

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Ralph Peak, :
Petitioner :
v. : Nos. 2037 C.D. 2013
Department of Public Welfare, : 2328 C.D. 2013
Respondent : Submitted: May 16, 2014

BEFORE: HONORABLE DAN PELLEGRINI, President Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE ANNE E. COVEY, Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE SIMPSON**

FILED: June 26, 2014

In these consolidated appeals, Ralph Peak (Claimant) petitions for review of two orders of the Department of Public Welfare (DPW): (1) an order terminating his disability benefits under the law commonly known as Act 534¹ and (2) an order denying his request for reconsideration. Claimant argues the decision to terminate benefits is not supported by substantial, competent evidence where the credited medical expert, an orthopedic surgeon, was not qualified to testify regarding Claimant's neurological injuries, and the order denying reconsideration compounded this error. Discerning no error, we affirm.

¹ Act of December 8, 1959, P.L. 1718, as amended, 61 P.S. §951.

Claimant worked as a youth development aide at New Castle Youth Development Center,² a juvenile detention center, of DPW. In March 2012, Claimant sustained injuries to his face, head and upper back in the course of his employment, and he began receiving benefits pursuant to Act 534.

At DPW's request, Mark Fye, M.D. (DPW's Expert), performed an independent medical examination (IME) of Claimant. The doctor opined that Claimant completely recovered from his work injury and was able to return to work as a youth development aide without restrictions or limitations.

Based on the results of the IME, in August 2012, DPW sent Claimant a letter advising him to report to work. Claimant did not report to work as directed. DPW's Bureau of Human Resources requested a hearing to review Claimant's entitlement to continuing Act 534 benefits.

An administrative law judge (ALJ) with DPW's Bureau of Hearings and Appeals (BHA) conducted a hearing in June 2013. DPW presented surveillance videos, the deposition of DPW's Expert and the transcript testimony of Claimant before a workers' compensation judge.³ Claimant presented stipulated facts, medical records, and the deposition of Robert S. Vandrak, D.O. (Claimant's

² New Castle Youth Development Center closed operations in February 2013. Resp't's Br. at 11 n.1.

³ Act 534 benefits supplement workers' compensation benefits. McWreath v. Dep't of Pub. Welfare, 26 A.3d 1251, 1255 (Pa. Cmwlth. 2011).

Physician). Based on her review of the stipulated facts, exhibits, and briefs, the ALJ made the following relevant findings of fact.

Three surveillance videos taken in April 2012 depict Claimant: walking; standing; opening and closing doors; entering, driving and exiting an automobile; pumping gasoline; pushing a shopping cart; bending at the waist, back and knees; lifting various objects; squatting to the floor and rising; and, pull-starting a lawnmower and briefly pushing it with no visible signs of discomfort. ALJ's Op., 10/11/13, Finding of Fact (F.F.) Nos. 4-6.

DPW's Expert, who is a board-certified orthopedic surgeon, performed an IME on Claimant. Based on his examination of Claimant and review of Claimant's medical history, records and reports, he testified Claimant sustained a contusion and strain of the cervical, thoracic, and lumbar spine as a result of the work injury. DPW's Expert could not find any objective neurological, mechanical, or musculoskeletal condition to support Claimant's subjective complaints of discomfort. DPW's Expert determined Claimant's work injury resolved. He further opined Claimant is capable of returning to work without restrictions. F.F. Nos. 7-9, 14.

Claimant's Physician, a psychiatrist, examined Claimant multiple times in 2012. Based on his treatment of Claimant and records review, he testified Claimant sustained a work injury that resulted in traumatic brain injury, headaches, post-traumatic vertigo with injury to the vestibular system, cervical spine injury, weakness in the left upper extremity, brachial plexus injury, and lumbar spine

injury. He opined Claimant is not able to work based on ongoing neurological deficits with injury to the head, cervical spine, and lumbar spine. F.F. No. 16.

Despite finding both experts credible, the ALJ ultimately found DPW's Expert more credible than Claimant's Physician. F.F. Nos. 17-18. In addition, the ALJ found DPW's Expert's opinion that Claimant was capable of returning to unrestricted work was corroborated by the surveillance videos. F.F. No. 19. Thus, the ALJ recommended the termination of Claimant's Act 534 benefits. Reproduced Record (R.R.) at 2, 11.

The BHA adopted the ALJ's recommendation in its entirety. From this decision, Claimant petitioned for review with this Court (Docket No. 2037 C.D. 2013), and he also requested reconsideration with the Secretary of DPW, which was denied. Claimant then filed a second petition for review of the Secretary's order denying reconsideration (Docket No. 2328 C.D. 2013). This Court consolidated the appeals.

On appeal,⁴ Claimant contends DPW's decision to terminate benefits is not supported by substantial, competent evidence. Specifically, Claimant argues DPW's Expert was not competent to testify because he lacked expertise or knowledge regarding Claimant's neurological injury and was therefore not

⁴ This Court's review is limited to determining whether constitutional rights were violated, whether an error of law was committed, and whether the necessary findings of fact were supported by substantial evidence. DePaolo v. Dep't of Pub. Welfare, 865 A.2d 299 (Pa. Cmwlth. 2005).

qualified to express an opinion. On this same basis, Claimant asserts the Secretary erred by refusing his request for reconsideration.

Act 534 provides for benefits to employees of youth development centers under DPW for injuries sustained during the course of employment by the act of any person committed to such a facility. 61 P.S. §951. A person who is deemed eligible for benefits under Act 534 is entitled to “full salary, until the disability arising therefrom no longer prevents his return as an employee of such ... institution at a salary equal to that earned by him at the time of his injury.” Id.

“The purpose of Act 534 ... is to assure those undertaking dangerous employment in certain institutions that they will continue to receive full income when they are injured while performing their duties; by offering such assurance, the Commonwealth can attract employees to and keep them in the essential and dangerous jobs.” McWreath v. Dep’t of Pub. Welfare, 26 A.3d 1251, 1255 (Pa. Cmwlth. 2011). Act 534 supplements workers’ compensation benefits. Id.

An employee receiving Act 534 benefits has a property interest in those benefits. Squire v. Dep’t of Pub. Welfare, 696 A.2d 255 (Pa. Cmwlth. 1997). Act 534 benefits cannot be terminated without a prior due process hearing, at which the administrative agency, DPW, bears the burden of proving the employee’s disability ceased. Id.

Further, the test for Act 534 eligibility does not require actual availability of a position. McWreath. Rather, the determination of eligibility is

based on “the employee’s capability to perform the duties of a position with the employer paying the pre-injury salary, regardless of the availability of such position.” Id. at 1259.

Questions of resolving conflicts in the evidence, witness credibility, and evidentiary weight are for the fact finder, not for this Court. Pinnacle Health Sys. v. Dep’t of Pub. Welfare, 942 A.2d 189 (Pa. Cmwlth. 2008). Moreover, “the ALJ is free to accept or reject the testimony of any witness ... in whole or in part.” DePaolo v. Dep’t of Pub. Welfare, 865 A.2d 299, 305 (Pa. Cmwlth. 2005).

If the evidence accepted constitutes substantial evidence, this Court is precluded from disturbing the ALJ’s findings, despite the existence of contrary evidence. Id. Substantial evidence has long been defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Id. Moreover, it is irrelevant whether the record contains evidence to support findings other than those made by the fact finder; the critical inquiry is whether there is evidence to support the findings actually made. See Bedford Somerset MHMR v. Workers' Comp. Appeal Bd. (Indus. Metal Plating, Inc.), 873 A.2d 25 (Pa. Cmwlth. 2005).

Finally, an expert medical witness is qualified to testify outside of his medical specialty, and any objection to that testimony goes to the weight of the evidence, not its competency. Sch. Dist. of Phila. v. Workers' Comp. Appeal Bd. (Hilton), 84 A.3d 372 (Pa. Cmwlth. 2014). However, medical testimony that is less than positive or based merely on possibilities does not constitute legally

competent evidence. Spehar v. Dep't of Pub. Welfare, 447 A.2d 333 (Pa. Cmwlth. 1982).

Here, substantial, competent evidence supports the ALJ's findings. DPW's Expert conducted an IME and found no medical basis for Claimant's subjective complaints. R.R. at 78. DPW's Expert explained he could not find any objective evidence of any neurological or musculoskeletal problems. R.R. at 78, 92. DPW's Expert credibly testified that Claimant fully recovered from his work injury, and that he could return to full-duty work without restrictions. Id. at 80, 87, 91. The surveillance videos, which showed Claimant walking, standing, bending, and driving with no visible signs of discomfort, corroborated his opinion.

Although Claimant's Physician testified Claimant is not capable of returning to work because he continues to suffer from head, neck and spinal injuries and a condition known as Benign Paroxysmal Positional Vertigo (BPPV), the ALJ found DPW's Expert's testimony to be more persuasive. In crediting DPW's Expert over Claimant's Physician, the ALJ explained:

[DPW's Expert] ... gave the impression that he was truthful and that he knew what he was talking about. He articulately and logically explained how the various sources of information resulted in his opinion. In addition, [his] impressive credentials supported his credibility. Specifically, he is board certified in Orthopedic Surgery, completed a Spine Fellowship, he has published articles about orthopedics including the spine, and he presented at numerous speaking engagements.

* * * *

[Claimant's Physician] agreed on cross examination that the cervical CT scan result was normal, and that mild degenerative changes could be considered normal findings, that soft tissue injuries would be expected to heal within six weeks or so, and that [Claimant]'s complaints ... were all subjective.

R.R. at 10-11. We are bound by the ALJ's credibility determinations. See Pinnacle Health.

Claimant contends DPW's Expert was not competent to testify regarding Claimant's alleged neurological condition because he is not a neurologist, but this contention goes to the weight of the testimony, not its competency. See Hilton. Although DPW's Witness testified that questions regarding BPPV should be posed to a neurologist who specifically deals with that condition, R.R. at 91, Claimant's Physician is also not a neurologist.

Nevertheless, DPW's Expert testified, "as a spinal surgeon I deal with the cervical, thoracic and lumbar nerves on a daily basis." Id. at 75. DPW's Expert acknowledged Claimant complained of headaches and dizziness, among other things. Id. at 83. He credibly testified he could not find any objective evidence to support Claimant's subjective complaints. Id. at 78. He explained, "based on his musculoskeletal system, specifically his cervical, thoracic and lumbar spine, and in conjunction with his neurological examination, I did not feel there was any reason [Claimant] could not go back to work." Id. at 80-81. He continued, "I do not feel [Claimant] had any neurologic injury to his brachial plexus and his nerve roots from his cervical spine." Id. at 92. Contrary to Claimant's assertions, DPW's Expert provided a well-reasoned and thorough

explanation for his opinion, and his testimony constitutes competent, substantial evidence.

Based on our review, the ALJ's determination is amply supported by DPW's Expert's testimony, the lack of objective evidence to support Claimant's complaints, and the surveillance videos showing Claimant performing numerous physical activities without difficulty. Thus, we conclude ALJ did not err or abuse her discretion by terminating Claimant's Act 534 benefits, and the Secretary did not err by denying reconsideration.

Accordingly, the orders of DPW are affirmed.

ROBERT SIMPSON, Judge

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	:	
Petitioner	:	
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v.	:	2328 C.D. 2013
	:	
Department of Public Welfare,	:	
	:	
Respondent	:	

ORDER

AND NOW, this 26th day of June, 2014, the orders of the Department of Public Welfare are **AFFIRMED**.

ROBERT SIMPSON, Judge