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

MIKE MLADENOVICH,	)	
	)	
Claimant-Appellant,	)	
	)	
v.	)	Superior Court
	)	C.A. No. N10A-05-010 JAP
CHRYSLER GROUP, L.L.C.,	)	
	)	
Employer-Appellee.	)	

Submitted: October 20, 2010
Decided: January 31, 2011

On Appeal from the Industrial Accident Board of the State of Delaware
In and For New Castle County
***REVERSED** and **REMANDED** for Further Findings*

MEMORANDUM OPINION

Appearances:

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JOHN A. PARKINS, Jr., JUDGE

Before the Court is Claimant Mike Mladenovich's appeal of the Industrial Accident Board's decision to terminate his disability benefits. Employer Chrysler Group, L.L.C., ("Chrysler"), paid total disability benefits to Claimant until January 2009 when it presented a petition to terminate to the Industrial Accident Board, (the "Board").[1] The Board found that Claimant was not entitled to any benefits because he has retired from the work force.[2] Claimant does not dispute that he is no longer entitled to total disability benefits but asserts that he is entitled to partial disability benefits because his physical restrictions have resulted in a loss of earning power and he did not retire from the work force.[3] The Court remands the matter back to the Industrial Accident Board, (the "Board"), for a determination on partial disability.

Factual and Procedural Background

Claimant is a sixty-three-year-old immigrant from Yugoslavia who worked for Chrysler for 15 years on an automobile assembly line performing heavy-duty work.[4] He received weekly wages in the amount of $1,382.98.[5] On October 23, 2006, Claimant suffered a compensable work-related injury to his right shoulder when he was performing a door fit job on the assembly line.[6] The job required

[1] Industrial Accident Board Decision on Petition to Terminate Benefits, Petition to Determine Additional Compensation Due and Petition for Disfigurement Benefits, 9 (Apr. 14, 2010) (hereinafter "Board Decision").
[2] Board Decision at 10.
[3] Claimant's Opening Brief on Appeal, 9, 12 (Aug. 16, 2010).
[4] Board Decision at 4.
[5] Board Decision at 2.
[6] Transcript of Administrative Hearing, 6, 40-41 (Nov. 13, 2010) (hereinafter "T").

extensive use of his arms and shoulders.[7] Claimant was restricted to light-duty work because he had nearly no use of his right arm after the injury.[8]

In April 2007, Claimant elected early retirement for the following reasons:

(1) he felt that he had no choice since his workers' compensation had not yet been approved;

(2) he was strongly advised by management to do so;

(3) he was told by management that he would lose his light-duty position;

(4) he was unable to perform his previous heavy-duty job;

(5) he had a wife and child to support; and

(6) he was 60 years old.[9]

However, Claimant testified that it was not his intention to leave the work force.[10] Claimant stated that he had intended to continue working at Chrysler and but for his injury and the closing of the plant he would still be there.[11] He has not found any other employment since that time.[12]

In December 2007, Claimant underwent surgery on his shoulder and, afterward, five months of physical therapy which led to some improvement.[13] He was then released by his treating physician to return to restricted, light-duty work

[7] T at 6, 40-41.
[8] Board Decision at 4.
[9] T at 29-30, 38, 42, 47-49, 57; Board Decision at 4, 10.
[10] T at 48-49.
[11] T at 49.
[12] Board Decision at 4; T at 49-50.
[13] Board Decision at 4; T at 43.

beginning in 2009.[14] Claimant testified that he has looked for work in the newspaper and online but has not been able to find anything that would not harm his shoulder.[15] He stated that he did not submit any applications due to the paucity of suitable jobs he could perform in the ongoing economic downturn.[16] During this time and up to January 20, 2009, when it filed its petition to terminate, Chrysler paid Claimant total disability benefits.[17]

At the hearing before the Board on November 13, 2009, Claimant presented expert deposition testimony from Stephen J. Rodgers, M.D., who testified that Claimant suffered from a "massive full thickness rotator cuff tear" to his right upper arm, confirmed by MRI, for which he underwent a surgical repair.[18] Dr. Rodgers stated a physical examination revealed that Claimant's shoulder sloped, that his muscle was smaller than the muscle on his left side, and that his strength and active range of motion were both diminished.[19] Dr. Rodgers opined that nothing in a surveillance video showing Claimant doing household chores and walking his dog showed that Claimant's range of motion exceeded that which Dr. Rodgers had measured during the examination.[20] Dr. Rodgers concluded that

[14] Board Decision at 9.
[15] Board Decision at 4.
[16] T at 37.
[17] Board Decision at 9.
[18] Board Decision at 2; T at 14.
[19] Board Decision at 3.
[20] Board Decision at 3.

Claimant could no longer perform the type of heavy-duty work that he did for Chrysler but that he could work a full 40-hour week with restrictions.[21]

Dr. Uday Uthaman, who is board-certified in pain management and is Claimant's treating physician, testified that Claimant was disabled through 2008, able to perform sedentary work beginning in 2009, but not able to do the type of heavy-duty work he performed on the Chrysler assembly line.[22] The restrictions Dr. Uthaman imposed on Claimant included no use of the right arm above shoulder level, no repetitive use of the shoulder joint, and no lifting with the right arm of over five pounds.[23]

Chrysler relied upon the expert deposition testimony of Elliott H. Leitman, M.D., an orthopedic surgeon, who upon examination of Claimant opined that Claimant was exaggerating his symptoms of weakness and pain.[24] Dr. Leitman further testified that Claimant was capable of working at a medium level of restriction with any lifting limited to 50 pounds.[25]

In addition, Chrysler submitted surveillance video of Claimant doing various household chores and walking his dog but using his right arm sparingly. The parties also stipulated to the admittance of Chrysler's labor market survey which

[21] Board Decision at 3-4.
[22] Board Decision at 3, 8; Deposition of Uday Uthaman, M.D., 4, 8-10 (Apr. 15, 2009) (hereinafter "Uthaman Deposition").
[23] Board Decision at 3; T at 69; Uthaman Deposition at 8-10.
[24] Deposition of Elliott H. Leitman, M.D., 4, 7-9 (hereinafter "Leitman Deposition").
[25] Leitman Deposition at 13.

demonstrated that seventeen jobs ranging from sedentary to medium-duty work were available at an average wage of $427.05 per week.[26]

On April 14, 2010, the Board granted the petition to terminate disability benefits finding that Claimant is disqualified to receive benefits because he retired and removed himself from the work force.[27] The Board further found the reason for Claimant's retirement to be partly age-related and impliedly unrelated to the work-place injury.[28] The Board did not find Claimant's testimony regarding his job search to be persuasive and stated that Claimant had not made a good faith effort to find another job.[29] However, the Board made no findings regarding Claimant's physical condition as it relates to partial disability.

Claimant has timely petitioned the Court to overturn the Board's decision to grant Chrysler's petition to terminate, and briefing is complete.

Contentions of the Parties

Claimant asserts that the Board's refusal to grant partial disability benefits was legal error because unrebutted evidence demonstrates that he has lost earning power due to his work-related injury. Claimant also argues that the Board erred when it determined that he had retired from the work force and that he was required to seek and obtain work in order to receive benefits.

[26] Board Decision at 5.
[27] Board Decision at 10.
[28] Board Decision at 10.
[29] Board Decision at 10.

Chrysler contends that the Board's decision is legally correct in terminating benefits because Claimant removed himself form the work force.

Standard of Review

The Court reviews the Board's decision to establish that there is substantial evidence to sustain the Board's factual findings and that the Board correctly applied the law.[30] Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[31] The Court will not weigh evidence or make findings of fact but merely determines whether substantial evidence exists in the record to uphold the Board's decision.[32] The Court shall not overturn the Board's findings of fact unless the evidence cannot support such findings.[33] And, when conflicting expert testimony is presented, the Board may accept the expert opinion of its choice.[34]

The Court will "consider the record in the light most favorable to the prevailing party below" and will conduct a *de novo* review of any legal questions.[35] However, "[w]here the Board in reaching its conclusions overrides or misapplies the law, or the judgment exercised is manifestly unreasonable, an appellate court

[30] *Anchor Motor Freight v. Ciabattoni*, 716 A.2d 154, 156 (Del. 1998); *Shively v. Allied Systems, Ltd.*, 2010 WL 537734, *9, Ableman, J. (Del. Super. Feb. 9, 2010).
[31] *Anchor Motor Freight*, 716 A.2d at 156; *Shively*, 2010 WL 537734 at *9.
[32] *Day & Zimmerman Sec. v. Simmons,* 965 A.2d 652, 656 (Del. 2008).
[33] *Bustos v. Castle Const. of Delaware, Inc.*, 2005 WL 2249762, *2, Johnston, J. (Del. Super. Aug. 31, 2005).
[34] *State v. Thompson*, 864 A.2d 929 (Del. 2004).
[35] *Anchor Motor Freight*, 716 A.2d at 156; *Shively*, 2010 WL 537734 at *9.

will not hesitate to reverse."[36] And, if the Board fails to make a determination on a critical issue, the Court may remand the case for further findings.[37]

Discussion

Partial Disability—The Threshold Issue

When an employer petitions to terminate or modify total disability benefits, the employer as the moving party carries the burden of proving a change in the claimant's condition—whether the disability has entirely or partially terminated.[38] Upon a petition to terminate total disability benefits, the employer also carries the burden of proving that a claimant is *not partially disabled* where evidence demonstrates "that in spite of improvement, there is a continued disability" which could affect the claimant's earning capacity.[39]

In *Waddell v. Chrysler Corp*., an employee suffered a work-related compensable injury resulting in several surgeries over a three-year period during which he received total disability benefits.[40] Upon petition by the employer, the Board in *Waddell* terminated total disability benefits.[41] The employee appellant in *Waddell* argued successfully "that the Board failed to make a necessary

[36] *Sharpe v. W.L. Gore & Associates*, 1998 WL 438796, *2, Silverman, J. (Del. Super. May 29, 1998) (quoting *Ohrt v. Home,* Del. Super., C.A. No. 96A-01-005, Cooch, J. (Aug. 9, 1996) Mem. Op. at 3).
[37] *Sharpe*, 1998 WL 438796 at *2.
[38] *Strawbridge & Clothier v. Campbell*, 492 A.2d 853, 854 (Del. 1985); *Bd. of Pub. Ed. in Wilmington v. Rimlinger*, 232 A.2d 98, 101 (Del. 1967); *DeAngelo v. Del Campo Bakery*, 1990 WL 74300, *3, Del Pesco, J. (Del. Super. May 23, 1990).
[39] *Waddell v. Chrysler Corp*., 1983 WL 413321, *3, Bifferato, J. (Del. Super. June 7, 1983) (emphasis added).
[40] *Waddell*, 1983 WL 413321 at *1.
[41] *Waddell*, 1983 WL 413321 at *1.

determination of whether or not the claimant is partially disabled [and] that the employer failed to sustain its burden of proof that claimant is no longer totally or partially disabled."[42] While the *Waddell* Board did find that the employee was not *prima facie* a displaced worker (a determination "based on the degree of impairment of earning capacity rather than physical impairment alone" along with other factors), it did not determine whether a partial disability remained—an analysis as to partial disability being distinct from an analysis as to displaced worker status.[43] Therefore, notwithstanding the Board's finding that the employee was not a displaced worker, the *Waddell* Court remanded the case to the Board for determination of partial disability.[44]

Judge Bifferato, in *Waddell* stated:

> "As a rule, partial disability has only been at issue where there was a specific petition for its determination either by the employer, usually for a change from total disability to partial disability based on improvement in the employee's condition or a return to employment . . . or by the employee, usually after obtaining post-injury employment . . . . Of course, in these cases the burden of proving the claim is on the party bringing the petition.[45]

In cases where, as here, the employer is petitioning for the termination of total disability benefits and where some evidence shows a continuing disability that "could reasonably affect the employer's earning capacity," *Waddell* requires the

[42] *Waddell*, 1983 WL 413321 at *1.
[43] *See Waddell*, 1983 WL 413321 at *1-3. The Board in its decision, here, cites case law appropriate for a "*prima facie* displaced worker" analysis. *See* Board Decision at 8. However, the issue of displaced worker status is neither discussed therein nor is it the issue before the Court.
[44] *Waddell*, 1983 WL 413321 at *2, 4.
[45] *Waddell*, 1983 WL 413321 at *3.

employer to demonstrate that any disability has completely ended.[46] Conversely, when a claimant has returned to regular employment prior to the Board hearing, the claimant must file a petition for partial disability benefits and, thus, bears the burden of demonstrating such partial disability.[47] In this case, Chrysler has filed the petition and, thus, bears the burden of showing Claimant's disability has ended.

Determination of a claimant's physical condition upon the cessation of total disability "is the threshold issue in regard to the question of partial disability."[48] Under such circumstances where the employer petitions for termination of total disability and evidence shows a continuing disability that could affect earning power, if the Board makes the determination that a claimant is no longer totally disabled, the Board is legally required to make a determination as to partial disability.[49] In other words, upon remand the Board shall "reevaluate the evidence to determine if [c]laimant is partially disabled" by making "certain factual determinations necessary to a finding that claimant is, or is not, partially disabled."[50] (No computation as to amount due is required unless the Board

[46] *Waddell*, 1983 WL 413321 at *3 (citing *Wallace v. Chaplin Cadillac-Olds, Inc.,* 433 A.2d 394, 397 (Me. Supr. 1981)); *Allen v. Megee Plumbing & Heating*, 1996 WL 453351, *3, Graves, J. (Del. Super. July 25, 1996).
[47] *DeAngelo*, 1990 WL 74300 at *2-3.
[48] *Brown v. James Julian, Inc.*, 1997 WL 27095, *1-2, Barron, J. (Del. Super. Jan. 23, 1997); *Fiorucci v. C.F. Braun & Co.*, 173 A.2d 635, 645-46 (Del. Super. 1961) (stating that the Superior Court shall look to the record for factual findings and shall not make such findings even when the Board has not done so with regard to a claimant's physical condition).
[49] *Waddell*, 1983 WL 413321 at *2-4; *Chickadel v. Delmarva Power & Light Co.*, 1992 WL 9059, *4, Barron, J. (Del. Super. Jan. 6, 1992) (finding that "[t]otal disability necessarily includes partial disability and it is not unreasonable to include within the burden of proving that a claimant is no longer totally disabled, the burden of proving that he is no longer partially disabled").
[50] *Waddell v. Chrysler Corp.*, 1985 WL 552272, *1, Bifferato, J. (Del. Super. Mar. 27, 1985) (hereinafter "*Chrysler Corp.*").

reaches a finding that partial disability continues.[51]) Such a rule of law "is consistent with the general judicial rule of construction that the Delaware Worker's Compensation Act is to be liberally construed, in reference to its intended benevolent purpose."[52]

The record in the instant matter contains substantial evidence that "in spite of improvement" Claimant remains partially disabled.[53] For example, the record indicates that Claimant's treating physician, Dr. Uthaman, has released him to light-duty work with restrictions and that Claimant's expert, Dr. Rodgers, agrees with these restrictions.[54] Dr. Uthaman further testified that these restrictions prevent Claimant from performing the same type of work that he performed while working at the Chrysler plant.[55] Even Chrysler's expert, Dr. Leitman, agreed that Claimant has some work restrictions.[56]

Despite this substantial evidence, the Board made no finding concerning Claimant's alleged continuing partial disability. Instead, it based its decision to terminate benefits solely on Claimant's retirement from the work force. And, while Chrysler argues that retirement from the work force is the threshold issue, in *Brown v. James Julian, Inc.*, Judge Barron suggests otherwise, namely, that upon

[51] *Chrysler Corp*., 1985 WL 552272 at *1.
[52] *Chickadel*, 1992 WL 9059 at *4 (citing *General Motors Corp. v. Coulbourne,* 415 A.2d 1345, 1347 (Del. 1979)).
[53] *See Waddell*, 1983 WL 413321 at *3.
[54] *See* Uthaman Deposition at 4, 8-10; Board Decision at 3; T at 69.
[55] *See* Uthaman Deposition at 8-10.
[56] *See* Leitman Deposition at 13.

termination of total disability benefits the retired "[c]laimant's physical condition . . . is the threshold issue in regard to the question of partial disability."[57]

Thus, the Board is legally required to make a determination on the issue of partial disability upon termination of Claimant's total disability benefits. Since the Board has not made such a determination, the matter must be remanded for further findings.

Retirement's Effect on Partial Disability

Retirement can disqualify an employee from receiving partial disability benefits if the employee intends to leave the work force.[58] However, since the purpose of an award of partial disability benefits is to reimburse an employee for lost earning power due to a work-related injury, a retired employee intending to stay in the work force who has lost such earning power would be entitled to partial disability benefits.[59] Obtaining subsequent employment is not required.[60] If an employee is able to demonstrate that the decision to retire was motivated by a work-related injury and such injury obstructs the employee's ability to find a comparable job and, thus, has diminished the employee's earning power, the

[57] *Brown*, 1997 WL 27095 at *1-2.
[58] *General Motors Corp. v. Willis*, 2000 WL 1611067, *2, Babiarz, J. (Del. Super. Sept. 5, 2000) (finding that a retired employee who does not intend to leave the work force can collect partial disability benefits in addition to pension benefits).
[59] *Willis*, 2000 WL 1611067 at *2-3 (citing *Chrysler Corp. v. Chambers*, 288 A.2d 450, 452 (Del. Super. 1972), *aff'd*, 299 A.2d 431 (Del. 1972)); *Sharpe*, 1998 WL 438796 at *2.
[60] *Rozek v. Chrysler, LLC.*, 2010 WL 5313229, *2, Toliver, J. (Del. Super. Dec. 7, 2010); *Waddell*, 1983 WL 413321 at *3.

employee is entitled to benefits.[61] Importantly, a decision to retire in the face of economic uncertainties or due to the financial standing of an employer is not conclusive as to an employee's intention to leave the work force.[62]

The ability to work has been a factor in previous opinions determining whether an employee had retired. For example, in *General Motors Corp. v. Willis*, in determining whether a retired employee was entitled to partial disability benefits in addition to pension benefits, the Board correctly considered whether the employee was physically capable of working at the previous job, whether the employee sought another job, whether the employee lost earning power due to the injury, and whether the employee was below the usual age for retirement.[63] And, in *Sharpe v. W.L. Gore & Associates*, this Court also required consideration of the reason for retirement, specifically, whether the decision to retire was motivated by the work-related injury.[64]

In the matter before the Court, Claimant retired from the work force in April 2007, approximately six months after his work-related injury occurred.[65] Chrysler paid total disability benefits long after Claimant's retirement. In fact, Chrysler paid total disability benefits up until January 2009 when Claimant was released by Dr. Uthaman to work a light-duty job with restrictions. So, Chrysler paid total

[61] *Sharpe*, 1998 WL 438796 at *5.
[62] *See NVF v. Wilkerson,* 2006 WL 2382799, *3, Del Pesco, J. (Del. Super. July 27, 2006).
[63] 2000 WL 1611067 at *3.
[64] 1998 WL 438796 at *5.
[65] Board Decision at 4.

disability benefits for nearly two years before presenting a petition to terminate on the premise that due to his retirement Claimant had removed himself form the work force.

Since Claimant would be entitled to partial disability benefits if his retirement were motivated by his work-place injury, the Court must consider the evidence as to the motivating factors for his retirement along with the Board's findings thereto. The evidence heard by the Board as to the Claimant's motivation included the following:

(1) Claimant felt he had no choice but to retire;

(2) his worker's compensation had not yet been approved;

(3) he had "almost not use of the arm;"

(4) he was about 60 years old at this time;

(5) he had been warned that he could lose the light-duty position he had been filling since the work-related injury occurred; and

(6) he had a wife and child to support.[66]

In response to this evidence, the Board determined that Claimant's retirement was partly motivated by his age.[67] Specifically, the Board stated that "his age was at least part of the issue at that time."[68] By stating that age was only part of the reason for his retirement, the Board tacitly conceded that Claimant's

[66] Board Decision at 4, 10.
[67] Board Decision at 10.
[68] Board Decision at 10.

retirement was also motivated by other factors. Unfortunately, the record is silent as to what the Board believed these factors to be. From the evidence, the Court can easily surmise what these other motivating factors are and that they directly relate to Claimant's work-related injury—the lack of choice, the inability to use his arm, the waiting period for workers' compensation, the fear of losing his light-duty position knowing that he could not perform his previous heavy-duty job, and the fear of losing his light-duty position knowing that his family depended on him. Out of the six motivating factors for retirement that Claimant stated in his testimony, only one, his age, was not related to the work-place injury.

Because of the Board's conclusion that other motivating factors exist and based on Claimant's adequate demonstration that his retirement was motivated by the injury, the Court finds that no substantial evidence exists to support the Board's implied finding that Claimant's retirement was not motivated by the work-place injury or a finding that Claimant's retirement was motivated by age alone.

Furthermore, the age of 60 can hardly be considered the usual age for retirement especially in a recession and, even if the other motivating factors did not exist, the Board's reliance on this one factor to establish that an employee intended to leave the work force is a reach at best. On the contrary, in *Willis*, the fact that an employee is below the usual retirement age, as is the case here, is an argument for

the receipt of partial disability benefits not the other way around.[69] Therefore, the Court finds no substantial evidence exists to support the Board's finding that Claimant's age at retirement demonstrates that he has left the work force.

In further support of its determination that Claimant has left the work force, the Board states that Claimant has not worked since his retirement in 2007.[70] However, the evidence demonstrates that Claimant was totally disabled and receiving total disability payments until 2009 when he was released to light-duty work by his treating physician. Moreover, since obtaining employment is not required in order to receive partial disability payments, the Court finds that the Board committed error in determining that Claimant has left the work force because he has not obtained another job.

The Board made no finding as to two of the considerations outlined in *Willis*, namely, whether Claimant was physically capable of working at his previous job or whether he lost earning power due to the work-related injury.[71] It did, however, find that "Claimant has not made a good faith effort to look for work and that he has not done so because he has chosen to retire and remove himself from the work force."[72] Although Claimant reviewed want ads online and in the

[69] 2000 WL 1611067 at *3.
[70] Board Decision at 10.
[71] 2000 WL 1611067 at *3.
[72] Board Decision at 10.

newspaper, the Board concluded that because Claimant had not filled out any applications for employment, he had retired.[73]

The Board relies on *Willis* for the premise that looking for work is required to obtain partial disability benefits.[74] However, the Board's requirement that Claimant submit applications for jobs that he believes he cannot perform is not based on any legal authority. The Board equates completing applications with a good faith effort to look for a job.[75] While this may have been a reasonable expectation in times past, during a recession when jobs are few and far between, it is possible that simply reading want ads can be considered a good faith effort for one who is restricted to light-duty work and is not submitting applications because of his restrictions. In fact, Claimant's restrictions appear to obstruct Claimant's ability to find a comparable job and thereby serve to bolster his argument for entitlement to partial disability benefits.[76] And, while Chrysler's labor market survey suggests that jobs are available that Claimant can perform, none of the jobs mentioned therein were comparable to the job he is no longer able to do.[77]

Therefore, the Court finds the Board's requirement that Claimant be required to submit applications for jobs he believes he cannot perform to be legal error. Accordingly, since no substantive evidence exists to support the Board's findings

[73] Board Decision at 10.
[74] Board Decision at 10.
[75] Board Decision at 10.
[76] *See Sharpe*, 1998 WL 438796 at *5.
[77] Board Decision at 5.

that Claimant's retirement was not motivated by his work-related injury or that Claimant's age at retirement shows that he left the work force, and since the Board erred in finding that Claimant had left the work force because he had no job and in finding that Claimant was required to submit applications for jobs he believes he cannot perform, the Court reverses the Board's determination and finds that Claimant has not removed himself from the work force.

The Board's decision is, therefore, ***REVERSED*** and ***REMANDED*** for proceedings in conformity herewith.

IT IS SO ORDERED.

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Judge John A. Parkins, Jr.