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

WILLIAM SPENCER,	)	
	)	
Appellant,	)	
Claimant-Below,	)	
	)	C.A. No. 07A-06-003 PLA
v.	)	
	)	
AIR LIQUIDE AMERICA,	)	
	)	
Appellee,	)	
Employer-Below.	)	

ON APPEAL FROM THE INDUSTRIAL ACCIDENT BOARD
AFFIRMED

Submitted: April 22, 2008
Decided: May 6, 2008

This 6th day of May, 2008, upon consideration of the appeal of William Spencer ("Spencer") from the decision of the Industrial Accident Board ("Board" or "IAB"), it appears to the Court that:

1. Spencer worked as a truck driver for Air Liquide America ("ALA"). On September 25, 2003, Spencer suffered a compensable work accident during the course and scope of his employment when he fell while attempting to climb a three-foot wall. The Board found Spencer to be totally disabled and awarded him workers' compensation benefits.

2. In October 2004, ALA sought to terminate Spencer's total disability benefits. The Board denied ALA's petition.[1] ALA filed another petition to terminate Spencer's benefits in 2005. The Board held a hearing on the merits on January 12, 2006.[2] At that hearing, Dr. John B. Townsend, III testified on behalf of ALA, and Dr. Stephen Boyajian testified on behalf of Spencer. The Board again denied the petition and found that both physicians had a good faith divergence of opinion as to Spencer's ability to return to work. As a result, the Board concluded that ALA failed to meet its burden of proof "[w]ithout more evidence (such as . . . a valid functional capacity evaluation) to weigh in favor of one over the other."[3]

3. On October 26, 2006, ALA filed a third petition to terminate Spencer's benefits. The Board held a hearing to address the petition on April 2, 2007. Dr. Townsend again testified on behalf of ALA. Dr. Townsend had evaluated Spencer on four separate occasions between June 2004 and February 2007, as well as reviewed his medical records. In his August 4, 2005 evaluation, Dr. Townsend found decreased ranges of motion

[1] *Spencer v. Air Liquide America*, Del. IAB, Hearing No. 1237818 (Oct. 28, 2004) [*Spencer I*].

[2] *Spencer v. Air Liquide America*, Del. IAB, Hearing No. 1237818 (Feb. 9, 2006) [*Spencer II*].

[3] *Id.* at 11.

in the low back and neck. Spencer had normal strength and reflexes. He found no evidence of any nerve or nerve root injury.

4. Cindy Strouse ("Strouse"), a licensed physical therapy assistant, testified by deposition at the hearing. Strouse administered a Functional Capacity Evaluation ("FCE") on September 14, 2006 to evaluate Spencer's condition. The FCE is a detailed questionnaire regarding pain levels and ratings coupled with a series of activities and tasks to determine a safe work capability level for the patient.[4] Spencer self-reported that he could sit for approximately one hour and walk consistently for fifteen minutes, including using stairs. He also informed her that he could lift ten to fifteen pounds for short distances and that he could lift fifteen to twenty pounds on occasion. During the FCE, a number of tests were discontinued because Spencer could not complete them and complained of pain. Strouse determined that the FCE, however, was valid because Spencer put forth a good effort. The FCE concluded that Spencer would be unable to work full-time as a truck driver but that he could do part-time work in a job that allowed frequent positional changes. It did not evaluate what Spencer could lift on a "frequent" basis. Strouse also did not contact Spencer the day after the FCE to determine if he

[4] *Spencer v. Air Liquide America*, Del. IAB, Hearing No. 1237818 (Apr. 2, 2007), at 4 [*Spencer III*].

was suffering from any pain, even though the FCE software had a field for that information.

5. Dr. Townsend concurred with the FCE's assessment. He supported his opinion with his clinical findings from his examination of Spencer on February 16, 2007. During that examination, Dr. Townsend's testing revealed normal strength and reflexes. He did note diminished range of motion in the neck and back with complaints of pain in the neck, low back, and left upper extremity. Nonetheless, he continued to believe that Spencer could work in a sedentary capacity with a ten-pound weight limit, so long as he engaged in no repetitive bending or twisting, did no climbing or crawling, and was able to change positions at least hourly. He agreed with the FCE that Spencer should begin to work for only four hours per day, and stated that Spencer could build up to a full eight-hour day.

6. Dr. Stephen J. Rodgers testified on behalf of Spencer. Dr. Rodgers evaluated Spencer in July 2005 and January 2007. Although Dr. Rodgers agreed as a theoretical matter that Spencer could work in a sedentary position, he doubted as a practical matter that Spencer could return to work. His 2007 evaluation largely confirmed his 2005 findings of abnormalities in the cervical and lumbar spine with radicular symptoms, no unilateral atrophy, and no clinical evidence of any neurological deficits. He

did find that Spencer's range of motion had marginally improved. He opined that, while sedentary work is the equivalent of "puttering around the house," Spencer's use of a Class 2 narcotic and his inability to have restorative sleep would affect his alertness during the day. He agreed, however, that Spencer was coherent and he would recommend sedentary work.

7. Notably, both Doctors Rodgers and Townsend rejected the recommendation of Dr. Stephen Boyajian, Spencer's treating physician and the physician on whom the Board relied in its earlier decision denying ALA's petition, that Spencer should obtain a mobility device. Dr. Rodgers opined that such a device would be "the worst idea" and advised Spencer to resist the suggestion. Similarly, Dr. Townsend found Dr. Boyajian's opinion to be inappropriate because Dr. Boyajian never performed any physical examinations but merely monitored Spencer's pain medication usage.

8. Spencer also testified at the hearing on his own behalf. He explained that his pain level is related to the level of activity he performs. He can walk back and forth in his house, but he will need to sit down. After sitting for twenty or thirty minutes, he needs to move again. He becomes fatigued frequently during the week and needs to nap. He admitted that he

can drive locally. After the FCE, Spencer testified that he was in a large amount of pain. His wife testified in support of this testimony.

9. On May 11, 2007, the Board issued a decision in which it concluded that Spencer could perform sedentary work part time. The Board first determined that Strouse's testimony regarding the FCE was admissible under *Daubert* because (1) Spencer failed to object during the deposition or prior to the hearing; (2) most of her testimony related to her own factual observations of Spencer, rather than to an expert opinion of his capabilities; (3) Strouse was qualified to administer the FCE by her skill and experience; and (4) there was no evidence suggesting that her methodology was invalid.[5] Rather, Spencer's critiques of the FCE, including Strouse's failure to consider Spencer's pain afterwards, related to its weight, not admissibility.[6] The Board then found that the medical dispute was "relatively small" because both Doctors Townsend and Rodgers agreed that Spencer could physically perform sedentary work, provided that he work part time to address Dr. Rodgers' concerns about Spencer's drowsiness.[7] The Board found that ALA had offered sufficient evidence to demonstrate that Spencer

[5] *Spencer III* at 13-16.

[6] *Id.* Dr. Rodgers, in fact, testified that a patient is expected to have increased pain after an FCE because the purpose of the evaluation is to push a patient's limits. *Id.* at 15.

[7] *Id.* at 16-17.

was no longer totally disabled and that that there were positions available to Spencer that could accommodate his restrictions. As a result, the Board terminated Spencer's total disability status but awarded him partial disability benefits equal to his total disability benefits.

10. Spencer has now appealed the decision of the IAB to this Court. Spencer argues that the Board's decision is not supported by substantial evidence because the Board failed to indicate why it accepted Dr. Townsend's opinion at the third hearing while it rejected that opinion in the previous two hearings. Spencer further asserts that the Board should not have relied on the FCE, which assessed the functions that Spencer could perform on an occasional and not frequent basis, because it did not address any of the conflicting evidence indicating that Spencer experienced pain during the FCE and could not complete the evaluation. He claims that the Board erred in accepting Strouse's opinion of Spencer's abilities because she was not qualified as a physical therapy assistant to render such opinions under *Daubert v. Merrell Dow Pharmaceuticals*.[8]

11. In response, ALA notes that the Board correctly found Strouse's opinion admissible because she is a licensed physical therapist, has been practicing in the field of physical therapy for nine years, has conducted

[8] 509 U.S. 579 (1993).

over fifty FCEs at a rate of two or three per week, and has been trained by the developer of the FCE process. Moreover, ALA notes that Spencer's inability to complete portions of the test do not invalidate the results because non-work related injuries prevented completion. Spencer also failed to put forth any evidence that the FCE was invalid or that the methodology was improper. ALA disagrees with the contention that the evidence presented at the hearing was the same as the evidence presented at previous hearings because: (1) Dr. Townsend's opinion, which was never rejected but found to be equally valid at previous hearings, was now supported by the testimony of Dr. Rodgers; (2) the April 2, 2007 hearing included medical testimony from Spencer's own physician, Dr. Rodgers, who, for the first time, opined that Spencer was capable of work; and (3) the Board had evidence of a FCE at the April 2, 2007 hearing that was never presented previously.

12. Appellate review of an IAB decision is limited. The Court's function "is confined to ensuring that the Board made no errors of law and determining whether there is 'substantial evidence' to support the Board's factual findings."[9] Substantial evidence means "such relevant evidence as a

[9] *Bermudez v. PTFE Compounds, Inc.*, 2006 WL 2382793, at *3 (Del. Super. Ct. Aug. 16, 2006), *aff'd*, 929 A.2d 783, 2007 WL 2405119 (Del. Mar. 29, 2007) (Table).

reasonable mind might accept as adequate to support a conclusion."[10] The Court "does not weigh the evidence, determine questions of credibility, or make its own factual findings."[11] The "substantial evidence" standard means "more than a scintilla but less than a preponderance of the evidence."[12] The Court must also give "a significant degree of deference to the Board's factual conclusions and its application of those conclusions to the appropriate legal standards."[13] In reviewing the evidence, the Court must consider the record "in the light most favorable to the prevailing party below."[14] The Court reviews questions of law *de novo* to determine "whether the Board erred in formulating or applying legal precepts."[15]

13. Spencer's first claim of error relates to the Board's decision to admit evidence of the FCE and Strouse's observations related to it.[16] The

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[10] *Anchor Motor Freight v. Ciabottoni*, 716 A.2d 154, 156 (Del. 1998).

[11] *Hall v. Rollins Leasing*, 1996 WL 659476, at *2 (Del. Super. Ct. Oct. 4, 1996) (citing *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965)).

[12] *Breeding v. Contractors-One-Inc.*, 549 A.2d 1102, 1104 (Del. 1988).

[13] *Bermudez*, 2006 WL 2382793 at *3 (citing 29 *Del. C.* § 10142(d)).

[14] *Id.*

[15] *Id.*

[16] The Court notes that Spencer waited until the hearing to raise his *Daubert* objection and gave no notice that the issue would be presented. *See Spencer III* at 13. Because the Board addressed the substantive merits of Spencer's argument, the Court will do the same.

case of *Daubert*, which has been accepted by the Supreme Court in evaluating whether expert testimony should be admitted,[17] requires the judge to determine (1) whether the technique has been tested; (2) whether the technique has been subjected to peer review and publication; (3) whether the technique has a high known or potential rate of error and whether standards control its operation; and (4) whether the technique is generally accepted within a relevant scientific community.[18] In essence, the focus of a *Daubert* analysis is on the principles and methodology that the expert used, not on her resulting conclusions.[19]

14. As an initial matter, because the Board is not strictly bound by the Delaware Rules of Evidence, the Board may disregard them as long as it does not abuse its discretion.[20] The board abuses its discretion in admitting evidence only where its decision "exceeds the bounds of reason given the circumstances, or where rules of law or practice have been ignored so as to

[17] *See M.G. Bancorporation v. LeBeau*, 737 A.2d 513 (Del. 1999).

[18] *Bowen v. E.I. DuPont de Nemours & Co.*, 906 A.2d 787, 794 (Del. 2006) (citing *Daubert*, 509 U.S. at 590-94).

[19] *Id.*

[20] *Standard Distrib., Inc. v. Hall*, 897 A.2d 155, 157-58, 158 n.7 (Del. 2006).

produce injustice."[21] In this case, the Board correctly applied *Daubert* and did not abuse its discretion. The Board first concluded that many of Strouse's observations were "simple facts" that were admissible because she could testify as a fact witness.[22] Second, and more importantly, the Board found that her extensive training, her use of standardized software, and her experience with FCEs qualified her because she was more skilled than the average person.[23] The Board then applied the four *Daubert* factors and concluded that (1) her methodology was valid because she used the standard FCE protocol; (2) she properly applied the methodology to Spencer during his FCE; (3) there was no challenge to the peer review or general acceptance of the FCE; and (4) Spencer failed to put forth any evidence suggesting that Strouse improperly applied the methodology.[24] The Board also correctly found that Strouse's failure to follow up with Spencer and determine his pain levels after the test did not invalidate the test because the methodology did not require a follow-up.[25] Similarly, the fact that Spencer could not

[21] *Bolden v. Kraft Foods*, 889 A.2d 283, 2005 WL 3526324, at *2 (Del. Dec. 21, 2005) (Table).

[22] *Spencer III* at 14.

[23] *Id.*

[24] *Id.* at 15.

[25] *Id.*

complete the tests does not invalidate the results because the purpose of the test is to push one's limits.[26] The Board correctly determined that Spencer's objections challenged the weight, rather than the admissibility, of the FCE. Thus, the Board correctly applied *Daubert* to conclude that the FCE was admissible.[27]

15. Spencer next argues that the Board's decision is not supported by substantial evidence because it relied on the opinion of Dr. Townsend that was rejected on two previous occasions. He also contends that Dr. Townsend improperly relied on the FCE. The Board is permitted to choose between the conflicting medical opinions of physicians, and either constitutes substantial evidence on appeal.[28] Although Dr. Townsend's opinion that Spencer could work in a limited capacity remained the same throughout all three hearings, Dr. Rodgers testified at the third hearing that he believed Spencer could and should return to work. This recommendation was supported by the FCE, which found that Spencer was capable of returning to work in a limited capacity. While Dr. Boyajian recommended a mobility device for Spencer, the Board was free to reject that opinion,

[26] *Id.*

[27] *See Bolden*, 2005 WL 3526324 at *3 (affirming the Board's decision to admit evidence under *Daubert* where the expert relied on standard methods and had clinical experience).

[28] *Reese v. Home Budget Ctr.*, 619 A.2d 907, 910 (Del. 1992).

especially when both Doctors Townsend and Rodgers vigorously disagreed. Importantly, unlike the evidence presented at the first two hearings, the Board now had a valid FCE addressing Spencer's limitations, something that was lacking from the previous hearings and which the Board itself noted would have supported ALA's claim that Spencer is disqualified from total disability benefits.[29] Because the Board had evidence from both treating physicians and from an FCE that supported ALA's contention that Spencer was no longer totally disabled, the Board's decision is supported by substantial evidence.

16. This holding is analogous to *Holden v. State*,[30] wherein this argument was similarly rejected. In that case, the claimant appealed a decision of the IAB that terminated his total disability benefits because he claimed his physical condition had not changed. The Court held that the employer need only establish that the claimant is physically capable of returning to work regardless of whether the claimant's physical condition had changed.[31] As long as the employer demonstrates that the claimant was medically capable of returning to work and that work was available within the claimant's restrictions, the Board's decision is supported by substantial

[29] *Spencer III* at 2.

[30] 1996 WL 280877 (Del. Super. Ct. May 16, 1996).

[31] *Holden*, 1996 WL 280877 at *3.

evidence.[32] Because both physicians in that case testified that the claimant could return to work with minimal restrictions and the employer offered evidence that there were jobs within his restrictions, the Court affirmed the Board's decision.

17. Just as in *Holden*, the Board in this case considered substantial evidence that Spencer was no longer totally disabled and that other work within his restrictions was available. ALA demonstrated that Spencer was physically capable of returning to work through the testimony of Dr. Townsend, Dr. Rodgers, and Strouse. The evidence was further supported by the results of the FCE. ALA then demonstrated that there were at least nine part-time positions that would address Spencer's restrictions.[33] The Board therefore correctly concluded that ALA met its burden of establishing that Spencer was no longer totally disabled.

[32] *Id.* at *4.

[33] *Spencer III* at 18.

18. Based on the foregoing, the Court concludes that the Board committed no errors of law in admitting the FCE. The Board's decision that Spencer is no longer totally disabled is also supported by substantial evidence. Accordingly, the decision of the Industrial Accident Board is hereby **AFFIRMED**.

IT IS SO ORDERED.

Peggy L. Ableman, Judge

Original to Prothonotary

cc: R. Stokes Nolte, Esq.
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