

SUPERIOR COURT
OF THE
STATE OF DELAWARE

T. HENLEY GRAVES
RESIDENT JUDGE

SUSSEX COUNTY COURTHOUSE
ONE THE CIRCLE, SUITE 2
GEORGETOWN, DE 19947

October 8, 2010

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RE: *Valmont Structures v. Mode*
C.A. No. S10A-03-004 (THG)

Date Submitted: September 21, 2010

Date Decided: October 8, 2010

On Appeal from the Board's Decision to Deny Employer's
Petition to Terminate Benefits: **AFFIRMED**

Dear Counsel:

This is the Court's decision on Valmont Structures' appeal of the Industrial Accident Board's ("the Board") decision that denied Valmont Structures' Petition for Termination of Benefits. The Board's decision is affirmed.

STATEMENT OF THE CASE

A. Factual & Procedural Background

On February 1, 2006, Kenneth R. Mode, employed as a welder for Valmont Structures ("Employer"), sustained a work-related injury to his lower back. Mr. Mode received certain worker's compensation benefits as a result of this injury.

On April 27, 2009, Employer filed a Petition to Terminate Benefits ("Petition"). In support of its Petition, Employer alleged Mr. Mode was capable of returning to work. The Board held a hearing

on Employer's Petition on August 27, 2009. The Board, via a written decision mailed on February 23, 2010, found that Mr. Mode remains totally disabled. The Board also awarded Mr. Mode attorneys' fees and medical witness fees. Employer appeals that decision.

B. The Board Hearing

At the Board hearing, Dr. Andrew Gelman, Dr. Stephen Rodgers, and Dr. Ganesh R. Balu, testified via deposition. Stacie Ward and Mr. Mode testified live at the hearing.

Ms. Ward, a vocational consultant for Cascade Disability Management, Inc., testified first on behalf of Employer. Ms. Ward conducted a labor market survey in the Greenwood, Delaware, area in the months of June and July of 2007. Taking into account Mr. Mode's occupational and educational background, as well as Drs. Gelman and Rodgers' medical records for Mr. Mode, Ms. Ward identified four jobs for which she believed Mr. Mode was qualified. Specifically, Ms. Ward found Mr. Mode could work jobs relating to customer service, cashiering, and front desk security with an average weekly wage of \$424.00.

On cross-examination, Ms. Ward acknowledged that the current economic climate is very different from that of the summer of 2007, when the labor market survey had been conducted. Ms. Ward stated it was her belief that the positions advertised as "full-time" could be filled by someone who was able to work only on a part-time basis at the outset.

Dr. Gelman, a board-certified orthopedic surgeon, also testified on behalf of Employer. Dr. Gelman examined Mr. Mode on December 3, 2008. Dr. Gelman also reviewed Mr. Mode's medical records relevant to his compensable injury, including several MRI reports.

At the time Dr. Gelman examined Mr. Mode, Mr. Mode complained of lower back pain, in addition to leg pain. Mr. Mode appeared to be "uncomfortable." However, Dr. Gelman testified Mr. Mode walked with a level gait without assistance and was able to stand upright and to raise up on his

heels and toes. Although Dr. Gelman observed that Mr. Mode's spinal range of motion was restricted, Dr. Gelman concluded that nothing in the exam was "objectively abnormal."

Dr. Gelman testified he believed Mr. Mode's back pain was not the result of any acute abnormality but was, rather, due to chronic long-standing changes that predate Mr. Mode's February 2006 injury. Dr. Gelman testified it was his impression that Mr. Mode was on a medication regimen with occasional injections and that, in his estimation, it was unusual that Mr. Mode's treating physician had not prescribed physical therapy. Dr. Gelman diagnosed Mr. Mode with a "nonspecific category of failed back syndrome."

Dr. Gelman opined that Mr. Mode was capable of work as of the date of his examination. Dr. Gelman completed a Return to Work Physical Capabilities form for Mr. Mode dated January 15, 2009. That Return to Work form stated Mr. Mode could "start part time and titrate to tolerance." Dr. Gelman indicated on the Return to Work form that Mr. Mode could, during the course of an eight-hour workday, stand or walk for one to two hours, sit for one to two hours, and drive for one to two hours.

On cross-examination, Dr. Gelman said that he read Mr. Mode's MRI as showing "features of scarring at the L5-S1 level with some nerve root involvement." Although Dr. Gelman opined in direct examination that he did not believe Mr. Mode's injury to be work-related, on cross, he admitted he had not seen or heard of the existence of any medical records relating to complaints of back pain by Mr. Mode prior to the date of Mr. Mode's injury on February 1, 2006.

On re-direct examination, Dr. Gelman affirmed that, with the exception of Dr. Balu, the records from Mr. Mode's other physicians did not document bilateral lower extremity weakness.

Dr. Rodgers testified on behalf of Mr. Mode. Dr. Rodgers, a physician board-certified in occupational medicine and the subspecialty of preventive medicine, examined Mr. Mode on June 17, 2008, and July 6, 2009. Dr. Rodgers testified that the lumbar fusion surgery Mr. Mode had undergone

did not improve his back pain but, instead, probably worsened his pain. Dr. Rodgers stated that he interpreted Mr. Mode's February 4, 2009, MRI to show the S1 nerve root was trapped in scar tissue. Dr. Rodgers opined that the scar tissue essentially served to undo the intended benefits of the surgery. In fact, Dr. Rodgers testified that a July 23, 2007, MRI conducted shortly after Mr. Mode's surgery already showed some scarring. Dr. Rodgers concluded his physical examinations of Mr. Mode were consistent with the MRIs. Specifically, Dr. Rodgers testified that Mr. Mode's range of motion was significantly diminished and that this diminished range of motion was consistent with the fusion surgery. However, Dr. Rodgers testified that some of Mr. Mode's symptoms were worse than those typically experienced post-operatively. For example, Mr. Mode had increased muscle tone that would not ordinarily be expected after an initial period of convalescence.

In July of 2009, Dr. Rodgers opined that Mr. Mode could not function at a sedentary level as defined by the Department of Labor. Dr. Rodgers based this conclusion on the following: (a) Mr. Mode had not improved as a result of the back surgery; (b) Mr. Mode had an MRI that was consistent with his clinical presentation; (c) Mr. Mode was not comfortable walking or driving for long periods of time; and (d) Mr. Mode's occupational and educational history. Dr. Rodgers testified that Mr. Mode would have difficulty sitting upright due to the increased pressure placed upon his back when so situated.

On cross-examination, Dr. Rodgers admitted that he had not done an independent reading of Mr. Mode's MRIs; rather, his opinion is based upon the reading of the reviewing radiologist. Dr. Rodgers also testified he was not able to differentiate Mr. Mode's legs based upon strength and he had not noted any lack of coordination on Mr. Mode's part in his report.

Mr. Mode testified on his behalf in front of the Board. Mr. Mode explained his educational background and employment history to the Board. Mr. Mode obtained a GED after dropping out of

school after the ninth grade and his past employment has consisted solely of manual labor. Mr. Mode told the Board his back pain is now worse than it was prior to the surgery. Mr. Mode testified that he experiences pain and discomfort when sitting or standing in one position for too long. Mr. Mode also testified that he is unable to sleep for long periods of time due to the pain. Mr. Mode stated the massage therapy he had undergone had helped ease his pain to some extent. Mr. Mode also told the Board about his trip to the Division of Vocational Rehabilitation for testing where he was unable to sit still for more than seven minutes. Mr. Mode has applied for Social Security Disability benefits, though the application has been turned down, pending appeal.

Mr. Mode testified he had an incident recently where he fell down and was unable to get back up. Mr. Mode testified that he would prefer to work and that he, in fact, misses work. However, Mr. Mode testified he did not think he would be a good fit for the jobs selected by the labor market survey because he cannot sit or walk for very long.

On cross-examination, Mr. Mode testified he only met with Dr. Gelman for five minutes.

The Board members asked several questions of Mr. Mode concerning his pain medication therapy. In response to their questions, Mr. Mode testified that he sees Dr. Balu approximately once a month. Mr. Mode testified the massage therapy makes him feel better in the short term but that the pain quickly returns. Mr. Mode testified he had recently received a letter from the Division of Vocational Rehabilitation stating that Mr. Mode was a low priority and it would likely be another ninety days before the Division had further contact with Mr. Mode. Mr. Mode stated he had worn a back brace in the past, although neither of his treating physicians had recommended that he do so. However, Mr. Mode discontinued using one because he found it restricted his range of motion even further.

Dr. Balu, Mr. Mode's primary treating physician as to Mr. Mode's back injury, testified next on behalf of Mr. Mode. Dr. Balu is board-certified in pain management and physical medicine and

rehabilitation. In 2006, Mr. Mode was referred to Dr. Balu from Dr. Rastogi, the neurosurgeon who ultimately wound up operating on Mr. Mode. Dr. Balu's physical exam of Mr. Mode in April of 2006 showed thoracic spinal tenderness, para-spinal spasm, facet and intervertebral tenderness at the L4-5 and L5-S1 levels, a positive result from the straight leg test of the left leg, and minimal weakness in the left lower extremity, mainly in the ankle area. Because Mr. Mode had failed physical therapy, Dr. Balu prescribed a series of spinal injections. Mr. Mode had initial success with the spinal injections but the relief did not prove to be long-lasting. Dr. Balu saw Mr. Mode in September of 2006 and did not see him again until January of 2008, or approximately six months after Mr. Mode had undergone lumbar fusion surgery. In January of 2008, Mr. Mode continued to have low back pain. Mr. Mode reported to Dr. Balu that the surgery had not eased his pain, nor had the post-operative therapy helped. Mr. Mode had trouble sitting, standing, walking, bending, and lifting. He reported tingling, numbness and coldness in his lower left extremity. Dr. Balu found Mr. Mode's range of motion had decreased, he had facet loading tenderness, he tested positive for the straight leg raising test and Mr. Mode had weakness in his left lower extremity. Dr. Balu planned a treatment program comprised of three elements: medication, injections, and therapy. Injections were performed on a regular basis throughout 2008 and into 2009. Mr. Mode's pain continued to return after the short relief provided by the injections. Dr. Balu was seeing Mr. Mode on a monthly basis during this time. Dr. Balu continued to note that Mr. Mode had left leg pain and experienced difficulty when bending and lifting.

When Mr. Mode visited Dr. Balu in January of 2009, Mr. Mode had started seeing a chiropractor and was undergoing therapy, including massage therapy. Dr. Balu saw Mr. Mode in February and again in March of 2009. As of the March visit, Mr. Mode had been to see Dr. Rastogi for follow-up. Dr. Rastogi had suggested a spinal cord stimulator might be an option for Mr. Mode. Dr. Balu continued to see Mr. Mode on a monthly basis and continued to note a reduced range of motion and Mr. Mode's

appearance that he was in pain. The relief from the increasingly invasive injections continues to be short-lived.

Dr. Balu testified he had prescribed two pain medications for Mr. Mode: Oxycodone and Valium. Dr. Balu stated he is well aware Mr. Mode is a recovering addict and that he had not observed any signs of addiction behavior.

In Dr. Balu's opinion, Mr. Mode is unable to return to work because Dr. Balu does not believe Mr. Mode could engage in the level of activity required for even the "sedentary" jobs listed on the labor market survey.

On cross-examination, Employer inquired as to why Dr. Balu had not made notations regarding the specific degree or grade of lower extremity weakness. Dr. Balu testified he did not make a note of such because the difference was one of degree – that is, he would not change his treatment plan based on a minor difference in leg strength. Dr. Balu stated that, if he had seen a marked change in Mr. Mode's condition, then he would have looked into further testing because such a change would necessitate a reevaluation of Mr. Mode's treatment plan.

On re-direct, Dr. Balu emphasized the fact that he had been treating Mr. Mode for a substantial period of time and felt comfortable with his decision to keep Mr. Mode out of work based upon that fact, in addition to his clinical observations.

DISCUSSION

A. Standard of Review

The review of the Board's decision is confined to an examination of the record for errors of law and a determination of whether substantial evidence exists to support the Board's findings of fact. *Histed v. E.I. Du Pont de Nemours & Co.*, 621 A.2d 340, 342 (Del. 1993). The Supreme Court and this Court have emphasized the limited appellate review of an agency's findings of fact. The reviewing Court must

determine whether the administrative decision is supported by substantial evidence. *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66-67 (Del. 1965). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Oceanport Ind. v. Wilmington Stevedores*, 636 A.2d 892, 899 (Del. 1994). The appellate court does not weigh the evidence, determine questions of credibility, or make its own factual findings. *Johnson*, 312 A.2d at 66. Questions of law are reviewed *de novo*. *Delhaize America, Inc. v. Baker*, 2002 WL 31667611, at *2 (Del. Super.).

B. The Merits

A The Board's decision to deny Employer's Petition for Review was not in error because it was supported by substantial and competent evidence.

Employer argues the Board's decision is not supported by substantial evidence because the Board based its decision solely on the fact that all three testifying doctors acknowledged Mr. Mode had complaints of low back pain with radicular pain. Employer posits that this finding is based entirely on Mr. Mode's subjective complaints and, therefore, is insufficient evidence to support the Board's findings of fact and conclusions of law.

The Board held:

[Employer's] initial burden of proof is to show that [Mr. Mode] is medically employable. Dr. Gelman opined that [Mr. Mode] could work with sedentary restrictions (ten pound lifting limit, limits on sitting/standing/driving, and no crawling, stooping or kneeling), beginning on a part-time [sic] at first. Drs. Rodgers and Balu, on the other hand, both opine that Claimant is presently totally disabled from gainful employment.

The primary difference between the doctors pertains to their respective assessments of [Mr. Mode's] subjective pain. All three doctors acknowledge that [Mr. Mode] has complaints of low back pain with radicular pain. Dr. Gelman believes that [Mr. Mode] can still work in at least a part-time sedentary basis with this pain, while Dr. Rodgers and Dr. Balu both believe that [Mr. Mode's] pain is so disabling (not permitting him to engage in any prolonged sitting, standing or walking) that he is not capable of being employed. No functional capacity evaluation has been performed to attempt to more objectively quantify [Mr. Mode's] work capability. However, the fact that the selective nerve root blocks given at L5 and S1 have reportedly given substantial (albeit temporary) relief is some confirmation that the L5-S1 level is a source of [Mr. Mode's] radicular problems.

As stated, [Employer] bears the burden of proof to show, more likely than not, that [Mr. Mode] is capable of working. In the Board's estimation, [Employer] has not met this burden. The Board finds the testimony of Dr. Rodgers and Dr. Balu to be more persuasive concerning [Mr. Mode's] work capabilities. Without more support for his opinion, Dr. Gelman's testimony, at best, suggests a mere possibility that [Mr. Mode] could work, not a probability which is what [Employer] must prove. Accordingly, [Employer's] petition is denied.

Employer argues the Board improperly permitted the physician's testimony to rest upon the subjective complaints of Mr. Mode and failed to evaluate the instances where medical professionals could not document any objective signs of ongoing injury.

Employer ignores its responsibility for proving medical employability. The Board did not discount Dr. Gelman's testimony but, rather, found that Dr. Gelman's testimony, absent independent corroboration and in light of the testimony of Drs. Rodgers and Balu, did not rise to the level necessary to meet Employer's burden. The Board's rejection of Dr. Gelman's opinion as the sole basis for Employer's position was a credibility determination. "It is well-settled that issues of credibility rest solely within the Board's discretion and will not be disturbed absent a showing of unreasonable or capricious circumstances." *Hart v. Columbia Vending Serv.*, 1998 WL 281241, at *4 (Del. Super.). The Board "is free to adopt the opinion testimony of one expert over another, and that opinion, if adopted, will constitute substantial evidence for purposes of appellate review." *Bolden v. Kraft Foods*, 2005 WL 3526324, at *4 (Del.); *see also Jepsen v. University of Delaware-Newark*, 2003 WL 22139774, at 2 (Del. Super.) ("[A]s a finder of fact, the board is entitled to discount the testimony of any witness on the basis of credibility, provided it states specific, relevant reasons for so doing.').

In this case, all of the physicians were relying in great part on Mr. Mode's subjective complaints of pain. The Board acknowledged this fact. In light of the testimony and the procedural posture of the case, it chose to give more credence to Drs. Rodgers and Balu. Mr. Mode had already been found to be totally disabled. The burden was on Employer to show that he was no longer so. The Board, as fact-

finder, was in the unique position to make a credibility determination as to the doctors' testimony. In this case, the Board did not abuse its discretion in opting to give more weight to Dr. Balu, Mr. Mode's treating physician, and Dr. Rodgers than to Dr. Gelman.

B. *The Board's decision does not fail as a matter of law because the Board did take into consideration Mr. Mode's own testimony about his capabilities as related to his medical disability.*

Employer asserts the Board illegally failed to take into consideration Mr. Mode's testimony regarding his capabilities, specifically his ability to drive forty-five minutes to the Board hearing and previously for various medical evaluations. Employer implies Mr. Mode's ability to do this, with or without subsequent pain, renders him not totally disabled as a matter of law. This argument has no merit. As stated above, Employer has the burden to show that Mr. Mode is medically employable. Mr. Mode testified that, after driving, he experienced elevated pain. The Board was in the unique position to be able to view Mr. Mode during the hearing and, therefore, after his forty-five minute drive. Even assuming Mr. Mode made the trip with no increased level of pain, the fact that he could drive a certain distance does not necessitate, as a matter of law, a finding that Mr. Mode is medically employable.

CONCLUSION

Based on the foregoing, the Board's decision is affirmed.

IT IS SO ORDERED.

Very truly yours,

/s/ T. Henley Graves

oc: Prothonotary
cc: Industrial Accident Board