

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

MARGARET BONEY-NEARHOS,)
) C.A. No. 00A-07-005 - JTV
Claimant Below-)
Appellant,)
)
5.)
)
SOUTHLAND CORP.,)
)
Employer Below-)
Appellee.)

Submitted: April 19, 2001
Decided: July 31, 2001

Walt F. Schmittinger, Esq., Dover, Delaware. Attorney for Appellant.

Robert Ralston, Esq., Wilmington, Delaware. Attorney for Appellee.

*Upon Consideration of Appeal From Decision
of Industrial Accident Board*
AFFIRMED

VAUGHN, Resident Judge

ORDER

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

1. Margaret Boney-Nearhos appeals from a decision of the Industrial Accident Board ("IAB") denying her petition to commute her worker's compensation benefits. She was injured in

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a work-related accident in 1982 while working at one of Southland Corporation's 7-11's. She was awarded total disability benefits which she has been receiving ever since, except for a brief period when she worked at Kent General Hospital. The IAB concluded that the petitioner had not met her burden for commutation of her benefits and denied her petition.

2. The claimant presented extensive testimony in support of her petition. What appears here is just a summary. The work-related accident she experienced at 7-11 was a back injury which has required extensive treatment including four surgeries. She testified that the back condition causes her severe, daily pain. She had a prior respiratory problem. She testified that the stress of litigation over her workers' compensation benefits worsens her back pain and her respiratory problems. Since 1990 she has had cervical spine surgery as well as a tracheotomy procedure. She attributes her worsened respiratory problem and the need for the tracheotomy to stress from her workers' compensation litigation. Ms. Boney-Nearhos has also suffered psychiatric problems and has developed depression and feelings of worthlessness. She takes many medications. She testified that she wants to have her benefits commuted because she wants to get on with her life and wants to avoid the constant worry about whether the insurance company will try to take away her checks. She testified that her intent is to put the money in Federal National Mortgage bonds which yield seven and one-half to eight percent.

3. Dr. Rowe testified that the claimant was not going to get any better, and that all medical care had been exhausted except for symptomatic treatment of flare-ups. Dr. Goodill, a pulmonologist, testified that stress associated with the workers' compensation litigation has aggravated her respiratory problems, and thought that commutation would be beneficial. He further testified that if her respiratory issues did not resolve themselves, he wasn't sure she would live much longer. Dr. Zingaro, a clinical psychologist, diagnosed the claimant as having major depression. He also testified that stress from the workers' compensation litigation worsened her depression, and that her ongoing medical problems, including the stress, limit any ability to improve her mental health.

4. In its decision denying the claimant's petition, the IAB made the following pertinent

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findings and conclusions. It was not persuaded that the stress of litigation was a significant factor aggravating the claimant's psychiatric or physical condition. It noted that the claimant had apparently never gone through a full hearing on her benefits since the injury occurred in 1982. The record does not contain the dates and number of times that the employer had started efforts to review her disability. The IAB concluded that there was insufficient evidence for it to discern any pattern in efforts to terminate the claimant's benefits, and stated that it was not persuaded that the threat of litigation had surfaced enough to warrant commutation. The IAB further concluded that the claimant's pain and stress caused by pain would continue even if her benefits were commuted. The IAB further concluded that the claimant had not demonstrated financial hardship. Her husband is employed with a salary of \$35,000 per year. She has health insurance coverage through his employer. The claimant uses her weekly compensation benefits primarily to purchase her medications. Finally, the IAB questioned the reliability of using actuarial tables to determine her life expectancy in light of Dr. Goodill's testimony, and noted that an attorneys fee would have to be paid from any commutation. In short, the IAB concluded that commutation would not be in her best interest.

5. Ms. Boney-Nearhos argues that she established that she has permanent total disability and that there is no evidence which would permit the IAB to question that condition; that the IAB placed undue and incorrect reliance on the case of *Phoenix Steel Corp. v. Brinzo*;¹ that the IAB's decision is inconsistent with a number of other decisions which are different from *Brinzo* and similar to Ms. Boney-Nearhos' case;² that the evidence in favor of commutation is so convincing that it was error for the IAB to deny the petition; that the IAB improperly questioned the economic benefit of

¹ Del. Super., 389 A.2d 269 (1978).

² *O'Day v. Healy-DiSabatino*, Del. Super., C.A. No. 86A-MR-4, Steele, J. (Sept. 20, 1988) (Mem. Op.); *Blackiston v. Happy Harry, Inc.*, Del. Super., C.A. No. 91A-05-11, Toliver, J. (Oct. 21, 1992); *Chambers v. State of Delaware*, IAB Hearing No. 578712 (Nov. 9, 1992); *Warren v. Kirkwood Tires*, IAB Hearing No. 569584 (Dec. 12, 1984); *Passwaters v. Delagra Corp.*, IAB Hearing No. 536442 (Mar. 29, 1985).

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commutation when, in fact, the commutation would give the claimant a substantially increased amount, free from fear of future termination of benefits; and that the IAB acted improperly in questioning the use of actuarial tables in Ms. Boney-Nearhos' case.

6. The court's function on appeal is to determine whether the Board's decision is supported by substantial evidence and free from legal error.³ Substantial evidence means such relevant evidence as a reasonable mind might

³ *General Motors v. Freeman*, Del. Supr., 164 A.2d 686, 688 (1960); *Johnson v. Chrysler Corp.*, Del. Supr., 213 A.2d 64, 66-67 (1965).

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accept as adequate to support a conclusion.⁴ The appellate court does not weigh the evidence, determine questions of credibility or make its own factual findings.⁵ It merely determines if the evidence is legally adequate to support the agency's factual findings.⁶

⁴ *Oceanport Ind. v. Wilmington Stevedores*, Del. Supr., 636 A.2d 892, 899 (1994); *Battista v. Chrysler Corp.*, Del. Super., 517 A.2d 295, 297 (1986), *appeal dismissed*, Del. Supr., 515 A.2d 397 (1986).

⁵ *Johnson* at 66.

⁶ 29 *Del. C.* § 10142(d).

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7. The IAB may grant a petition for commutation “if it appears that it will be for the best interest of the employee ... or that it will avoid undue expense or hardship to either party.”⁷ However, commutation is not favored.⁸ The primary rule is that benefits should be paid in periodic installments.⁹ This is for the protection of the employee.¹⁰ The petitioner has the burden of establishing her right to commutation.¹¹ The petition should be granted only under unusual circumstances and where the reasons are sound and convincing.¹² The issue is whether the IAB’s decision denying Ms. Boney-Nearhos’ petition is supported by substantial evidence.

⁷ 19 *Del. C.* § 2358.

⁸ *D & M Contractors v. Forlano*, Del. Super., 283 A.2d 843 , 846 (1971); *Molitor v. Wilder*, Del. Super, 195 A.2d 549, 552 (1963).

⁹ 19 *Del. C.* § 2360.

¹⁰ *Molitor*, at 551-552.

¹¹ *D & M Contractors v. Forlano*, at 846.

¹² *Molitor*, at 552.

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8. Based upon a careful review of the IAB's findings and conclusions, it appears that it did accept as fact for purposes of its decision that the claimant suffered from a permanent, total disability. While the IAB did not make an affirmative finding that she suffered from permanent, total disability, it is clear from the findings and conclusions that it proceeded as though that had been established.

9. The Court is not persuaded by the claimant's argument that the IAB placed an undue and incorrect reliance upon the *Brinzo* decision. *Brinzo* was a case in which the claimant and his spouse were living in an apartment too small for their needs, under circumstances where they had some reasonable fear of their mail, including their income checks, being stolen, and where they had difficulty paying their bills to the point where sometimes they had to forego medical treatment. It appears that the IAB was simply contrasting that case with this one. My reading of the IAB's decision does not lead me to the conclusion that it gave undue effect to the *Brinzo* case, or that it was denying this claimant's petition simply because her situation is different than Mr. and Mrs. Brinzo's, or that commutation is limited to cases like the Brinzo's.

10. The other cases cited by the claimant do not lead to the conclusion that the IAB's decision is not supported by substantial evidence in this case. Two of them are cases in which the claimant needed the money to buy his home.¹³ In one of those cases the claimant was actually in default on his home mortgage. Another case, which has no factual similarity to this case, was one in which the Court determined that certain of the IAB's findings were without evidentiary support, with the result that

¹³ *Chambers* at 2 and *Warren* at 2.

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the Court remanded the case for a further hearing.¹⁴ Two of them have some factual similarity to this case in that they involve situations where the claimant had psychological problems and it was thought commutation would have a rehabilitative effect.¹⁵ However, deciding whether commutation is in a claimant's best interest based upon psychological benefit involves a very case specific judgment. It is clear from this record that the IAB had reservations about whether commutation would, in fact, result in any demonstrable improvement in the claimant's psychological condition.

¹⁴ *Blackiston*, at 3.

¹⁵ *O'Day* at 2 and *Passwaters* at 3-4.

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11. The IAB's comments regarding the economic effect of commutation appear in a portion of the decision which primarily concludes that the claimant does not suffer financial hardship. Where the claimant is not experiencing financial hardship which would warrant commutation on that grounds, the IAB is under no obligation to grant commutation based upon an economic analysis showing that she will receive more money overall through commutation than through periodic payments.¹⁶

¹⁶ *Kandravi v. Beebe Hospital of Sussex*, Del. Super., C.A. No. 94A-10-005, Ridgely, P.J. (May 26, 1995) (ORDER).

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12. The life expectancy issue arose due to testimony from Dr. Goodill that the claimant “may live a fairly normal life expectancy or she may die in the next couple of months.” Dr. Zingaro testified that if “the laryngeal spasms issue does not somehow get resolved, I don’t think she is going to live very long.” The claimant argues that this Court has held that in the absence of evidence estimating the remaining length of a claimant’s life expectancy, a normal life expectancy should be presumed.¹⁷ She also argues that the IAB routinely makes use of actuarial tables for life expectancy determinations. In its decision, the IAB “notes that the evidence regarding Claimant’s life expectancy was limited and inconclusive.” If the IAB had made a specific finding concerning the claimant’s life expectancy based upon this record, it may be that the finding would present a substantial issue. Reading the decision as a whole, however, it does not appear to the Court that this issue was decisive to the IAB’s decision to deny the claimant’s petition or that its decision rests to any significant degree upon this factor. The comments that the IAB does make on the issue of the claimant’s life expectancy are supported by substantial evidence.

13. The final, and ultimate, issue is whether the evidence which the claimant presented in support of her petition was so convincing that there is no substantial evidence upon which the IAB could base a denial. The primary reason advanced by the claimant at the hearing for her wanting commutation was that it would relieve her of stress related litigation, i.e. worrying about whether her benefits might at some point be lost. Notwithstanding the evidence which the claimant presented in support

¹⁷ *Ware v. Baker Driveway, Inc.*, Del. Super., 295 A.2d 734 (1972).

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of her request, the IAB was not persuaded that the claimant's stress was so litigation related, or that commutation would so relieve that stress, that commutation rose to the level of being in the claimant's best interest. The IAB had concerns that the claimant would continue to experience everyday stress and stress caused by pain even with commutation. There was evidence in the record to support that conclusion. Dr. Rowe, for example, testified that the low-back injury pain was a cause of significant stress. And Dr. Goodill, while testifying that it would be beneficial to the claimant to alleviate stress related to her disability status, also testified that she had stress from other causes, including psychological trauma. Dr. Zingaro's testimony, while supportive of the claimant's application, also indicates that the claimant has a number of psychological issues apart from the litigation stress. The IAB has a duty to grant commutation only where it is in the best interest of the employee to do so, or where

it will avoid undue expense or hardship. Here, even though the claimant's physicians supported commutation, the IAB was entitled to evaluate that evidence in making a judgment as to whether the stated reason, relief of stress from litigation, was sufficiently established so as to lead the IAB to conclude that commutation was in her best interest under all of the circumstances. Based upon my review of the record, I am satisfied that there is adequate evidence to support the IAB's reasons for denying the claimant's petition and that the reasons given are free from legal error.

14. Therefore, the decision of the IAB is *affirmed*.

IT IS SO ORDERED.

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Resident Judge

oc: Prothonotary
cc: Order Distribution