IN THE COMMONWEALTH COURT OF PENNSYLVANIA

| | | |
|---|---|---|
| City of Philadelphia, Petitioner | : | |
| v. | : | No. 642 C.D. 2008 |
| | : | Submitted: September 26, 2008 |
| Workers' Compensation Appeal Board (Stinsman), Respondent | : | |

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE FLAHERTY FILED: December 3, 2008

The City of Philadelphia (Employer) petitions for review from an order of the Workers' Compensation Appeal Board (Board) that affirmed the decision of Workers' Compensation Judge (WCJ) Thomas Devlin granting a Reinstatement Petition filed by Charles Stinsman (Claimant). We reverse.

In a 1999 decision authored by WCJ Nancy Goodwin, Claimant was awarded benefits for emphysema, chronic bronchitis, and asbestos-related pleural disease resulting from his employment as a firefighter. WCJ Goodwin found Claimant's firefighting exposures to be a substantial contributing factor to Claimant's emphysema and chronic bronchitis. She found Claimant's cigarette smoking also contributed to these conditions.[1] The WCJ further found that

[1] When there is a non-work-related condition and a work-related condition, the claimant can establish a right to indemnity benefits if he proves the work-related condition is a substantial contributing factor to his disability. Pokita v. Workmen's Compensation Appeal Board (U.S. Air), 639 A.2d 1310 (Pa. Cmwlth. 1994).

Claimant's asbestos exposures solely contributed to his pleural thickening. Claimant was awarded partial disability benefits retroactive to May 25, 1995. The WCJ indicated that Claimant was unable to continue working as a fireman. Claimant, however, had concurrent employment with M.A.B. Paints while he worked as a firefighter that he continued to perform after he stopped working for Employer. The WCJ acknowledged that Claimant was physically able to continue working at M.A.B. Paints. Nonetheless, Claimant stopped working for M.A.B. Paints on May 31, 2005 due to increased difficulties with his breathing.

Claimant filed a Reinstatement Petition on December 13, 2005 alleging a worsening of his condition as of June 1, 2005. In support of his Petition, Claimant testified that he was a firefighter for Employer from 1963 through 1995. He acknowledged that he worked for M.A.B. Paints through May 31, 2005. According to Claimant, he worked there two days a week, six hours per day. He explained that he had slowly reduced the amount of days he worked and the amount of hours. Claimant explained that in 1997, he utilized one inhaler containing Azmacort. Now he requires two inhalers containing Azmacort and Pulmicort respectively. He indicated that he used to take the Pulmicort once per day. Now, he must use both inhalers twice per day. Claimant stated that he cannot lift anything heavy anymore. He gets short of breath more easily than he did before and he is constantly coughing. Claimant was asked whether he was capable of doing any sort of work and he responded "no." Nonetheless, he testified as follows:

> Q. And again, it's your opinion that you're not capable of performing any sort of work; correct?
>
> A. Maybe driving a car or something, yes.

Reproduced Record (R.R.), p. 49a.

Claimant presented the testimony of Jonathan L. Gelfand, M.D., board certified in internal medicine and pulmonary disease, who first saw him in 1997. At that time, he diagnosed Claimant with emphysema, chronic bronchitis, and pleural thickening. He saw Claimant again on August 21, 2005 whereupon he noted Claimant had complaints of shortness of breath on exertion that increased over the years. Claimant provided a history that he smoked regularly until six months prior to the 2005 examination, smoking approximately four or five cigarettes per day. He had been smoking up to one pack of cigarettes per day until 2002 or 2003. Upon examination, Dr. Gelfand noted Claimant's breath sounds were diminished. Dr. Gelfand stated that new pulmonary function studies were done showing air flow obstruction of a moderately severe degree. In comparing the 1997 pulmonary studies with those of 2005, there was significant deterioration. Claimant had air trapping and overinflation that was more significant. Dr. Gelfand further noted deterioration in diffusing capacity. Dr. Gelfand did not detect any change related to Claimant's asbestos-related pleural thickening.

Dr. Gelfand stated Claimant could not return to his employment as a firefighter. He said it would be difficult for Claimant to return to work for M.A.B. Paints and that he believes Claimant is totally disabled. He defined total disability as the inability to perform any regular job function. Dr. Gelfand conceded there may be some hypothetical form of employment that Claimant could work, but he was unaware of any. The following pertinent discussion took place during Dr. Gelfand's deposition:

> Q. …Doctor, can you give the judge an opinion as to the cause of the deterioration in [Claimant's] breathing between 1997 and 2005?

…

A. *The deterioration from 1997 to 2005 is substantially attributable to his cigarette smoking and the passage of time.*

…

Q. Doctor, what role, if any did his 32 years of firefighting have?

A. *That was a substantial contributing factor to the impairment of his lung functioning that he already had in 1997. So, in 1997, he was already starting with substantial impairment.*

*Anything that happened after 1997 was superimposed on that, but was simply added to that. He was already impaired in 1997.*

His impairment in 2005 was worse than in 1997, but would not have been anywhere near as bad but for his firefighting activity.

If he had not been a firefighter, he probably would have had some— he would still have some abnormalities in his lung function, but they would be significantly less severe.

Q. Doctor, if he had stopped smoking cigarettes when you saw him in 1997, is it possible to give an opinion as to what shape his lungs would be in 2005?

A. *They would probably not be as good as they had been in 1997, but they probably would be better than they are.* (Emphasis added).

R.R. at 98a-100a.

On March, 29, 2007, WCJ Devlin granted Claimant's Reinstatement Petition. In so doing, the WCJ credited Claimant's testimony. The WCJ further

credited Dr. Gelfand's testimony over the medical expert submitted by Employer. The WCJ made the following specific findings that are pertinent to this appeal:

**FINDINGS OF FACT**

> 3. Claimant testified that he stopped working at M.A.B. Paints on May 31, 2005 due to increased difficulties with his breathing. Claimant testified that over the course of time he had to increase his inhalers from one a day to two inhalers a day and from taking one of the inhalers once a day to taking the same inhaler twice a day.
>
> Claimant further testified that due to his increasing difficulties breathing, he had to reduce the number of hours he worked at M.A.B. Paints until finally ceasing his employment. Claimant further testified that he has suffered increased difficulty with breathing, stamina, with lifting objects, as well as shortness of breath and coughing.
>
> ...
>
> 5. Claimant's medical expert, Dr. Jonathan Gelfand, examined Claimant both in 1997 as well as 2005. Dr. Gelfand performed four view chest x-rays as well as pulmonary function studies and a physical examination. *Dr. Gelfand testified and based on pulmonary function studies Claimant's chronic bronchitis and emphysema have deteriorated at the point that Claimant can no longer be employed.* Dr. Gelfand further testified that Claimant's deterioration is due to a combination of factors, including continued cigarette smoking since leaving the Fire Department as well as the passage of time and the residual effect of his firefighting exposures.
>
> ...

## CONCLUSIONS OF LAW

> 1. Claimant has met his burden of proof in this Reinstatement Petition that his firefighting exposures are a substantial contribution (sic) factor in the worsening of his work injury, and that Claimant is totally disabled.... (Emphasis Added).

(Decision dated 3/29/07, pp. 1-2).

Employer appealed this decision to the Board which affirmed in an order dated March 13, 2008. This appeal followed.[2]

Employer argues on appeal that the WCJ failed to apply the correct burden of proof. Employer contends that Claimant must establish that his work-related injury has worsened to the point that he can no longer perform his job at M.A.B. Paints and that he is unable to perform any type of gainful employment. Employer asserts that the WCJ and the Board required Claimant only to establish that his condition worsened and that he could not do his pre-injury jobs. *Assuming arguendo* that the WCJ utilized the correct burden of proof, Employer contends the evidence of record is insufficient to support a finding that Claimant met that burden. Employer argues that Claimant failed to prove he had a zero earning capacity because he and his medical expert conceded he could do some form of work. Further, Employer suggests that Claimant's worsening breathing problems are attributable to his continued cigarette smoking, not his work-related

[2] Our review is limited to determining whether an error of law was committed, whether necessary findings of fact are supported by substantial evidence and whether constitutional rights were violated. Shop Vac Corp. v. Workers' Compensation Appeal Board (Thomas), 929 A.2d 1236 (Pa. Cmwlth. 2007).

occupational disease. Thus, even if Claimant were totally disabled, the complete lack of earning power is not due to his work exposures.

Section 306(b)(1) of the of the Pennsylvania Workers' Compensation Act (Act), Act of June 2, 1915, P.L. 736, as amended, 77 P.S. §512, indicates that partial disability is payable for a period not to exceed 500 weeks. Thus, the period during which partial disability benefits are available is capped at approximately nine and one-half years. Stehr v. Workers' Compensation Appeal Board (Alcoa), 936 A.2d 570, 572 (Pa. Cmwlth. 2007).[3] In Meden v. Workmen's Compensation Appeal Board (Bethenergy Mines), 647 A.2d 620 (Pa. Cmwlth. 1994), this Court held that when a claimant seeks a modification of his benefits to total disability following the expiration of the 500 week period, he must establish that his disability, or earnings loss, in relation to his work injury, has increased to the point that he is now totally disabled.

The Supreme Court, in Stanek v. Workers' Compensation Appeal Board (Greenwich Collieries), 562 Pa. 411, 426, 756 A.2d 661 (2000), was asked to decide the issue of whether Meden articulates the appropriate standard in circumstances involving a post-500-week claim for total disability benefits. The Court noted that the standard adopted in Meden was the standard to be utilized in instances where a claimant had not yet reached 500 weeks of partial disability. Id. at 419, 756 A.2d at 665. Rejecting this premise, the Court stated that in the post-500-week context, a claimant, in seeking to obtain total disability benefits must prove that he has no ability to generate earnings. Id. at 425, 756 A.2d at 668.

[3] Claimant began receiving partial disability benefits as of May 25, 1995. Thus, his 500th week of partial disability would have been received on or about December 23, 2004. Claimant continued working at M.A.B. Paints until May 31, 2005. Claimant filed his Reinstatement Petition seeking a return to total disability as of June 1, 2005.

Stated another way, he must establish a "zero earning capacity." Moreover, he must establish a worsening of his condition. Id.

The Supreme Court further addressed exactly what Claimant must establish to demonstrate he has a zero earning capacity. The standard is different for an individual who is working up until the date when entitlement to partial disability expires than for one who has not engaged in light-duty work that was previously found available. The Court stated "In the post-500-week context, where the claimant is working until the time period for which total disability benefits are sought, we discern no reason to require more than that the claimant establish, by clear and precise evidence, that his increased, work-related impairment has precluded continuation of such light-duty employment. The burden to prove the availability of employment consistent with the claimant's physical limitations will then shift to the employer."[4] Stanek, 562 Pa. at 426, 756 A.2d at 669. A claimant seeking a reinstatement of benefits who was not working at the time of expiration of 500 weeks of partial disability will not be afforded the benefit of the presumption of total disability from an inability to perform an existing light duty job. Rather, he must prove a negative, that there are no jobs available that he could work consistent with his physical limitations. In this setting, medical testimony that concedes that a claimant retains the physical ability to accomplish some work,

[4] The Supreme Court, in Stanek, referenced this Court's decision in Kunicki v. Workmen's Compensation Appeal Board (Felice), 423 A.2d 1368 (Pa. Cmwlth. 1981), in arriving at the necessity for clear and precise evidence in establishing a worsening of his condition and an inability to work his light duty job. Stanek, 562 Pa. at 425, 756 A.2d at 668. In Kunicki, we required "precise and credible evidence" of a "definite and specific nature" concerning a change in the claimant's physical condition so as to render him totally disabled following what was, at that time, an expiration of 350 weeks of partial disability. Kunicki, 423 A.2d 1370.

with no vocational or other form of assessment as to why such work is not available, will be deemed fatal to the claim. Id.

Claimant was working at M.A.B. Paints until May 31, 2005. Claimant, in his Reinstatement Petition, requested a reinstatement to total disability as of the very next day, June 1, 2005. Thus, Claimant had the burden to show by clear and precise evidence that his work-related impairment worsened to the point that it precluded continuation of his "light-duty employment," *i.e*, his job at M.A.B. Paints that was previously found to be within his physical restrictions. Stanek. This is because he was working "until the time period for which total disability benefits are sought."[5] If that fact was established, the burden then shifted to Employer to show work availability. Id.

In summarizing testimony of Claimant, WCJ Devlin specifically made findings concerning Claimant's observations that, *inter alia*, he had more difficulty with breathing and stamina over time when lifting objects. Moreover, the WCJ referenced that Claimant went from using one inhaler per day to using two inhalers twice per day. The WCJ also made notation of Dr. Gelfand's opinion that Claimant's bronchitis and emphysema have deteriorated to the point that Claimant can no longer be employed. In his Conclusions of Law, the WCJ found that Claimant's work injury worsened and that Claimant is totally disabled. Hence, he is unable to continue work at M.A.B. Paints. The WCJ did not expressly indicate that he utilized the standard espoused in Stanek. Nonetheless, the findings he made in his decision are sufficient to indicate that he utilized the correct standard.

[5] We acknowledge that Claimant obtained employment with M.A.B. Paints before he sustained his injury, not afterwards. Nonetheless, this employment was previously found to be within his physical restrictions in the 1999 Decision of WCJ Goodwin. We can ascertain no reason why the holding of Stanek would be inapplicable to the present manner.

Thus, we cannot agree with Employer that the WCJ did not apply the correct burden of proof. It is acknowledged that the WCJ's findings do not address whether Employer failed to satisfy a showing of work availability. Employer, however, does not advance an argument that it made such a showing.

Employer's argument that Claimant had to establish an inability to work any job must fail. Such a heightened burden would only apply if Claimant was not working at the point that his entitlement to partial disability expired. Stanek. Thus, it is of no consequence that Claimant indicated that he may be able to do some type of work, specifically something involving driving a car. Nor does it matter that Dr. Gelfand theorized that there may be some type of employment Claimant was capable of doing although he was unaware of any specific positions.

Because we have determined that the WCJ utilized the correct burden of proof in this instance, we must address Employer's argument that the evidence submitted by Claimant is sufficient to meet his burden. Consistent with Stanek, Claimant must establish he had increased, work-related impairment. He must further establish that the worsening of his condition precluded him from working the job he was performing at the expiration of the 500 weeks of partial disability. Claimant must establish these facts by clear and precise evidence.[6] Id.

[6] Claimant argues that the clear and precise evidence standard espoused in Stanek only applied to the issue of work availability, not the standard of medical proof. We reject this argument. The Supreme Court in Stanek expressly stated that a claimant in a post-500-week context such as the one here must "establish, by clear and precise evidence, that his increased work-related impairment has precluded continuation of such light duty employment." Stanek, 562 Pa. at 426, 756 A.2d at 669. Arguably, this sentence could be read to indicate that once a claimant has established a worsening of his condition by some lighter standard, he must then establish by clear and precise evidence that he can no longer continue his light duty employment as a result. Nonetheless, we reiterate that the Court, in Stanek, endorsed the standard established in Kunicki in regards to a claimant's burden of proof in this instance. Kunicki required precise and credible evidence of a definite and specific nature regarding the issue of whether there has been a change in the claimant's physical condition. Thus, any ambiguity that could be read into

There can be no disagreement based on the credible testimony of Claimant and Dr. Gelfand that Claimant's emphysema and chronic bronchitis worsened in the years preceding Claimant's decision to leave M.A.B. Paints in 2005. Dr. Gelfand, however, stated that the deterioration of Claimant's condition from 1997 to 2005 was primarily caused by Claimant's cigarette smoking and the aging process. Dr. Gelfand agreed that Claimant's firefighting exposures were a substantial contributing factor to the impairment he had in 1997. He explained, however, that any further deterioration was superimposed onto the impairment that existed at that time. Dr. Gelfand was questioned what the condition of Claimant's lungs would be if he had stopped smoking in 1997. He stated that Claimant's lungs would "probably not be as good" as they were in 1997. He added that they "probably would be better" than they are now.

Claimant's own medical witness testified that the Claimant's increased impairment was largely attributable to his continued cigarette smoking, not his firefighting exposures. Thus while his condition has worsened, such worsening has a non-work-related cause. Dr. Gelfand opined that if Claimant ceased smoking in 1997, the condition of his lungs "probably" would have deteriorated somewhat anyway. The use of the term probably is equivocal at best.[7] Moreover, he softened the impact of his statement by indicating that Claimant's lungs would probably be better than they are now had Claimant quit smoking. Given the fact that Claimant must establish a worsening of his work-related

---

the above quoted language referenced and Stanek ultimately proves irrelevant when the opinion is read as a whole. Thus, we reject Claimant's argument.

[7] The terms "might have been" or "probably" in the offering of an opinion render that opinion equivocal. Lewis v. Workmen's Compensation Appeal Bd. (Pittsburgh Bd. of Educ.), 472 A.2d 1176, 1178 (Pa. Cmwlth. 1984).

impairment by clear and precise evidence, we cannot agree that Claimant satisfied his burden in this instance. Consequently, the WCJ erred in reinstating Claimant's benefits to total disability. The evidence presented by Claimant indicates that his work-related impairment has not precluded him from continuing his work at M.A.B. Paints. Rather, it was non-work-related factors, particularly Claimant's cigarette smoking and the aging process, that were superimposed on Claimant's baseline impairment that caused the worsening of Claimant's condition and the total disability.

This matter is distinguishable from City of Philadelphia v. Workers' Compensation Appeal Board (McGinn), 879 A.2d 838 (Pa. Cmwlth. 2005). The claimant, in McGinn, was awarded benefits for chronic obstructive lung disease following a twenty year career as a firefighter. Thereafter, the claimant opened his own plumbing business. In 2001, he was physically unable to continue operating his plumbing business and closed the same. The claimant filed a reinstatement petition seeking total disability benefits. He asserted his condition worsened since he retired from the fire department, that he needed an oxygen apparatus, and he was not capable of employment. His medical expert opined that the claimant's pulmonary function had deteriorated significantly and that the claimant was unable to do work of any kind. The employer's medical expert opined that all of the claimant's occupationally-induced chronic obstructive pulmonary disease had resolved, leaving only evidence of the tobacco induced component of the claimant's disease. The employer's expert indicated that the claimant's chronic obstructive pulmonary disease was now explained by the claimant's history of heavy smoking, not his history as a firefighter.

The WCJ credited the employer's medical evidence over that submitted by the claimant. Consequently, he denied the claimant's reinstatement petition. The Board reversed finding that relitigating the basic cause of the disease was barred by res judicata. It further found that the employer could not meet its burden of proving that the occupational disease was reversible by relitigating the extent cigarette smoking as opposed to work exposure caused the claimant's disability. This Court affirmed noting that in the original decision that granted the claimant workers' compensation benefits, the WCJ did not find that the claimant was disabled to tobacco use. Rather, the claimant's chronic obstructive lung disease was found to be attributable to his occupation as a firefighter. We indicated that an occupational disease must be established as reversible in order to find a completely new cause to be found to be the basis of the claimant's current disability. Id. at 842.

A claimant's heightened burden of proof in the context of a post-500-weeks claim for total disability benefits was not discussed in McGinn. Moreover, the issue in this matter is not whether Claimant's overall impairment is attributable to his cigarette smoking and the aging process to the exclusion of his work-related conditions. Rather, the issue is whether Claimant's medical testimony that acknowledges a baseline impairment caused by firefighting exposures but opines that any further deterioration "is substantially attributable to his cigarette smoking and the passage of time" can satisfy Claimant's burden under Stanek. As stated, that burden is to establish by clear and precise evidence *increased, work-related impairment* precludes continuation of light duty employment. Id. We reiterate, Claimant cannot satisfy that burden.

There is insufficient evidence of record to establish Claimant met his burden of proof in this matter. Consequently, the order of the Board affirming the WCJ's grant of Claimant's Reinstatement Petition is reversed.

JIM FLAHERTY, Senior Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

| | | |
|---|---|---|
| City of Philadelphia, Petitioner | : | |
| v. | : | No. 642 C.D. 2008 |
| Workers' Compensation Appeal Board (Stinsman), Respondent | : | |

**O R D E R**

AND NOW, this 3rd day of December, 2008, the Order of the Workers' Compensation Appeal Board in the above-captioned matter is reversed.

JIM FLAHERTY, Senior Judge