IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

State of Delaware,	)	
	)	
Appellant,	)	
	)	
v.	)	C.A. No.: N21A-01-001 VLM
	)	
Kimberly Griffith,	)	
	)	
Appellee.	)	

MEMORANDUM OPINION

Submitted: June 11, 2021
Decided: September 30, 2021

Upon Consideration of Appellant's Appeal of the Decision of the Industrial Accident Board, **AFFIRMED**.

William R. Baker, Esquire, of Tybout, Redfearn & Pell. *Attorney for Appellant*.

Sean P. Gambogi, Esquire, Megan E. Traynor, Esquire (Certified Limited Practice Licensee) of Kimmel, Carter, Roman, Peltz & O'Neill, P.A. *Attorneys for Appellee*.

MEDINILLA, J.

I. INTRODUCTION

Appellant State of Delaware ("Employer") challenges a decision of the Industrial Accident Board (the "Board") that found Appellee Kimberly Griffith ("Griffith") did not voluntarily remove herself from the job marketplace and is entitled to temporary total disability benefits. For the reasons set forth below, upon consideration of the arguments, submissions of the parties, and the record in this case, the Board's decision is **AFFIRMED**.

II. FACTUAL AND PROCEDURAL BACKGROUND

On January 21, 2014, Griffith sustained an injury to her lower back while in the course of her employment with the State of Delaware in her capacity as a fourth-grade teacher at Mount Pleasant Elementary School.[1] Employer acknowledged the injury compensable and started paying weekly temporary total disability benefits in February of 2014 of $660.79 based on her average weekly salary of $1,129.16.[2]

From 2014 until 2016, Griffith tried conservative treatment for her work-injury. This proved insufficient and she required spine surgery. She interviewed five surgeons[3] before selecting Dr. Jeffrey Rihn, of the Rothman Institute of

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[1] Decision on Petition to Determine Additional Compensation Due [hereinafter *IAB Decision*], at 2; Stipulation of Facts, at ¶ 1.
[2] *See* IAB Decision, at 2; Stipulation of Facts, at ¶ 4.
[3] IAB Hearing, at 16:20-22.

Orthopaedics, who performed a spinal fusion in April of 2016.[4] Unfortunately, in February of 2017, Dr. Rihn took x-rays that showed a loosening of the hardware described as a "slight haloing around the bilateral L5 screws,"[5] and he told Griffith that he would likely have to perform another surgery.[6] He suggested she undergo a CT scan to confirm a possible nonunion failed fusion.[7]

Also in February 2017, at the request of Employer, Griffith underwent a defense medical evaluation (DME) by Dr. Matz, who opined that she was eligible to work sedentary to light work,[8] although he also told her she may require additional periods of total disability pending diagnostic testing and her doctor's visits.[9] Although Dr. Rihn did not release her to work, in August of 2017 Griffith and Employer stipulated to an agreement to a reduced payment. This agreement reduced her weekly disability payments from $660.79 to $426.72 that continues today.[10]

For the three years that followed, while receiving partial disability benefits, Griffith continued to perform home physical therapy with hope that she would return

[4] Appellant's Opening Brief, at 7; Stipulation of Facts, at ¶ 3.
[5] IAB Hearing, at 14:13-16.
[6] *Id.* at 14:20-23.
[7] *Id.* at 26:6-9.
[8] *Id.* at 5:6-9.
[9] *Id.* at 21:2-6.
[10] *See* Appellant's Opening Brief, at 1; Stipulation of Facts at ¶ 4.

to teaching.[11] In 2018, she tried to make an appointment to see Dr. Rihn but she stated he was in China for a ten-week training session for doctors.[12]

Griffith finally obtained the CT scan on March 17, 2020, and Dr. Rihn advised that she had developed a nonunion of her fusion at L4-L5, and significant loosening of the bilateral L5 screws requiring revision fusion at L4-L5, with possible extension to S1 level.[13] On that same day, Griffith filed a Petition to Determine Additional Compensation Due, seeking acknowledgement that the proposed surgery was reasonable, necessary and related, as well as an agreement for ongoing total disability from the date of surgery.[14]

The parties stipulated as to the compensability of the proposed surgery and that Griffith would be totally disabled from that date.[15] However, Employer argued that she failed to prove a recurrence of total disability because she never filed for recurrence until learning of the new surgery and delayed seeking treatment for over several years.[16] Additionally, Employer argued she cannot demonstrate a loss of earning capacity where she failed to conduct a reasonable job search for years after she agreed to terminate her total disability benefits in 2017.[17] As such, Employer

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[11] IAB Hearing, at 12:3-7.
[12] *Id.* at 23:5-10.
[13] Stipulation of Facts, at ¶ 5.
[14] IAB Decision, at 2.
[15] Stipulation of Facts, at ¶ 6.
[16] Appellant's Opening Brief, at 19.
[17] Stipulation of Facts, at ¶ 7.

claimed she voluntarily removed herself from the workforce and not entitled to total disability.[18] The Board disagreed.

The Board[19] acknowledged that Griffith was receiving temporary partial disability benefits under an agreement with Employer[20] and that Employer did not dispute the recommended surgery as compensable.[21] The Board determined the narrow issue was essentially whether Griffith voluntarily left the labor market to preclude her right to receive further wage loss benefits.[22] The Board conducted a totality of the circumstances test[23] and found that Griffith had not voluntarily removed herself from the job marketplace,[24] and was entitled to total disability benefits.

On January 7, 2021, Employer filed a notice of appeal. Briefs were filed on April 19 and May 6, 2021, and the matter was assigned to this Court on June 11, 2021. This matter is now ripe for decision.

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[18] *Id.*
[19] The parties stipulated to a decision by the Worker's Compensation Hearing Officer, acting as the Board, in accordance with 19 *Del. C.* § 2301B; IAB Hearing, at 3:5-8.
[20] IAB Decision, at 6.
[21] *Id.*
[22] *Id.* at 6.
[23] *Id.*
[24] *Id.* at 8.

III. PARTY CONTENTIONS

Employer contends the Board erred as a matter of law, fact, and that its decision is not supported by substantial evidence,[25] primarily that it was error for the Board to find Griffith did not voluntarily remove herself from the job marketplace.[26] Employer also contends Griffith provided insufficient evidence of her disability when she failed to provide medical expert testimony.[27] Griffith seeks this Court affirm the Board's decision and find the Board's decision is supported by substantial evidence, free from legal error.[28]

STANDARD OF REVIEW

On an appeal from a Board decision, the Superior Court does not ". . . weigh the evidence, determine questions of credibility, and make its own factual findings and conclusions."[29] Those functions are exclusively held by the Board.[30] In considering an appeal from the Board, this Court's review is limited to correcting

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[25] Appellant's Opening Brief, at 7.
[26] *Id.*
[27] Appellant's Reply Brief, at 14; This issue is not considered by the Court as no legal authority was offered regarding a standard for sufficient evidence of a no-work order. Regardless, the Board's ruling did not require expert medical testimony. *See, e.g.*, *Robbins v. Helmark Steel*, 2011 WL 1326272, at *3 (Del. 2013) (affirming Board decision that claimant did not satisfy burden due to lack of credibility, not because of lack of expert medical testimony).
[28] Appellee's Answering Brief, at 13.
[29] *Christiana Care Health Servs. v. Davis*, 127 A.3d 391, 394 (Del. 2015); *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965).
[30] *Noel-Liszkiewicz v. La-Z-Boy*, 68 A.3d 188, 191 (Del. 2013); *Breeding v. Contractors-One-Inc.*, 549 A.2d 1102, 110 (Del. 1988).

errors of law and a determination of whether substantial evidence[31] in the record supports the Board's decision.[32] "Absent an abuse of discretion or an error of law, a Board decision that is supported by substantial evidence will not be overturned by the Court."[33] Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[34] Issues raised on appeal involving exclusively a question of law are reviewed de novo.[35] In its review of the record, the Court will evaluate it "in the light most favorable to the prevailing party below."[36]

IV. DISCUSSION

Under Delaware law, an employee bears the burden of proving a recurrence of temporary total disability to the Board.[37] As such, an employee must show a

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[31] *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981) (Substantial evidence constitutes relevant evidence that a reasonable person "might accept as adequate to support a conclusion.").
[32] *Maracle v. Int'l Game Tech*, 2010 WL 541199, at *2 (Del. Super. Feb. 1, 2010); *Histed v. E.I. Du Pont de Nemours & Co.*, 621 A.2d 340, 342 (Del. 1993); *Johnson*, 213 A.2d at 66; *Lecompte v. Christiana Care Health Sys.*, 2002 WL 31186551, at *2 (Del. Super. Oct. 2, 2002) (citing 29 *Del. C.* § 10142(d)) (The Superior Court determines whether the record "is legally adequate to support the Board's findings.")).
[33] *Miller v. Delaware Psychiatric Ctr.,* No. CIV.A. N12A-06007DCS, 2013 WL 1281850, at *7 (Del. Super. Mar. 28, 2013) (citing *Stanley v. Kraft Foods, Inc.*, 2008 WL 2410212, *2 (Del. Super. Mar. 24, 2008)).
[34] *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981).
[35] *Vincent v. E. Shore Markets*, 970 A.2d 160, 163 (Del. 2009) (quoting *Baughan v. Wal-Mart Stores*, 947 A.2d 1120, 2008 WL 1930576, at *2 (Del. 2008) (TABLE)); *Duvall v. Charles Connell Roofing*, 564 A.2d 1132 (Del. 1989).
[36] *Miller*, 2013 WL 1281850, at *7 (citing *General Motors Corp. v. Guy*, 1991 WL 190491, at *3 (Del. Super. Aug. 16, 1991)).
[37] 29 *Del. C.* § 10125(c).

work-related change in the condition.[38] Delaware case law has established that a revision of surgery can satisfy a change in condition.[39] Employer acknowledges that the proposed surgery is reasonable, necessary, and related to the work injury, and that Griffith will be totally disabled from the date of the proposed surgery.[40] Yet it maintains she is not entitled to receive total disability benefits because she removed herself from the job marketplace.[41]

Delaware law has determined that an employee may be ineligible to receive benefits when it is determined that an employee has retired or voluntarily removed himself from the workplace.[42] The determination of whether an employee has voluntarily removed herself from the job market requires the Board to consider factors under a totality of the circumstances test.[43] Accordingly,

> [a]n employee may collect disability benefits even after voluntarily retiring from a specific job, so long as that employee does not intend to remove herself from the job market altogether. But where [. . .] an employee does not look for any work or contemplate working after retiring, however, ***and*** is content with her retirement lifestyle, that employee is not eligible for workers' compensation benefits.[44]

[38] *See, e.g.*, *DiSabatino & Sons, Inc. v. Facciolo,* 306 A.2d 716, 719 (Del. 1973); *State v. Archangelo*, 2017 WL 3912786, at *1 (Del. Super. Aug. 9, 2017).
[39] *See Redman v. State*, 2015 Del. Super. LEXIS 317, at * 2 (Del. Super. Feb. 4, 2015).
[40] Stipulation of Facts, at ¶ 6.
[41] Appellant's Opening Brief, at 7.
[42] *Est. of Jackson v. Genesis Health Ventures*, 23 A.3d 1290, 1291 (Del. 2011).
[43] *See, e.g.*, *Redman*, 2015 Del. Super. LEXIS 317, at *5.
[44] *Archangelo*, 2017 WL 3912786, at *3 (citing *Est. of Jackson*, 23 A.3d at 1291 (emphasis added).

To determine whether an employee is no longer eligible to receive benefits, the Board must consider whether an employee has looked for work or contemplated work after retiring (job search) and whether she is content with a retirement lifestyle. Here, the Board set forth the rationale why in considering both prongs, the ruling favored Griffith. Since Employer takes issue with the Board's conclusions as to each, the Court looks at job search and retirement lifestyle, respectively.

A. Board's Determination that Employee's Failure to Conduct Job Search was not Dispositive to Establish Voluntary Removal from the Workforce is Supported by Substantial Evidence

Griffith wishes to return to work as a teacher. For two years after the work-injury, Griffith underwent physical therapy (PT) for 8 to 12 weeks,[45] and performed home PT every other day.[46] She committed to this regimen in the hopes of returning to work someday. To date, she continues her PT routine to include "core strengthening, oblique crunches, leg raises, superman, hundredths…[doing] 20 reps, three sets, for each…."[47] Griffith also tried to work before and during the period of COVID-19, in February and April of 2020, where she delivered food for a delivery service, Post Mates, approximately four times.[48] She stated this type of job afforded

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[45] IAB Decision at 3.
[46] *Id.*
[47] IAB Hearing, 12:3-7.
[48] *Id.* at 13:7-21.

her the flexibility needed because she is a single mother with full custody of her two children.[49] In March 2020, she learned she needed another surgery and indicated an employer would be reluctant to hire someone who was contemplating surgery.

Employer's strident contention that Griffith's has "chosen to sit back" and is "standing by"[50] for the return of total disability benefits misses the mark. Furthermore, its reliance on *Redman v. State*[51] is misplaced. In *Redman,* the Board found "[a] claimant's failure to seek employment or conduct an adequate job search is compelling evidence that a claimant has voluntarily removed themselves from the workforce."[52] Distinguishable is that the *Redman* claimant was not credible.[53] Here, the Board specifically found Griffith was,[54] and acknowledged that her decision to voluntarily reduce her temporary total disability benefits to partial disability weighed against her,[55] she nevertheless provided credible testimony wherein the "weight of evidence falls on [Griffith]'s side of the argument."[56] Thus, it was proper for the Board to make credibility determinations in her favor and the Court finds no error in the Board's ruling.

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[49] *Id.*
[50] Appellant's Opening Brief, at 20.
[51] *Redman v. State*, 2015 Del. Super. LEXIS 317 (Del. Super. Feb. 4, 2015).
[52] *Redman*, 2015 Del. Super. LEXIS 317, at *5.
[53] *See Id.* at *7–*8.
[54] IAB Decision, at 8 ("Claimant presented in a credible way….").
[55] *Id.* at 7.
[56] *Id.* at 8.

It was also appropriate for the Board and the Court agrees that Griffith's limited attempts to look for work, standing alone, was not dispositive on the issue of whether an employee has voluntarily removed herself from the workplace. Finding *Archangelo v. State* on point,[57] the Board properly considered that Griffith is "a teacher and went to college specifically for that profession."[58] Injured after seventeen years of being a schoolteacher, she expressed her desire to continue teaching once she was physically capable of doing so.[59]

Employer's argument that *Archangelo* is distinguishable is also without merit.[60] Employer is correct that in *Archangelo*, the parties agreed on a recurrence of his work-related permanent disability[61] and that agreement is not present here.[62] But that distinction does not negate the applicability of *Archangelo* as directly on point.[63] That Board considered and rejected employer's argument that the employee/coach/teacher had "traditionally retired" by not adequately seeking employment opportunities. For the same reasons stated by the Board here, *Archangelo* shares a similar fact pattern whose ruling proved favorable to the employee. There is no error of law.

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[57] *See State v. Archangelo*, 2017 WL 3912786, at *1 (Del. Super. Aug. 9, 2017).
[58] IAB Decision, at 7.
[59] *Id.*
[60] Appellant's Opening Brief, at 19.
[61] *Archangelo*, 2017 WL 3912786, at *1.
[62] *See* Stipulation of Facts at ¶ 5.
[63] IAB Decision, at 7.

B. Board's Determination that Employee was not Living a Retirement Lifestyle is Supported by Substantial Evidence

Employer argues that Griffith has "inappropriately chosen to sustain life under her disability benefits" because she voluntarily agreed to a reduced income.[64] Here, Employer suggests that Griffith was content with her partial disability status and focuses on Griffith's failure to file for the "recurrence" of total disability benefits despite having a "no-work" note from her surgeon.[65] Essentially, that for over three years following her agreement to reduce her benefits from total to partial disability in 2017,[66] she did not request the Board place her back on total disability. It posits that if the Board had properly considered Griffith's failure to file, it should have concluded that she voluntarily removed herself from the job marketplace (i.e., content with living only with partial disability benefits.)

Employer cites *State v. Disharoon*[67] to undergird this argument that a gap in treatment and a gap in filing for recurrence of disability is sufficient reason to deny Griffith's request for benefits.[68] First, the Board accepted Griffith's explanation that although she had not been released (nor has ever been released) from total disability status by her treating surgeon,[69] she did not file a petition for the recurrence of total

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[64] *See* Appellant's Reply Brief, at 12.
[65] *Id.* at 13–14.
[66] Stipulation of Facts, at ¶ 4.
[67] 2013 WL 3339395 (Del. Super. June 17, 2013).
[68] *See* Appellant's Opening Brief, at 14-15.
[69] *See* IAB Hearing, at 14:4-5, 15:12-13, 25:22-25.

disability benefits because she could not afford Dr. Rihn's $6,000 deposition fee, which would have been necessary to present a claim for such benefits.[70] Second, the Board found *Disharoon* "clearly distinguishable."[71] The Court agrees that the reasoning in *Disharoon* was based on legal error and a conflated burden of proof.[72] These issues are not present here.

Further distinguishable is that the *Disharoon* claimant had been released to work by her own surgeon,[73] a factor important in this decision. Thus, Employer's reliance on *Anderson v. Harbor Seafood House*[74] and *Popken v. State*,[75] equally misses an important point. All those claimants had been released by their physicians from their total disability status. Griffith had not.[76]

Griffith agreed to accept a reduced partial disability payment after Employer's defense medical evaluator opined that she was eligible to do sedentary or light duty work with the caveat that episodes of total disability would be expected depending on diagnostic findings and her doctor's visits. True enough, the CT scan in March 2020 confirmed the surgery forecasted in February 2017. And the Board accepted

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[70] *Id.* at 32:4-20.
[71] IAB Decision, at 8.
[72] *Id.* (citing *Disharoon*, 2013 WL 3339395).
[73] *Id.* (citing *Disharoon*, 2013 WL 3339395). *See also* IAB Decision, at 8 (distinguishing the present case from *Anderson v. Harbor Seafood House*, IAB. Hearing No. 1249425 (Oct. 31, 2019) for the same reason).
[74] IAB. Hearing No. 1249425 (Oct. 31, 2019).
[75] IAB Hearing No. 1266150 (Aug. 25, 2011).
[76] IAB Hearing, at 15:7-11.

her reasons for the delay as she was "[f]reaked out. Sad. Concerned. Defeated."[77] She further explained the delay was due to not wanting to "face the fact of the possibility of having another surgery."[78]

This record is clear that Griffith waited two years after her injury and interviewed five surgeons before agreeing to undergo a spinal fusion only to learn that it failed. Waiting to undergo a second surgery was properly considered by the Board. As were her response to the bad news and her reasons for the delay. But as to whether she was living a retirement lifestyle, the Board considered several other factors.

The Board factored Griffith's age and found "Claimant is at a young age (51) to be retiring."[79] Contrary to Employer's argument, this finding is neither legally nor factually erroneous. Though Employer cites to cases where other claimants may have been denied benefits at age 49, age alone is not a dispositive factor, and the Board was within its discretion to weigh Griffith's age, occupation, training, and life considerations in its ruling.

Further, *Anderson* did not cite retirement age as the reason for its denial of that claimant's disability benefits. Rather, the denial was due to the lack of credible

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[77] *Id.* at 14:24-25.
[78] *Id.* at 21:11-15.
[79] IAB Decision, at 7.

evidence to support a finding that claimant sought employment after being released by his own doctor to resume medium duty work.[80] Claimant there sought a job that exceeded his physical restrictions, and the court found this to be in bad faith.[81] Here, no such facts exist. Similarly to *Anderson*, the claimant in *Popken* had also been released to work by her physician, but did not make any reasonable effort to find a job.[82]

Finally, the Board considered that Griffith, a single mother raising two boys, had no other source of income[83] or anything that could be classified as retirement income, further justifying a finding against a retirement lifestyle.[84] The Board properly found she is not enjoying a retirement lifestyle.[85] None of the factors considered by the Board were errors of law nor fact.

CONCLUSION

Under the totality of the circumstances, the Court finds substantial evidence exists to support the Board's decision that Griffith has not voluntarily removed

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[80] *See Anderson*, IAB Hearing No. 1249425, at 2.
[81] *Id.*
[82] *Popken*, IAB Hearing No. 1266150, at 3.
[83] IAB Decision, at 7. *See also* IAB Hearing, at 18:10-23 (noting only other money received by Griffith is food stamps).
[84] *See, e.g.*, *Archangelo*, 2017 WL 3912786, at *4 (finding consideration by the Board of other forms of income was not in error).
[85] IAB Decision, at 6–7 (citing *Estate of Jackson*, 23 A.3d at 1291).

herself from the job marketplace and is entitled to temporary total disability benefits.

Since there is no legal error, the Board's decision is **AFFIRMED**.

IT IS SO ORDERED.

/s/ Vivian L. Medinilla
Vivian L. Medinilla
Judge