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

KEITH FAULKNER, Appellant,	)	
v.	)	C.A. No. 08A-10-004 JRJ
M. DAVIS & SONS, INC., Appellee.	)	

Submitted: February 9, 2009
Decided: July 22, 2009

Upon Appeal from the Industrial Accident Board: **AFFIRMED.**

OPINION

Gary S. Nitsche, Esquire and Michael B. Galbraith, Esquire, 1300 N. Grant Avenue, Suite 101, P.O. Box 2324, Wilmington, Delaware, 19899, Attorneys for Appellant.

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Jurden, J.

I. INTRODUCTION

Appellant Keith Faulkner ("Faulkner") files this partial appeal from the Industrial Accident Board's (the "Board") decision to terminate his total disability benefits. For the reasons set forth below, the Court finds that the Board's decision is supported by substantial evidence and is free from legal error. Accordingly, the Board's decision is **AFFIRMED**.

II. STATEMENT OF FACTS AND PROCEDUAL HISTORY

Faulkner was injured while working for M. Davis & Sons, Inc., ("Davis & Sons") on June 14, 2002.[1] Faulkner was chopping up oil pipelines and throwing them in a metal dumpster when he twisted and injured his back.[2] After this incident, Faulkner returned to work and re-injured his lumbar, thoracic, and cervical spine.[3] Davis & Sons paid worker's compensation benefits to Faulkner for this accident at the rate of $490.67 per week based on an average weekly wage of $736.00 at the time of the incident.[4] Davis & Sons filed a petition to terminate benefits on October 22, 2007, claiming that Faulkner can work in a limited capacity and therefore is no longer totally incapacitated for the purpose of working.[5]

[1] Industrial Accident Board Decision ("IAB Decision") at 2, Sept. 3, 2008.
[2] IAB Hr'g Tr. 124-25, April 16, 2008, Docket Item ("D.I.") 3.
[3] *Id.* at 125.
[4] IAB Decision at 2.
[5] *Id.*

Faulkner claims he remains totally disabled and unable to work, even part-time.[6]

Faulkner filed a petition to determine additional compensation due seeking permanent impairment benefits for his cervical and lumbar spine on January 17, 2008.[7] Faulkner also sought payment of expenses related to medical, prescription medication, transportation, medical witnesses, and attorney's fees.[8] The Board convened on April 16, 2008 to hear these claims.[9]

A. Davis & Sons' Witnesses: Dr. Wilifram Rieger, Dr. William Barrish, Dr. John B. Townsend, and Mr. Danny O'Neal

Wilifram Rieger, M.D., a psychiatrist, testified on behalf of Davis & Sons.[10] Based upon Dr. Reiger's examination of Faulkner, Dr. Reiger determined that Faulkner was fully oriented and there were no signs of psychosis.[11] Additionally, Dr. Reiger concluded that Faulkner was not clinically depressed.[12] Dr. Reiger instructed Faulkner to take the Minnesota Multi-face Personality Inventory ("MMPI").[13] The results of the MMPI

[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] IAB Hr'g Tr. at 41.
[11] *Id.* at 54.
[12] *Id.*
[13] *Id.* at 58.

suggested that Faulkner grossly exaggerated his problems and that he was merely "angry, hostile, and resentful of others."[14]

William Barrish, M.D., testified by deposition on behalf of Davis & Sons.[15] Dr. Barrish specializes in physical medicine and rehabilitation, sports medicine, and spine medicine.[16] According to Dr. Barrish, an MRI of Faulkner's lumbar spine revealed a small central disc herniation at L4-5, with degenerative changes and hypertrophy of the facet joints.[17] An MRI of Faulkner's cervical spine showed a tiny midline disc herniation at C4-C5 and C6-C7, with a small midline disc herniation at C5-6.[18] Finally, an MRI of Faulkner's thoracic spine revealed very minimal ventral extradural defects at T5-T6, T6-T7, and T7-T8.[19]

Dr. Barrish recommended that Faulkner continue pain management with medications and determined that he was not a surgical candidate.[20] Furthermore, Dr. Barrish opined that Faulkner had reached maximum medical improvement.[21] Dr. Barrish recommended a functional capacity evaluation ("FCE") to determine whether Faulkner could return to work.[22]

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[14] *Id.* at 59-60.
[15] Barrish Dep. 2: 7-9, April 10, 2008.
[16] *Id.*
[17] *Id.* at 6: 4-7.
[18] *Id.* at 6: 8-10.
[19] *Id.* at 6: 11-13.
[20] *Id.* at 16: 12-19.
[21] *Id.* at 16: 20-22.
[22] *Id.* at 17: 2-6.

Based on the FCE results, Dr. Barrish concluded that Faulkner could "work in a limited capacity, working up to four hours per day with sedentary physical demands, lifting up to ten pounds occasionally . . . ."[23]

John B. Townsend, III, M.D., testified by deposition on behalf of Davis & Sons.[24] Dr. Townsend, a neurologist, met with Faulkner on March 18, 2008.[25] Faulkner complained of low back pain, headaches, right shoulder pain, right leg, knee, and foot pain, and numbness.[26] After examining Faulkner, Dr. Townsend determined that Faulkner had chronic neck and low back pain syndrome.[27] According to the 5th Edition of the AMA Guides, based on a DRE category II, Dr. Townsend opined that Faulkner has a 9% permanent impairment to the lumbar spine and an 8% permanent impairment to the cervical spine.[28] With this impairment, Dr. Townsend testified that he felt Faulkner could perform sedentary work.[29]

Danny O'Neal, a vocational rehabilitation consultant from Cascade Disability Management, Inc., testified on behalf of Davis & Sons.[30] Mr. O'Neal prepared a Labor Market Survey ("LMS"), relying on the part-time

[23] *Id.* at 17: 23-18:4.
[24] Townsend Dep. 2: 7-14, April 3, 2008.
[25] *Id.* at 2:4, 3:3-6.
[26] *Id.* at 4: 21-5:15.
[27] *Id.* at 15:7-9.
[28] *Id*. at 15:24 -16:1, 16:16-17. A "DRE" is an abbreviation used in the AMA Guides for "diagnosis-related estimate." *Dukes v. Fitzgerald's Auto Salvage*, 2001 WL 1489982, at *1 n.2 (Del. Super. 2001).
[29] Townsend Dep. 22: 8-12.
[30] IAB Hr'g Tr. at 105.

sedentary work restrictions recommended by Dr. Barrish.[31] Mr. O'Neal discovered a total of twelve positions, eight of which were available on a part-time basis, which complied with Faulkner's work abilities and restrictions.[32] The average weekly wage of these eight positions is $180.00, resulting in a weekly wage loss of $556.00.[33]

B. Faulkner's Witnesses: Dr. Jay G. Weisberg and Dr. Steven D. Grossinger

Jay G. Weisberg, M.D., testified on behalf of Faulkner.[34] Dr. Weisberg is a board certified psychiatrist.[35] Dr. Weisberg testified that Faulkner is depressed and that his depression is related to his work injuries.[36] From a psychological perspective, Dr. Weisberg does not believe that Faulkner is capable of working because it would be very difficult for him to take his mind off of his pain.[37]

Dr. Steven D. Grossinger also testified on behalf of Faulkner.[38] Dr. Grossinger is board certified in neurology and pain management.[39] In Dr. Grossinger's opinion, Faulkner is not able to work because of his ongoing

[31] *Id.* at 106.
[32] *Id*. at 107.
[33] *Id.* at 108. According to the LMS, the average hourly rate of these eight part-time positions is $8.99 per hour, or $180.00 per week. Prior to his injury, Faulkner earned $736.00 as an employee at Davis & Sons. Therefore, Faulkner would experience a weekly wage loss of $556.00. *Id.*
[34] IAB Hr'g Tr. at 79.
[35] *Id*. at 80.
[36] *Id.* at 85.
[37] *Id.* at 86.
[38] *Id*. at 6.
[39] *Id.*

requirement for medication and evidence of muscular skeletal injury.[40] According to the 5th Edition of the AMA Guides, using DRE Category III, Dr. Grossinger concluded that Faulkner has a 17% partial impairment to his lumbar spine and a 24% partial impairment to his cervical spine.[41] Dr. Grossinger placed Faulkner in DRE Category III, instead of Category II as suggested by Dr. Townsend, because of evidence of radiculopathy, finding of weakness, and abnormalities on electrical diagnostic testing.[42]

C. Decision of the Board

The Board rendered its decision on September 3, 2008.[43] The Board accepted Dr. Barrish's and Dr. Reiger's opinions regarding Faulkner's ability to work over those opinions of Dr. Grossinger and Dr. Weisberg.[44] The Board concluded that Faulkner was able to return to part-time, sedentary work.[45] The Board granted Davis & Sons petition to terminate claimant's total disability benefits, but awarded Faulkner ongoing partial disability benefits from the date of their decision.[46]

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[40] *Id.* at 17-18.
[41] *Id.* at 20.
[42] *Id.* at 20-21.
[43] IAB Decision at 28.
[44] *Id.* at 18.
[45] *Id.* at 19-20.
[46] *Id*. at 28. The Board also granted Faulkner's petition to determine additional compensation due, as well as payment of medical, prescription, and transportation expenses. The Board granted Faulkner's attorney's fees and witness fees for medical testimony. Neither party appealed the Board's decision to award these benefits. *Id.*

III. STANDARD OF REVIEW

In reviewing a decision on appeal from the Board, this Court must determine if the decision is supported by substantial evidence and is free from legal error.[47] Substantial evidence has been defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[48] The Court does not "weigh the evidence, determine questions of creditability, or make its own factual findings."[49] If the Board's decision is supported by substantial evidence, this Court "must affirm the ruling unless it identifies an abuse of discretion or a clear error of law."[50] Questions of law are reviewed *de novo*.[51]

IV. PARTIES CONTENTIONS

Faulkner argues that there is insufficient evidence in the record to support the Board's findings that he is no longer totally disabled from work.[52] First, Faulkner claims that there has been no change in his physical condition since Davis & Sons' prior petition to terminate his benefits, which

[47] *See Short v. Unemployment Ins. Appeal Bd*., 1986 WL 17127 at *1 (Del. 1986) (citing *Unemployment Ins. Appeal Bd. v. Duncan*, 337 A.2d 308 (Del.1975)).
[48] *Federal Street Financial Service v. Davies*, 2000 WL 1211514 at *2 (Del. Super. 2000) (quoting *Gorrell v. Division of Vocational Rehabilitation and Unemployment Ins. Appeal Bd.*, 1996 WL 453356 at * 2 (Del. Super. 1996)).
[49] *Johnson v. Chrysler Corp*., 213 A.2d 64, 66 (Del.1965).
[50] *Bolden v. Kraft Foods*, 2005 WL 3526324, at *2 (Del. Super. 2005) (citing *Digiacomo v. Bd. of Public Educ*., 507 A.2d 542, 546 (Del.1994)).
[51] *Anchor Motor Freight v. Ciabattoni*, 716 A.2d 154, 156 (Del.1998) (citing *State v. Cephas*, 637 A.2d 20, 23 (Del.1994)).
[52] Appellant Keith Faulkner's Opening Br. on Appeal from the IAB ("Faulkner Opening Br."), Docket Item ("D.I.") 7 at 13.

was denied by the Board on August 8, 2005.[53] Second, Faulkner claims that the Board's determination that "working may . . . provide a beneficial distraction . . . [for his] chronic pain" is unsupported by competent medical testimony.[54] Finally, Faulkner agues that the Board erred in relying upon the FCE results without considering the testimony of Dr. Grossinger, who opined Faulkner could only work part-time if he was alert and coherent.[55]

Davis & Sons argues there is sufficient evidence in the record to support the Board's findings that Faulkner is no longer totally disabled from work.[56] First, Davis & Sons argues that the Board did not err in finding Faulkner could return to work, despite the Board's previous denial of its petition to terminate benefits.[57] Second, Davis & Sons argues the Board did not rely on Dr. Reiger's testimony that "distraction is the best therapy for pain" as a dispositive factor in reaching their conclusion to terminate Faulkner's benefits.[58] Finally, Davis & Sons claims that the Board correctly relied on the FCE results, which concluded that Faulkner is capable of working part-time.[59]

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[53] *Id.*
[54] *Id.* at 14 (quoting IAB Decision at 19).
[55] *Id*. at 13-14.
[56] Appellee Davis & Sons Answering Brief ("Answering Brief"), D.I. 8 at 6.
[57] Id. at 9.
[58] *Id.* at 18.
[59] *Id.* at 19-20.

V. DISCUSSION

In a total disability termination case, the initial burden is on the employer to establish that the employee is no longer totally incapacitated for the purpose of working.[60] If the employer satisfies this burden, the employee must establish that he is a "displaced worker" or that he "has made reasonable efforts to secure suitable employment which have been unsuccessful because of the injury."[61] A worker is displaced if he "is so handicapped by a compensable injury that he will no longer be employed regularly in any well known branch of the competitive labor market and will require a specifically-created job if he is to be steadily employed."[62] The determination of total disability requires consideration of the employee's physical impairment, along with other factors, such as the employee's mental capacity, education, training, and age.[63]

If the employee is unable to establish he is a displaced worker or that he has made reasonable efforts to secure employment, total disability benefits will be terminated.[64] If the employee does meet this burden, the

[60] *Torres v. Allen Family Foods*, 627 A.2d 26, 30 (Del.1995) (citing *Governor Bacon Health Center v. Noll*, 315 A.2d 601, 603 (Del. Super. 1974)).
[61] *Torres*, 672 A.2d at 30 (citing *Franklin Fabricators v. Irwin*, 306 A.2d 734, 737 (Del.1973)).
[62] *Ham v. Chrysler Corp*., 231 A.3d 258, 261 (Del.1967).
[63] *Torres*, 672 A.2d at 30 (citing *Franklin Fabricators v. Irwin*, 306 A.2d 734, 737 (Del.1973)).
[64] *See Torres*, 672 A.2d at 30.

burden shifts back to the employer to show the availability of work within the employee's capabilities.[65]

In this case, the Board considered testimony from several witnesses regarding Faulkner's ability to work.[66] When conflicting expert opinions are each supported by substantial evidence, the Board is free to accept one opinion over the other opinion.[67] After considering the testimony of both party's witnesses, the Board concluded that:

> [a]lthough Claimant is clearly experiencing some chronic pain symptoms and is pre-occupied with his workers' compensation litigation, Claimant was able to attend the five hour hearing before the Board and participate appropriately. The Board is, therefore, unconvinced that Claimant's chronic pain symptoms, alleged depression, difficulty concentrating and/or side effects from his medication are significant enough to prevent him from returning to part-time sedentary work.[68]

The Court will only reverse a decision of the Board if its findings are not supported by substantial evidence or where the Board has made a legal mistake.[69]

After reviewing the record, it is apparent that the Board's decision to rely on Dr. Reiger's and Dr. Barrish's opinions regarding Faulkner's ability

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[65] *Id.*
[66] IAB Decision at 18.
[67] *Standard Distrib. v. Hall*, 897 A.2d 155, 158 (Del.2006).
[68] IAB Decision at 19.
[69] *Delgado v. Unemployment Insurance Appeal Bd.*, 295 A.2d 585, 586 (Del. Super. 1972).

to work is supported by substantial evidence and is free from legal error.[70] Both Dr. Reiger and Dr. Barrish based their conclusions upon two in-person clinical evaluations of Faulkner, as well as the results from an MMPI report and the FCE respectively. Based upon the doctors' individual evaluations of Faulkner, both doctors concluded Faulkner was able to return to work on a part-time sedentary basis.

The Board determined that Faulkner failed to meet his initial burden of proof that he was a displaced worker or that he performed a reasonable job search.[71] This decision is supported by substantial evidence and free from legal error. According to Mr. O'Neal, eight positions that comply with Faulkner's sedentary work restrictions recommended by Dr. Barrish are available.[72] Furthermore, there is no indication in the record that Faulkner has attempted to find employment. Even if the Court assumes Faulkner is a displaced worker, Davis & Sons has met its burden of finding available jobs within Faulkner's restrictions.

As to Faulkner's claims in the present appeal, he first argues that there has been no change in his physical condition since the Board previously

[70] *See Short v. Unemployment Ins. Appeal Bd*., 1986 WL 17127 at *1 (Del.) (citing *Unemployment Ins. Appeal Bd. v. Duncan*, 337 A.2d 308 (Del. 1975)).
[71] IAB Decision at 20.
[72] *Id.* at 8.

denied Davis & Sons' petition to terminate benefits.[73] Under Delaware law, a petition to terminate benefits that is supported by new evidence is not barred by a prior denial of a previous petition.[74] Although the Board previously denied Davis & Sons' petition to terminate Faulkner's total disability benefits, this prior decision does not bar the employer from filing a subsequent petition to terminate benefits.[75] In the present case, new evidence regarding Faulkner's medical condition was presented by the testimony of Dr. Barrish and Dr. Reiger. Thus, as long as the Board's decision is supported by substantial evidence, this Court "must affirm the ruling unless it identifies an abuse of discretion or a clear error of law."[76] This Court finds no such error.

Next, Faulkner claims the Board's determination that work might be a good distraction for his chronic pain is not supported by competent medical evidence.[77] Although the Board references Dr. Reiger's testimony that work might a positive distraction in dealing with his pain, the Board does not rely on this testimony in concluding that Faulkner is no longer totally incapacitated from working; instead the Board merely references this

[73] Faulkner Opening Br. at 13.
[74] *See Avon Products, Inc. v. Lamparski*, 293 A.2d 559 (Del. 1972).
[75] *See id*.
[76] *Bolden v. Kraft Foods*, 2005 WL 3526324, at *2 (Del. Super. 2005) (citing *Digiacomo v. Bd. of Public Educ*., 507 A.2d 542, 546 (Del.1994)).
[77] Faulkner Opening Br. at 13.

testimony as an additional factor as to why working might help Faulkner cope with his pain.

Finally, Faulkner argues that the Board relied on the FCE in error without considering the testimony of Dr. Grossinger.[78] This Court finds no evidence that the Board did not consider Dr. Grossinger's testimony. Instead, the Board chose to rely Dr. Reiger's opinion over the opinion of Dr. Grossinger. Dr. Reiger found that Faulkner was fully oriented and that there were no signs of psychosis or cognitive dysfunction.[79] According to Dr. Reiger, Faulkner appeared to be very "shrewd and savvy."[80] The Board's reliance upon Dr. Reiger's opinion is supported by substantial evidence and free from legal error.

VI. CONCLUSION

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

IT IS SO ORDEDED.

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Jan R. Jurden, Judge

[78] *Id.* at 14.
[79] IAB Hr'g Tr. at 54.
[80] *Id.*