IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

LINDA ZELO,	:	
	:	
Claimant, Below/ Appellant,	:	C.A. No. 03A-08-002 WLW
	:	
v.	:	
	:	
DELMARVA RURAL MINISTRIES,	:	
	:	
Employer-Below/ Appellee.	:	

Submitted: January 2, 2004
Decided: March 15, 2004

ORDER

Upon Appeal of Decision of Industrial Accident Board. Affirmed.

Walt F. Schmittinger of Schmittinger and Rodriguez, P.A., Dover, Delaware; attorneys for Appellant.

Cassandra F. Roberts of Young Conaway Stargatt & Taylor, LLP, Wilmington, Delaware; attorneys for Appellee.

WITHAM, J.

Introduction

This is an appeal by Linda Zelo from a decision of the Industrial Accident Board ("Board" or "IAB") terminating ongoing total disability payments. The employer, Delmarva Rural Ministries ("Delmarva"), has answered the appeal. Based on the following, it appears that the decision of the Hearing Officer should be ***affirmed***.

Background

Appellant, Linda Zelo, was employed by Delmarva Rural Ministries as a medical records assistant and translator for the doctors and Hispanic patients. On October 20, 1999, in the course of her employment, Ms. Zelo was carrying five or six reams of copy paper. As she set the paper down on a table, she felt a pop in her back and fell to her knees. Immediately she began experiencing pain in her legs and lower back. Since the industrial accident, Ms. Zelo has been treated with traction, medications, injections and two back surgeries. She reportedly experiences constant pain and is unable to sit, stand, walk or drive a car for extended periods of time.

Since the time of the accident, Ms. Zelo has been receiving total disability benefits. On December 12, 2002, Ms. Zelo filed a Petition to Determine Additional Compensation Due alleging that she suffered 35% permanent impairment to her lumbar spine due to a compensable injury which occurred while she was employed with Delmarva. Delmarva asserts that Ms. Zelo suffered only 18% permanent impairment to her lumbar spine. On February 12, 2003, Delmarva filed a Petition for Review to terminate Ms. Zelo's total disability benefits, alleging that Ms. Zelo is capable of working in a sedentary or light duty capacity. Ms. Zelo

contends that she is totally disabled. After obtaining the consent of the parties, a Hearing Officer conducted a hearing on the petitions on August 6, 2003.

The Hearing Officer concluded that Ms. Zelo suffered a 26% permanent impairment to her lumbar spine, but was not a displaced worker and thus not totally disabled. The scope of this appeal is limited only to the decision of the Hearing Officer to terminate Ms. Zelo's ongoing total disability benefits.

Discussion

Standard and Scope of Review

On appeal from the IAB, the role of the Superior Court is to determine whether there was substantial competent evidence to support the finding of the Board.[1] Substantial evidence is such relevant evidence that a reasonable mind may accept to support a conclusion.[2] The Court is not the trier of fact and does not have the authority to weigh the evidence or make its own factual findings.[3] The Court will defer to the Board in its assessment of demeanor and credibility of witnesses and the weight to be given to their testimony.[4] However, the Court's review of questions of law is *de novo*.

Termination of Benefits

When an employer files a petition to terminate benefits, the initial burden is on the employer to establish that the claimant is no longer totally disabled and thus

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

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

[3] *Johnson*, 213 A.2d at 66.

[4] *General Motors Corp. v. Cresto,* 265 A.2d 42, 43 (Del. Super. Ct. 1970).

able to work.[5] If the employer meets that burden, the claimant must then establish that she is a displaced worker, that is, that she "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."[6] The employee's physical impairment along with her mental capacity, education, training or age may constitute a *prima facie* showing that she is displaced.[7] If there is not a *prima facie* showing that she is a displaced worker, the employee could still establish that she is displaced by showing that she has made reasonable efforts to obtain appropriate employment but has been unable to do so because of her back condition.[8] If the employee can demonstrate that she is displaced, the burden is then on the employer to show work within the employee's capabilities is available.[9] When the question before the Court is whether the party with the burden of production has satisfied that burden, it is a question of law and the Court is not bound by the Board's conclusion.[10]

Initially, the Hearing Officer concluded that Delmarva met its burden of establishing that Ms. Zelo is capable of working in at least a sedentary capacity. The Hearing Officer accepted the opinion of Dr. John Townsend over the opinions

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

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

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

[8] *Id.*

[9] *Id.*

[10] *Howland v. State,* 1986 Del. Super. LEXIS 1475, *8.

of Dr. Stephen Rodgers, Dr. Asit Upadhyay, and Dr. Gabriel Somori. She found that Dr. Rodgers had last examined Ms. Zelo in October 2002 and testified that Ms. Zelo could not work because she was experiencing uncontrollable pain. However, he admitted that he was not aware that Dr. Hari Kuncha had released her to work and that she was no longer taking pain medication. The Hearing Officer further found that Dr. Upadhyay had not seen Ms. Zelo since January 8, 2003, and had only treated her for two months. In addition, the Hearing Officer heard Dr. Somori testify that Ms. Zelo has not been on pain medication for several months and that she was noncompliant with appointments and recommendations made by the doctor. Doctor Somori had recommended that Ms. Zelo schedule diagnostic facet injections to help determine what level of work she could perform; Ms. Zelo never scheduled the diagnostic facet injections. Because of her reliance on the testimony of Dr. Townsend, the Hearing Officer concluded that Delmarva met its burden of establishing that Ms. Zelo was not totally disabled.

Ms. Zelo claims that because her treating physician, Dr. Somori, ordered her not to work due to her back problems it was error for the Hearing Officer to find that she was not totally disabled and incapable of working. In making this argument, Ms. Zelo relies on the Delaware Supreme Court's opinion *Gilliard-Belfast v. Wendy's, Inc.,*[11] in which the Court held that a claimant who can only resume some form of employment by disobeying the orders of her treating physician is totally disabled regardless of her capabilities.

[11] 754 A.2d 251, 254 (Del. 2000).

In *Gilliard-Belfast*, the claimant suffered a knee injury in a compensable work accident while working for Wendy's. Gilliard-Belfast filed a petition to determine additional compensation due seeking ongoing total disability benefits and a determination that prescribed surgery was compensable. Prior to the filing of the petition, Gilliard-Belfast's doctor ordered her to not work until the surgery was performed. Wendy's expert recommended light duty work pending the surgery. However, there was no disagreement between the doctors that the surgery was proper. The Board concluded that Gilliard-Belfast was not totally disabled, relying upon the opinion of Wendy's expert. The Superior Court affirmed the decision of the Board, but the Supreme Court reversed, stating that the Board's decision was contrary to well-established Delaware law which stated that the claimant remains disabled "'so long as his treating physician insists that he remain unemployed...'"[12]

However, the present case is distinguishable from *Gilliard-Belfast*. Unlike *Gilliard-Belfast*, there was not a consensus among the treating physicians regarding Ms. Zelo's ability to work. The Hearing Officer in the present case heard testimony that Dr. Kuncha had released Ms. Zelo to return to work immediately before she stopped treating with him. Doctor Upadhyay issued a no work order in March 2003, but he had not treated or even seen Ms. Zelo since January 8, 2003. At that time, Ms. Zelo was aware that Dr. Kuncha, who had seen her more recently than Dr. Upadhyay, had released her to work. Doctor Somori issued a no work order, but also recommended that Ms. Zelo undergo diagnostic facet injections to determine her capabilities, which she had not done. Finally, the

[12] *Id.* at 254 (*citing Malcolm v. Chrysler Corp.,* 255 A.2d 706, 710 (Del. Super. Ct. 1969)).

Board relied upon testimony by Dr. Somori attributing at least some of Ms. Zelo's pain to a leg length discrepancy.

Because there was not a consensus among Ms. Zelo's treating physicians regarding her return to work and Dr. Somori attributed some of her pain to a leg length discrepancy unrelated to the industrial accident, this situation is distinguishable from *Gilliard-Belfast*. It was appropriate for the Hearing Officer to find that Ms. Zelo was not totally incapacitated and thus able to work. Therefore, this Court finds that Delmarva met its burden of establishing that Ms. Zelo was capable of working in spite of her back injury.

The Hearing Officer next considered whether Ms. Zelo was a *prima facie* displaced worker. The Hearing Officer found that Ms. Zelo was thirty-two years old with a high school diploma. In addition, Ms. Zelo had taken other courses training as a travel agent and as a medical billing clerk. Ms. Zelo has good communication skills, in two languages, and has clerical and administrative experience. Based upon this, the Hearing Officer concluded that Ms. Zelo was not a *prima facie* displaced worker. There is substantial evidence supporting the Hearing Officer's decision, therefore the Court agrees with the determination that Ms. Zelo is not a *prima facie* displaced worker.

The Hearing Officer then evaluated whether Ms. Zelo was a displaced worker after making a reasonable effort to locate employment. The Hearing Officer concluded that Ms. Zelo failed to prove that she had made an effort to secure suitable employment. Ms. Zelo's job search records do not indicate the positions she sought, what the jobs entailed or whether jobs were even available at the businesses when she applied. In addition, the Hearing Officer found that many

of the employers listed were child care centers and thus would go beyond Ms. Zelo's sedentary restrictions.

Ms. Zelo argues that the Hearing Officer erred in finding that she did not make a reasonable effort to secure suitable employment. She relies on *Hawkes v. Radisson Wilmington Hotel* in which the Court held that the claimant is not required to provide corroboration concerning her job efforts and the rejection by prospective employers due to the physical limitations.[13] In addition, Ms. Zelo cites *Howland v. State*, where the Court found that Ms. Howland's testimony that she had applied for three jobs, in addition to applying for her previous job two times, and was told by each that they wanted someone healthier was sufficient to satisfy the claimant's burden of proving that she made a reasonable effort to locate suitable employment.[14]

The Hearing Officer found that Ms. Zelo was not seeking suitable employment, as some of the jobs were not sedentary positions. However, Ms. Zelo testified that the jobs she was seeking were clerical positions or receptionist positions, both of which are sedentary. Although she did apply for jobs in day care centers, there was no testimony that she was applying for a position as a child care worker. In explanation of what happens when she tells potential employers about her back problems, Ms. Zelo stated, "Positions were no longer available when I called,"[15] and "[Potential employers] kind of turn their tone, the tone had shifted

[13] 1985 Del. Super. LEXIS 1092, *6.

[14] 1986 Del. Super. LEXIS 1475, *12.

[15] Transcript of IAB Hearing, p. 196.

from my inquiry of the job to more of a very skeptical or saying that this would not be a job that we would consider you for."[16] Based on the testimony given during the hearing and the exhibits provided by Ms. Zelo, this Court finds that she has met her burden of showing that she made a reasonable effort to locate suitable employment and was turned down due to her back condition.

The question now is whether Delmarva sufficiently established that there were positions available which Ms. Zelo could perform. Tracy Wilkerson, a senior case manager at Concentra Integrated Services, developed a labor market survey after reviewing the various doctors' reports which permitted Ms. Zelo to work in a sedentary capacity and Dr. Townsend's report that said she could work in a light duty capacity. She based her survey on sedentary positions, as that was the most restrictive release. She identified jobs which would be less than thirty miles from Ms. Zelo's home, taking into consideration that she could not travel in a car for long periods of time. Ms. Wilkerson contacted potential employers to identify job openings, discussed the Claimant's specific health conditions with the employers and then visited the job site to find out what the job entailed. She identified eleven jobs which she and the employers believed would fit within Ms. Zelo's restrictions. While the employers did not agree to hire Ms. Zelo, they agreed that the positions were within her restrictions and she could apply.

The Hearing Officer found the testimony of Ms. Wilkerson to be credible, despite the Claimant's efforts to discredit her testimony. Various people with whom she had contact testified that they did not remember meeting with her.

[16] Transcript of IAB Hearing, p. 197.

However, she explained that her meetings with them are brief and sometimes only over the phone. When she visits the job site, she might meet with someone other than the contact she has listed. It is the role of the Hearing Officer to assess the credibility of witnesses, therefore the Court is bound by the Hearing Officer's determination that Ms. Wilkerson was a credible witness as long as her determination is supported by substantial evidence. The Hearing Officer clearly stated her reasons for concluding that Ms. Wilkerson was credible and reliable, thus the Court accepts the Hearing Officer's conclusion to rely upon the testimony of Ms. Wilkerson.

Ms. Zelo contends that Ms. Wilkerson failed to meet the requirements set forth in *Jennings v. University of Delaware*[17] when she conducted the job survey. In *Jennings*, the Court found that a placement counselor, who did not meet with potential employers to find out what the job involved and observe the conditions under which the claimant would work, did not establish that suitable jobs were available for the claimant.[18] The potential employers do not have to agree to hire the claimant, but the counselor should discuss the claimant's specific qualifications and limitations with the potential employer to determine if the employer would be willing to consider the claimant.

After a thorough reading of the transcript, the Court agrees with the Hearing Officer's finding that Ms. Wilkerson did satisfy the factors discussed in *Jennings.* While she did not actually meet with Ms. Zelo, she was aware of her background -

[17] 1986 Del. Super. LEXIS 1088.

[18] *Id.* at *7-8.

educational, professional, and medical. Ms. Wilkerson met with the employers and observed the available positions. Even though the employers did not agree to hire Ms. Zelo, they did agree that they would consider hiring someone with her medical condition and background. The Court agrees with the Hearing Officer that these employers may have simply forgotten their brief meeting with Ms. Wilkerson. Therefore, this Court finds that Delmarva has met its burden of establishing that suitable jobs are available for Ms. Zelo.

Conclusion

Based on the parties' briefs, the decision of the Hearing Officer, and the record of the hearing, this Court finds that Delmarva Rural Ministries met its burden of establishing that Ms. Zelo is no longer totally disabled, therefore the decision of the Hearing Officer is ***affirmed***.[19] Ms. Zelo's request for costs and attorneys' fees for this appeal pursuant to title 19, section 2350(e) of the Delaware Code is ***denied***.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.

J.

WLW/dmh
oc: Prothonotary
xc: Order Distribution

[19] The Board also concluded that Ms. Zelo was not partially disabled based upon the average salaries provided by Ms. Wilkerson and Ms. Zelo's salary prior to the injury. Ms. Zelo has not raised the issue of partial disability in her appeal, therefore the Court will not address it.

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File