COURT OF APPEALS OF VIRGINIA

Present: Judges Baker, Elder and Fitzpatrick

PAUL ALLEN MASON

v. Record No. 2365-95-3

WYTHEVILLE GOLF CLUB, INC.
AND
VIRGINIA COMMERCE GROUP
SELF-INSURANCE ASSOCIATION

MEMORANDUM OPINION*
PER CURIAM
JUNE 11, 1996

FROM THE VIRGINIA WORKERS' COMPENSATION COMMISSION

(Paul Allen Mason, pro se, on brief).

(Ruth Nathanson Carter; Midkiff & Hiner, on brief), for appellee Wytheville Golf Club, Inc.

No brief for appellee Virginia Commerce Group Self-Insurance Association.

Paul Allen Mason ("claimant") contends that the Workers' Compensation Commission erred in denying his change in condition application on the ground that he failed to prove that his back symptoms and psychological treatment were causally related to his compensable February 2, 1993 injury by accident. Upon reviewing the record and the briefs of the parties, we conclude that this appeal is without merit. Accordingly, we summarily affirm the commission's decision. Rule 5A:27.

On appeal, we view the evidence in the light most favorable to the prevailing party below. R.G. Moore Bldg. Corp. v.

*Pursuant to Code § 17-116.010 this opinion is not designated for publication.

Mullins, 10 Va. App. 211, 212, 390 S.E.2d 788, 788 (1990). "General principles of workman's compensation law provide that '[i]n an application for review of any award on the ground of change in condition, the burden is on the party alleging such change to prove his allegations by a preponderance of the evidence.'" Great Atl. & Pac. Tea Co. v. Bateman, 4 Va. App. 459, 464, 359 S.E.2d 98, 101 (1987) (quoting Pilot Freight Carriers, Inc. v. Reeves, 1 Va. App. 435, 438-39, 339 S.E.2d 570, 572 (1986)). Unless we can say as a matter of law that claimant's evidence sustained his burden of proof, the commission's findings are binding and conclusive upon us. Tomko v. Michael's Plastering Co., 210 Va. 697, 699, 173 S.E.2d 833, 835 (1970).

On February 2, 1993, claimant sustained a lower back sprain. In an October 3, 1994 opinion, the commission found that claimant had been released by his treating physicians to return to his pre-injury employment without restrictions effective March 3, 1994. This decision was not appealed. On October 24, 1994, claimant filed a change in condition application alleging additional disability due to his back condition and causally related psychological treatment, which began in September 1994.

At all times after March 3, 1994, Drs. James M. Leipzig, an orthopedist, and Murray E. Joiner, Jr., a physiatrist, could find no objective evidence of an injury and no objective basis for claimant's continuing subjective complaints. As early as June

1993, Dr. Joiner characterized claimant as a malingerer. By February 8, 1994, he found that claimant had reached maximum medical improvement and released him to return to his pre-injury work without restrictions. From February 1994 through July 1994, claimant sought no medical treatment for his alleged back injury. In July 1994, claimant returned to Dr. Leipzig, who could not explain claimant's symptoms and indicated that he had "no clear answer for him with regard to etiology or treatment." Dr. Leipzig referred claimant to Dr. Andrew J. Cepulo, a rehabilitation specialist.

On August 8, 1994, although Dr. Cepulo imposed certain work restrictions upon claimant, he admitted he had no explanation for claimant's assertion that his back kept "going out." Dr. Cepulo noted that there was "nothing focal going on . . . to explain such a complaint." When claimant revealed to Dr. Cepulo in a September 20, 1994 office visit that he had been physically abused as a child, and therefore, was having difficulty dealing with his pain, Dr. Cepulo referred him to Dr. Neil Dubner, a psychiatrist.

Dr. Dubner began treating claimant on September 22, 1994. Claimant gave Dr. Dubner a history of depression due to his "pain syndrome." Dr. Dubner was apparently unaware of claimant's past history of emotional trauma, drug and alcohol abuse, and incarceration. Based solely upon the history given to him by claimant, Dr. Dubner opined that claimant's emotional dysfunction

was causally related to the February 2, 1993 injury and its residuals.

On April 12, 1995, Dr. Kevin F. Hanley, an orthopedist, reviewed claimant's medical records for employer. Dr. Hanley concluded that claimant's failure to respond to the conservative management protocols directed towards him was a clear indication of malingering and embellishment. Dr. Hanley noted that the objective findings did not indicate any significant injury to the spinal axis nor did they support claimant's present complaints. He opined that claimant's continuing discomfort was fabricated and not substantiated by the medical records. Dr. Hanley saw no evidence to support any disability.

The commission denied claimant's application, finding that he failed to prove any physical change in his condition since the commission terminated his compensation on March 3, 1994. This finding is amply supported by the medical records and opinions of Drs. Leipzig, Joiner, Cepulo, and Hanley. Based upon this lack of any persuasive objective medical evidence supporting a functionally incapacitating injury, we cannot find as a matter of law that claimant sustained his burden of proving causally related disability due to his alleged continuing back symptoms.

Moreover, in its role as fact finder, the commission was entitled to determine what weight, if any, was to be given to Dr. Dubner's opinion. "It lies within the commission's authority to determine the facts and the weight of the evidence . . . ." Rose

v. Red's Hitch & Trailer Servs., Inc., 11 Va. App. 55, 60, 396 S.E.2d 392, 395 (1990). Dr. Dubner based his opinion upon an inaccurate and incomplete psychological history. Where a medical opinion is based upon an incomplete or inaccurate medical history, the commission is entitled to conclude that the opinion is of little probative value. See Clinchfield Coal Co. v. Bowman, 229 Va. 249, 251-52, 329 S.E.2d 15, 16 (1985).

For these reasons, we affirm the commission's decision.

Affirmed.