

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

John Petrovich,	:
Petitioner	:
	:
v.	:
	:
Workers' Compensation Appeal	:
Board (Consol PA Coal Company),	: No. 538 C.D. 2008
Respondent	: Submitted: October 10, 2008

BEFORE: HONORABLE DAN PELLEGRINI, Judge  
          HONORABLE ROCHELLE S. FRIEDMAN, Judge  
          HONORABLE JOHNNY J. BUTLER, Judge

**OPINION NOT REPORTED**

MEMORANDUM OPINION BY  
JUDGE BUTLER

FILED: December 8, 2008

John Petrovich (Claimant) petitions for review of the February 28, 2008 order of the Workers' Compensation Appeal Board (Board) reversing the April 17, 2007 order of the Workers' Compensation Judge (WCJ) which granted Claimant's claim petition. Claimant argues that the WCJ's decision that he met his burden of proof is supported by substantial evidence. We disagree.

Claimant injured his low back on May 1, 1991 while working as a mine foreman for Consol PA Coal Company (Employer). He reinjured his back in a work-related vehicle accident on July 30, 1992. Claimant went through five surgeries on his back between May 1, 1991 and October 31, 2005. Claimant received total disability benefits after his July 30, 1992 injury, but those benefits

were modified to partial disability benefits in October 1996 because the WCJ found that there was available work that Claimant was physically capable of doing. Claimant received 500 weeks of partial disability benefits through November 12, 2004.<sup>1</sup> During the time Claimant was receiving disability, he worked as a part-time golf coach for the local community college. He resigned from that position in February 1999, and has not worked since then.

Claimant filed for reinstatement of benefits in December 2005 alleging his condition had worsened. Claimant offered the testimony of Alexander Kandabarow, M.D., a board-certified physician in orthopedic surgery, and Employer offered the testimony of Paul Lieber, M.D., a board-certified physician in rehabilitation and physical medicine. The WCJ concluded that Claimant had met his burden of proof, noting that Claimant underwent surgery in October 2005 and could not work due to his pain and use of medication, and reinstated Claimant's total disability benefits. Employer appealed, and the Board reversed the WCJ's order, finding that Claimant presented insufficient evidence to prove total disability from the work force. Claimant appealed.<sup>2</sup>

In *Stanek v. Workers' Comp. Appeal Bd. (Greenwich Collieries)*, 562 Pa. 411, 756 A.2d 661 (2000), the Pennsylvania Supreme Court established the

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<sup>1</sup> Partial disability benefits are paid to a claimant "during the period of such partial disability . . . but for not more than five hundred weeks." Section 306(b)(1) of the Workers' Compensation Act (Act), Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. § 512(1).

<sup>2</sup> 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).

burden of proof that a claimant must meet in order for total disability benefits to be reinstated after exhausting partial disability benefits.<sup>3</sup> The Court provided:

where . . . the claimant has ceased work during the period of eligibility for partial disability benefits, is presently physically capable of work of some kind, and fails to offer credible evidence indicating why such work is not available to him, benefits cannot be afforded . . . .

*Id.* at 426-27, 756 A.2d at 669. Further, “a post-500-week claimant must establish his total disability by precise and credible evidence of a more definite and specific nature than that required to obtain compensation initially or modification within the 500-week period[,]” and he “must . . . establish that he has no ability to generate earnings (or a ‘zero earning capacity’) . . . .” *Id.* at 425, 756 A.2d at 668.

In the present case, Claimant’s benefits were modified to partial in 1995. WCJ Order, October 29, 1996 (10/29/96 WCJ Order) at 8; Reproduced Record (R.R.) at 231. He worked as a part-time golf instructor until he resigned in February 1999. WCJ Order, April 17, 2007 (4/17/07 WCJ Order) at 2; R.R. at 11. Claimant’s partial disability benefits expired in November 2004. Notes of Testimony, February 7, 2006 (2/7/06 N.T.) at 7; R.R. at 46.

The Board based its decision to reverse the WCJ’s decision granting benefits on Dr. Kandabarow’s failure to unequivocally state “that Claimant could not be gainfully employed or that the extent of Claimant’s ability to work would be so de minimus to constitute total disability.” Board Opinion (Bd. Op.) at 8; R.R. at 34. Claimant’s burden was to show that “he . . . has no earning capacity since partial disability benefits have been exhausted and that his . . . medical condition has worsened.” *Keystone Coal Mining Corp. v. Workers’ Comp. Appeal Bd.*

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<sup>3</sup> A claimant in this situation is often referred to as a “post-500-week claimant.”

(*Fink*), 896 A.2d 691, 696 n.2 (Pa. Cmwlth. 2006). Claimant failed to meet his burden.

The evidence did show that Claimant's condition had worsened, and Dr. Kandabarow opined that Claimant is not capable of performing any type of work on a regular basis due to ongoing pain and the strong medication he takes. 4/17/07 WCJ Order at 2; R.R. at 11. However, Dr. Lieber testified that Claimant's condition had only worsened to the extent that Claimant was limited to sedentary duties and light duty work. 4/17/07 WCJ Order at 4; R.R. at 13. On cross-examination, Dr. Kandabarow agreed that it was possible that Claimant perform part-time sedentary work:

Q. In your mind, would he be able to at this point in time be able to perform work on a part time, if not a full time basis?

A. It is possible.

Q. It would have to be something in a sedentary capacity which involved limited lifting, standing and walking and that sort of thing?

A. Yes. Sedentary at most. Practically speaking, I don't think that he could do that on a full time basis.

Kandabarow Notes of Deposition Testimony, August 22, 2006 (Kandabarow N.T.) at 18; R.R. at 100.

Evidence showing that a claimant was physically able to perform sedentary work does not entitle him to total disability compensation, although he may be entitled to receive partial disability benefits at the total disability rate. *See Keystone*; and *Burton v. Workers' Comp. Appeal Bd. (Hershey Automatic)*, 711 A.2d 596 (Pa. Cmwlth. 1998). Thus, while both medical experts agreed that

Claimant's condition had worsened, both also agreed that Claimant can perform some sedentary work, meaning he still has earning potential.

Since Claimant is physically capable of work of some kind, his burden under the *Stanek* standard was to show that there was no sedentary work available to him. Claimant presented no evidence as to the availability of sedentary work that Claimant could perform within his limitations. Therefore, Claimant failed to meet his burden of proof, and the Board's February 28, 2008 order is affirmed.

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JOHNNY J. BUTLER, Judge

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**ORDER**

AND NOW, this 8<sup>th</sup> day of December, 2008, the February 28, 2008  
order of the Workers' Compensation Appeal Board is AFFIRMED.

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JOHNNY J. BUTLER, Judge