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

VENESSA JEFFERSON,	)	
	)	
Employee-Appellant,	)	C.A. No.: N10A-04-016 JRJ
	)	
v.	)	
	)	
BANK OF AMERICA,	)	
	)	
Employer-Appellee.	)	

Date Submitted: September 3, 2010
Date Decided: December 17, 2010

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

OPINION

Michael D. Bednash, Esquire, Kimmel, Carter, Roman & Pelts P.A., 56 W. Main Street, Fourth Floor Plaza 273, Newark, Delaware 19701, Attorney for the Appellant.

Scott A. Simpson, Esquire, 300 Delaware Avenue, Suite 1700, P.O. Box 1630, Wilmington, Delaware 19899, Attorney for Appellee.

JURDEN, J.

INTRODUCTION

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

FACTS AND PROCEDURAL HISTORY

On February 15, 2007, Claimant slipped and fell on ice when she attempted to access a handicapped entrance at Bank of America (hereinafter "Employer"). Claimant suffered injuries related to the fall, which Employer accepted as compensable, including a right shoulder strain, low back strain, right rotator cuff injury and left thigh contusion.[1] Claimant received an award for five percent permanent impairment to both her low back and right shoulder. Pursuant to Claimant's award, she received benefits at a rate of $361.34 per week based upon an average weekly wage calculation of $542.01 per week. On September 29, 2009, Employer filed a Petition for Review of Benefits alleging Claimant was physically able to return to work.

Post-Polio Related Symptoms/Condition.

Claimant, who is forty-two years old, had polio as a child. Prior to her work injury, Claimant suffered from post-polio related symptoms, including left wrist, knee, hip, and ankle problems. Claimant has held a position in data entry with Employer from 1995 until the accident in 2007.

Claimant has had numerous medical treatments and procedures related to her post-polio condition. She was treated for thoracic spine pain in 1999, decreased movement and grip strength in her left hand, as well as visual difficulties in 2001, and bursitis of the right shoulder in

[1] Deposition Testimony of Dr. Townsend at 11, (Mar. 10, 2010) (Hereinafter "Townsend Dep.").

2002.[2] In 2004, she was treated for pain in her right arm with recurrent right shoulder tendonitis. She has a history of falls at work in 2003 and 2005, the latter fall requiring her to have a new leg brace constructed.[3] Claimant has also complained of stress related to work in 2006 and 2007.[4]

Claimant's 2007 Slip and Fall.

Dr. Kartik Swaminathan treated Claimant for injuries related to the 2007 work accident.[5] Pursuant to Dr. Swaminathan's recommendation, Claimant returned to work in September of 2007,[6] but was released by Employer because she was unable to meet the required minimum input of 10,000 figures per hour.[7] After Claimant's accident, she could only key in 7,300 figures per hour, well below the minimum standards.[8] At the request of Dr. Swaminathan, Claimant completed a functional capacity evaluation (hereinafter "FCE") to assess her physical abilities in relation to her job demands.[9] The FCE indicated that Claimant could lift up to five pounds occasionally, and that she was to limit overhead lifting and firm grasping.[10]

Dr. Feeney's Testimony.

On February 14, 2008, Claimant began treatment with a chiropractor, Dr. Sean Feeney. Dr. Feeney testified by deposition on Claimant's behalf. He stated Claimant was initially on total temporary disability from the time of the accident until June of 2007, when she returned to work on a part time basis with restrictions. On September 1, 2007, pursuant to Dr. Swaminathan's recommendation, Claimant attempted to return to work full time. Dr. Feeney

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[2] *Id.* 8-9.
[3] *Id.*
[4] *Id.* at 9-10.
[5] IAB Hr'g Tr. at 13, March 15, 2010 (hereinafter "Tr.").
[6] Appellant Jefferson Opening Brief at 2.
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.*

opined that Claimant suffered from a right shoulder sprain with contusions and adhesive capsulitis with bursitis, lumbosacral spine strain, and a bilaterial sacroiliac joint sprain and strain with mayofacial pain, all related to the February 15, 2007, work injury.[11]

Dr. Feeney treated Claimant with general spinal and extremity manipulative therapy, therapy modalities, and a rehabilitative exercise program. Dr. Feeney placed Claimant on total temporary disability status as of February 14, 2008. Dr. Feeney testified that he periodically re-evaluated claimant between February 2008, and February 2009. After treatment, Claimant felt up to 70 percent improvement in her condition. She would relapse to some degree in the absence of treatment.[12]

Dr. Feeney opined that the work accident exacerbated Claimant's post-polio condition and that as of February of 2009, Claimant had reached maximum medical improvement.[13] Dr. Feeney noted Claimant's work restrictions at five pounds maximum lifting and avoidance of repetitive lifting, twisting, turning, bending, reaching, and overhead lifting. Dr. Feeney signed a disability certificate on March 1, 2009, stating that Claimant was on total disability for an indefinite basis.

Dr. Townsend's (Employer's Expert) Testimony.

Dr. John Townsend testified on behalf of Employer. He examined Claimant in November of 2008 and July of 2009 and reviewed all pertinent medical records. Dr. Townsend found that Claimant had some diminished range of motion in the low back and tenderness over the lower back muscles. He did not find any spasm or evidence for straight leg raising pain radiating to the legs.[14] Dr. Townsend found Claimant had some diminished range of motion in

[11] Deposition Testimony Dr. Feeney at 11, (March 10, 2010) (hereinafter "Feeney Dep.").
[12] *Id.* at 16.
[13] *Id.* at 18.
[14] Townsend Dep. at 13-14.

the right shoulder as well as tenderness over the shoulder region.[15] Dr. Townsend opined that there were no objective findings that specifically related to the work accident, but Claimant's subjective low back and right shoulder pain were likely related to the accident.[16] As of November 2008, Dr. Townsend believed Claimant was capable of sedentary work if she refrained from lifting more than ten pounds and avoided walking upstairs or for a prolonged period.[17]

Dr. Townsend re-evaluated Claimant on July 31, 2009, and found Claimant's physical findings and subjective complaints were similar to those of his first examination. He opined Claimant was capable of working in a sedentary capacity.[18] Dr. Townsend opined that the chiropractic treatment Dr. Feeney provided was not necessary and that the number of treatments was well outside Delaware Guidelines because Claimant had not demonstrated functional gains within six to eight sessions.[19]

Claimant's Testimony.

Claimant testified at the Board Hearing that she started using a wheelchair the day prior to the Hearing, but had used it in the past after surgery.[20] Claimant further testified she was able to help around the house but felt very weak starting one year prior to Dr. Townsend's second examination.[21]

The parties stipulated to the admission of a Labor Market Survey documenting jobs available within the restrictions set forth by Dr. Townsend.

Board's Conclusions.

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[15] *Id.*
[16] *Id.*
[17] *Id.* at 16.
[18] *Id.* at 20-24.
[19] *Id.* at 22.
[20] Industrial Accident Board Decision at 7, April 6, 2010 (hereinafter "IAB Decision").
[21] Tr. at 34.

The Board held that Claimant was capable of sedentary work with restrictions.[22] Specifically, the Board found Dr. Townsend's testimony more persuasive than Dr. Feeney's.[23] The Board was persuaded by Dr. Townsend's opinion that Claimant's objective findings on examination were not work related and pre-existed the work injury.[24] The Board found it persuasive that Claimant took only Advil for her work related injury and that the FCE determined that Claimant was capable of sedentary work.[25] The Board was not convinced by Dr. Feeney's testimony that the work injury exacerbated her post-polio syndrome.[26] "While the Board did find Claimant mostly credible, it was also not persuasive that Claimant's wheel Chair use began the day prior to the hearing."[27] In sum, the Board accepted Dr. Townsend's opinion that Claimant was capable of sedentary work with restrictions.

The Board found Claimant suffered some wage loss as a result of her injury and awarded partial disability at the compensation rate of $86.34 per week. Additionally, the Board denied Claimant Attorney's fees because pursuant to 19 *Del. C. § 2320,* the Employer submitted a written settlement offer to Claimant, thirty days prior to the hearing "equal to or greater than the amount awarded," but the Claimant did not accept the offer.

STANDARD OF REVIEW

On appeal, this Court determines whether the agency's decision is supported by substantial evidence and is free from legal error.[28] Substantial evidence is such relevant

[22] IAB Decision at 6-7.
[23] *Id.* at 7 ("In finding that Claimant is capable of working in some capacity, the Board found Dr. Townsend's testimony more persuasive than Dr. Feeney's.").
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *General Motors v. McNemar*, 202 A.2d 803, 805 (Del. Super. 1964); *General Motors Corp. v. Freeman*, 164 A.2d 686, 688 (Del. Super. 1960).

evidence that a reasonable mind would accept as adequate to support a conclusion.[29] This Court does not act as the trier of fact, nor does it have authority to weigh the evidence, decide issues of credibility, or make factual conclusions.[30] In reviewing the record for substantial evidence, the Court must consider the record in the light most favorable to the party prevailing below.[31] The Court's review of conclusions of law is *de novo*.[32] Absent an error of law, the Board's decision will not be disturbed where there is substantial evidence to support its conclusions.[33]

PARTIES' CONTENTIONS

Claimant argues her post-polio syndrome was exacerbated by the work accident such that she is eligible for total disability. She contends that under Delaware law, a pre-existing injury does not disqualify a claim for workers' compensation, and if a work related injury aggravates a pre-existing injury, the Employer is liable. Claimant asserts there is not substantial evidence to conclude that her post-polio syndrome was not exacerbated by the work accident. Moreover, Claimant argues that there is not substantial evidence to conclude Claimant is capable of returning to work on a sedentary basis because when Claimant returned to work subsequent to her injury, she could not complete the minimum typing requirements set forth by Employer.

Employer argues that it met its burden of establishing that Claimant's incapacity was diminished such that Claimant could return to work in a sedentary capacity. Employer asserts the Board correctly accepted Dr. Townsend's testimony as more persuasive than Dr. Feeney's. Employer acknowledged that Claimant's pre-existing condition was slightly exacerbated, but contends there was substantial evidence presented to the Board indicating Claimant was capable of returning to work in a functional capacity, regardless of any exacerbation to her condition.

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[29] *Oceanport Ind. v. Wilmington Stevedores*, 636 A.2d 892, 899 (Del. Super. 1994).
[30] *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. Super. 1965).
[31] *Benson v. Phoenix Steele*, 1992 WL 354033, at *2 (Del Super. Nov. 6, 1992).
[32] *Reese v. Home Budget Center*, 619 A.2d 907 (Del. Super. 1992).
[33] *Dellachiesa v. General Motors Corp.*, 140 A.2d 137 (Del. Super. 1958).

DISCUSSION

In a total disability termination case such as this, the initial burden is on Employer to establish that Claimant is no longer totally incapacitated for the purpose of working.[34] Pursuant to *19 Del. C. §* 2347, Employer must prove by a preponderance of the evidence that Claimant's incapacity has been diminished. If the Employer satisfies this burden, Claimant must establish that she is a "displaced worker" or that she "has made reasonable efforts to secure suitable employment which have been unsuccessful because of the injury."[35] If Claimant is unable to establish she is a displaced worker or that she has made reasonable efforts to secure employment, total disability benefits will be terminated.[36] If Claimant meets this burden, the burden shifts back to the Employer to show the availability of work within the Claimant's capabilities.[37]

There is sufficient evidence in this record to support the Board's conclusion that Claimant is capable of working in a sedentary capacity. When conflicting expert opinions are each supported by substantial evidence, the Board is free to accept one opinion over the other opinion.[38] The Board found Dr. Townsend's testimony that Claimant's present injuries were not work related and pre-existed the work accident more persuasive than Dr. Feeney's contrary conclusion. Dr. Townsend opined that Claimant's objective condition was not work related and only her subjective complaints were related to the work injury. Bolstering Dr. Townsend's conclusion is the FCE which determined that Claimant was capable of working in a sedentary capacity and Dr. Swaminathan's recommendation releasing Claimant to full-time work. It is not this Court's role to find fact, and where substantial evidence supports a Board conclusion, the

[34] *Torres v. Allen Family Foods*, 672 A.2d 26, 30 (Del. 1995) (citing *Governor Bacon Health Center v. Noll*, 315 A.2d 601, 603 (Del. Super. 1974)).
[35] *Id.* (citing *Franklin Fabricators v. Irwin*, 306 A.2d 734, 737 (Del. 1973)).
[36] *Id.*
[37] *Id.*
[38] *Standard Distrib. v. Hall*, 897 A.2d 155, 158 (Del. 2006).

Court must defer to the Board's finding. The Board's reliance upon Dr. Townsend's opinion is supported by substantial evidence and free from legal error.

Dr. Feeney's conclusions seem to indicate that Claimant could have worked in a limited sedentary capacity. Dr. Feeney found Claimant could lift up to five pounds and was to avoid repetitive lifting, twisting, turning, bending, reaching and overhead lifting, limitations consistent with a sedentary work restriction. Nonetheless, Dr. Feeney certified Claimant as totally disabled. The FCE, similar to Dr. Feeney's findings, revealed that Claimant could lift up to five pounds and should limit firm grasping and overhead lifting, restrictions consistent with a sedentary position. Moreover, Dr. Feeney acknowledged that Dr. Swaminathan released Claimant back to full-time work and Dr. Swamimnathan would not have done so if he did not feel Claimant capable.[39] Also undermining Dr. Feeney's recommendation is Dr. Sweeney's opinion that the number of chiropractic treatments Claimant received was well outside Delaware guidelines.[40] Claimant herself testified that she could do household chores, only took Advil for pain related to her injuries and began using a wheelchair the day before the Board Hearing. In sum, the record reflects substantial evidence supporting the Board's finding that Claimant was not totally disabled.

Because Employer has established that Claimant is no longer totally incapacitated, to overturn the Board's determination, Claimant must show that she has made reasonable efforts to secure gainful employment which have failed. Claimant does not allege that she has made efforts to find alternative employment opportunities that would accommodate her work restrictions. However, the stipulated Labor Market Survey, which illustrates representative jobs available in the labor market, established there are eight employment opportunities within

[39] Feeney Dep. at 39-40.
[40] Townsend Dep. at 15 ("I felt that the patient had an excessive amount of treatment at United Spine Center.").

Claimant's capabilities. Because there are alternative employment opportunities suitable for Claimant and she has not established that she is a displaced worker, she is not entitled to greater compensation.

CONCLUSION

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

IT IS SO ORDEDED.

Jan R. Jurden, Judge