

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: June 27, 2024

CV-23-1524

In the Matter of the Claim of JOHN T.
CARROLL,

Appellant,

v

NASSAU COUNTY POLICE
DEPARTMENT et al.,
Respondents.

MEMORANDUM AND ORDER

WORKERS' COMPENSATION
BOARD,
Respondent.

Calendar Date: June 5, 2024

Before: Pritzker, J.P., Lynch, Ceresia, Fisher and Mackey, JJ.

Fusco, Brandenstein & Rada, PC, Woodbury (*Jesse A. Sigismonti* of counsel), for appellant.

Vecchione, Vecchione, Connors & Cano, LLP, Garden City Park (*Michael F. Vecchione* of counsel), for Nassau County Police Department and another, respondents.

Fisher, J.

Appeal from a decision of the Workers' Compensation Board, filed April 5, 2023, which ruled, among other things, that claimant had voluntarily removed himself from the labor market and was not entitled to postretirement wage loss benefits.

In March 2009, claimant, a police officer and union representative, injured his back and left knee while making an arrest, and resultantly underwent a spinal surgery (laminectomy and discectomy) on May 4, 2010. He returned to work in 2011 on restricted administrative duty, and later that year resumed the full-time duties of a police officer until July 2019, when he was again put on restricted duty. Claimant continued to work on restricted duty as a union representative in an administrative capacity until he opted to take a normal service retirement effective May 14, 2020, and thereafter raised the issue of involuntary retirement as a result of the back injuries he sustained in 2009.

A hearing was held at which claimant testified, explaining his restricted light job duties and that he had retired involuntarily due to the ongoing and worsening back pain and symptoms that he experienced while performing those duties, notwithstanding the employer's accommodation of his back condition, and on the advice of his treating orthopedic surgeon. Claimant further testified that his position required sitting approximately five to six hours per day and worsened his symptoms, and that taking breaks or standing to alleviate his pain was not always feasible. The commanding officer of the medical administration office also testified regarding claimant's administrative duties, stating that he was permitted to stand and stretch to alleviate his symptoms and that there was no time limitation on how long he could remain on restricted duty status. Deposition testimony and medical records and reports were submitted in support of claimant's back injury. Specifically, claimant's treating orthopedic surgeon, who began treating claimant in February 2019, testified that claimant had a progressively worsening disability of 33.3% in February 2019 that, as of August 2020, left him 75% disabled. The orthopedist diagnosed claimant with multi-level spinal compression, lumbar stenosis, disc degeneration and radiculopathy, and further testified that retirement had been necessary because claimant's restricted job duties involved sitting and sedentary work, which were "very difficult" and provoked his back symptoms. Based on this, the orthopedist opined that claimant could only tolerate part-time sedentary work, he could not sit for full days and that he should not sit for more than one hour at a time. Claimant's pain management specialist examined him six or seven times between January and November 2020, and found – based upon these examinations, the treating orthopedist's disability calculation, an MRI report and claimant's complaints – that he had a mild/moderate disability of 33.3% and that his condition had stabilized, noting that he had never advised claimant to retire.

The employer and its workers' compensation carrier procured an independent medical examination of claimant that was performed eight months after his retirement in January 2021, by an orthopedic surgeon (hereinafter the carrier's consultant) who

reviewed his medical records and submitted a report; the report recommended continuing physical therapy but did not offer an opinion regarding claimant's degree of disability, ability to perform his restricted job duties with accommodations at the time of his retirement or whether retirement was medically advised. The report recorded claimant's ongoing complaints of low back pain, pain radiating down his right leg and pain in his mid-back to the right buttocks and posterior thigh and lateral leg numbness and tingling, and included a diagnosis of right side sciatica and postoperative status. The carrier's consultant, who conceded that he had no recollection of the examination, later testified and, adopting the content of his report, opined that claimant had a moderate to marked disability, had limited range of motion with pain, had not reached maximum medical improvement and that he should continue physical therapy and avoid repetitive lifting and prolonged standing, walking and stair climbing.

A Workers' Compensation Law Judge (hereinafter WCLJ) found that although claimant had not been forced by the employer to retire and the employer had attempted to accommodate his condition, even his modified duties were too painful and, accordingly, he had involuntarily retired primarily due to his disability that resulted from the 2009 injury. The WCLJ held in abeyance an award for lost wages from claimant's May 14, 2020 retirement until December 7, 2020, pending further review of medical records, and made an award of continuing lost wage payments at a 50% temporary partial disability rate for the period of December 7, 2020 through December 30, 2022 (the day after the final hearing). On administrative appeal, the Workers' Compensation Board modified the WCLJ's decision, concluding that claimant's disability did not prevent him from performing his light duty assignment with accommodations, and that he had voluntarily retired. The Board rescinded the award of lost wages and replaced it with a finding of no compensable lost time. Claimant appeals.

We affirm. "Generally, a claimant who voluntarily withdraws from the labor market by retiring is not entitled to workers' compensation benefits unless the claimant's disability caused or contributed to the retirement" (*Matter of Losquadro v Nassau County Police Dept.*, 225 AD3d 1083, 1084 [3d Dept 2024] [internal quotation marks and citations omitted]; accord *Matter of Digbasanis v Pelham Bay Donuts Inc.*, 224 AD3d 1047, 1048-1049 [3d Dept 2024]; *Matter of Vankoevering v New York State Canal Corp.*, 211 AD3d 1301, 1302 [3d Dept 2022]). "Although the absence of evidence of medical advice to retire may be a relevant factor in determining whether a particular claimant's retirement constituted a voluntary withdrawal from the labor market, medical advice to retire is not . . . an essential element for a finding that a claimant's compensable injury played a role in the decision to retire" (*Matter of Evans v Jewish Home & Hosp.*, 289

AD2d 795, 796 [3d Dept 2001] [internal citations omitted]), but there must "be some evidence that the claimant's disability caused or contributed to the retirement" (*Matter of Vankoevering v New York State Canal Corp.*, 211 AD3d at 1302 [internal quotation marks, brackets and citations omitted]). "Whether a retirement or withdrawal from the labor market is voluntary is a factual determination to be made by the Board" (*Matter of Rivera v Joseph L. Balkan, Inc.*, 193 AD3d 1214, 1215 [3d Dept 2021] [internal quotation marks and citations omitted]). "[T]he Board's determination of that issue will not be disturbed if supported by substantial evidence [and, to that end,] . . . as the sole arbiter of witness credibility, the Board has broad authority to resolve factual issues based on credibility of witnesses and draw any reasonable inference from the evidence in the record" (*Matter of Saporito v Office of Ct. Admin.*, 217 AD3d 1031, 1032-1033 [3d Dept 2023] [internal quotation marks and citations omitted]).

In finding that claimant had voluntarily retired, the Board credited the opinions of claimant's pain management specialist that he had a 33.3% disability and the carrier's consultant that he had a moderate to marked disability over that of his treating orthopedist that his disability level progressively increased to 75% around the time of his retirement and required that he retire, an assessment made without an awareness of the accommodations being made in his light duty assignment. The Board noted that claimant had been able to work full time as a police officer for years after his 2010 surgery and was able to tolerate the restricted duty assignment that began in 2019, in which he was permitted to stand, walk and stretch as needed without repercussions, finding no persuasive evidence that he was having difficulty performing those duties before he retired. Contrary to claimant's argument, the Board, not the WCLJ, "is the sole arbiter of witness credibility" and "has the exclusive province to resolve conflicting medical opinions and to evaluate medical evidence before it" and "was not bound by the WCLJ's determinations" (*Matter of Ghaffour v New York State Black Car Operators*, 224 AD3d 1021, 1023 [3d Dept 2024] [internal quotation marks, brackets and citations omitted]). Although the WCLJ credited claimant's testimony and the treating orthopedist's finding that the light duty work was too painful and that retirement was necessary in concluding that he had involuntarily retired, the Board was entitled to draw different inferences and discount that conclusion based upon the other medical evidence and testimony and the orthopedist's concession that he was unaware that claimant was permitted to take breaks to move, stand and stretch as needed, which would alleviate his symptoms caused by prolonged periods of sitting.

We discern no error in the Board's conclusion that this case more closely resembles the facts in *Employer: County of Nassau Civil Service II* (2022 WL 18359761,

2022 NY Wrk Comp LEXIS 6972 [WCB No. G296 5754, Dec. 30, 2022]), than the facts in *Employer: County of Nassau Civil Service I* (2020 WL 6200143, 2020 NY Wrk Comp LEXIS 14471 [WCB No. G257 8586, Oct. 19, 2020]). This conclusion was based upon the Board's findings that claimant was able to perform his light duty assignment with accommodations at the time he retired, and that his treating orthopedist's opinion regarding his progressively worsening disability and inability to perform the light duty work was not credible as it was made without an understanding regarding his accommodations and conflicted with the credited opinions of his pain management specialist and the carrier's consultant and was not supported by the record. Notably, "this Court will not disturb a finding of the Board where it is supported by substantial evidence, even where[, as here,] a contrary conclusion of the WCLJ is also supported by substantial record evidence" (*Matter of Ghaffour v New York State Black Car Operators*, 224 AD3d at 1023-1024). Under the circumstances presented and deferring to the Board's credibility determinations, we find that substantial evidence supports the Board's finding that claimant's work-related injuries did not cause or contribute to his decision to retire and, given that he voluntarily withdrew from the labor market, claimant was not entitled to an award of reduced earnings subsequent to the date of his retirement (*see Matter of Losquadro v Nassau County Police Dept.*, 225 AD3d at 1085). In view of the foregoing, we find no reason to disturb the Board's decision (*see Matter of Farrulla v SUNY at Stony Brook*, 193 AD3d 1206, 1208 [3d Dept 2021]).

Pritzker, J.P., Lynch, Ceresia and Mackey, JJ., concur.

ORDERED that the decision is affirmed, without costs.

ENTER:

A handwritten signature in black ink that reads "Robert D. Mayberger". The signature is written in a cursive, slightly slanted style.

Robert D. Mayberger
Clerk of the Court