IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

BOGDEN ZDZIECH,	)	
Appellant,	)	
v.	)	C.A. No. 01A-01-007-RSG
DAIMLERCHRYSLER CORP.,	)	
Appellee.	)	

Date Submitted: December 3, 2001
Date Decided: December 7, 2001

Upon Appeal from a Decision of the Industrial Accident Board.
*Decision **AFFIRMED**.*

MEMORANDUM OPINION

David J. Lyons, Esquire, Wilmington, for Employee-Appellant.

Scott L. Silar, Esquire, Wilmington, for Employer-Appellee.

GEBELEIN, Judge.

Bogden Zdziech ("Claimant") has appealed the Industrial Accident Board's ("Board" or "IAB") December 27, 2000 decision denying in part and granting in part the Claimant/appellant's Petition to Determine Additional Compensation Due; denying compensation for total disability, but awarding compensation for certain medical expenses, and for medical witness and attorney's fees. Claimant claims that in its decision on these issues, the Board committed errors of fact and law, and asks that this Court grant the Claimant/Appellant such other and further relief as the Court deems just and proper, including attorney's fees and costs.

DaimlerChrysler ("Employer") argues in the Answering Brief in support of the Board's December 27, 2000 decision that there exists substantial evidence in the record to verify the findings of the Board, and that the Board's decision should be affirmed and not overturned on appeal.

NATURE AND STAGE OF THE PROCEEDINGS

On April 3, 2001, Claimant filed a Petition to Determine Additional Compensation Due pursuant to 19 *Del.C.* §2324. In his petition, Claimant was seeking a recurrence of total disability resulting from work related accidents that occurred on June 29, 1982, and July 5, 1983, ongoing from December 6, 1999, medical expenses, medical witness fees, and attorney's fees.

On August 23, 2000, a hearing was held before the Industrial Accident Board on Claimant's petition. The board held the record open after the hearing so that additional medical evidence could be addressed and closing arguments were to be submitted within 60 days to the Board after the hearing date. Employer submitted its closing arguments on October 20, 2000 and Claimant submitted his closing arguments on October 23, 2000. The Board reconvened on December 19, 2000, and issued the decision on December 27, 2000. The Board's decision denied Claimant's

petition for recurrence of total disability, and reimbursement for the recent MRI, but awarded Claimant certain other medical expenses.

On January 16, 2000, Claimant appealed the Board's decision to the Superior Court for the State of Delaware alleging that the Board erred as a matter of law and fact in denying Claimant's petition for a recurrence of total disability, and reimbursement for an MRI ordered by Claimant's treating physician. Claimant filed his Opening Brief on July 23, 2001, and Employer filed its Answering Brief in support of the Board's decision of December 27, 2000, on August 13, 2001.

FACTS

Bogden J.Zdziech ("Claimant") was injured in work-related accidents on June 29, 1982, and July 5, 1983, while working for DaimlerChrysler Corporation ("Employer"). Pursuant to an Agreement as to Compensation, dated May 10, 1985, Employer paid compensation for total disability benefits. Over the years, Employer also paid compensation for various benefits, including medical expenses and permanent impairment to the neck, lower back, and right upper and lower extremities. On April 3, 2000, Claimant filed a Petition to Determine Additional Compensation Due seeking compensation for a recurrence of total disability ongoing from December 6, 1999. The Board concluded in its December 27, 2000 decision that Claimant was not entitled to ongoing total disability.

In 1983, Claimant, who is 49 years old, was making $10 to $11 per hour and working 45 hours per week. From 1992 till June 1999, Claimant worked as a bus driver without taking pain medication. From June 1999 to December 1999 he did his exercises and did not seek medical attention.

Claimant has not been employed since June 1999, at which time he was working 25 hours

per week as opposed to 45 to 54 hours that he had previously worked, because of pain and loss of sleep. Claimant saw Dr. Uthaman in December 1999 and was prescribed Vicodin and Neurotin for lower back pain. Dr. Uthaman also recommended vocational rehabilitation.

Dr. Uthaman wrote one disability slip in December 1999. In February 2000, after an MRI of the lumbar spine, Dr. Uthaman told Claimant that he could not perform the duties of a bus driver.

In the August 23, 2000, hearing held by the Board, Claimant and Dr. Pierre LeRoy testified for the Claimant, while Dr. John B. Townsend, III, testified for the Employer.

Dr. LeRoy, who had last treated Claimant in April 1998, had recommended continuing home therapy, and encouraged continuing his bus driver job, testified in the August 2000 hearing that there were structural changes in the 2000 MRI from injuries in 1982 and 1983. Also that Dr. Uthaman's disability slip disabled the Claimant from all forms of gainful activity. Dr. LeRoy spoke with Claimant over the phone on August 9, 2000, and in his opinion, the Claimant had remained disabled from all forms of gainful employment since December 6, 1999.

Dr. John Townsend testified that he had examined Claimant on three dates: August 9, 2000, May 26, 1993, and February 5, 1998. Claimants complaints were the same over the three visits, and there was a better range of motion when Claimant was not actually being examined. In Dr. Townsend's opinion, Claimant was capable of working with restrictions.

The Board was more persuaded by the testimony of Dr. Townsend than Dr. LeRoy, and concluded that Claimant had not met his burden to show he had ongoing total disability.

This appeal by Claimant of the Board's December 27, 2000 decision followed.

STANDARD OF REVIEW

In reviewing the decisions of the IAB, this Court must determine whether the findings and

conclusions of the Board are free from legal error and supported by substantial evidence in the record.[1] The function of the reviewing Court is to determine whether the agency's decision is supported by substantial evidence.[2] Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[3] The appellate court does not weigh the evidence, determine questions of credibility, or make its own factual findings.[4] It merely determines if the evidence is legally adequate to support the agency's factual findings.[5] It also determines if the Board made any errors of law.

Also, on appeal "[t]he Superior Court does not sit as a trier of fact with authority to weigh the evidence, determine questions of credibility, and make its own factual findings and conclusions."[6]

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[1] *See Unemployment Insurance Appeal Board v. Martin*, Del. Supr., 431 A.2d 1265 (1981); *Ponchvatilla v. United States Postal Service*, Del. Super., C.A. No. 96A-06-19, Cooch, J. (June 9, 1997), Mem. Op. at 2; 19 *Del. C.* §3323(a) ("In any judicial proceeding under this section, the findings of the [UIAB] as to the facts, if supported by evidence and in the absence of fraud, shall be conclusive, and the jurisdiction of the Court shall be confined to questions of law.")

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

[3] *Oceanport Ind. v. Wilmington Stevedores*, Del. Supr., 636 A.2d 892, 899 (1994); *Battisa v. Chrylser Corp.*, Del. Super., 517 A.2d 295, 297 (1986), *app. dism.*, Del. Supr., 515 A.2d 397 (1986).

[4] *Johnson v. Chrysler*, 213 A.2d at 66.

[5] Title 29 *Del. C.*§ 10142(d).

[6] *Johnson v. Chrysler Corp*., Del. Supr., 213 A.2d 64, 66 (1965).

The Superior Court may not overturn a factual finding of the Industrial Accident Board unless there is "no satisfactory proof" supporting the Board's finding.[7] It is also well settled that "[t]he credibility of the witnesses, the weight of their testimony, and the reasonable inferences to be drawn therefrom are for the Board to determine."[8]

DISCUSSION

The question posed by Claimant is whether the Board committed errors of fact and law in denying Claimant's claim for ongoing total disability based on his treating physician's un-rescinded disability certification and in denying facially reasonable and necessary medical expenses incurred at the treating physician's recommendation prior to the defense medical examiner's review of the case.

[7] *Id* at 67.
[8] Coleman v. Department of Labor, Del. Super., 288 A.2d 285, 287 (1972).

To support his case, Claimant cites *Gilliard*, in which the Delaware Supreme Court held that even assuming claimant could, if absolutely necessary, physically maintain a job of some sort, he nevertheless remains disabled from viewpoint of worker's compensation so long as his treating physicians insist that he remain unemployed.[9]

The premise of *Gilliard*, however, is that the treating physician insist that the Claimant remain unemployed. In the case at bar, the Board found that the treating physician did not insist that the Claimant remain unemployed. According to the findings of the Board, the Claimant did not have un-rescinded disability certification from his treating physician as he claims. The disability slip issued by Dr. Uthaman to the Claimant, by its own terms, was at best limited to two months.

The Board rejected Dr. LeRoy's opinion that since Dr. Uthaman did not release Claimant to work or write another certification, Claimant remains totally disabled, and found that evidence was to the contrary. Around March 2000, Dr. Uthaman advised the Claimant to pursue vocational rehabilitation. The Doctor's records for April 18, 2000, and May 30, 2000 corroborate this recommendation. The Board notes that if Dr. Uthaman had believed that the Claimant was disabled on an ongoing basis, he would not have made this recommendation. Also, the Board found Dr. Townsend's testimony regarding symptom magnification to be persuasive, and noted that this could have misled Dr. Uthaman into finding Claimant disabled.

The Board did not believe that the medical expenses incurred were facially reasonable and necessary, because, again, it was more persuaded by Dr. Townsend's testimony which conflicted with Dr. LeRoy's testimony, not only regarding total disability, but regarding whether Claimant's

[9] *Gilliard-Belfast v. Wendy's Inc*., Del Supr., C.A. No.9, 2000, Holland, J. (June 12, 2000).

total disability during the time in question was causally related to the work injuries. Dr. Townsend opined that the recent MRI was unnecessary since there was no clinical evidence of specific muscle weakness, as opposed to weakness in every muscle, or radicular sensory loss, as opposed to loss everywhere. Also, there was no evidence of denervation in Claimant's leg. Claimant has a sensory neuropathy, which is consistent with diabetes, not the work injuries.

According to 19 *Del.C.* § 2324, Delaware's Worker's Compensation Statute, a claimant is not entitled to continued total disability after said disability ceases, and if it is determined that said claimant is medically capable of working. In the present case, even though Dr. Uthaman certified that Claimant was totally disabled, Dr. Townsend believed the Claimant to be capable of working with restrictions because each time he examined Claimant, the findings, clinically and diagnostically, remained essentially the same, suggesting that there was no recurrence of total disability.

In case of competing medical testimony, as here, the Board is free to choose one opinion over the other, as long as substantial evidence supports that opinion.[10] In the case at bar, the Board considered both physicians' testimonies, then decided to go with Dr. Townsend's testimony, which it had the discretion to do.[11] In *Wortman*, the Superior Court suggested that the Board was free to disregard a doctor's testimony as long as it expressed itself clearly, and included some direct comment on the tests used by the physician.[12] The Supreme Court, however, disagreed with the Superior Court's approach and reversed, holding that as triers of fact, the Board members were

[10] *DiSabatino Bros. v. Wortman*, Del.Supr., 453 A.2d 102 (1982).
[11] *Id.*
[12] *Id.*

entitled to accept the testimony of the employer's expert without any further clarification.[13]

In the present case, not only was the Board's decision supported by substantial evidence, but the Board clearly stated the reason why it chose to believe Dr. Townsend's testimony over Dr. LeRoy's, which, according to *Wortman*, as well other Supreme Court cases such as *Peggy*, and *Aubrey Cephas*, it did not have to: In *Peggy,*[14] the Supreme Court held that the Board was free to adopt the opinion of one expert over the opinion of another, while in *Aubrey Cephas*,[15] the Supreme Court reaffirmed its commitment of deference to Board decisions, by holding that as long as substantial evidence existed to support the Board's findings, it was within the Board's authority to adopt the testimony of one doctor over the testimony of another.

The Board did not find the testimony of Claimant to be convincing, and found that it was "unusual that Claimant's symptoms were serious enough to prevent him from working, but not serious enough to seek medical treatment." The Claimant took himself out of work in June 1999 because of increasing pain symptoms but did not obtain medical attention until December 6, 1999. Again, the Board did not find Claimant's testimony to be credible that he did not know where to turn after Dr. LeRoy retired, even though Dr. LeRoy had told him to select a new treating physician. Claimant selected Dr. Uthaman, who was already training with Dr. LeRoy, because of easy access to medical records.

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[13] *Id.* at 160 *citing General Motors v. Veasey*, Del. Supr., 371 A.2d 1074, 1076 (1977) *overruled on other grounds, Duvall v. Chas. Connell Roofing*, Del.Supr., 564 A.2d 1132, 1134 (1989).
[14] *Peggy S. Downes v. State of Delaware*, Del.Supr., No. 25 1993 Walsh J., (Mar. 30, 1993).
[15] *State of Delaware v. Aubrey Cephas*, Del.Supr., C.A. No. 92A-03-005, Veasey J. (Jan. 1994).

In order for the Board to award compensation for total disability ongoing from December 6, 1999, Claimant had the burden of establishing by a preponderance of the evidence that he was entitled to such compensation. The Claimant was not able to meet this burden to the satisfaction of the Board. This Court "will not substitute its judgment for that of an administrative body where there is substantial evidence to support the decision and subordinate findings of the agency."[16] Moreover, we must take "due account of the experience and specialized competence" of the IAB and the purposes of the Workman's Compensation Act.[17]

CONCLUSION

For the reasons stated herein, the decision of the Industrial Accident Board is **AFFIRMED**.

IT IS SO ORDERED.

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The Honorable Richard S. Gebelein

Orig: Prothonotary
Cc: IAB
David J. Lyons, Esq.
Scott L. Silar, Esq.

[16] *Olney v. Cooch*, Del.Supr., 425 A.2d 610, 613 (1981).
[17] 29 *Del.C.* § 10142(d).