IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

PAMELA MILLER,	)	
	)	
Employee-Appellant	)	C.A. No. 08A-08-004 JRS
	)	
v.	)	
	)	
LAYTON HOME,	)	
	)	
Employer-Appellee	)	

Date Submitted: January 6, 2009
Date Decided: April 29, 2009

Upon Appeal from the Industrial Accident Board.
AFFIRMED.

O R D E R

This 29th day of April, 2009, upon consideration of the appeal filed by Pamela Miller ("Ms. Miller") from the decision of the Industrial Accident Board ("Board") granting Layton Home's ("Layton") Petition to Terminate Benefits, it appears to the Court that:

1. On August 14, 1992, Ms. Miller injured her back while working as a food service employee for Layton. As a result of the injury, Ms. Miller began receiving total disability benefits of $165.07 per week.

2. Layton previously filed two Petitions to Terminate Benefits, in 2003 and 2005, and both were denied by the Board.

3. On November 13, 2007, Layton filed another Petition to Terminate Benefits on the basis that Ms. Miller was physically able to return to work in a sedentary position. Ms. Miller maintained that she remained totally disabled.

4. The Board held a hearing on March 20, 2008. Layton presented the deposition testimony of Dr. Robert Keehn and live testimony from Robert Stackhouse, a vocational rehabilitation expert. Additionally, Layton presented a surveillance DVD of Ms. Miller's activities. In addition to her own testimony, Ms. Miller presented the deposition testimony of her treating physician, Dr. Clemente Oguwande.

5. Dr. Keehn is an orthopedic surgeon who has examined Ms. Miller on four occasions since 2002, and has reviewed her medical records. The March 2008 hearing was Dr. Keehn's third time testifying as to Ms. Miller's medical condition and physical capacity.

6. Dr. Keehn first examined Ms. Miller on August 17, 2002. As a result of that examination, Dr. Keehn testified that Ms. Miller was capable of returning to work on a full time, sedentary basis, but was not capable of returning to work with

Layton. His belief, at the time, was that this restriction was permanent. Dr. Keehn's examination of Ms. Miller on July 22, 2004 yielded similar opinions.

7. The Physical Capabilities Forms completed by Dr. Keehn in 2002 and 2004 had somewhat different restrictions. The 2004 form indicated that Ms. Miller could stand or walk six to eight hours per day. The 2002 form indicated that she could stand or walk three to five hours per day or, alternately, one to three hours per eight hour work day. Dr. Keehn resolved these differences by testifying that these restrictions are similar and that both fall into the sedentary work category.

8. Ms. Miller's next visit with Dr. Keehn was on March 22, 2007. During this visit, Dr. Keehn noted that Ms. Miller's subjective complaints were out of proportion with his objective findings. Specifically, he observed that Ms. Miller's complaints and use of a cane did not correlate with the results of her physical examination. In Dr. Keehn's opinion, with the exception of medications, Ms. Miller did not require any further medical treatment. Dr. Keehn's belief that Ms. Miller was capable of sedentary work did not change.

9. Dr. Keehn's most recent examination of Ms. Miller occurred on October 25, 2007. During this visit, Ms. Miller walked with a limp and described pain from her left hip down to her left leg and on the right side. Ms. Miller was wearing a lumbar support and a splint on her right wrist, and reported use of a

cane. On physical examination, Dr. Keehn observed that Ms. Miller had a limp, a ratcheted type of movement when she moved her neck, and a restricted range of motion of her neck, low back, and shoulders. Dr. Keehn believed that Ms. Miller may have exaggerated or magnified her symptoms.

10. As a result of his examination, Dr. Keehn testified that Ms. Miller is capable of performing full-time, sedentary work in a setting where Ms. Miller would not be required to lift over ten pounds, climb, bend, or stoop. Additionally, Dr. Keehn believed that Ms. Miller should be weaned off narcotic medication.

11. Dr. Oguwande is a board certified physician in family medicine who has treated Ms. Miller since 1997. Dr. Oguwande primarily manages Ms. Miller's pain medication, and makes referrals for diagnostic testing and visits with specialists when neeeded. Like Dr. Keehn, Dr. Oguwande has testified regarding Ms. Miller's condition in all three of the hearings on Layton's petitions to terminate benefits.

12. Since 2005, when Dr. Oguwande last testified, he has continued to treat Ms. Miller's lower back. Dr. Oguwande has also continued to refer Ms. Miller for diagnostic testing, including ordering an MRI and EMG study of her lower extremities in early 2006. Dr. Oguwande testified that during a July 2007 visit, Ms. Miller was very tender in the area alongside her spinal column and had

muscle spasms in her lower back. Most recently, in March 2008, Ms. Miller continued to complain of lower back pain, with muscle spasms and radiation to her lower extremities, paresthesia, and numbness. Dr. Oguwande prescribed Oxycontin, Soma, and a Duragesic patch for pain.

13. Dr. Oguwande, based on his examination of Ms. Miller and review of her medical records, believed that Ms. Miller was, and is, unable to perform any type of work. He does not believe that Ms. Miller is capable of performing any type of job at a consistent level because of her back pain and the drowsiness caused by her prescription narcotics.

14. Ms. Miller testified that she when she sits for long periods of time she experiences pain. To manage the pain, Ms. Miller uses a TENS unit, medications, and a heating pad. She testified that these medications make her drowsy and dizzy. Ms. Miller sees Dr. Oguwande approximately every two-to-four weeks for medication prescriptions, but is not examined during every visit. Ms. Miller testified that she goes to the Emergency Room for narcotics to treat pain flare ups when her doctor's office is closed, but has not been to the ER since March 2007. She testified that on the day of the hearing she had taken Soma, Neurontin, Phenegan, Oxycontin, and was wearing a Duragesic patch.

15. Layton presented a surveillance DVD which showed Ms. Miller performing a number of activites on August 27, 2007, and August 31, 2007. The footage shows Ms. Miller walking her dog, walking several blocks to a store, and then carrying items on her return trip. In the video, Ms. Miller walks without a visible limp or the use of a cane, and bends over easily.

16. Following Dr. Keehn's review of the DVD footage, he noted that she moved in a fluid manner, which was not the case when he examined her. Dr. Oguwande believed that the footage merely showed Ms. Miller walking, which he had encouraged her to do, but noted that in the footage she lacks an obvious limp and was probably not wearing a back brace. Ms. Miller testified that she was performing tasks she was encouraged to do by her physician, that the footage captured good days not representative of her overall condition, and that she was indeed walking with a limp off camera on the days she was recorded.

17. On July 10, 2008, the Board issued its opinion finding that Ms. Miller's total disability had ended, and terminating Ms. Miller's total disability benefits. Specifically, the Board found the testimony of Dr. Keehn to be more persuasive than that of Dr. Oguwande. Acknowledging that the Board had twice denied Layton's petition to terminate benefits, the Board noted several differences in the present case which warranted termination of Ms. Miller's benefits.

18. First, the Board found the surveillance DVD to be "compelling."[1] The Board focused on the contrast between Ms. Miller's condition, as shown on the DVD, and her condition just two months later at Dr. Keehn's office. The Board stated:

> In this DVD, [Ms. Miller], just two months prior to her appointment with Dr. Keehn, is seen walking with no limp, or at most a limp that only Dr. Oguwande can perceive, and pulling a bag filled with goods from a [store]. Despite this ease of movement on the DVD, when she saw Dr. Keehn she was wearing a back brace, she had a limp and described pain from her left hip down to the left leg, and on the right side. She had a splint on her right wrist and was wearing a lumbar support. She also reported use of a cane. None of this was seen on the surveillance DVD.[2]

Even more important to the Board was the fact that:

> [I]n the surveillance DVD, [Ms. Miller] is seen walking in a smooth and fluid manner for approximately eleven blocks from her home to Dr. Oguwande's office. Her fluidity of motion leads Dr. Keehn to believe that she is magnifying her symptoms and the Board agrees.[3]

19. The Board also relied on the fact that earlier petitions were filed just one and three years after Ms. Miller's last surgery. At the time of the hearing on her third petition, six years had elapsed since her 2002 surgery.[4]

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[1] *Miller v. Layton Home*, IAB Hearing No. 978500 at 12 (Decision on Petition to Terminate Benefits, July 10, 2008).

[2] *Id.*

[3] *Id.*

[4] *Id.*

20. The Board also found that the decrease in Ms. Miller's visits to an Emergency Room and her ability to testify coherently at the hearing while on her medication both constituted evidence of improvement in her condition and her ability to work.[5]

21. On appeal to this court, Ms. Miller alleges that the Board erred as a matter of law and fact in finding that her total disability had ended because this conclusion is not supported by substantial evidence.[6] In support of this contention, she alleges that the Board's use of the surveillance DVD and the reduced frequency of Ms. Miller's Emergency Room visits to support its finding that Dr. Keehn's testimony was more persuasive than Dr.Oguwande's was incorrect. Layton's position is that the Board's decision to terminate Ms. Miller's total disability benefits was correct, and supported by substantial evidence.

22. This Court has repeatedly emphasized the limited extent of its appellate review of administrative determinations. The Court's review is confined

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[5] *Id.*

[6] Ms. Miller also argues that the Board improperly addressed her request for reimbursement of medical expenses submitted at the hearing. In its decision, the Board stated that the medical expenses issue had been resolved by the parties, and that the bills had been, or were going to be, paid. *Id.* at n.2. Ms. Miller disagrees and alleges that the bills have not been paid. The Court will not consider this argument because Ms. Miller failed properly to submit her request for medical expenses. When a petition is pending before the Board, a party may make a request for medical expenses only if the party timely files a letter request with the Department of Labor and opposing counsel. 19-1000-1331 DEL. CODE. REGS. § 26.2.1. Submitting a request during the hearing does not satisfy the rule. Consequently, the issue was not properly before the Board.

to ensuring that the Board made no errors of law and determining whether "substantial evidence" supports the hearing officer's factual findings.[7] Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[8] It is "more than a scintilla but less than a preponderance of the evidence."[9] The "substantial evidence" standard of review contemplates a significant degree of deference to the Board's factual conclusions and its application of those conclusions to the appropriate legal standard.[10] "Absent an abuse of discretion, this Court must uphold the Board's decision."[11] In its review of the facts, the Court will consider the record in the light most favorable to the prevailing party below.[12] Questions of law that arise from the hearing officer's decision are subject to *de novo* review, pursuant to Superior Court Civil

[7] *Canyon Constr. v. Williams*, 2003 WL 1387137, at *1 (Del. Super. Ct. 2003); *Hall v. Rollins Leasing*, 1996 WL 659476, at *2-*3 (Del. Super. Ct. 1996).

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

[9] *Id.*

[10] *See Hall*, 1996 WL 659476, at *3 (*citing* DEL. CODE ANN. tit. 29, § 10142(d)).

[11] *Mullin v. W.L. Gore & Assocs.*, 2004 WL 1965879, at *1 (*citing Oceanport Indus. v. Wilmington Servs.*, 636 A.2d 892, 899 (Del. Super. Ct. 1972)).

[12] *General Motors Corp. v. Guy*, 1991 WL 190491, at *3 (Del. Super Ct. 1991).

Rule 3(c), which requires that the Court determine whether the Board erred in formulating or applying legal concepts.[13]

23. The factual record in this case consists of the surveillance DVD and hearing and deposition testimony of each party's witnesses. Testimonial evidence necessarily implicates an inquiry by the fact finder into the credibility of the witnesses testifying before him. The Board is in the best position to make and answer that inquiry. Credibility determinations made by the Board will not be disturbed on appeal unless the Court determines that the hearing officer abused his discretion.[14] In making this determination, the Court will not independently "weigh the evidence, determine questions of credibility, [or] make its own factual findings and conclusions."[15]

24. The Board did not abuse its discretion in reaching its conclusions in this case because the testimony and surveillance DVD presented at the hearing provided the Board with substantial evidence upon which to find Dr. Keehn's diagnosis of Ms. Miller's disability status credible. The Board's opinion details the reasons it accepted Dr. Keehn's assessment and rejected Dr. Oguwande's

[13] *See Anchor Motor Freight v. Ciabattoni*, 716 A.2d 154, 156 (Del. 1998).

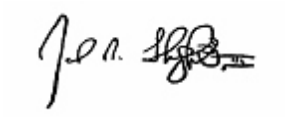
[14] *Simmons v. Delaware State Hosp.*, 660 A.2d 384, 388 (Del. 1995).

[15] *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965).

assessment. "[I]t is entirely proper and appropriate for the Board to accept the medical testimony of one expert witness over that of another."[16]

25. Based on the foregoing, the decision of the Board granting Employer's Petition to Terminate Benefits is **AFFIRMED.**

IT IS SO ORDERED.



Judge Joseph R. Slights, III

Original to Prothonotary

cc: Joseph J. Rhoades, Esquire
John J. Klusman, Jr., Esquire

[16] *Simmons*, 660 A.2d at 66.