IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

WILLIAM KING,	)
	) C.A. No. 02A-09-004 JTV
Claimant Below - Appellant,	)
	)
v.	)
	)
DuPont,	)
	)
Employer Below-Appellee.	)

Submitted: March 17, 2004
Decided: June 15, 2004

Walt F. Schmittinger, Esq., Schmittinger & Rodriguez, Dover, Delaware. Attorney for Appellant.

Robert Ralston, Esq., Wilmington, Delaware. Attorney for Appellee.

Upon Consideration of Appellant's Appeal From
Decision of Industrial Accident Board
AFFIRMED

VAUGHN, Resident Judge

King v. DuPont
C.A. No. 02A-09-004 JTV
June 15, 2004

ORDER

Upon consideration of the parties' briefs and the record of the case, it appears that:

1. William King (" the claimant") appeals from a decision of the Industrial Accident Board (" the Board") denying his petition for partial disability benefits. I affirm the Board' s decision.

2. The claimant was a spinning machine operator for the DuPont Company. The job was repetitive and physically demanding. He suffered work-related injuries to both upper extremities. The injuries were first documented in January 1997, when the claimant went to Dr. Richard DuShuttle. Dr. DuShuttle diagnosed the claimant with tennis elbow in both arms. In April 1997 Dr. DuShuttle told the claimant to " go easy" with the arms and return on an as-needed basis. The claimant went back to Dr. DuShuttle in April 1999. Dr. DuShuttle determined that the claimant continued to have tennis elbow in both arms, and, in addition, carpal tunnel syndrom in both wrists. On June 9, 1999 Dr. DuShuttle issued a " one-handed light duty note to re-evaluate" the claimant. In July 1999 Dr. DuShuttle performed surgery on the right wrist. In August 1999 Dr. DuShuttle did surgery on the left wrist. After this second surgery, Dr. DuShuttle released the claimant to light duty work only. Injury to the claimant' s arms persisted and in September and October 2000, Dr. DuShuttle did surgery on the left and then the right arm for the tennis elbow condition. At that point the claimant was working " full time modified duty."

Dr. DuShuttle described this status as one in which the doctor did not want the claimant,

> to overdo it . . . I wanted him to do where he' s not going to be causing discomfort or injury . . .[i]n other words, if there' s anything he can do at work to minimize repetitive use of the elbow or wrist or even to minimize overdoing it . . . [i]n other words . . . I understand that for him a lot of this stuff was overtime and I was not too enthusiastic about overtime because of the tendency to overdo it or overuse his arms.

3. In December 2000 the claimant reported to Dr. DuShuttle that he had changed jobs to a new one which was more strenuous than his DuPont job. Dr. DuShuttle decided that the claimant should have permanent work restrictions, and recommended that he not engage in any repetitive frequent lifting, pushing or pulling with a maximum of 10 to 15 pounds. The doctor didn' t want him to do anything to aggravate his arms. The doctor recommended that he not work any overtime in a type of position involving the repetitive use of the arms and hands. In March of 2001 Dr. DuShuttle noted that the claimant' s conditions had improved and that he could return for future treatment on an as-needed basis. It remained Dr. DuShuttle' s opinion that a permanent work restriction, which he described in his testimony as a roughly light duty restriction, was appropriate.

4. In January 1997 when the claimant first went to see Dr. DuShuttle, the claimant was making $1,045.67 per week with DuPont, which included overtime. The claimant introduced into evidence his W-2 forms showing that he made $41,229

in 1997, $41,914.52 in 1998, $43,646 in 1999 and $36,500.58 in 2000, compared with, according to his testimony, $54,000 before 1997. During all these periods, his base salary, without overtime, did not decrease.

5. After April 1997 the claimant worked some overtime, but not as much as before 1997. When Dr. DuShuttle placed the claimant on a light duty restriction, the claimant ceased working overtime altogether. According to the claimant's testimony, once he was formally placed on light duty status, he was ineligible for overtime under company policy.

6. In June 2001, the claimant accepted early retirement from DuPont with reduced pension. In his testimony, he stated that DuPont decided to cut back on jobs, that his job would be regressed to a lower paying, different job, and that he did not have enough seniority to avoid the cutback.

7. After retirement, the claimant looked for work and began a power washing business that lasted for three months. He testified that his partner did most of the labor as he could not tolerate that activity for extended periods of time. The claimant then began employment with Dover Downs on January 2, 2002, making $30,000 per year.

8. Prior to this proceeding, the claimant was paid worker's compensation benefits for the overtime pay he lost between January and April 1997, and, in addition, compensation for seven and a half percent permanent impairment. In this proceeding, the claimant seeks ongoing partial disability benefits because he couldn't work overtime after being placed on light duty status while at DuPont and is not

capable of working without restrictions.

9. Dr. DuShuttle testified that in his opinion the claimant continues to be restricted to light duty work activities based upon permanent impairment to the arms, and that he has achieved maximum medical improvement.

10. Dr. Gelman testified on behalf of DuPont. He reviewed claimant's medical records concerning his treatment and examined him on March 30 and September 17, 2001. Dr. Gelman testified that he did not believe that the claimant had any work restrictions. He also testified that there were no objective findings from his examinations. The claimant had purely subjective complaints. Dr. Gelman found that the outcome from the four surgeries was very good and that the claimant functioned at a high level of activity. The claimant told Dr. Gelman that he actively performed strenuous work, including pushing and pulling up to three hundred pounds on wheels and some repetitive work with a computer. During the second evaluation, the claimant told Dr. Gelman that his arms were a lot better and he had no elbow problems but some tightness and tingling in his forearm. Dr. Gelman also testified that the claimant has no atrophy of his upper extremities, which indicates that the claimant had been using his upper extremities on a regular basis. Dr. Gelman concluded that claimant could work without restriction.

11. At the hearing the employer introduced a videotape taken by Mr. Sorintino of Facticon which showed the claimant's power washing activities on July 12, 2001. Facticon is a company that performs investigations and surveillance for insurance carriers and employers. Mr. Sorintino testified that he is duly licensed to

perform that type of work and that his company had been retained to carry out surveillance of the claimant. The Board viewed the tape and concluded that it showed the claimant working for over an hour without a break; that when he was not actually power washing, he was lifting and carrying ladders and other equipment; and that he showed no distress from his physical activities. The Board concluded that the activities shown on the tape were inconsistent with the claimant's testimony concerning limitations on his physical abilities, and that he was not a credible witness.

12. The Board accepted the testimony of Dr. Gelman over that of Dr. DuShuttle and held that the claimant did not meet his burden of establishing a loss of earning capacity and partial disability.

13. The scope of review for appeal of a board decision is limited to examining the record for errors of law and determining whether substantial evidence is present in the record to support the Board's findings of fact and conclusions of law.[1] "Substantial evidence" is defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[2] On appeal, the court does not "weigh the evidence, determine questions of credibility, or make its own factual

---

[1] *Robinson v. Metal Masters, Inc.*, 2000 Del. Super. LEXIS 264, *Histed v. E.I. DuPont de Nemours & Co.*, 621 A.2d 340, 342 (Del. 1993); *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965).

[2] *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981); *Consolo v. Federal Maritime Commission*, 383 U.S. 607, 620 (1966).

findings."[3] The court is simply reviewing the case to determine if the evidence is legally adequate to support the agency's factual findings.[4] The court must give "due account of the experience and specialized competence of the Board and of the purposes of our workers' compensation law."[5] When reviewing the Board's findings, the reviewing court should accept those findings, even if acting independently, the reviewing court would reach contrary conclusions.[6] Absent an error of law, the standard of review is abuse of discretion.[7] An abuse of discretion arises only where the Board's decision has "exceeded the bounds of reason in view of the circumstances."[8] Only where no satisfactory proof exists to support the factual finding of the Board may the Superior Court overturn it.[9]

14. The Board has the discretion to accept the testimony of one expert over that of another expert when evidence is in conflict and the opinion relied upon is

---

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

[4] *ILC of Dover, Inc. v. Kelley*, 1999 Del. Super. LEXIS 573, at *3.

[5] *Histed*, 621 A.2d at 342.

[6] *H&H Poultry v. Whaley*, 408 A.2d 289, 291 (Del. 1979).

[7] *Digiacomo v. Board of Public Education*, 507 A.2d 542, 546 (Del. 1986).

[8] *Floundiotis v. State*, 726 A.2d 1196, 1202 (Del. 1999); *Lilly v. State*, 649 A.2d 1055, 1059 (Del. 1994).

[9] *Johnson*, 213 A.2d at 64.

supported by substantial evidence.[10] In addition, when an expert's opinion is based in large part upon the patient's recital of subjective complaints and the trier of fact finds the underlying facts to be different, the trier is free to reject the expert's testimony.[11]

15. I find nothing improper in the Board's findings that the claimant was not credible and that Dr. Gelman's opinion was more credible than the opinion of Dr. DuShuttle. These determinations by the Board support the conclusion that the claimant does not suffer any work restrictions, loss of earning capacity, or temporary disability. The testimony of Dr. Gelman and the other evidence consistent with his testimony provide substantial evidence to support the Board's finding that the claimant is not partially disabled.

16. I find that the Board's decision that the claimant retired from DuPont because of impending job cuts, not his injuries, is supported by substantial evidence.

17. The claimant also argues that under *Gilliard-Belfast v. Wendy's*,[12] he is partially disabled, on the theory that he is entitled to rely upon his physician's restriction that he work only light duty. In *Gilliard-Belfast*, the claimant was

---

[10] *Resse v. Home Budget Center*, 619 A.2d 907, 910 (Del. 1992); *DiSabatino v. Wortman*, 453 A.2d 102, 106 (Del. 1982); *General Motors Corp. v. Veasey*, 371 A.2d 1074, 1076 (Del. 1977) (rev'd on other grounds by *Duvall v. Charles Connell Roofing*, 564 A.2d 1132 (Del. 1989)); *Butler v. Ryder M.L.S.*, 1999 Del. Super. LEXIS 29, at *5-6 (Del. Super. 1999).

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

[12] 754 A.2d 251 (Del. 2000).

awaiting surgery necessitated by a work accident. All physicians who examined her agreed that the surgery was related to the work accident and was appropriate treatment. Her treating physician ordered her not to work while waiting for the surgery because he did not believe that she could work with her particular injury. A non-treating physician believed she was capable of light duty work while waiting for the surgery. The Supreme Court held that the Board and the Superior Court committed error by accepting the testimony of the non-treating physician that the claimant could perform light duty work pending the surgery and, on that basis, denying her claim for total disability. The Court held that a person who can only perform some form of employment by disobeying the orders of his or her treating physician is totally disabled, at least temporarily, regardless of his or her capabilities.

18. The claimant acknowledges that *Gilliard-Belfast* is factually distinguishable because it involved a doctor's restriction of no work, as opposed to a restriction to light duty. He argues by analogy that the principle involved in *Gilliard-Belfast* applies equally where the treating physician's restriction is something less than total disability. The theory of the claimant's argument, as the Court perceives it, is that under *Gilliard-Belfast*, the Board cannot, as a matter of law, find that he is capable of physical labor without restrictions because his treating physician restricted him to light duty work only.

19. In *Gilliard-Belfast* both medical doctors who testified agreed that the proposed surgery was reasonable and appropriate. The only issue was whether the claimant should be considered partially or totally disabled while awaiting that treatment. In this case there is no proposed surgery which the claimant is awaiting.

The doctors are offering their opinions in a different context than that present in *Gilliard-Belfast.* In addition, in this case the Board found that the claimant is not credible. The claimant's credibility was not in issue in *Gilliard-Belfast.* For these reasons, in addition to the acknowledged factual differences, I find that *Gilliard-Belfast* is distinguishable.

20. I conclude that the Board's decision is supported by substantial evidence and free of legal error.

21. Therefore, the decision of the Board is ***affirmed***.

IT IS SO ORDERED.

/s/ James T. Vaughn, Jr.
Resident Judge

oc: Prothonotary
cc: Order Distribution
File