

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RICHARD STEINKE,
Plaintiff

CIVIL ACTION

v.

SEPTA,
Defendant

NO. 99-5345

MEMORANDUM AND ORDER

McLaughlin, J

June 5, 2002

The plaintiff in this action, Richard Steinke, alleges that the Southeastern Pennsylvania Transit Authority ("SEPTA") terminated his employment because of his disability in violation of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 et seq.¹ Currently pending before the Court are the parties' cross-motions for summary judgment. Because the Court concludes that Steinke has not established that he has a disability under the ADA, the Court will deny Steinke's motion for summary judgment and grant summary judgment for SEPTA.

The basic facts underlying Steinke's claim are as

¹ The complaint also contained a claim for violation of the Pennsylvania Human Relations Act ("PHRA"), 43 Pa. Cons. Stat. Ann. §§ 951-63 (1991). However, the plaintiff withdrew his PHRA claim on January 16, 2002. See Docket #45.

follows.' Steinke began working for SEPTA in 1972. He worked as a second class mechanic, a job which required him to perform heavy lifting. On January 6, 1979, Steinke suffered an electrocution while working in SEPTA's train yard. Steinke received several weeks of worker's compensation payments while he recovered from this incident. Steinke returned to work in April of 1979, resuming his position as a second class mechanic. Steinke continued working in his position at SEPTA until late 1985. Steinke Dep. at 293. On October 31, 1985, Steinke suffered a second injury when he fell off a ladder after a drain gate fell in, causing the ladder to topple. **As** a result of this fall, Steinke sustained an injury to his back. Because of this injury, Steinke was unable to return to work, and he again began receiving worker's compensation payments.

Steinke was diagnosed as having a herniated lumbar

² In deciding a motion for summary judgment, the Court must view the facts in the light most favorable to the non-moving party. Josev v. John R. Hollingsworth Corp., 996 F.2d 632, 637 (3d Cir. 1993). Summary judgment is appropriate if all of the evidence demonstrates that there is no genuine issue **of** material fact and that the moving party is entitled to judgement as a matter of law. Fed. R. Civ. Pro. 56(c). The moving party has the initial burden of demonstrating that no genuine issue of material fact exists. Once the moving party has satisfied this requirement, the non-moving party must present evidence that there is a genuine issue of material fact. The non-moving party may not simply rest on the pleadings, but must go beyond the pleadings in presenting evidence of a dispute of fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323-324 (1986).

disk. His treating physician, Dr. Seymour Leiner, has continuously certified since 1987 that because of this injury, Steinke was unable to return to his previous work as a SEPTA mechanic. Steinke continues to receive worker's compensation payments to this day.

In September of 1997, SEPTA requested that Steinke attend an Independent Medical Examination ("IME") to determine his continued eligibility for worker's compensation benefits. In February of 1998, Steinke submitted to an IME before Dr. Bong Lee. Dr. Lee performed numerous tests on Steinke. On February 17, 1998 Dr. Lee wrote a report which concluded that although Steinke suffered from "[p]ain syndrome of the low back and neck", there was "no orthopaedic reason this patient has to be totally disabled." Dr. Lee's report also indicated that Steinke had normal ambulation, had no evidence of joint effusion or asymmetrical musculature or atrophy, had full range of motion in his hips and knees, had sluggish, but not pathological, right knee and ankle reflexes, and that Steinke tested negative for tension in his sciatic nerve. See Dr. Lee Report of Feb. 17, 1998, Plf.'s Mot. for Summ. J. at Ex. A, 3-4.

In March of 1998, Steinke was informed that he would be required to attend a return to work assessment with SEPTA's medical department because Dr. Lee's report indicated that **he**

could return to his previous job. On April 9, 1998, Steinke, accompanied by his daughter, met with Dr. Gares, the chief physician in SEPTA's medical department. During this meeting, Dr. Gares concluded that there was a conflict of medical opinion regarding Steinke's ability to return to work. For that reason, Dr. Gares referred Steinke to Michael Lappe, SEPTA's Medical Records Librarian, for an explanation of SEPTA's dispute resolution procedure designed to clear up any difference of medical opinion regarding an employee's ability to return to work.

After meeting with Dr. Gares, Steinke went to Lappe's office as directed. Lappe and Steinke discussed the dispute resolution procedure that was outlined in the Collective Bargaining Agreement ("CBA") between SEPTA and Steinke's union, the Transport Workers Union of Philadelphia Local 234. Section 1201 of the CBA provides that when there is a dispute of medical opinion regarding the employee's ability to perform his/her job, the employee must submit to a medical examination by a neutral third party physician. If the employee refuses to submit to the examination, that employee is deemed to have resigned his/her employment with SEPTA.

When Lappe asked Steinke to consent to examination by a third party physician, Steinke requested an opportunity to review

the CBA procedure with his worker's compensation attorney before giving consent to the examination. Steinke attempted to contact his attorney via telephone at that time, but was unable to reach him. Steinke then left Lappe's office without signing the examination consent form, intending to have his attorney review the form before he signed it. Later that day, at 5:10 p.m., Steinke left a message on Lappe's voice mail indicating that he intended to sign the consent form and would deliver the form to SEPTA the following day, on April 10. Steinke did not deliver the signed form to SEPTA on April 10.

On the afternoon of April 14, Steinke left another voice mail message for Lappe, explaining that he did not deliver the form on April 10 because he was sick. On April 15, Steinke faxed the signed consent form to Lappe's office. On April 28, 1998, Steinke was informed via letter that because he refused to submit to the dispute resolution process on April 9 or to show up as promised on April 10, he was deemed to have resigned his employment with SEPTA effective April 12, 1998.

Steinke argues that the sequence of events of April 1998 establish that SEPTA failed to, in good faith, engage in an interactive process to determine if, with or without reasonable accommodation, Steinke could perform the essential functions of the position he held or desired. See Taylor v. Phoenixville Sch.

Dist., 184 F.3d 296, 311 (3d Cir. 1999). However, before the Court can determine whether there was a breakdown in the interactive process that violated the ADA, it must be determined whether Steinke has made out a prima facie case of disability discrimination under the ADA. Id.

In order to state a prima facie case of discrimination under the ADA, a plaintiff must show: (1) he is a disabled person within the meaning of the ADA; (2) he is otherwise qualified to perform the essential functions of the job, with or without reasonable accommodations by the employer; and (3) he has suffered an otherwise adverse employment decision as a result of the discrimination. Taylor, 184 F.3d at 306. To be a disabled person within the meaning of the ADA, the plaintiff must be a "qualified individual with a disability." 42 U.S.C. § 12112(a); Marinelli v. City of Erie, Pa., 216 F.3d 354, 359 (3d Cir. 2000). A qualified individual with a disability is "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8).

The ADA defines a disability as either "(A) a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment."

42 U.S.C. § 12102(2). Although a plaintiff is entitled to show that he has a disability by establishing any of these three conditions, Steinke does not argue that either (B) or (C) apply in this case.³ For that reason, the question here is whether Steinke has established that he has a physical or mental impairment that substantially limits a major life activity.

The regulations promulgated by the Equal Employment Opportunity Commission define an impairment as any physiological disorder, condition or anatomical loss which affects the neurological or musculoskeletal body systems (among others). See 29 C.F.R. § 1630.2(h)(1); Marinelli, 216 F.3d at 360. SEPTA does not argue that Steinke's back condition is not an impairment for purposes of the ADA, and it seems clear that his herniated disk and the attendant pain qualify as an impairment. Marinelli, 216 F.3d at 360 (plaintiffs "residual pain is . . . a condition that affects his musculoskeletal system"). For that reason, Steinke is an individual with an impairment under the ADA.⁴

³ The parties entered into a stipulation withdrawing any possible claim that Steinke was "regarded as" having an impairment by SEPTA. See Docket #39. Although Steinke did not stipulate to the withdrawal of any possible claim that he had a "record of such impairment", he does not argue that the "record of such impairment" provision is applicable in this case.

⁴ SEPTA does seem to argue, however, that Steinke's "blackouts" do not qualify as an impairment under the ADA. However, because Steinke qualifies as an individual with an
(continued...)

Steinke must also establish that his impairment substantially limits a major life activity. The EEOC regulations provide that an individual is substantially limited in a major life activity if he is "unable to perform a major life activity that the average person in the general population can perform" or is "significantly restricted as to the condition, manner or duration under which the average person in the general population can perform that same major life activity." 29 C.F.R. §§ 1630.2(j)(1)(i) & (ii); Marinelli, 216 F.3d at 361. Major life activities are "those basic activities that the average person in the general population can perform with little or no difficulty." 29 C.F.R. App. § 1630.2(i); Marinelli, 216 F.3d at 361. The regulations provide that examples of such activities include "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." Id.

The relevant factors to consider when determining whether an impairment substantially limits a major life activity are: (1) the nature and severity of the impairment; (2) the duration or expected duration; and (3) the expected or actual permanent or long-term impact of or resulting from the

⁴(...continued)
impairment regardless of his blackouts, the Court will consider SEPTA's arguments pertaining to Steinke's blackouts in the discussion of substantial limitation of a major life activity.

impairment. See 19 C.F.R. § 1630.2(j)(2); Taylor v. Pathmark Stores, 177 F.3d 180, 185 (3d Cir. 1999). In evaluating this issue, the Third Circuit has cautioned that "courts must adjudicate ADA claims on a case-by-case basis" and that "only extremely limiting disabilities . . . qualify for protected status under the ADA." Marinelli, 216 F.3d at 362.

Steinke asserts that he is substantially limited in his ability to walk, bend, lift and stand.⁵ SEPTA does not argue that these are not major life activities under the ADA. Rather, SEPTA argues that Steinke has not established that as a result of his impairment he is substantially limited in his ability to engage in those activities. After a close review of the record evidence, the Court agrees.

Steinke, as the ADA plaintiff, "bears the burden of establishing that he is disabled within the meaning of the ADA", and he must affirmatively point to evidence in the record that establishes that he is substantially limited in a major life activity in order to survive a motion for summary judgment. See Marinelli, 216 F.3d at 363; see also Toyota Mfg., Ky., Inc. v.

⁵ Steinke is not asserting that he is substantially limited in his ability to engage in the major life activity of working. For that reason, the Court need not consider whether Steinke's impairment prevents him from engaging in a broad category or class of jobs. Marinelli, 216 F.3d at 364.

Williams, 122 S. Ct. 681, 691-92 (2002) (noting that an ADA plaintiff must "prove a disability by offering evidence that the extent of the limitation [caused by their impairment] in terms of their own experience . . . is substantial"). In support of his argument that he was substantially limited in the major life activities of walking, bending, lifting and standing, Steinke points primarily to two sources of evidence: his deposition testimony, and the deposition testimony and accompanying records of Dr. Leiner, his treating physician.⁶

At his deposition, Steinke testified that in early 1998

⁶ The record contains a number of medical documents from Dr. Leiner certifying that Steinke was "disabled" from performing his previous work as a second class mechanic. In his deposition testimony, Dr. Leiner made it clear that through these forms he intended to convey, for purposes of Steinke's worker's compensation case, only that Steinke was unable to do the heavy lifting required of his previous position with SEPTA. Therefore, these forms, and Steinke's worker's compensation case in general, have little value in determining what restrictions Steinke had in his ability to engage in the major life activities of walking, lifting, bending and standing. Dr. Leiner's opinion that Steinke was "disabled" for purposes of worker's compensation does not speak to whether Steinke was "disabled" for purposes of the ADA. See Marinelli, 216 F.3d at 366 n.8 (obtaining worker's compensation benefits does not mandate a finding of disability under the ADA, which is a separate scheme with different standards). Further, any value that the worker's Compensation case might have in determining whether Steinke was substantially limited in the major life activity of working is irrelevant because, as already noted, Steinke is not claiming that he is substantially limited in working. See Lebron-Torres v. Whitehall Labs., 251 F.3d 236, 241-42 (1st Cir. 2001) (recognizing that compensation payments may be "suggestive of possible disability" relating to major life activity of working).

he would get "a lot of numbness and burning, pins and needles" and similar pains if he stood longer than "a half an hour or so." Steinke Dep. at 325. He also testified that he could stand as long as he had to, but that he wouldn't necessarily be doing it without pain or discomfort. Id. Steinke admitted that his doctor did not place any limitation on the amount of time he could stand. Id. at 326.

In testifying about how his impairments affected his ability to walk, Steinke stated that if his back "was really giving [him] trouble" he would have trouble walking. Id. He also testified that although most days he "wouldn't want to" **walk** around because it would cause additional pain, he was able to walk and actually walked his dogs most days. Id. at 327.⁷

Steinke testified that he could bend, but only with pain, and that to compensate for the pain, he learned to squat rather than to bend in order to pick things up. Id. at 328-29. His testimony also indicates that no doctor instructed him that he was unable to bend. Id.

⁷ Steinke also testified to some extent about how his impairments affected his ability to sit. He stated that when sitting, he had to re-adjust when he was uncomfortable. Steinke Dep. at 324. He also testified that he did not know whether he had any restrictions on his ability to sit in early 1998. Id. In any event, in his briefs Steinke makes it clear that he is not claiming that he is substantially limited in the major life activity of sitting.

Steinke also testified that in 1998 he could lift 10-25 pounds, if he did not have to do it often. He stated, however, that if he had to lift heavy weights repetitiously, it could not be done without pain. Id. at 363. Steinke also reported that no doctor ever tested his ability to lift or told him that he was restricted as to the amount of weight that he could lift. Id.

Steinke further testified that in early 1998, he suffered from periodic "blackouts." He stated that prior to these blackouts, he would get a severe headache and his upper neck at the base of his skull would get hard. Id. at 84. At that point, Steinke is able to lay down so that he can avoid the coming blackout. Id.

Steinke introduced no medical evidence relating to his "blackouts", and he testified that he was not receiving, or even seeking, medical treatment for the condition in 1998.⁸ **An** ADA plaintiff need not introduce medical evidence of an impairment as long as the impairment "is within the comprehension of a jury

⁸ Although Steinke seems to cite to Dr. Lee's February 17, 1998 report as support for the assertion that he had been diagnosed with blackout episodes, it is clear that Dr. Lee did not diagnose Steinke with blackout episodes, but merely mentioned the blackout episodes in his discussion of Steinke's medical history. See Plf.'s Mot. for Summ. J. at Ex. A. In fact, Dr. Lee noted that test results in Steinke's medical record indicated that Steinke had an "unremarkable" clinical neurological examination and that the results of an EEG study were "normal". Id. at 4-5.

that does not possess a command of medical or otherwise scientific knowledge." Marinelli, 216 F.3d at 360. Steinke's "blackouts", however, are not plainly "among those ailments that are the least technical in nature and are amenable to comprehension by a lay jury." Id. at 361. For that reason, Steinke's failure to introduce medical evidence in support of his "blackouts" cuts against his claim of disability. See Id.; Dorn v. Potter, 191 F. Supp.2d 612, 623 (W.D. Pa. 2002) (lack of medical evidence of claimed impairment of a learning disability cuts against the plaintiff's claim of disability).

Steinke's treating physician, Dr. Leiner, testified at his deposition that in his treatment of Steinke, he never gave specific restrictions regarding Steinke's ability to sit, stand, walk or lift. Rather, he gave Steinke the same general precautions that he gives to all of his patients with back problems. Leiner Dep. at 63-65. Dr. Leiner's general back precautions advise his patients to sleep with a pillow behind their knees, to lift with their knees rather than with their back, to use certain car seats when driving, to take medication on occasion, to employ moist heat, to wear shock absorbing shoes, and to avoid heavy lifting. Id. at 120-122.

The Court concludes that this evidence is insufficient to establish that Steinke is disabled under the ADA. Because

Steinke testified that he can bend, lift, stand and walk, albeit with difficulty, the pertinent question becomes whether he has “adduced sufficient evidence from which a factfinder reasonably could conclude that the nature and severity of his [impairment] significantly restricted his ability to [do these activities] as compared to an average person in the general population.” Kelly v. Drexel Univ., 94 F.3d 102, 105 (3d Cir. 1996). See Taylor v. Pathmark Stores, Inc., 177 F.3d 180, 186 (3d Cir. 1999) (“The relevant question is whether the difference between his ability and that of an average person is qualitatively significant enough to constitute a disability.”). There are several Third Circuit decisions that are instructive in this answering this question in the case at bar.

In Kelly v. Drexel University, the ADA plaintiff had suffered a hip fracture, was left with a rather noticeable limp, and was restricted in his ability to walk. He testified that he could not walk more than a mile without stopping, and that he had difficulty climbing stairs. Kelly, 216 F.3d at 103-04. The Third Circuit held that these limitations, while constituting an impairment, did not substantially limit the plaintiff’s ability to engage in the major life activity of walking.

In Taylor v. Pathmark Stores, Inc., the ADA plaintiff was a supermarket employee who had undergone arthroscopic surgery

for an ankle injury. As a result of the injury and surgery, the plaintiff was able to walk only with a limp, had to use crutches at times, and was left with an inability to walk or stand for more than fifty minutes at a time. Taylor, 177 F.3d at 183-86. In light of this evidence the Third Circuit concluded that the plaintiff's ability to walk and stand was "not significantly less than that of an average person" and that he was not disabled for purposes of the ADA.

Finally, in Marinelli v. City of Erie, Pennsylvania, the ADA plaintiff suffered from residual pain in his arm that resulted from an on-the-job accident. The plaintiff testified that the more he used his arm, the more it hurt, and that he would eventually have to lay down until the pain went away. Marinelli, 216 F.3d at 357. The plaintiff argued, inter alia, that this condition left him substantially limited his ability to lift. Id. at 362. The Third Circuit noted that the plaintiff's ten pound lifting limitation did not "render him sufficiently different from the general population such that he [was] substantially limited in his ability to lift" and that he was not disabled under the ADA. Id. at 364.⁹

⁹ In Marinelli, testimony about the plaintiff's lifting restrictions came into the record only during the presentation of the defendant's case at trial. Marinelli, 216 F.3d at 363.
(continued..)

Taken together, these cases stand for the proposition that in order to qualify as a disability under the ADA, the plaintiff's impairment must truly render him significantly less able to perform a major life activity than an average person. In this case, Steinke has testified that in 1998, he could lift 10-25 pounds, that he was able to walk and stand for at least a half hour, that he was able to squat to compensate for bending restrictions, and that he had learned to control his "blackouts" through rest.¹⁰ The testimony of Dr. Leiner supports this recitation of Steinke's physical abilities. This evidence establishes that Steinke was able to "carry out most regular activities that require standing and walking [and lifting and bending]". Taylor, 177 F.3d at 186-87. Indeed, Steinke testified that he walked his dogs, hunted during hunting season,

⁹(...continued)

Because the Third Circuit held that the district court should have granted the defendant's Rule 50 motion at the close of the plaintiff's case, the Third Circuit did not need to hold that the ten pound lifting restriction was insufficient to constitute a disability under the ADA. However, the Third Circuit indicated that even if they considered the lifting restriction evidence, it "would also hold that [the plaintiff's] lifting restriction does not render him sufficiently different from the general population such that he is substantially limited in his ability to lift." Id. at 364.

¹⁰ Steinke did not, in his briefs submitted to the Court or in his deposition testimony, articulate how his "blackouts" substantially limited the major life activities of walking, bending, lifting or standing.

took out the trash, drag raced, rode a quad-runner ATV motorcycle, and mowed his lawn. In addition, when confronted with a surveillance video of him washing his Jeep, Steinke admitted that as he washed the vehicle he was able to crouch on his tippy-toes, to bend over with his legs spread, and to get down on his knees and bend over to wash the vehicle's mats.¹¹

In light of the substantial impairment standard applied by the Third Circuit in Kelly, Taylor, and Marinelli, this evidence strongly supports SEPTA's argument that Steinke's impairments did not substantially limit his ability to walk, bend, lift or stand. See also, Cade v. Consol. Rail Corp., No. Civ. A. 98-5941, 2002 WL 922150 (E.D. Pa. May 7, 2002) (inability to climb stairs frequently, need to use a cane to walk, and inability to stand for long periods of time due to arthritic knee condition not a disability under Rehabilitation Act); Dorn v. Potter, 191 F. Supp.2d 612 (W.D. Pa. 2002) (back impairment not a disability where plaintiff could shower, walk about a mile, lift 50 pounds, stand for some time without pain, and mow the lawn); Buskirk v. Apollo Metals, 116 F. Supp.2d 591 (E.D. Pa. 2000) (back impairment not a disability where doctor gave plaintiff

¹¹ Although this surveillance video was taken during 2001, Steinke testified that he would have been able to wash the Jeep in the same manner during 1998. Steinke Dep. at 556.

only moderate medical restrictions on bending, sitting and pushing). The evidence of record relied upon by Steinke fails to meet his burden of showing that his impairments "render him sufficiently different from the general population such that he is substantially limited in his ability" to walk, bend, lift or stand. Marinelli, 216 F.3d at 364.

Steinke's main argument on the issue of substantial impairment is that his ability to do common activities, "such as car washing", is limited because of the lifting and bending required. Plf.'s Summ. J. Br. at 4; Plf.'s Resp. to Def.'s Mot. for Summ. J. at 7. He asserts that because he is significantly restricted in the condition, manner or duration under which he can perform these activities as compared to an average person in the general population, he is disabled under the ADA. Id. (citing 29 C.F.R. § 1630.2(j)(ii)).

As the only illustrative example of this proposition, Steinke points to his deposition testimony in which he responded to the surveillance video which showed him bending, lifting, and standing for an hour as he washed his Jeep. Steinke testified that when washing the vehicle, he filled the bucket of water and put the rugs in the bucket while the it was on the steps so that he would do the "least amount of bending" possible. Steinke Dep. at 558. Steinke also testified that washing the car would take

him longer than it would take a "regular person." Id. at 559.

This illustration, however, exemplifies Steinke's failure to appreciate the nature of the restriction required in order to qualify as disabled under the ADA. As Kelly, Taylor, and Marinelli make clear, "only extremely limiting disabilities . . . qualify for protected status under the ADA." Marinelli, 216 F.3d at 362. Being forced to fill water buckets while they are on a step is a limitation, to be sure, but it is not the type of substantial limitation that renders Steinke's ability to engage in common activities "significantly less than" an average individual. Taylor, 177 F.3d at 186-87. In addition, as discussed above, although Steinke argues that his testimony established that "day to day walking, standing, sitting and bending was difficult and caused pain", neither Steinke's testimony nor the other evidence of record establish that he was "substantially limited" in his ability to perform these activities.

Therefore, because Steinke has not pointed to evidence in the record that establishes that he is significantly limited in his ability to perform the major life activities of walking, bending, lifting **or** standing, Steinke has not established a prima facie case of discrimination under the ADA. Like the plaintiffs in Kelly, Taylor, and Marinelli, Steinke has established only

that he "is impaired" but not that he is "disabled." Kelly, 94 F.3d at 108.

As the Third Circuit has stated, "Congress did not intend for the **ADA** to protect all individuals who suffer from medical difficulties; rather, Congress desired to shield from adverse employment actions those individuals whose medical troubles prevented them from engaging in significant daily activities." Marinelli, 216 F.3d at 366. Steinke has failed to point to record evidence "that would allow a reasonable juror to conclude that he was a member **of** the latter class of individuals". Id. For that reason, the Court will deny Steinke's motion for summary judgment and will grant summary judgment in favor of **SEPTA**.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RICHARD STEINKE,
Plaintiff

CIVIL ACTION

v.

SEPTA,
Defendant

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NO. 99-5345

ORDER

AND NOW, this 5 day of June, 2002, upon
consideration of the parties' cross-motions for Summary Judgment
(Docket #43 & #44), and all responses thereto, **IT IS HEREBY**
ORDERED that, for the reasons given in a Memorandum of today's
date, the plaintiff's Motion for Summary Judgment is DENIED and
the defendant's Motion for Summary Judgment **is** GRANTED.

BY THE COURT:


MARY A. McLAUGHLIN, J.

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