IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

SAMUEL ELLIOTT,	)	
	)	
Claimant-Appellant,	)	
	)	
v.	)	Superior Court
	)	C.A. No. N11A-08-008 DCS
STATE OF DELAWARE,	)	
	)	
Employer-Appellee.	)	

Submitted: March 19, 2012
Decided: June 29, 2012

On Appeal from the Industrial Accident Board of the State of Delaware
In and For New Castle County
AFFIRMED IN PART and REVERSED AND REMANDED IN PART

MEMORANDUM OPINION

Appearances:

Ronald Stoner, Esquire, Newark, Delaware
Attorney for Appellant

John J. Klusman, Jr., Esquire, Wilmington, Delaware
Attorney for Appellee

DIANE CLARKE STREETT
JUDGE

Factual and Procedural Background

Appellant Samuel Elliott, ("Mr. Elliott"), a law enforcement officer for the State of Delaware, (the "Employer"), suffered injuries after a compensable work-related accident which occurred while he was apprehending a fugitive.[1] Mr. Elliott was a competent member of a Probation and Parole team that operates in SWAT-like fashion to apprehend escapees from the criminal justice system; it is a team in which the members trust each other with their lives.[2]

At approximately midnight on February 2, 2007, Mr. Elliott and his team members received information that a dangerous fugitive whom they were seeking was at a motel on Route 40 and preparing to leave town.[3] Upon arriving at the motel, the officers found the fugitive in the driver's seat of a parked pickup truck with the motor running. Mr. Elliott approached the passenger side while another officer approached the driver's side, and they attempted to get the fugitive to exit the truck. Upon the fugitive's refusal, Mr. Elliott shattered the window with his baton and leaned in, partially entering the vehicle, in an effort to take the fugitive into custody. The fugitive took off at a

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[1] The Industrial Accident Board's Decision on the Petition to Determine Additional Compensation Due and Petition to Terminate Benefits, pp. 2, 4 (Jul. 22, 2011) (hereinafter "Decision of the Board").

[2] Decision of the Board at 2; Transcript of Board Hearing, pp. 21, 34, 47 (Mar. 28, 2011) (hereinafter "T").

[3] Mr. Elliott's attorney made an opening statement at the Board Hearing describing the circumstances of the work-related accident. T at 7-9. The Board accepted counsel's statement of the facts, and the Employer's attorney stated that the facts were horrendous and undisputed. T at 15-16.

high rate of speed in reverse while driving in a semi-circle, hit a curb, switched gears, and proceeded forward across the motel parking lot while shouting that he would not be taken into custody—all while Mr. Elliott was hanging halfway out of the passenger-side window and commanding the fugitive to stop. Mr. Elliott was wearing a police tactical vest that apparently snagged on the truck's inside door handle. Mr. Elliott shot at the fugitive from inside the truck, and another officer, Michael Cocuzza, shot at the fugitive from outside the truck.[4] Nevertheless, the truck continued moving until it hit a fence and Mr. Elliott was ejected, landing approximately thirty feet away on his back in the parking lot.[5] The fugitive died from his gunshot wounds.

Michael Cocuzza, Mr. Elliott's supervisor at Probation and Parole, ("Cocuzza"), testified that he was at the scene when the accident occurred and had fired shots at the fugitive while Mr. Elliott was still entangled in the vehicle.[6] He stated that he saw Mr. Elliott get thrown out of the truck, went to him immediately and performed a first responders' first aid check on him, and asked him what was wrong.[7] Cocuzza further testified that Mr. Elliott was not that alert, had his gun flopping around in the wrong hand, and seemed to make

[4] T at 26-27.
[5] Decision of the Board at 11.
[6] T at 26-27.
[7] *Id.*

an attempt at humor when Cocuzza spoke to him.[8] Cocuzza, therefore, determined that Mr. Elliott was losing consciousness and, thus, he took his weapon from him.[9] Emergency medical services responded, and Mr. Elliott was transported to the hospital. He suffered various injuries to his neck, spine, right shoulder and head and received ongoing treatment by a series of physicians for pain, chronic headaches, memory loss, dizziness, balance impairment, and blurred double vision.[10]

After being evaluated at the hospital, Mr. Elliott saw his family doctor, Dr. Wingel, and went to physical therapy.[11] While trying to run on the treadmill during his therapy session, he nearly passed out and was told by his physical therapist that he probably had a concussion.[12] He was then referred to Dr. Shiple who treated him from May 2007 to the present and administered regular neck and spine injections.[13]

Mr. Elliott was also treated at Bryn Mawr Therapy for visual, cognitive and vestibular rehabilitation so as to assist him with visual reaction time, math, reading, organization, and balance.[14] He stated that he was discharged due to

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[8] *Id.*
[9] T at 28.
[10] Decision of the Board at 11.
[11] T at 57.
[12] *Id.*
[13] T at 57, 66-67; Deposition of Brian Shiple, D.O., pp. 6-7 (Mar. 23, 2011); Decision of the Board at 16.
[14] T at 68-69.

lack of progress.[15] Mr. Elliott also testified to difficulty with driving, judging distances, and finding his way.[16] Because of those difficulties, he had to stop driving.[17] He now must be driven to appointments on a daily basis—he goes to physical therapy twice per week, a psychologist once per week, and had been going to Bryn Mawr Rehab three times per week prior to his discharge.[18]

Mr. Elliott also stated that he has balance difficulties that cause him to fall often, experience dizziness, and suffer migraine headaches.[19] He is being treated by Dr. Kelly, a neurologist, for these issues. Mr. Elliott further stated that he has intense neck pain on a daily basis and the pain is worse if he misses a session of physical therapy.[20] He also testifies to having intense mid and lower back pain on a regular basis.[21] He states, too, that his ability to taste and smell has diminished since the accident.[22]

Mr. Elliott would very much like to return to work but states that he is currently unable to perform the duties of his former job or the duties of many other jobs.[23] He states that he cannot drive, sit for too long, watch a monitor for

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[15] T at 70.
[16] T at 70-71.
[17] T at 70-71.
[18] T at 71, 83-84.
[19] T at 72-73.
[20] T at 74-75.
[21] T at 75-76.
[22] T at 83.
[23] T at 77.

too long, process sound properly, do housework, do yard work, or even take care of his baby.[24]

On, July 12, 2010, Mr. Elliott filed a Petition to Determine Additional Compensation Due with the Industrial Accident Board, (the "Board"), alleging a permanent impairment to multiple body parts as a result of the accident.[25] The Employer and Mr. Elliott came to an agreement as to the compensation for the permanent injury to his right shoulder.[26] The Employer also paid for a seven percent permanent impairment to the cervical spine, thoracic spine, and lumbar spine.[27] The Employer disputes that any higher degree of spinal impairment exists and disputes causation as to Elliott's brain, smell, taste and balance impairments.[28]

Furthermore, on September 17, 2010, the Employer petitioned to terminate Mr. Elliott's benefits alleging that Mr. Elliott was no longer totally disabled as a result of the accident.[29]

At the hearing before the Board on March 28, 2011, testimony on behalf of Mr. Elliott was heard from the following:

- Mr. Elliott, Appellant;

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[24] T at 79-80.
[25] Decision of the Board at 2.
[26] *Id*. at 38.
[27] *Id*.
[28] *Id*. at 38-39.
[29] *Id*. at 2.

- Lisa Elliott, Mr. Elliott's Wife;
- Officer Michael Cocuzza, Mr. Elliott's Supervisor;
- Officer John Moyer, Mr. Elliott's Partner;
- Dr. John Dettwyler, Mr. Elliott's Treating Psychologist, relying on interviews with Mr. Elliott and testing and treatment records from Bryn Mawr Brain Injury Center;
- Dr. Brian Shiple, Mr. Elliott's Treating Sports Medicine Physician; and
- Dr. Alan Fink, Neurologist and Mr. Elliott's Medical Expert, relying on records from Bryn Mawr Brain Injury Center.

Testimony for the Employer was provided by:

- Dr. James Langan, Neuropsychologist, relying on examinations, emergency room medical records, records from Bryn Mawr Brain Injury Center, specifically those of Dr. Murphy who is also a neuropsychologist, and VA medical records;
- Dr. William Sommers, Neurologist, relying on four examinations, medical records from the primary care doctor, and testing performed by Dr. Langan;
- Dr. Karl Rosenfeld, Orthopedic Surgeon, relying on examinations, CT Scan and MRI Report; and
- Dr. Wolfram Rieger, Psychiatrist, relying on various medical records including those from Drs. Sommers, Langan, and Rosenfeld, as well as VA records.

Cocuzza testified that Mr. Elliott was a good worker in whom he had a high degree of trust and that he knew of no deficit in Mr. Elliott's ability to do his job.[30] Cocuzza further testified that prior to being hired as a Probation and Parole officer, Mr. Elliott was subjected to psychological testing so that he

[30] T at 23.

would be able to carry a weapon for the job.[31] Cocuzza also stated that there was nothing about Mr. Elliott that suggested in any way prior to the accident that Mr. Elliott was unhappy with his job or had pre-existing psychological problems.[32]

Cocuzza stated, too, that prior to the instant accident, Mr. Elliott had been injured in a previous automobile collision while on the job in 2006.[33] Furthermore, although Mr. Elliott, prior to the instant accident, sought medical treatment from Dr. Rosenfeld and received physical therapy for a neck injury resulting from the previous collision, he did not lose any time from work.[34]

Cocuzza also testified that he has been in Mr. Elliott's company on several occasions after the accident occurred during which he gave Mr. Elliott rides, took his son to a sporting event, and they spent time together.[35] Cocuzza stated that since the accident Mr. Elliott does not seem to be the same as he was before—he cannot do what he used to do.[36]

John Moyer, ("Moyer"), former member of the United States Air Force, twelve-year veteran with the Department of Corrections, and Mr. Elliott's

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[31] T at 24-25.
[32] T at 24.
[33] T at 24, 61.
[34] T at 24, 61-62.
[35] T at 25.
[36] T at 25-26.

partner in the Probation and Parole unit, also testified for Mr. Elliott.[37] Moyer testified that he and Mr. Elliott had a great working relationship, that he was unaware of any deficiencies in Mr. Elliott's ability to his job, and that he and Mr. Elliott discussed "pretty much everything."[38] Mr. Elliott had never informed Moyer of any problems at home or any concerns about his ability to do his job.[39] Moyer testified that he trusted Mr. Elliott with his life and had no reservations about Mr. Elliott's ability to protect him on the job.[40] Moyer stated that there was definitely a difference in Mr. Elliott since the accident—he is unable to do what he used to do and relies on others to do for him what he would normally have done for himself.[41] Moyer further testified that he now helps Mr. Elliott with various household chores that Mr. Elliott would have previously done himself.[42] Moyer was also unaware of Mr. Elliott having any psychological issues prior to the 2007 accident.[43]

Mr. Elliott's wife of ten years, Lisa, ("Mrs. Elliott"), also testified as to the change in Mr. Elliott since his accident. She stated that prior to the accident, Mr. Elliott was very thorough and committed to his work, physically

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[37] T at 29-30.
[38] T at 31-32.
[39] T at 33.
[40] T at 34.
[41] *Id.*
[42] *Id.*
[43] *Id.*

fit, healthy, and she had no concerns about his mental abilities.[44] She further testified that she now cannot ask Mr. Elliott to handle any home responsibilities because he is not able to perform them and she now feels like a caregiver instead of a wife. According to Mrs. Elliott, Mr. Elliott cannot care for or play with their son, cannot watch their baby, and cannot engage in sexual activity.[45]

Mr. Elliott testified to an active lifestyle prior to the accident and a history of working in jobs that are physically demanding such as: firefighter, paper mill worker, government security guard for aircraft protection, water rescuer, prison guard and United States combat soldier.[46] Mr. Elliott testified that since the accident he is unable to participate in activities that were a regular part of his life prior to his injuries such as: martial arts, boating, swimming, rock climbing, running, camping, fishing and various outdoor activities.[47] He further testified that he is unable to do many household chores including vacuuming, lawn care, and cleaning his fish tank.[48]

Mr. Elliott also stated that he was in the Army from 1989 to approximately 1997 where he performed combat duty while serving two tours in the Middle East and one tour in the demilitarized zone of Korea.[49] He

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[44] Decision of the Board at 8.
[45] *Id*. at 8-9.
[46] T at 42-44.
[47] T at 38, 82.
[48] T at 80.
[49] T at 40-42.

testified that during his first Middle East tour he was assigned for about one year and a half to the First Calvary Division in Iraq during Operation Desert Storm.[50] For approximately one year during his tour in Korea, he was assigned to 4 Papa 3, the northernmost observation post, for the purpose of keeping North Koreans from crossing the border.[51]

In 2003, while working for the Department of Corrections, Mr. Elliott was recalled to active duty for Operation Iraqi Freedom during which he served combat duty in Iraq for about one year and a half.[52] After this tour, he was diagnosed with post-traumatic stress disorder and Crohn's disease (an intestinal ailment) and received a medical retirement.[53]

At the end of his tour, Mr. Elliott immediately returned to work as a probation officer and performed his duties for approximately two years prior to the instant accident.[54]

Mr. Elliott further testified that he had no restrictions either physically or emotionally on his ability to perform any of his jobs prior to the accident.[55]

Mr. Elliott stated that after the accident he has had problems with his eyes—light sensitivity, double vision, migraines and floaters.[56] He also needs

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[50] T at 41.
[51] T at 41.
[52] T at 58.
[53] T at 59.
[54] T at 61.
[55] T at 50.

special prescription sunglasses and tinting on the windows of his home and vehicles.[57] He had never had any eye problems before the accident.[58]

Mr. Elliott also testified that after the accident he has had emotional problems resulting from his injuries, and, as a result, sees Dr. John Dettwyler, a clinical psychologist who specializes in traumatic brain injury.[59] Mr. Elliott testified that he has memory and functional failures, he and his wife have discussed this with Dr. Dettwyler, and he believes that Dr. Dettwyler has helped him.[60] Moreover, he testified that despite his memory difficulties he is able to discuss the accident because he has heard so much about it after the fact from the other officers that were on the scene and because he has had to repeat the story many times for different doctors.[61]

Dr. Dettwyler diagnosed Mr. Elliott with psychological disorders and cognitive changes secondary to traumatic brain injury and has not released him to return to work.[62] Dr. Dettwyler testified that he was aware that Dr. Langan and Dr. Rieger[63] opined that nothing was wrong with Mr. Elliott and that his problems related to pre-existing psychological problems that occurred before

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[56] T at 36-37.
[57] T at 36-37.
[58] T at 37.
[59] T at 55, 117, 118.
[60] T at 54-55.
[61] T at 56-57.
[62] Decision of the Board at 9-10.
[63] *See infra* at p. 18.

the instant accident.[64] Dr. Dettwyler, however, stated that Mr. Elliott's presentation was consistent with his medical record and that his memory gaps require further evaluation to determine if they are caused by Mr. Elliott's cognitive problems.[65] He further testified that he was aware of Mr. Elliott's prior post-traumatic stress disorder diagnosis, but that there is no indication that Mr. Elliott had any cognitive problems prior to the instant accident.[66] Dr. Dettwyler has reviewed Mr. Elliott's medical records and interviewed him at least fifteen times; he has never suspected that Mr. Elliott is faking his symptoms.[67] Dr. Dettwyler also noted that Dr. Rieger's diagnosis was based only on records and suggested that Dr. Rieger's report was incomplete because it did not consider Dr. Dettwyler's treatment records.[68]

Mr. Elliott also presented expert deposition testimony from Dr. Alan Fink, a neurologist, who evaluated him for the purpose of rating his permanent impairment.[69] Dr. Fink noted that Mr. Elliott has motion limitations in his neck, low back, and shoulder; he also experiences muscle spasms in his low back.[70] He also found upon examination that although Mr. Elliott was alert, he had difficulty with orientation, memory, judgment, problem solving, nausea,

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[64] Decision of the Board at 10.
[65] *Id*.
[66] *Id*.
[67] *Id*. at 9-10.
[68] *Id*. at 10.
[69] *Id*. at 11.
[70] *Id*. at 12.

reading, writing, smell, and taste and had significantly abnormal reflexes which included clonus and hyperreflexia.[71]

Dr. Fink further explained that his finding regarding Mr. Elliott's abnormal reflexes were a significant "true finding" that were the result of a head or spinal cord injury and could not be controlled by the patient.[72] He also stated that any subsequent failure to find hyperreflexia and clonus on the part of Dr. Rosenfeld was caused by Mr. Elliott's prescribed use of Zanaflex which masks such problems.[73] Dr. Fink also referred to results of testing performed by two neuropsychologists who also found abnormal results as to memory and orientation.[74] Based on his examination, Dr. Fink diagnosed Mr. Elliott with post-concussive syndrome and post-traumatic stress disorder.[75] He also found that Mr. Elliott sustained permanent injuries to his brain, neck, mid-back, cervical spine, right shoulder, vision, balance, sexual function, smell and taste.[76]

Dr. Fink also testified concerning the correlation between Mr. Elliott's cognitive problems (lack of awareness at the scene of the accident and his amnesia as to the events surrounding the accident) and post-concussive

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[71] *Id.*; Deposition of Alan Fink, M.D., pp. 10-11, 13, 15 (Dec. 10, 2010) (hereinafter "Fink Depo").
[72] Decision of the Board at 12; Fink Depo at 39.
[73] Decision of the Board at 14.
[74] *Id.* at 12.
[75] *Id.*
[76] *Id.* at 13.

syndrome.[77] Dr. Fink opined that brain injuries such as Mr. Elliott's may not have outward physical manifestations, and he stated that Mr. Elliott's past psychological history has been exaggerated and that Mr. Elliott had only missed minimal time at work due to previous accidents.[78] Dr. Fink did not find Mr. Elliott's behavior or demeanor to be odd but found it to be consistent for someone with a head injury.[79] He provided permanency ratings as follows:

a) Brain – 40%
b) Cervical spine – 43%
c) Thoracic spine – 25%
d) Lumbar spine – 13%
e) Smell – 1%
f) Taste – 1%
g) Balance – 5%.[80]

Dr. Fink followed the American Medical Association Guides in determining the permanency ratings for Mr. Elliott's spine by applying the conversion factors for each spinal region—cervical, thoracic and lumbar—thereto rather than by applying only the conversion factor for the lumbar spine to the cervical and thoracic spine.[81]

Dr. Brian Shiple, a treating sports medicine physician, testified by deposition that Mr. Elliott suffered from post-concussion syndrome involving

[77] *Id*.
[78] *Id*. at 14-15.
[79] Fink Depo at 16.
[80] Decision of the Board at 13.
[81] *Id*. at 14.

delayed recovery from severe symptoms of concussion.[82] His symptoms included headaches, cognitive issues, dizziness, depressed mood and photophobia for which he wears tinted glasses.[83] Dr. Shiple referred Mr. Elliott to the Bryn Mawr Brain Injury Center.[84] The various specialists at the Bryn Mawr Brain Injury Center all agree that Mr. Elliott suffers from post-concussion syndrome.[85] Dr. Shiple stated that he had never seen evidence of faking on the part of Mr. Elliott and had never caught him in a lie.[86] Dr. Shiple further testified that Mr. Elliott suffered from a variety of musculoskeletal injuries of the spine, neck and shoulder for which he was being treated.[87] Dr. Shiple testified that he believes that Mr. Elliott's musculoskeletal injuries would continue to improve but that he had a poor prognosis for returning to work.[88]

The Employer relied upon the expert deposition testimony of Dr. William Sommers, a neurologist, who stated that Mr. Elliott may have had post-concussion syndrome for a period of time after the accident but that it would have resolved itself by now.[89] Dr. Sommers testified that he did not believe Mr. Elliott had any degree of neurological brain dysfunction and became convinced

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[82] *Id*. at 15, 17, 19.
[83] *Id*.
[84] *Id*.
[85] *Id*. at 18.
[86] *Id*.
[87] *Id*. at 16.
[88] *Id*. at 19.
[89] *Id*. at 23.

that he had psychological problems instead.[90] In formulating his opinions, Dr. Sommers also relied on neuropsychological assessments of Dr. Langan which, according to Dr. Langan, gave invalid results due to Mr. Elliott's poor performance on them and could not be used to determine Mr. Elliott's true abilities because they indicated progressive decline of abilities which is not associated with the type of injury Mr. Elliott sustained.[91] Dr. Sommers testified "that 80 to 90 percent of patients with mild concussion experience resolution within weeks"—not decline.[92]

Dr. Sommers also diagnosed Mr. Elliott with chronic cervical, thoracic and lumbar spine pain and released him to work a light duty position with a 20 to 25 pound lifting restriction.[93] Using the American Medical Association Guides, he placed Mr. Elliott into the "DRE Category II" for permanent injuries to the cervical, thoracic and lumbar spine.[94] Dr. Sommers then used the lumbar spine conversion factor to convert a whole person impairment to a regional impairment rating of seven percent—he used the lumbar spine factor (.75) for the cervical and thoracic spine impairments as well as the lumbar spine impairment because "the conversion factors provided in the AMA Guides

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[90] *Id*. at 24.
[91] *Id*; Report of James S. Langan, Psy.D., p. 9 (Dec. 12, 2008); Deposition of Dr. Langan, pp. 41-44 (Dec. 16, 2010).
[92] Decision of the Board at 24.
[93] *Id*. at 25-26.
[94] *Id*.

exaggerate the regional impairment ratings for the cervical spine and the thoracic spine".[95] Moreover, he opined that Mr. Elliott had no permanent impairment to the brain and suspected that he could be faking symptoms related thereto.[96]

As to balance problems and impairments to Mr. Elliott's functions of taste and smell, Dr. Sommers testified that no objective evidence exists to support these complaints.[97]

Dr. Karl Rosenfeld, an orthopedic surgeon, testified for the Employer that on two separate occasions Mr. Elliott exhibited positive findings of hyperreflexia and clonus in the lower extremity reflexes.[98] He acknowledged that such symptoms are caused by brain injury.[99] Nevertheless, Dr. Rosenfeld concluded that other tests—a CT scan and MRI—did not support a diagnosis of brain injury.[100] Dr. Rosenfeld also stated that, during a later exam, he did not find hyperreactive reflexes or clonus.[101] He further made subjective remarks about Mr. Elliott's appearance stating that he was odd, memorable and scary-looking.[102] This is in contrast to Dr. Rosenfeld's appraisal of Mr. Elliott in

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[95] *Id*. at 26, 44.
[96] *Id*.
[97] *Id*. at 27.
[98] *Id*. at 20-21.
[99] *Id*. at 20-21.
[100] *Id*. at 21.
[101] *Id*. at 22.
[102] Deposition of Karl Rosenfeld, p. 10 (Dec. 8. 2010).

November 2006 when he examined him after the prior collision. At that time, Dr. Rosenfeld did not give any indication that he was intimidated by Mr. Elliott but rather joked with him regarding a female officer.[103] In fact, he stated in his November 29, 2006, report that Mr. Elliott was a gentleman, forthcoming, and devoid of symptom magnification.[104] That 2006 report did not indicate anything about Mr. Elliott's allegedly odd appearance.

Dr. James Langan, a neuropsychologist, also testified for the Employer and stated that Mr. Elliott may have somatoform disorder—a propensity to convert psychological problems into physical symptoms.[105] Dr. Langan performed various tests that measured the validity of symptoms, malingering, mental status, and cognitive abilities.[106] These tests did not result in a diagnosis of any neuropsychological condition that would prevent Mr. Elliott from working.[107] Dr. Langan also reviewed previous medical records from the VA pursuant to Mr. Elliott's military service in the Persian Gulf which demonstrated anxiety, headaches, mood problems, personality disorder, and somatoform disorder.[108]

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[103] T at 62.
[104] *See* Opening Brief of Appellant, p. 9 (Dec. 13, 2011) (referring to Dr. Rosenfeld's Nov. 29, 2006, report which was introduced at the Board Hearing); T at 62-65.
[105] Decision of the Board at 32; Report of James S. Langan, Psy.D., p. 9 (Dec. 12, 2008); Deposition of Dr. Langan, pp. 41-44 (Dec. 16, 2010).
[106] *Id.*; Decision of the Board 29-30.
[107] *Id.*
[108] *Id.* at 32.

Dr. Wolfram Rieger, a psychiatrist, also testified for the Employer stating that Mr. Elliott was narcissistic and paranoid with a tendency to somatize and that his complaints of post-concussion syndrome were bizarre and far-fetched.[109] He did not restrict Mr. Elliott from working and insisted that persons with concussions always get better within six months, but later admitted that there were exceptions to the rule.[110] He also stated that dizziness was the most frequently reported symptom of patients who somatize but also noted that dizziness could be symptomatic of a concussion.[111] Dr. Rieger also noted that Mr. Elliott denied erectile dysfunction and on at least one occasion since the accident admitted to having sexual relations with and impregnating his wife.[112]

On July 27, 2011, the Board found that Mr. Elliott failed to demonstrate by a preponderance of the evidence that he sustained a permanent impairment to his brain, smell, taste or balance and also failed to support his contentions of permanency ratings to his spinal regions in excess of seven percent.

The Board also terminated Mr. Elliott's total disability and awarded him partial disability.

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[109] *Id*. at 34-36.
[110] *Id*. at 37.
[111] *Id*. at 38.
[112] Deposition of Wolfram Rieger, p. 17 (Mar. 21, 2011).

Mr. Elliott has timely petitioned the Court to overturn the Board's decisions, and briefing is complete.

Contentions of the Parties

Mr. Elliott asserts that the Board's decision is not supported by substantial evidence and is legally incorrect. The Employer contends that the Board's decision is based on substantial evidence and is without legal error.

Standard of Review

The Court reviews the Board's decision to determine if substantial evidence exists in the record to support the Board's findings of fact and to determine if the Board erred in its application of the law.[113] Substantial evidence consists of "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[114]

Thus, the Court, in its review of the Board's decision, does not weigh the evidence or make factual findings but only determines if substantial evidence exists upon which the Board's factual findings can be legally supported.[115] The Court shall not overturn the factual findings of the Board except where no satisfactory evidence exists to sustain the findings.[116]

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[113] *Anchor Motor Freight v. Ciabattoni*, 716 A.2d 154, 156 (Del. 1998); *Shively v. Allied Systems, Ltd.*, 2010 WL 537734, *9 (Del. Super. 2010).
[114] *Anchor Motor Freight*, 716 A.2d at 156; *Shively*, 2010 WL 537734 at *9.
[115] *Day & Zimmerman Sec. v. Simmons,* 965 A.2d 652, 656 (Del. 2008).
[116] *Bustos v. Castle Const. of Delaware, Inc.*, 2005 WL 2249762, *2 (Del. Super. 2005).

In addition, the Court "consider[s] the record in the light most favorable to the prevailing party below."[117] However, the Court reviews questions of law *de novo*.[118]

Discussion

Delaware law provides for compensation for the loss of use of a part of the body due to a work-related injury.[119] The burden of demonstrating the existence and extent of such a work-related injury lies with the claimant.[120] A claimant must present evidence not only of pain but also of loss of use in order to demonstrate a compensable permanent impairment.[121]

The Board errs as a matter of law if it determines that a claimant has not met the burden of proving a permanent loss of use "but does not articulate a standard for determining" that permanent loss of use.[122] In *Lindsay*, the Board denied a claim for permanent impairment based on its preference for the deposition testimony of one expert over the deposition testimony of another expert.[123] However, the Lindsay Court reversed and remanded the decision because the Board, while finding that the claimant had not met her burden of

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[117] *Shively*, 2010 WL 537734 at *9.
[118] *Anchor Motor Freight*, 716 A.2d at 156; *Shively*, 2010 WL 537734 at *9.
[119] *Del. C.* 19 § 2326.
[120] *Streett v. State*, 669 A.2d 9, 11 (Del. 1995).
[121] *Munyan v. Daimler Chrysler Corp.*, 909 A.2d 133, 137 (Del. 2006).
[122] *Lindsay v. Chrysler Corp.*, 1994 WL 750345, *4-5 (Del. Super. 1994).
[123] *Lindsay*, 1994 WL 750345 at *3.

proof, did not articulate "the standard for assessing permanent loss of use . . . ."[124]

Moreover, the Board may reject the testimony of a physician on the basis of credibility as long as it gives "specific, relevant reasons for doing so."[125] However, the rule regarding the Court's deference to the Board's credibility determinations "falls when the testimony is given by deposition."[126] The Board is to resolve conflicts in expert medical testimony and clearly articulate a resolution.[127]

Brain Impairment

In the matter before the Court, Dr. Fink, Mr. Elliott's expert witness, provides a 40 percent permanent impairment rating to Mr. Elliott's brain based on work-related traumatic brain injury including cognitive changes pursuant to post-concussion syndrome. His opinion is supported by Drs. Dettwyler and Shiple.

On the other hand, the Employer's expert, Dr. Sommers, offers that Mr. Elliott's symptoms are related to somatoform disorder and malingering and no valid evidence of brain injury exists. His opinion is supported by Drs. Langan and Rieger.

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[124] *Id.* at *5.
[125] *Turbitt v. Blue Hen Lions, Inc.*, 711 A.2d 1214, 1215 (Del. 1998).
[126] *Lindsay*, 1994 WL 750345 at *3 (stating that such deference is based upon the Court's assumption that the Board observed a witness's demeanor).
[127] *Id.* at *3.

The Board found Dr. Sommers testimony to be more persuasive than Dr. Fink's testimony and found that Mr. Elliott did not suffer from permanent brain injury. The Board determined that since patients suffering from post-concussion syndrome and traumatic brain injury improve over time, Mr. Elliott's worsening symptoms as determined by various tests were inconsistent with this diagnosis. The Board also found that Mr. Elliott's testimony as to his memory was not credible.

Again, the Board may reject the testimony of a physician on the basis of credibility as long as it gives "specific, relevant reasons for doing so."[128] Therefore, while the Board is allowed to be more persuaded by Dr. Sommers' testimony over Dr. Fink's, it still must articulate a specific reason for rejection of Dr. Fink's testimony. And, the Board must also resolve any conflicts between Dr. Fink's diagnosis and Dr. Sommers' diagnosis and articulate a resolution.[129] For the most part, the Board has done just that—it explains its preference for Dr. Sommers' diagnosis of somatoform disorder over Dr. Fink's diagnosis by articulating that Mr. Elliott's worsening symptoms are inconsistent with Dr. Fink's diagnosis of post-concussion syndrome.

Nevertheless, the Court finds that an unresolved conflict in testimony remains concerning clonus and hyperreflexia as to Mr. Elliott's reflexes. Both

[128] *Turbitt v. Blue Hen Lions, Inc.*, 711 A.2d 1214, 1215 (Del. 1998).
[129] *See Lindsay* at *3.

Dr. Fink, Mr. Elliott's expert, and Dr. Rosenfeld, the Employer's expert, determined that Mr. Elliott has abnormal reflexes including clonus and hyperreflexia which are indicative of brain injury. However, Dr. Rosenfeld concluded that other tests—a CT scan and MRI—did not support brain injury. The Board made no determination as to which of these two opinions regarding symptoms indicative of brain injury it found credible or why. Furthermore, the Board did not resolve the conflict regarding whether the hyperreflexia and clonus in the reflexes, found by both experts, was indicative of permanent brain injury. Therefore, the Court must remand the matter back to the Board for such findings.

As to credibility determinations, the Board fails to explain why the Employer's experts, Drs. Sommers, Langan and Rieger, were found more credible that Mr. Elliott's experts, Drs. Dettwyler and Fink. The Board provides little reasoning for its preference of the Employer's experts and does not discuss the credibility or lack of such as to Mr. Elliott's experts. Therefore, the Court remands the decision for specific reasons why Mr. Elliott's experts were not deemed credible, especially Dr. Dettwyler who interviewed his patient at least fifteen times.

Spine Impairment

Both parties agree that there is some degree of permanent injury to Mr. Elliott's spine resulting from the accident. The Employer's expert, Dr. Sommers, applied the lumbar conversion factor to all three spinal areas—cervical, thoracic and lumbar—resulting in a seven percent permanent impairment rating for each spinal region. Mr. Elliott's expert, Dr. Fink, applied the conversion factors from the American Medical Association Guides for each specific spinal area resulting in a 43% permanent impairment rating for the cervical spine, a 25% permanent impairment rating for the thoracic spine, and a 13% permanent impairment rating for the lumbar spine. The Board explained that it favored Dr. Sommers' testimony as to use of the lumbar conversion factor for each region because applying the AMA Guides' conversion factors exaggerates the regional impairment ratings for the cervical and thoracic spine areas. Dr. Sommers also placed Mr. Elliott in the "DRE Category II" for his cervical spine complaints whereas Dr. Fink placed him in the "DRE Category III." This difference in category affects the whole person impairment rating with Dr. Sommers' rating of seven percent being accepted by the Board as more credible than Dr. Fink's regional rating of 43% and whole person rating of 15%.

The Board explained that Dr. Sommers' placement in Category II for the cervical spine was appropriate because Mr. Elliott's radicular complaints, which

caused Dr. Fink to place Mr. Elliott in Category III, were non-verifiable by EMG.[130] The Board provided a similar explanation for preferring Dr. Sommers' placement of Mr. Elliott in Category II for the lumbar spine impairment rating correlating with a seven percent impairment rating stating that Dr. Sommers' opinion was the most consistent with the evidence.[131]

Since the Board is free to reject Dr. Fink's testimony as to the spinal permanency rating on the basis that Dr. Sommers' testimony "more fully comports to the Board's understanding of an impairment based on its experience with individuals with similar symptoms" and because it provided a specific and relevant reason, the Court will not find error.[132] Furthermore, this Court has previously found that a Board's determination that the use of a specific DRE Category for a cervical spine injury would result in an inflated rating is not erroneous *where consistent with the evidence*.[133]

Smell and Taste Impairment

"When an expert's opinion of causality is based in large part upon the patient's recital of subjective complaints and the trier of fact finds the underlying facts to be different, the trier is free to reject the expert's

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[130] Decision of the Board at 45.
[131] *Id*. at 46.
[132] *Collins v. Giant Food, Inc*., 1999 WL 1442024, *3-5 (Oct. 13, 1999).
[133] *See id.* (emphasis added).

conclusion."[134] Here, the Board found that Dr. Fink's testing of Mr. Elliott's smell and taste, resulting in a one percent impairment, lacked credibility because it did not consist of objective testing. In so doing, the Board is apparently articulating a standard for the evaluation of smell and taste impairments. Since the Board has provided the standard of required objective testing and, thus, has rejected Dr. Fink's method of testing as insufficient to support an impairment, the Board's decision will not be overturned.[135]

Balance Impairment

Again, the Board is free to reject with reason the expert opinion of Dr. Fink as to Mr. Elliott's complaints of dizziness and balance problems and accept the opinion of Dr. Sommers that no balance impairment exists. However, since the Board relied in part upon a comment of Dr. Rieger, in support of somatoform disorder, that dizziness is the most frequent symptom complained of among patients who fake their ailments, and since the Court is remanding the issue of whether Mr. Elliott has a somatoform disorder or a brain injury, the Court must also remand the Board's finding that there is no impairment to Mr. Elliott's balance. If, upon remand, the Board determines that the expert findings regarding Mr. Elliott's reflexes are indicative of a brain

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[134] *Breeding v. Contractors-One-Inc.*, 549 A.2d 1102, 1104 (Del. 1988).
[135] *See Lindsay* at *5 (finding that a standard for assessing loss of use must be articulated by the Board).

impairment and, in so doing, rules out a somatoform disorder, the Board will also need to take another look at the issue of Mr. Elliott's balance impairment. Under such circumstances, Dr. Rieger's comment about dizziness being a commonly faked symptom would be considered in a different light or may not be considered at all.

Termination of Total Disability

Based on its finding that Mr. Elliott does not suffer from a brain impairment, the Board determined that Claimant is no longer totally disabled, can return to work in a light duty capacity, and is entitled to partial compensation in this regard. Nevertheless, since the Board's disability determination is based in part on its finding that no brain impairment exists, the Court also remands the Board's decision to terminate total disability in the event that a further finding of the Board as to expert findings regarding reflexes results in an altered decision.

ACCORDINGLY, the Board's decision as to Mr. Elliott's brain impairment is ***REVERSED AND REMANDED for a determination by the Board as to whether the evidence from Dr. Fink and Dr. Rosenfeld regarding Mr. Elliott's reflexes indicate a continuing permanent brain impairment and, if not, the specific reasons for rejecting the experts' testimony regarding reflexes. The Board's determination shall include a credibility finding***

regarding Dr. Rosenfeld comparing his comments regarding Mr. Elliott in November 2006 to his comments after the 2007 accident at issue. The Board's determination shall also include specific findings as to the credibility or lack thereof of Drs. Fink and Dettwyler. The Board's determination shall further contain findings as to the evidence presented by and credibility accorded to Mr. Elliott's non-expert witnesses—Cocuzza, Moyer and Mrs. Elliot—as such relates to whether Mr. Elliott has a brain impairment.

The Board's decisions regarding Mr. Elliott's spinal impairments are ***AFFIRMED***.

The Board's decisions regarding Mr. Elliott's smell and taste impairments are ***AFFIRMED***.

The Board's decisions regarding Mr. Elliott's balance impairment and termination of total disability are ***REVERSED AND REMANDED*** for consideration as discussed herein.

IT IS SO ORDERED.

/s/
Diane Clarke Streett
Judge