

**IN THE SUPERIOR COURT OF STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

JUAN TORRES,)	
)	
Claimant-Below Appellant/ Cross-Appellee,)	
)	
v.)	C.A. No. N13A-07-011 ALR
)	
REYBOLD HOMES, INC.)	
)	
Employer-Below Appellee/ Cross-Appellant.)	

Submitted: January 10, 2014
Decided: April 24, 2014

*On Appeal from Decision of the
Industrial Accident Board*

AFFIRMED

MEMORANDUM OPINION

Gary S. Nitsche, P.A., Nicholas M. Krayner, Esq., Weik, Nitsche & Dougherty,
Attorney for Claimant-Below Appellant, Cross-Appellee.

John Gilbert, Esq., Heckler & Frabizzio, Attorney for Employer-Below Appellee/
Cross-Appellant.

ROCANELLI, J.

Claimant was injured at work on March 27, 2006 when he was working for Employer. Claimant received worker's compensation benefits. This is an appeal by Claimant-Below, Juan Torres ("Claimant") from the July 11, 2013 decision of the Industrial Accident Board ("Board").

On October 1, 2012, Reybold Homes, Inc. ("Employer") filed a Petition to Terminate Benefits, alleging Claimant was capable of returning to work and, therefore, should have his total disability benefits terminated. On December 12, 2012, Employer filed an Appeal of a Utilization Review Decision to dispute the reasonableness and necessity of ongoing medical treatment that commenced on June 5, 2012. A consolidated hearing on the merits was held before the Board on April 29, 2013. The Board issued a decision on July 11, 2013 terminating total disability benefits and finding that the disputed medical treatment was reasonable and necessary ("Board's Decision").

Claimant filed this appeal regarding the Board's Decision to terminate his total disability benefits. Employer filed this cross-appeal of the Board's Decision regarding the reasonable and necessary nature of the disputed medical treatment. For the reasons set forth below, the Board's Decision is affirmed.

Board's Factual Findings

On March 27, 2006, Claimant was employed as a construction worker for Employer when he suffered an injury to his right knee on a job site. As a result of

his work injury, Claimant was placed on total disability and underwent substantial medical treatment.

Claimant had three arthroscopic surgeries on his right knee from April 2006-2009. Despite these surgeries, Claimant's knee pain persisted. From 2010-2012, Claimant continued to see various doctors for pain management and physical therapy. After multiple examinations, three different doctors suspected Claimant's knee pain was due to damaged nerves. Eventually, Claimant was referred to Dr. Patrick Swier.

Dr. Swier first examined Claimant on March 27, 2012. Dr. Swier confirmed the other doctor's suspicions and diagnosed Claimant with an injury to part of the saphenous nerve. Dr. Swier soon determined that Claimant's nerve damage required "denervation" surgery, which involves removing smaller nerves from the body and covering bigger nerves with muscle tissue to numb the nerves in exchange for pain relief.

On June 5, 2012, Dr. Swier performed the denervation surgery, Claimant's fourth surgery since the work accident.¹ Claimant experienced complications after surgery and Claimant eventually required a pain management specialist. As Claimant's medical treatment has progressed, he has continued to experience multiple complications. Claimant walks with a cane, and complains of constant

¹ Employer filed a cross-appeal disputing the reasonableness and necessity of this surgery and all subsequent medical treatment received as a result of that surgery, discussed below.

shooting pain and numbness. Pain medication allows Claimant to walk, often with a cane, drive for short periods of time and accomplish minor daily activities independently.

Board's Decision

The Board held a hearing on all petitions on April 29, 2012. At the hearing the Board considered the testimony of Claimant, Paul Zachery, Jr., Claimant's previous supervisor, and Mary Ann Shelli-Palmer, a vocational expert who conducted a labor market survey. In addition, the Board considered the depositions of Dr. Patrick Swier, Dr. Damon Cary and Dr. Elliot Leitman. A surveillance video of Claimant was also considered. The Board determined that all of Claimant's medical treatment was reasonable, necessary, and causally related to the 2006 work accident. In reaching this decision, the Board considered the testimony of the witnesses who testified including three medical experts, a vocational expert, Claimant, and Claimant's former supervisor.

The Board also considered the petition to terminate Claimant's total disability benefits. After considering the testimonial evidence and watching the surveillance video, the Board terminated Claimant's total disability benefits. However, the Board awarded Claimant partial disability benefits. In reaching this decision, the Board discussed Claimant's existing physical abilities and addressed his self-reliance as observed in the surveillance video. Additionally, the Board

rejected Claimant's argument that he lacked the necessary skills and education to secure new employment, providing a detailed overview of Claimant's training and translation skills, and noting these are transferable to another job.

Claimant now appeals the Board's Decision to terminate total disability benefits and the Employer cross-appeals the Board's Decision to accept Claimant's medical treatment as reasonable and causally related to the work accident.

STANDARD OF REVIEW

The Court's appellate review of the Board's Decision is limited. The Court will review the record for errors of law and determine whether the Board's Decision was supported by substantial evidence.² Substantial evidence is relevant evidence that the reasonable person could accept to adequately support a conclusion.³ If substantial evidence in support of the Board's Decision exists, then the Board's Decision stands,⁴ even if the Court would reach a contrary conclusion.⁵ The Court will not weigh the evidence, determine credibility, or make its own factual findings.⁶ The Court takes the specialized competence and

² *Person-Gaines v. Pepco Holdings, Inc.*, 981 A.2d 1159, 1161 (Del 2009).

³ *Histed v. E.I. DuPont de Nemours & Co.*, 621 A.2d 340, 342 (Del. 1993).

⁴ *Person-Gaines*, 981 A.2d at 1161.

⁵ *H&H Poultry v. Whaley*, 408 A.2d 289, 291 (Del. Super. 1979).

⁶ *Person-Gaines*, 981 A.2d at 1161; *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965).

experience of the Board into account.⁷ Absent legal error, which is reviewed *de novo*;⁸ the standard of review is abuse of discretion.⁹

DISCUSSION

This Court must decide if there is substantial evidence in the record to support (1) the Board's Decision that Claimant's disputed medical treatment was reasonable, necessary and causally related to the work incident and (2) the Board's Decision to terminate Claimant's total disability benefits based on its determination that Claimant is not a totally disabled displaced worker.

Board's Decision that Claimant's Medical Treatment was Reasonable, Necessary and Related to Work Injury

Employers are required to pay for the medical expenses reasonably and necessarily related to an employee's work injury.¹⁰ Employers may request a Utilization Review of an employee's medical treatment to determine reasonableness.¹¹ Utilization Review decisions may be appealed to the Board for *de novo* review.¹² Both Claimant and Employer filed Utilization Review appeals to the Board.

⁷ *Histed*, 621 A.2d 340, 342 (Del. 1993).

⁸ *Person-Gaines*, 981 A.2d at 1161.

⁹ *Id.*

¹⁰ 19 Del. C. § 2322(a); *Turnbull v. Perdue Farms*, 1998 WL 281201, at *2 (Del. Super. May 18, 1988).

¹¹ 19 Del. Admin. C. § 1341-5.0 at 5.4.

¹² 19 Del. Admin. C. § 1341-5.0 at 5.5; *Turnbull*, 1998 WL 281201, at *2.

Employer asserts that the Board erred as a matter of law in connection with its decision regarding the reasonableness and necessity of Claimant's disputed June 5, 2012 surgery and subsequent medical treatment. Employer claims that the Board's failure to use the words "it is the Claimant's burden of proof" necessarily means that the Board applied the incorrect legal standard by considering the evidence to determine the reasonableness of the disputed medical treatment. The Court disagrees.

In reaching its decision, the Board considered the progression of Claimant's medical treatment as explained in lengthy detail in the Board's Decision. The Board finds that, after three surgeries by Dr. Mesa, Claimant was referred to Dr. Kim for pain management. Dr. Kim then referred Claimant to Dr. Brady, an orthopedic surgeon affiliated with Dr. Leitman's practice. Dr. Brady agreed with Dr. Kim's suspicions as to the cause of Claimant's knee pain and then referred Claimant to Dr. Swier, who performed the June 5, 2012 surgery.

Then, the Board considered testimony provided by three medical experts and the Claimant. The Board accepted the testimony of Dr. Swier and Dr. Cary to determine that Claimant's surgery and subsequent medical treatments were reasonable, necessary, and causally related to the work accident. The Board rejected the testimony of Dr. Leitman, who stated that Claimant had reached maximum improvement in July 2010 and any procedure afterwards was

impractical because even Dr. Leitman acknowledged that Claimant still had knee pain in July 2010.

The Board determined that Claimant's *continued* pain lead to pain management treatments and additional knee examinations. Eventually, Claimant was referred to Dr. Swier in 2012, which lead to the nerve injury diagnosis and the disputed June 5, 2012 denervation surgery. Furthermore, despite opposing the June 5, 2012 surgery, even Dr. Leitman agreed that all of Claimant's medical treatment subsequent to the surgery was reasonable and necessary to that surgery.

As a result, the Board determined Claimant's eventual referral to Dr. Swier to be causally related to the work injury. Accordingly, the Claimant satisfied his burden of proof, and the Board determined that the medical treatment was reasonable. There was substantial record evidence to support this conclusion.

Board's Decision to Terminate Claimant's Benefits

When an employer files a petition to terminate an employee's total disability benefits, the employer bears the initial burden of "demonstrating that the employee is no longer totally incapacitated for the purpose of working."¹³ If the employer satisfies this burden then disability benefits end unless the employee can show that he is a displaced worker.¹⁴

1. Board's Decision that Claimant Was No Longer Totally Disabled

¹³ *Torres v. Allen Family Foods*, 672 A.2d 26, 30 (Del. 1995).

¹⁴ *Id.*

Claimant argues that the Board did not hear competent evidence to support a conclusion that Claimant is no longer totally disabled. The Court disagrees. The Board considered Claimant's medical history and the testimony of two medical experts as well as the Claimant. The Board is charged with determining the "credibility of witnesses, the weight of their testimony and the reasonable inferences to be drawn there from."¹⁵ The Board is free to accept one expert's opinion over another and may accept or reject an expert's testimony entirely.¹⁶

The Board considered Dr. Cary's testimony that Claimant remains totally disabled because of constant pain requiring pain medication as well as Claimant's testimony regarding his physical limitations, but ultimately determined that Claimant has the ability to function in a workplace. The Board rejected Claimant's testimony, finding that Claimant overstated his physical limitations based on the surveillance video showing Claimant walking, getting in and out of a car, walking up hills and bending his knee ninety degrees.

The Board also rejected the Claimant's credibility. It is the Board's role, not the Court's role, to make credibility findings. In addition, despite Claimant's contentions that Dr. Leitman's testimony was wholly discredited, the Board accepted Dr. Leitman's testimony that Claimant can return to work in a sedentary or light-duty capacity.

¹⁵ *Coleman v. Dep't of Labor*, 288 A.2d 285, 287 (Del. 1972).

¹⁶ *Person-Gaines*, 981 A.2d at 1161.

The Court does not determine witness credibility and will not overturn the Board's findings in this regard. The Court finds that the Board's determination that Claimant is no longer totally disabled is supported by substantial evidence.

2. Board's Decision that Claimant is Not a Displaced Worker

Once the Board determines that an employee is no longer totally disabled for the purpose of working, the burden shifts to the employee to prove that he is a displaced worker because (1) he is *prima facie* displaced¹⁷ or (2) he is an actual displaced worker. If the employee can prove that he is displaced, then benefits will continue.

The Delaware Supreme Court defines a *prima facie* displaced worker as one that “is so handicapped by compensable injury that he will no longer be employed regularly in any well-known branch of the competitive labor market and will require a specially created job if he is to be steadily employed.”¹⁸ Determining *prima facie* displaced worker status requires the Board to consider the medical evidence as well as factors such as the employee's age, education, and any occupational and general experiences.¹⁹

In the alternative, the employee may demonstrate he is an actual displaced worker by showing he has made reasonable efforts to secure employment but has been unsuccessful because of his disabling work injury.²⁰ If the employee cannot prove a reasonable job search, he is not considered actually displaced and disability

¹⁷ *Torres*, 672 A.2d at 30.

¹⁸ *Ham v. Chrysler Corp.*, 231 A.2d 258, 261 (Del. 1967).

¹⁹ *Id.*; *Franklin Fabricators v. Irwin*, 306 A.2d 734, 737 (Del. 1973).

²⁰ *Torres*, 672 A.2d at 30-31 (citation omitted).

benefits will be terminated.²¹ If the employee proves displaced status, then the burden shifts back to the employer to negate the employee's displaced status by showing the "availability of work within the employee's capabilities."²²

Because the Board properly determined Claimant is not totally disabled for the purpose of working, Claimant must prove he is an actual displaced worker in order to continue receiving total disability benefits. Claimant argues that the Board erred as a matter of law by failing to find Claimant is a *prima facie* displaced worker. The Court disagrees.

After considering the testimony of Claimant, Claimant's former supervisor, and a vocational expert, the Board determined that Claimant has numerous transferable skills, and that he did not establish that he meets the *prima facie* displaced worker threshold. The Board determined that Claimant's testimony downplayed his transferable skills. The Board considered Claimant's fourth grade education and his claims that he cannot read or write English. However, the Board noted Claimant's ability to recognize signs, learn the meaning of symbols and adhere to directions as demonstrated by his valid drivers license and daily 15-minute drives.

The Board rejected Claimant's argument that he could not learn the skills to operate a cash register as such responsibilities require the recognition of numbers

²¹ See *id.* at 31 (applying *Franklin Fabricators* standard).

²² *Franklin Fabricators*, 306 A.2d at 737; *Torres*, 672 A.2d at 31.

and some knowledge of simple mathematics. In addition, the Board found that Claimant has facilitated Spanish and English communication between sub-contractors on the work site for eight years and that this experience is transferable to customer service skills, as the vocational expert testified. Finally, the Board rejected Claimant's testimony that he does not know how to use a computer or a cell phone because Claimant's cell phone rang during the hearing and Claimant silenced it.

The Court finds that substantial evidence in the record supports the Board's determination that Claimant is not a *prima facie* displaced worker. Additionally, because Claimant did not present evidence of a reasonable job search to establish that he was actually displaced, the disability analysis ends here. The Board did not decide, and this Court is not required to determine, whether Claimant is an actual displaced worker. It is Claimant's burden to prove he was displaced. Claimant did not qualify as *prima facie* displaced and did not present any evidence of being an actual displaced worker. Claimant correctly asserts that he was under no obligation to search for employment pursuant to *Gilliard-Belfast v. Wendy's, Incorporated*²³ because Claimant's treating physician restricted him from working. However, the Board correctly applied the *Gilliard-Belfast* rule and terminated Claimant's total disability benefits from the date of its decision. By

²³ 754 A.2d 251 (Del. 2000).

making the termination effective from the date of its decision, the Board did not penalize Claimant for not job-searching previously because he had relied upon his doctors' conclusions that he was disabled.

CONCLUSION

The Court has examined the record below and determined that substantial evidence supports the Board's Decision. The Board did not commit any errors of law. The Board's Decision must be and hereby is AFFIRMED.

IT IS SO ORDERED this 24th day of April, 2014.

Andrea L. Rocanelli

The Honorable Andrea L. Rocanelli