

Supreme Court, Appellate Division

Third Judicial Department

Decided and Entered: January 5, 2012

511382

In the Matter of the Claim of
RICARDO FRANCO,
Appellant,

AFFIRMED the Board's ruling that claimant had no further causally related disability.

v

PECKHAM INDUSTRIES, INC.,
et al.,
Respondents.

MEMORANDUM AND ORDER

WORKERS' COMPENSATION BOARD,
Respondent.

Calendar Date: November 16, 2011

Before: Peters, J.P., Rose, Kavanagh, McCarthy and Garry, JJ.

Law Office of Joseph A. Romano, New York City (Mark Du of counsel), for appellant.

Jones, Jones, L.L.C., New York City (Sara Thomas of counsel), for Peckham Industries, Inc. and another, respondents.

Kavanagh, J.

Appeal from a decision of the Workers' Compensation Board, filed April 14, 2010, which ruled that claimant had no further causally related disability.

Claimant injured his back while raking blacktop for the employer in April 2004 and was awarded workers' compensation benefits. In September 2004, claimant received epidural steroid injections to relieve his back pain. In October 2004, claimant was hospitalized and treated for tuberculosis myelitis. Claimant

sought to amend his workers' compensation claim to include tuberculosis myelitis as a consequential injury. After referring the matter to an impartial specialist, the Workers' Compensation Board concluded that there was insufficient evidence of a causal relationship to support the amendment of claimant's case to include tuberculosis myelitis. Upon further proceedings to determine whether claimant had any disability related to his established work-related injury subsequent to June 9, 2006, the Workers' Compensation Law Judge concluded that he did not. The Board modified the Workers' Compensation Law Judge decision with regard to certain evidentiary rulings and otherwise affirmed. Claimant now appeals.

We affirm. Inasmuch as claimant did not appeal from the Board's determination not to amend the claim to include consequential tuberculosis myelitis and did not re-present the issue in its application for Board review, such claim is unpreserved (see Matter of Beers v Jump Start Advanced Academics, 57 AD3d 1026, 1028 [2008]; Matter of Cullen v City of White Plains, 45 AD3d 1167, 1168-1169 [2007]). Turning to the issue of whether the Board's determination that claimant has no further disability due to his work-related back injury is supported by substantial evidence, we recognize the Board's authority to resolve differing medical evidence and we defer to the Board's credibility determinations (see Matter of Banner v Anheuser-Busch Cos., Inc., 59 AD3d 759, 760 [2009]; Matter of Dimitriadis v One Source, 53 AD3d 704, 705-706 [2008]; Matter of Cullen v City of White Plains, 45 AD3d at 1168). The Board found the opinions of John Mitamura, an orthopedist, and Sandra Caniciu, a neurologist, more credible than the other medical experts. Mitamura and Caniciu, who both examined and treated claimant, opined that claimant's present disability is not related to his workplace injury, but is solely due to the subsequent, unrelated tuberculosis myelitis condition. Accordingly, we find that the Board's determination is supported by substantial evidence and we will not disturb it.

Peters, J.P., Rose, McCarthy and Garry, JJ., concur.

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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