

Decided and Entered: May 23, 2013

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In the Matter of the Claim of
KAREN PAWLITZ-DELGAIZO,
Respondent,

v

COMMUNITY GENERAL HOSPITAL
et al.,
Appellants,
and

SPECIAL DISABILITY FUND,
Respondent.

WORKERS' COMPENSATION BOARD,
Respondent.

AFFIRMED Board's ruling that §15(8)d
does not apply.

MEMORANDUM AND ORDER

Calendar Date: April 16, 2013

Before: Rose, J.P., Stein, Spain and McCarthy, JJ.

Gitto & Niefer, LLP, Binghamton (Jason M. Carlton of
counsel), for appellants.

Steven M. Licht, Special Funds Conservation Committee,
(Jill B. Singer of counsel), for Special Disability Fund,
respondent.

McCarthy, J.

Appeal from an amended decision of the Workers' Compensation
Board, filed July 3, 2012, which ruled that the employer's
workers' compensation carrier is not entitled to reimbursement
from the Special Disability Fund.

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Claimant sustained a work-related injury to her head, back and pelvis in October 1998 and was awarded workers' compensation benefits. Subsequently, the employer and its workers' compensation carrier (collectively referred to as the carrier) sought reimbursement from the Special Disability Fund pursuant to Workers' Compensation Law § 15 (8) (d). Following depositions of claimant as well as the carrier's expert, a Workers' Compensation Law Judge found that the carrier was entitled to reimbursement. On appeal, the Workers' Compensation Board reversed. Thereafter, the carrier sought reconsideration or full Board review and the Board issued an amended decision reaching the same conclusion, but adding certain facts and analysis. The carrier now appeals, and we affirm.

"To qualify for reimbursement from the Fund, the employer must demonstrate that claimant suffered from (1) a preexisting permanent impairment that hindered job potential, (2) a subsequent work-related injury, and (3) a permanent disability caused by both conditions that is materially and substantially greater than would have resulted from the work-related injury alone" (Matter of Burley v Theriault Transp., 85 AD3d 1423, 1423 [2011] [citations omitted]; see Workers' Compensation Law § 15 [8] [d]). We agree with the Board that the carrier failed to prove that claimant's preexisting conditions hindered or were likely to hinder her employment or job potential. While the carrier's expert did offer an opinion that claimant's low back spondylolisthesis and migraine conditions could pose a hinderance to employability, this opinion was based upon generalities and speculation. Notably, the expert did not examine claimant and the available medical records did not reflect that claimant was subject to any restrictions or that these conditions presented any hinderance to her ability to work. Claimant testified that she was not under any restrictions, she was treated with medication for these conditions on an as-needed basis and the medications were effective (see Matter of Weiner v Glenman Indus. & Commercial Contr. Corp., 95 AD3d 1516, 1518 [2012]). Based upon the foregoing, we find that the Board's determination is supported by substantial evidence and we decline to disturb it (see Matter of Shelper v City of Tonawanda, 67 AD3d 1313, 1314 [2009]; compare Matter of Grabinsky v First At Nursing Servs., 79 AD3d 1494, 1495 [2010]).

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Rose, J.P., Stein and Spain, JJ., concur.

ORDERED that the amended 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