

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

MARIA DUQUE-GOMEZ, )  
 )  
 Claimant-Appellant, )  
 )  
 v. ) C.A. N13A-03-001 PRW  
 )  
 BJ'S WHOLESALE CLUB, INC., )  
 )  
 Employer-Appellee. )  
 )

Submitted: September 3, 2013  
Decided: November 26, 2013

*Upon Appeal from the Decision of the Industrial Accident Board.*  
**AFFIRMED.**

**OPINION AND ORDER**

Maria Duque-Gomez, *pro se*.

Christian G. McGarry, Esquire, Elzufon Austin Tarlov & Mondell, P.A.,  
Wilmington, Delaware, Attorney for Employer-Appellee BJ's Wholesale  
Club.

**WALLACE, J.**

## I. INTRODUCTION

Maria Duque-Gomez<sup>1</sup> appeals the February 1, 2013 decision of the Industrial Accident Board (the “Board”).<sup>2</sup> The Board terminated Ms. Duque-Gomez’s disability benefits, which were granted after a July 16, 2008 accident that caused her injuries (the “Accident”), upon BJ’s Wholesale Club’s (“BJ’s”) Petition for Termination of Total Disability Benefits (the “Petition”). Ms. Duque-Gomez alleges: (1) that the Board erroneously accepted the testimony of BJ’s expert witness, Dr. Andrew J. Gelman, D.O., over the testimony of her own expert, Dr. Barry L. Bakst, D.O.; and (2) that BJ’s negligence delayed her treatment, worsening her medical condition. BJ’s claims that the Board’s decision to credit Dr. Gelman over Dr. Bakst meets the substantial evidence standard of review. BJ’s claims also that any new allegations of negligence must be considered waived as not raised before the Board below.

Because the Board relied on adequate evidence and did not abuse its discretion, its decision granting BJ’s Wholesale Club’s April 2012 Petition for Termination of Total Disability Benefits is hereby **AFFIRMED**.

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<sup>1</sup> Although represented by counsel at all relevant proceedings below, Ms. Duque-Gomez filed this appeal *pro se*.

<sup>2</sup> *Duque-Gomez v. BJ’s Wholesale Club*, Industrial Accident Board Hearing No. 1327802 (Feb. 1, 2013).

## **I. FACTUAL AND PROCEDURAL BACKGROUND**

### **A. Ms. Duque-Gomez's Relevant Background**

Ms. Duque-Gomez is a forty-nine year-old<sup>3</sup> high-school graduate from Colombia who has lived in the United States since 2001. Since coming to the United States, Ms. Duque-Gomez took a Project Management course at Delaware Technical & Community College (“Del Tech”). And although Ms. Duque-Gomez’s primary language is Spanish, she satisfactorily completed seven Del Tech continuing education classes; all were taught exclusively in English.

At the time of the Accident Ms. Duque-Gomez was employed by BJ’s in the bakery and food court where she made food, took food orders, changed money, and cleaned the kitchen. Ms. Duque-Gomez no longer works at BJ’s.

### **B. The Accident**

On July 16, 2008, Ms. Duque-Gomez injured her cervical spine, lumbar spine, and right ankle while engaged in her work responsibilities in BJ’s cafeteria area. Ms. Duque-Gomez was injured while pulling a cart

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<sup>3</sup> At the time of the hearing, Ms. Duque-Gomez was forty-eight years old. The Board’s decision, however, states she was thirty-eight years old. But it is clear from that decision that Ms. Duque-Gomez’s age played no part in the Board’s ultimate finding that she is capable of sedentary work despite the Accident. Nor did Ms. Duque-Gomez’s age have any bearing on the Board’s discretionary decision to accept the testimony of Dr. Gelman over Dr. Bakst, which is the error Ms. Duque-Gomez alleges on appeal.

loaded with muffin trays. The trays slid forward and hit Ms. Duque-Gomez in the face. She sustained a blow to the left side of her face and to her left upper arm. Ms. Duque-Gomez avoided a fall by grabbing a sink with her right hand.

### **C. Ms. Duque-Gomez's Medical Treatment**<sup>4</sup>

Just after the Accident, Ms. Duque-Gomez was in pain but continued her work and completed her shift that day before going home. The next day, Ms. Duque-Gomez visited Dr. Tribuiani, her primary care physician, who noted some tenderness and bruising on the left side of her face and her left upper arm, where the muffin trays had hit. About one month later, on August 8, 2009, Ms. Duque-Gomez visited Dr. Barry L. Bakst. At that time Ms. Duque-Gomez reported to Dr. Bakst that she had received treatment immediately after the Accident and had been cleared to return to work the following week. Several exploratory procedures, including cervical and lumbar MR imaging and electrophysiologic testing, yielded normal results. After returning to work, however, Ms. Duque-Gomez complained of right ankle pain. Despite the fact that the results of Dr. Bakst's examination of

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<sup>4</sup> See generally Ex. A to BJ's Ans. Brf. (Deposition of Andrew J. Gelman, D.O., Nov. 14, 2012); Ex. C to BJ's Ans. Brf. (Deposition of Barry L. Bakst, D.O., Nov. 29, 2012). Although he was not Ms. Duque-Gomez's treating physician, Dr. Gelman examined Ms. Duque-Gomez on February 6, 2012; June 6, 2012; and October 30, 2012, and reviewed her medical records and history. Dr. Bakst began treating Ms. Duque-Gomez for her injuries in August 2008.

Ms. Duque-Gomez's foot were normal, he later referred her to Dr. Earnest Troisi, a podiatrist, for her foot pain.

Dr. Troisi first saw Ms. Duque-Gomez on December 3, 2008 and concluded she had an inversion ankle injury consistent with an anterior talofibular strain. Over the next two years, Dr. Bakst and Dr. Troisi treated Ms. Duque-Gomez's spine, foot, and ankle pain with medications for chronic pain. They also prescribed her medication for depression and anxiety, and referred her to Dr. Ginger Chiang for interventional pain management. In addition, Dr. Troisi performed multiple injections of Ms. Duque-Gomez's right ankle and recommended a CAM boot, which, although helpful for foot and ankle pain, changed the length of her gait, and therefore likely increased her lower back pain.<sup>5</sup>

In May 2011, Dr. Gregory Mote, Dr. Troisi's partner, recommended surgical repair of a medial osteochondral lesion. Dr. Mote performed the surgery on September 2, 2011 and, along with Dr. Bakst, administered post-operative care to Ms. Duque-Gomez, including the CAM boot and the medications Cymbalta, Tramadol, and Neurontin. Despite the surgery, post-

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<sup>5</sup> The expert witnesses agreed a CAM boot changes a person's gait and can aggravate already extant lower back pain.

operative treatment, and renewed visits to Dr. Chiang, Ms. Duque-Gomez's right ankle pain persisted.

By July 2012, Ms. Duque-Gomez continued to experience reduced range of motion due to back pain, ropiness, and tenderness around her spine. Dr. Bakst referred Ms. Duque-Gomez to Dr. Emmanuel Devotta, who saw her on August 9, 2012. Dr. Devotta determined Ms. Duque-Gomez suffered from complex regional pain syndrome ("CRPS") and allodynia of the dorsum of the foot.<sup>6</sup>

Ms. Duque-Gomez saw Dr. Bakst again in September 2012, at which time she complained of continued pain in her right foot and lower back, though her exam was normal and there was no swelling. At that time Dr. Bakst also diagnosed Ms. Duque-Gomez with CRPS, as well as anxiety and depression.

#### **D. January 18, 2013 Hearing**

##### **i. Ms. Duque-Gomez's Testimony**

Ms. Duque-Gomez testified, through a Spanish interpreter, that since the Accident she continues to suffer from back, neck, and foot pain, and she needs to use a CAM boot and a walker every day. She testified that she is in

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<sup>6</sup> Allodynia is a condition where a stimulus that is not normally painful causes the patient great pain.

pain standing and walking, and feels pain any time she places her foot directly on the ground, either when standing or sitting. She is unable to drive because of the CAM boot and because driving causes her too much pain.

Ms. Duque-Gomez testified that she leaves her home only for medical appointments and to exercise in her sister's pool three times per week. She testified that she does not believe she can work, as she is unable to even complete housework. As to her language skills, Ms. Duque-Gomez stated Spanish is her primary language and she has difficulty communicating in English.

**ii. BJ's Medical Expert**

Dr. Gelman, an orthopedic surgeon, testified on BJ's behalf. Dr. Gelman testified that he examined Ms. Duque-Gomez in February 2012 and determined that she suffered from a poor surgical outcome from the September 2011 foot surgery performed by Dr. Mote. Dr. Gelman's opinion was that Ms. Duque-Gomez's pain had a "strong psychological overlay," and that she was magnifying some symptoms.

Dr. Gelman examined Ms. Duque-Gomez again in June 2012, at which time she complained only of right ankle pain. Dr. Gelman concluded the lower back examination was normal and that the right foot and ankle

exhibited no swelling. Overall, Dr. Gelman noticed little difference between the February 2012 and the June 2012 exams; Ms. Duque-Gomez continued to magnify her symptoms. At that time, Dr. Gelman opined that Ms. Duque-Gomez could perform full-time sedentary work with her limited restrictions being she should walk only short distances and she should avoid prolonged standing or walking because of her subjective pain symptoms.

Dr. Gelman last examined Ms. Duque-Gomez in October 2012, at which point Ms. Duque-Gomez complained of lower back and ankle pain, and was assisted by a walker and a CAM boot. Dr. Gelman observed little difference in her exam, though he did observe that she allowed more touch to sensitive areas, and that over the course of the three exams, the location of the sensitivity had moved.

Dr. Gelman further commented on Dr. Bakst and Dr. Devotta's CRPS diagnoses. CRPS, Dr. Gelman testified, is a nonscientific condition that is distinguished by a variety of symptoms including sensitivity, swelling, and hair change features. In support of his opinion that Ms. Duque-Gomez is experiencing a poor surgical outcome with a psychological overlay, Dr. Gelman testified that Ms. Duque-Gomez does not exhibit symptoms of CRPS such as temperature change, skin texture variation, hair growth, and



hypersensitivity to touch.<sup>7</sup> For example, Ms. Duque-Gomez did not complain of pain associated with hypersensitivity of her foot and ankle region while wearing the CAM boot. Neither did she complain of hypersensitivity during massage and range-of-motion exercises administered by Dr. Bakst. Although Dr. Gelman recognized some color changes to the skin around the right ankle, he testified that the discoloration was consistent with Ms. Duque-Gomez's operation.

Dr. Gelman approved all but five of the positions suggested in the Labor Market Survey ("LMS") for Ms. Duque-Gomez's continued employment.

### **iii. Ms. Duque-Gomez's Medical Expert**

Dr. Bakst testified that Ms. Duque-Gomez cannot realistically perform even sedentary work because of the pain she experiences in her foot, lower back, neck, and spine. On cross-examination, Dr. Bakst testified that Ms. Duque-Gomez's pain had a psychological component, and that despite his recommendation, she was not interested in seeking a psychological evaluation.

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<sup>7</sup> Ms. Duque-Gomez's podiatrist confirmed she lacked these symptoms of CRPS.

#### **iv. Barbara Stevenson's Testimony**

Barbara Stevenson is a vocational expert who testified for BJ's. She conducted the LMS, which captured data from February through October 2012. The jobs Ms. Stevenson found paid between \$290 and \$520 per week, and many accepted those who, like Ms. Duque-Gomez, are more comfortable speaking Spanish. The majority of the positions available were in customer service, similar to Ms. Duque-Gomez's position at BJ's. Finally, Ms. Stevenson testified that Ms. Duque-Gomez's inability to drive due to pain in her right foot would not prevent her from securing employment since she would likely qualify for Delaware Area Regional Transit Paratransit door-to-door services.

#### **v. Other Relevant Testimony**

BJ's presented two other witnesses, Collette Hayes, registrar for Del Tech, and Tuesdea Grybowski, assistant manager of operations at BJ's. Both witnesses spoke to Ms. Duque-Gomez's English-language proficiency. Ms. Hayes described the skills needed to receive course credit, as Ms. Duque-Gomez did, for classes at Del Tech. These skills included attending lectures, completing assignments and tests, and participating in class discussions. Ms. Grybowski testified that Ms. Duque-Gomez's responsibilities in the BJ's bakery required her to take orders from customers

for specialty items. She also testified that Ms. Duque-Gomez received detailed task lists in English and never expressed a problem reading them. Finally Ms. Grybowski testified that she and Ms. Duque-Gomez communicated well in English without the aid of an interpreter.

#### **E. The Board's Decision**

By its decision dated February 1, 2013, the Board granted BJ's Petition, finding Ms. Duque-Gomez was entitled to receive neither total disability benefits, nor partial disability benefits.<sup>8</sup> In doing so, the Board explicitly accepted Dr. Gelman's opinion that Ms. Duque-Gomez was capable of returning to work, albeit in a sedentary capacity, over Dr. Bakst's opinion that that the combination of Ms. Duque-Gomez's injuries to her right foot, lower back, and neck, meant it was "unrealistic" that she could work a long-term job.<sup>9</sup>

The Board was "not convinced [Ms. Duque-Gomez] was not magnifying her symptoms, especially in regard to the neck and low back."<sup>10</sup> The Board also found Ms. Duque-Gomez's credibility lacking. While she

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<sup>8</sup> *Duque-Gomez v. BJ's Wholesale Club*, Industrial Accident Board Hearing No. 1327802, at 20 (Feb. 1, 2013).

<sup>9</sup> Although Dr. Bakst also opined that Ms. Duque-Gomez was capable of building up from several hours of work per day to a more normal capacity.

<sup>10</sup> *Duque-Gomez v. BJ's*, Hearing No. 1327802, at 15.

testified that she had difficulty conversing in the English language, BJ's presented Ms. Grybowski, Ms. Duque-Gomez's former supervisor, who testified that she never had difficulty conversing with co-workers or customers. The Board also found credible Dr. Gelman's testimony that Ms. Duque-Gomez magnified her injuries during exams.

Based on the factors above, the Board concluded that Ms. Duque-Gomez was no longer totally disabled as a result of the injuries sustained in the course of her employment with BJ's. That finding shifted the burden back to Ms. Duque-Gomez to demonstrate that she was either a *prima facie* displaced worker, or she was unemployable despite having conducted a reasonable job search.<sup>11</sup> Because Ms. Duque-Gomez failed to present evidence of either circumstance to rebut BJ's showing that she was no longer totally disabled, the Board terminated her total disability benefits as of April 2, 2012, the date of BJ's Petition.

## **II. STANDARD OF REVIEW**

On appeal from the Board, errors of law are reviewed *de novo*.<sup>12</sup> If the Court finds no error of law, the Board's decision is reviewed for an

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<sup>11</sup> *Torres v. Allen Family Foods*, 672 A.2d 26, 30 (Del. 1995).

<sup>12</sup> *Delaware Bd. of Nursing v. Gillespie*, 41 A.3d 423, 425 (Del. 2012) (citing *Person-Gaines v. Pepco Holding, Inc.*, 981 A.2d 1159, 1161 (Del. 2009)). Ms. Duque-Gomez does not raise any questions of law arising from the Board's decision.

abuse of discretion.<sup>13</sup> “The Board has abused its discretion only when its decision has exceeded the bounds of reason in view of the circumstances.”<sup>14</sup>

Upon its limited appellate review, this Court must determine, “whether substantial evidence supports the [Board’s] findings below.”<sup>15</sup> “Substantial evidence” is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”<sup>16</sup> In making its determination, the Court reviews the record below in the light most favorable to the prevailing party, here BJ’s.<sup>17</sup> The Court does not “weigh the evidence, determine questions of credibility or make [its] own factual findings.”<sup>18</sup> Rather, the Court must show deference toward the Board’s fact-finding and its application of those facts to the appropriate legal standards.<sup>19</sup>

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<sup>13</sup> *Id.*

<sup>14</sup> *Person-Gaines*, 981 A.2d at 1161 (internal quotation marks excluded).

<sup>15</sup> *Bermudez v. PTFE Compounds, Inc.*, 2006 WL 2382793, at \*3 (Del. Super. Ct. Aug. 16, 2006); see *Histed v. E.I. du Pont de Nemours & Co.*, 621 A.2d 340, 342 (Del. 1993).

<sup>16</sup> *Histed*, 621 A.2d at 342 (citing *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981)).

<sup>17</sup> *Bermudez*, 2006 WL 2382793, at \*3.

<sup>18</sup> *Delaware Bd. of Nursing v. Gillespie*, 41 A.3d 423, 425 (Del. 2012).

<sup>19</sup> *Bermudez*, 2006 WL 2382793, at \*3 (citing DEL. CODE ANN. tit. 29 § 1142(d)).

The Court may only overturn the Board's decision where, "there is no satisfactory proof in support of a factual finding."<sup>20</sup>

### III. THE PARTIES' CONTENTIONS

#### A. Ms. Duque-Gomez's Argument

On appeal, Ms. Duque-Gomez argues that the Board erroneously accepted Dr. Gelman's expert testimony over Dr. Bakst's expert testimony. She contends Dr. Gelman performed only a "superficial analysis" of her injured foot, neck, back, and jaw, and thus Dr. Gelman was not competent to testify to her physical impairments or judge her ability to perform her work tasks.<sup>21</sup> Ms. Duque-Gomez submits that, in contrast, Dr. Bakst<sup>22</sup> has four years of experience managing her care. Further, Ms. Duque-Gomez argues Dr. Gelman, who is not a psychologist, is not qualified to opine that her pain is psychological.

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<sup>20</sup> *Johnson v. Chrysler Corp.*, 213 A.2d 64, 67 (Del. 1965).

<sup>21</sup> Op. Brf. at 1.

<sup>22</sup> In her Opening Brief, Ms. Duque-Gomez references opinions of Dr. Mote. She also attaches a letter from Dr. Mote's office dated June 3, 2013. BJ's correctly notes, however, that Dr. Mote's opinions were not presented to the Board, and may not be considered on appeal. *See* DEL. CODE ANN. tit. 29, § 10142(d) ("The Court's review . . . shall be limited to a determination of whether the agency's decision was supported by substantial evidence on the record before the agency.").

## **B. BJ's Argument**

In response, BJ's first argues that the Board's discretionary choice of one expert's opinion over the other meets the "substantial evidence" standard of review on appeal from an administrative agency.<sup>23</sup> Moreover, BJ's contends, Dr. Gelman's expert opinions are supported by objective medical evidence. In addition, despite his opinion that Ms. Duque-Gomez's pain had a "psychological overlay," Dr. Gelman took Ms. Duque-Gomez's pain complaints into account when determining that she was capable of working full-time in a sedentary position. Dr. Gelman, BJ's argues, is competent to opine that Ms. Duque-Gomez's symptoms have a psychological overlay because he is a medical doctor who has received continuing education in psychology and psychiatric care.<sup>24</sup>

## **IV. DISCUSSION**

The Court, in its "limited role" upon review of a decision of the Board, "is to determine whether the decision is free from legal error and

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<sup>23</sup> See *DiSabatino Bros., Inc. v. Wortman*, 453 A.2d 102, 106 (Del. 1982) ("[T]he Board was free to accept the testimony of . . . the employer's expert neurologist, over contrary opinion testimony."); *General Motors Corp. v. Veasey*, 371 A.2d 1074, 1077 (Del. 1977) ("In reviewing the sufficiency of the evidence to support the Board's factual findings, our inquiry is limited to the determination of whether there was 'substantial' evidence sufficient to support those findings.").

<sup>24</sup> *DiSabatino*, 453 A.2d at 106 ("It is settled in Delaware that an experienced practicing physician is an expert, and it is not required that he be a specialist in the particular malady at issue in order to make his testimony as an expert admissible."); see also *Clements v. Diamond State Port Corp.*, 831 A.2d 870, 877 (Del. 2003).

supported by substantial evidence.”<sup>25</sup> Absent an abuse of discretion, the Court will not substitute its own judgment for the judgment of the Board.<sup>26</sup> Where, as here, the parties present conflicting evidence to the Board, “[i]t is exclusively the board’s role to resolve conflicts in the testimony and to weigh the credibility of each witness.”<sup>27</sup>

In the instant case the Board heard from Dr. Gelman and Dr. Bakst via deposition testimony. The Board accepted Dr. Gelman’s opinion that Ms. Duque-Gomez had a “poor right foot and ankle surgical outcome with a strong psychological overlay.”<sup>28</sup> In its opinion, the Board clearly stated it found Dr. Gelman’s opinion that Ms. Duque-Gomez could work in a sedentary position “more persuasive” than Dr. Bakst’s opinion that she could not.<sup>29</sup> The Board noted that other evidence supported Dr. Gelman’s expert opinion testimony, including the subjective nature of Ms. Duque-Gomez’s pain, the 2008 normal EMG diagnostic testing, and improvements in

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<sup>25</sup> *Christiana Care Health Sys., VNA v. Taggart*, 2004 WL 692640, at \*10 (Del. Super. Ct. Mar. 18, 2004).

<sup>26</sup> *See Playtex Products v. Leonard*, 2002 WL 31814637, at \*7 (Del. Super. Ct. Aug. 22, 2002); *Christiana Care*, 2004 WL 692640, at \*10.

<sup>27</sup> *Playtex Products*, 2002 WL 31814637, at \*7.

<sup>28</sup> *Duque-Gomez v. BJ’s Wholesale Club*, Industrial Accident Board Hearing No. 1327802, at 15 (Feb. 1, 2013).

<sup>29</sup> *Id.* at 14-15.



mobility as of the 2012 exams.<sup>30</sup> With regard to Dr. Bakst’s opinion that Ms. Duque-Gomez was unable to work, the Board commented that “Dr. Bakst relied heavily on [Ms. Duque-Gomez]’s subjective complaints in rendering his opinion in regard to her ability to work,” and that Ms. Duque-Gomez herself “had credibility issues.”<sup>31</sup>

The Board is “entitled to accept the testimony of one medical expert over the views of another.”<sup>32</sup> The Delaware Supreme Court has stated that the Board does not err in accepting one expert’s opinion over the other as long as the Board “set[s] forth the factual basis for its conclusion,” and “[t]hose factual findings are supported by the record.”<sup>33</sup> Here, the Board clearly referenced the diagnostic testing results and physical exam notes upon which it based its decision to accept Dr. Gelman’s opinion that Ms.

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<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 16.

<sup>32</sup> *Standard Distrib. Co. v. Nally*, 630 A.2d 640, 646 (Del. 1993); *Sunrise Assisted Living, Inc. v. Milewski*, 2004 WL 2419141, at \*4 (Del. Super. Ct. July 16, 2004); *see San Juan v. Mountaire Farms*, 2007 WL 2759490, at \*4 (Del. Super. Ct. Sept. 18, 2007) (“While the Board has the sole authority to determine the credibility of witnesses and may accept one witness’s testimony over another’s, the Board can *only* do so where there is substantial evidence supporting both opinions.” (emphasis in original)).

<sup>33</sup> *Clements v. Diamond State Port Corp.*, 831 A.2d 870, 877 (Del. 2003) (finding the Board decision to accept one expert’s opinion over another was not supported by substantial evidence); *General Motors Corp. v. Veasey*, 371 A.2d 1074, 1077 (Del. 1977) (“The medical testimony of one doctor, while not in agreement with that of the other two testifying physicians was sufficient competent evidence in support of the permanent disability finding.”).

Duque-Gomez is capable of sedentary work. In addition to citing those medical records, the Board also referenced testimony impeaching Ms. Duque-Gomez's credibility in support of its decision to accept Dr. Gelman's assessment that her pain had a strong psychological overlay over her own testimony that pain prevented her from working in any capacity. Any "discretionary ruling of the Board will not be disturbed on appeal unless it is based on clearly unreasonable or capricious grounds."<sup>34</sup> Here, the Court is satisfied that the Board did not abuse its discretion in weighing the competing expert medical opinions with the evidence presented, and in making its determination as to persuasiveness and credibility. The Court is not persuaded by Ms. Duque-Gomez's argument that Dr. Gelman, a practicing physician and stipulated-to expert witness in this case, was unqualified to opine as to the psychological component of her post-operative pain.<sup>35</sup>

Finally, the Court does not consider Ms. Duque-Gomez's new allegations against BJ's that it negligently caused the Accident or failed to conduct a proper follow-up investigation. On appeal, the Court is limited to

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<sup>34</sup> *Christiana Care Health Sys, VNA v. Taggart*, 2004 WL 692649, at \*10 (Del. Super. Ct. Mar. 18, 2004) (quoting *Thomas v. Christiana Excavating Co.*, 1994 WL 750325, at \*4 (Del. Super. Ct. Nov. 15, 1994)).

<sup>35</sup> See n.24, *supra*.

a review of the record.<sup>36</sup> Supposing she could, Ms. Duque-Gomez did not present the Board with any evidence of BJ's alleged negligence. The issue is, therefore, considered waived and will not be reviewed by the Court.<sup>37</sup>

## V. CONCLUSION

For the forgoing reasons, the decision of the Industrial Accident Board granting BJ's Wholesale Club's April 2012 Petition for Termination of Total Disability Benefits is hereby **AFFIRMED**.

**IT IS SO ORDERED.**

/s/ Paul R. Wallace

Paul R. Wallace, Judge

Original to Prothonotary

cc: All counsel via File & Serve

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<sup>36</sup> DEL. CODE ANN. tit. 29, § 10142(d) ("The Court's review . . . shall be limited to a determination of whether the agency's decision was supported by substantial evidence on the record before the agency."); *Oceanport Indus., Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 902-03 (Del. 1994) (finding an issue first raised on appeal is not properly before the Court and is considered waived); *Kidd v. Cmty. Sys., Inc.*, 1995 WL 862129, at \*2 (Del. Super. Ct. July 5, 1995) ("It is clear that appellant must make its appeal from the Board's decision based upon the record made below. Appellant cannot introduce new evidence or argument on appellate review of the Board's decision.")(internal citations omitted).

<sup>37</sup> See *Oceanport*, 636 A.2d at 903.