**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

**IN AND FOR NEW CASTLE COUNTY**

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| BRADLEY BENTZEN, | ) | |
| | ) | |
| Claimant-Appellant, | ) | |
| | ) | |
| v. | ) | C.A. No. N12A-10-009 JRJ |
| | ) | |
| CIBA SPECIALTY CHEMICALS, | ) | |
| | ) | |
| Employer-Appellee. | ) | |
| | ) | |

Date Submitted: February 11, 2013
Date Decided: March 26, 2013

**OPINION**

*On Appeal from the Industrial Accident Board*: **AFFIRMED**

Gary S. Nitsche, Esquire, and Michael B. Galbraith, Esquire (argued), Weik, Nitsche & Dougherty, 305 North Union Street, Second Floor, P.O. Box 2324, Wilmington, DE 19899, Attorneys for Claimant-Appellant.

Natalie L. Palladino, Esquire (argued), Tybout, Redfearn & Pell, 750 Shipyard Dr., Suite 400, P.O. Box 2092, Wilmington, DE 19899; Attorney for Employer-Appellee.

**JURDEN, J.**

## I. INTRODUCTION

Appellant, Bradley Bentzen ("Claimant"), appeals the decision of the Industrial Accident Board (the "Board") terminating 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 of legal error. Accordingly, the Board's decision is **AFFIRMED**.

## II. FACTS AND PROCEDURAL HISTORY

Claimant injured his lumbar spine in 1998, 2003, and 2006, all while working for Ciba Specialty Chemicals (the "Employer").[1] Claimant had disc replacement surgery in 2003,[2] then returned to work until his most recent injury on February 27, 2006.[3] Claimant has not worked since, receiving total disability benefits of $543.53 per week from that time until the Board's September 19, 2012, decision to terminate total disability benefits and award partial disability benefits of $379.20 per week.[4]

At the time of his August 14, 2012, hearing before the Board, Claimant was thirty-seven years old.[5] Claimant graduated from high school[6] and has taken approximately two years of college courses.[7] Claimant worked for the Employer from 1996 to 2006.[8] Before that, Claimant worked for Pizza Hut for three years as a shift manager.[9] Claimant does not believe he is able to work because he "can only sit for less than 30 minutes at a time, sometimes less, and can only

[1] Appellant's Opening Brief at 1, *Bentzen v. Ciba Specialty Chems.*, No. N12A-10-009 (Del. Super. Jan. 7, 2013) (Trans. ID 48791807) [hereinafter Brief]; Employer-Appellee's Answering Brief on Appeal at 1, *Bentzen v. Ciba Specialty Chems.*, No. N12A-10-009 (Del. Super. Jan. 25, 2013) (Trans. ID 49117739) [hereinafter Answer].
[2] Brief at Exhibit B, p. 9 (August 14, 2012, Transcript of Administrative Hearing) [hereinafter Transcript].
[3] *Id.*; Brief at 1; Answer at 1.
[4] Brief at 1-2; Answer at 1; Brief at Exhibit A, p. 2 and 34 (Industrial Accident Board's September, 19, 2012, Decision on Petition to Terminate Benefits) [hereinafter Decision].
[5] Transcript at 7.
[6] *Id.*
[7] *Id.* at 8.
[8] *Id.*
[9] *Id.* at 8, 31.

stand for 15 minutes at a time."[10] Claimant also testified that he has difficulty showering, walking, and is "limited in his ability to drive," though Claimant admitted that he drove to the August 14, 2012, hearing.[11] Claimant testified that "he is not able to use a computer because he can[not] sit for too long."[12] There is no dispute over the fact that Claimant is intelligent.[13]

Claimant first saw Frank J.E. Falco, M.D., ("Dr. Falco") in 2003.[14] Dr. Falco performed an IDET procedure on Claimant in 2006[15] and implanted an intrathecal pain pump in April of 2009.[16] Claimant has been seeing Dr. Falco for pain management since 2010.[17] Before the pump, Claimant was lying down all day and taking morphine and Dilaudid in pill form "in an amount taken by terminally ill patients."[18] Since the implantation of the pump, and under Dr. Falco's care, Claimant has been able to gain at least fifty percent relief from the pain[19] and wean himself off all narcotics but Dilaudid,[20] which he takes at moderate levels.[21] Dr. Falco believes that Claimant is not capable of working without increasing his pain and accelerating adjacent segmental degeneration.[22] Dr. Falco has diagnosed Claimant with a host of ailments, including failed back syndrome, chronic pain syndrome, and opioid dependence.[23] Nevertheless, Dr. Falco's examinations have found that Claimant's strength is normal, that he is alert, and that he

[10] Brief at 4; *see also* Transcript at 13-15.
[11] *Id.*
[12] *Id.*
[13] *See* Transcript at 77.
[14] Brief at Exhibit E, p. 3-4 (December 2, 2011, Deposition of Frank Falco, M.D.) [hereinafter Falco 1].
[15] Transcript at 9.
[16] *Id.* at 11.
[17] *Id.* at 11-12.
[18] *Id.* at 21.
[19] Brief at Exhibit F, p. 4-5 (August 8, 2012, Deposition of Frank J.E. Falco, M.D.) [hereinafter Falco 2].
[20] Falco 1 at 5.
[21] Falco 2 at 23.
[22] *Id.* at 38.
[23] *Id.* at 11.

exhibits no distress.[24] Moreover, Dr. Falco admits that Claimant's medications would "[a]bsolutely not" interfere with Claimant's ability to work.[25]

Claimant met with Stephen L. Fedder, M.D., ("Dr. Fedder") on three occasions.[26] After the second examination, Dr. Fedder agreed that Claimant was totally disabled from work.[27] After the third examination, however, Dr. Fedder changed his opinion, concluding that Claimant is capable of working in a sedentary position, provided he can get up every 30 minutes or so.[28] Dr. Fedder made this decision even though Claimant's weight, exam, and medications had not changed since the second visit.[29] Instead, Dr. Fedder based his conclusion on the fact that Claimant "was able to walk around my office without any problems" (noting that his cane barely touched the ground), that Claimant "has no neurological deficits," that Claimant "is able to do everything that he needs to do with his arms and legs, can get in and out of a chair," and that Claimant "has no spinal instability."[30]

With a body mass index of 38, Dr. Fedder believes that Claimant suffers only from chronic ensconced pain syndrome and morbid obesity.[31] Dr. Fedder further believes that Claimant does not need his pain medication because:

> [H]e has no visible source of pain. He has no instability in his back. He has no neural element compression. He has not motor function abnormality; He has no neurological abnormality. He moves with a reciprocating gait. He's really got no evidence of a primary pain generator that I can see.[32]

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[24] *Id.* at 34-35.
[25] *Id.* at 38.
[26] Brief at Exhibit C, p. 5 (December 12, 2011, Deposition of Stephen L. Fedder, M.D.) [hereinafter Fedder 1]; Brief at Exhibit D, p. 5 (August 9, 2012, Deposition of Stephen L. Fedder M.D.) [hereinafter Fedder 2].
[27] Fedder 1 at 25-26.
[28] Fedder 2 at 13.
[29] *Id.* at 34.
[30] *Id.* at 15.
[31] Fedder 1 at 10-11.
[32] Fedder 2 at 33.

Dr. Fedder believes that Claimant's dependence on narcotics is the "basis of his problem," and recommends "an inpatient detoxification program," including some "psychotherapy to change his mindset a bit and to get out of the chronic pain syndrome mindset. . . ."[33]

The Employer filed a Petition for Review on April 9, 2012, alleging the Claimant forfeited his rights to total disability benefits because he refused to enter into an inpatient narcotic detoxification program.[34] The Employer later amended its Petition to include a termination of total disability.[35] The Board held a hearing on August 14, 2102,[36] and issued their Decision on September 19, 2012, wherein it terminated Claimant's disability status, holding that he is capable of working in a sedentary duty capacity.[37] The Board further found that Claimant is entitled to compensation for partial disability at a rate of $379.20 per week.[38] Claimant filed his appeal on October 22, 2012.[39]

## III. STANDARD OF REVIEW

When reviewing an appeal from the Industrial Accident Board, this Court's "only role" is to determine whether the Board's decision "is supported by substantial evidence and free of legal error."[40] Substantial evidence "means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion"[41]; it is "more than a scintilla but less than a preponderance."[42] This Court "does not sit as a trier of fact with authority to weigh the

[33] *Id.* at 11-13.
[34] Decision at 1.
[35] *Id.*
[36] *Id.*
[37] *Id.* at 27-31, 34-35.
[38] *Id.* at 31-32.
[39] Brief at 2.
[40] *Standard Distrib., Inc. v. Hall*, 897 A.2d 155, 157 (Del. 2006), citing *General Motors Corp. v. Freeman*, 164 A.2d 686, 688 (Del. 1960) and *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965).
[41] *Oceanport Indus., Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 899 (Del. 1994), citing *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981).
[42] *Olney*, 425 A.2d at 614 (internal citation omitted).

evidence, determine questions of credibility, and make its own factual findings and conclusions."[43] The Court reviews questions of law *de novo*.[44]

## IV. ISSUE

The only issue on appeal is whether the Board's decision to terminate Claimant's total disability benefits is supported by substantial evidence and free of legal error.[45]

## V. ANALYSIS

The initial burden of proving that Claimant is not totally disabled falls upon the Employer.[46] The Employer must show that Claimant is not completely incapacitated[47] (*i.e.*, demonstrate "medical employability"[48] or, in other words, that Claimant is not "totally disabled physically"[49]). If the Employer satisfies its burden, Claimant may then show that he is a "displaced worker"[50] (*i.e.*, demonstrate that, though Claimant is not totally disabled physically, he is "totally disabled economically"[51]). A displaced worker is one that 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 specially-created job if he is to be steadily employed."[52]

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[43] *Johnson*, 213 A.2d at 66.
[44] *Chavez v. David's Bridal*, 979 A.2d 1129, 1133-34 (Del. Super. 2008), citing *Munyan v. Daimler Chrysler Corp.*, 909 A.2d 133, 136 (Del. 2006).
[45] Brief at i and 24 (Argument: "THE INDUSTRIAL ACCIDENT BOARD'S TERMINATION OF CLAIMANT'S TOTAL DISABILITY BENEFITS CONSTITUTES LEGAL ERROR AND IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE"); *id.* at 3 (Statement of Questions Involved: "Whether the Industrial Accident Board's termination of Claimant's total disability benefits is supported by substantial evidence and free from legal error").
[46] *Torres v. Allen Family Foods*, 672 A.2d 26, 30 (Del. 1995), citing *Governor Bacon Health Ctr. v. Noll*, 315 A.2d 601, 603 (Del. Super. 1974); *see also Howell v. Supermarket Gen. Corp.*, 340 A.2d 883, 834-35 (Del. 1975), quoting *Chrysler Corp. v. Duff*, 314 A.2d 915, 918 n.1 (Del. 1973).
[47] *Id.*
[48] *Howell*, 340 A.2d at 834-35, quoting *Duff*, 314 A.2d at 918 n.1.
[49] *Noll*, 315 A.2d at 603.
[50] *Torres*, 672 A.2d at 30, citing *Noll*, 315 A.2d at 603; *see also Howell*, 340 A.2d at 834-35, quoting *Duff*, 314 A.2d at 918 n.1.
[51] *Noll*, 315 A.2d at 603, quoting *Ham v. Chrysler Corp.*, 231 A.2d 258, 261 (Del. 1967).
[52] *Ham*, 231 A.2d at 261; see also *Torres*, 672 A.2d at 30, citing *Ham*, 231 A.2d at 261.

To qualify as a displaced worker, Claimant must establish: "(1) that he is an unskilled worker, unable to perform any task other than general labor; and (2) that his inability to perform the duties of general laborer is due to the injury sustained in the employment accident."[53] In its determination of whether Claimant is a displaced worker, the Board "should consider the degree of physical impairment as well as the mental capacity, education, training and age" of Claimant.[54] These factors constitute a *prima facie* showing that Claimant is displaced.[55] However, even if Claimant cannot show that he is *prima facie* displaced, he is "a displaced worker and deemed 'totally disabled'" if he "has made reasonable efforts to secure suitable employment which have been unsuccessful because of the injury."[56] If Claimant demonstrates that he is displaced, the Employer then has the burden of showing the availability of work within Claimant's capabilities.[57]

In the case *sub judice*, the Board determined that Claimant is not totally disabled because Claimant is neither completely incapacitated nor displaced.[58] The Board based its determination on the conflicting depositions of Dr. Falco and Dr. Fedder, the testimony of Claimant, and the Board's observations of Claimant during the hearing.[59] In the presence of conflicting expert opinion, the Board is free to choose either opinion because both are supported by substantial

[53] *Vaszquez v. Abex Corp.*, 618 A.2d 91, No. 49, 1992, at *2 (Del. 1992 (TABLE), citing *Hensley v. Artic Roofing, Inc.*, 369 A.2d 678, 679 (Del. 1976); *see also Guy v. State*, 1996 WL 111116, at *6 (Del. Super. Mar. 6, 1996), citing *Ham*, 231 A.2d at 262, *Hensley*, 369 A.2d at 679; *and see* Bailey v. Milford Mem'l Hosp., 1995 WL 790986, at *7 (Del. Super. Nov. 30, 1995), citing *Ham*, 231 A.2d at 261, *Hensley*, 369 A.2d at 679.
[54] *Vaszquez*, No. 49, 1992, at *2, citing *Franklin Fabricators v. Irwin*, 306 A.2d 734, 737 (Del. 1973).
[55] *Torres*, 672 A.2d at 30, citing *Franklin Fabricators*, 306 A.2d at 737.
[56] *Id.*
[57] *Id.*
[58] Decision at 26-30.
[59] *Id.*

evidence.[60] When those opinions are expressed through depositions, however, the Board may not base its determination solely on the "persuasiveness" of one witness over another.[61]

The Board's determination that Claimant is not totally physically disabled is supported by substantial evidence. Dr. Fedder concluded that Claimant "can return to work with sedentary restrictions, allowing for him to stand and move around every 30 minutes."[62] Though Dr. Falco came to the opposite conclusion, he nevertheless testified that "Claimant's pain is now well controlled and he no longer has side effects from the medication."[63] Dr. Falco also "conceded that Claimant's medications have no effect on his inability to work" and noted a "50% improvement" in Claimant's pain management.[64] The Board rejected Dr. Falco's assertion that returning to work might aggravate Claimant's chronic pain, relying instead upon the Delaware Healthcare Practice Guidelines' conclusion that returning to work can be therapeutic.[65] This is significant in light of Dr. Fedder's opinion that Claimant's chronic pain might be based on his "weight and deconditioning,"[66] as well as the fact that the Board observed Claimant sit with no observable discomfort during a hearing that lasted approximately two hours,[67] despite Claimant's claim that he cannot sit for periods longer than thirty minutes.[68]

The Board's determination that Claimant is not displaced is also supported by substantial evidence. Claimant can sit and walk for limited durations.[69] Claimant is a high school graduate with two years of college education.[70] His intelligence is average or above.[71] He gained

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[60] *DiSabatino Bros., Inc. v. Wortman*, 453 A.2d 102, 106 (Del. 1982).
[61] *Rhinehardt-Meredith v. State*, 963 A.2d 139, No. 302, 2008, at *5 (Del. 2008) (TABLE), citing *Lindsay v. Chrysler Corp.*, 1994 WL 750345 (Del. Super. Dec. 7, 1994).
[62] Decision at 29.
[63] *Id.* at 28.
[64] *Id.*
[65] *Id.*
[66] *See id.* at 13.
[67] *Id.* at 29.
[68] Transcript at 13-15; Brief at 4, 27, and 28.
[69] *See* Decision at 29.
[70] *Id.* at 30.

"experience with management in a retail environment while working for Pizza Hut."[72] He is only thirty-seven years of age.[73] Thus, concluded the Board, Claimant is "not an unskilled laborer limited to doing only heavier duty work" and, therefore, "does not fit the profile" of a *prima facie* displaced worker.[74] Furthermore, Claimant "admitted that he did not search for work, and has not worked since 2006."[75]

## VI. CONCLUSION

Because the Board's determinations were supported by substantial evidence and free of legal error, its decision to terminate Claimant's total disability benefits is **AFFIRMED**.

**IT IS SO ORDERED**.

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Jan R. Jurden, Judge

cc: Prothonotary

[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] *Id.*
[75] *Id.*