IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

CHERYLE HAIRSTON, Claimant-Below, Appellant, v. CHRISTIANA CARE HEALTH SERVICES, Employer-Below, Appellee.	))))))))))))	C.A. No. N09A-10-003 MMJ

Submitted: September 3, 2010
Decided: November 8, 2010

On Appeal From Decision of the Industrial Accident Board
AFFIRMED

OPINION

Gary S. Nitsche, Esquire, Michael B. Galbraith, Esquire, Weik, Nitsche & Dougherty, Wilmington, Delaware, Attorneys for Claimant-Below, Appellant

John J. Ellis, Esquire, Anthony M. Frabizzio, Esquire, Heckler & Frabizzio, Wilmington, Delaware, Attorneys for Employer-Below-Appellee

JOHNSTON, J.

Cheryle Hairston ("Claimant") has appealed the June 21, 2009 decision of the Industrial Accident Board ("Board"). The Board granted Christiana Care Health Services' ("Employer") Petition to Terminate Claimant's total disability benefits, granted Claimant's Petition to Determine Additional Compensation Due, and denied, in part, Claimant's request for reimbursement of medical expenses.

Claimant contends that the Board's decisions to terminate her total disability benefits and to deny her request for reimbursement of medical expenses constituted legal error and were not supported by substantial evidence.

FACTUAL AND PROCEDURAL CONTEXT

On April 20, 2006, Claimant was lifting a patient onto a bed when she fell, injuring her neck, back, and arm. Christiana Care acknowledged that these injuries were compensable. Claimant has received $434.68 per week, based on an average weekly wage of $652.00.

On May 11, 2009, Christiana Care filed a Petition to Terminate Claimant's compensation for total disability. On June 1, 2009, Claimant filed a Petition to Determine Additional Compensation Due, seeking recognition of her lumbar spine injury. Before her petition, Claimant only had been compensated for her cervical spine injury.

Claimant filed two additional Petitions to Determine Additional Compensation Due to recoup medical expenses. The first petition addressed the expenses for Claimant's treatment before May 23, 2008. The second petition sought the expenses for Claimant's treatment after May 23, 2008, which were denied by the April 14, 2009 Utilization Review prepared by National Medical Reviews, Inc.[1] On September 1, 2009, the Board held a consolidated hearing on all of these matters.

Claimant's Treatment

On April 28, 2006, Claimant visited Dr. Nicholas Biasotto, her family doctor, complaining of back pain and spasms. An MRI taken on May 15, 2006 revealed multiple disc bulges and protrusions in Claimant's cervical spine. Dr. Biasotto referred Claimant to Dr. Bikash Bose, a neurosurgeon.

On September 11, 2006, Claimant saw Dr. Bose, and complained of neck, back, and arm pain, and spasms in both arms. Dr. Bose treated Claimant, and referred her to Dr. Pramod Yadhati, a pain management specialist. Claimant's primary complaint to Dr. Yadhati was lumbar pain that radiated into both of her legs. On January 15, 2007, Claimant saw Dr. Ali Kalamchi, an orthopaedic surgeon. Claimant complained of leg aches to

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[1] The Delaware Health Care Advisory Panel developed a utilization review program to evaluate medical care and expenses for the prompt resolution of issues related to treatment, compliance, and practice guidelines. An employer or insurance carrier may engage in utilization review to evaluate the necessity of medical care to determine if a Claimant's expenses are compensable. 19 *Del. C.* § 2322F(j).

Dr. Kalamchi, but reported that her lumbar pain was tolerable as a result of the treatment she had received from Dr. Bose and Dr. Yadhati.

On January 25, 2007, Dr. Bose operated on Claimant, performing a four-level fusion to stabilize her cervical spine. Though Claimant saw some improvement from the surgery, a May 1, 2007 MRI revealed disc protrusion and slight herniation. At a July 2007 check-up with Dr. Bose, Claimant complained of pain radiating into her shoulder, neck, and lower back.

On November 1, 2007, a Functional Capacity Evaluation indicated that Claimant had the ability to perform sedentary work. On January 7, 2009, a second Functional Capacity Evaluation noted that Claimant was exerting sub-maximal effort.

On January 21, 2008, Dr. Peter Bandera, a specialist in physical medicine and rehabilitation, examined Claimant. Dr. Bandera diagnosed Claimant with cervical and lumbar strain, sprain, and radiculopathy, and cervical and lumbar intervertebral disc dysfunction. Claimant saw Dr. Bandera three times a week for physical therapy, which included traction, electrical stimulation, hot packs, hydrotherapy, and an adjustment program. Additionally, Dr. Bandera administered a lumbar injection.

On January 23, 2008, Claimant visited Dr. Bruce Rudin, an orthopaedic spine surgeon. Claimant complained that her neck pain had

worsened. Imaging indicated that Claimant's spine had not completely healed from surgery—a condition referred to as "nonunion." Also, the hardware used for the operation was loose. Dr. Rudin recommended that Claimant undergo a second surgery on her cervical spine.

On April 15, 2008, Dr. Rudin performed surgery to address the nonunion. After surgery, Dr. Bandera treated Claimant with conservative therapy, which included heat, electric stimulation, and medication support. On May 28, 2008, Claimant reported some improvement and that most of her neck pain had resolved.

On September 3, 2008, Dr. Rudin examined Claimant. Dr. Rudin associated her lower back pain with trochanteric bursitis, a hip condition that often is a direct consequence of a lumbar injury. Dr. Rudin administered an injection to Claimant's hip.

On September 11, 2008, Dr. Bandera put Claimant into work conditioning treatment. This included lifting weights and pushing and pulling exercises. Eventually, Dr. Bandera increased the intensity of Claimant's therapy to work hardening, designed to increase Claimant's strength even more. Claimant was not working at this time. She was still suffering from neck and back spasms and right shoulder impingement.

A November 14, 2008 MRI revealed multiple disc bulges and extrusions. Additionally, it showed that the herniation identified in the May 1, 2007 MRI had regressed into a fissure. Claimant continued her treatment with Dr. Bandera, and complained to him of neck, back, and right shoulder pain. Dr. Bandera diagnosed Claimant with disc extrusions and right shoulder impingement.

Claimant's Condition and Work Experience

Claimant, now 54 years old, testified that she spends most of her day reading and sleeping because of her pain and the side effects of her medication. She has difficulty getting dressed and otherwise preparing to leave her home. Sometimes, she cannot get out of bed. Claimant explained that she can sit for up to 90 minutes, and can drive for up to 45 minutes. She cannot walk long distances or perform physically demanding tasks, such as yard work. Claimant relies on friends for transportation, who take her to church and out to breakfast on Sundays.

Claimant completed high school and has taken some college courses. She has telephone experience in customer service. For almost 20 years, Claimant worked for DuPont in quality control. Currently, Claimant takes courses at Wilmington University.

The Hearing

Dr. Kalamchi opined that Claimant sustained a temporary strain and sprain to her lumbar spine, which did not aggravate Claimant's underlying degenerative condition. Dr. Kalamchi examined a 2003 MRI of Claimant's lumbar spine that revealed disc desiccation and arthritis. Dr. Kalamchi testified that the normal progression of her 2003 condition would result in more desiccation and bulging over the next five to ten years. He believes that the results of the May 15, 2006 MRI, the May 1, 2007 MRI, and the November 14, 2009 MRI are consistent with his forecast. Dr. Kalamchi opined that the condition of Claimant's lumbar spine was a result of her pre-existing degenerative condition, and that condition was not aggravated or accelerated by her work injury.

Dr. Kalamchi testified that the injection that Dr. Bandera administered to Claimant's lower back was unreasonable and unnecessary. Additionally, Dr. Kalamchi opined that five months of therapy after Claimant's initial surgery, as prescribed by Dr. Bandera, was excessive. Dr. Kalamchi believes that because Claimant's condition did not improve after three months, additional therapy was unnecessary and risky in light of the concern for nonunion. Further, Dr. Kalamchi testified that Claimant engaged in unnecessary therapy after her second surgery. Dr. Kalamchi asserted that,

because Claimant was not working or exercising at home, engaging Claimant in work conditioning and work hardening program was purposeless.

Dr. Kalamchi opined that Claimant has the ability to perform sedentary work, relying on the November 1, 2007 and January 7, 2009 Functional Capacity Evaluations. Dr. Kalamchi testified that Claimant exaggerated her symptoms when he examined her.

Joseph Lucey, a vocational case manager, prepared a labor market survey ("LMS") that identified seven jobs that meet the work restrictions outlined by Dr. Kalamchi. Lucey testified that he personally investigated each position, and informed each employer of Claimant's limitations. Based on Lucey's representations, the employers stated that they would give Claimant the same consideration as other applicants. The average weekly wage of the seven positions is $414. None of the positions require a high school diploma.

Dr. Bandera opined that Claimant's condition was related to her April 20, 2006 injury. He relied on the presence of disc herniations in the May 1, 2007 MRI and the November 14, 2008 MRI, which were absent in Claimant's 2003 MRI. Further, the November 14, 2008 MRI revealed a

fissure. These results, Dr. Bandera testified, are inconsistent with the normal progression of a degenerative condition.

Dr. Bandera asserted that all of his treatment was related to Claimant's work injury, and his therapy of Claimant's lumbar condition was pursuant to the Health Care Advisory Panel's Practice Guidelines ("Guidelines").[2] There were no Guidelines for cervical spine therapy, so Dr. Bandera treated Claimant's cervical condition by analogy to the lumbar Guidelines.

Dr. Rudin testified that the series of MRIs do not show a natural progression of degeneration. The herniations that were discovered through the May 1, 2007 MRI and the November 14, 2008 MRI indicated that Claimant's condition had somehow been accelerated. Dr. Rudin opined that the progression is inconsistent with the desiccation and arthritis that were present in the 2003 MRI.

Dr. Rudin explained that, generally, it is difficult to determine if there is a relationship between trochanteric bursitis and a lumbar condition. However, he believes that Claimant's lumbar condition was related, justifying his decision to administer a hip injection.

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[2] Effective May 23, 2008, the Delaware Health Care Advisory Panel adopted Health Care Practice Guidelines for health care treatment in workers' compensation. 19 *Del. C.* § 2322C(1).

Dr. Rudin testified that Claimant's lumbar condition was not a result of her cervical condition; in other words, Claimant suffered two separate injuries from the April 20, 2006 accident. Often, when there are two injuries present, he explained, the injury that is easier to treat will be addressed first. In Claimant's case, that was her cervical condition.

Dr. Rudin opined that Claimant could return to work in a sedentary capacity, agreeing with the January 7, 2009 Functional Capacity Evaluation. Dr. Rudin recommended that this initially be on a part-time basis, with gradual increases based on Claimant's tolerance.

The Board's Opinion

The Board found Dr. Kalamchi's testimony persuasive, holding that Claimant has the ability to work in a sedentary capacity. It cited Dr. Rudin's testimony and the results of the November 1, 2007 Functional Capacity Evaluation, as well. The Board noted Claimant's improvement as a result of the second surgery and her ongoing therapy. Additionally, the Board relied on Claimant's testimony as to her day-to-day activities. Particularly, the Board gave weight to Claimant's ability to attend classes at Wilmington University, go to church on Sunday, and enjoy breakfast afterwards.

The Board held that Claimant is qualified for the positions identified in the LMS. The Board found Lucey credible, accepting his testimony that

he personally reviewed the positions and confirmed that the employers would give Claimant the same consideration as other applicants. The Board determined that Claimant was qualified for all of the positions in the LMS. Therefore, the Board reduced Claimant's monthly benefits from $434.68 to $296.68 to reflect her ability to perform part-time work for an initial six-month period. After six months, Claimant's monthly benefits will be further reduced to $158.67, reflecting her ability to return to full-time work.

The Board found that Claimant met the burden of proof for her Petition to Determine Additional Compensation Due regarding her lumbar condition. The Board held that Claimant's lumbar condition is a result of the April 20, 2006 accident. The Board emphasized that Claimant complained of lower back pain throughout her treatments. Currently, doctors are considering surgery on Claimant's lumbar spine. The Board accepted Dr. Rudin's testimony that Claimant's lumbar injury was separate from her cervical condition. The Board sided with Dr. Bandera and Dr. Rudin, finding that Claimant's degenerative lumbar condition was aggravated and accelerated by the work accident. The Board relied on the series of MRIs which, in 2003, revealed desiccation and arthritis, and in 2007 and 2009, revealed herniations. The Board awarded Claimant medical witness fees and attorney's fees for her success on this claim.

The Board found that Dr. Bandera's treatment from January 22, 2008 to April 14, 2008 was unreasonable and unnecessary. The Board agreed with the results of the Utilization Review, holding that therapy was unnecessary because Claimant's mobility could not be increased and a second cervical surgery was likely. The Board cited Dr. Kalamchi's testimony that the Utilization Review was accurate.

The Board held that Dr. Bandera's work conditioning and work hardening treatment from September 11, 2008 to December 16, 2008 was unreasonable and unnecessary. The Board accepted Dr. Kalamchi's testimony that, because Claimant had the ability to work in a sedentary capacity, the best course of treatment would have been to have Claimant return to work. Further, the Board agreed with Dr. Kalamchi's opinion that work hardening is inappropriate if the patient has yet to return to work.

The Board found that Dr. Rudin's hip injection was unrelated to Claimant's work accident, and therefore, unreasonable and unnecessary. It held that, while Claimant did experience some hip discomfort, Dr. Rudin did not further examine Claimant to ascertain the source of her symptoms. Therefore, the Board deemed Dr. Rudin's opinion to be speculative, and held that the hip injection was not related to Claimant's lumbar condition and work accident.

STANDARD OF REVIEW

On appeal from the Industrial Accident Board, the Superior Court must determine if the Board's factual findings are supported by substantial evidence in the record.[3] "Substantial evidence" is less than a preponderance of the evidence but is more than a "mere scintilla."[4] It is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[5] The Court must review the record to determine if the evidence is legally adequate to support the Board's factual findings. The Court does not "weigh evidence, determine questions of credibility or make its own factual findings."[6] If the record lacks satisfactory proof in support of the Board's finding or decision, the Court may overturn the Board's decision.[7] On appeal, the Superior Court reviews legal issues *de novo*.[8]

DISCUSSION

The Board Applied the Appropriate Standard of Review in Determining the Compensability of Claimant's Medical Expenses.

Claimant argues that it is unclear what legal standard the Board applied to her petition to recover medical expenses. Prior to May 23, 2008, the Board was required to determine whether the expenses were "reasonably

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[3] *Histed v. E.I. DuPont deNemours & Co.*, 621 A.2d 340, 342 (Del. 1993).
[4] *Richardson v. Perales*, 402 U.S. 389, 401 (1971).
[5] *Histed*, 621 A.2d at 342 (citing *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981)).
[6] *Olney*, 425 A.2d at 614.
[7] *Johnson v. Chrysler Corp*., 213 A.2d 64, 66-67 (Del. 1965).
[8] *Person-Gaines v. Pepco Holdings, Inc.*, 981 A.2d 1159, 1161 (Del. 2009).

and necessarily related to an employee's work injury."[9] Effective May 23, 2008, pursuant to 19 *Del. C.* § 2322C, the Delaware Health Care Advisory Panel enacted the Health Care Practice Guidelines for the treatment of individuals receiving workers' compensation. Section 2322C(6) states, in part, that medical expenses "shall be presumed, in the absence of contrary evidence, to be reasonable and necessary if such services conform to the most current version of the Delaware health care practice guidelines." Claimant contends that because the Board failed to apply two distinct legal standards to reflect the periods of treatment before and after the May 23, 2008 statutory changes, it committed legal error.

Section 2322C(6) creates a presumption that medical expenses are reasonable and necessary if the treatment conforms to the Guidelines. The presumption will not apply if evidence shows that expenses were unreasonable and unnecessary.

Treatment from January 22, 2008 to April 14, 2008

The Board noted that Dr. Bandera, when treating Claimant's cervical condition from January 22, 2008 to April 14, 2008, relied on the Guidelines for lumbar treatment by analogy. At that time, however, the Guidelines were not in effect. The Board found that "the cervical treatment from

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[9] *Turnbull v. Purdue Farms*, 1998 WL 281201, at *2 (Del. Super.), *aff'd*, 723 A.2d 328 (Del. 1998); *see also Hernandez v. Boston Mkt., Inc.*, 878 A.2d 461 (Del. 2005).

January 22, 2008 to April 14, 2008[] was unnecessary and unreasonable."[10] It relied on the evidence that Claimant's mobility could not be improved, and that the treatments during that time were dangerous as a second cervical surgery was imminent. The Board did not refer to the section 2322C(6) presumption. Despite the Board's reference to the actual Guidelines, it applied the appropriate standard to Claimant's treatment from January 22, 2008 to April 14, 2008. The Board's "[i]nartful drafting of the opinion is not fatal."[11]

Treatment from September 11, 2008 to December 16, 2008

The Board concluded that Claimant's therapy from September 11, 2008 to December 16, 2008 was an "exception to reasonableness, necessity, and relatedness . . ..."[12] This period of time is after May 23, 2008, and accordingly, if Claimant's treatments were pursuant to the Guidelines, the section 2322C(6) presumption would apply. However, the Board found certain evidence to be contrary to the reasonableness and necessity of those treatments. Dr. Kalamchi testified that work conditioning and work hardening were unreasonable and unnecessary because Claimant had not returned to work. Because the evidence rebutted the section 2322C(6)

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[10] *Hairston v. Christiana Care Health Serv.'s*, No. N09A-10-003, at 22 (Del. I.A.B. Jun. 29, 2010).

[11] *See Chicago Bridge & Iron Co. v. Walker*, 1984 WL 483445, at *1 (Del. Super.) (citing *Petrea and Son Oil Co. v. Moore*, 442 A.2d 75 (Del. 1982)).

[12] *Id*.

presumption, the Board was required to determine whether the treatment was reasonably and necessarily related to Claimant's work injury. It held that the treatment was "unnecessary and agree[d] with Dr. Kalamchi that the work conditioning program was not effective."[13] The Board exercised its discretion in weighing the evidence and considering the conflicting expert medical testimony.

The Board acknowledged that the section 2322C(6) presumption might apply to Claimant's hip injection; however, it found evidence to the contrary.[14] The Board was dissuaded by Dr. Rudin's speculation that Claimant's lumbar condition was related to trochanteric bursitis. As a result, the presumption did not apply, having been rebutted. The Board applied the appropriate standard, finding that the hip injection was unrelated to Claimant's lumbar condition, and therefore, unreasonable and unnecessary.

The Board's Decision, that Claimant's Work Conditioning and Work Hardening was Unreasonable and Unnecessary, is Free from Legal Error.

Claimant argues that the Board committed legal error because it failed to recognize the distinction between work conditioning and work hardening for Claimant's treatments from September 11, 2008 to December 16, 2008. Claimant argues that the Guidelines distinguish between the two treatments.

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[13] *Id*. at 23.
[14] *Id*.

Therefore, she asserts, the Board erred by not referencing the Guidelines to distinguish between the two treatments and determine if the section 2322C(6) presumption applies.

Claimant misinterprets the Board's opinion and section 2322C(6). The Board held:

> Dr. Bandera made a distinction between work conditioning and work hardening, as he would follow up work conditioning with therapy for work hardening. The Board is not convinced that such a distinction can be made or that it is necessary other than to provide for more therapy. Hence, the Board finds the treatment unnecessary and agrees with Dr. Kalamchi that the work conditioning program was not effective.[15]

The Board was not convinced that any real distinction could be made with respect to Dr. Bandera's therapy. It suspected that Dr. Bandera provided Claimant with excessive therapy. The Board did not opine that, generally, there is no distinction between work hardening and work conditioning in the medical profession. In any event, it does not appear that the Board's decision was based upon any distinction, or lack of difference, between work conditioning and work hardening. Rather, the Board simply found that Dr. Bandera's treatment during this time period was unreasonable and unnecessary.

[15] *Id*.

Dr. Kalamchi testified that the work conditioning and work hardening were unreasonable and unnecessary treatments—evidence rebutting the section 2322C(6) presumption. The Board's determination that Claimant's treatment from September 11, 2008 to December 16, 2008 was unreasonable and unnecessary did not constitute legal error.

The Board's Partial Denial of Claimant's Petition to Recover Medical Expenses was Supported by Substantial Evidence.

Claimant asserts that the Board's denial of her petition to recover expenses was not supported by substantial evidence.

The Board held that Dr. Bandera's treatments from January 22, 2008 to April 14, 2008 were unreasonable and unnecessary. The Board relied upon the Utilization Review and Dr. Kalamchi's evidence that at that time, Claimant's condition could not be improved, and therapy was risky in light of the probability of a second surgery. The Board did not give credence to Dr. Bandera's testimony that the therapy was pursuant to the Guidelines.

The Board held that Dr. Bandera's work conditioning and work hardening treatments from September 11, 2008 to December 16, 2008 were unreasonable and unnecessary. Again, the Board found Dr. Kalamchi persuasive. It accepted his opinion that having Claimant return to work would have been more beneficial than work conditioning. Further, it accepted Dr. Kalamchi's opinion that work hardening was not appropriate

because Claimant had not yet returned to work. The Board found Dr. Bandera's testimony that the treatments were given according to the Guidelines to be unpersuasive.

The Board held that Claimant's hip injection was unrelated to her lumbar condition, and therefore, unreasonable and unnecessary. The Board cited Dr. Rudin's failure to conclusively connect Claimant's complaints of lower back pain to trochanteric bursitis. The Board considered Dr. Rudin's testimony to be speculative, and therefore found it to be unpersuasive.

The Court defers to the Board's "experience and specialized competence" in its findings of fact.[16] Further, the Board is free to accept one opinion, while rejecting another.[17] The Board considered conflicting medical expert testimony, and found certain opinions more persuasive. The Board's decision to deny Claimant payment of her medical expenses for these treatments was supported by substantial evidence.

Claimant's Appeal of the Board's Decision to Terminate Her Total Disability Benefits is Barred by Superior Court Civil Rule 72(c).

Claimant argues that the Board's decision to terminate her total disability benefits was not supported by substantial evidence. Employer

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[16] 29 *Del. C.* § 10142(d) (2009) ("The Court, when factual determinations are at issue, shall take due account of the experience and specialized competence of the agency and of the purposes of the basic law under which the agency has acted. The Court's review, in the absence of actual fraud, shall be limited to a determination of whether the agency's decision was supported by substantial evidence on the record before the agency.")
[17] *Standard Distrib. v. Hall*, 897 A.2d 155, 158 (Del. 2006).

contends that Claimant waived this argument by failing to include it in her Notice of Partial Appeal. Claimant's only argument on appeal was: "The ground for the partial appeal is that the denial of the claim for medical expenses was not supported by substantial competent evidence and constitutes an error of law." Claimant responds that, although she did not raise the issue in her Notice of Partial Appeal, she maintains the ability to bring the argument.

Claimant asserts that Superior Court Civil Rule 72(c) specifically addresses partial Board appeals, and only requires a Claimant to state what portions of the Board's decision she accepts. Because she did not accept the Board's decision to terminate her total disability benefits, Claimant argues that she maintains the right to challenge the issue on appeal.

Rule 72(c) provides in part:

> The notice of appeal shall specify the parties taking the appeal, shall designate the order, award, determination, or decree, or part thereof appealed from; shall state the grounds of the appeal; shall name the Court to which the appeal is taken; and shall be signed by the attorney for the appellants. In appeals from the Industrial Accident Board, where the Claimant accepts part of the award while appealing the remainder of the award, the notice of appeal must specify that portion of the award accepted.[18]

[18] Sup. Ct. Civ. R. 72(c).

Rule 72(c) requires a Claimant not only to state what portions of the award she accepts, but to state what portions of the decision she appeals and the grounds for the appeal. Claimant failed to include in her Notice of Partial Appeal the ground that the Board's decision to terminate her total disability benefits was not supported by substantial evidence. Therefore, Claimant waived her right to assert the argument on appeal.

Nevertheless, had Claimant properly raised the issue on appeal, the evidence demonstrates that the Board did not err in terminating Claimant's total disability benefits. The Board accepted the testimony from Dr. Kalamchi and Dr. Rudin and the results of the November 1, 2007 Functional Capacity Evaluation, all concluding that Claimant had the ability to work in a sedentary capacity. The Board saw improvement in Claimant's condition from her second surgery and ongoing therapy. The Board gave significant weight to Claimant's testimony that she was able to attend classes and church and to dine at a restaurant. The Board found the vocational case manager witness to be credible, and held that Claimant was qualified for the positions he identified in the labor market survey. Therefore, the Court finds that the Board's decision to deny Claimant's total disability benefits was supported by substantial evidence.

CONCLUSION

The Board applied the appropriate standard of review to Claimant's petition to recover medical expenses. The Board did not commit legal error by failing to distinguish between work conditioning and work hardening. The Board did not consider the treatment from January 22, 2008 to April 14, 2008 on the basis of the Health Care Practice Guidelines (which were not in effect), except by analogy. It properly found that Claimant was not entitled to the 19 *Del. C.* § 2322C(6) presumption for treatment from September 11, 2008 to December 16, 2008, because the presumption had been rebutted. The Board's decision to partially deny Claimant's request for medical expenses was supported by substantial evidence in the record. By failing to include it in her Notice of Partial Appeal, Claimant waived her claim that the Board's decision to terminate her total disability evidence was not supported by substantial evidence. However, had the issue been properly raised, the Board's decision was supported by substantial evidence. The Board's decisions were not legally erroneous.

THEREFORE, the Court hereby **AFFIRMS** the Board's decision in its entirety.

IT IS SO ORDERED.

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The Honorable Mary M. Johnston