SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4199-15T4

PEDRO GARCES,

Petitioner-Appellant,

v.

MID-STATE LUMBER CORP. and
SECOND INJURY FUND,

Respondents-Respondents.

Submitted November 9, 2017 – Decided April 10, 2018

Before Judges Nugent and Geiger.

On appeal from the Department of Labor and Workforce Development, Division of Workers' Compensation, Claim Petition Nos. 2010-2872 and 2010-31004.

Garces, Grabler & LeBrocq, attorneys for appellant (Anna Buontempo, on the brief).

Biancamano & DiStefano, attorneys for respondent Mid-State Lumber Corp. (James G. Serritella, on the brief).

Christopher S. Porrino, Attorney General, attorney for respondent Second Injury Fund (Melissa H. Raksa, Assistant Attorney General, of counsel; Cheryl B. Kline, Deputy Attorney General, on the brief).

PER CURIAM

The New Jersey Workers' Compensation Act, N.J.S.A. 34:15-1 to -146, authorizes a party to reopen a compensation award. "Upon the application of any party, a formal award, determination, judgment, or order approving settlement may be reviewed within two years from the date when the injured person last received a payment on the ground that the incapacity of the injured employee has subsequently increased." N.J.S.A. 34:15-27. Petitioner Pedro Garces appeals from an April 22, 2016 judgment that dismissed with prejudice his applications for review or modification of two formal awards. The Judge of Compensation (JOC) dismissed petitioner's applications after petitioner presented his proofs at an administrative hearing. We affirm.

Petitioner was employed by Mid-State Lumber Corp.[1] The awards he sought to modify stemmed from injuries he sustained in two compensable accidents: one on October 16, 2009 (the first accident), another on December 11, 2009 (the second accident). Those claims were resolved by an "Order Approving Settlement." The settlement was for 66.67 percent partial permanent disability, "orthopedic and neurologic in nature, for residuals of recurrent herniated disc L3-L4 and herniated disc at L4-L5 status post lumbar

[1] For ease of reference, we refer throughout this opinion to petitioner's employer, Mid-State Lumber Corp., as "respondent."

laminectomy and decompression L3-L4 and L4-L5 with bilateral lateral fusion with spinal instrumentation and bone grafting and L4-L5." Respondent received an "Abdullah"[2] credit of 27.5 percent for petitioner's pre-existing disability.

On June 15, 2013, fifteen months after the JOC entered the order approving settlement, petitioner filed applications for review or modification of the settlement award. Thereafter, petitioner filed a "Second Injury Fund Verified Petition" seeking a determination that he was totally and permanently disabled.

To prove his incapacity had increased since the order approving settlement, petitioner testified during the worker's compensation trial and presented the testimony of two experts. The first, Dr. Arthur Becan, was "a board certified medical review officer and a board certified independent medical examiner," who once practiced orthopedic surgery but had not done so for at least five years. The second, Dr. Peter Crain, was an expert in neurology and neuropsychiatry. During the hearing, respondent introduced into evidence, without objection, reports and records that included those of petitioner's treating physician, Carl P. Giordano, who had performed the spinal surgeries.

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[2] Abdullah v. S.B. Thomas, Inc., 190 N.J. Super. 26, 29-32 (App. Div. 1983) (explaining under N.J.S.A. 34:15-12(d), an employer is entitled to a credit for an employee's previous loss of function to the same body part).

Dr. Giordano's records established that on June 25, 2012, only three months after the JOC issued the order approving settlement, petitioner requested of respondent authorization for voluntary medical treatment. Petitioner claimed his back pain and consequent disability had worsened. Dr. Giordano had petitioner undergo post-operative MRI scans and EMG testing to evaluate the organic basis for his subjective complaints.

After examining petitioner and considering the diagnostic studies, Dr. Giordano concluded petitioner required no further treatment or intervention. Dr. Giordano reported petitioner could return to work with some restrictions. The doctor also reported that if petitioner practiced good body mechanics and maintained proper fitness, he would require no further treatment. Dr. Giordano commented petitioner's post-operative MRI "is luckily quite benign," revealing "excellent decompression of the nerve roots with no residual pathology or adjacent level pathology." The doctor added that petitioner's EMG test was "equally benign with no evidence of any radiculopathy."

Petitioner's expert, Dr. Becan, had examined petitioner in June 2011 and reported on petitioner's disability from the first and second accidents. Dr. Becan examined petitioner again on January 30, 2014, and reported on his increased disability. In 2011, the doctor had opined petitioner's disability was ninety

percent of partial total. Following his 2014 examination, he was of the opinion that petitioner's disability had increased by an additional twenty percent of partial total. Asked about objective findings that supported the opinion he reached in 2014, Dr. Becan explained his observations during his 2014 examination of petitioner. The doctor said petitioner "walked with a guarded and antalgic gait pattern," "had a noticeable limp on the right," and "was unable to heal or toe walk on his right leg." In addition, petitioner had posterior midline tenderness, "ilio-lumbar ligament tenderness bilaterally," and "right-sided sacroiliac joint tenderness." The doctor also noted restrictions when he put petitioner through numerous clinical maneuvers, which the doctor referred to as a sitting root sign, straight leg raising, and range of motion.

Dr. Becan performed clinical neurological examinations that he claimed revealed weakness in certain muscles in petitioner's feet, ankles, and lower legs. According to the doctor, he observed atrophy of petitioner's calf muscles and decreased sensation in petitioner's lumbar spine.

On cross-examination, respondent's attorney methodically questioned the doctor about his 2011 examination. During the 2011 examination, many if not most of the clinical maneuvers petitioner performed demonstrated restrictions that were worse than

restrictions disclosed when petitioner performed the same clinical maneuvers during the 2014 examination.

Petitioner's other expert, Dr. Peter Crain, had also examined petitioner twice, first on May 10, 2011, and again on March 12, 2014. Dr. Crain admitted his diagnosis and opinions concerning the percentage of petitioner's disability were identical in 2011 and 2014. When specifically asked if his estimates of disability were exactly the same during the two examinations, the doctor replied, "[t]hat's correct."

Following petitioner's proofs, respondent filed a motion to dismiss petitioner's applications for modification of the previous award. The JOC granted the motion. In a thorough opinion, the JOC undertook a meticulous analysis of Dr. Becan's 2012 and 2014 clinical examinations of petitioner. The judge found:

> [T]he range of motion tests measuring forward flexion and left lateral flexion improved. Muscle strength testing of the right quadriceps and hamstrings improved. Muscle tone of the right leg improved. The right ankle jerk reflex improved. The backward extension with right and left rotation stayed the same. The straight leg raising improved on the left by 10 degrees and slightly worsened on the right by 20 degrees.
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> The court finds the measurable limitations presented fail to satisfy the standard of substantial worsening of the back condition. The objective medical evidence demonstrates a moderate increase of degrees on one test.

The JOC noted Dr. Becan opined petitioner could not return to work but did not know what petitioner's job duties entailed. Further, Dr. Becan opined petitioner's orthopedic disability had increased by twenty percent, from ninety percent to one hundred and ten percent, and expressed that opinion without consideration of previous accidents for which respondent had received the Abdullah credit reflected in the 2012 Order Approving Settlement. The JOC concluded Dr. Becan had a basic misunderstanding of functional disability and had rendered a net opinion.

Similarly, the JOC noted Dr. Crain conducted a physical examination in 2014 that revealed the same physical findings as the examination he conducted in 2011, and the doctor had found no significant change in petitioner's neuropsychiatric disability.

Based on what was essentially undisputed testimony, the JOC determined petitioner had failed to proffer any objective medical evidence that his disability had substantially worsened. The judge recounted petitioner's testimony and concluded there was no objective medical evidence to corroborate his subjective complaints of pain. The court dismissed petitioner's applications for modification of the previous awards as well as petitioner's second injury fund petition.

On appeal, petitioner argues Dr. Becan supported his diagnosis with objective medical evidence, so the court should

have given his opinion full weight. Petitioner also argues the JOC should not have discredited the testimony because Dr. Becan did not use proper terminology concerning petitioner's disability. Petitioner claims he was prohibited from providing relevant testimony about psychiatric complaints. Last, petitioner insists that in view of all the evidence, he demonstrated an increase in his functional disability.

Having considered petitioner's arguments in light of the record, we have determined the JOC's decision is supported by sufficient credible evidence on the record as a whole, and petitioner's arguments are without sufficient merit to warrant further discussion. R. 2:11-3(e)(1)(D) & (E).

Affirmed.