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

RODNEY HARMON,	)	
	)	
Appellant,	)	
	)	
v.	)	C.A. No.: N13A-11-001 FSS
	)	
TRANS CARGO,	)	
	)	
Appellee.	)	

Submitted: April 25, 2014
Decided: July 30, 2014

ORDER

Upon Appeal from the Industrial Accident Board – AFFIRMED

Appellant suffered multiple injuries to his lower back before suffering a compensable work injury in 2007. Now, Appellant filed for additional compensation, primarily for proposed surgery to his spine. Basically, the Industrial Accident Board, applying *Blake v. State*,[1] denied the additional benefits because it accepted Employer's medical expert's opinion that the proposed surgery was not causally related to Appellant's work injury. Appellant appeals both the Board's legal causation analysis and credibility findings on which its decision rests.

[1] 792 A.2d 188 (Del. 2002)(TABLE).

I.

The parties agreed that Appellant had an accident at work on December 15, 2007, injuring his back. After a period of disability, he returned to work before eventually resigning on February 25, 2009. Subsequently, Appellant worked at WB Mason for three months in 2010 and then Seaford Ice Company for three months in 2011. He was let go by both employers when their insurance carriers refused to cover his pre-existing back injury. Otherwise, Appellant has been unemployed.

Before the 2007 work accident, Appellant had several motor vehicle accidents that injured his back. For example, in 2004, he was in a severe motorcycle accident and treated with Dr. Grossinger for the associated lumbar injuries. An MRI in 2004 showed disc abnormality, degenerative findings, and radiculopathy at L5-S1. He was then on disability for approximately a year.

Appellant has also treated, on and off, for back pain since the 2007 work-related injury. Dr. Grossinger performed ablations in February 2010 and January 2011 as well as injections in June, July, and September 2012. Between those procedures, Appellant did not return to Dr. Grossinger. An MRI in 2008 showed the degenerative condition's progressing. Appellant had another MRI in 2012. Based on that MRI and Appellant's professed lack of relief, Dr. Grossinger referred Appellant to Dr. Rudin for a surgical consultation. Dr. Rudin recommended an

anterior interbody fusion at L5-S1. Accordingly, through counsel, Appellant filed a Petition to Determine Additional Compensation Due, mentioned at the outset, above.

A hearing was held September 23, 2013. Essentially, the hearing focused on whether the additional total disability, medical expenses, and proposed spinal fusion surgery are causally related to the 2007 work accident and compensable. The Board denied additional compensation on October 10, 2013. Appellant filed a timely appeal.

II.

Appellant makes three claims. First, the Board applied the wrong causation standard by applying *Blake* where it should have applied *Standard Distributing Company v. Nally*.[2] Alternatively, the Board misapplied the holding in *Blake*. Lastly, Appellant argues the Board abused its discretion by relying on the Employer's expert.

Employer responds the Board properly applied *Blake* when finding the 2007 work injury did not make the proposed surgery necessary now. Further, *Blake* is the proper standard because *Nally* applies only where there is a subsequent work injury. Lastly, the Board properly exercised its discretion in weighing the conflicting, medical evidence and finding Employer's expert more credible.

[2] 630 A.2d 640 (Del. 1993).

III.

Review of the Board's decision is limited to whether the Board's findings were supported by substantial evidence and whether the decision is free from legal error.[3] The court will not weigh evidence, determine questions of credibility, or make its own factual findings and conclusions.[4] The law is well-settled that the Board, not the court, is responsible for deciding which medical expert is more believable.[5] The court may overturn the Board's decision about expert witness credibility, but only if the court finds that the Board's credibility determination is not supported by some evidence.

"The standard of review indirectly favors the Board's decision even more when the expert's opinions are based on subjective symptoms described to the expert by a petitioner. That is because the court is unable to assess a petitioner's credibility remotely."[6] Again, however, the court may not parse the experts' testimony in order to reach its own decision about which expert is more convincing.[7] As to a close case, the employee bears the burden of proof in a petition for additional compensation.[8]

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[3] *Thompson v. Christina Care Health Sys.*, 25 A.3d 778, 781–82 (Del.2011).

[4] *Id.* at 782.

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

[6] *Fieni*, 2014 WL 2444795, *supra* note 1.

[7] *Clements v. Diamond State Port Corp.*, 831 A.2d 870, 878 (Del. 2003).

[8] *Mobil Oil Corp. v. Bd. of Adjustment of Town of Newport*, 283 A.2d 837, 839 (Del. Super. 1971).

IV.

As laid out above, Plaintiff's first claim alleges the Board's applying *Blake* was legal error. *Blake* held the proper standard for additional surgery compensation is "whether the surgery would have been required at that time but for the accident."[9] Both before the Board and here, Plaintiff alleges *Duvall v. Charles Connell Roofing*,[10] as modified by *Nally*, should control. *Duvall* and *Nally* both address successive carrier cases where a claimant is injured twice, and the employer changed insurers between the two injuries. *Duvall* and *Nally* focus on whether the second injury is a "recurrence" without an intervening accident for which the initial insurer is liable, or an "aggravation" brought on by a new incident and covered by the new insurer. *Duvall* held "an injury is compensable if the ordinary stress and strain of employment is a substantial cause of the injury."[11] Under these definitions, Appellant argues his worsening condition and need for surgery should be considered a "recurrence," for which Trans Cargo is responsible.

Appellant's reliance on *Duvall* and *Nally* is misplaced. As mentioned, they address subsequent injury cases. Appellant offers no case applying *Duvall* or *Nally* without a subsequent injury. As there is no subsequent injury here, these cases are inapplicable and *Blake*, the default standard, applies.

[9] *Blake*, 792 A.2d 188 at *1.

[10] 564 A.2d 1132 (Del. 1989).

[11] *Duvall*, 564 A.2d at 1133.

Appellant further argues even if *Blake* is the appropriate standard, the Board misapplied it. Essentially, Appellant alleges Employer's expert's testimony here was very similar to that in *Blake*. Appellant states in conclusory fashion, "If a compensable work injury occurs and complicates a prior existing (in this case, non-symptomatic for a two year period) condition, the employer is responsible thereafter to the full extent of necessary and reasonable treatment without further reference to the proven to be asymptomatic prior existing condition." Appellant offers no authority for that.

Whether the Board properly applied *Blake* leads to Appellant's third claim, that the Board abused its discretion in finding Dr. Townsend more credible than Dr. Grossinger. The Board held "the proposed surgery is not necessitated by the work injury and in so finding adopts Dr. Townsend's opinion that this procedure is elective and could have been done even prior to the work accident in 2007." In its October 2013 decision, the Board elaborately recounted the hearing testimony and carefully considered the doctors' and Appellant's testimony. The Board also detailed the importance of Appellant's credibility and his inconsistent testimony, both here and in earlier hearings: the experts' opinions were largely based on his subjective complaints.

Taking it all into account, including Appellant's credibility, the Board decided that Dr. Townsend's opinions were more believable than Dr. Grossinger's. Hence, the decision in Employer's favor. The outcome turned on which expert was more believable about Appellant's degenerative condition, the work injury, and causation, bearing in mind that Appellant had the burden of proof.[12]

Here, Dr. Townsend provided several reasons that, individually and collectively, seriously undermine Dr. Grossinger's surgery referral and his opinion about causation. Dr. Townsend testified that the nature of degenerative spine conditions is to wax and wane in intensity and flare up occasionally. After consulting Appellant's records, Dr. Townsend opined that the 2004 EMG and follow up in 2009 were essentially the same. Similarly, Appellant's 2009 and 2012 MRIs showed worsening degenerative conditions, such as disc osteophytes complex and loss of disk hydration. Further, Dr. Townsend stated a patient would not wait seven years to get a surgical evaluation and the only change in Dr. Grossinger's records before the surgery was that Appellant reported more pain. In short, Appellant undisputedly suffered chronic low back pain with intermittent periods of severe pain for years before the work incident, and after the work incident was able to return to full duty work, often going months without any medical care. Dr. Townsend, accordingly,

[12] *Mobil Oil Corp.*, 283 A.2d at 839.

opined the surgery was related to Appellant's chronic, progressive back issues as opposed to the 2007 work incident.

After weighing the conflicting evidence presented to it, the Board decided that Appellant did not prove it was more likely than not that, but for the 2007 work incident, he would not need surgery now. The court may not re-weigh the evidence, reach its own conclusions about those things, and then reverse the Board based on the court's own fact-finding.

For the foregoing reasons, the Industrial Accident Board's October 10, 2013 decision is **AFFIRMED.**

IT IS SO ORDERED.

/s/ Fred S. Silverman
Judge

cc: Prothonotary (Civil)
Andrew J. Carmine, Esquire
Christopher A. Amalfitano, Esquire