IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

LORRAINE DUFFY,	)	
	)	C.A. No. K11A-08-003 JTV
Appellant,	)	
	)	
v.	)	
	)	
STATE OF DELAWARE,	)	
	)	
Appellee.	)	

Submitted: March 7, 2012
Decided: July 5, 2012

Roy S. Shiels, Esq., Brown, Shiels & O'Brien, Dover, Delaware. Attorney for Appellant.

Natalie L. Palladino, Esq, Tybout, Redfearn & Pell, Wilmington, Delaware. Attorney for Appellee.

Upon Consideration of Appellant's
Appeal From Decision of the Industrial Accident Board
REMANDED

VAUGHN, President Judge

Lorraine Duffy v. State of Delaware
C.A. No. K11A-08-003 JTV
July 5, 2012

OPINION

This is an appeal from a decision of the Industrial Accident Board ("the Board"). The Board determined that the appellant, Lorraine Duffy ("the claimant"), sustained a compensable, psychological injury as a result of a hostile work environment. The Board concluded that the injury commenced on February 8, 2006, the day the claimant left her workplace.[1] The Board also concluded that her compensable injury resolved itself, at least as a work-place injury, by July 16, 2006. It accordingly awarded her total disability for that period of time.

The claimant contends that her compensable, total disability lasted at least until June 18, 2008. On appeal, she makes two arguments. The first is that the Board made factual errors which led to legal error by an incorrect application of the case of *Gilliard-Belfast v. Wendy's Inc.*[2] The second is that the Board committed legal error by refusing to admit into evidence a July 16, 2006 letter written by Dr. Lilian Kraman-Roach to the claimant, while permitting and relying on a characterization of the letter by a witness, Dr. Neil Kaye.

The appellee is the State of Delaware, Department of State, Division of Corporations ("the employer").

FACTS

I will set forth the facts only as needed to address the issues which I address on appeal.

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[1] This date is also referred to in the record as February 6, 2006. The difference is not material to this appeal.

[2] 754 A.2d 251 (Del. 2000).

Because of stress at her hostile work environment, the claimant sought assistance from the State of Delaware Employee Assistance Program in 2004. The counselor there suggested she begin seeing a psychiatrist and a therapist. The claimant began treatment in 2005 with Dr. Kraman-Roach, a psychiatrist, and Dr. Patricia Guariello, a clinical psychologist. After she left her employment on February 8, 2006, Dr. Kraman-Roach gave the claimant two months of total disability slips for the period from February 27, 2006 through April 27, 2006.[3] The slips do not seem to be part of the record, but I will infer that they say, in substance, that the claimant was totally disabled and unable to work for the periods covered by the slips.

On March 26, 2006, the claimant ceased being treated by Dr. Kraman-Roach. Her psychologist, Dr. Guariello, recommended that she start going to Dr. Stephen Cindrich, because Dr. Guariello thought that Dr. Cindrich would be a "better fit." The claimant began being treated by Dr. Cindrich in April or May of 2006 and continued to see him until September 2007, when he discontinued his practice.

The claimant testified that Dr. Kraman-Roach never told her she could return to employment. After the claimant began treatment with Dr. Cindrich, however, she did ask Dr. Kraman-Roach for a letter regarding her treatment so that she would have information about her treatment and the people treating her. Dr. Kraman-Roach responded with a letter dated July 19, 2006 to the claimant which stated, among other things, "therefore, I believe you could return to work."

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[3] It was unclear whether it was Dr. Kraman-Roach or Dr. Guariello who gave Duffy the disability slips, but the Board found that it did not matter because both were her treating physician during that time period.

The claimant testified that Dr. Cindrich told her, emphatically, that she could not go back to work. Dr. Cindrich's records are sparse, and it does not appear that there is any written verification of his alleged instruction that she not work.

At some point, Dr. Guariello did advise the claimant she needed to find something that would get her out of the house, but did not specify that she should seek employment. For a period after Dr. Cindrich left, the claimant saw her family doctor, who treated her with medications. In early 2008 she was treated for six-months by Dr. Abad-Santos. On June 18, 2008, Dr. Guariello wrote the claimant a letter indicating that she could return to work and advising her to do so.

Two psychiatrists testified at the hearing before the Board. One was Dr. Brian Crowley, who testified on behalf of the claimant. He evaluated her on two occasions, July 28, 2008 and June 23, 2010. In his deposition, given December 22, 2010, he testified that she continued to be disabled due to the psychological injury caused by the hostile work environment.

Dr. Kaye testified on behalf of the employer. Dr. Kaye examined the claimant on three occasions, September 6, 2006, November 27, 2007 and October 11, 2010. His opinion was that there was some stress that acted as a trigger for the claimant's depression in February 2006, but the work stress was only one element of much larger personal issues that the claimant was experiencing. He testified that the work-related stress and depression was resolved by May 2006; and that the claimant is now and has been capable of full-time employment since his three examinations of her, and probably since at least May 6, 2006. He testified that the claimant has a long and extensive history of mental, emotional, and psychological problems.

STANDARD OF REVIEW

The scope of review for an appeal from the Board is limited to an examination of the record for errors of law, and a determination of whether substantial evidence is present to support the IAB's findings of fact and conclusions of law.[4] Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[5] The court will defer to the Board in its assessment of demeanor and credibility of witnesses and the weight to be given to their testimony.[6] When the issue raised on appeal is exclusively a question of the proper application of the law, the review by the court is *de novo*.[7]

DISCUSSION

In her first argument, the claimant contends that the Board made significant factual errors. She contends that the Board erred by finding that the claimant did not change psychiatrists from Dr. Kraman-Roach to Dr. Cindrich until after Dr. Kraman-Roach wrote her letter of July 19, 2006. She further alleges that the Board compounded this error by allowing it to influence the Board's assessment of her credibility.

The Board found, in pertinent part: "Despite admitting that shortly after Dr.

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[4] *Davis v. Mark IV Transp.*, 2011 WL 2623906, at *1 (Del. Super. June 30, 2011) (citing *Porter v. Insignia Mgmt. Group,* 2003 WL 22455316 , at *3 (Del. Super. June 3, 2003)).

[5] *Davis,* 2011 WL 2623906, at *1 (citing *Oceanport Ind. v. Wilmington Stevedores,* 636 A.2d 892, 899 (Del. 1994)).

[6] *Zelo v. Delmarva Rural Ministries*, 2004 WL 2829054, at *1 (Del. Super. Mar. 15, 2004).

[7] *Davis,* 2011 WL 2623906, at *1 (citing *Porter,* 2003 WL 22453316, at *3)).

Kraman-Roach's July 2006 letter was written Claimant changed psychiatrists, Claimant denies ever receiving or even being aware of Dr. Kraman-Roach's July 2006 letter." However, the claimant did not admit that she changed psychiatrists shortly after Dr. Kraman-Roach's July 2006 letter. Her testimony was that she saw Dr. Kraman-Roach through March and then changed to Dr. Cindrich, and that she began seeing Dr. Cindrich in April or May. The July 2006 letter written by Dr. Kraman-Roach seems consistent with the claimant's testimony. Its contents include a statement that the claimant had been seeing Dr. Kraman-Roach from February 2005 to March 2006. While there may sometimes be ambiguity as to when one ceases being treated by a physician versus when one formally ends a relationship with a physician, there is not substantial evidence in this case to support the Board's finding that the claimant admitted changing psychiatrists shortly after the July 2006 letter.

In addition, the record does not seem to contain any evidence that the claimant ever denied receiving or being aware of Dr. Kraman-Roach's letter. Her testimony was that she, herself, requested the letter for informational purposes. Therefore, there is not substantial evidence to support the Board's finding that the claimant denied receiving or being aware of the July 2006 letter.

The Board also stated:

> . . . the Board disagrees with Claimant's argument that she was entitled from February 6, 2006 to June 18, 2008 to stay out of work pursuant to *Gilliard-Belfast* because the Board is unable to find that Claimant was advised to do so by any treating physician. Furthermore, the suspicious timing of Claimant's change in psychiatrists from Dr. Kraman-Roach to Dr. Cindrich just after Dr. Kraman-Roach had issued

> written correspondence advising Claimant that she was no longer totally disabled does not entitle Claimant to the presumptions of *Gilliard-Belfast* even had there been solid evidence that Dr. Cindrich had issued Claimant any total disability slips.

This finding seems to include an implicit finding by the Board that the claimant's testimony that Dr. Cindrich orally instructed her not to work was not credible, and the Board's suspicion seems to be based on a misapprehension that the claimant changed psychiatrists in July or later rather than in April or May.

I express no opinion about the claimant's credibility. However, I think that she is entitled to have her credibility evaluated on correct facts. Since the factual findings described above which are not supported by substantial evidence may possibly have affected the Board's assessment of the claimant's credibility, I will remand the case to the Board for further findings of fact and conclusions of law consistent with this opinion.

The employer contends that the Board's analysis of *Gilliard-Belfast* and the Board's outcome are correct. However, I think the better course of action is to give the Board the opportunity in the first instance to establish correct facts and then see if those facts lead it in any different direction. I am not inclined to engage in a *Gilliard-Belfast* analysis on the current record.

As to the claimant's second argument, I find no error in the Board's decision not to admit the July 2006 letter into evidence. At the hearing claimant's counsel seemed to contend that the contents of the letter were relevant to assessing inferences

drawn by Dr. Kaye, not for the truth of the contents. In her brief, the claimant also contends on appeal that it was offered to show that Dr. Kraman-Roach acknowledged when her professional treatment ended.

As to the first contention, it would seem that if the contents of the letter were relevant to assessing inferences drawn by Dr. Kaye, one would first have to accept the truth of the contents, making the letter hearsay. The letter does not fall within the exception for business records, because it is not a regularly conducted business activity. Furthermore, the claimant had the opportunity to examine Dr. Kaye as fully upon the letter as counsel wished at Dr. Kaye's deposition.

As to the second contention, Dr. Kraman-Roach's statement in the letter that treatment ended March 28, 2006 was included in a question and confirmed in an answer at the hearing without objection. Therefore, it seems to me that it is part of the record. The Board's decision to exclude the letter, if error, was harmless.

Therefore, the case is ***remanded*** to the Board for further proceedings consistent with this opinion.[8]

IT IS SO ORDERED.

/s/ James T. Vaughn, Jr.

cc: Prothonotary
Order Distribution
File

[8] The parties are advised that when the Superior Court remands a case to an administrative agency, the appeal is closed in Superior Court. Any future review of the case would have to be brought before the Court by a new appeal.