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

ROBERT ROBBINS,	)	
	)	
Employee-Appellant,	)	
	)	
v.	)	C.A. No. 09A-09-005-JRJ
	)	
HELMARK STEEL,	)	
	)	
Employer-Appellee.	)	

Date Submitted: January 26, 2011
Date Decided: April 6, 2011

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

OPINION

William R. Peltz, Esq., Kimmel, Carter, Roman & Peltz, Plaza 273, 56 West Main Street, 4th Floor, Christiana, Delaware 19702, Attorney for Appellant.

John J. Ellis, Esq., Heckler & Frabizzio, 800 Delaware Ave., Suite 200, P.O. Box 128, Wilmington, DE 19899, Attorney for Appellee.

JURDEN, J.

INTRODUCTION

Appellant, Robert Robbins (hereinafter "Claimant"), files this appeal from the Industrial Accident Board's (the "Board") decision to deny his Petition for Additional Compensation Due. For the reasons explained below, the Court finds that the Board's decision is supported by substantial evidence and is free from legal error. Accordingly, the Board's decision is **AFFIRMED**.

FACTS AND PROCEDURAL HISTORY

While employed by Helmark Steel (hereinafter "Employer"), Claimant suffered an industrial injury to both his lower extremities. The injuries were recognized as compensable and Claimant received compensation for limited periods of disability, as well as a permanent partial impairment of 41% and 25% to his left and right legs, respectively.[1] On February 9, 2009, Claimant filed a Petition to Determine Additional Compensation Due, alleging a recurrence of total disability from February 12, 2009, forward.[2] In a decision dated August 11, 2009, the Board denied the Claimant's Petition.

Claimant has worked in the areas of steel, pipefitting, and welding since he graduated high school. The Claimant's job with Employer involved operating heavy equipment, working at heights and underground, and lifting heavy weights and tools.[3] On June 11, 1999, a crane lifting a 4000 pound steel beam malfunctioned and dropped the beam on the Claimant's legs. Claimant suffered serious leg injuries which required

[1] *See* Appellant's Opening Brief at 2 (hereinafter "App. Op. Br.").
[2] It is unclear to the Court as to when the alleged no-work order was actually issued. Claimant testified that he was instructed not to work on February 11, 2009. The Appellant's Opening Brief states the alleged no-work order was issued on February 12, 2009. Appellant's Answering Brief states the no-work order was issued on March 11, 2009. The Board stated that "Dr. Yezdani apparently totally disabled Claimant in February of 2009." Finally, Dr. Townsend testified that Dr. Yezdani issued the alleged no-work order March 11, 2009. The record does not contain a no-work order or a copy of Dr. Yezdani's records related to Claimant's examinations.
[3] App. Op. Br. at 3.

multiple surgeries, including the placement of rods and screws and subsequent removal of those screws.[4] After his injury, Claimant maintained similar welding positions with different employers. In March of 2004, pursuant to an agreement between the parties, Claimant went on total disability for a 3 week period.[5] For the past two years Claimant has been employed by General Marine Industrial Services as a pipe fitter and welder on barges in the Delaware River, working at heights.[6]

Claimant testified that he is stiff and achy every morning and has a difficult time getting motivated for work.[7] Claimant believed he was in jeopardy of losing his job and was afraid of falling at work.[8] Claimant also testified that the weather conditions at his current job exacerbated his condition because it is 10 to 15 degrees cooler on the water.[9] Claimant began treatment with Dr. Yezdani in October of 2008, due to his ongoing leg condition.[10] Claimant worked on and off from October of 2008, to February 11, 2009, when, Claimant alleges, Dr. Yezdani ordered him not to return to work at all.[11]

Dr. Townsend testified by deposition, and his was the only medical testimony the Board heard.[12] Dr. Townsend evaluated Claimant on December 7, 2000, and May 13, 2009, and reviewed the Claimant's medical records, including those of Dr. Yezdani.[13] Dr. Townsend testified that as of the December 7, 2000 examination, Claimant was

[4] *Id.* at 2.
[5] Industrial Accident Board Decision at 7, August 11, 2009 (hereinafter "IAB Decision").
[6] App. Op. Br. at 2.
[7] Industrial Accident Board Hearing Transcript at 10, June 18, 2009 (hereinafter "Tr.").
[8] *Id.*
[9] *Id.* at 11.
[10] Dr. Yezdani never testified at the Hearing. However, over objection, Claimant testified regarding his belief as to Dr. Yezdani's prognosis and Dr. Townsend testified regarding Dr. Yezdani's records.
[11] Tr. at 14.
[12] *Id.* at 31-40.
[13] *Id.*

"capable of working full time . . . ."[14] Dr. Townsend then testified regarding Claimant's condition as of the 2009 examination, opining that the Claimant's work with Employer did not create any permanent worsening of his injury and that he was capable of working with restrictions.[15] Dr. Townsend explained that there was not any notable worsening of the Claimant's condition between the first and second evaluations, and that the Claimant's symptoms could be effectively managed with medication.[16]

Dr. Townsend testified about Dr. Yezdani's February 11, 2009 examination of Claimant. Dr. Yezdani's report indicated that Claimant continued to have pain and would be permanently disabled for the rest of his life. Dr. Townsend understood the term "permanently disabled" to mean that the Claimant could never return to work,[17] however Dr. Townsend disagreed with this conclusion, testifying that he believed Claimant was capable of working.[18] Dr. Yezdani noted in October, 2008 that Claimant had not worked for about a year. However, this was inconsistent with the Claimant's work records and the Claimant's statement that he had worked continuously until October of 2008.[19] Dr. Townsend opined that Claimant had not been totally disabled from "some point in 2000 up until he was taken out [of work] by Dr. Yezdani."[20]

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[14] *Id.* at 32.
[15] *Id.* at 33-4.
[16] *Id.* at 35.
[17] Dr. Townsend Deposition at 20 (June 10, 2009):

> [Dr. Yezdani] noted that the patient had been unable to work in his usual occupation for about a year . . . He stated that [Claimant] continued to have pain and mobility problems associated with his injuries and that he would be permanently disabled and would have to be on pain medication for the rest of his life because of his disability.

[18] Tr. at 37.
[19] IAB Decision at 6.
[20] Tr. at 40.

The Board's Decision

The Board determined that Claimant had not met his burden of proving that he had suffered a recurrence of total disability. The Board found Dr. Townsend's testimony persuasive that Claimant's condition had not changed between 2000 and 2009, and that Claimant was currently capable of working. The Board reasoned that the Claimant's subjective pain was causally related to weather conditions at his current worksite and did not manifest as a result of an exacerbated physical condition. The Board also noted that Claimant had complained of the same symptoms in 2000 as he did in 2009, which did not support a change in physical condition.[21] The Board found that although Claimant may have some restrictions in regard to his preferred occupation, he was able to work in some capacity and his condition had not changed since the last period of total disability; a finding that prohibits a total disability award.[22]

The Board also found that Dr. Yezdani's instructions to Claimant did not amount to a no-work order such that he was entitled total disability during the pendency of his petition.[23] The Board found Dr. Yezdani's note ambiguous as to the meaning of "permanently disabled," and concluded that "Claimant simply was not able to show to the Board's satisfaction that the medical report/note from March 11, 2009, meant to totally disable him from all forms of work."[24]

PARTIES' CONTENTIONS

Claimant argues that Dr. Yezdani's instructions amounted to a no-work order, and therefore, if Claimant returned to work, he would have been disobeying his doctor's

[21] IAB Decision at 8.
[22] *See West v. Ponderosa Steak House*, 1998 WL 281195, at *4 (Del. Super. May 13 1998) ("Without such a change, the Board could not possibly make a finding that Claimant suffered a recurrence.").
[23] *See Gilliard-Belfast v. Wendy's, Inc.*, 754 A.2d 251 (Del. 2000).
[24] IAB Decision at 13.

orders. Claimant contends that under the circumstances of this case, he has satisfied the *Gilliard-Bellfast*[25] test such that he is entitled to temporary total disability benefits from February 12, 2009 until the Board's decision of August 11, 2009. Claimant further contends that the Board's decision denying temporary total disability benefits for the Claimant's alleged 2008 recurrence of disability is not supported by substantial evidence.

Employer argues that there was substantial evidence presented for the Board to find that Claimant had not suffered a recurrence of total disability. Employer further contends that the Board correctly declined to apply *Gilliard-Bellfast* because Claimant failed to establish that Dr. Yezdani actually issued a no-work order, and that even if such an order had been issued, the Employer's due process rights were violated because they had no opportunity to cross-examine Dr. Yezdani regarding the meaning of his alleged no-work order.

STANDARD OF REVIEW

On appeal, this Court determines whether the Board's decision is supported by substantial evidence and is free from legal error.[26] Substantial evidence is such relevant evidence that a reasonable mind would accept as adequate to support a conclusion.[27] This Court does not act as the trier of fact, nor does it have authority to weigh the evidence, decide issues of credibility, or make factual conclusions.[28] In reviewing the record for substantial evidence, the Court must consider the record in the light most favorable to the party prevailing below.[29] The Court's review of conclusions of law is *de*

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[25] *Gilliard-Belfast*,
754 A.2d 251.
[26] *General Motors v. McNemar*, 202 A.2d 803, 805 (Del. Super. 1964); *General Motors Corp. v. Freeman*, 164 A.2d 686, 688 (Del. Super. 1960).
[27] *Oceanport Ind. v. Wilmington Stevedores*, 636 A.2d 892, 899 (Del. Super. 1994).
[28] *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. Super. 1965).
[29] *Benson v. Phoenix Steele*, 1992 WL 354033, at *2 (Del Super. Nov. 6, 1992).

novo.[30] Absent an error of law, the Board's decision will not be disturbed where there is substantial evidence to support its conclusions.[31]

DISCUSSION

Claimant argues that he is entitled to total disability benefits between the date Dr. Yezdani's alleged no-work order was issued, February 12, 2009, and August 11, 2009, the date the Board made its decision, pursuant to the Delaware Supreme Court's holding in *Gilliard-Belfast*.[32] In *Gilliard-Belfast*, the Supreme Court held "that a person who can only resume some form of employment by disobeying the orders of his or her treating physician is totally disabled, at least temporarily, regardless of his or her capabilities."[33] A prerequisite to finding *Gilliard-Belfast* applicable is a determination that the Claimant's treating physician had ordered Claimant to not perform any work,[34] or in other words, a no-work order had been issued. In this case, the Board concluded that Dr. Townsend's hearsay testimony concerning Dr. Yezdani's notes, along with the Claimant's testimony regarding his belief as to Dr. Yezdani's instructions, were insufficient to find that Dr. Yezdani had issued a no-work order. The Board found that Dr. Yezdani's note was ambiguous because the term "permanently disabled" was not clear in terms of context.[35]

Substantial evidence exists to affirm the Board's determination that a no-work order had not been issued. Inexplicably, Claimant did not call Dr. Yezdani to testify regarding what he meant by "permanently disabled." Claimant took Dr. Yezdani's

[30] *Reese v. Home Budget Center*, 619 A.2d 907 (Del. Super. 1992).
[31] *Dellachiesa v. General Motors Corp.*, 140 A.2d 137 (Del. Super. 1958).
[32] *Gilliard-Belfast*, 754 A.2d 251; *see Smith v. James Thompson & Co.*, 918 A.2d 1164, 1167 (2007).
[33] *Id.* at 254.
[34] *Delhaize America, Inc. v. Baker*, 880 A.2d 1047, at *1 (Del. 2005) (TABLE) ("Simply stated, if a claimant is instructed by his treating physician that he or she is not to perform *any* work, the claimant will be deemed totally disabled during the period of the doctor's order.") (emphasis in the original).
[35] IAB Decision at 12.

instructions to mean that he could not work in any capacity. However, the Board gave little weight to Claimant's testimony on this issue stating, "his lay testimony was not sufficient to the Board, and certainly not unbiased in nature."[36] Dr. Townsend also speculated that "permanently disabled" meant that Claimant could no longer work in any capacity. However, the Board was not convinced by either the Claimant's subjective belief or Dr. Townsend's speculation as to what Dr. Yezdani meant by "permanently disabled." The term could have meant permanent partial disability, as Claimant had previously received permanency benefits for both of his legs.[37] The term could also have meant that Claimant was permanently disabled from his current position but not with respect to all employment.[38] Because Dr. Yezdani did not testify as to what his notes meant, the Court will not speculate regarding what "permanently disabled" was intended to mean. It is the Claimant's burden to establish that he is entitled to additional compensation, and where substantial evidence supports a Board conclusion, the Court must defer to the Board's finding.

Substantial evidence exists to conclude that the Claimant had not suffered a recurrence of total disability. In order to support a petition for additional compensation, the Claimant has the burden of proving by a preponderance of the evidence that he suffered a recurrence of total disability.[39] "Where the injury is internal, medical testimony is necessary to establish the existence of the injury."[40] The Claimant failed to

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[36] *Id.*
[37] *See* 19 *Del. C.* § 2326.
[38] *See Joynes v. Peninsula Oil Co.*, 2001 WL 392242, at *3 (Del. Super. Mar. 14, 2001) (distinguishing *Gilliard-Belfast* because the Claimant's doctor had not issued a "*carte blanche* no work order" and the record did not indicate what medical restrictions Claimant was under).
[39] *Macy's v. Campbell*, 2006 WL 1816219, at *4 (Del. Super. June 28, 2006) ("[T]he burden is on the Claimant to prove she had suffered a recurrence after a termination of benefits."); *see* 29 *Del. C.* § 10125 (c).
[40] *Briones v. Conagra/Perdue Farms*, 1998 WL 110094, at *2 (Del. Super. Jan. 7, 1998) (citations omitted).

provide any medical testimony whatsoever to support his contention that he suffered a recurrence of total disability. Dr. Townsend testified that there had been no notable worsening with regard to Claimant's condition between 2000 and 2009.[41] Claimant has not met his burden of proving recurrence "[w]here Claimant's 'objective examinations were essentially unchanged.'"[42] Dr. Townsend further testified that nothing in his medical findings or the Claimant's medical history indicates that the Claimant is totally disabled.[43] "Credibility of witnesses and the weight to be accorded their testimony is to be determined by the Board."[44] The Board was free to believe Dr. Townsend's testimony over the Claimant's,[45] and thus, substantial evidence existed to conclude that Claimant did not suffer a recurrence of total disability.

CONCLUSION

For the aforementioned reasons, the decision of the Industrial Accident Board is **AFFIRMED**.

IT IS SO ORDEDED.

Jan R. Jurden, Judge

[41] Tr. at 33.
[42] *Steele v. Animal Health Sales, Inc.*, 2001 WL 1355134, at *4 (Del. Super. Oct. 19, 2001) (citations omitted).
[43] Tr. at 34.
[44] *Builders & Managers, Inc. v. Cortilesso*, 608 A.2d 725, at *2 (Del. 1992) (TABLE).
[45] IAB Decision at 11 ("The Board found Dr. Townsend's testimony to be very persuasive . . . and accepts his opinion that Claimant can work in a medium duty job. . . .").