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

Decided and Entered: February 9, 2023 534205

In the Matter of the Claim of KEVIN BRENNAN,
Appellant,
v

VILLAGE OF JOHNSON CITY et al., MEMORANDUM AND ORDER
Respondents.

WORKERS' COMPENSATION BOARD,
Respondent.

Calendar Date: January 12, 2023

Before: Garry, P.J., Egan Jr., Lynch, Pritzker and McShan, JJ.

Kevin Brennan, Endicott, appellant pro se.

Gitto & Niefer, LLP, Binghamton (*Jason M. Carlton* of counsel), for Village of Johnson City and another, respondents.

Pritzker, J.

Appeal from a decision of the Workers' Compensation Board, filed September 20, 2021, which, among other things, disallowed claimant's request to amend his claim to include certain consequential conditions and ruled that claimant's Workers' Compensation Law § 114-a violation disqualified claimant from receiving a schedule loss of use award.

In 1995, claimant sustained a work-related injury, and his subsequent claim for workers' compensation benefits was established for an injury to his back and later amended to include bilateral hips. In 2002, the Workers' Compensation Board upheld a decision by a Workers' Compensation Law Judge finding that claimant violated Workers' Compensation Law § 114-a and permanently disqualified him from receiving future wage-replacement benefits.[1] In 2012, the Board's decision permanently disqualifying claimant from receiving indemnity benefits was affirmed by this Court (98 AD3d 1199, 1199-1200 [3d Dept 2012], *lv dismissed* 20 NY3d 998 [2013]).

In November 2019, claimant sought to amend the claim to include certain consequential gastrointestinal conditions. In a December 2020 decision, a Workers' Compensation Law Judge (hereinafter WCLJ) directed claimant's treating physician to provide testimony regarding whether claimant's alleged consequential gastrointestinal conditions were causally related. Following said testimony and hearings, the WCLJ, among other things, disallowed the alleged consequential gastrointestinal claim, finding that claimant failed to show that his alleged conditions were causally related, and ruled that claimant's hip injury was amendable to a 45% schedule loss of use (hereinafter SLU) to the left leg (hip). However, due to claimant's permanent disqualification from receiving indemnity benefits as a result of his Workers' Compensation Law § 114-a violation, the WCLJ also found that claimant was ineligible to receive payment for the SLU award. Upon administrative appeal, the Workers' Compensation Board found that it was proper for the WCLJ to direct depositions of, among others, claimant's treating physician, that claimant is disqualified from receiving indemnity benefits, which includes any SLU award, and that claimant failed to establish through credible medical evidence that his consequential gastrointestinal conditions were causally related. Claimant appeals.

We affirm. With regard to the Board's denial of claimant's request to amend his claim to include consequential gastrointestinal injuries, " '[t]he Board is empowered to determine the factual issue of whether a causal relationship exists based upon the record, and its determination will not be disturbed when supported by substantial evidence' " (*Matter of Blanch v Delta Air Lines*, 204 AD3d 1203, 1204 [3d Dept 2022], quoting *Matter of Park v Corizon Health Inc.*, 158 AD3d 970, 971 [3d Dept 2018], *lv denied* 31 NY3d 909 [2018]; *see Matter of Johnson v Adams & Assoc.*, 140 AD3d 1552, 1553 [3d Dept 2016]). "In addition, as the party seeking benefits, claimant bears the burden of

[1] Liability for the claim was subsequently transferred, effective in November 2002, to the Special Fund for Reopened Cases pursuant to Workers' Compensation Law § 25-a (192 AD3d 1287, 1288 [3d Dept 2021]).

establishing, by competent medical evidence, a causal connection or relationship between [his] employment and the claimed disability" (*Matter of Christensen-Mavrigiannakis v Nomura Sec. Intl., Inc.*, 175 AD3d 1748, 1752 [3d Dept 2019] [internal quotation marks, brackets and citations omitted]; *see Matter of Richman v New York State Workers' Compensation Bd.*, 199 AD3d 1216, 1217 [3d Dept 2021]; *Matter of Maldonado v Doria, Inc.*, 192 AD3d 1247, 1248 [3d Dept 2021]). As to claimant's request to amend his claim to include alleged consequential gastrointestinal conditions, "the Board is vested with the authority to resolve conflicting medical opinions and to draw reasonable inferences from record evidence" (*Matter of Blanch v Delta Air Lines*, 204 AD3d at 1205 [internal quotation marks and citations omitted]; *see Matter of Schmerler v Longwood Sch. Dist.*, 163 AD3d 1373, 1374 [3d Dept 2018], *lv denied* 32 NY3d 910 [2018]).

Atif Saleem, a board-certified physician in internal medicine and gastroenterology who provided treatment to claimant, testified that he has treated claimant since 2016 and diagnosed claimant with the at-issue gastrointestinal issues. With regard to the cause of these conditions, Saleem testified that one of the at-issue conditions is idiopathic, and he was unable to discern the cause of claimant's other conditions as they are so prevalent in the population at large and often have many environmental factors. Saleem also indicated that, although there was a possibility that the medications claimant was taking could cause "flare-ups" of his gastrointestinal issues, he could not discern, to a degree of medical certainty, whether claimant's medications caused some or all of his gastrointestinal conditions.

Similarly, Ira Breite, a board-certified physician in internal medicine and gastroenterology who conducted a records review and independent medical examination of claimant, testified that, although he could not definitively rule out an association, he thought it was highly unlikely that claimant's gastrointestinal issues were causally related. Breite also indicated that the gastrointestinal issues that claimant is experiencing are most likely the result of the aging process and that there is a relatively weak association between the medications that claimant is taking and his conditions. In view of the foregoing, and according deference to the Board's assessments of credibility, we find that substantial evidence in the record supports its decision to disallow claimant's request to amend his claim in the manner sought (*see Matter of Blanch v Delta Air Lines*, 204 AD3d at 1205-1206; *Matter of Neira-Bernal v SIG Contracting Corp.*, 183 AD3d 1103, 1104 [3d Dept 2020]; *Matter of Molette v New York City Tr. Auth.*, 166 AD3d 1278, 1278 [2018]).

Finally, contrary to claimant's contention, it was not improper for the Board to find that the discretionary penalty of permanently disqualifying claimant from receiving wage-replacement benefits precluded an SLU award to claimant for the left leg. "[T]he plain language of Workers' Compensation Law § 114-a unambiguously limits the application of the outlined penalties to wage replacement benefits awarded pursuant to Workers' Compensation Law § 15" (*Matter of Giello v Providence Fire Dist.*, 57 AD3d 1294, 1296 [3d Dept 2008]; *see* Workers' Compensation Law § 114-a [1]; *Matter of Rodriguez v Burn-Brite Metals Co.*, 1 NY3d 553, 555-556 [2003]). In turn, Workers' Compensation Law § 15 (3) includes both schedule and nonschedule awards for permanent partial disabilities (*see* Workers' Compensation Law § 15 [3] [a]-[t], [w]). Accordingly, given the Board's previous decision to impose the discretionary penalty of permanently disqualifying claimant from receiving future wage-replacement benefits, which includes any SLU award made under Workers' Compensation Law § 15 (*see Matter of Rodriguez v Burn-Brite Metals Co., Inc.*, 1 NY3d at 555; *Matter of Galeano v International Shoppes*, 171 AD3d 1416, 1418 & n 1 [3d Dept 2019]), we discern no basis to disturb the Board's determination finding that claimant was not eligible to receive an SLU award under the circumstances presented here (*see Matter of Martinez v LeFrak City Mgt.*, 100 AD3d 1110, 1110-1111 [3d Dept 2012]; *Matter of Dieter v Trigen-Cinergy Solutions of Rochester*, 14 AD3d 748, 749 [3d Dept 2005], *appeal dismissed* 4 NY3d 881 [2005]; *cf. Matter of Rosario v Consolidated Edison Co. of N.Y. Inc.*, 174 AD3d 1186, 1187-1189 [3d Dept 2019]). To the extent that claimant's remaining contentions are properly before us, they have been considered and found to be without merit, including his claim that the WCLJ improperly directed deposition testimony from claimant's treating physician (*see Matter of Lewis v Stewart's Mktg. Corp.*, 90 AD3d 1345, 1346 [3d Dept 2011]; *Matter of Carr v Cairo Fire Dist.*, 80 AD3d 810, 812 [3d Dept 2011]; *Matter of Emanatian v Saratoga Springs Cent. School Dist.*, 8 AD3d 773, 774 [3d Dept 2004]; *see also* 12 NYCRR 300.10 [c]).

Garry, P.J., Egan Jr., Lynch and McShan, JJ., concur.

ORDERED that the decision is affirmed, without costs.

ENTER:

Robert D. Mayberger
Clerk of the Court