

**Pursuant to Ind.Appellate Rule 65(D),
this Memorandum Decision shall not be
regarded as precedent or cited before
any court except for the purpose of
establishing the defense of res judicata,
collateral estoppel, or the law of the case.**

ATTORNEY FOR APPELLANT:

JEFFREY S. STURM
Sturm & Phillips
Valparaiso, Indiana

ATTORNEY FOR APPELLEE:

TODD M. CONOVER
Merrillville, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

REGGIE CARTER,

Appellant-Plaintiff,

vs.

UNITED STATES STEEL,

Appellee-Defendant.

)
)
)
)
)
)
)
)
)
)

No. 93A02-0701-EX-60

APPEAL FROM THE INDIANA WORKER'S COMPENSATION BOARD
Application Nos. C-158052, C-162883

July 30, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Reggie Carter filed an Application for Adjustment of Claim with the Worker's Compensation Board of Indiana (the "Board") against his employer, United States Steel ("U.S. Steel"). A Single Hearing Member awarded Carter compensation for the permanent partial impairment of his right leg, but denied Carter benefits for his alleged permanent total disability and future medical treatment. Thereafter, Carter petitioned the full Board, which affirmed the Single Hearing Member's decision.¹ Carter now appeals and presents the following restated issues for our review:

1. Whether the Board abused its discretion when it found that Carter was not entitled to permanent total disability ("PTD") benefits.
2. Whether the Board abused its discretion when it denied Carter compensation for future medical treatment.

We affirm.

FACTS AND PROCEDURAL HISTORY

On January 18, 2001, and July 2, 2001, Carter sustained two separate injuries to his right knee within the course and scope of his employment as a motor inspector for U.S. Steel. After the first injury, a medial meniscus tear to his right knee, Carter underwent surgery and recovered enough to return to his regular job without restrictions. After the second injury, another medial meniscus tear to his right knee, Carter underwent a second surgery, but did not regain knee function sufficient to accommodate his job as a motor inspector.

¹ The Board made a few non-material modifications to the Single Hearing Member's decision which are not relevant to our review on appeal.

After undergoing several months of medical treatment, in January 2002, Dr. Paul Gruszka declared that Carter had reached maximum medical improvement (“MMI”) with regard to the work-related injuries to his right knee. Dr. Gruszka noted that Carter was experiencing pain and numbness in his leg, but opined that those symptoms were unrelated to the knee injuries Carter had sustained at work. Upon discharge from Dr. Gruszka’s care, Carter was given the following work restrictions: no climbing, squatting, or kneeling. And Dr. Gruszka assigned Carter a 2% permanent partial impairment (“PPI”) rating with regard to Carter’s lower extremity function. Carter was unable to return to his job at U.S. Steel. Carter received temporary total disability (“TTD”) benefits in the amount of \$18,788.61 from July 3, 2001, through February 27, 2002. In addition, U.S. Steel’s worker’s compensation carrier paid Carter’s medical expenses until February 2002.

On September 17, 2002, Carter filed an application for adjustment of claim with the Board. Following a hearing, the Single Hearing Member found and concluded in relevant part as follows:

7. Plaintiff was released for return to work but failed to do so and was placed on non-occupational disability status. (Defendant’s Exhibit “G”).
8. Defendant provided statutory medical benefits. (Defendant’s Exhibits “E” and “H”).
9. There was no evidence per se produced to show that there was any unpaid amount for medical expense under the statute; but if there be any, then “statutory medical” should be paid.
10. Dr. Gruszka assigned a permanent partial impairment rating of an additional two percent (2%) loss of lower extremity function as a result of the injury of July 3, 2001. (Defendant’s Exhibit “E”, page 18).

* * *

13. Plaintiff filed a Vocational Report of Christopher A. Young, Vocational Expert. Although Mr. Young found Plaintiff to be permanently and totally disabled, his findings are not supported by credible evidence. Mr. Young did not personally meet with Plaintiff prior to the preparation of his report dated April 2, 2005. Instead, he spoke with Plaintiff via a telephone conversation lasting some 30-45 minutes. (Defendant's Exhibit "A", pages 51-52). Mr. Young administered no written test of any kind. (Defendant's Exhibit "A", page 51). Dr. Gruszka reviewed Plaintiff's functional capacity evaluation indicating that Plaintiff could work at a medium physical demand level subject to a 50 pound maximum and frequent lifting and carrying requirement of up to 25 pounds. (Defendant's Exhibit "I", page 16). Dr. Gruszka added a restriction of no climbing and no squatting or kneeling, but discharged Plaintiff from his care without permanent restrictions in his report dictated February 5, 2002. (Defendant's Exhibit "E", page 18).

14. As of April 2, 2005 (date of report of Mr. Young), Plaintiff was 48 years old and a high school graduate. Plaintiff also completed an electrical apprenticeship at U.S. Steel. (Defendant's Exhibit "A", page 48).

15. Plaintiff is capable of sedentary work. (Defendant's Exhibit "E", page 17).

16. Plaintiff is computer literate; has a certificate from a mail order private investigator school; can add, subtract, multiply and divide; is capable of reading and writing; driving a vehicle; traveling and shopping. (Defendant's Exhibit "A", pages 42-43, 47-50).

17. Dr. Angela [Wheeler] treated the Plaintiff at his request. Plaintiff's initial complaints on February 5, 2002, relate to pain in and behind the right knee with tingling down the back of his knee and numbness. (Defendant's Exhibit "B", Exhibit 1). Dr. Gruszka found these complaints not to be related to Plaintiff's July 3, 2001, injury. (Defendant's Exhibit "E", page 18).

18. Dr. Wheeler found that Plaintiff was not totally disabled. (Defendant's Exhibit "B", Exhibit 1 thereto, page 3). Dr. Wheeler signed a report of medical examination circling item 10 indicating that Plaintiff was permanently incapacitated. (Plaintiff's Exhibit "A" to Defendant's Exhibit "B"). However, the box is not checked nor the date filled in. When confronted with this in her deposition, Dr. Wheeler testified that she was not really sure that she herself had circled box No. 10, even though her

signature appears on the bottom of the form. She also testified that anyone who had access to that form could have circled box No. 10 (at any time). That would have included Plaintiff. (Defendant's Exhibit "B", pages 28-31).

19. Plaintiff made complaints of anxiety, depression, insomnia, nightmares and agoraphobia to a psychiatrist, Dr. Prasad. (Defendant's Exhibit "C", pages 3, 13).

20. Dr. Prasad conducted no psychological or psychiatric testing. (Defendant's Exhibit "C", page 4).

21. Dr. Prasad made a diagnosis of generalized anxiety disorder, major depression and mild psychosis. (Defendant's Exhibit "C", page 4).

22. Plaintiff has suffered from alcohol addiction and was hospitalized for a two (2) week period for same. (Defendant's Exhibit "C", page 5). All of this pre-dated July 3, 2001. Plaintiff also suffered a nervous breakdown in October, 2000. (Defendant's Exhibit "A", page 59).

23. Dr. Prasad found no cognitive impairment or decrease in memory function or the ability to concentrate and concluded that Plaintiff could come to a reasonable judgment about day-to-day affairs. (Defendant's Exhibit "C", page 6). Plaintiff has abused Xanax, Vicodin, Neurontin, Elavil and Prozac and was doctor shopping or hopping. (Defendant's Exhibit "C", page 8 and Exhibit "I", page 28). Dr. Prasad found Plaintiff had a limited or very good ability to do unskilled work. (Defendant's Exhibit "C", page 12).

24. Dr. Prasad found that anxiety, avoidance of public activities, depression and insomnia existed independent of anything that was job related. (Defendant's Exhibit "C", page 13).

25. Plaintiff in the past attended paralegal classes, and Dr. Prasad encouraged him to continue. (Defendant's Exhibit "C", pages 15-16).

26. Dr. Prasad found that Plaintiff's history of anxiety predated the work-related incident at U.S. Steel by at least a decade, and that Plaintiff's prognosis was good. (Defendant's Exhibit "C", page 17).

27. There is insufficient evidence to say that Plaintiff is permanently totally disabled from all reasonable employment, although he may have an award from the Social Security Administration which would be based on its criteria (including both work and non-work factors).

28. Plaintiff may be disabled for Social Security purposes but not for worker's compensation purposes. He has transferable skills and is capable of sedentary work. He is not permanently totally disabled.

29. Statutory medical expenses that Plaintiff is due have been paid by Defendant, including care and treatment provided by Dr. Gruszka. (Defendant's Exhibits "D" and "E", all pages). If, in fact, there are any unpaid statutory medical expenses, the parties may submit the same at a hearing thereon upon request.

30. No additional orthopedic services are needed. (Defendant's Exhibit "E", page 18). Plaintiff's new complaints of numbness do not appear to be related to his initial injury, including those complaints of posterior pain. (Defendant's Exhibit "E", page 18).

31. Dr. Wheeler treated Plaintiff for complaints of numbness and posterior pain. (Defendant's Exhibit "B", pages 5-6).

32. Ongoing treatment by Dr. Wheeler is not related to the work injury, and Defendant should not be responsible for same.

33. Plaintiff will need to take Glucosamine/Chondroitin Sulfate most likely forever. However, those medications are needed for pre-existing osteoarthritis of the patellofemoral joint. (Defendant's Exhibit "D", page 47).

* * *

36. Plaintiff has qualified for Rule 65 pension [through U.S. Steel] and is receiving benefits thereunder. (Defendant's Exhibit "A", page 14).

37. The medical opinion regarding permanent partial impairment is somewhat unclear and not to the point, but it is evident that Plaintiff does have some permanent partial impairment. If one were to synthesize the opinions of the several physicians, the net probability would be that [a] fair and reasonable permanent partial impairment finding would be at eight percent (8%) or nine percent (9%) of the person.

CONCLUSIONS OF LAW

* * *

4. All statutory medical expenses have been paid, and no additional amounts are due, except as set out in Finding No. 29 above, which is incorporated herein.

5. Plaintiff is not permanently and totally disabled as a result of his work-related injuries on January 18, 2001, and July 3, 2001.

6. Plaintiff is entitled to recover for nine percent (9%) impairment of his right leg above the knee as a result of the injuries of January 18, 2001, and July 3, 2001 (cumulative).

* * *

AWARD

IT IS, THEREFORE, CONSIDERED, ORDERED AND ADJUDGED by the Worker's Compensation Board of Indiana that there be awarded Plaintiff as against Defendant compensation at the statutory rate for his nine percent (9%) permanent partial impairment of the right leg above the knee as a result of his injuries of January 18, 2001, and July 3, 2001.

Appellant's App. at 9-13. Carter appealed to the Full Board, which unanimously affirmed the Single Hearing Member's decision, with only minor modifications. This appeal ensued.

DISCUSSION AND DECISION

Standard of Review

In challenging the Board's decision, Carter confronts a stringent standard of review. When we review a decision of the Full Worker's Compensation Board, "we are bound by the factual determinations of the Board and will not disturb them unless the evidence is undisputed and leads inescapably to a contrary conclusion." Howard v. U.S.

Signcrafters, 811 N.E.2d 479, 481 (Ind. Ct. App. 2004). We must disregard all evidence unfavorable to the decision and examine only the evidence and the reasonable inferences therefrom that support the Board's findings. Id. We will not reweigh the evidence nor judge the credibility of the witnesses. Id.

Issue One: PTD Benefits

Carter first contends that the Board abused its discretion when it denied his request for permanent total disability benefits. To establish a permanent total disability, an injured employee is required to prove that he cannot carry on reasonable types of employment. Perez v. U.S. Steel Corp., 428 N.E.2d 212, 215-16 (Ind. 1981). The reasonableness of the employee's opportunities are to be assessed by his physical and mental fitness for them and by their availability. Id. at 216. Here, Carter bore the burden of proving that he cannot carry on reasonable types of employment to justify recovery for a permanent total disability. See id. Once plaintiff has established the degree of obvious physical impairment, coupled with other facts such as the claimant's capacity, education, training, or age, and has established that he has attempted unsuccessfully to find work or that it would be futile to search for work in light of his impairment and other characteristics, the burden of producing evidence that reasonable employment is regularly and continuously available then rests on the employer. Walker v. State, 694 N.E.2d 258, 265 (Ind. 1998).

Carter maintains that the Board should have awarded him PTD benefits based upon the following evidence: 1) the vocational expert's report stating that he is unable to work; 2) his Social Security disability benefits award; 3) Dr. Craig Tokowicz's

statement that there were no jobs for Carter at U.S. Steel to accommodate his work restrictions; and 4) Carter's testimony that he cannot work. Further, Carter states that having met his burden of proof, that burden shifted to U.S. Steel to present evidence "that reasonable employment is regularly and continuously available." See Walker, 694 N.E.2d at 265. Carter contends that U.S. Steel failed to satisfy its burden of proof. But U.S. Steel argues that Carter did not meet his burden of proof or, in the alternative, that U.S. Steel presented evidence sufficient to show that Carter is able to find reasonable employment. We address each contention in turn.

Carter first contends that Christopher Young, a vocational rehabilitation expert, produced a credible report stating that "there is no reasonable work that Mr. Carter could be expected to do, since his condition . . . is permanent." Appellant's App. at 59. Carter maintains that that report, which was the only report prepared by a vocational rehabilitation expert in this case, requires the Board to find in his favor. But the Board did not find Young's report credible given that it was based solely on a review of Carter's medical records and a thirty to forty-five minute telephone call with Carter. Young did not administer any tests to Carter. We cannot say that the Board abused its discretion when it did not find Young's report credible, especially in light of the medical evidence showing that Carter is able to do sedentary work.²

² Carter argues that because U.S. Steel did not hire a vocational expert to prepare its own report, Young's report "was not contradicted." Brief of Appellant at 11. But U.S. Steel did present other evidence that Carter is able to do sedentary work and has transferable skills. See, e.g., Appellant's App. at 40-41, 61, 75. Carter's contention on this issue is without merit.

Carter also suggests that the Social Security disability award is dispositive evidence that he is entitled to PTD benefits. While that evidence is probative, it is not dispositive. The Board did not abuse its discretion in weighing that evidence.

Next, Carter points out that Dr. Tokowitz, a physician employed by U.S. Steel, stated on September 10, 2003, “[t]here has been no work available to accommodate [Carter’s work] restrictions at [U.S. Steel].” Appellant’s App. at 161. Carter contends that that evidence supports his prima facie case. Carter states, “This fact shows that the availability of jobs for Mr. Carter, even within his former employer, were substantially limited. If U.S. Steel cannot find work for Mr. Carter, who could?” Brief of Appellant at 14. But Dr. Tokowicz’s statement only covers the period of time until September 10, 2003. Carter did not present any evidence that he subsequently sought work from U.S. Steel or from any other employer. Indeed, Carter admitted not having looked for work at all after his injury on July 1, 2001. Appellant’s App. at 27. Carter’s argument on this point misses the mark. See Perez, 428 N.E.2d at 216 (holding Board did not abuse its discretion in denying PTD benefits where plaintiff offered no evidence regarding the availability, or lack thereof, of “reasonable types of employment”).

Carter also asserts that his testimony that he is unable to find reasonable work is probative evidence. Again, while that evidence is probative, it is not dispositive of the issue of his entitlement to PTD benefits. The Board did not abuse its discretion when it considered that evidence.

U.S. Steel contends that Carter failed to meet his burden of proof, especially in light of Carter’s own testimony that he did not make any attempt to find reasonable

employment opportunities. See Walker, 694 N.E.2d at 265 (holding plaintiff has burden to show unsuccessful attempt to find work or that any attempt would be futile). But we need not decide that issue, because U.S. Steel presented evidence to support the Board's findings and conclusions regarding Carter's ability to find reasonable work.

In particular, following a functional capacity evaluation ("FCE"), a physician concluded, "According to the physical demands defined by the Department of Labor, [Carter] is currently able to function at the medium level. At this level, the client lifts up to 50 [pounds] maximum and frequently lift/carry up to 25 [pounds]." Appellant's App. at 184. Further, Dr. R. Anand and Dr. Tokowitz both stated that Carter was able to do sedentary work. Finally, as the Board found: Carter is a high school graduate; he has obtained a private investigator certificate; he has attended paralegal classes; he knows how to use a computer; he can drive; he can read and write; and he can add, subtract, multiply, and divide numbers. That evidence supports a reasonable inference that Carter has transferable job skills.

In sum, Carter's contentions on appeal amount to a request that we reweigh the evidence, which we will not do. While the evidence shows that Carter suffers from psychological problems which, he contends, affect his ability to work, there is evidence that those problems pre-dated his work-related injuries. And his psychiatrist testified that despite those problems, he believed that Carter has "limited or [a] very good ability to do unskilled work." Appellant's App. at 261. And Carter maintains that he has back pain which prevents him from working. But U.S. Steel presented evidence that Carter's back pain is unrelated to the injuries he sustained at work. Carter has not demonstrated

that the evidence leads inescapably to a conclusion that he is entitled to PTD benefits. The Board did not abuse its discretion on that issue.

Issue Two: Future Medical Benefits

Carter also contends that the Board abused its discretion when it denied him compensation for ongoing and future medical expenses. But, again, his contention on this issue amounts to a request that we reweigh the evidence. While Dr. Wheeler testified that Carter would benefit from periodic cortisone injections to treat his knee pain and “may need a joint replacement” at some point, Appellant’s App. at 98-99, Dr. Gruszka concluded that Carter was at maximum medical improvement as of January 2002 and discharged him from his care. The Board did not abuse its discretion in denying Carter future medical expenses in light of the conflicting evidence regarding the etiology of his ongoing symptoms.

Conclusion

Given our standard of review on appeal, we cannot say that the Board abused its discretion when it denied Carter PTD benefits. While we might have weighed the evidence differently if we were the trier-of-fact, we are precluded from reweighing the evidence on appeal and must affirm the Board’s findings and conclusions.

Affirmed.

RILEY, J., and BARNES, J., concur.