

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

WAYNE P. CHERRIX,)
)
 Claimant-Appellant,)
)
 v.) C.A. No. 03A-08-008 JRS
)
 SKATING CLUB OF WILMINGTON,)
)
 Employer-Appellee,)

Date Submitted: April 1, 2004
Date Decided: May 19, 2004

*On Appeal from a decision of the Industrial Accident Board. **AFFIRMED.***

ORDER

1. Wayne P. Cherrix appeals from an order of the Industrial Accident Board (“the Board”) denying his petition to determine additional compensation due. On July 13, 1993, while employed with the Wilmington Skating Club (“Skating Club”), Mr. Cherrix injured his left foot when a ladder he was standing on collapsed, resulting in back and leg pain. In 1995, he underwent back surgery for a herniated disc, and three years later he had his spine surgically fused. On June 27, 2001, Mr. Cherrix appeared before the Board on Skating Club’s petition to terminate benefits, which the Board denied. On July 21, 2003, Mr. Cherrix again appeared before the

Board on his petition to determine additional compensation due. He sought an award of benefits beginning in December, 2002 for a recurrence of total disability. The Board denied the petition in a decision dated August 4, 2003. Mr. Cherrix appeals from this ruling.

2. At the hearing, Mr. Cherrix testified that in the past year his pain medication has increased dramatically. He walks with a cane approximately 70% of the time. According to Mr. Cherrix, he can no longer perform household chores. He sees a psychologist for the anxiety caused by his chronic physical pain, and was recently approved for social security benefits.

3. Dr. Falco testified by deposition on Mr. Cherrix's behalf.¹ Dr. Falco had last examined Mr. Cherrix on October 2, 2002.² At that time, he opined that Mr. Cherrix could return to sedentary work.³ On December 3, 2002, a nurse in Dr. Falco's office examined Mr. Cherrix and gave him a work disability slip stating that he could not work. According to Dr. Falco's records, Mr. Cherrix complained that

¹Both Dr. Falco and Dr. Gelman previously testified by deposition at the June 27, 2001 hearing, and were again deposed for the present proceedings.

²Mr. Cherrix visited Dr. Falco's office at least eight times in 2001, twelve times from January 2002 to December of 2002, and six times from January 2003 to May 2003. Several times, Mr. Cherrix was examined by members of Dr. Falco's staff. Dr. Falco himself last examined Mr. Cherrix in October of 2002.

³In his deposition for the July 2001 hearing, Dr. Falco stated that Mr. Cherrix was able to work in a "sedentary to light-duty capacity, lifting no more than 25 pounds at a time . . ."

the pain in his back and legs had increased. The nurse, in turn, placed Mr. Cherrix on temporary total disability. Dr. Falco agreed that the nurse's evaluation of the pain was based on subjective complaints alone. From a physical perspective, Dr. Falco classified Mr. Cherrix's work ability as "sedentary." He was concerned, however, that Mr. Cherrix's subjective perception of the pain would make it difficult for him to work even in a sedentary capacity. Consequently, Dr. Falco recommended a Functional Capacity Evaluation to demonstrate whether Mr. Cherrix was unable to work or whether his work restrictions needed to be increased. It does not appear that this testing was ever performed.

4. Dr. Gelman testified by deposition on Skating Club's behalf. He examined Mr. Cherrix in July of 1998, October of 1999 and May of 2003. He found that the changes in the levels of Mr. Cherrix's pain were difficult to appreciate because they were subjective. He did not find that Mr. Cherrix had experienced an objective deterioration from 1999 to 2003; in fact, he commented that there was actually some objective improvement during this time period. Dr. Gelman opined that Mr. Cherrix was able to work at a sedentary position, with restrictions.

5. The Board found Dr. Gelman more persuasive than Dr. Falco. It agreed with his conclusion that Mr. Cherrix's condition had not changed - - at least from an objective perspective - - since the Board's last hearing in June of 2001. The Board

concluded that Mr. Cherrix's complaints of pain were credible, but did not believe that subjective complaints alone were sufficient for a finding of a recurrence of total disability as of December of 2002. It rejected Dr. Falco's opinion of Mr. Cherrix's work status in favor of Dr. Gelman's opinion. In sum, the Board concluded that Mr. Cherrix failed to demonstrate a recurrence of total disability.

6. In this appeal, Mr. Cherrix argues that he met his burden of proof of showing a recurrence of total disability, and that the Board erred as a matter of law in holding otherwise. According to Mr. Cherrix, the Court should consider the Board's 2001 decision, where it expressed approval of his efforts to find employment. He contends that he has been totally disabled since 2003. Mr. Cherrix believes that the combination of his present level of pain with his already severe work restrictions render employment in the current labor market highly unlikely. He criticizes the Board for finding him credible, yet not taking into account his testimony about how his pain has increased and caused substantial stress to his life. To show an objective increase in pain, Mr. Cherrix points to the fact that he now needs to use a cane and can no longer perform household chores. Furthermore, he has been approved for Social Security disability income. He argues that the subjective increase in his pain is undisputed by the physicians and the Board and, consequently, the Board's decision is not supported by substantial evidence.

7. Skating Club argues that the Board's decision was well-supported by the testimony of Dr. Gelman. As the fact-finder, the Board was obligated to reconcile conflicting medical testimony by accepting the opinion of one expert over another. According to Skating Club, Dr. Gelman's conclusions were supported by substantial evidence because: (1) he examined Mr. Cherrix more recently than Dr. Falco, (2) his findings during this examination were similar to Dr. Falco's, and (3) Dr. Falco's records do not reflect a significant objective change in Mr. Cherrix's condition between 2002 and 2003. Finally, Skating Club argues that the Board properly rejected Dr. Falco's work opinion because it was based solely on Mr. Cherrix's subjective complaints.

8. On appeal from a decision of the Board, the scope of review is narrow. The Court must determine whether the Board's conclusions are supported by substantial evidence and are free from legal error.⁴ "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."⁵ The Court cannot weigh evidence, determine questions of credibility, or make its own factual findings.⁶ Its function is limited to determining whether the evidence is

⁴*Stevens v. State*, 802 A.2d 939, 944 (Del. Super. Ct. 2002)(citations omitted).

⁵*Devine v. Advanced Power Control, Inc.*, 663 A.2d 1205, 1209 (citations omitted).

⁶*Id.* (citation omitted).

legally adequate to support the Board’s findings.⁷ The Court should take into account the experience and specialized competence of the Board in workers’ compensation law.⁸

9. As the claimant, Mr. Cherrix bore the burden at the hearing of showing a recurrence of total disability.⁹ A recurrence is defined as the “return of an impairment without the intervention of a new or independent accident.”¹⁰ “Total disability” does not mean “utter helplessness.”¹¹ It means that a claimant 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.’”¹²

10. When medical experts present conflicting testimony on the existence of a “total disability,” the Board must reconcile the testimony in light of “the employee’s age, education, general background, occupational and general experience, emotional stability, the nature of the work performable under the physical impairment, and the

⁷*Id.* (citation omitted).

⁸*Histed v. E.I. DuPont deNemours & Co.*, 621 A.2d 340, 342 (Del. 1993).

⁹*Walden v. Georgia-Pacific Corp.*, 1999 WL 1611419, at *4 (Del. Super.), *aff’d* 738 A.2d 239 (Del. 1999)(citing *Howard v. York Roofing, Inc.*, 1988 WL 97893 (Del. Super.)).

¹⁰*Id.* (quoting *DiSabatino & Sons, Inc. v. Facciolo*, 306 A.2d 716, 719 (Del. 1973); *Pepeta v. Container Corp.*, 1994 WL 555474 (Del. Super.), *aff’d*, 659 A.2d 228 (Del. 1995)).

¹¹*M.A. Hartnett, Inc. v. Coleman*, 226 A.2d 910, 913 (Del. 1967).

¹²*Id.* (quoting *Lee v. Minneapolis Street Railway Co.*, 41 N.W. 2d 433 (1950)).

availability of such work.”¹³ The Board may accept the opinion of one expert over that of another as long as its decision is supported by substantial evidence.¹⁴ When an expert’s testimony is based solely on the subjective complaints of a patient, the Board may accept or reject such findings.¹⁵

11. The Court is satisfied that the Board’s findings are well-supported by competent evidence of record. Mr. Cherrix attempted to show that he was totally disabled through his own testimony and Dr. Falco’s testimony, and Skating Club rebutted this with Dr. Gelman’s testimony. Dr. Falco testified that he had not seen Mr. Cherrix since October of 2002.¹⁶ After reviewing the medical records from the 2003 visits, he opined that his diagnosis of Mr. Cherrix’s physical capabilities “would have remained the same, from a structural point of view.”¹⁷ Although Dr. Falco expressed concern about Mr. Cherrix’s level of pain worsening, he also noted that “[t]he perception of the pain has worsened,” rather than the physical aspect of it, and

¹³*Steele v. Animal Health Sales, Inc.*, 2001 WL 1355134, at *5 (Del. Super.)(quoting *Ham v. Chrysler Corp.*, 231 A.2d 258, 261 (Del. 1967)).

¹⁴*Dupont Hospital for Children v. Pierce*, 2001 WL 755326 (Del. Super.), *aff’d* 820 A.2d 371 (Del. 2001)(citing *DiSabatino Bros., Inc. v. Wortman*, 453 A.2d 102 (1982)).

¹⁵*Adams v. Nabisco*, 1995 WL 653435, at *4 (Del. Super.)(citing *Breeding v. Contractors One*, 549 A.2d 1102, 1104 (Del. 1988); *Sears, Roebuck & Co. v. Farley*, 290 A.2d 639, 641 (Del. 1972)).

¹⁶D.I. 3 (6/26/03 deposition of Dr. Falco) at 10.

¹⁷*Id.* at 11.

that the increase in pain was “all subjective.”¹⁸ Dr. Falco opined that Mr. Cherrix’s ability to work from December 2002 to the date of the hearing would have been classified as “sedentary,” from a physical perspective.¹⁹ In fact, portions of Dr. Falco’s testimony actually support Dr. Gelman’s conclusion because neither expert found an objective deterioration of Mr. Cherrix’s spine that correlated with his subjective complaints. The Board properly rejected Dr. Falco’s opinion because it was based on Mr. Cherrix’s subjective complaints alone.²⁰

12. Based on the foregoing, the Court concludes that the Board correctly resolved the conflict in expert testimony by choosing Dr. Gelman’s opinion, which was supported by substantial evidence, over that of Dr. Falco.²¹ Therefore, the decision of the Board is **AFFIRMED**.

¹⁸*Id.* at 12, 16.

¹⁹*Id.* at 10.

²⁰Board’s decision dated August 4, 2003 at 8 (“Dr. Falco bases his current return to work opinion solely on Claimant’s subjective complaints of an increased intensity in his pain since December 2002.”). *See also infra* note 15.

²¹The Court notes that it cannot reverse the Board simply because it might have reached a different conclusion if presented with the same evidence in the first instance. *See Diamond Materials v. Manganaro*, 1999 WL 1611274, at *2 (Del. Super.) (“[T]his Court will give deference to the expertise of administrative agencies and must affirm the decision of an agency even if the Court might have, in the first instance, reached an opposite conclusion.”)(citations omitted).

IT IS SO ORDERED.

Judge Joseph R. Slights, III

Original to Prothonotary.