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Re: Carey v. H & H Maintenance, Inc.,
C.A. No. 00A-09-003

DATE SUBMITTED: April 11, 2001

Dear Counsel:

Pending before me is an appeal by Durand Carey ("Appellant") from a decision of the Industrial Accident Board (the "Board") in favor of H&H Maintenance, Inc. ("Appellee"). The Board concluded that Appellant is no longer totally disabled as a result of an accident in 1993 and terminated his total disability benefits. This is my decision on Appellant's appeal.

BACKGROUND

Appellant was injured while working for Appellee in 1993. He fell off of a "chiller" in a poultry plant, injuring his head, neck, and arm. Appellant was paid total disability benefits for a period of time and then returned to work. Appellant's

complaints about neck pain and subsequent surgery for it in 1999 led to an agreement between Appellant and Appellee for total disability benefits. Appellee filed a petition to terminate Appellant's total disability benefits on June 12, 2000. The Board held a hearing on August 10, 2000. The Appellant, two doctors, and a vocational consultant testified at the hearing. The Board ruled on August 23, 2000, that Appellant was not totally disabled, that he was not a displaced worker, and that he had not performed an adequate job search. The Board then terminated Appellant's total disability benefits as of June 12, 2000.

ISSUES

The Appellant raised five issues on appeal.

1) **Whether the Board's reliance upon Dr. Townsend's deposition testimony instead of Dr. Shuey's deposition testimony is the product of a rational and documented thought process and supported by substantial evidence?**
2) **Whether Appellant is totally disabled because his doctor told him not to work?**
3) **Whether the Board should have given Appellant an opportunity to conduct a reasonable job search before it terminated his total disability benefits?**
4) **Whether the Board erred in finding that there was no objective evidence of a brain injury?**

5) Whether the Board erred in stating that Appellant should bear the cost of testing to carry his burden of proof?

STANDARD OF REVIEW

The Supreme Court and this Court repeatedly have emphasized the limited appellate review of the factual findings of an administrative agency. The function of the Superior Court on appeal from a decision of the Industrial Accident Board is to determine whether the agency's decision is supported by substantial evidence and whether the agency made any errors of law. *General Motors v. McNemar,* Del. Supr., 202 A.2d 803, 805 (1964); *General Motors v. Freeman,* Del. Supr., 164 A.2d 686 A.2d 688 (1960). Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Oceanport Ind. v. Wilmington Stevedores*, Del. Supr., 636 A.2d 892, 899 (1994). The appellate court does not weigh the evidence, determine questions of credibility, or make its own factual findings. *Johnson v. Chrysler Corp.,* Del. Supr., 213 A.2d 64, 66 (1965). It merely determines whether the evidence is legally adequate to support the agency's findings.

I. Whether the Board's reliance upon Dr. Townsend's deposition testimony instead of Dr. Shuey's deposition testimony is the product of a rational and documented thought process and supported by substantial evidence?

Two doctors testified by deposition at the hearing before the Board. John Townsend, a neurologist, testified on behalf of Appellee. Dr. Townsend reviewed Appellant's medical records and examined him on November 20, 1997, and March 30, 2000. Dr. Townsend concluded that Appellant can work with restrictions.

Henry Shuey, a neurosurgeon, testified on behalf of Appellant. Dr. Shuey examined Appellant in 1997 and 1999 for complaints about pain in his neck and arm. Dr. Shuey observed that Appellant demonstrated a slowness of thought and action. Dr. Shuey also observed that Appellant's MRI test done in 1999 showed marked withering of the brain. Dr. Shuey recommended testing to document the extent of Appellant's neurological dysfunction. However, Dr. Shuey did not believe that this testing was necessary in order to provide medical treatment to Appellant. Dr. Shuey testified that, based on Appellant's arm problem and brain dysfunction, Appellant was unable to work. Dr. Shuey also testified that, based solely on Appellant's arm problem, Appellant could work with restrictions.

Dr. Townsend disagreed with Dr. Shuey's finding of brain withering.

The two doctors offered conflicting testimony about the nature and extent of Appellant's injuries. The Board concluded that Appellant is no longer totally disabled by the injuries that he sustained in 1993 and that he is able to work. In reaching this decision, the Board relied upon Dr. Townsend's testimony instead of Dr. Shuey's testimony. Appellant argues that the Board erred because its ruling implies that Dr. Townsend reviewed the same evidence that Dr. Shuey reviewed. Appellant states that this implication is incorrect because Dr. Townsend did not review the MRI test that Dr. Shuey reviewed. I believe that Appellant has misinterpreted the Board's ruling. The applicable section of the Board's ruling is excerpted below:

Dr. Shuey, however, performed no cognitive testing of Claimant and, from an objective standpoint, refers only to brain "withering," on the MRI, which Dr. Townsend did not find.

Appellant read this section and concluded that it implied that Dr. Townsend reviewed the MRI and found that it did not show brain "withering." I disagree with Appellant's conclusion. I believe that it only means that Dr. Townsend disagreed with Dr. Shuey's finding of brain "withering." Dr. Townsend made it very clear in his testimony to the Board that he did not review the MRI. Therefore, it seems very unlikely that the Board would have meant to say that Dr. Townsend did review it.

The general rule that a court defers to the Board's credibility rulings falls when the testimony is given by deposition because the rationale behind that general rule fails. *Boulden v. Delmarva Power and Light Co.,* Del. Super., C.A. No. 94A-02-009, Alford, J. (Oct. 31, 1994) Op. & ORDER at 7. The Board is not in a better position to assess the demeanor of witnesses or to determine the weight and credibility of the witnesses' testimony. *Id.* In *Lindsay v. Chrysler Corp.,* Del. Super., C.A. No. 94A-04-005, Barron, J. (Dec. 7, 1994) Mem. Op. at 7, the Court found the Board's decision resting solely on the persuasiveness of deposition testimony and not making specific findings is an insufficient foundation for appellate review. *Id.* In a case where there is a substantial amount of medical evidence and the experts disagree, the need for clearly articulated findings is crucial, as it is the Board's function to resolve conflicts in medical testimony. *Id.* However, the Board does not need to repeat facts in its 'Findings' when the testimony is explained in another section of the decision and the Board's reasoning is explained with the appropriate

details. *Justison v. Home Health Corp.,* Del. Super., C.A. No. 98A-08-008, Goldstein, J. (May 19, 1999) ORDER at 4.

The Board articulated two very clear reasons for relying upon Dr. Townsend's testimony instead of Dr. Shuey's testimony. One, Dr. Shuey did not perform any testing to support his conclusions. Dr. Shuey concluded that Appellant was totally disabled by, in part, a brain injury. However, Dr. Shuey did not conduct any cognitive testing to determine the severity of the brain injury. The Board obviously viewed this as a serious deficiency in Dr. Shuey's testimony. Two, Dr. Shuey relied on information in reaching his conclusions that the Board did not accept. Dr. Shuey relied, in part, on Appellant's presentation, which in Dr. Shuey's view suggested slowness of thought and movement. Dr. Townsend examined Appellant and found that he was able to communicate without difficulty. Shelli Palmer, a vocational consultant, observed and listened to Appellant testify at the hearing. She then testified that Appellant was still able to do eight of the nine jobs that she had identified as being suitable for him. The Board also observed and listened to Appellant at the hearing and did not find the problems that Dr. Shuey found. It was only Dr. Shuey who thought that Appellant's problems in speech and motion were so poor that it prevented Appellant from working. The Board, Dr. Townsend and Ms. Palmer all felt otherwise.

There are other reasons as well for favoring Dr. Townsend's testimony over Dr. Shuey's testimony. Dr. Townsend reviewed all of the medical records about Appellant's head injury and the treatment that he received for it. Dr. Shuey did not

review these records, leaving him less informed than Dr. Townsend. I believe that Appellant's work history also has to be taken into consideration. Appellant was out of work for two and one-half months following the accident in 1993. He then returned to work for Appellee. Appellant worked for Appellee and two other employers until 1997. He did the same kind of work without restrictions that he had done before the accident. Appellant was injured in 1997 while working for an employer other than Appellee. He was out of work for a week and then was terminated because he did not return to work. It is, quite frankly, hard to reconcile Dr. Shuey's finding that Appellant has a disabling brain injury with Appellant's work history. Moreover, the MRI was but one of many pieces of evidence presented to the Board. It was not the only test done with regard to Appellant's head injury. A CT Scan of Appellant's head was done in 1996. It was considered to be "normal." Once again, this is hard to reconcile this with Dr. Shuey's conclusions.

I am satisfied that the Board adequately explained why it relied on Dr. Townsend's testimony instead of Dr. Shuey's testimony, and that the Board's explanation makes sense. I am also satisfied that there is substantial evidence in the record to support the Board's reliance on Dr. Townsend's testimony.

II. Whether Appellant is totally disabled because his doctor told him not to work?

Appellant argues that he is totally disabled, at least for some time and purpose, because Dr. Shuey told him not to work. In support of this argument, Appellant cites the holding in *Gilliard-Belfast v. Wendy's.* Del. Supr., 754 A.2d 251

(2000). In this case, the Delaware Supreme Court held that "a person who can only resume some form of employment by disobeying the orders of his or her treating physician is totally disabled, at least temporarily, regardless of his or her capabilities." The Board ruled that *Gilliard-Belfast* is inapplicable because it did not believe that Appellant's cognitive problems were related to the accident in 1993. In other words, the Board found that Dr. Shuey had told Appellant not to work for reasons unrelated to his accident in 1993. This distinction is correct and it does make *Gilliard-Belfast* inapplicable to this case. Dr. Shuey testified that, based solely on Appellant's arm problem, Appellant could work with restrictions. Therefore, it had to be Appellant's cognitive problems that were keeping him from working. The Board has never determined that Appellant's cognitive problems were related to the accident in 1993. In *Gilliard-Belfast*, the injured worker had been told by her doctor not to work because of medical problems that the Board had determined were related to the worker's accident. This distinction makes *Gilliard-Belfast* inapplicable to Appellant's case.

III. Whether the Board should have given Appellant an opportunity to conduct a reasonable job search before it terminated his total disability benefits?

The Board concluded that Appellant was not totally disabled, and that he is not a displaced worker. After reaching this conclusion, the Board did not then give Appellant an opportunity to conduct a reasonable job search before it terminated his benefits. Appellant argues that he must be given an opportunity to conduct a

reasonable job search before his disability benefits can be terminated because Dr. Shuey had told him not to work.

This would require, in cases like this, a two step process before a worker's total disability benefits could be terminated. The Board would have to first determine that the worker was not totally disabled. The worker would then have to be given a period of time to conduct a job search. The Board would then have to conduct a second hearing to determine if the worker's job search was unreasonable before it could terminate the worker's total disability benefits. The Delaware Supreme Court has stated that *Gilliard-Belfast* does not mandate such a sweeping change. *Visnovsky v. Wade Insulation,* Del. Supr., No. 457, 2000, Berger, J. (Jun. 1, 2001).

This ground of appeal fails.

IV. Whether the Board erred in finding that there was no objective evidence of a brain injury?

Appellant argues that the Board erred when it found, in Appellant's words, that there was no objective evidence of a brain injury. This argument is based on the MRI done in 1999 that, in Dr. Shuey's opinion, shows brain "withering." Appellant has again misinterpreted the Board's findings and ruling. It is a more fair and accurate reading of the Board's decision to say that the Board felt that Dr. Shuey did not sufficiently explain the nature and extent of the brain injury. This failing on Dr. Shuey's part prevented the Board from finding that the brain injury

was related to the accident in 1993 and that it prevented Appellant from working. The Board did not ignore the MRI or Dr. Shuey's testimony. It was just not persuaded by them.

V. Whether the Board erred in stating that Appellant should bear the cost of testing to carry his burden of proof?

In its decision, the Board stated that Appellant should have done testing to determine the extent of his cognitive dysfunction. Appellant argues that the Appellee or the Board should pay for this testing. Appellant's rationale is that because Appellee initially has the burden to prove that Appellant is totally disabled, then it should pay for testing that might bear on this issue. I disagree with Appellant's rationale for this. Appellee satisfied its burden of proving that Appellant is not totally disabled. The burden then shifted to Appellant to prove that he is *prima facie* dispalced. *Turnbull v. Perdue Farms, Inc.,* Del Super., C.A. No. 96A-07-002, Lee, J. (March 26, 1997) Mem. Op. at 13. Appellant relied on a brain injury to support his argument that he was incapable of working. It was Appellant's burden to prove that he was unemployable due to a brain injury and that the brain injury is casually related to the accident in 1993. If cognitive testing would establish a brain injury and the severity of it, then it is only logical that Appellant should have to pay for it.

CONCLUSION

I affirm the Board's decision for the reasons set forth herein.

IT IS SO ORDERED.

Very truly yours,

E. Scott Bradley

cc: Prothonotary's Office
xc: Industrial Accident Board