IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Ryan Geary, Petitioner	:	
v.	:	No. 372 C.D. 2010
	:	Submitted: September 3, 2010
Workers' Compensation Appeal Board (Northwestern Human Services), Respondent	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE LEAVITT FILED: December 15, 2010

Ryan Geary (Claimant) petitions for review of an adjudication of the Workers' Compensation Appeal Board (Board) modifying his total disability compensation to partial. In doing so, the Board affirmed the decision of the Workers' Compensation Judge (WCJ) that Northwestern Human Services (Employer) had proved that it offered Claimant a part-time job he was capable of performing. Finding no error, we affirm.

Claimant was employed as a youth service specialist at Northwestern Academy. On March 4, 2007, Claimant was struck in the head while restraining an unruly student and lost consciousness. Employer issued a Notice of Temporary Compensation Payable (NTCP) describing the injury as a concussion and paying total disability benefits. The NTCP subsequently converted to a Notice of Compensation Payable.

In September 2007, Claimant attended an independent medical examination (IME) with John B. Chawluk, M.D., who determined that Claimant was capable of returning to modified-duty work. As a result, Employer sent Claimant a Notice of Ability to Return to Work, offering Claimant a part-time job in Employer's front office answering telephones. Claimant did not attempt the job. Employer then filed a petition seeking a modification of benefits.[1]

A hearing was held before the WCJ. In support of its petition, Employer offered a copy of its September 18, 2007, communication with Claimant. The first item in this communication was Employer's letter, which stated, in relevant part, as follows:

> … Dr. Chawluk has determined that you are able to return to work at an alternative duty position effective September 11, 2007. I have enclosed a copy of that note. This position will provide for your (sic) two hours a day five days a week…. Please report to the Building Bridges Unit at NHS Academy on September 25, 2007 at 10:00 a.m. to 12:00 p.m…. Please contact me directly … if you have any problems.

Reproduced Record at 212a (R.R. ___). Attached to this job referral letter was Dr. Chawluk's "preliminary report of evaluation" in which he wrote:

> In my opinion [Claimant] should be able to start at 2 hours/day in sedentary work with no client contact at this time.

[1] Claimant filed a review petition seeking to expand the description of his work injury. The parties resolved that issue by stipulating that the work injury included "post-concussion syndrome and depression NEC." Reproduced Record at 281a. The WCJ issued an order approving the stipulation. Claimant also filed a review petition to amend his average weekly wage. The WCJ denied that petition and it is not at issue on appeal.

R.R. 215a. Also attached was Dr. Chawluk's physical capacities check list indicating, *inter alia*, that Claimant could drive. Finally, Employer attached the following job description:

> Duties may include some and/or all of the following light duty jobs listed below.
>
> Phone Work (0-2 hours) While sitting answer phone calls.

R.R. 217a.

Employer presented the testimony of Kelly Leibig, assigned to supervise Claimant in the offered job. Leibig explained it was expected that Claimant would answer approximately five calls on a normal day and ten calls on a busy day. In this position, Claimant would have no direct contact with clients.

Employer presented the deposition testimony of Dr. Chawluk, a board certified neurologist who performed Claimant's IME on September 11, 2007. Claimant reported that he was experiencing ringing in the ears; dizziness; constant headaches; and personality changes in the nature of being easily agitated. Based on Claimant's history, a physical examination, and a review of medical records and radiographic diagnostic test results, Dr. Chawluk opined that Claimant could perform sedentary work starting gradually, *i.e.* starting two hours per day, in order to allow Claimant to adapt to his return to work. Because of Claimant's "behavioral issues and short-temperedness," Dr. Chawluk restricted Claimant from direct client contact. R.R. 236a. Dr. Chawluk approved the telephone job as meeting Claimant's restrictions.

Claimant testified on his own behalf. He acknowledged receiving both the Notice of Ability to Return to Work as well as the job referral letter with the job description. Claimant did not believe he could work two hours per day because, "I'm

easily tired and I don't know if I would be able to put in those kind of hours that quickly." R.R. 97a. Claimant also testified that he had no way to get to work because he is not able to drive; when he is in a car, he has trouble concentrating and things seem as though they are moving at an extremely fast pace. Claimant admitted that his physicians have not required him to surrender his driver's license.

Claimant presented the deposition testimony of Michael S. Driscoll, Ph.D., who has an advanced degree in neuropsychology. Dr. Driscoll began treating Claimant in August 2007. Claimant's test results were normal; stated otherwise, Claimant's complaints are subjective. Dr. Driscoll forbade Claimant from returning to his pre-injury job because it could expose Claimant to another head injury in the event another violent client incident occurred. Dr. Driscoll testified that he would approve the telephone job for Claimant so long as he was not required to help restrain a student should a crisis develop. However, Dr. Driscoll believed that Claimant would miss a significant number of days because his ability to function after the work injury has been inconsistent. Dr. Driscoll also testified that based on Claimant's subjective complaints, Claimant could not safely drive to work.

After reviewing the evidence, the WCJ accepted as credible the testimony of Dr. Chawluk and Kelly Leibig over that of Dr. Driscoll and Claimant.[2] The WCJ found that Claimant could drive to and from work and that he was able to perform the telephone job two hours per day. The WCJ concluded that Employer made a good faith offer of employment. The WCJ further concluded that Claimant did not follow up on the referral in good faith, noting that Claimant never contacted

[2] The WCJ has complete authority over questions of credibility, conflicting medical evidence and evidentiary weight. *Sherrod v. Workmen's Compensation Appeal Board (Thoroughgood, Inc.)*, 666 A.2d 383, 385 (Pa. Cmwlth. 1995).

Employer about the job offer and did not discuss the job with any physician. Accordingly, the WCJ modified Claimant's benefits from total to partial as of September 25, 2007, based on the compensation available from Employer's offered job. Claimant appealed, and the Board affirmed. Claimant then petitioned for this Court's review.[3]

On appeal, Claimant argues that his benefits should not have been modified for two reasons. First, Claimant argues that Employer's job referral failed to comply with the requirements of *Kachinski v. Workmen's Compensation Appeal Board (Vepco Construction Company)*, 516 Pa. 240, 532 A.2d 374 (1987). Second, Claimant argues that the WCJ erred in concluding that Claimant did not act in good faith upon receiving the job offer.

An employer wishing to modify a claimant's disability benefits to partial disability may do so, *inter alia*, by establishing under Section 306(b)(2) of the Workers' Compensation Act[4] (Act) that the claimant has "earning power," which "shall be determined by the work the employe is capable of performing…." 77 P.S. §512(2). Section 306(b)(2) of the Act mandates that

> [i]f the employer has a specific job vacancy the employe is capable of performing, the employer shall offer such job to the employe.

77 P.S. §512(2).

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[3] This Court's review of an order of the Board is limited to determining whether the necessary findings of fact are supported by substantial evidence, whether Board procedures were violated, whether constitutional rights were violated or an error of law was committed. *City of Philadelphia v. Workers' Compensation Appeal Board (Brown)*, 830 A.2d 649, 653 n.2 (Pa. Cmwlth. 2003).

[4] Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. §512(2).

The requirements of *Kachinski* apply to specific jobs the employer is required to offer. *South Hills Health System v. Workers' Compensation Appeal Board (Kiefer)*, 806 A.2d 962, 967 (Pa. Cmwlth. 2002). Under *Kachinski*, the employer must produce medical evidence of a change in the claimant's physical condition and a referral to an available job that fits within the occupational category (*e.g.*, light, sedentary, etc.) for which the claimant has been cleared. *Kachinski*, 516 Pa. at 252, 532 A.2d at 380. A job referral must provide the claimant with information about the job that is sufficiently detailed to allow the claimant to determine whether the job falls within his capabilities. *Eidem v. Workers' Compensation Appeal Board (Gnaden-Huetten Memorial Hospital)*, 560 Pa. 439, 445, 746 A.2d 101, 105 (2000). This means that the employer must give a basic description of the job, but

> [i]t is clear that the employer need not specify every aspect of the job in question, since in *Kachinski* this court explicitly rejected such a hypertechnical approach to reviewing these referrals. Rather, the referral should be reviewed in a common sense manner in order to determine whether a suitable position has been made available to the claimant.

Id. at 445, 746 A.2d at 104 (citation omitted).

Claimant argues that Employer's job referral failed to describe the proffered job in sufficient detail to allow Claimant to make an informed decision whether to return to work. Claimant contends that Employer's September 18, 2007, mailing to him did not specify the actual job duties involved in "phone work," such as how many calls he would answer in a given day. It did not state whether he would have other duties such as transferring calls, delivering messages or filing.

Employer responds that Claimant waived this issue because he failed to raise it in his appeal to the Board. We agree with Employer.

It is axiomatic that an issue not specifically raised before the Board is waived. *Jonathan Sheppard Stables v. Workers' Compensation Appeal Board (Wyatt)*, 739 A.2d 1084, 1089 (Pa. Cmwlth. 1999). Claimant's stated reason for not attempting the job was that he thought the hours would be too much for him and he could not drive. He never claimed that the referral was insufficient to apprise him of the job duties.[5] Thus, the Board never addressed that issue. Because Claimant did not raise the issue before the Board, it is waived.

Further, even if Claimant had properly preserved this issue, his argument would fail. The job referral letter and job description received by Claimant specified that he would "answer phone calls" "[w]hile sitting," for two hours a day, five days a week. R.R. 212a, 217a. This is sufficiently detailed.

Claimant also argues that the WCJ erred in concluding that Claimant did not act in good faith to pursue the job. Under *Kachinski*, once the employer proves that it referred the claimant to an available job, the burden shifts to the claimant to prove that he made a good faith effort to pursue the job referral; if he does not, benefits will be modified. *Kachinski*, 516 Pa. at 252, 532 A.2d at 380.

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[5] Claimant suggests in his brief that Employer displayed bad faith in attempting to return him to work because the job offer was "a thinly veiled attempt to avoid payment of workers' compensation benefits" and Employer did not send the job referral to Dr. Driscoll and work with him to determine what work Claimant was capable of performing. Claimant's brief at 9. Again, Claimant did not specifically raise this issue before the Board. At any rate, the argument is without merit. Employer offered Claimant an actual job in good faith. Further, there is no requirement that an employer work with the claimant's treating physician. If an employer's physician gives medical clearance to work, the claimant is free to rebut that opinion with the testimony of his treating physician; it is then up to the WCJ to determine which expert is more credible. *Williams v. Workers' Compensation Appeal Board (USX Corporation-Fairless Works)*, 862 A.2d 137, 142-143 (Pa. Cmwlth. 2004). Finally, Claimant claims that Employer acted in bad faith by pursuing the modification petition even though Dr. Chawluk changed Claimant's restrictions three days after the job referral letter. It is unclear what Claimant means by this as he did not develop this argument and cited nothing in the record to support this assertion.

Claimant points out that when he received the job offer in September 2007, his doctor had not yet released him to return to work in any capacity. This fact is of no moment. Dr. Driscoll restricted Claimant from returning to his pre-injury job, but not from all jobs. In fact, in an August 2007 report, Dr. Driscoll recommended that Claimant "seek employment in another work setting where the risk of future injury is remarkably less." R.R. 202a. Employer did not offer Claimant his pre-injury job; it offered him a telephone job for which he was cleared by Dr. Chawluk. Upon receiving the job offer, Claimant did not consult with his doctor. Rather, he did nothing at all. He relied on his subjective belief that he could not do the job, which did not meet his burden of proving a good faith response as required by *Kachinski*.

Accordingly, the order of the Board is affirmed.

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MARY HANNAH LEAVITT, Judge

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Workers' Compensation Appeal Board (Northwestern Human Services), Respondent	:	

ORDER

AND NOW, this 15th day of December, 2010, the order of the Workers' Compensation Appeal Board dated February 16, 2010, in the above captioned matter is hereby AFFIRMED.

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MARY HANNAH LEAVITT, Judge