IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	)	
	)	CIVIL ACTION NUMBER
Employer Below, Appellant	)	
v.	)	
	)	02A-12-008-JOH
THEODORE TOWNSEND	)	
	)	
Employee Below, Appellee)		

Submitted: June 11, 2003
Decided: October 3, 2003

MEMORANDUM OPINION

Appeal from a Decision of the Industrial Accident Board - ***AFFIRMED***

John J. Klusman, Jr., Esquire, and Noriss E. Cosgrove, Esquire, of Tybout Redfearn & Pell, attorneys for employer-below, appellant

Gary S. Nitsche, Esquire, of Weik, Nitsche, Dougherty & Componovo, attorney for employee-below, appellee

HERLIHY, Judge

The Red Clay Consolidated School District appeals the Industrial Accident Board's denial of its petition to terminate Theodore Townsend's total disability benefits. All of its alleged errors committed below involved the weighing of evidence and the credibility of witnesses, such that they fall squarely and exclusively within the province of the Board.[1] Accordingly, the decision below is **AFFIRMED**.

Facts

Claimant Theodore Townsend, on July 7, 1998, while working for Red Clay Consolidated School District (the "State"), fell from a loading dock approximately five feet to the ground. He sustained substantial injuries to his upper and lower back, neck, and buttocks. There was no dispute that Townsend's injuries were the result of his work related accident and the State has been paying total disability benefits in the amount of $411.11 a week since July 8, 1998.

On October 13, 2000, the State filed its first petition to terminate Townsend's total disability benefits on the grounds that he was no longer totally disabled. A hearing took place on February 22, 2001. Relying on the testimony of Townsend's physician, Dr. Bruce Grossinger, the Board[2] denied the petition.

The State filed its second petition to terminate Townsend's benefits on June 3, 2002, arguing that suitable employment was available to Townsend. The Hearing Officer

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[1] The parties stipulated that a hearing officer rather than the Board could hear and determine the case. All references hereafter are to the hearing officer.

[2] This was a decision by the Board.

conducted a hearing on November 26, 2002. The State presented Robert Stackhouse, a vocational rehabilitation specialist. He reviewed Townsend's medical and occupational history and generated a labor market survey, finding twelve jobs that Townsend would be qualified to perform based upon his physical limitations as outlined by Dr. Alan Fink, the State's examining physician. The positions were primarily sedentary, customer service positions. Stackhouse admitted that all of the positions required between sixty and eighty percent frequent handling.

Greg Rybicki testified, by deposition, on behalf of the State. Rybicki, a physical therapist, performed a functional capacity examination on Townsend in March 2002. The purpose of the exam was to determine what Townsend, within his restrictions, was capable of performing within a normal workday. Rybicki testified that it was his opinion that Townsend could use his hands repetitively for a limited duration of time over a five to six hour workday. He also provided statistics as to accuracy of such functional capacity examinations generally, noting that 99 percent of those who have returned to work based on their results have worked successfully without re-injury. On cross-examination, Rybicki admitted that Townsend had difficulty manipulating small parts due to trembling and suffered pain during the examination.

Dr. Fink also testified, by deposition, for the State. He examined Townsend and his records and concluded that Townsend suffered mild limitations in neck range of motion and right ulnar neuropathy, but that there was no significant wasting of the hands. He also agreed

that continued treatment with Dr. Grossinger was appropriate. With regard to returning to work, Dr. Fink testified that Townsend's condition was guarded and that he could not perform a job with repetitive hand movements. After his most recent examination, Dr. Fink noted that there were no significant changes in Townsend's condition between his 2001 examination and the 2002 examination. He concluded, however, that Townsend could return to light-duty, sedentary work five to six hours a day, and that the twelve positions listed in the labor market survey were appropriate. But on cross-examination, Dr. Fink admitted that he had originally underestimated the severity of Townsend's condition and agreed that his condition had not significantly improved in the last couple of years. He was also unaware that the Board had denied the State's prior petition.

Townsend presented Dr. Bruce Grossinger, who testified that Townsend suffered multiple herniated discs in his cervical and thoracic spine, ulnar nerve entrapment, and severe atrophy and claw-hand deformity of the right hand as a result of the fall. He further testified that Townsend still lacks manual dexterity and is unable to grasp objects, such that assistance is required for his daily living activities. He also testified that Townsend's condition has not changed since February 2001, when the last petition to terminate benefits was rejected, and that he has reached maximal medical improvement. On cross-examination, Dr. Grossinger admitted that he did not directly observe the jobs listed in the labor market survey and that the functional capacity examination was a valid study, but disagreed with some of its conclusions. Dr. Grossinger did not believe that Townsend was capable of standing 4 to 5

hours per day, walking 3 to 4 hours per day or lifting up to 21 lbs. and that the functional capacity exam failed to address the specific limitations Townsend has due to his specific deformity.

Lastly, Townsend, himself, testified that he has left and right hand numbness with deformity to his right hand. He further stated that he must constantly rub his right hand, his only regular activity is making tea, he suffers headaches daily, and he does not sleep well. He is incapable of buttoning his shirt or tying his shoes. He further testified that he could drive only short distances and can only walk three to four city blocks. He also stated that he suffered pain throughout the functional capacity exam and had married a friend due to his need for daily living assistance.

The Hearing Officer found that the State had failed to demonstrate that Townsend's total disability had ended and denied the petition to terminate. In particular, the Hearing Officer found that the testimony was uncontroverted that Townsend's condition had not changed since the first petition to terminate was denied. Accordingly, he concluded that the State had failed to meet its prima facie burden of demonstrating that Townsend's disability had ended. He also rejected the functional capacity examination's findings, noting that Townsend had suffered pain and difficulty during the test. The Hearing Officer further found Stackhouse's testimony to be wholly uncredible, because even he admitted that the positions he found required significant manual handling.

The State has appealed the Officer's decision, making two arguments. First, it

maintains that the Hearing Officer's finding that the State did not prove that Townsend's disability had ended and was capable of working was erroneous as a matter of law because it was not supported by substantial evidence. In particular, the State contends that the decision of the Hearing Officer is undermined by his incorrect understanding that both testifying physicians believed that Townsend's condition had not changed at all since the last petition was rejected. The State also takes issue with the Hearing Officer's characterization of the functional capacity examination as representing only a "snapshot" of the Townsend's capability on one particular day, rather than as a prediction of Townsend's job capabilities in any given workday. The State also faults the Hearing Officer's rejection of its labor market survey as unreliable because it did not specify exactly what was unreliable about it.

The State's second argument is actually just a more comprehensive restatement of the "snapshot" portion of its first argument. The State argues that the Hearing Officer's finding that the functional capacity examination was merely a "snapshot" of Townsend's physical capabilities was an error of fact and not supported by substantial evidence.

Standard of Review

The function of the Superior Court on appeal from a decision of the Industrial Accident Board, in this case a Hearing Officer, is to determine whether there was substantial evidence in the record to support the Board's findings of fact and conclusions of law.[3]

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

Questions of law are reviewed de novo.[4] In reviewing the record for substantial evidence, the Court must consider the record in a light most favorable to the party prevailing below.[5] Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[6] The credibility of witnesses, the weight of their testimony and the factual inferences drawn therefrom are for the Board to determine.[7] This Court does not substitute its judgment for that of the Board.[8]

Discussion

In the present matter, an employer has filed a petition to terminate total disability benefits. After filing a petition to terminate an employee's total disability benefits, a former employer bears the initial burden of demonstrating that the employee is no longer totally incapacitated for the purpose of working.[9] If the employer satisfies that burden, the employee must show that she is a "displaced worker."[10] A worker is displaced if she "is so handicapped by a compensable injury that [s]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 [s]he is to be steadily employed."[11] Therefore, the employer bears the initial burden to

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[4] *Ocean Port Indus. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 899 (Del. 1994).

[5] *Brittingham v. St. Michael's Rectory*, Del. Super., C.A. No. 99A-11-001, Bradley, J. (July 25, 2000).

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

[7] *Keeler v. Metal Masters Equip. Co., Inc.*, 712 A.2d 1004, 1006 (Del. 1998).

[8] *Delaware Alcoholic Bev. v. Alfred I. DuPont Sch. Dist.*, 385 A.2d 1123, 1125 (Del. 1978).

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

[10] *Id.*

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

establish that the disability has ceased or that the disability is not a result of the accident.[12] Here, since there is no issue as to causation, the State bears the initial burden of establishing that the employee is no longer incapacitated.

In deciding that the State had failed to meet its burden, the Hearing Officer reasoned as follows:

> The testimony in this case was uncontroverted about one critical fact. Both Drs. Grossinger and Fink agreed that Claimant's condition has not changed at all over the past couple of years or, at least, since the last Petition to Terminate Benefits. This admission by the medical experts, alone, demonstrates the State has failed to meet its prima facie evidentiary burden in this matter. As noted in the controlling case law regarding termination, the State, as petitioning party, must demonstrate that Claimant's disability has ended before the termination inquiry proceeds any further. State could not establish even this burden. It is noted that the hearing officer found Dr. Grossinger credible. Dr. Fink's testimony was more difficult to resolve. Dr. Fink stated quite clearly that Claimant's condition has not changed and that his condition remains guarded to poor but believes Claimant is capable of sedentary work with some manual hand movement. The hearing officer accepts Dr. Fink's statement regarding Claimant's unchanged status but cannot give weight to his representations as to Claimant's ability to return to work. In essence, State, through its expert physician, acknowledges Claimant's total disability continues but maintains Claimant can return to work. These positions are inapposite.[13]

The State first attacks the Hearing Officer's decision because it said that the testimony was uncontroverted as to the fact that Townsend's condition has not changed at all over the past couple years. This, according to the State, is an incorrect statement. Dr. Fink's trial deposition states:

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[12] *Torres,* 672 A.2d at 30.

[13] *Townsend v. State,* IAB No. 1131516 (Dec. 9, 2002) at 6-7 (citations omitted).

Q: And he had just like the first time some objective findings and some neurological or strength deficits; right?

A: Correct.

Q: He told you that he hadn't improved a whole lot?

A: Correct.

Q: And you agree with that; right?

A: Yes.

Q: In fact, you would agree that he hasn't improved a whole lot in the last couple of years; is that true?

A: Correct.

Q: And specifically if I were to ask you, say around the spring of 2001, he hasn't improved a lot since that time either, has he?

A: Correct.

Q: Were you aware that this Board previously found that he could not go back to work in the spring of 2001?

A: No.[14]

The Hearing Officer may have been inaccurate in a small degree by saying Dr. Fink testified Townsend had not changed when he actually said he had not improved a whole lot. The difference in the circumstances of this case is inconsequential and semantical.

Linguistic technicalities aside, both parties' doctors agree that Townsend's physical condition has not changed in any significant way since the last time the Board rejected a

[14] Fink deposition, Nov. 13, 2002, pp. 20-21.

State's request for termination of benefits. In fact, neither doctor testified that Townsend's condition had improved at all. The only issue in dispute between the parties is whether Townsend's physical limitations constitute total disability. The Hearing Officer heard testimony from a number of witnesses and concluded it did. Furthermore, the record is replete with substantial evidence to support that decision. There are no valid grounds to upset it.

Despite the State's attempts to phrase its complaints as issues for this Court to decide, each of its assertions actually attack the credibility determinations of the Hearing Officer. The Hearing Officer found Dr. Fink's testimony to be confusing, if not contradictory, to the extent that he testified that Townsend had not improved to any significant extent, but nevertheless thought Townsend would be capable of performing light duty, sedentary work. Implicit in the Hearing Officer's reasoning is the premise that the Board had already found Townsend to be totally disabled in 2001. The State apparently misses that premise.

The State cites as error the Hearing Officer's use of the word "snapshot" when referring to Rybicki's functional capacity exam. Townsend's counsel used the work to describe the exam and Rybicki never disputed that characterization. Again, while there is quibble room here over the use of that word, it does not rise to the level of error.

The State similarly finds error in the Hearing Officer's rejection of Mr. Stackhouse's testimony about his job market survey results. But, as the Hearing Officer correctly noted, that issue need not be addressed because the State failed to carry its initial evidentiary burden.

In short, it was the Hearing Officer who heard the testimony of the professionals and observed Townsend explain his physical limitations. This Court did not. That is precisely why the credibility of witnesses, the weight of their testimony and the factual inferences drawn therefrom are for the Board (or Hearing Officer) to determine.[15] This Court will not second-guess the decision below.

Conclusion

The decision of the Industrial Accident Board is **AFFIRMED**.

J.

[15] *Keeler v. Metal Masters Foodservice Equip. Co., Inc.*, 712 A.2d 1004, 1006 (Del. 1998).