SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

1 THE CIRCLE, SUITE 2
SUSSEX COUNTY COURTHOUSE
GEORGETOWN, DE 19947

Jane M. Keifer
312 Matthew Circle
Milford, DE 19963

Christopher T. Logullo, Esquire
Chrissinger & Baumberger
Three Mill Road, Suite 301
Wilmington, DE 19806

Re: ***Jane Kiefer v. Nanticoke Health Services, Inc.***
C.A. No. S08A-10-001-RFS

Upon Appellants' Appeal of the Industrial Accident Board. Affirmed.

Submitted: March 24, 2009
Decided: June 2, 2009

Dear Ms. Kiefer and Mr. Logullo:

This is an appeal from the September 11, 2008 decision of the Industrial Accident Board ("Board") granting Nanticoke Health Services, Inc.'s ("Employer") Petition for Review to Terminate Benefits. Jane Kiefer ("Claimant") now appeals the decision of the Board, seeking to reverse the grant of the petition and the reinstatement of her worker's compensation benefits. For the reasons set forth below, the Board's decision is upheld.

BACKGROUND

Claimant's left shoulder allegedly became injured on February 2, 2008 while attempting to lift a 300 pound patient in the course of her employment as a nurse for Employer. After being examined in the emergency room, Claimant was sent home for several days to allow the alleged injury to heal. Claimant returned to work after this period. Thereafter, her back was allegedly

injured on February 14, 2008 while trying to lift the same patient. Claimant received workers' compensation benefits.

Subsequently, Claimant was cleared to return to light duty, i.e., work that would not involve any heavy lifting. After being dismissed by Employer, Claimant obtained a job with Perdue on April 21, 2008. Her employment lasted until May 13, 2008. Perdue did not state a reason for its end.

Employer filed a Petition to Terminate benefits on May 6, 2008. Employer had Dr. Andrew Gelman conduct a medical examination of Claimant on July 23, 2008. Dr. Gelman is a medical board certified orthopedic surgeon. Dr. Gelman testified in a deposition that Claimant was no longer disabled and could work without restrictions. In reaching his opinion, Dr. Gelman considered Claimant's records from her doctor, Dr. Schwartz. However, Dr. Schwartz's deposition was not taken.

The Board held a hearing on September 8, 2008 and ruled in favor of Employer. The Board found that Claimant was no longer totally disabled and was not a displaced worker. In major part, it relied upon pertinent portions of Dr. Gelman's deposition that were read into the record. Claimant has appealed that decision to this Court.

STANDARD OF REVIEW

The review of a decision of the Industrial Accident Board is limited to an examination of the record for errors of law, and a determination of whether substantial evidence exists to support the Board's findings of fact and conclusions of law. *Histed v. E. I. Du Pont de Nemours & Co.*, 621 A.2d 340, 342 (Del. 1993); *Willis v. Plastic Materials*, 2003 WL 164292 (Del. Super. 2003) at *1. Substantial evidence equates to "such relevant evidence as a reasonable mind might accept

as adequate to support a conclusion." *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981). It is more than a scintilla but less than a preponderance of the evidence. *Breeding v. Contractors-One-Inc.*, 549 A.2d 1102, 1104 (Del. 1988). On review, this Court does judge witness' credibility nor does it weigh the evidence; those functions are reserved exclusively for the Board. *Id.* at 1106.

Questions of law are reviewed de novo. *McDonalds v. Fountain*, 2007 WL 1806163 (Del. Super. 2007) at *1. Absent error of law, the standard of review for a Board's decision is abuse of discretion. *Opportunity Center, Inc. v. Jamison*, 2007 WL 3262211 (Del. Supr. 2007) at *2. The Board has abused its discretion only when its decision has "exceeded the bounds of reason in view of the circumstances." *Willis* at *1.

DISCUSSION

Claimant has not cited any errors of law in her hearing before the Board. Claimant has argued that the Board made a mistake in relying solely on Dr. Gelman's testimony without taking testimony from Dr. Schwartz. While Delaware worker's compensation law allows her to choose a doctor for care of job related injuries, the Board is not required to hear testimony from the treating physician. 19 *Del. C.* § 2348(i). Section 19 of the Delaware Code states:

> (i) At such hearing, it shall be incumbent upon all parties to present all available evidence and the Board shall give full consideration to all evidence presented. In addition, the Board may examine all witnesses. **If either party or the Board seeks to utilize the medical testimony of an expert, it may do so; provided, that prompt and adequate notice to the opposing party or parties is given.** Medical testimony of an expert may be presented by: deposition; by live testimony at the hearing; by telephonic testimony at the hearing; or by videotape.

Id. (emphasis added). Unlike Employer's decision to present evidence through Dr. Gelman, Claimant did not offer any medical testimony.

Section 19 also states "In case of every appeal to the Superior Court the cause shall be determined by the Court from the record". 19 *Del. C.* § 2350(b). This Court may not consider anything beyond the Board's hearing record. Claimant's arguments primarily deal with issues beyond the record. Claimant has asked for the full value of a nurse's contract which she lost. She attributes this problem to an alleged slanderous reference from Employer. She also demands Employer to provide her with a usable reference to help obtain employment. Points like these are out of bounds; they have no bearing on this appeal; they cannot be heard in this appellate proceeding.

Claimant also argues that her injury was misstated by Liberty Mutual and that she has not signed her receipts as a result. She also claims that the Delaware Department of Labor has not provided her with certain services. Again, these issues were not a part of the Board's hearing and are not relevant to this appeal.

Claimant has asked for several corrective measures to be taken against Employer. Once again, Claimant fails to appreciate the nature of this appeal. It is not a lawsuit against Employer. This Court is merely hearing an appeal from the Board about whether or not Claimant should receive workers' compensation benefits. The appellate issues are narrowly focused to whether substantial evidence supports the result and if it is free of legal error. Any other matters are extraneous.

Upon review, there was substantial evidence to support the administrative decision. The Board's responsibility is to weigh the evidence and the credibility of any witnesses, *Breeding* at 1106. Claimant disputes the accuracy of Dr. Gelman's testimony; however, his expert testimony was essentially unchallenged. Dr. Gelman stated:

> I don't believe Miss Virella needs active treatment. I believe she's reasonably healthy and can continue with general exercises on her own to maintain good flexibility of her dorsal scapular area … I believe that she can work full time. I believe that short of common sense, Miss Virella probably does not need specific restrictions.

Dep. of Dr. Andrew Gelman, pp. 14-15. Dr. Gelman's testimony provided a sufficient basis for the Board to decide that Claimant was no longer disabled.

The Board also did not abuse its discretion in deciding that Claimant was not a displaced worker. Claimant has argued that she should receive benefits because she has been unable to find and maintain employment despite her efforts. The Board concluded that her unemployment was not the result of a disability. She did not present any evidence that she was denied employment due to a disability. Her alleged disability was not even the subject of discussion in her job hunt. Based on Claimant's and Dr. Gelman's testimony, the Board's conclusion is reasonable. There was substantial evidence to support the Board's decision to terminate her benefits, and the Board did not abuse its discretion in deciding that Claimant was no longer disabled and was not a displaced worker.

CONCLUSION

Considering the foregoing, the decision of the Industrial Accident Board is affirmed. In the reply, Claimant attempted to put forward matters that were not presented to the Board, and they cannot be given consideration at this stage of the case.

IT IS SO ORDERED.

Very truly yours,

Richard F. Stokes

RFS/cv

cc: Prothonotary