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

COURTNEY WILLIAMS,	)	
	)	
Claimant Below-Appellant	)	
	)	
v.	)	C.A. No. 08A-05-004 WCC
	)	
STATE OF DELAWARE,	)	
	)	
Employer Below-Appellee.	)	

Submitted: February 9, 2009
Decided: May 28, 2009

OPINION

Appeal from Industrial Accident Board. AFFIRMED.

Courtney Williams, 1304 Wilson Street, Wilmington, DE 19801. *Pro Se* Appellant.

Francis X. Nardo, Esquire, 750 Shipyard Drive, Suite #400, P.O. Box 2092, Wilmington, DE 19899-2092. Attorney for Appellee.

CARPENTER, J.

Introduction

Before this Court is Courtney Williams's (the "Appellant") appeal of the Industrial Accident Board's ("IAB" or the "Board") decision, which granted the State's Petition to Terminate Benefits.[1] Upon review of the record in this matter, the Court finds substantial evidence to support the Board's decision and therefore, the Board's decision is AFFIRMED.

Facts

The Appellant is a former employee of the State of Delaware (the "Employer"). He was involved in a work-related accident on December 6, 2005, when a fork lift struck his back. The Appellant sought emergency medical treatment immediately after the accident, although no fractures were found in his back. The following day, the Appellant went to see a chiropractor, Dr. Joseph Sebastiani, and one month after that, he began seeing Dr. Conrad King for treatment.

An MRI of the Appellant's back taken in January 2006 showed a normal spine with only some bulging of one of the discs which was not related to the Appellant's accident. There were no lumbar spine herniated discs and no nerve root compression.

[1]The parties stipulated that the decision of the Hearing Officer would represent the decision of the Board pursuant to 19 *Del. C.* § 2301B(a)(4). To avoid confusion, the Court will reference this decision as that of the Board's.

In May 2006, a physical examination of the Appellant revealed that he had full range of motion of the cervical spine and no upper extremity complaints. His lumbar spine was not tender and he had no spasm, although he did complain of some tenderness around L5-S1. When raising his leg in a straightened position, the Appellant had some lower back pain. He also experienced back pain when flexed to sixty degrees and extended to twenty degrees, although there were no spasms in his lower back, nor were there any objective signs of injury. As of March 28, 2007, the Appellant had full range of motion of the lumbar spine with only some discomfort at the extremes of flexion. By June 2007, the Appellant still complained of back pain, particularly when bending forward. He occasionally took Percocet to control the pain, but had not returned to work and had not done any physical therapy or had any chiropractic treatment since January of 2006. In January of 2008, the Appellant was still not working and continued to experience lower back pain when twisting or turning.

Dr. Donald Saltzman testified on behalf of the Employer that the work accident caused a lumbar sprain which was superimposed on an existing strain. Dr. Saltzman believed that the Appellant had reached maximum medical improvement as of June 14, 2007, and that as of that date the Appellant was able to work in a light-duty full-time position with limited lifting (nothing over 20

pounds). He did find the Appellant to require ongoing medical treatment and suggested he use a non-narcotic drug for his pain, instead of Percocet.

Dr. Conrad King testified on behalf of the Appellant and opined that the Appellant is totally disabled from the work accident. As a result, Dr. King believes that the Appellant is unable to work in any capacity, although he indicated that he hopes the Appellant will be able to return to work eventually. Dr. King agreed that the January 2006 MRI did not show any disc herniations or any nerve root compression. The MRI did reveal some disc bulging at L4-L5 and a small annular tear at T4-T5, but Dr. King considered the bulging to be minimal and did not find the tear to be medically significant.

The Board also heard the testimony of Michael Haley, a vocational rehabilitation specialist, who prepared a Labor Market Survey ("LMS") to determine the kinds of jobs the Appellant would be qualified for and would be capable of holding. Mr. Haley accepted Dr. Saltzman's opinion that the Appellant is capable of full-time, light-duty work, and found eight positions in New Castle County that were within those restrictions.

The Board heard the Employer's Petition to Terminate Benefits and held an evidentiary hearing to determine whether the Appellant is totally disabled from the work accident or, alternatively, qualifies as a displaced worker. The Board

concluded that the Appellant is not totally disabled and is able to return to light-duty work in accordance with Dr. Saltzman's opinion. Thus, the Board granted the Employer's petition. The Appellant now appeals the Board's decision, arguing that he was not sufficiently compensated for his work-related back injury. He also maintains that he still has significant back pain and cannot work.

Standard of Review

This Court's role in reviewing an appeal from an administrative agency is limited.[2] The Court will only evaluate the record, in the light most favorable to the prevailing party below, to determine if substantial evidence existed to reasonably support the Board's conclusion and to ensure that it is free from legal error.[3] "Substantial evidence" is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[4] Thus, the Court does not address issues of credibility, nor does it independently weigh the evidence presented to the Board.[5] If the record supports the Board's findings, the Court must accept those

[2] *Zicarelli v. Boscov's Dep't Store, LLC*, 2008 WL 3486207, at *2 (Del. Super. June 5, 2008).

[3] *Id.*

[4] *Del. Alcoholic Beverage Control Comm'n v. Newsome*, 690 A.2d 906, 910 (Del. 1996) (citing *Oceanport Ind., Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 899 (Del. 1994)).

[5] *Michael A. Sinclair, Inc. v. Riley*, 2004 WL 1731140, at *2 (Del. Super. July 30, 2004) (citing *Unemployment Ins. App. Bd. v. Div. of Unemployment Ins.*, 803 A.2d 937 (Del. 2002)).

findings even if the Court might have reached a different conclusion based on the facts presented.[6]

Discussion

The question before the Court is whether the Board had substantial evidence to find: (1) that the Appellant was not totally incapacitated and (2) that the Appellant did not qualify as a displaced worker. In order to prevail on a petition to terminate benefits, the employer must demonstrate that the claimant is no longer totally incapacitated due to the work-related injury.[7] If the employer is able to make such a showing, the burden shifts to the claimant to demonstrate that he or she is a displaced worker.[8] This requires the claimant to show that, after a reasonable job search, the claimant was unable to find work due to his or her injuries.[9] If the claimant successfully proves this, the burden returns to the employer to show that jobs exist within the claimant's physical limitations.[10]

a. Total Incapacitation

[6] *Anderson v. Comfort Suites*, 2004 WL 304359, at * 2 (Del. Super. Feb. 12, 2004) (explaining that "[a]bsent an abuse of discretion, this Court must uphold the Board's decision.") (citing *Oceanport Ind., Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 899 (Del. 1994)).

[7] *Meloni v. Westminster Village*, 2006 WL 2382832, at *3 (Del. Super. Aug. 17, 2006) (citing *Governor Bacon Health Ctr. v. Noll*, 315 A.2d 601, 603 (Del. Super. 1973)).

[8] *Stratton v. Bayhealth Medical Ctr.*, 2005 WL 2841608, at *2 (citing *Howell v. Supermarkets General Corp.*, 340 A.2d 833, 835 (Del. 1975)).

[9] *Id.*

[10] *Id.*

The Appellant claims that he remains totally disabled from the work accident and is unable to work. In determining whether he is unable to work, the Board heard conflicting medical testimony regarding the Appellant's condition. It is well-settled in Delaware that it is within the purview of the Board's capabilities to accept the testimony of one expert over the testimony of an expert offering a competing viewpoint, provided both experts' opinions are supported by substantial evidence.[11]

The Board considered the testimony of the Appellant's physician, Dr. King,[12] and the physician testifying on behalf of the Employer, Dr. Saltzman. Dr. King did not believe the Appellant was capable of returning to work, although it is difficult to ascertain the basis of this opinion as it appears to a large degree that the doctor's opinion is simply based upon the subjective complaints of the Appellant. While the radiology reports do indicate "a tiny annular tear" at T4-T5 and a "small central to left disc herniation" at T7-T8, there is no evidence of ongoing injury sufficient to permanently disable the Appellant, now over three years since the

[11]*Glanden v. Land Prep, Inc.*, 918 A.2d 1098, 1103 (Del. 2007) (citing *Reese v. Home Budget Ctr.*, 619 A.2d 907, 910 (Del. 1992)); *see also DiSabatino Bros., Inc. v. Wortman*, 453 A.2d 102, 106 (Del. 1982) (citing *General Motors v. Veasey*, 371 A.2d 1074, 1076 (Del. 1977)).

[12]The Court notes that there appears to be no prior treatment relationship between the Appellant and Dr. King, or any apparent medical referral to Dr. King. Thus, one has to wonder why Dr. King appears to be a physician who regularly testifies on behalf of plaintiffs without any connection to the parties. While the Court has its suspicions about Dr. King's mysterious appearances in such cases, it will simply suggest that this may affect his credibility before the Board.

accident, other than his own reports of pain. The Board ultimately accepted the testimony of Dr. Saltzman based on the fact that both experts agreed that the Appellant's lumbar MRI showed no abnormalities, nor does he have radiculopathy or any nerve root involvement.

The Court finds that the Board did not exceed its authority or discretion in accepting Dr. Saltzman's testimony over that of Dr. King and there is substantial evidence to find that the Appellant is no longer totally disabled.

b. **Displaced Worker**

The Appellant does not specifically argue in the briefing that he is a displaced worker. However, in his testimony before the Board, he indicated that he did not find any of the positions provided in the LMS to be suitable, and described them as "chicken feed" due to the fact that those positions pay less than his previous position. While there is a significant question whether the Appellant has met his burden of establishing a reasonable unsuccessful job search, the Board did hear and accept Mr. Haley's LMS as being a valid reflection of the Appellant's job and salary prospects. Regardless of the Appellant's subjective complaints regarding these opportunities, the Employer met its burden of demonstrating the existence of jobs within the Appellant's physical limitations.

The Court again finds that the Board did not abuse its discretion or commit legal error. Thus the Court finds that there was substantial evidence to support the Board's finding that the Appellant is not a displaced worker.

Conclusion

Considering all of these factors, the Court finds that there is sufficient support in the record for the Board's decision that the Appellant is not totally disabled and is not a displaced worker. For the foregoing reasons, the decision of the Board is AFFIRMED.

IT IS SO ORDERED

Judge William C. Carpenter, Jr.