IN THE SUPERIOR COURT OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

JOSEPH MEDFORD, Claimant Below-Appellant,	)	
	)	
v.	)	C.A. 01A-12-001-PLA
	)	
STATE OF DELAWARE, Employer Below-Appellee.	)	
	)	

Submitted: June 21, 2002
Decided: September 10, 2002

UPON APPEAL FROM A DECISION OF
THE INDUSTRIAL ACCIDENT BOARD
AFFIRMED.

ORDER

Gregory A. Morris, Esquire, Liguori, Morris & Redding, Attorney for Claimant Below-Appellant.

David C. Culley, Esquire, Tybout, Redfearn & Pell, Attorney for Employer Below-Appellee.

ABLEMAN, JUDGE

Joseph Medford ("Appellant") has appealed from the November 14, 2001, decision of the Industrial Accident Board of the State of Delaware ("IAB" or "Board") resulting in the denial of Appellant's Petition for disability from February 11, 2001 through May 31, 2001, attorney's fees and medical witness fees. This is the Court's decision on appeal.

FACTS

The Appellant is a sergeant with the Department of Corrections at Gander Hill Prison in Wilmington. He has been employed by the State for the last seventeen (17) years, and has served for the past thirteen (13) years as a sergeant. In May of 2000, Appellant commenced working with a female officer named Laurie McMurray. According to Appellant, on at least three separate occasions, Officer McMurray either placed Appellant in a headlock or sat in Appellant's lap. On these occasions, Appellant was forced to wrestle with Officer McMurray to extricate himself from her grip. On one such occasion, both Appellant and Officer McMurray ended up on the floor.

Despite this conduct, Appellant did not prepare any written reports of these occurrences and never notified any of his superiors of Officer McMurray's inappropriate behavior. Instead, Appellant counseled Officer McMurray on the inappropriateness of this behavior. Since there were no reoccurrences of this

conduct, Appellant believed his counseling had rectified the situation and he thus saw no further need for disciplinary action or documentation.

On September 26, 2000, Appellant was interviewed by Jonathan Sines of the Internal Affairs Unit of the Department of Corrections, concerning allegations made by Officer McMurray that Appellant had touched her in a sexual manner by inserting his fingers into her vagina. A follow up investigation by the Internal Affairs Unit found the charges to be unsubstantiated but Appellant was disciplined for wrestling with a female subordinate officer on more than one occasion.

On December 13, 2000, Warden Raphael Williams issued a Disciplinary Charge Letter to Appellant. The Letter charged Appellant with conduct unbecoming an officer as Appellant had, on more than one occasion, wrestled with a subordinate female officer, taken no action to stop such conduct, and had neglected to report the incidents to a superior officer. After Appellant participated in a pre-decision meeting with Deputy Warden George Hawthorne to discuss the charges, Deputy Warden Hawthorne issued a letter to Appellant on January 8, 2001, informing him that he had been given a fifteen (15) day suspension from duty without pay.

During this period, Appellant began to encounter problems with Captain Janice Morris, his shift commander with whom he had previously enjoyed a fifteen (15) year friendship. Appellant alleged that it was Captain Morris who was the

initial source of the sexual misconduct allegations against him. According to Appellant, Captain Morris had provoked Officer McMurray to make the various allegations against him. As his relationship with Captain Morris began to deteriorate, Appellant claimed that Captain Morris began a period of unprovoked harassment. Appellant's superior officers substantiated this unwarranted behavior by Captain Morris towards Appellant. Lt. Taylor, Appellant's supervisor, testified that Captain Morris pressured Officer McMurray to make the various allegations. In addition, Captain Morris instigated attempts to have a prior evaluation of Appellant, performed by Lt. Pope, modified from a exemplary evaluation to a negative evaluation.

On February 12, 2001, Appellant saw his family physician, Dr. David Krasner, complaining of constant headaches, poor appetite, loss of sleep, and lack of a sex drive resulting from the Internal Affairs Investigation disciplinary actions and harassment from Captain Morris. Prior to this office visit, Appellant had visited or telephoned Dr. Krasner, or his office staff, on October 17 and 31, 2000, December 7, 12, 18, and 19, 2000, January 2, 3, 9, 16 and 30, 2001, and February 2 and 9, 2001. On none of these dates did Appellant mention or complain of any stress or work related problems. Dr. Krasner, who is board certified in family practice and is not a psychiatrist or psychologist, testified by deposition that it was not until the February 12th visit, that he acquiesced to Appellant's request to be

excused from work until March 13, 2001. Dr. Krasner told Appellant that he "should not be in the workplace for awhile." [1] Dr. Krasner diagnosed acute stress reaction, prescribed a medication known as Effexor, and referred Appellant for counseling. Appellant refused the medication and did not pursue Dr. Krasner's suggestion to seek counseling.

On March 13, 2001, Appellant returned to Dr. Krasner. Appellant had not entered into counseling. Appellant testified during the hearing before the Board that the reason he had not commenced counseling was his inability to find a counselor.[2] Dr. Krasner stated in his deposition that Appellant told him that he had not sought counseling because "it was not covered under his insurance."[3] Appellant told Dr. Krasner that he wished to remain out of work and requested that Dr. Krasner extend his leave from work. Dr. Krasner extended Appellant's leave and started Appellant on a mild dosage of Effexor.

On April 19, 2001, Appellant again visited Dr. Krasner. At that time, Appellant told Dr. Krasner that he was not feeling any better and requested that Dr. Krasner keep him out of work until May 31, 2001. Dr. Krasner increased Appellant's dosage of Effexor and complied with Appellant's request, extending his disability period to May 31, 2001.[4]

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[1] Board Decision, dated November 14, 2001, at 4 (hereinafter "Bd. Dec. at ___.").
[2] Board Hearing Transcript, dated October 31, 2001, at 40 (hereinafter "Bd. Hr'g Tr. at ___.").
[3] Deposition of Dr. David Krasner, dated August 23, 2001, at 9 (hereinafter "Dep. Dr. Krasner at ___.").
[4] Dep. Dr. Krasner at 9.

About two weeks later, on May 3, 2001, Appellant visited Dr. Krasner again, complaining that he still was not feeling any better. Dr. Krasner increased Appellant's dosage of Effexor and learned that Appellant had still not sought counseling. Dr. Kranser "strongly" advised Appellant to seek counseling.[5]

On May 17, 2001, during an office visit with Dr. Krasner, Appellant advised Dr. Krasner that he was receiving counseling from Dr. York. Dr. Krasner increased Appellant's dosage of Effexor and recommended that Appellant continue his counseling with Dr. York and to return to work per the advice of Dr. York.[6]

Appellant saw Dr. Krasner one last time on June 19, 2001, at which point Dr. Krasner reduced the dosage of Effexor due to the sedative effects of the higher dosage. Dr. Krasner recommended that Appellant continue counseling with Dr. York and return for a follow up visit in July. Appellant returned to work in his former position on May 31, 2001 and did not return for any subsequent visits with Dr. Krasner.

Dr. David York, a licensed clinical psychologist, saw Appellant for the first time on May 15, 2001. Appellant reported to Dr. York that he had been accused of sexually harassing a subordinate, that the subordinate was accusing him unjustly, and that his immediate supervisor was treating him in an unusually punitive way.[7] Dr. York believed that Appellant's symptoms mirrored those of a person suffering

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[5] *Id*. at 12.
[6] *Id.* at 14.

from depression. In addition to weight gain, Appellant complained of decreases in appetite, sleep, energy, interest in sex and anhedonia. Dr. York diagnosed an adjustment disorder coupled with depressive and anxiety features and recommended that Appellant see him on a weekly basis.

Appellant saw Dr. York on May 23, 2001 for his first weekly session but did not show up for his June 13, 2001 appointment. Appellant's only other visit with Dr. York was on June 29, 2001. Dr. York stated in his deposition that he felt Appellant's depression may have been altered or affected by his pending litigation. Dr. York was not able conclusively to connect Appellant's depression to what had transpired at his work place. Doctor York stated only that Appellant's "beliefs" about what had occurred at his job contributed to his depression,[8] but that he could not state with certainty that what actually occurred at Appellant's job had contributed to his depression.[9]

Dr. Neil Kaye testified by deposition for the State. Dr. Kaye is a medical doctor who specializes in psychiatry. Dr. Kaye performed a medical examination of the Appellant on behalf of the Employer. In addition, Dr. Kaye reviewed Appellant's employment records, the Internal Affairs file of the reported misconduct, and various medical records, including those prepared by Drs. Krasner and York. Dr. Kaye noted Appellant's history of hypertension, bulging discs,

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[7] Deposition of Dr. David York, dated August 22, 2001, at 6-7 (hereinafter "Dep. Dr. York at ___.").
[8] Dep. Dr. York at 23.

migraine headaches and cluster headaches, back pain and colonic polyp removal. Appellant told Dr. Kaye that the fictitious accusations of sexual misconduct with another employee at his work place had created the stress. Appellant told Dr. Kaye that he was unable to work for the time period between February 11, 2001 through May 31, 2001, because "he was a nervous wreck and crying all the time."[10] Further, Appellant reported to Dr. Kaye that this was the only stressor in his life at the present time. Appellant neglected to mention other past and present contributing factors outside of the work place environment that may have been linked to his condition. Because of Appellant's less than "forthcoming" responses, Dr. Kaye characterized the Appellant as "disingenuous."[11] After consideration of all the above, Dr. Kaye determined that there was no evidence that the Appellant was totally disabled as a consequence of the stress of his job.

In addition, the Employer also called Captain Janice Morris and Major Perry Phelps as witnesses at the hearing. Captain Morris was not Appellant's immediate supervisor but did act in a supervisory role over the Appellant during the relevant period in question. Captain Morris denied harassing the Appellant although she did admit to reprimanding the Appellant for an incident unrelated to the purported sexual misconduct allegations. Major Phelps is third in command at Gander Hill Prison. He testified that Appellant's disciplinary sanction resulting in a fifteen (15)

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[9] *Id.*
[10] Bd. Dec. at 8.

day suspension without pay was not the result of accusations of sexual harassment, but due to Appellant's failure to take the proper course of action in addressing the inappropriate behavior and his seeming acquiescence and participation in the behavior.

On April 11, 2001, the Appellant filed with the Board a "Petition to Determine Compensation Due to Injured Employee" for disability from February 11, 2001 through May 31, 2001, attorney's fees and medical witness fees. Appellant alleged that he had suffered mental injury in connection with his work as an employee of the State Department of Corrections. A hearing before the Board was held on October 31, 2001.

On November 14, 2001, the Board issued its decision denying the Appellant's Petition. On December 5, 2001, the Appellant filed a timely notice of appeal of the Board's decision to this Court, arguing that: 1) the Board erred as a matter of law by failing to properly follow the holdings in the case of State of Delaware v. Cephas, Del. Supr., 637 A.2d 20 (1994); 2) the Board's decision was not supported by and was against the weight of the evidence adduced at the hearing; and 3) the decision of the Board is not supported by substantial, competent evidence.

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[11] *Id.*

DISCUSSION

The Supreme Court and this Court repeatedly have emphasized the limited appellate review of factual findings of an administrative agency. The function of the reviewing Court is limited to determining whether substantial evidence supports the Board's decision and is free from legal error.[12] Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[13] The reviewing Court does not weigh the evidence, determine questions of credibility, or make its own factual findings.[14]

Simply put, the Court does not sit as trier of fact, nor should the Court replace its judgment for that of the Board.[15] It is the exclusive function of the IAB to evaluate the credibility of witnesses before it.[16] Moreover, due deference shall be given to the experience and specialized competence of the Board.[17] The Court determines if the evidence is legally adequate to support the agency's factual

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[12] DEL. C. ANN. tit. 29 § 10142(d) (1997); *Soltz Management Co. v. Consumer Affairs Bd.*, 616 A.2d 1205, 1208 (Del. 1992); *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66-67 (Del. 1995); *General Motors v. Freeman*, 164 A.2d 686, 688 (Del. 1960).

[13] *Oceanport Ind. v. Wilmington Stevedores*, 636 A.2d 892, 899 (Del. 1994); *Battista v. Chrysler Corp.*, 517 A.2d 295, 297 (Del. Super. 1986), *app. dism.*, 515 A.2d 397 (Del. 1986).

[14] *Johnson*, 213 A.2d at 66.

[15] *Id.*

[16] See, e.g., *Vasquez v. Abex Corp.*, 1992 Del. LEXIS 431, Horsey, J. (Nov. 2, 1992)(ORDER).

[17] DEL. C. ANN. tit. 29 § 101429(d) (1997); *Histed v. E.I. duPont de Nemours & Co.*, 621 A.2d 340, 342 (Del. 1993).

findings.[18] Application of this standard "requires the reviewing court to search the entire record to determine whether, on the basis of all the testimony and exhibits before the agency, it could fairly and reasonably reach the conclusion that it did."[19] In this process, "the Court will consider the record in the light most favorable to the prevailing party below."[20] Only where there is no satisfactory proof in support of the factual findings of the Board may the Superior Court or the Supreme Court overturn it.[21]

The Appellant contends that the Board erred as a matter of law by failing to follow the holdings in the case of State of Delaware v. Cephas, Del. Supr., 637 A.2d 20 (1994), that the Board's decision was not supported by and was against the weight of the evidence, and that the Board's decision was not supported by substantial, competent evidence. The Appellee responds that the Board did not err as a matter of fact or law and that the Board's decision was supported by substantial competent evidence.

Applying the foregoing standard, the Court finds the deposition testimony of Dr. Neil Kaye, based upon his examination of the Appellant and his review of Appellant's medical records, employee records and documents related to the Internal Affairs investigation and deliberations, as constituting substantial,

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[18] *Id.*

[19] *National Cash Register v. Riner*, 424 A.2d 669, 674-75 (Del. Super. 1980).

[20] *General Motors Corp. v. Guy*, 1991 Del. Super. LEXIS 347, Gebelein, J. (Aug. 16, 1991).

competent evidence to support the Board's findings. It is within the purview of the Board, and not this Court, to weigh the credibility of the witnesses, and to accept or reject the Appellant's subjective complaints.[22] In the instant case, the Board rejected the Appellant's subjective complaints. In justifying its findings the Board stated:

As to Dr. Krasner

> The Board found that Dr. Krasner had diagnosed Appellant with acute stress reaction and agreed to Appellant's request to be let out of work until March 13, 2001. Moreover, the Board found that "Claimant refused medication and did nothing to follow Dr. Krasner's order that he enter into counseling. Claimant finally decided that he should 'try' medication on March 13, 2001 and finally saw a psychologist on May 15, 2001."[23] Appellant's excuse for delay in seeking appropriate counseling was that he couldn't find a counselor while Dr. Krasner said Claimant told him it was not covered by his insurance. This Court supports the Board's determination that neither explanation is convincing. The Board concurred with Dr. Kaye, who said "[A]voidance of medication and therapy is inconsistent with someone who is so stressed he cannot work."[24] Further, the Board noted Dr. Kaye's comment that, "'Basically, if you are feeling that badly, you're willing to go out of your way to get yourself help and treatment and make some sacrifices in order to get better.'"[25]

[21] *Johnson*, 213 A.2d at 64.
[22] See, e.g., *Vasquez v. Abex Corp.*, 1992 Del. LEXIS 431.
[23] Bd. Dec. at 11.
[24] *Id.* at 12.
[25] *Id*.

As to Dr. York

The Board was not convinced that Appellant made a good faith effort to seek treatment and counseling after Dr. York diagnosed him with an adjustment disorder with both depressive and anxiety features. Dr. York had recommended weekly visitations and for Appellant to consult with a psychiatrist. Appellant attended only two sessions with Dr. York on May 23, 2001 and June 29, 2001. The Board took note of Appellant's pursuit of a "spotty" course of treatment.[26] Additionally, the Board pointed out that Appellant had testified that he terminated any future visits with Dr. York because the appointment times were 'too inconvenient.'[27] In contradiction to this and other testimony from Appellant that his insurance did not cover such visits, Dr. Kaye testified that Appellant's insurance authorized more treatment and visits with Dr. York.

As to Dr. Kaye

The Board cited that Appellant's responses to Dr. Kaye's questions regarding additional or other external stressors, which may have contributed to Appellant's mental stress, were less than forthcoming. Specifically, Appellant told Dr. Kaye that for the period of February 11, 2001 through May 31, 2001, he was unable to work because "he was a nervous wreck and crying all the time."[28] Appellant confided in Dr. Kaye that the only contributing factor to his stress during this period was the stress related to the felonious accusations of sexual misconduct with another coworker. Yet, the Board emphasized that the Appellant failed to mention that he recently had undergone a divorce and subsequent remarriage for the third time. Further, the Appellant failed to reveal that he had a thirteen (13) year history of suffering with lower back pain. Appellant had sought relief from the pain by taking Tylenol with Codeine, but later switched to Percocet that he borrowed from some one else. Appellant denied that this lower back pain caused him any stress. Appellant also underwent a colonoscopy on February 9, 2001, after which blood was found in his stools in addition to several polyps and tumors. Yet, again, Appellant denied that this condition caused him any stress. Appellant's failure to either reveal or deny these additional factors as contributing to his stress lead the Board to conclude that

[26] *Id.*
[27] *Id.*
[28] *Id.*

> "[C]laimant's responses to these questions about contemporaneous sources of stress [were] *less then candid*."[29]

In addition, the Board found:

> Despite the fact that Appellant was questioned as to prior potential related stressors, Appellant failed to disclose a serious 1989 automobile accident, a 1992 assault suffered at the prison, a 1994 assault at his home by twenty (20) men, and a 1996 assault in which he was attacked, bound and locked in the trunk of a car. This Court concurs with the Board in its conclusion that, "[T]he Board is convinced any or all of these events could be called stressors and agree with Dr. Kaye that the withholding of this information was '*disingenuous*.'"[30] Finally, the Board stressed that both of Appellant's expert medical witnesses could not even "unequivocally" state that Appellant was unable to work during this period. The Board found the expert doctors' responses to be ambiguous and limited in scope in proving any classification of a disability. A final element in the Board's denial of disability compensation rested on the Board's determination that Appellant's lack of credibility and failure to divulge potential alternative stressors served to discredit his physicians' testimony even further since their [Appellant's expert physicians'] diagnoses and opinions were inherently grounded upon the truthfulness and reliability of Appellant's subjective complaints of stress.

The Board, in reaching its conclusion, chose not to rely upon either the Appellant's subjective complaints or his expert treating physicians' testimony. Instead, the Board found the Appellee's expert, Dr. Kaye, to be more credible. The Board is "free to choose between the conflicting diagnoses of examination

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[29] *Id.* at 13 (emphasis added).
[30] *Id.* (emphasis added).

physicians and either diagnosis constituted substantial evidence on appeal."[31] As previously noted, substantial evidence is evidence that a reasonable mind might accept as suitable to support a conclusion.[32] It must be more than a scintilla but less than a preponderance.[33]

The Board performed its exclusive function and reconciled the inconsistent testimony and determined the credibility of witnesses.[34] Absent an abuse of discretion, the Board's decision may not be disturbed by a reviewing court.[35] Since the record does not reflect that the Board abused its discretion when assessing the credibility of witnesses, this court will not disturb its findings.

Accordingly, this Court must conclude that the decision of the Industrial Accident Board denying Appellant's disability compensation is based upon substantial evidence and free of legal error.

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[31] *Branch v. Kraft General Foods*, 1994 Del. Super. LEXIS 426, Goldstein, J. (Mar. 24, 1994); see also *Reese v. Home Budget Center*, 619 A.2d 907, 910 (Del. 1992); and *DiSabatino Bros., Inc. v. Wortman*, 453 A.2d 102, 106 (Del. 1982).

[32] *Streett v. State*, 669 A.2d 9, 11 (Del. 1995); *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981).

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

[34] *Simmons v. Delaware State Hospital*, 660 A.2d 384, 388 (Del. 1995); *Breeding*, 549 A.2d at 1106.

[35] *Id.*

CONCLUSION

For the foregoing reasons, the decision of the Industrial Accident Board is hereby **AFFIRMED**.

IT IS SO ORDERED.

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Peggy L. Ableman, Judge

cc: Gregory A. Morris, Esquire
David G. Culley, Esquire
Industrial Accident Board
Prothonotary