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

Decided and Entered: November 27, 2024 CV-23-0883

In the Matter of the Claim of
MIROSLAV LAPAN,
Appellant,
v

TRADE WINDS ENVIRONMENTAL et al.,
Respondents.

MEMORANDUM AND ORDER

WORKERS' COMPENSATION BOARD,
Respondent.

Calendar Date: October 10, 2024

Before: Clark, J.P., Pritzker, Reynolds Fitzgerald, Ceresia and Mackey, JJ.

Schotter Millican, LLP, Brooklyn (*Geoffrey Schotter* of counsel), for appellant.

Weiss, Wexler & Wornow, PC, New York City (*J. Evan Perigoe* of counsel), for Trade Winds Environmental and another, respondents.

Mackey, J.

Appeal from a decision of the Workers' Compensation Board, filed April 18, 2023, which ruled, among other things, that claimant failed to demonstrate attachment to the labor market and rescinded prior awards of workers' compensation benefits.

Claimant was employed as an asbestos handler until he ceased working in October 2015. He subsequently established a workers' compensation claim for work-related gastroesophageal reflux disease, chronic obstructive pulmonary disease, obstructive sleep apnea, posttraumatic stress disorder and lung cancer, with a date of disablement of June 8, 2012. After various proceedings and a hearing, a Workers' Compensation Law Judge (hereinafter WCLJ) found that claimant had voluntarily removed himself from the labor market for the period of May 3, 2016 through January 17, 2018, based upon his failure to perform a diligent work search within his medical restrictions. That decision was upheld upon administrative appeal. Claimant subsequently submitted documentation of his job search, beginning in 2021, and a hearing was held on the issue of labor market reattachment. A WCLJ thereafter found that claimant had demonstrated his reattachment to the labor market as of November 16, 2021, and awarded temporary partial disability benefits. Upon administrative appeal, the Workers' Compensation Board reversed and rescinded the awards, finding that claimant had not reattached to the labor market. Claimant appeals.

Whether a claimant has met his or her burden to demonstrate an attachment to the labor market is a factual issue for the Board to resolve, and its decision in this regard will be upheld if supported by substantial evidence in the record as a whole (*see Matter of Winkelman v Sumitomo Rubber USA*, 228 AD3d 1153, 1156-1157 [3d Dept 2024]; *Matter of Canela v Sky Chefs, Inc.*, 193 AD3d 1216, 1216-1217 [3d Dept 2021]). "It is incumbent upon a claimant to demonstrate attachment to the labor market with evidence of a search for employment within medical restrictions" (*Matter of Joseph v Historic Hudson Val. Inc.*, 202 AD3d 1243, 1244 [3d Dept 2022] [internal quotation marks and citations omitted]; *see Matter of Palmer v Champlain Val. Specialty*, 149 AD3d 1342, 1342 [3d Dept 2017]). "The Board has found that a claimant remains attached to the labor market when he or she is actively participating in a job location service, a job retraining program or a Board-approved rehabilitation program, or where there is credible documentary evidence that he or she is actively seeking work within his or her medical restrictions through a timely, diligent and persistent independent job search" (*Matter of Policarpio v Rally Restoration Corp.*, 189 AD3d 1796, 1797-1798 [3d Dept 2020] [internal quotation marks and citations omitted]; *see Matter of King v Riccelli Enters.*, 156 AD3d 1095, 1096-1097 [3d Dept 2017]).

Claimant submitted extensive evidence of his job search, both through job location services and individually, providing more than 600 pages of proof that he filed applications to numerous job postings. These included applications for positions such as dishwasher, doorman, cook, parking garage attendant, kitchen attendant/helper, juice

barista and laundry attendant. However, as claimant testified, despite having applied for innumerable jobs, he did not receive any interviews. He also applied for vocational rehabilitation services and was advised to enroll in English as a second language classes, which he promptly did. The WCLJ found that claimant demonstrated attachment to the workforce as of November 16, 2021, the date his English classes started, and we agree.

We are mindful that the Board "is the sole arbiter of witness credibility" (*Matter of Felicello v Marlboro Cent. Sch. Dist.*, 178 AD3d 1252, 1253 [3d Dept 2019] [internal quotation marks and citations omitted]), but the decision here does not hinge on witness credibility. Rather, documentary evidence amply demonstrates that claimant has engaged in a "diligent and persistent job search so as to demonstrate attachment to the labor market" (*Matter of Policarpio v Rally Restoration Corp.*, 189 AD3d at 1800), and we find that the Board's conclusion to the contrary is not supported by substantial evidence.

Pritzker, Reynolds Fitzgerald and Ceresia, JJ., concur.

Clark, J.P. (dissenting).

I respectfully dissent, as I believe that the Board's determination that claimant failed to attach to the labor market is a factual determination to which this Court must defer. "It is incumbent upon a claimant to demonstrate attachment to the labor market with evidence of a search for employment within medical restrictions" (*Matter of Joseph v Historic Hudson Val. Inc.*, 202 AD3d 1243, 1244 [3d Dept 2022] [internal quotation marks and citations omitted]; *see Matter of Palmer v Champlain Val. Specialty*, 149 AD3d 1342, 1342 [3d Dept 2017]). The determination as to whether a claimant made such a showing "is a factual one that [we] must uphold as long as there is substantial evidence to support it. We may not weigh the evidence or reject the Board's choice simply because a contrary determination would have been reasonable" (*Matter of Zamora v New York Neurologic Assoc.*, 19 NY3d 186, 192-193 [2012] [internal citations omitted]; *see Matter of Winkelman v Sumitomo Rubber USA*, 228 AD3d 1153, 1156-1157 [3d Dept 2024]; *Matter of Canela v Sky Chefs, Inc.*, 193 AD3d 1216, 1216-1217 [3d Dept 2021]; *Matter of Rothe v United Med. Assoc.*, 18 AD3d 1093, 1094 [3d Dept 2005]). "The Board has found that a claimant remains attached to the labor market when he or she is actively participating in a job location service, a job retraining program or a Board-approved rehabilitation program, or where there is credible documentary evidence that he or she is actively seeking work within his or her medical restrictions through a timely, diligent and persistent independent job search" (*Matter of Policarpio v Rally Restoration*

Corp., 189 AD3d 1796, 1797-1798 [3d Dept 2020] [internal quotation marks and citations omitted]; *see Matter of King v Riccelli Enters.*, 156 AD3d 1095, 1096-1097 [3d Dept 2017]).

Here, the record reflects that claimant completed an assessment with a job location program but was denied the service due to his need to address ongoing medical concerns. The denial letter also noted claimant's limited proficiency of the English language and recommended that he enroll in an English as a Second Language class.[1] Thereafter, claimant did not seek any other job retraining or rehabilitation programs. Accordingly, I would find that substantial evidence supports the Board's determination that claimant failed to "actively participat[e] in job location services, retraining programs or rehabilitation programs to secure employment" during the relevant time period (*Matter of Ostrzycki v Air Tech Lab, Inc.*, 174 AD3d 1255, 1256-1257 [3d Dept 2019]; *see Matter of King v Riccelli Enters.*, 156 AD3d at 1097-1098; *Matter of Palmer v Champlain Val. Specialty*, 149 AD3d at 1343).

As to claimant's independent employment search, he submitted over 600 pages of job postings and application confirmations. A significant share of those submissions, however, are not in the English language, and no translation is provided. As to the English-language postings, it is unclear whether the jobs fell within claimant's medical restrictions, as the postings were largely devoid of the job requirements and claimant did not otherwise supply such information. Consequently, the Board found that claimant failed to demonstrate that he engaged in a good faith effort to obtain employment that fell within his medical restrictions. The Board's determination that claimant failed to diligently engage in an active independent employment search within his medical restrictions is supported by substantial evidence, and I would defer to the Board's resolution of such factual issue (*see Matter of Palmer v Champlain Val. Specialty*, 149 AD3d at 1343; *Matter of Pravato v Town of Huntington*, 144 AD3d 1354, 1356-1357 [3d Dept 2016]).

As the Board's ultimate determination that claimant failed to demonstrate an attachment to the labor market reflects its resolution of a factual issue – a matter within its province that we do not second-guess – I would accord due deference to such determination, and I would affirm (*see Matter of Zamora v New York Neurologic Assoc.*, 19 NY3d at 193; *Matter of Vukotic v Prince Food Corp.*, 224 AD3d 1035, 1036-1037 [3d

[1] Claimant had completed some English as a Second Language classes before the assessment, but he re-enrolled in said classes following the program's recommendation.

Dept 2024], *lv denied* 42 NY3d 902 [2024]; *Matter of Ostrzycki v Air Tech Lab, Inc.*, 174 AD3d at 1257; *compare Matter of Canela v Sky Chefs, Inc.*, 193 AD3d at 1217).

ORDERED that the decision is reversed, with costs, and matter remitted to the Workers' Compensation Board for further proceedings not inconsistent with this Court's decision.

ENTER:

Robert D. Mayberger
Clerk of the Court