

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

JEFFREY DONAWAY,)
) C.A. No. 01A-07-008 JTV
 Claimant Below /)
 Appellant,)
)
 v.)
)
 GEORGE & LYNCH,)
)
 Employer Below /)
 Appellee.)

Submitted: January 13, 2003

Decided: April 30, 2003

Walt F. Schmittinger, Esq., Schmittinger & Rodriguez, Dover, Delaware. Attorney for Claimant - Below / Appellant.

Raymond W. Cobb, Esq., Wilmington, Delaware. Attorney for Employer - Below / Appellee.

*Upon Consideration of Claimant's Appeal From
The Industrial Accident Board*

AFFIRMED

VAUGHN, Resident Judge

ORDER

Donaway v. George & Lynch

C.A. No.

April 30, 2003

Upon consideration of the parties' briefs and the record of the case, it appears that:

1. The claimant, Jeffrey Donaway¹ ("claimant"), appeals from a decision of the Industrial Accident Board ("Board") which denied his petition for permanent partial disability benefits. The Board granted the claimant total disability benefits, medical expenses and attorney's fees. No appeal is taken by either side from these awards, and no further mention of them is necessary. The appeal is limited to the denial of permanent partial disability benefits.

2. The claimant was injured in a work-related accident on November 7, 1989. In the ensuing years he underwent five operations because of the injury. In the proceeding before the Board, he claimed that the injury caused a 75% loss of sexual function and a 10% loss of bladder function. The Board determined that the claimant had not met his burden of proving that he had permanent impairment to the bladder or loss of sexual function as a result of the work accident. The claimant contends that the Board's determination as to these issues is not supported by substantial evidence.

3. In support of the petition, the claimant's wife testified that prior to the claimant's operations, the parties had an active sex life. As the operations took place, however, the parties' sexual activity declined. Ms. Donaway testified that the claimant began having difficulty achieving erections and in the last years of his life he had no interest in sex. In the summer of 2000, Dr. Delbert Kwan prescribed

¹ Jeffrey Donaway died on November 21, 2000. This appeal is being pursued by Claimant's widow, Venetia Donaway, on behalf of Jeffrey Donaway's estate.

Donaway v. George & Lynch

C.A. No.

April 30, 2003

viagra. According to Ms. Donaway, that helped some but did not resolve the problem. She testified that in the last years of his life, the claimant had back and leg pain approximately 90% of the time. As to the loss of bladder function, Ms. Donaway testified that she had taken her husband to the hospital emergency room at least ten times to be catheterized. She testified that on these occasions he could not urinate at all.

4. Dr. Stephen Rodgers testified on behalf of the claimant. He examined Mr. Donaway in May 2000. He also examined the claimant's extensive medical records. Records from Johns Hopkins University Medical Center indicated that the claimant stated in 1996 that he was unable to have sexual relations with his wife. The records also included a report by Dr. Fink dated September 20, 1998 in which Dr. Fink recorded that the claimant was able to maintain an erection only at times. Dr. Rodgers testified that it was not unusual to find that the claimant had not undergone any treatment for erectile dysfunction because men are typically reluctant to discuss such a problem. The records from Johns Hopkins University also indicated that the claimant had complained of problems with urinary retention and while at Johns Hopkins in September of 1996 had to be catheterized to void two and a half times a normal specimen of urine. Dr. Rodgers testified that the September 16, 1996 event was indicative of a neurogenic bladder. The claimant stated to Dr. Rodgers that when he had a severe pain flare up, he would be unable to empty his bladder and had required catheterization possibly twelve times. Based upon the information he obtained from the claimant at the time of the examination and the medical records and reports, Dr. Rodgers was of the opinion that the

Donaway v. George & Lynch

C.A. No.

April 30, 2003

claimant suffered from a 75% loss of sexual function and 10% permanent impairment to the bladder, both caused by the 1989 work-related injury. He testified in detail concerning his use of the American Medical Association Guide (“AMA Guide”) to the Evaluation of Permanent Impairment, including the classes of impairments discussed in the Guide, in arriving at his opinions. In light of the claimant’s extensive surgical history, Dr. Rodgers found Mr. Donaway’s reported sexual impotence to be quite believable and saw no need to put him through any testing. Dr. Rodgers also testified that there were no other risk factors present that would account for the loss of sexual function and the bladder problems.

5. The claimant underwent a second documented catheterization in September of 2000, about two months before his death.

6. Dr. Irvin Hirsch, a urologist, testified on behalf of the employer. He examined the claimant in June of 2000. In his interview with the claimant, Mr. Donaway reported that the onset of his sexual dysfunction occurred in approximately 1997. He described his sexual dysfunction as severe and stated that he was unable to achieve and maintain erections at all. In other words, he reported, in substance, that he had no sexual function at all. Dr. Hirsch believed that there were risk factors present apart from the claimant’s surgical procedures which might account for the sexual problem, such as a vascular factor. He suggested that the claimant submit to some routine tests. According to the doctor, routine testing could help sort out causes, such as vascular versus neurologic, or physical versus psychological. The claimant, however, refused all testing. Dr. Hirsch’s conclusion was that there was no objective basis upon which one could conclude that the

Donaway v. George & Lynch

C.A. No.

April 30, 2003

claimant suffered from either sexual dysfunction or a bladder ailment, or, if so, the cause. He also expressed the opinion that one could not draw a conclusion as to whether the need for the catheterizations was caused by the claimant's work-related injury and the surgical procedures which followed without an objective test, such as a urodynamic study or systems metrogram.

7. The scope of review for appeal of a Board decision is limited to examining the record for errors of law and determining whether substantial evidence is present on the record to support the Board's findings of fact and conclusions of law.² "Substantial evidence" is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."³ On appeal, the court does not "weigh the evidence, determine questions of credibility, or make its own factual findings."⁴ The court is simply reviewing the case to determine if the evidence is legally adequate to support the agency's factual findings.⁵ Absent an error of law, the standard of review on appeal is abuse of discretion.⁶ An abuse of discretion arises only where the Board's decision has "exceeded the bounds of reason in view

² *Robinson v. Metal Masters, Inc.*, 2000 Del. Super. LEXIS 264 (Del. Super. 2000); *see Histed v. E.I. DuPont de Nemours & Co.*, 621 A.2d 340, 342 (Del. 1993); *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965).

³ *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981); *Consolo v. Federal Maritime Commission*, 383 U.S. 607, 620 (1966).

⁴ 213 A.2d at 66.

⁵ *ILC of Dover, Inc. v. Kelley*, 1999 Del. Super. LEXIS 573, at *3 (Del. Super. 1999).

⁶ *Digiacommo v. Board of Public Education*, 507 A.2d 542, 546 (Del. 1986).

Donaway v. George & Lynch

C.A. No.

April 30, 2003

of the circumstances.”⁷

8. The Board concluded that the claimant failed to establish by a preponderance of the evidence that he suffered from a bladder impairment or sexual function impairment that was caused by his work accident. It’s findings of fact and conclusions of law are set forth in full as follows:

The Board finds Claimant has not proven by a preponderance of the evidence that he has permanent impairment to the bladder or loss of sexual function as a result of the work accident. In support of his opinion Claimant offered the testimony of Dr. Rodgers. It is Dr. Rodgers’ opinion that Claimant has 10% permanent impairment to the bladder and 75% loss of sexual function as a result of his work injury and subsequent treatment for that injury. The Board does not find Dr. Rodgers’ opinion to be persuasive.

Dr. Rodgers testified that his opinion was based on the medical records and Claimant’s history. The only medical document indicating any problems Claimant had with his bladder is the September 1996 records (sic) from Johns Hopkins. According to that record, Claimant reported problems with urinary retention that required catheterization and he was catheterized at Johns Hopkins during that visit. This occurred almost four years before Dr. Rodgers’ exam. Although Claimant related a history of at least eleven other catheterizations there were no medical records supporting this history. In addition, there had been no testing of the bladder. In fact, there was no mention in any of the medical records dated prior to Dr.

⁷ *Floundiotis v. State*, 726 A.2d 1196, 1202 (Del. 1999); *Lilly v. State*, 649 A.2d 1055, 1059 (Del. 1994).

Donaway v. George & Lynch

C.A. No.

April 30, 2003

Rodgers' exam that Claimant was being treated for a bladder problem or that he had been diagnosed with a bladder condition.

Similarly, the medical records dated prior to Dr. Rodgers' exam lack any mention of treatment or diagnosis for loss of sexual function. Dr. Rodgers' relied solely on Claimant's history in assessing loss of sexual function. A medical expert's opinion of causality may be rejected by the trier of fact when that opinion is based in large part upon the patient's recital of subjective complaints and the trier of facts (sic) finds the underlying facts to be different. *Breeding v. Contractors-One-Inc.*, Del. Supr., 549 A.2d 1102, 1104 (1988). The Board rejects Dr. Rodgers' opinion regarding loss of sexual function because it is based solely on Claimant's history and the Board finds Claimant's history to be unreliable based on the inconsistent histories related to the various medical providers.

The September 1996 John (sic) Hopkins' records indicate Claimant reported that he had been unable to have sexual relations with his wife. In 1998, Claimant told Dr. Fink that he was only able to maintain an erection at times. In May 2000, he told Dr. Rodgers that he could achieve a partial erection at times and at other times no erection at all. With the partial erection he sometimes ejaculated and other times he did not. And in June 2000, he told Dr. Hirsch that he was unable to achieve and maintain an erection in all sexual contacts. In addition, Ms. Donaway testified that Claimant could not achieve erections most of the time because of his back pain and he became disinterested in sex in the last few years. In light of the inconsistent histories, the Board has significant

Donaway v. George & Lynch

C.A. No.

April 30, 2003

reservations about the validity of Dr. Rodgers' opinion.

Based on the foregoing, the Board finds Claimant has not shown by a preponderance of the evidence that he has 10% permanent impairment to the bladder and 75% loss of sexual function as a result of his work accident.

9. The claimant contends that the Board made inaccurate findings of fact which are not consistent with the factual record; that the Board ignored factual evidence; that there was not only one documented catheterization in the medical records, there were two; and that there is no evidence contradicting the testimony of Ms. Donaway and the history given by Mr. Donaway that there were numerous catheterizations. Relying upon *Lemmon v. Northwood Construction*,⁸ he contends that where there is no dispute as to the facts alleged by a witness, the witness' credibility is not called in to question and the Board cannot deny the existence of those facts. Under this principle, he contends, the Board should have accepted the testimony of Ms. Donaway and the history given by Mr. Donaway that there were multiple catheterizations. He further contends that the Board's finding that "there was no mention in any of the medical records dated prior to Dr. Rodgers' exam that Claimant was being treated for a bladder problem or that he had been diagnosed with a bladder condition" is inconsistent with the medical records which document a catheterization at Johns Hopkins in 1996. The claimant also contends that the Board's finding of inconsistency in his accounts of sexual problems is an inaccurate finding; that his accounts are consistent in describing significant sexual difficulty;

⁸ 690 A.2d 912 (Del. 1996).

Donaway v. George & Lynch

C.A. No.

April 30, 2003

that they differ only in descriptions of the severity of the problem; and that all of his accounts fall within one of the classes of impairment set forth in the AMA Guide. He also contends that it should not be surprising that the extent of his sexual impairment would differ from time to time as his pain level worsened or improved. The claimant also contends that no significance should be accorded his initial refusal to submit to testing by Dr. Hirsch because shortly thereafter he agreed to undergo testing, but the employer never followed up. It would be unfairly prejudicial, he contends, to hold the lack of testing against him simply because the employer refused to follow up on testing. This is especially so, he contends, because the AMA Guide does not require testing in order to diagnose and rate impairment to sexual function.

10. After considering the claimant's contentions, I have concluded that there is substantial evidence to support the Board's decisions. The Board's decision makes it clear that the Board was aware that there were actually two documented catheterizations. Its reference to one was contained in its comments regarding Dr. Rodgers' opinion. At the time of Dr. Rodgers' examination there had been only one documented catheterization; the second occurred later. In addition, the Board's comment that "there was no mention in any of the medical records dated prior to Dr. Rodgers' exam that claimant was being treated for a bladder problem or that he had been diagnosed with a bladder condition" must be read in context. I find that this choice of words was not meant to ignore the documented catheterization which occurred in 1996; but rather to express the Board's view that two incidents, occurring four years apart, do not establish a diagnosed, treated bladder condition.

Donaway v. George & Lynch

C.A. No.

April 30, 2003

11. The *Lemmon* case is unavailing to the claimant in this case. There, the Delaware Supreme Court held that the Board may not reject uncontradicted testimony based on innuendos of possible intoxication unrelated to the issues involved in the case. The apparent absence of any medical documentation for most of the multiple catheterizations which Mr. Donaway and his wife claimed he underwent, however, is a factor which the Board could appropriately take into account in this case in assessing their credibility. Where, as here, there is some reason to question a witness' testimony, the Board is not obligated to accept such testimony as true simply because it is not directly contradicted by another witness. The fact that the claimant had undergone so little verifiable treatment for any bladder problem is adequate to support the Board's conclusion that the claimant failed to meet his burden of proving that his injury caused a permanent impairment of his bladder.

12. While the claimant's varying accounts of his sexual dysfunction do permit an inference which harmonizes and explains the differences in those accounts as claimant contends, they also permit the inference drawn by the Board that the accounts are inconsistent and, therefore, unreliable. And while all of the claimant's descriptions of the problem may fall into one of the impairment classifications in the AMA Guide, his descriptions of his condition do not establish causation. The Board's rejection of Dr. Rodgers' opinion on that issue is supported by substantial evidence. Its determination that the complaints upon which he relied were inconsistent and, therefore, unreliable, undermines Dr. Rodgers' opinion. There was an absence of any actual diagnosis or treatment of a sexual disorder from

Donaway v. George & Lynch

C.A. No.

April 30, 2003

any treating physician prior to the time Dr. Rodgers formed his opinion. And although not expressly relied upon by the Board in its findings, the evidence includes the testimony of Dr. Hirsch, a urologist, that there were other risk factors in the claimant's case which may account for sexual dysfunction. Since the Board made no findings of fact regarding Dr. Hirsch's testimony, I make no findings regarding his testimony. Dr. Hirsch's testimony is mentioned only because, along with other evidence mentioned, it does support the Board's conclusion that the claimant failed to meet his burden of proof.⁹

13. The Board's decision is ***affirmed***.

IT IS SO ORDERED.

Resident Judge

oc: Prothonotary
cc: Order Distribution
File

⁹ The claimant contends that it would be unfairly prejudicial to hold the failure to perform testing against him, since he volunteered to undergo testing shortly after his appointment with Dr. Hirsch. Nothing in the Board's decision suggests that the Board ruled against him because he refused testing on the occasion he was with Dr. Hirsch.