

testified that he retired because of his breathing problems); *Kasper v. Workers' Comp. Appeal Bd. (Perloff Bros., Inc.),* 769 A.2d 1243 (Pa. Cmwlth. 2001) (where the claimant completed an application to receive pension benefits, and never made any attempt to find employment for three years after his retirement); *Shannopin Mining Co. v. Workers' Comp. Appeal Bd. (Turner),* 714 A.2d 1153 (Pa. Cmwlth 1998) (where the claimant testified that he retired because he could not breathe, and he did not look for work thereafter); *Patterson-Kelly Co. v. Workmen's Comp. Appeal Bd. (Woodrow),* 586 A.2d 1043 (Pa. Cmwlth. 1991) (where the claimant claimed that his back injury caused him to opt for early retirement, and he never stated unequivocally that he did not intend to seek further employment); and *Dugan* (where the claimant gave unequivocal testimony that he was retired, and was no longer attempting to obtain employment). In the present case, Claimant only testified that, at the age of 62, he was working toward retirement at the age of 65 by putting money aside. He had taken no steps to actually apply for retirement, nor was he then receiving a pension.[3] Further, there was no evidence presented that Claimant would continue to refuse employment had he been able to work in any capacity. Therefore, Claimant did not voluntarily withdraw from the work force entitling Employer to continued suspension of his benefits.

Next, Employer argues that Dr. Carey's medical testimony is insufficient to support Claimant's reinstatement of benefits based on the previous finding that Claimant failed to pursue a job in good faith. In order to reinstate total disability benefits after suspension which was based on a lack of good faith in pursuing available employment, a "claimant must prove a change in his condition such that he could no longer perform the jobs previously offered to him." *Spinabelli v.*

[3] The Social Security benefits Claimant was receiving were due to his disability, rather than his age.

Workmen's Comp. Appeal Bd. (Massey Buick, Inc.), 614 A.2d 779, 780 (Pa. Cmwlth. 1992).

In the present case, the WCJ found that, based on the evidence as a whole, there was a worsening of Claimant's work-related injury as of December 21, 2006, resulting in his total disability from any type of work. R.R. at 31a. Specifically, Dr. Carey testified unequivocally that Claimant's inability to perform any type of work was related to his 1996 work injury. R.R. at 83a. The WCJ also found that Employer's medical expert agreed that Claimant was totally disabled from any type of work due to an underlying back condition. R.R. at 31a. Finally, both Claimant and Dr. Carey testified that Claimant's pain medications had been increased due to a worsening in his condition. R.R. at 77a-79a, 95a-97a.

> Substantial evidence is such relevant evidence as a reasonable person might accept as adequate to support a conclusion. In performing a substantial evidence analysis, this court must view the evidence in a light most favorable to the party who prevailed before the factfinder. . . . Furthermore, in a substantial evidence analysis where both parties present evidence, it does not matter that there is evidence in the record which supports a factual finding contrary to that made by the WCJ, rather, the pertinent inquiry is whether there is any evidence which supports the WCJ's factual finding. It is solely for the WCJ, as the factfinder, to assess credibility and to resolve conflicts in the evidence. . . . As such, the WCJ may reject the testimony of any witness in whole or in part, even if that testimony is uncontradicted.

Hoffmaster v. Workers' Comp. Appeal Bd. (Senco Prods., Inc.), 721 A.2d 1152, 1155-56 (Pa. Cmwlth. 1998) (citations omitted). Based on a review of the record here, there is substantial evidence to support the WCJ's findings and conclusions, as well as the Board's decision to affirm the WCJ's order.

Based on the reasons stated above, we affirm the order of the Board.

_____

JOHNNY J. BUTLER, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Boscov's Department Stores, Petitioner	:	
v.	:	
Workers' Compensation Appeal Board (Basham), Respondent	:	No. 1699 C.D. 2009

O R D E R

AND NOW, this 16th day of February, 2010, the July 30, 2009 order of the Workers' Compensation Appeal Board is affirmed.

JOHNNY J. BUTLER, Judge