IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Charles O'Neill, Petitioner	:	
v.	:	No. 2094 C.D. 2007
Workers' Compensation Appeal Board (City of Philadelphia), Respondent	:	Submitted: February 22, 2008

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY FILED: April 15, 2008

Charles O'Neill (Claimant) petitions for review of the order of the Workers' Compensation Appeal Board (Board) that reversed the decision of a workers' compensation judge (WCJ) granting his petition to modify/reinstate compensation benefits pursuant to the provisions of the Pennsylvania Workers' Compensation Act (Act).[1] We affirm.

Claimant was employed as a firefighter by the City of Philadelphia (Employer). Claimant suffered trauma to his neck in 1973 while fighting a fire in the course and scope of his employment. As of July 1, 1988, Claimant was rendered totally disabled from performing the duties of his job due to work-related

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

injuries of chronic cervical sprain and strain, cervical spondylosis and left brachial neuralgia. On April 24, 1992, a WCJ issued a decision disposing of Claimant's claim petition, awarding Claimant total disability benefits in the amount of $377.00 per week.

On January 22, 1997, Employer filed a petition to modify Claimant's total disability benefits to partial disability benefits based on his failure to pursue in good faith a suitable job to which he was referred by Employer in October of 1996. A WCJ granted Employer's modification petition, and the Board's affirmance of this decision was later affirmed by this Court.[2]

On June 20, 2005, Employer filed a petition to terminate Claimant's disability benefits on the basis that he had fully recovered from his work-related injuries and was capable of returning to work. A WCJ denied Employer's termination petition, and the Board's affirmance of that decision was likewise later affirmed by this Court.[3]

On February 27, 2006, Claimant filed the instant petition in which he sought to reinstate his partial disability benefits to total disability benefits. In the petition, Claimant alleged that his disability had increased to the point that he was now totally disabled and unable to work in any capacity due to his work-related injuries. On March 6, 2006, Employer filed an answer to the petition denying all of the material allegations raised therein. Hearings before a WCJ ensued.

In support of the petition, Claimant testified and presented the deposition testimony of Michael Rafferty, D.O., a physician board certified in

[2] See O'Neill v. Workers' Compensation Appeal Board (City of Philadelphia), (Pa. Cmwlth., No. 1903 C.D. 2004, filed March 1, 2005).

[3] See City of Philadelphia v. Workers' Compensation Appeal Board (O'Neill), (Pa. Cmwlth., No. 931 C.D. 2007, filed October 29, 2007).

family practice. In opposition to the petition, Employer presented the deposition testimony of William Spellman, M.D., a physician board certified in orthopedic surgery.

On February 14, 2007, the WCJ issued a decision in which she made the following relevant findings of fact:

> 5. The Judge notes that Claimant's Petition to Modify and Reinstate was filed within his 500 week eligibility period for partial disability benefits. Therefore, Claimant could prevail by showing that there was an increase in loss of earning power due to the disability, whether the medical condition has changed or not. *See Dillon v. WCAB (Greenwich Collieries)*, [536 Pa. 490, 640 A.2d 386 (1994)]; *Stanek v. WCAB (Greenwich Collieries)*, 701 A.2d 627 (Pa. Cmwlth. 1997)[, aff'd, 562 Pa. 411, 756 A.2d 661 (2000)]; *Volk v. WCAB (Consolidation Coal Co.)*, 647 A.2d 624 (Pa. Cmwlth. 1994).
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> 6. The Judge accepts the testimony of the Claimant as credible in its entirety. Claimant testified that his condition has worsened to the point that he is not able to work at all. He knows of no employment in which he is physically and vocationally qualified to perform, based on his neck injury. Claimant's testimony establishes that the deterioration of his physical condition has reduced his earning power to total disability.
>
> 7. The Judge accepts the testimony and opinions of the Claimant's medical expert [Dr. Rafferty] and finds such to be credible and persuasive. Dr. Rafferty opined that, as a result of his work-related injury, Claimant is not employable on an ongoing or regular basis; and, that would make him disabled from regular employment. He further testified that Claimant's use of pain medication and muscle spasm medication would interfere with any sedentary job in that they would reduce his mental function. This conclusion is supported by Claimant's testimony and Dr. Rafferty's clinical findings. Dr. Rafferty's testimony establishes that Claimant had an

> increase in wage loss as a result of his work related injury.

WCJ Decision at 4.

Based on the foregoing, the WCJ concluded that Claimant met his burden of proving that his disability had increased from partial disability to total disability. Id. at 5. As a result, the WCJ issued an order granting Claimant's petition, and reinstating his total disability benefits of $377.00 per week as of February 26, 2006. Id.

On March 7, 2007, Employer appealed the WCJ's decision to the Board. In the appeal, Employer alleged that the WCJ erred in granting Claimant's petition because: (1) there was no evidence that his condition had worsened from his condition at the time his disability benefits were modified; and (2) the WCJ applied the wrong burden of proof in disposing of Claimant's petition to reinstate his total disability benefits.

On October 19, 2007, the Board issued an opinion and order disposing of Employer's appeal. In the opinion, with respect to Employer's first allegation of error, the Board stated the following, in pertinent part:

> As argued by [Employer], Claimant never testified that his neck problems have worsened to the point that he is now not able to work at all. Thus, this finding is not supported. Furthermore, Dr. Rafferty testified that Claimant did not indicate to him that his condition had worsened subsequent to the modification of benefits in 1996. He testified only that Claimant's "use of the pain medications and/or muscle spasm relieving medications may certainly interfere with other sedentary jobs" which would likely make him disabled from regular employment. As noted, Claimant stated that Valium was his original medication prescribed for his neck injury 33 years ago. Since there was no evidence establishing that Claimant's condition had worsened subsequent to the modification of his benefits such that he could no longer

> perform the fire dispatcher position, … the Decision granting a reinstatement is not supported….

Board Opinion at 7.

With respect to Employer's second allegation of error, the Board stated the following, in pertinent part:

> Claimant argues that the burden espoused by the Court in [Dillon] is applicable and thus, he only needed to show that his disability recurred through no fault of his own. However, the facts in Dillon are inapposite. In Dillon, the claimant's benefits were modified based on a stipulation of the parties that there were jobs available of a light and sedentary nature that Dillon could perform given his physical limitations. However, he was subsequently able to establish that although he was able to perform sedentary work, that there was no work of this type available to him and as a result, the Court concluded that he was entitled to receive total disability benefits because his loss of earning capacity was due to a lack of available employment through no fault of his own.
>
> * * *
>
> As noted, the burden in Dillon was based on a modification as a result of a stipulation of the parties that the claimant could perform some type of sedentary work. It was not based on the claimant's failure to return to a job that was actually offered to him as in the instant case. Thus, we must reject Claimant's argument.

Id. at 7-8.

Based on the foregoing, the Board issued an order reversing the WCJ's decision granting Claimant's petition to reinstate total disability benefits. Id. at 9. Claimant then filed the instant petition for review.[4]

[4] This Court's scope of review is limited to determining whether there has been a violation of constitutional rights, errors of law committed, a violation of Board procedures, and *(Continued....)*

In this appeal, Claimant contends that the Board erred in reversing the WCJ's decision because the Board capriciously disregarded substantial competent evidence supporting her determination, and misapplied the substantial evidence analysis by substituting its own credibility determinations. We do not agree.

We initially note that where, as here, a prior suspension of disability benefits is based on a finding that a claimant has failed to pursue a job in good faith, in a reinstatement proceeding, the "claimant must prove a change in his condition such that he can no longer perform the job(s) offered to him which served as the basis for the earlier suspension." Williams v. Workers' Compensation Appeal Board (Hahnemann University Hospital), 834 A.2d 679, 684 (Pa. Cmwlth. 2003). "[I]n other words, Claimant had to establish that he was *more* disabled than he had been when he rejected the [suitable employment] at the time it was offered to him." Nabisco Brands, Inc. v. Workmen's Compensation Appeal Board (Almara), 706 A.2d 877, 880 (Pa. Cmwlth. 1998), petition for allowance of appeal denied, 558 Pa. 613, 736 A.2d 606 (1999) emphasis in original). [5]

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whether necessary findings of fact are supported by substantial evidence. Lehigh County Vo-Tech School v. Workmen's Compensation Appeal Board (Wolfe), 539 Pa. 322, 652 A.2d 797 (1995).

[5] See also Griffiths v. Workers' Compensation Appeal Board (Red Lobster), 760 A.2d 72, 76 (Pa. Cmwlth. 2000) ("[C]laimant's loss of earning power is not due to his disability, but due to his lack of good faith in pursuing work made available to him which was within his physical limitations. In order to receive a reinstatement of total disability benefits, **claimant must prove a change in his condition such that he could no longer perform the jobs previously offered to him.** [*Spinabelli v. Workmen's Compensation Appeal Board (Massey Buick, Inc.)*, 614 A.2d 779, 780 (Pa. Cmwlth. 1992), *petition for allowance of appeal denied*, 533 Pa. 654, 624 A.2d 112 (1993)] (emphasis added).").

In addition, in a workers' compensation proceeding, the WCJ is the ultimate finder of fact. Hayden v. Workmen's Compensation Appeal Board (Wheeling Pittsburgh Steel Corp.), 479 A.2d 631 (Pa. Cmwlth. 1984). As the fact finder, the WCJ is entitled to accept or reject the testimony of any witness, including a medical witness, in whole or in part. General Electric Co. v. Workmen's Compensation Appeal Board (Valsamaki), 593 A.2d 921 (Pa. Cmwlth.), petition for allowance of appeal denied, 529 Pa. 626, 600 A.2d 541 (1991). Thus, determinations as to witness credibility and evidentiary weight are within the exclusive province of the WCJ. Hayden.

Moreover, "substantial evidence" is such relevant evidence as a reasonable person might accept as adequate to support a conclusion. Waldameer Park, Inc. v. Workers' Compensation Appeal Board (Morrison), 819 A.2d 164 (Pa. Cmwlth. 2003); Hoffmaster v. Workers' Compensation Appeal Board (Senco Products, Inc.), 721 A.2d 1152 (Pa. Cmwlth. 1998). In performing a substantial evidence analysis, the evidence must be viewed in a light most favorable to the party who prevailed before the WCJ. Waldameer Park, Inc.; Hoffmaster. In a substantial evidence analysis where both parties present evidence, it is immaterial that there is evidence in the record supporting 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. Waldameer Park, Inc.; Hoffmaster.

In support of his petition in this case, Claimant testified and presented the deposition testimony of Dr. Rafferty. As noted above, in granting Claimant's petition, the WCJ found as fact that "Claimant testified that his condition has worsened to the point that he is not able to work at all. He knows of no employment in which he is physically and vocationally qualified to perform, based on his neck injury. Claimant's testimony establishes that the deterioration of his

physical condition has reduced his earning power to total disability." WCJ Decision at 3-4.

However, contrary to the WCJ's findings of fact, Claimant never testified that his condition had changed so that he was more disabled than he was at the time his benefits were modified based on his bad faith failure to follow through on Employer's referral of suitable employment. In fact, Claimant testified that his work-related injury has remained as disabling as it was when he stopped working in the 1980's. See N.T. 3/30/06[6] at 8-10, 11, 12-13, 15, 21, 22-23, 24-25. Thus,

[6] "N.T. 3/30/06" refers to the Claimant's testimony before the WCJ at a hearing on March 30, 2006. Specifically, Claimant testified in pertinent part, as follows:

> Q. And what is the condition of your neck today?
>
> A. Soreness and stiffness runs down my shoulders into my arm, my left arm and it cracks a lot and makes noise. It's like a sledge hammer hitting an anvil sometimes. And I have problems sleeping and turning. I have to watch myself when I turn my neck. I got to go real slow. I use a shower exercise for it and I take Percocets.
>
> Q. Who prescribes the Percocets?
>
> A. My family doctor.
>
> Q. Who's that?
>
> A. Dr. Michael Rafferty.
>
> Q. Do you take any other medication besides Percocet?
>
> A. Valium.
>
> Q. How often do you take Valium?
>
> A. Three or four times a week.
>
> Q. And who prescribes the Valium?
>
> A. Dr. Rafferty.
>
> Q. Why do you take the Valium?
>
> A. For my neck. It relaxes my neck sometimes and I take the Percocet.

(Continued....)

Q. How long have you had these problems with your neck?

A. Since the early ‘70s.

Q. That’s the 1970’s?

A. Yes.

Q. Have you had any employment or have you had any job or have you worked at all since you left employment with [Employer]?

A. No.

Q. Do you know of anything that you are physically and vocationally qualified to do based on your neck injury?

A. No.

Q. If such work were to become available, would you be willing to give it a try providing that it was approved by your physician?

A. Yes.

Q. In addition to Dr. Rafferty have you seen any other doctors for your neck?

A. Dr. Desmond.

Q. Why did you see Dr. Desmond?

A. I had problems with my shoulder and my neck and I went to see him.

* * *

Q. Mr. O’Neill, in your opinion have you totally recovered from your neck injury?

A. No.

* * *

Q. Now, the periods that you were talking about when you went back to work and you went off work, were they during the 1970s and 1980s?

A. When I was working?

Q. Yes.

A. Yes, the 70s and 80s.

(Continued....)

Q. Did you last work in 1988?

A. That is correct.

Q. And you have not worked since then?

A. That's correct.

* * *

Q. [T]he neck injury that you sustained occurred approximately 33 years ago; is that correct?

A. Yes, yes.

Q. Do you currently have any other condition that keeps you from working or is the only reason your testimony that you're not currently working because of your neck?

A. That's correct.

Q. That is the only reason you're not working?

A. Correct.

* * *

Q. Dr. Desmond you saw him on one occasion, July 29, 2005 for your neck; is that right?

A. I seen [sic] him more.

Q. For your neck?

A. Yes, yes – no. One time.

Q. One time for the neck?

A. Yes.

Q. And you told him your neck is basically unchanged and you're seeing him because you need to be evaluated for disability. Would that be fair?

A. Yes.

* * *

Q. Now, when is the last time you saw Dr. Rafferty?

A. About three or four months ago –

Q. Let me finish.

– for your neck injury.

(Continued....)

there is not substantial evidence in the record to support the WCJ's findings of fact in this regard.

With respect to Dr. Rafferty's testimony, as noted above, the WCJ found as fact that "Dr. Rafferty opined that, as a result of his work-related injury, Claimant is not employable on an ongoing or regular basis; and, that would make

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> A. I see him every three or four months. And the last time I guess was the last time I was there, three or four months. I got a prescription refill.
>
> Q. And is that the Valium and Percocet?
>
> A. Yes.
>
> Q. And it was a little confusing. You get the Valium for your neck?
>
> A. Yes. That was my original medication 33 years ago.
>
> * * *
>
> Q. [H]ave you worked for wages since you left your employment with the city?
>
> A. No.
>
> Q. Have you looked for any work since you stopped working for the city?
>
> A. Yes.
>
> Q. When did you look for work and where did you look for work?
>
> A. It was about 8 or 10 times that I was suggested to go to different places. The list is with – I believe my attorney has it and it's different companies that I went to.
>
> Q. When? Recently in the –
>
> A. It was in the 90s.
>
> Q. Other than seeing Dr. Rafferty every three or four months to get your prescriptions, do you get anything else other than treatment for your neck?
>
> A. No.

him disabled from regular employment. He further testified that Claimant's use of pain medication and muscle spasm medication would interfere with any sedentary job in that they would reduce his mental function…. Dr. Rafferty's testimony establishes that Claimant had an increase in wage loss as a result of his work related injury." WCJ Decision at 4.

Again, contrary to the WCJ's findings of fact, Dr. Rafferty's testimony does not establish that Claimant's condition had changed so that his disability had increased since the time that his benefits were modified based on his bad faith failure to follow through on Employer's referral of suitable employment. Rather, Dr. Rafferty clearly testified that his medical opinion that Claimant was fully disabled was based on a history that Claimant's work-related injuries have remained consistently disabling for over twenty years. See N.T. 6/1/06[7] at 11-12,

[7] "N.T. 6/1/06" refers to the transcript of the deposition testimony of Dr. Rafferty taken on June 1, 2006. Specifically, Dr. Rafferty testified, in pertinent part, as follows:

> Q. [W]hen did he become your patient?
>
> A. Mr. O'Neill first presented to the office February 23, 2000.
>
> Q. And did you take a history from him at that time?
>
> A. Yes, I did.
>
> Q. What was that history?
>
> A. The patient was coming to the office for follow-up of his hypertension. He also had mentioned a few skin lesions to be looked at. And reported a history of chronic neck problems secondary to an explosion at a fire in the 1970's for which he took occasional valium.
>
> * * *
>
> Q. Turning more toward the present. When did you most recently see Charles O'Neill in your office?
>
> A. April 18th of this year.
>
> Q. At that time did you do a physical examination of his neck?

(Continued....)

A. Yes. I did.

Q. What were your findings?

A. He had some mild decreased range of motion of the cervical spine in all planes of motion. He had some mild spasm and tenderness of the left more so than the right trapezius muscles. I did not note any hand or arm weakness. He had normal pulses to the arms on each side. There was no Tinel's or Phalen's sign or thenar wasting that would be consistent with carpal tunnel syndrome. And the reflexes to both upper extremities were normal.

Q. And did you arrive at a diagnosis with regard to Charles O'Neill's neck at this time, which I think you said was April 18?

A. April 18, correct.

Q. 2006?

A. Yes.

Q. What was the diagnosis?

A. The diagnosis at this time was that of cervical spondylosis, left brachial neuralgia and chronic cervical sprain and strain; and that was I'll say mostly based on the patient's history to that point. And I noted that his exam of that day was certainly consistent with that history and those diagnoses.

* * *

Q. Dr. Rafferty, based on the history you took from Charles O'Neill and based on your treatment of him as his treating physician, and based on your examination of April 18, 2006, of Charles O'Neill's neck and based on your diagnosis, do you have an opinion to a reasonable degree of medical certainty as to whether, with regard to Charles O'Neill's acknowledged work-related injury to his neck, he is physically capable of any employment at all as of the date you most recently saw him, April 18, 2006? Do you have an opinion?

A. In that the patient has had 20-some years of symptoms that have been relatively unchanged, and has had documented past cervical spondylosis and brachial neuralgia as the cause, I would say that he is going to likely continue to have chronic pain that would prevent most active jobs. And his use of the pain

(Continued....)

14-16, 17-18, 24-25. Thus, there is not substantial evidence in the record to support the WCJ's findings of fact in this regard.

In short, contrary to Claimant's assertions, the Board did not capriciously disregard substantial competent evidence supporting the WCJ's determination, and did not misapply the substantial evidence analysis by substituting its own credibility determinations for those of the WCJ. Rather, the Board properly found that the WCJ's critical findings of fact were not supported by substantial evidence in the certified record, and correctly reversed her decision granting Claimant's reinstatement petition on this basis.[8]

> medications and/or muscle spasm relieving medications may certainly interfere with other sedentary jobs in that they could decrease his mental function while he would need take those medicines. So I would say that he would not be employable for most things on an ongoing or regular basis, and that would make him I'll say disabled from regular employment.
>
> * * *
>
> Q. And the diagnosis that you told us about during your direct testimony, it indicates in this note it's "by history"; is that correct?
>
> A Correct.
>
> Q. You did not review any diagnostic studies in conjunction with this April 18, '0[6], evaluation; is that correct?
>
> A. Correct….
>
> Q. Now, you indicate in here that the claimant has had symptoms 20-plus years without significant change. Yet during the four to six times that you saw him between 2000 and present, I don't see any notation of cervical problems other than the fact that he has a history of neck pain; is that correct?
>
> A. Correct.

[8] Moreover, because Dr. Rafferty's testimony was based on facts that are at variance with the established facts of this case, it is not competent to support the reinstatement of Claimant's benefits. See, e.g., Williams, 834 A.2d at 684 ("Here, contrary to the finding in WCJ Olin's 1991 decision, Dr. Kambin indicated his belief that Claimant could have never performed the

(Continued....)

Accordingly, the order of the Board is affirmed.

JAMES R. KELLEY, Senior Judge

instructor position at C.H.I. Institute. Indeed, Dr. Kambin testified that Claimant could not perform any type of gainful employment *at that time*. It is well-settled that where an expert's opinion is based upon an assumption which is contrary to the established facts of record, that opinion is worthless. *Noverati v. Workmen's Appeal Board (Newtown Squire Inn)*, 686 A.2d 455 (Pa. Cmwlth. 1996). Consequently, because Dr. Kambin's opinion is contrary to facts as found by WCJ Olin, it is not competent to support the requisite finding that Claimant could *no longer* perform the instructor position at C.H.I. Institute.") (emphasis in original).

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Charles O'Neill, Petitioner	:	
v.	:	No. 2094 C.D. 2007
Workers' Compensation Appeal Board (City of Philadelphia), Respondent	:	

O R D E R

AND NOW, this 15th day of April, 2008, the order of the Workers' Compensation Appeal Board, dated October 19, 2007 at No. A07-0520, is AFFIRMED.

JAMES R. KELLEY, Senior Judge