IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

VAUDIE PUCKETT, III, Employee/Appellant,	)	
v.	)	C.A. No.: 11A-11-003 FSS **(E-FILED)**
MATRIX SERVICES, Employer/Appellee.	)	

Submitted: April 3, 2012
Decided: July 9, 2012

ORDER

Upon Appeal from the Industrial Accident Board - *AFFIRMED.*

Vaudie Puckett, III, appeals the Industrial Accident Board's terminating his total disability benefits. Puckett argues *res judicata* barred the Board's revisiting its original grant of benefits. Puckett also argues that in reviewing his on-going disability, the Board applied the wrong legal standard. Specifically, Puckett argues that the Board could not terminate unless his employer first proved Puckett's "condition changed." Actually, *res judicata* did not bar further review and the Board's decision is factually supported and legally correct.

I.

On December 24, 2002, Appellant, Vaudie Puckett, III, a boiler maker, repeatedly hit his head while inside an oil tank, hunched-over welding and carrying heavy pipes. Banging his head exacerbated his syrinx, a rare abnormal cyst inside his spine. On September 30, 2004, Puckett filed a Petition to Determine Compensation Due. On September 16, 2005, the Board found Puckett totally disabled and entitled to benefits from his employer, Appellee, Matrix Services.

In 2010, at Matrix's request, Puckett saw Dr. Jeffrey Meyers twice. On March 30, 2010, Puckett presented with "chronic left upper extremity pain and numbness with radiation." Dr. Meyers also noted Puckett had "limited range of motion in his neck." Nonetheless, Dr. Meyers opined that Puckett could "return to work at a minimum sedentary level with the ability to change positions as needed with minimal use of his left upper extremity."

On December 2, 2010, Puckett also completed a functional capacity evaluation, showing he could return to work in a sedentary capacity, lifting and carrying less than 20 pounds. The report also noted Puckett "gave a very poor effort." Dr. Meyers testified, "An FCE does not always reflect on the claimant's ability to continue working on a regular basis, but in [Puckett's] case, we're working at low physical demand levels. I think he would be safe doing that full-time."

On April 13, 2011, Dr. Meyers performed the second defense medical examination. Puckett again presented with "hypersensitivity to palpation over the left neck, chest, and upper extremity." Dr. Meyers testified, "Puckett's condition had not changed since his March 30, 2010 visit and he is safe to return to work full-time at a sedentary and possibly higher level." On February 9, 2011, with Dr. Meyers's opinion in-hand, Matrix petitioned to terminate Puckett's total disability.

Meanwhile, in January 2011, Puckett began seeing Dr. Manonmani Antony, an anesthesiologist and pain management specialist, once a month. Dr. Antony explored different treatments to wean Puckett off narcotics, including Lyrica®, acupuncture, methadone, and deep brain stimulation. Ultimately, Dr. Antony kept Puckett on narcotics because insurance did not cover Lyrica® and Puckett refused the other options. Dr. Antony testified, "Puckett won't be able to return to work at any point, at any level [of pain medication]," but admitted, "Puckett's risk of re-injury while performing a sedentary duty job was no greater than his staying at home."

On June 21, 2011, the Board heard the case. On October 6, 2011, the Board found "the work capacity opinion of Dr. Meyers to be more convincing . . .than the opinion of Dr. Antony."[1] Thus, it reduced its award to partial disability benefits.

[1] *See Standard Distrib. Co. v. Nally*, 630 A.2d 640, 646 (Del. 1993) ("[T]he Board [is] entitled to accept the testimony of one medical expert over the views of another.").

II.

On appeal from the Industrial Accident Board, the court's role is limited to determining whether there was substantial evidence supporting the Board's findings, and whether the decision was legally correct.[2] Substantial evidence is enough evidence to support a conclusion.[3] It is more than a scintilla but less than a preponderance.[4] Questions of law are reviewed *de novo*.[5] When considering the facts, the court defers to the Board's expertise and competence.[6] The Board determines credibility, not the court.[7]

In a petition to terminate disability benefits, the employer must show "the employee is no longer totally incapacitated for the purpose of working."[8] If the employer meets this burden, the burden shifts to the employee to show he is "so handicapped by a compensable injury that he will no longer be employed regularly."[9]

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[2] *Johnson v. Chrysler Corp.,* 213 A.2d 64, 66 (Del. 1965); *General Motors Corp. v. Jarrell,* 493 A.2d 978, 980 (Del. Super. 1985).

[3] *Oceanport Indus., Inc. v. Wilmington Stevedores, Inc.,* 636 A.2d 892, 899 (Del. 1994).

[4] *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981).

[5] *Munyan v. Daimler Chrysler Corp.,* 909 A.2d 133, 136 (Del. 2006).

[6] *Histed v. E.I. DuPont de Nemours & Co.,* 621 A.2d 340, 342 (Del. 1993).

[7] *Simmons v. Delaware State Hosp.,* 660 A.2d 384, 388 (Del. 1995).

[8] *Torres v. Allen Family Foods,* 672 A.2d 26, 30 (Del. 1995).

[9] *Ham v. Chrysler Corp.*, 231 A.2d 258, 261 (Del. 1967).

Here, significantly, the Board addressed Puckett's credibility:

> The Board does not find Puckett credible that he remains disabled from all work related to the 2002 work accident, more than eight years after the event. His chronic pain focuses mainly on his left upper extremity, his non-dominant side. He is able to drive over thirty miles a day to pick up his daughter at school.[10]

III.

A.

Citing several cases, Puckett argues *res judicata* bars the Board's revisiting its 2005 decision because Puckett's condition has not changed, and Matrix is "hoping new Board members find differently."[11] According to Puckett, both medical experts agree Puckett's condition has not changed. Thus, *res judicata* applies.

Puckett misreads his lead authority, *Harris*.[12] The Board has authority, pursuant to 19 *Del. C.* §2347, to review awards once every six months upon

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[10] *Puckett v. Matrix Services,* No. 1230651, at *12-13 (Del. I.A.B. Oct. 6, 2011).

[11] *See, e.g., Harris v. Chrysler Corp.,* 541 A.2d 598, 1988 WL 44783, at *1 (Del. 1988) (TABLE) ("*Res judicata* is not a bar to the Board's exercise of its authority conferred by 19 *Del.C.* § 2347 to review, modify or terminate previous awards upon proof of subsequent change of condition.").

[12] *See id.*

petition.[13] The statute's allowing repetitive petitions does not invite harassment. That is because the law also provides that if the Board concludes a claimant remains entitled to compensation, the Worker's Compensation Act provides medical witness fees and attorneys' fees to the claimant.[14]

A petition to reconsider incapacity or status must allege the "incapacity of the injured employee has subsequently terminated, increased, diminished or recurred."[15] *Betts v. Townsends, Inc.* holds: "Where the Board is asked to reconsider the incapacity or status of a claimant based on one of [19 *Del. C.* §2347's] specifically delineated changes in circumstances, the doctrine of *res judicata* is inapplicable."[16]

In other words, Matrix is not asking the Board to reconsider "the correctness of its 2005 decision," it is alleging a change in circumstance.[17] Therefore, *res judicata* did not bar the Board from hearing Matrix's petition, but as a matter of law, Matrix had to produce evidence showing that after the original disability award, Puckett's incapacity had diminished.

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[13] 19 *Del. C.* § 2347.

[14] *Id.* § 2320(10); *see also id.* § 2322(e).

[15] *Id.* § 2347.

[16] 765 A.2d 531, 534 (Del. 2000) (*citing Harris,* 541 A.2d at 598).

[17] *Betts*, 765 A.2d at 534 ("*Res judicata* [prevents] the Board from reviewing the correctness of a prior award.").

B.

Along the same line, Puckett argues even if review were proper, the Board used the wrong legal standard. Puckett argues the 2005 decision found Puckett "totally disabled physically." Therefore, according to Puckett, the Board could not alter that determination unless Matrix showed Puckett's condition had changed since 2005.

As explained above, Matrix filed a petition to terminate benefits, for which "change in condition" is a discredited standard.[18] Instead, Matrix's burden is to show Puckett is "no longer incapacitated for the purpose of working."[19] In 2011, the Board held, "[Puckett] is capable of returning to work in a sedentary duty capacity with restrictions on a full-time basis." Specifically, the Board found, "Dr. Meyers' clinical examinations and reliance on a functional capacity evaluation reliable." Thus, Matrix met its threshold burden, shifting the final burden of proof to Puckett.

Puckett failed because the Board did not believe "he remains disabled from all work related to the 2002 work accident, more than eight years after the event." That means the Board found Puckett was no longer totally disabled. Put

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[18] *See Brokenbrough v. Chrysler Corp.,* 460 A.2d 551, 553 (Del. Super. 1983) ("In petitions alleging cessation of disability, the 'change of condition' standard is not an appropriate burden.").

[19] *Torres,* 672 A.2d at 30.

another way, the Board concluded that even if Puckett's medical condition is the same in 2011 as it was in 2005, he nevertheless is now capable of sedentary work and, therefore, it can no longer be said he is "totally incapacitated for the purpose of working."[20] The Board's conclusion is consistent with and based on a medical expert's recent opinions. Thus, its decision has factual support and does not misapply the standard of review. The court is not allowed to second-guess by substituting its view of the evidence for the Board's.

IV.

For the foregoing reasons, the Industrial Accident Board's October 6, 2011 decision granting Matrix's Petition to Terminate Disability Benefits is **AFFIRMED**.

IT IS SO ORDERED.

/s/ Fred S. Silverman
Judge

cc: Prothonotary
John J. Klusman, Jr., Esquire
William R. Baker, Jr., Esquire
Jeffrey P. Wasserman, Esquire

[20] *Id.*