IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

ANITA CARR,	)	
	)	
Claimant Below-Appellant,	)	
	)	
v.	)	C.A. No. 01A-08-002 HDR
	)	
STATE OF DELAWARE,	)	
	)	
Employer Below-Appellee.	)	

Submitted: February 19, 2002
Decided: May 15, 2002

Walt F. Schmittinger, Esq. of Schmittinger & Rodriguez, P.A., Dover, Delaware, for Claimant Below-Appellant.

John J. Klusman, Esq. of Tybout, Redfearn & Pell, Wilmington, Delaware, for Employer Below-Appellee.

Upon Claimant's Appeal from a Decision of the Industrial Accident Board to Terminate Temporary Total Disability Benefits in Favor of Temporary Partial Disability Benefits
REVERSED AND REMANDED

RIDGELY, President Judge

Carr v. State of Delaware
01A-08-002 HDR
May 15, 2002

O R D E R

This 15th day of May, 2002, upon consideration of the parties' briefs and the record below, it appears that:

(1) Anita Carr ("Claimant") appeals the decision of the Industrial Accident Board (the "Board"), which granted the State of Delaware's ("Employer") petition for review, in part, by terminating her total disability benefits and awarding her temporary partial disability benefits. Additionally, the Board made an ancillary award of medical witness fees and attorneys' fees. The Claimant's appeal is limited to the issue of the Board's termination of temporary total disability benefits in favor of temporary partial disability benefits. Because the Board erred as a matter of law in its application of the displaced worker doctrine, the decision is reversed.

(2) The Claimant worked for the Employer at the Stockley Center as an attendant/caregiver beginning in 1989. It was her only job other than as a housewife. She was injured on August 27, 1996, when she attempted to assist a client who fell while boarding a bus. She underwent surgery for this injury and returned to work for less than a month, in January of 1997. Claimant underwent surgery two additional times and had recently completed a successful trial of a spinal cord stimulator. At the time of the Board hearing Claimant was scheduled to have a spinal cord stimulator permanently implanted.

At the hearing before the Board, deposition testimony from three physicians was presented, including the Claimant's treating physicians and the Employer's physician. All three physicians testified that the Claimant could work only part-time, subject to certain restrictions. Employer's medical expert rendered a diagnosis

of "failed back syndrome" and limited her to light to sedentary activities. He acknowledged she would have permanent restrictions on the number of hours and days she could work per week. Under the best scenario she could work four to six hours on workdays with those days limited to two days on, one day off, two days on and then the weekend off. Deposition testimony was presented from a vocational rehabilitation specialist, who testified that he performed a labor market survey using the physicians' restrictions. The Board also heard testimony from the Claimant describing her attempts to find part-time employment.

The Board found that all of the medical experts agreed that the Claimant was capable of returning to some form of employment. The Board found that none of the ten labor market survey jobs described by the vocational rehabilitation specialist were appropriate for the Claimant. Nevertheless, the Board determined that Claimant is not a prima facie displaced worker, and that the burden was on her to show that she had made reasonable efforts to secure suitable employment which had been unsuccessful because of the injury. The Board found that the Claimant failed to meet this burden. The Employer conceded that Claimant is partially disabled. There was no evidence of Claimant's post-injury earnings capacity. The Board then awarded partial disability benefits in lieu of temporary total disability benefits at the total disability rate for 300 weeks.

(3) In reviewing the decisions of the Board, the function of this Court is to determine whether its conclusions are supported by substantial evidence and free

from legal error.[1] Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[2] This Court does not weigh the evidence, determine questions of credibility or make its own factual findings.[3] It merely determines if the evidence is legally adequate to support the agency's factual findings.[4] The Court must also determine whether the Board's decision is free from legal error.[5] The Court's review of alleged legal errors is de novo.[6]

(4) The Board terminated the Claimant's total disability benefits in favor of temporary partial disability benefits on the basis that she was neither physically totally disabled as a result of her injury nor economically disabled as a displaced worker.[7] The Claimant challenges this finding both legally and factually.

When an employer files a petition for termination of benefits, it bears "the initial burden of demonstrating that the employee is no longer totally incapacitated

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[1] *M.A. Hartnett, Inc. v. Coleman,* 226 A.2d 910, 911-12 (Del. 1967); *Johnson v. Chrysler Corp.,* 213 A.2d 64, 66-67 (Del. 1965); *General Motors v. Freeman,* 164 A.2d 686, 689 (Del. 1960).

[2] *Oceanport Ind. v. Wilmington Stevedores,* 636 A.2d 892, 899 (Del. 1994).

[3] *Johnson* at 66.

[4] 29 *Del. C.* § 10142(d).

[5] *Brooks v. Johnson,* 560 A.2d 1001, 1002 (Del. 1989).

[6] *Id.*

[7] *Carr v. State of Delaware*, IAB Hearing No. 1089626 (August 15, 2001) ("Decision") at 9.

for the purpose of working."[8] Once an employer has satisfied its burden by demonstrating that an employee is no longer "totally incapacitated for the purpose of working," total disability benefits may continue if the employee establishes that she is a "displaced worker."[9] A displaced worker, also called a worker in the "odd-lot" category, is a worker who, while not completely incapacitated for work, is so handicapped by a compensable injury that she will no longer be employed regularly in any well known branch of the competitive labor market and will require a specially-created job if she is to be steadily employed.[10]

In determining whether or not an employee has established that she is a prima facie displaced worker, the Board may consider "evidence of degree of obvious physical impairment, coupled with other factors such as the injured employee's mental capacity, education, training, or age."[11] If the employee is found to be a prima facie displaced worker, the burden remains on the employer, "to show the availability to the employee of regular employment within the employee's capabilities."[12] If, on the other hand, the evidence does not obviously categorize the employee as a prima facie displaced worker, the primary burden is upon the

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[8] *Torres v. Allen Family Food*s, 672 A.2d 26, 30 (Del. 1995) (citing *Governor Bacon Health Ctr. v. Noll*, 315 A.2d 601, 603 (Del. Super. Ct. 1974)).

[9] *Torres*, 672 A.2d at 30; *see also, Franklin Fabricators v. Irwin*, 306 A.2d 734, 737 (Del. 1973).

[10] *Ham v. Chrysler Corp.*, 231 A.2d 258, 261 (Del. 1967).

[11] *Franklin Fabricators*, 306 A.2d at 737.

[12] *Id.*

employee to show that she had made reasonable efforts to secure suitable employment which have been unsuccessful because of the injury.[13]

Claimant argues substantial evidence does not exist on the record to support a finding Claimant is not prima facie a "displaced worker." This Court's standard of review of the Board's decision that the "[claimant] was not a prima facie displaced worker is whether there is substantial evidence to support the decision."[14] In this case, the Board found Claimant to not be a prima facie displaced worker. It reasoned:

> Having observed Claimant during the hearing, the Board finds the degree of Claimant's obvious physical impairment to be more than minimal but not severe. This finding is based on Claimant's use of a cane and occasional shifting of her body. Claimant is only forty-two years old. She appears to be of at least average intelligence. She is articulate and poised. She is a high school graduate with some additional training in computers. She had no problem understanding and responding to questions.[15]

The evidence before the Board was that the Claimant should avoid repetitive activities such as kneeling, crawling, squatting, bending and climbing. She can lift ten to fifteen pounds if not using a cane and half that amount if using a cane. She can walk or stand for two to four hours at a time for a total of four to six hours. She can sit for up to four hours at a time for a total of four to six hours. The evidence also

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[13] *Id.*

[14] *O'Donnell v. UE & C Catalytic, Inc.,* 1995 WL 717196, at *3 (Del. Super. Ct.) (citing *Oakwood Mobile Homes v. Mosley,* Del. Supr., No. 304, 1991, Moore, J. (Feb. 12, 1992) (ORDER) at 5).

[15] Decision at 9.

showed that neither her employer nor she could find a job within her capabilities.

The evidence portrays a person disqualified for regular employment in any well-known branch of the competitive labor market, for whom a job must be specially created if she is to be steadily employed. After considering the evidence presented to the Board, I find that there is not substantial evidence in the record to support the finding that Claimant is not prima facie a displaced worker. The Board erred as a matter of law in shifting the burden of proof to her.

Accordingly, the Board's decision to terminate temporary total disability benefits in favor of temporary partial disability benefits is ***REVERSED*** and the matter is ***REMANDED***.

IT IS SO ORDERED.

/s/

Henry duPont Ridgely
President Judge

cmh
oc: Prothonotary
xc: Order distribution