IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Bruce Bowman, Petitioner	:	
v.	:	No. 2405 C.D. 2010
Workers' Compensation Appeal Board (City of Philadelphia), Respondent	:	
City of Philadelphia, Petitioner	:	
	:	No. 2501 C.D. 2010
v.	:	Submitted: May 13, 2011
Workers' Compensation Appeal Board (Bowman), Respondent	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE BROBSON **FILED:** August 31, 2011

Petitioner Bruce Bowman (Claimant) petitions for review of an order of the Workers' Compensation Appeal Board (Board), which reversed the decision of a Workers' Compensation Judge (WCJ) granting Claimant's petition to reinstate workers' compensation benefits. The City of Philadelphia (Employer) filed a precautionary cross-petition for review, which is also before the Court. These matters have been consolidated for our disposition. For the reasons that follow, we affirm the Board.

In 1996, a WCJ granted Claimant's claim petition, having determined that Claimant had sustained a work-related injury in the nature of heart and lung disease as a consequence of his twenty-nine year employment as a firefighter. This WCJ awarded Claimant total disability benefits from November 17, 1992, through December 31, 1992, and partial disability benefits thereafter. In January 2000, WCJ Michael Hetrick granted Employer's modification petition, thereby reducing Claimant's partial disability benefits, effective March 10, 1997, based upon the fact that Claimant had not made a good faith effort to accept a fire dispatcher job deemed suitable to his capabilities.

In July 2002, Claimant filed a petition to reinstate temporary total disability benefits for the period from January 1, 1995 through March 10, 1997. Claimant's 500 weeks of partial disability benefits[1] expired on August 2, 2002. On September 26, 2002, Claimant amended his reinstatement petition to include a request for reinstatement of total disability benefits as of September 1, 2002. By decision and order dated April 30, 2004, WCJ David Slom granted Claimant's petition to reinstate total disability benefits, effective September 1, 2002. The Board affirmed the WCJ's decision. On appeal to this Court, we reversed, concluding that Claimant was not entitled to a presumption of total disability because he did not establish that he had experienced a change in his condition such that he could no longer perform the suitable job that he had failed to accept (the fire dispatcher position).[2] Claimant continued to receive total disability compensation benefits throughout that appeal period.

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[1] Section 306(b)(1) of the Workers' Compensation Act (the Act), Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. § 512(1), limits a claimant's entitlement to partial disability benefits to 500 weeks.

[2] *City of Philadelphia v. Workers' Compensation Appeal Bd. (Bowman)*, Pa. Cmwlth. No. 590 C.D. 2005 (filed August 18, 2005).

On March 31, 2006, Claimant filed the reinstatement petition that is the subject of this appeal. In his reinstatement petition, he asserts that, as of January 1, 2005, he again began to have a decrease in earning power as a result of his work injury. During the course of the WCJ's hearings, claimant submitted the deposition testimony of his treating physician, Dr. Gary D. Yeoman, D.O. Dr. Yeoman testified that Claimant "was still complaining of fatigue." (Reproduced Record (R.R.) at 209a.) Dr. Yeoman testified that Claimant's thyroid function had gotten worse, but that he changed Claimant's thyroid "supplementation" to correct that condition and that he indicated to Claimant that the change might improve his chronic fatigue. (*Id*.)

Dr. Yeoman stated that Claimant had been taking a medication called Amiodarone since 1995. (R.R. at 210a.) Dr. Yeoman explained that the medication was necessary to treat Claimant's atrial fibrillation,[3] but that the medication is a poisonous substance that can affect other organs such as the thyroid and liver. (R.R. at 211a–212a.) Dr. Yeoman also testified that the liver and thyroid can have an effect on a person's energy level. (R.R. at 212a.) The thyroid, Dr. Yeoman testified, is responsible for metabolic rates and "[t]he liver is the main source of energy generation in the body." (R.R. at 212a–213a.) Dr. Yeoman indicated that Claimant's problems with his liver and thyroid were consistent with his complaints of fatigue and shortness of breath, and that those conditions made him "think over the years that these are some of the reasons why he's so tired." (R.R. at 213a.) Dr. Yeoman also related information indicating that Claimant had long-term high blood pressure. (R.R. at 217a.)

[3] Dr. Yeoman described this condition as "an irregularity that occurs intermittently in the top chambers of the heart, a[n] atrial, the atrial ventricles." (R.R. at 218a.)

Dr. Yeoman confirmed testimony he gave in 2003 for the purpose of Claimant's previous reinstatement petition to the effect that he believed that the treatment of Claimant's atrial fibrillation with Amiodarone caused his fatigue and shortness of breath. (R.R. at 219a.) Thus, Dr. Yeoman's testimony connects Claimant's shortness of breath and fatigue to a treatment for his work-related condition. Furthermore, as a result of the shortness of breath and fatigue, Dr. Yeoman opined that Claimant "could not function in any capacity because of that, and he can't function in any physical capacity because of that." (R.R. at 220a–221a.) Dr. Yeoman did not, however, testify that Claimant's condition, specifically his shortness of breath or fatigue, had become worse following the resolution of Claimant's previous reinstatement petition.

The WCJ granted Claimant's petition, awarding total disability benefits, and Employer appealed to the Board. The Board addressed three issues Employer raised: (1) whether Section 413(a) of the Act, 77 P.S. § 771, barred the granting of Claimant's reinstatement petition because that provision requires a claimant to file a reinstatement petition within three years from the last payment he received; (2) whether the doctrine of collateral estoppel (or issue preclusion) barred the WCJ from considering the issues raised in Claimant's reinstatement petition; and (3) whether the WCJ erred in concluding that Claimant satisfied his burden to prove that his condition had become worse such that work is no longer available to him. The Board rejected Employer's first two arguments, but agreed with Employer that Claimant had failed to satisfy his burden under the Act.

On appeal to this Court, Claimant argues that the Board erred in concluding that he failed to satisfy his burden, and Employer, as a precautionary

measure, argues that the Board erred in rejecting its statute of limitations and issue preclusion arguments.[4]

In a reinstatement petition matter such as this one, where a claimant seeks reinstatement of benefits after having already received 500 weeks of partial disability benefits, a claimant must submit medical testimony establishing (1) that his condition has worsened, and (2) that he has no ability to generate earnings. *Stanek v. Workers' Comp. Appeal Bd. (Greenwich Colleries)*, 562 Pa. 411, 756 A.2d 661 (2000) (*Stanek*).[5]

In *Stanek*, the Supreme Court stated as follows:

> Where . . . [a] claimant has not engaged in the light-duty work which was found to be available and consistent with his physical limitations in connection with the award of compensation for partial disability, his burden will be greater . . . . [T]he claimant will not be afforded the benefit of the presumption of total disability from an inability to perform an existing light-duty job. Rather, the claimant is in the position of having to prove a negative (i.e., that there are *no* jobs available in which he could work consistent with his physical limitations). In this setting, medical testimony which concedes that a claimant retains the physical ability to accomplish light duty work, with no vocational or other form of

[4] Our standard of review in a workers' compensation appeal is limited to determining whether an error of law was committed, whether constitutional rights were violated, or whether necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. § 704. We acknowledge our Supreme Court's decision in *Leon E. Wintermyer, Inc. v. Workers' Compensation Appeal Board (Marlowe)*, 571 Pa. 189, 812 A.2d 478 (2002), wherein the Court held that "review for capricious disregard of material, competent evidence is an appropriate component of appellate consideration in every case in which such question is properly brought before the court." *Wintermyer*, 571 Pa. at 203, 812 A.2d at 487.

[5] Our Supreme Court in *Stanek* observed that a claimant who has passed the 500-week partial benefit limit "must, in the first instance, establish that he has no ability to generate earnings (or a 'zero earning capacity'), since partial disability benefits are no longer available to that claimant." *Stanek*, 562 Pa. at 425, 756 A.2d at 668.

> assessment as to why such work is not available, will be deemed fatal to the claim.

562 Pa. at 426, 756 A.2d at 669.

More recently, in *Shannopin Mining Company v. Workers' Compensation Appeal Board (Sereg)*, 11 A.3d 623 (Pa. Cmwlth. 2011), this Court reviewed the findings of a workers' compensation judge who made determinations that a claimant in a post-500 week total disability modification petition had demonstrated that, because of his work-related injury, he was totally disabled from all gainful employment. Thus, the claimant in that case satisfied the onerous burden of establishing a negative—that, because of his work-related injury, there were "no jobs available in which he could work consistent with his physical limitations." *Stanek*, 562 Pa. at 426, 756 A.2d at 669.

Although testimony supporting a determination that a claimant has "zero earning capacity" would satisfy the requirement set forth in *Stanek* that a claimant demonstrate an inability to generate earnings, *Stanek* also imposes upon a claimant the requirement to offer expert medical testimony supporting a determination that the claimant's condition has become worse. The medical testimony a claimant submits must indicate that a claimant's comparative condition—between a previous evaluation when an offered job was deemed suitable and the time a claimant seeks reinstatement in the post-500 benefit week situation—has worsened. Our Supreme Court in *Stanek* explained the necessity for requiring testimony not only that a claimant has no earning capacity (in other words is totally disabled because he is not able to perform any work), but also that the claimant's condition has changed for the worse.[6]

[6] As the Supreme Court noted in *Stanek*, citing its earlier decision in *Stewart v. Workers' Compensation Appeal Board (Pa. Glass Sand/Silica)*, 562 Pa. 401, 756 A.2d 655 (2000), "a claim for total disability benefits asserted after the expiration of the period of eligibility for

The Supreme Court observed the necessity for such a stringent standard as follows:

> [J]ust as in cases where benefits have been terminated the claimant cannot relitigate the cessation of compensation under the guise of a petition for reinstatement, a post 500-week claim may not be used to overcome the effect of the statutory limit on eligibility for partial disability benefits. *See generally Diffenderfer* [*v. Workers' Compensation Appeal Board (Raybestos Manhatten, Inc.)*, 651 A.2d 1178, 1180 (Pa. Cmwlth. 1994), *appeal denied*, 540 Pa. 642, 659 A.2d 561 (1995)] ("if it were otherwise, partial disability benefits would continue *ad infinitum*, obliterating the finite nature of those benefits imposed under Section 306(b)").

Stanek, 562 Pa. at 424-25, 756 A.2d at 668 (citations omitted).

In this case, while Dr. Yeoman may have testified credibly regarding his opinion that Claimant was totally disabled, *i.e.*, not capable of performing any type of work, he did not offer any opinion on the question of whether Claimant's condition had worsened since the previous determination (affirmed by this Court) that Claimant was not entitled to a reinstatement of total disability benefits. Dr. Yeoman discussed the connection between the Amiodarone medication that Claimant takes to address his heart condition and the fatigue that Claimant experiences. Dr. Yeoman's testimony suggests that the fatigue and shortness of breath, induced by that medication, prevents Claimant from being able to perform any type of work. Dr. Yeoman, however, never testified that Claimant's fatigue

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partial disability benefits has attributes of both modification and reinstatement claims." *Stanek*, 562 Pa. at 417, 756 A.2d at 663 n.5. Similarly, the burden on an employer in a modification petition, *Consol Pa. Coal Co. – Enflow Fork Mine v. Workers' Compensation Appeal Board (Whitefield)*, 971 A.2d 526 (Pa. Cmwlth.), *appeal denied*, 601 Pa. 704, 973 A.2d 1007 (2009), and in a termination petition, *Lewis v. Workers' Compensation Appeal Board (Giles & Ransome, Inc.)*, 591 Pa. 490, 919 A.2d 922 (2007), requires some demonstration of a change in condition.

and shortness of breath was worse at the time he examined Claimant for purposes of the subject reinstatement petition compared to Claimant's earlier condition.[7]

Based upon the foregoing discussion, we conclude that Claimant did not satisfy his burden to demonstrate a worsening of his condition. Accordingly, we affirm the Board's order.[8]

P. KEVIN BROBSON, Judge

[7] Claimant argues that he testified credibly that he had a greater degree of fatigue at the time of his present reinstatement petition compared with a period five years earlier. Although that testimony may indicate that he believed his condition had become worse, his testimony is insufficient because he was required to submit medical opinion evidence concerning his claim that his condition had worsened. *See French v. Workers' Comp. Appeal Bd. (Foster Wheeler Energy Corp.)*, 745 A.2d 92, 94-95 (Pa. Cmwlth.), *appeal denied*, 563 Pa. 667, 759 A.2d 389 (2000).

[8] Because we affirm the Board's order, we need not address the issues Employer raises in its precautionary cross-petition for review. Furthermore, we dismiss Employer's cross-petition for review because Employer was not aggrieved by the Board's order and the Board's order granted the relief sought by Employer. *See* Pa. R.A.P. 501 and note to Pa. R.A.P. 511.

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O R D E R

AND NOW, this 31st day of August, 2011, the order of the Workers' Compensation Appeal Board is AFFIRMED. The cross-petition for review filed by the City of Philadelphia is dismissed.

P. KEVIN BROBSON, Judge