IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Steven Tarnoff,	:	
Petitioner	:	
	:	
v.	:	No. 559 C.D. 2008
	:	Submitted: September 12, 2008
Workers' Compensation Appeal	:	
Board (Active Transportation),	:	
Respondent	:	

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JOSEPH F. McCLOSKEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE PELLEGRINI FILED: October 9, 2008

Steven Tarnoff (Claimant) appeals from an order of the Workers' Compensation Appeal Board (Board) upholding the Workers' Compensation Judge's (WCJ) decision to grant Active Transportation's (Employer) suspension petition because he was no longer disabled due to his work-related injury.

On July 10, 2001, Claimant was injured in a motor vehicle accident while working for Employer as a truck driver. Employer issued a Notice of Compensation Payable (NCP) recognizing that Claimant sustained fractures to his left leg and left wrist because of that accident. In April 2002, the parties entered into a stipulated agreement, approved by the WCJ, stating that Claimant's weekly

compensation rate would be $644 based upon an average weekly wage of $1,237.43. In a July 2005 decision, the WCJ expanded the description of the work injury to include injuries to Claimant's left knee and shoulder. On February 14, 2006, Employer filed a suspension petition alleging that Claimant's present disability was no longer attributable to his work injuries, but rather to non-work-related medical conditions involving cardiovascular and renal issues.[1]

Before the WCJ, three medical experts testified; two for Employer and one for Claimant. All three medical experts agreed that Claimant had sufficiently recovered from his work-related injuries such that those injuries would not prevent Claimant from performing sedentary or light-duty work. The issue was whether his non-work-related medical conditions precluded him from accepting even those types of positions.

Employer submitted into evidence the deposition testimony of Garo Garibian, M.D. (Dr. Garibian), board-certified in internal medicine and cardiovascular diseases. Dr. Garibian opined that Claimant was completely disabled from performing gainful employment based on his non-work-related medical conditions that included advanced cardiovascular disease, including a prior heart attack; advanced renal disease, including a history of renal failure and a recommendation that Claimant have a transplant; Type II diabetes; severe

[1] According to Claimant's own medical expert, Claimant has been and would continue to be on dialysis for nine hours per day, remained a candidate for a kidney transplant, had heart bypass surgery, had been treated for chronic respiratory problems and was on several medications related to lung, cardiovascular and renal problems.

pulmonary problems; and gastrointestinal problems.[2] According to Dr. Garibian, these conditions were neither caused nor aggravated by the injuries Claimant suffered on July 10, 2001, but had pre-dated those injuries. In Dr. Garibian's opinion, these conditions had worsened over time and would have completely disabled him from any type of work regardless of the July 10, 2001 accident. According to Dr. Garibian, Claimant's health problems could cause sudden death at any moment and, therefore, he could never be permitted to return to truck driving or other driving because of the great risk of sudden death and the hazard that would create for his passengers or others on the road. Further, in Dr. Garibian's opinion, Claimant's aggressive cardiovascular disease could cause him to pass out or die at work even if he performed sedentary work.

Employer also submitted the deposition testimony of I. Howard Levin, M.D. (Dr. Levin), board-certified in neurology. Dr. Levin examined Claimant on at least two occasions and stated that Claimant's past medical history included asthma, high cholesterol and diabetes. According to Dr. Levin, Claimant also presented balance problems and occasionally had difficulty walking, had been hospitalized on numerous occasions, and had a pacemaker implanted in 2003. Dr. Levin opined that Claimant was not suffering from any neurological impairment from the July 10, 2001 accident, and that there was no causal relationship between the work-related injury and Claimant's current impairments. Dr. Levin opined that Claimant could not do much more than sedentary work.

[2] Dr. Garibian did not examine Claimant, but thoroughly reviewed all of his medical records.

Claimant submitted into evidence the deposition testimony of David Schwartz, M.D. (Dr. Schwartz), board-certified in internal medicine and cardiology. Dr. Schwartz testified that he had treated Claimant from June 8, 2004, through November 7, 2006, for his cardiologic condition, but while he was aware of Claimant's other health issues, he had not treated Claimant for those issues. Dr. Schwartz testified that in May 2005, Claimant underwent open-heart surgery and a bypass. Additionally, he testified that Claimant was on dialysis for his renal disease and that both his kidney condition and diabetes were under control. Dr. Schwartz agreed that Claimant was disabled due to his cardiac problems from May 2005 through November 2005, and further agreed that Claimant had been admitted to the hospital on previous occasions for cardiac and renal problems and that he would require dialysis for the rest of his life. Dr. Schwartz also indicated that Claimant had severe pulmonary problems, and that when he would take a pulmonary function test, Claimant would lose consciousness. Moreover, because of Claimant's various other health problems, he was unable to take a variety of medications which would have improved his cardiovascular health. Dr. Schwartz opined that Claimant could perform sedentary work.

Claimant testified that he was 65 years old and exercised by going to a gym daily. Claimant indicated that since he had his bypass, he has felt "wonderful." He confirmed that he underwent dialysis for nine hours each evening and planned to have a kidney replacement. Claimant stated that he had been looking for work at schools driving a van, and that he wanted a position that did not require him to walk around a lot. He testified that he currently used a cane for support and had been using it daily for seven months. Claimant indicated that his

left knee injury was the most serious injury from his work accident, and that his left hand did not have the strength it used to have. He also testified that he was applying for a bus driver position in Bucks County. On cross-examination, Claimant admitted that after his bypass surgery, he had post-operative complications, including wounds to his sternum and a left hip fracture. He also indicated that he had been using continuous home oxygen since July 2005.

The WCJ found both Dr. Garibian's and Dr. Levin's testimony credible but found Claimant and his medical expert, Dr. Schwartz, not credible. Based on those credibility findings and his review of the record, the WCJ found that Claimant was not capable of performing gainful employment due to his non-work-related medical conditions, and in May 2007, the WCJ granted the suspension petition. Claimant appealed to the Board, which affirmed the WCJ's decision. Claimant then filed an appeal with this Court.[3]

On appeal, Claimant maintains that the granting of the suspension petition was an error of law because the uncontroverted evidence of record does not show that Claimant is totally and permanently disabled from any level of employment as required by *Schneider, Inc. v. Workers' Compensation Appeal Board (Bey)*, 560 Pa. 608, 747 A.2d 845 (2000). In *Schneider*, our Supreme Court held that the employer was not required to prove job availability under *Kachinski*

[3] On appeal, our scope of review is limited to determining whether an error of law has been committed, findings of fact are supported by substantial evidence or whether constitutional rights have been violated. *Bethenergy Mines, Inc. v. Workmen's Compensation Appeal Board (Sebro)*, 572 A.2d 843 (Pa. Cmwlth. 1990).

v. Workmen's Compensation Appeal Board (Vepco Constr. Co.), 516 Pa. 240, 532 A.2d 374 (1987)[4] where it "would be pointless and would run contrary to the purpose of the ... Act" when the employee is precluded from ever returning to work because of the non-work-related injury. *Schneider*, 560 Pa. 613, 747 A.2d at 847. ("Showing that a sedentary or light-duty position is available to [claimant] would be an exercise in futility by virtue of [claimant's] physical condition.... [B]ecause the objective of reintroducing injured workers into the workforce would be in no way promoted here, we will not require a showing of job availability." *Id*. at 560 Pa. at 616-18, 747 A.2d at 849-50.)

Here, Claimant argues that the *Schneider* standard has not been met because Employer has not made out that he was permanently disabled from any level of employment. He points to his and Dr. Schwartz's testimony that he was capable of performing light-duty work, and that he was looking into becoming employed as a van or bus driver. While both of those witnesses so testified, the WCJ found Dr. Schwartz and Claimant not credible. Instead, the WCJ accepted Dr. Garibian's testimony detailing Claimant's advanced cardiovascular disease, advanced renal disease, Type II diabetes, severe pulmonary problems and gastrointestinal problems, and that even light-duty or sedentary work could result in Claimant's sudden death from those non-work-related conditions. Because a WCJ has complete authority over questions of credibility, conflicting medical

[4] Under *Kachinski*, an employer seeking a modification of benefits because a claimant has recovered some or all of his or her ability to work is required to establish that a suitable position was available to the claimant. In cases where the employer alleges and the evidence establishes that the claimant's work-related injuries have resolved to the point where he or she is capable of performing sedentary or light-duty work, the employer is generally required to establish that such work was made available to the claimant to warrant a suspension of benefits.

evidence and evidentiary weight, we cannot disturb that finding on appeal absent a clear abuse of discretion. *See Lombardo v. Workmen's Compensation Appeal Board (Topps Company, Inc.)*, 698 A.2d 1378 (Pa. Cmwlth. 1997).

He also argues that Dr. Levin's testimony that "he can't do much more than sedentary duty work" shows that he can perform some work. First, Dr. Levin's testimony was not offered to show that Claimant was permanently disabled, but rather it was offered as proof that Claimant's neurological complaints were not related to his work-related injury. Second, when Dr. Levin was asked on cross-examination whether Claimant was totally disabled, the WCJ found that testimony only credible to the extent that Claimant was capable of performing sedentary work because of his *work-related* injury, and Dr. Levin did not offer an unequivocal medical opinion as to Claimant's overall health and ability.

Finally, Claimant argues that Dr. Garibian did not specifically state that Claimant was "totally and permanently disabled" from any level of employment." Medical experts need not use "magic words" in order for their testimony to be considered unequivocal. *See Williams v. Workers' Compensation Appeal Board (Montgomery Ward)*, 562 A.2d 437 (Pa. Cmwlth. 1989). Although Dr. Garibian did not use the precise phrase to which Claimant refers, he unequivocally testified that due to his numerous non-work-related medical conditions, Claimant was "completely disabled" from performing any gainful employment, (Reproduced Record at 148a, 149a) which is sufficient to establish that Claimant cannot even perform sedentary or light-duty work.

Accordingly, because there was substantial evidence to conclude that Claimant was disabled from all work due to his non-work-related conditions, the Board did not err in upholding the WCJ's decision. The order of the Board is affirmed.

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DAN PELLEGRINI, JUDGE

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O R D E R

AND NOW, this 9th day of October, 2008, the order of the Workers' Compensation Appeal Board, dated March 17, 2008, No. A07-1326, is affirmed.

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DAN PELLEGRINI, JUDGE