IN THE SUPERIOR COURT FOR THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

MILTON BAILEY,	:	
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Appellant/Employee,	:	
	:	
v.	:	C.A. No. 03A-07-011 SCD
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	:	
STATE OF DELAWARE,	:	
	:	
Appellee/Employer.	:	

O P I N I O N

Upon employee's appeal from the decision of the Industrial Accident Board – **AFFIRMED**

Submitted: January 22, 2004
Decided: April 5, 2004

Matthew M. Bartkowski, Esquire, Kimmel, Carter, Roman & Peltz, Bear, Delaware, attorney for Appellant/Employee; and

David G. Culley, Esquire, M. Jean Boyle, Esquire, Tybout, Redfearn & Pell,Wilmington, Delaware, attorneys for Appellee/Employer.

Del Pesco, J.

This is an appeal from the decision of the Industrial Accident Board on Employer's Petition to Terminate Benefits. Milton J. Bailey ("Claimant") had an industrial accident on December 14, 1995 while working as a custodian for the Christina School District of the State of Delaware ("State"). He sustained compensable injuries to his left knee and cervical spine. Through the intervening years he has been compensated for several periods of total disability, with the most recent commencing on March 26, 1998. Claimant has received total temporary benefits, at a rate of $352.82 per week, based on wages at the time of injury of $529.21 per week. Claimant also received compensation for disfigurement and a forty-two percent permanent impairment to his cervical spine.

On March 5, 2003, State filed its Petition to Terminate Benefits. After a hearing, the Board concluded that the Claimant was no longer totally disabled, but that he has a diminished earning capacity. Claimant has appealed the Board's decision.

Summary of Facts

Milton Bailey ("Claimant") was injured in a work-related accident, which occurred on December 14, 1995.[1] Claimant slipped and fell on stairs, while carrying snow plowing equipment.[2] At the time of the accident, Claimant was working in the scope of his employment as a school custodian.[3] Initially, Claimant received treatment for his knee, later experienced pain in his neck and a tingling sensation in his fingers and hands, for which he sought further treatment.[4] Claimant underwent a cervical fusion procedure in 1996 that relieved some neck

[1] Transcript of *Bailey v. State of Delaware*, Industrial Accident Board Hearing ("IAB Hearing") 1071704, June 27, 2003, at 1.

[2] *Id*.

[3] *Id*. at 15.

[4] *Id*. at 47.

pain, but not the discomfort in his hands.[5] Claimant eventually saw Dr. Bruce J. Rudin who diagnosed Claimant with a pinched nerve in his neck.[6] In 1998, Claimant underwent a second neck operation, during which Dr. Rudin removed a piece of bone to take pressure off Claimant's spinal cord. His condition did not improve.[7] Since his surgery in 1998, Claimant has attended 56 sessions of therapy and takes medication daily for his pain, including OxyContin and Tylenol with Codeine.[8]

There were four witness who testified at the hearing.

Dr. William I. Smulyan testified by deposition for the State. He first examined the Claimant on November 10, 1999.[9] During the examination, Dr. Smulyan took Claimant's medical history and reviewed his medical records.[10] He noted that Claimant had been treating with Dr. Rudin and had undergone an anterior cervical fusion procedure and a posterior cervical laminectomy, both related to his compensable accident.[11] The Doctor concluded that the Claimant was not fit to return to work at that time.[12]

Dr. Smulyan examined Claimant again on August 16, 2000.[13] The Claimant complained that he "hurt all the time," but not as severe as previously indicated.[14] Claimant also informed

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[5] IAB Hearing at 49.

[6] *Id*. at 50.

[7] *Id*.

[8] *Id*. at 51, 53.

[9] Deposition of William I. Smulyan, M.D., June 16, 2003, at 3.

[10] *Id*. at 4-5.

[11] *Id*. at 4-5.

[12] *Id*. at 6.

[13] *Id*. at 7.

[14] *Id*.

him that he had not had any treatments since February of 2000, and had not worked since March of 1997.[15] Dr. Smulyan reported no change to Claimant's condition since the prior exam, and concluded that the Claimant continued to be unfit for work requiring any physical activity such as lifting, climbing, standing, bending, or stooping.[16]

Dr. Smulyan examined Claimant a third time on October 16, 2002.[17] Claimant denied any changes in his condition, and still felt pain in his neck which radiated through his extremities.[18] Dr. Smulyan again reviewed Claimant's medical records since his last visit, which showed that he was examined by Dr. Rudin in October of 2000 and February of 2001, with complaints of worsening neck pain and facial pain. Dr. Rudin ordered a C6-7 nerve block after the October 2000 visit; no further treatment for his neck pain was recommended after the February visit.[19] Dr. Smulyan also noticed Claimant attended several sessions of physical therapy in May of 2001.[20] He testified that Claimant should not return to work as a custodian for the State.[21]

On October 31, 2002, Dr. Smulyan offered an addendum to his report in order to clarify his previous recommendations as to Claimant's work capabilities.[22] In this addendum he stated that Claimant would be capable of performing sedentary work only.[23]

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[15] Deposition of William I. Smulyan, M.D., June 16, 2003, at 7.

[16] *Id*. at 8-9.

[17] *Id*. at 9.

[18] *Id*.

[19] *Id*. at 10.

[20] Deposition of William I. Smulyan, M.D., June 16, 2003, at 10.

[21] *Id*. at 11.

[22] *Id*.

In March of 2003, Dr. Smulyan completed a physical capabilities checklist which listed Claimant's work capabilities.[24] He noted that Claimant was never to bend, stoop, or climb ladders, but he felt Claimant could occasionally walk, stand, climb stairs, reach above his shoulder, and lift 21 to 50 pounds.[25] In addition, he could frequently reach below his shoulder and drive, and on a continuous basis sit for periods of six to eight hours a day.[26] Claimant was also capable of fine manipulation, pushing and pulling, simple grasping with both hands, and could use his feet for repetitive movement and operate foot controls.[27] Dr. Smulyan again opined that Claimant was fit for sedentary work.[28]

Mr. Robert Stackhouse also testified for the State. Mr. Stackhouse is employed by Proto Works as a vocational and rehabilitation counselor.[29] He testified that he reviewed Claimant's file, which included his education, professional work history, and medical documentation.[30] It was his understanding that Claimant had dropped out of high school after 11th grade and had thereafter acquired his GED.[31] Claimant had vocational training in the area of custodial care,

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[23] Deposition of William I. Smulyan, M.D., June 16, 2003, at 12.

[24] *Id*.

[25] *Id*.

[26] *Id*.

[27] *Id*. at 13.

[28] *Id*. at 12.

[29] IAB Hearing at 13.

[30] *Id*. at 13-14.

[31] *Id*. at 14. This information was obtained from a job application that Claimant filed with the Christina School District for the custodial position he obtained. *Id*. at 59.

held various certifications as a custodian, and attended additional educational seminars to supplement his training.[32]

Mr. Stackhouse testified that Claimant was a chief custodian at Christina School District, and had worked there from 1987 to 1997.[33] Prior to that, Claimant had worked in various jobs requiring physical labor.[34] Mr. Stackhouse also noted that Claimant had owned his own cleaning business called Robinhood Cleaning Services for approximately 10 years.[35] As Robinhood's owner/operator, Claimant supervised up to three employees, as well as assisted in the cleaning duties.[36]

Mr. Stackhouse also testified as to his knowledge of Claimant's medical history.[37] He was aware that Claimant had undergone two surgical procedures on his cervical spine and had primarily complained of pain to his neck, arms, and hands.[38] He further testified that in order for him to assess Claimant's case vocationally, he requested that Dr. Smulyan complete the physical capabilities checklist.[39]

Mr. Stackhouse testified that based on the checklist, as well as considering Claimant's vocational profile including his educational background, work history, and medical residuals,

[32] IAB Hearing at 14.

[33] *Id*. at 15.

[34] *Id*.

[35] *Id*.

[36] *Id*. at 16.

[37] IAB Hearing at 17.

[38] *Id*. at 17-18.

[39] *Id*. at 19.

Claimant was capable of working on a full-time basis.[40] In addition, Mr. Stackhouse prepared a labor market survey which identified jobs that he considered appropriate for Claimant from a vocational perspective.[41] The list contained 22 jobs, however he indicated that one specific job with Takeout Taxi was probably outside Claimant's sedentary restrictions.[42] Mr. Stackhouse further testified that he would categorize 14 of the jobs on the list as sedentary and 7 as light duty.[43] He also explained that he did not take into account Dr. Smulyan's assessment that Claimant could lift 21-50 pounds because he thought it sounded contradictory to sedentary restrictions, and would characterize that much weight as medium lifting capacity.[44] However, Mr. Stackhouse reiterated that the 14 jobs identified as sedentary typically required 10 pounds of lifting or less, while the 7 light duty jobs required a bit more weight bearing compared to the strict sedentary positions.[45] Mr. Stackhouse testified that all of the jobs listed, with the exception of Takeout Taxi, were appropriate for Claimant based on his education, work history, and medical condition.[46]

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[40] IAB Hearing at 20.

[41] *Id*. at 20-22. Mr. Stackhouse noted the jobs listed on his survey can be separated into five different occupational groupings: telemarketing, sedentary assembly, cashiering, customer services, and general security. He testified that he has observed the duties of all the positions detailed and opined that all were appropriate for Claimant. Generally, the telemarketing positions were part-time, however most of the other positions were for full-time employment. He was given assurances that most of the security positions were within Claimant's physical restrictions. The sales position and surveillance operator position required a high school or equivalent degree. There were also three positions which prefer a high school or equivalent degree. Mr. Stackhouse further testified that all of the positions are entry-level. *Id*. at 25-30.

[42] *Id*. at 22.

[43] *Id*. at 24.

[44] *Id*.

[45] IAB Hearing at 25.

[46] *Id*. at 27.

Claimant testified that he was born in 1948 and is 55 years old.[47] He dropped out of high school in the 9th grade and never received a GED.[48] Claimant testified that since the accident there are many things he can no longer do, such as wash his car, perform minor household repairs, and engage in recreational activities.[49] He is able to drive to the store and to visit his wife at her job.[50] His doctors have not placed any restrictions on his ability to drive even though he takes pain medication daily.[51]

Claimant testified that he had a previous accident in 1990, in which he had lower back surgery.[52] The accident in 1995 resulted primarily in pain to his neck which radiated down his arms into his hands.[53] Although he had undergone a neck fusion surgery in 1996, he returned to work for fear that he would be fired, even though he still felt pain.[54] To alleviate this pain during work, he had been taking Tylenol with Codeine everyday.[55] He further testified that Dr. Rudin performed a second neck surgery in 1998, removing a piece of bone from his neck.[56] After the surgery, Claimant participated in therapy sessions, but it did not relieve any pain.[57] In addition

[47] IAB Hearing at 45.

[48] *Id*. at 46.

[49] *Id*. at 56.

[50] *Id*. at 62-63.

[51] *Id*.

[52] IAB Hearing at 46.

[53] *Id*. at 47.

[54] *Id*. at 49.

[55] *Id*. at 50.

[56] *Id*.

[57] IAB Hearing at 51.

to Tylenol with Codeine, he now takes OxyContin twice daily.[58] Claimant further testified that he had to give up managing his business, Robinhood Cleaning Services, in 1998 because his pain was too severe.[59] He has not worked in any capacity since then and has not attempted to find another job.[60]

Dr. Rudin testified by deposition taken on June 26, 2003. He first examined Claimant in September of 1997, when he noted that Claimant had a history of neck and arm pain with a development of hand and finger numbness.[61] Dr. Rudin testified that although initially Claimant had been treated for carpal tunnel problems, additional diagnostic studies showed a two-level fusion at the C4-5, C5-6 cervical level, with upper extremity radiculopathy.[62]

On March 26, 1998, Dr. Rudin performed a posterior spinal decompression procedure, where pressure was relieved from the spinal cord, to improve the burning and discomfort which Claimant felt in his hands and arms.[63] After the surgery, Claimant's neck pain had improved, but the numbness persisted in his extremities.[64] Neurontin was prescribed for the numbness, but it had no effect.[65] In 1999, Claimant was prescribed OxyContin and was treated on and off by a physical therapist.[66] He further testified that he would see Claimant about once or twice a year

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[58] IAB Hearing at 53.

[59] *Id*. at 57-58.

[60] *Id*. at 61-62, 65.

[61] Deposition of Bruce Jay Rudin, M.D., June 26, 2003, at 3.

[62] *Id*. at 3-4.

[63] *Id*. at 5.

[64] *Id*. at 6.

[65] *Id*. at 7.

[66] *Id*.

for the next three years, with no significant improvements.[67] Dr. Rudin opined that Claimant has a permanent impairment rating of 42.3 percent.[68] When asked about Claimant's working capabilities, Dr. Rudin testified "[he] would rather not make a subjective guess as to what the patient can or can't do. [He would] rather have objective data. [Dr. Rudin] would have that patient obtain a functional capacity exam."[69] Claimant never underwent a functional capacity exam.

Standard of Review

The Delaware Supreme Court and this Court have repeatedly emphasized the limited appellate review of the factual findings of an administrative agency. On appeal from a decision of the Board, the Court is limited to determining whether substantial evidence in the record supports the Board's findings, and that such findings are free from legal error.[70] Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[71] If this Court finds substantial evidence and the Board has not committed an error of law, the Board's decision must be affirmed.[72]

Analysis

On March 5, 2003, the State filed a Petition to Terminate Benefits, alleging that Claimant was physically capable of returning to work, albeit with a diminished earning capacity.

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[67] Deposition of Bruce Jay Rudin, M.D., June 26, 2003, at 8.

[68] *Id*. at 9.

[69] *Id*. at 16-17.

[70] See *Employment Ins. Appeals Bd. of the Dep't of Labor v. Duncan*, 337 A.2d 308, 309 (Del. 1975*); Longobardi v. Unemployment Ins. Appeals Bd*., 287 A.2d 690, 692 (Del. Super. 1972), aff'd, 293 A.2d 295 (Del. 1972).

[71] *See Oceanport Ind. v. Wilmington Stevedores*, 636 A.2d 892, 899 (Del. 1994); *Battista v. Chrysler Corp*., 517 A.2d 295, 297 (Del. Super. 1986), app. dism., 515 A.2d 397 (Del. 1986).

[72] *Windsor v. Bell Shades and Floor Coverings*, 403 A.2d 1127, 1129 (Del. 1979).

The first issue presented was whether the employer has shown that the claimant is not totally incapacitated. Claimant argued that a termination petition cannot be granted unless the State can show a change in Claimant's physical condition since the 1998 surgery that rendered him totally disabled.[73] In *Brokenbough v. Chrysler Corporation*, the court noted four bases to modify a disability award, "specifically that the incapacity has (1) increased, (2) diminished, (3) terminated or (4) recurred."[74] The court determined that a termination only requires the employer to show that the employee is no longer entitled to compensation.[75] Similarly, in *Holden v. State*, the court opined "the employer must show that the incapacity has terminated because the claimant is physically able to return to work, regardless of whether the claimant's physical condition has changed."[76]

For a claimant to be considered "incapacitated" from work, it is necessary to consider his economic and physical qualifications. To show that a claimant's incapacity has terminated, evidence must be presented that the claimant is medically able to return to work and that employment is available within the claimant's restrictions.[77] The employer need not necessarily show that the claimant's physical condition has improved.[78]

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[73] IAB Hearing at 78.

[74] *Brokenbough v. Chrysler Corporation*, 460 A.2d 551, 552-53 (Del. Super. 1983).

[75] *Id*. at 553.

[76] *Holden v. State*, Del. Super., C.A. No. 95A-11-023, Del. Super., Barron, J., 1996 WL 280877 (May 16, 1996).

[77] *Id*. at *3.

[78] *Id*. at *4. The court noted that:

> an employee should not continue receiving total disability benefits if work is available within his restrictions. The *Brokenbough* Court acknowledged that to hold otherwise would yield inequitable results. An employer would forever be precluded from petitioning the Board to terminate an employee's benefits unless the employer could show a physical change, even though the disability had ceased because the claimant could work.

Id.

I find that there is substantial evidence to support the finding of the Board that Claimant is no longer totally disabled. Dr. Smulyan testified that he examined Claimant on several occasions and offered the opinion that he is capable of returning to work in a sedentary capacity. Additionally, he detailed Claimant's physical restrictions on a checklist which Mr. Stackhouse provided. Although the checklist indicated that Dr. Smulyan thought Claimant could lift 21-50 pounds, the testimony of Mr. Stackhouse shows that this weight recommendation was not considered by him in his vocational analysis because he thought it was inconsistent with sedentary work. The Board also noted that this weight discrepancy does not mean that Claimant could not handle lesser weights typical of sedentary jobs.

Dr. Smulyan's testimony is not disputed. Claimant's expert, Dr. Rudin, testified that he examined Claimant on several occasions but he declined to offer an opinion as to his work capabilities. The Board noted that "Dr. Rudin refused to hazard an opinion as to Claimant's work capacity absent a functional capacity examination. He did not state that Claimant was incapable of working."[79] The Board is free to accept one expert's opinion over another.[80] In this case there is no conflict.

In addition to the testimony of Dr. Smulyan, the Board pointed to other factors in support of its finding. The Board noted that "[Claimant] was alert, able to concentrate and able to answer questions appropriately," and further found that "[w]hile he appeared to be in some physical discomfort, it did not appear to be excessive or of such degree as to distract him from the matters at hand."[81] These observations are all consistent with Dr. Smulyan's testimony, and

[79] Decision of the Industrial Accident Board ("IAB Decision"), July 8, 2003, at 9.

[80] *DiSabatino Bros., Inc. v. Wortman*, 453 A.2d 102, 106 (Del. 1982).

[81] IAB Decision at 10.

are appropriate conclusions of the Board as the fact-finder. Thus, there is substantial evidence to support a finding that Claimant is no longer totally disabled.

The next issue presented is whether the Claimant is a displaced worker. A "displaced" worker is one who "while not completely incapacitated for work, is so handicapped by a 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."[82]

A worker's compensation claimant bears the burden of proving that he is "unable to perform any services 'other than those which are so limited in quality, dependability, or quantity that a reasonably stable market does not exist for them.'"[83] However, an employee can be considered *prima facie* displaced after weighing the physical impairment, along with other factors such as the employee's age, mental capacity, education and training.[84] If determined to be *prima facie* displaced, the employer is required to prove the availability of regular employment within the claimant's capabilities.[85]

I find the Board's decision that Claimant is not *prima facie* displaced to be supported by substantial evidence. Claimant was fifty-five years old at the time of the hearing, and has had a stable work history. Although Claimant left school in the ninth grade and has not acquired a GED, the Board noted he has been able to run his own business for ten years and did not appear to have diminished mental capacity to prevent him from finding suitable employment. Claimant

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

[83] *Joynes v. Peninsula Oil Co*., C.A. No. 00A-06-001, Del. Super., Witham, J. 2001 WL 392242 (Mar. 14, 2001).

[84] *See Franklin Fabricators v. Irwin*, 306 A.2d 734 (Del. 1973); *see also Chrysler Corp. v. Duff*, 314 A.2d 915 (Del. 1973).

[85] *Hebb v. Swindell-Dressler, Inc*., 394 A.2d 249 (Del. Super. 1978).

himself testified that he has not attempted to look for work, even though he is able to do some small things around the house and drive to visit his wife at work.

The State proved the availability of regular employment within the Claimant's capabilities. According to the labor market survey prepared by Mr. Stackhouse, which listed a detailed report of available jobs, their duties, and their requirements, Claimant meets the minimum qualifications and is capable of performing at least 19 of the 22 jobs listed.[86] The jobs are sedentary in that they require less than 10 pounds of lifting and involve mostly sitting and some walking. They are entry-level positions that do not require a high school diploma or a GED, and offer training to new employees. Additionally, Mr. Stackhouse testified that he has observed the duties of each job and opined that they are suitable employment for Claimant. The fact that Claimant owned and maintained his own business for ten years also demonstrates his competence to perform the functions that each job entails.

The calculation of diminished earning capacity is also supported by the record. Mr. Stackhouse used the middle-range of each job's salary to calculate the survey average. However, the Board noted that this method was inappropriate for Claimant under the circumstances, and determined the proper measure would be the lowest wage offered since the Claimant has not been in the labor market for several years and had been primarily a physical laborer.[87] Based on this approach, the Board concluded that a realistic earning capacity in a full-time sedentary position is $300.00 per week. This calculation of Claimant's earning capacity is supported by the evidence. Claimant's diminished earning capacity is a calculation of his prior earnings, less his anticipated earning capacity, for an award of $229.21 per week. Pursuant to title 19, section

[86] Two positions require employees to have a high school diploma or GED, while another position is beyond the Claimant's physical capabilities.

[87] IAB Decision at 11.

2325 of the Delaware code, Claimant is entitled to partial disability compensation at a rate of $152.81 per week. The decision of the Board is AFFIRMED.

IT IS SO ORDERED.

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Susan C. Del Pesco

xc: Original to Prothonotary
Counsel of Record