IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

MICHAEL GRABOWSKI,	)	
	)	
Employee-Below, Appellant,	)	
	)	
v.	)	C.A. No. 01A-01-017 RRC
	)	
KEYSOR CENTURY CORP.,	)	
	)	
Employer-Below, Appellee.	)	

Submitted: August 20, 2001
Decided: November 2, 2001

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

ORDER

This 2nd day of November, 2001, upon consideration of the submissions of the parties[1], it appears to this Court that:

1. This is an appeal from part of a decision rendered by the Industrial Accident Board (the "Board") on the petition of Michael Grabowski ("Claimant") to determine additional compensation due from an accident at work in January 1990. The Board awarded "total disability" benefits to Claimant pursuant to 19 Del. C. § 2324 for the periods of

[1] Appellant did not file a Reply Brief.

November 12, 1999 through January 6, 2000 and May 30 through July 18, 2000, along with medical expenses for injuries to Claimant's "lumbar spine" and "right lower extremity" (including costs associated with knee surgery that occurred in November 1999); these injuries were incurred while Claimant was in the employ of Keysor Century Corp. ("Employer").[2] Claimant now seeks an order from this Court awarding "recurring" total disability benefits beginning September 14, 1999 and continuing through the present, or, alternatively, an award of "partial disability" benefits pursuant to 19 Del. C. § 2325 for the periods of January 5, 2000 through May 29, 2000 and from July 17, 2000 through the present; Claimant also seeks a determination that the neck and upper extremity problems Claimant has experienced are causally related to his 1986 and 1990 work injuries and are therefore compensable. Claimant does not appeal that part of the Board's decision that awarded Claimant: 1) total disability benefits from November 7, 2000 through January 6, 2000 and May 30, 2000 through July 18, 2000; 2) medical expenses related to Claimant's lumbar spine and right lower extremity; and 3) attorney's and medical witness's fees. Nevertheless, for the reasons below, the Court denies the relief sought by Claimant, instead

[2] Michael Grabowski v. Keysor Century Corp., IAB Hearing No. 909811 (October 24, 2000) (hereinafter "IAB Decision at __").

finding the Board's decision to be supported by substantial evidence. Accordingly, the Court AFFIRMS the Board's decision.

2. Claimant sustained two distinct sets of work-related injuries while employed as a millwright for Employer. The first set of injuries (to Claimant's low back and right knee) occurred in June 1986 when Claimant slipped on a metal plate that had standing water on top of it. The second set of injuries (to Claimant's low back and both legs) occurred in June 1990 when Claimant was re-injured and fell forward onto both knees. Claimant had surgery performed on his right knee following the 1986 accident and on his back following the 1990 accident. Testimony from Claimant's treating physician at the October 24, 2000 Board hearing indicated that the back surgery had not been successful insofar as Claimant continued to suffer from residual effects of the injury even after the back surgery. Claimant apparently has not performed any type of work to earn income within the last few years.[3] Claimant has, however, already been compensated for his

[3] The exact period of time within which Claimant had not sought work is unclear from the record. At one point in the transcript from the IAB hearing, Claimant stated that he had not looked for work since being placed on total disability status by Dr. Rodgers (a physician who had treated Claimant since 1993) in the fall of 1999 (Tr. IAB Hr'g at 52.); at another point, Claimant stated that he had not worked for income "in the last couple of years" (Tr. IAB Hr'g at 69.). Finally, Dr. Ger (an orthopedic surgeon who examined Claimant at the request of Employer) noted in his deposition that Claimant had told him that he had not performed any work for income since the injuries that occurred in 1990. (Ger Dep. at 8.).

injuries.[4] Claimant asserts that the two work-related injuries have resulted in an acute low back condition that causes him to often and unexpectedly fall.

In January 1998, Claimant suffered a fall down a set of stairs, which Claimant asserts led to the development of cervical spine and upper extremity problems. Claimant's position is that the 1998 fall was caused by Claimant's back and lower extremity condition, which Claimant believes to have resulted from his previous work-related injuries. Claimant argues that all of his injuries are causally connected.

In November 1999, Claimant's right leg was operated on a second time; an arthroscopic procedure removing part of the knee was performed by Alex B. Bodenstab, M.D. ("Dr. Bodenstab"), an orthopedic surgeon. Dr. Bodenstab's post-operative recommendations included an instruction that Claimant not work at all, *i.e.*, that Claimant be "totally" disabled from any

[4] Claimant was compensated by mutual agreement between the parties in the form of "permanent injury" awards, 19 Del. C. § 2326, first in 1989 (for the 1986 set of injuries) and again in 1992 (for the 1990 set of injuries); the combined value of these permanency awards was subsequently increased in 1995. In September 1993, by mutual agreement, Claimant received total disability compensation for the two sets of injuries. These payments continued until an August 1997 hearing at which the Industrial Accident Board terminated Claimant's total disability award and instead instituted partial disability payments to Claimant. In making this determination, the Board found Claimant to be capable of performing sedentary work duties. Grabowski v. Keysor Century Corp., IAB No. 909811 (August 27, 1997). Claimant's partial disability payments continued until Employer filed a petition to terminate in March 1999; that matter was resolved when Claimant stipulated that he was no longer disabled, either partially or totally.

type of work, from the period of November 12, 1999 through January 6, 2000; thereafter, Claimant was only to perform sedentary work duty.

Claimant continued to see Dr. Bodenstab following the surgery. During an office visit on May 30, 2000, Dr. Bodenstab drew fluid out of Claimant's right knee and injected it with a mixture of Novocain and steroid. Although he did not designate Claimant as "totally disabled" at that time, Dr. Bodenstab has since opined that a "totally disabled" designation would have been appropriate following the procedure.[5] Dr. Bodenstab testified that he would have deemed Claimant disabled from the date of the injection until the date of Claimant's next office visit with him on July 18, 2000.

3. In June 2000, Claimant filed a petition with the Board to determine additional compensation due, seeking total disability payments retroactively from September 1999 to the date of the filing of the petition, as well as recovery of the costs associated with the surgery performed by Dr. Bodenstab.

Claimant sought an order from the Board granting a recurrence of total disability benefits from September 1999 forward based upon the diagnoses of Stephen J. Rodgers, M.D. ("Dr. Rodgers"), a physician

[5] Bodenstab Dep. at 19

specializing in occupational medicine. Dr. Rodgers treated Claimant beginning in 1993 and continuing up to and beyond the time of the January 1998 fall. Dr. Rodgers placed Claimant on total disability status during an office consultation with Claimant in August 1999 to discuss the upcoming knee surgery with Dr. Bodenstab.[6]

As a result of Claimant's filing of the petition, Employer requested that Claimant be independently examined by Errol Ger, M.D. ("Dr. Ger"), a board certified orthopedic surgeon. When undergoing this examination, Claimant did not provide Dr. Ger with any historical information as to what brought about the January 1998 fall, but apparently relayed only that he had fallen down some steps and injured, among other things, his neck. Dr. Ger diagnosed Claimant with osteoarthritis of the right knee, "status post back injury with subsequent lumbar disc surgery", and subjective complaints of neck pain. A clinical examination of Claimant's neck performed by Dr. Ger did not show any abnormalities.

In contrast to Dr. Ger's diagnosis, Dr. Rodgers opined that Claimant's neck and upper extremity injuries and the 1986 and 1990 work injuries were interrelated. Dr. Rodgers testified that Claimant had never had any neck problems before the 1998 fall, which Dr. Rodgers attributed to Claimant's

[6] Rodgers Dep. at 21.

leg giving out as a result of an acute pain in Claimant's back. Dr. Rodgers conceded on cross-examination, however, that insofar as the neck injuries were causally related to Claimant's other problems, his findings were largely based on Claimant's statements that he fell when his leg gave out, and that the 1998 fall did not occur otherwise.

4. The Board heard argument on Claimant's petition on October 10, 2000. Stating that Claimant carried the burden of proving that "but for his work accident he would not have experienced further injuries to his cervical and lumbar spine and right knee resulting in total disability,"[7] the Board found that Claimant had met his burden insofar as a fixed period of total disability benefits relating to Claimant's right knee problems were concerned. However, weighing the testimony of Drs. Rodgers, Bodenstab, and Ger, the Board found that Claimant's neck injuries were not causally related to the two work-specific injuries Claimant suffered while working for Employer. Accordingly, Claimant was not compensated for those injuries.

Dr. Bodenstab testified that he thought most of Claimant's right leg symptoms were coming from Claimant's back, but that a certain amount of pain might be related to an "intrinsic" problem in the knee itself. Dr.

[7] IAB Decision at 8.

Bodenstab testified that his diagnosis was reinforced when, following a second injection of Novocain and steroid to Claimant's knee in August of 1999, Claimant experienced temporary relief; this indicated to Dr. Bodenstab that the pain Claimant was experiencing was a result of a problem inside Claimant's knee, rather than coming solely from his back.

Dr. Rodgers believed a causative chain existed between all of Claimant's injuries, including the 1998 fall and the 1986 and 1990 accidents. Dr. Rodgers believed that Claimant's falls were more than likely caused by problems with Claimant's back, and that the 1986 and 1990 work accidents had caused damage to the nerve roots leading from Claimant's back to Claimant's lower extremities. Dr. Rodgers testified that he believed Claimant's falls were attributable to his back injury and causally connected the neck injury to Claimant's other injuries.

Dr. Ger, on the other hand, causally isolated Claimant's neck problems from the 1986 or 1990 accidents Claimant suffered, instead testifying that the neck problems were unique to the January 1998 fall. Dr. Ger based his opinion on the fact that, when questioned by Dr. Ger about the fall, Claimant did not mention the leg "giving way". Dr. Ger did agree on cross-examination that if Claimant had fallen down the stairs because his

back injury had caused his leg to give way, then Claimant's neck injuries could be causally connected to Claimant's previous work-related injuries.

Dr. Rodgers testified that during an office visit in January 1999, Claimant related that he was exploring computer training through job programs offered by the Department of Labor. Dr. Rodgers also testified that as of the January 1999 office visit, he hoped that Claimant would find home-based work or would otherwise consider some vocational training. Although Dr. Rodgers later modified his prognosis to the effect that Claimant was ineligible for work in the general labor market because of Claimant's "overall clinical progression," Dr. Rodgers testified that if Claimant possessed or developed a set of skills, Claimant could be self-employed.

Similarly, Dr. Ger testified that Claimant was unfit to work as a millwright, but was fit for sedentary work duty. Dr. Ger would not impose additional restrictions on Claimant because of Claimant's problems with his cervical spine. Dr. Ger testified that to the extent that Claimant was capable of working, albeit with medical restrictions in place, Claimant's unemployment was a result of his lack of vocational training.

Claimant himself testified that he had attended computer classes at Delaware Technical and Community College, and that he had a computer at

home. Claimant also testified that he had obtained a GED in 1992 or 1993, and that he had done so largely without the benefit of instruction. Claimant further testified that he had not sought work since being advised by counsel not to do so; this recommendation apparently was based on Dr. Rodgers's comment that Claimant was unfit for work in the general labor market.

The Board then denied Claimant's request for ongoing total disability benefits and instead held that Claimant had met his burden only to support an award of a fixed period of total disability benefits. The Board accepted as conclusive the testimony of Dr. Bodenstab insofar as the dates that Claimant was entitled to total disability payments, and rejected the testimony of Dr. Rodgers that Claimant was totally disabled ongoing from August 1999. Additionally, based on the testimony given by Dr. Ger, the Board found no connection between Claimant's cervical spine and upper extremity problems and his previous work-related injuries. Finally, the Board found Claimant to be able to perform sedentary work duties based on the testimony of all three doctors.

5. Following the Board's denial of partial disability benefits, awarding of only limited total disability benefits, and ruling that Claimant's neck injuries were noncompensable, Claimant filed a motion for reargument before the Board. That motion sought reconsideration of the Board's

decision not to award partial disability for the time period between the post-surgery date that Dr. Bodenstab set as the time when Claimant could return to sedentary duty work (January 6, 2000) and the date that Dr. Bodenstab injected Claimant's knee with steroid and Novocain (May 30, 2000); the motion also sought an award of ongoing total disability benefits to Claimant, and a determination of a causal relationship between Claimant's two work-related accidents and Claimant's subsequent injuries to his neck and upper body.

The Board rejected all of Claimant's arguments and denied the motion for reargument.[8] With regard to partial disability benefits, the Board stated that Claimant had the burden of proving that he had sustained a loss of earning capacity and that Claimant failed to meet that burden by not presenting any evidence at the hearing, such as a labor market survey to establish an income estimate; additionally, Claimant was unemployed at the time, so a loss of earning capacity determination was not possible.[9]

With regard to total disability benefits, the Board reiterated that it was free to choose the medical testimony of one expert over that of another, and accordingly restated its prior holdings. The Board also reiterated that the

[8] Grabowski v. Keysor Century Corp., IAB No. 909811 (January 2, 2001) (hereinafter "IAB Order on Reargument at __").

[9] IAB Order on Reargument at 2.

medical expenses associated with Claimant's neck and upper extremity injuries were not recoverable because the Board had found those injuries were not causally connected to Claimant's previous work injuries.[10]

6. Claimant then filed this appeal. Essentially Claimant argues here for the same relief requested in his motion for reargument: 1) that Claimant be awarded partial disability benefits for the period of January 5, 2000 to May 29, 2000 and from July 19, 2000 to the present; 2) that Claimant be awarded total disability benefits ongoing since September 19, 1999; and 3) that this Court make a determination that Claimant's neck and upper extremity problems are causally related to the two work accidents Claimant suffered and therefore medical expenses associated with those injuries are recoverable.

In rebuttal, Employer argues that the Board's findings are supported by substantial evidence and therefore are not to be disturbed on this appeal. Specifically, Employer argues that the testimony of Drs. Bodenstab and Ger to the effect that Claimant was capable of performing sedentary work duties justified the denial of additional total disability benefits to Claimant. Employer argues that partial disability benefits properly should not have

---

[10] IAB Order on Reargument at 3.

been awarded because Claimant failed to introduce testimony at the Board hearing with regard to his earning capacity. Finally, Employer contends that the denial of expenses relating to Claimant's problems with his neck and upper extremities was proper because the Board was free to choose the competing testimony of Dr. Ger over that of Dr. Rodgers.

7. The Supreme Court and this Court repeatedly have emphasized the limited appellate review of factual findings of an administrative agency. The function of the reviewing court is to determine whether substantial evidence supports the agency's decision.[11] Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[12] On appeal, the court does not weigh the evidence, determine questions of credibility, or make its own factual findings.[13] The reviewing court merely determines if the evidence is legally adequate to support the agency's factual findings.[14] If substantial evidence exists and the Board made no error of law, its decision must be affirmed.[15]

---

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

[12] Olney v. Cooch, Del. Supr., 425 A.2d 610, 614 (1981)

[13] Johnson, 213 A.2d at 66.

[14] See 29 Del. C. § 10142(d) (providing that a reviewing court shall take due account of the experience and specialized competence of a fact-finding agency).

[15] Breeding v. Contractors-One-Inc., Del. Supr., 549 A.2d 1102, 1104 (1988).

8. Here, the Board essentially chose the competing testimony of one expert over that of another; it is properly the role of the Board to resolve conflicts in testimony and issues of credibility and to determine what weight is to be given to the evidence presented.[16]

With regard to limiting Claimant's total disability to those periods of time following the arthroscopic surgery performed on Claimant's knee and the injection of Claimant's knee with Novocain, the Board placed "great weight"[17] on the testimony of Dr. Bodenstab regarding those time periods post-surgery and post-injection that Dr. Bodenstab believed Claimant to be unable to work. This was not error on the part of the Board given that other testimony of Dr. Ger showed that Claimant was capable of sedentary work duty during those times that Claimant was not physically restricted by his treating surgeon.[18]

The Board's decision to deny Claimant total disability benefits is supported by the fact that Claimant would be able to work if he were to

[16] Mooney v. Benson Mgt. Co., Del. Super., 451 A.2d 839 (1982), *rev'd on other grounds*, Del. Supr., 466 A.2d 1209 (1983).

[17] IAB Decision at 9.

[18] *See* M.A. Hartnett, Inc. v. Coleman, Del. Supr., 226 A.2d 910 (1967) (stating that total disability means such disability that the employee is unable to perform any services other than those which are so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist).

develop a set of skills. Claimant himself testified that he had obtained a GED without much, if any, preparation, and that he had in the past attempted to gain vocational training in the use of computers, but had ceased looking for work largely on the advice of counsel.

The Board also found that Claimant's neck and upper extremity injuries were noncompensable by evaluating and assessing the credibility of competing testimony; this Court will not on appeal disturb the Board's discretionary findings. The Court will note, however, that Dr. Rodgers stated on cross-examination that he had causally connected Claimant's neck injuries with Claimant's other injuries largely because of Claimant's statement that his 1998 fall was the result of acute pain caused by previous injury; Dr. Ger, by contrast, does not recall any such statement made to him when he independently examined Claimant, and Dr. Ger's physical clinical examination of Claimant's neck failed to show any abnormalities.

Finally, this Court upholds the Board's decision not to award Claimant partial disability benefits. In order to be awarded partial disability benefits, a Claimant must prove an actual reduction in earnings.[19] The degree of compensable disability depends upon the degree of impairment of

[19] Ernest DiSabatino & Sons v. Apostolico, Del. Super., 260 A.2d 710 (1969), *aff'd*, Del. Supr., 269 A.2d 552, *aff'd sub nom.* Magness Constr. Co. v. Waller, Del. Supr., 269 A.2d 554 (1970).

earning capacity.[20] In making its determination, the Board stated that Claimant did not meet his burden because he failed to present any evidence of a loss of earning capacity, and that, because Claimant was unemployed during the entire duration of the proceedings below, a loss of earning capacity determination was not possible. Deferring to the Board's fact-finding expertise, this Court will not disturb that finding on appeal.

9. For the reasons stated above, this Court finds there was substantial evidence introduced at Claimant's Board hearing to support the Board's decision. The Board otherwise committed no error of law. Accordingly, the Court AFFIRMS the Board's holding.

IT IS SO ORDERED.

_____

Prothonotary

cc: Industrial Accident Board
Donald E. Marston, Esquire, Attorney for Claimant
Robert W. Ralston, Esquire, Attorney for Employer

[20] Ham v. Chrysler Corp., Del. Supr., 231 A.2d 258 (1967).