STATE OF MICHIGAN

COURT OF APPEALS

LILLIE M. GUNN,

Plaintiff-Appellant,

v

CHRYSLER CORPORATION,

Defendant-Appellee.

UNPUBLISHED
October 15, 1996

No. 186275
LC No. 91-225

Before: Cavanagh, P.J., and Murphy and C. W. Simon, Jr.,* JJ.

PER CURIAM.

This case has been remanded for consideration as on leave granted. Plaintiff Lillie Gunn appeals a decision by the Worker's Compensation Appellate Commission (WCAC) affirming the decision of the magistrate granting defendant Chrysler Corporation's petition to stop benefits. We affirm.

Plaintiff received worker's compensation benefits pursuant to a decision entered on January 30, 1987 by the Worker's Compensation Appeal Board (WCAB). That decision held that plaintiff had a work-related orthopedic disability and a functional overlay. On December 20, 1989, defendant filed a petition to stop benefits. A physician's report attached to the petition stated that plaintiff had recovered from her orthopedic disability. Plaintiff was scheduled for an independent psychiatric examination. Plaintiff unsuccessfully moved to quash the subsequent deposition. The magistrate ruled that plaintiff was entitled to depose a psychiatrist to rebut defendant's evidence; however, plaintiff did not do so.

The magistrate granted the petition to stop benefits. Relying on testimony from Dr. Monson, an orthopedist, and Dr. Freedman, a psychiatrist, the magistrate found that plaintiff was neither orthopedically nor psychiatrically disabled. Benefits were terminated as of August 17, 1990, the date of Dr. Freedman's examination.

Both parties appealed, and the WCAC affirmed with modification the magistrate's decision. The WCAC rejected plaintiff's argument that defendant failed to comply with 1979 AC R 408.40 (Rule 10), which requires that a petition to stop be accompanied by a statement from a physician indicating

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* Circuit judge, sitting on the Court of Appeals by assignment.

that the claimant is able to return to work. Defendant's petition did not include a statement from a psychiatrist. The WCAC found that plaintiff had notice of the claims against her, including the claim that she had recovered from her psychiatric disability. In addition, the WCAC rejected plaintiff's claim that the magistrate shifted the burden of proof and required her to re-prove her claim. Finally, the WCAC rejected plaintiff's claim that the magistrate's findings were not supported by the requisite evidence.

Findings of fact made by a magistrate are conclusive on the WCAC if they are supported by competent, material, and substantial evidence on the whole record. MCL 418.861a(3); MSA 17.237(861a)(3). Judicial review is of the findings of fact made by the WCAC, not those made by the magistrate. The findings of fact made by the WCAC are conclusive if there is any competent evidence in the record to support them. *Holden v Ford Motor Co*, 439 Mich 257, 263; 484 NW2d 227 (1992).

On appeal, plaintiff argues that the WCAC erred as a matter of law by failing to dismiss the petition to stop benefits. Plaintiff contends that the WCAC overlooked defendant's failure to comply with Rule 10 and append a statement from a psychiatrist by essentially dismissing the rules as an "administrative convenience."

We disagree. We have held that the administrative rules pertaining to worker's compensation practice are binding. *Wojciechowski v General Motors Corp*, 151 Mich App 399, 404-405; 390 NW2d 727 (1986). In the instant case the WCAC did not hold otherwise. The WCAC found that although the petition to stop was not accompanied by a statement from a psychiatrist, plaintiff was notified of the psychiatric examination, and thus had notice that her eligibility for continuing benefits for a psychiatric disability was being questioned. Plaintiff was not deprived of the due process right to notice of the nature of the claims against her. Moreover, plaintiff had the opportunity to depose a psychiatrist before the trial; she was not limited to the 21-day deposition period in 1979 AC, R 408.40f(b)(ii), as she claims. We conclude that, at most, any error resulting from defendant's failure to attach a statement from a psychiatrist to its petition to stop was harmless.

Next, plaintiff argues that the WCAC erred by affirming the magistrate's decision because the magistrate shifted the burden of proof and required her to re-prove her case rather than requiring defendant to establish that she was no longer disabled. Noting that on at least two occasions the magistrate's opinion referred to "plaintiff's claim," plaintiff asserts that these references demonstrate that the magistrate shifted the burden of proof.

This issue is without merit. To prevail on a petition to stop benefits, a defendant must prove by a preponderance of the evidence that the claimant is no longer disabled. *White v Michigan Consolidated Gas Co*, 352 Mich 201, 210-211; 89 NW2d 439 (1958). The WCAC cited language from the magistrate's opinion such as "defendant has prevailed" and "plaintiff has recovered" as support for its finding that the magistrate was aware that defendant carried the burden of proof, and that the magistrate properly put the burden of proof on defendant. The WCAC's finding that the magistrate properly located the burden of proof was supported by competent evidence. *Holden, supra*.

Finally, plaintiff argues that the WCAC erred by affirming the magistrate's decision that she was no longer disabled because that decision was based on testimony to the effect that the originally adjudicated diagnosis was not valid. Plaintiff emphasizes that the WCAB's decision that she suffered from both a low back disability and a functional overlay was not appealed. When adjudicating the petition to stop, the magistrate did not rely on testimony establishing that her condition had changed; rather, the magistrate relied on testimony from Dr. Freedman to the effect that functional overlay is not a diagnosis but instead is a description of a condition. Plaintiff asserts that the WCAB's original finding that functional overlay was an appropriate basis for an award was final, that pursuant to the doctrine of res judicata it could not be relitigated.

The doctrine of res judicata provides that where two parties have fully litigated a claim and a final judgment has resulted, the claim cannot be relitigated by either party. Application of the doctrine of res judicata has three prerequisites: (1) there must have been a prior decision on the merits; (2) the issue must have been resolved in the first action, either because it was actually litigated or because it might have been presented and litigated in the first action; and (3) both actions must be between the same parties or their privies. *VanDeventer v Michigan Nat'l Bank*, 172 Mich App 456, 463-464; 432 NW2d 338 (1988).

This issue is without merit. While Dr. Freedman stated in his report that "functional overlay" is not a psychiatric diagnosis, he did not conclude that plaintiff had never been psychiatrically disabled. He opined that as of the date of his examination, August 17, 1990, plaintiff was not psychiatrically disabled. The magistrate was entitled to rely on this testimony. *Miklik v Michigan Special Machine Co*, 415 Mich 364, 367; 329 NW2d 713 (1982). Neither the magistrate nor the WCAC relitigated the issue of the basis of plaintiff's psychiatric disability. The WCAC's finding that plaintiff was no longer disabled was supported by competent evidence. *Holden, supra*.

Affirmed.

/s/ Mark J. Cavanagh
/s/ William B. Murphy
/s/ Charles W. Simon, Jr.