

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

VERNON McDOWELL,)	
)	
Claimant Below-)	
Appellant,)	
)	C.A. No. 03A-09-009 MMJ
v.)	
)	
JOHNSON CONTROLS,)	
)	
Employer Below-)	
Appellee.)	

Submitted: May 11, 2004
Date Decided: June 16, 2004

Upon Appeal from a Decision of the Industrial Accident Board
AFFIRMED

MEMORANDUM OPINION

Ronald Stoner, Esquire, *Attorney for Claimant-Appellant*

Anthony M. Frabizzio, Esquire, *Attorney for Employer-Appellee*

JOHNSTON, Judge

Vernon McDowell (“Claimant”) has appealed the Industrial Accident Board (“Board”)’s August 21, 2003 decision denying Claimant’s petition for temporary total disability benefits for the period from March 11, 2003 to May 20, 2003.

According to Claimant, an analysis of the Board’s findings of fact and conclusions of law shows that the Board erred by rejecting the expert medical testimony of Dr. Ganesh Balu, based on lack of credibility of Claimant, without considering Claimant’s medical status for the time period that total disability is alleged. Also, the Board made an error of fact as to testimony about the potential employment position of maintenance apprentice and relied upon that mistaken fact to support its finding of Claimant’s lack of credibility. Johnson Controls (“Employer”), on the other hand, requests that the Court affirm the Board’s decision because substantial evidence exists to support the Board’s findings that the Claimant was not credible and was capable of working in a light duty capacity.

FACTS AND PROCEDURAL CONTEXT

Claimant has been employed as a forklift operator and HV welder at Johnson Controls since 1990. On August 6, 2001, Claimant’s forklift and another forklift collided in a battery storage area. The force of the impact caused Claimant’s left leg to become trapped between the forklift body and the steel rail of the storage area wall. Claimant suffered a serious crush injury to his upper left thigh area, which ultimately

required two surgeries. Claimant briefly returned to work for 3 weeks in February 2002, but then was totally disabled again in March 2002. Although released by his doctor in August 2002, Employer did not have work available for Claimant until December 2002. Claimant gradually increased his working hours from 4 hours per day up to 8 hours per day through January 2003. On March 11, 2003, Claimant's doctor again totally disabled Claimant until May 20, 2003, when Claimant was released to return to work with restrictions. Employer did not have available work for Claimant with his restrictions. Claimant petitioned for temporary total disability benefits for the period of March 11, 2003 to May 20, 2003.

A hearing was held before a workers' compensation hearing officer ("Hearing Officer" or "Board") on August 13, 2003. The Hearing Officer heard argument on the issue of Claimant's medical status by deposition of Dr. Ganesh Balu and Dr. William Sommers. The Board considered the testimony of Claimant; Robert Brooks, a supervisor at Johnson Controls; and Wanda Clifton, Human Resource Manager at Johnson Controls.

The Board found that Claimant did not suffer a recurrence of his work injury from March 11, 2003 through May 20, 2003. Specifically, the Board found that Claimant did not meet his burden of proof. The Hearing Officer indicated that she did not find Claimant to be credible. She rejected Dr. Balu's opinion that Claimant

was totally disabled from March 11, 2003 through May 20, 2003, because his opinion was based upon Claimant's subjective complaints of pain. A medical expert's opinion as to causality may be rejected if the trier of fact finds that the opinion is based in large part on the claimant's subjective history and the claimant is found to be not credible.¹

The Hearing officer pointed to inconsistencies in Claimant's testimony and the evidence with regard to Claimant's subjective history. Specifically, in September 2002, Claimant applied for a maintenance apprenticeship program which was not a light duty program. The Human Resource Manager testified that the program is a medium to heavy duty job, which is not in Claimant's restrictions from Dr. Balu. However, Claimant testified that he observed his friends performing this position and he believed he would be able to perform this job. If the job had been offered to him, he would have accepted it.

Based upon the inconsistencies between the return to work restrictions of Dr. Balu, Claimant's subjective complaints, and Claimant's subjective belief that he could perform the maintenance program, the Hearing Officer found that Claimant was not credible and found he did not provide a credible history to Dr. Balu with regard to his subjective symptomatology. Therefore, the Hearing Officer found that the

¹*Breeding v. Contractors-One-Inc.*, 549 A.2d 1102, 1104 (Del. 1988).

Claimant did not suffer a recurrence of his work injury from March 11, 2003 through May 20, 2003.

The Hearing Officer's Order to deny the benefits requested was issued on August 21, 2003. An appeal of the Board's decision subsequently was filed with this Court.

STANDARD OF REVIEW

In reviewing the decisions of the IAB, this Court must determine whether the findings and conclusions of the Board are free from legal error and supported by substantial evidence in the record.² The function of the reviewing Court is to determine whether the agency's decision is supported by substantial evidence.³ Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.⁴ The appellate court does not weigh the

²19 Del. C. § 3323(a) (“In any judicial proceeding under this section, the findings of the [UIAB] as to the facts, if supported by evidence and in the absence of fraud, shall be conclusive, and the jurisdiction of the Court shall be confined to questions of law.”); see *Unemployment Insurance Appeal Board v. Martin*, 431 A.2d 1265, 1266 (Del. 1981); *Ponchvatilla v. United States Postal Service*, Del. Super., C.A. No. 96A-06-19, Cooch, J. (June 9, 1997), Mem. Op. at 2.

³*General Motors v. Freeman*, 164 A.2d 686, 688 (Del. 1960); *Johnson v. Chrysler Corporation*, 213 A.2d 64, 66-67 (Del. 1965).

⁴*Oceanport Ind. V. Wilmington Stevedores*, 636 A.2d 892, 899 (Del. 1994); *Battisa v. Chrysler Corp.*, 517 A.2d 295, 297 (Del. Super. 1986), *app. disp.*, 515 A.2d 397 (Del. 1986).

evidence, determine questions of credibility, or make its own factual findings.⁵ It merely determines if the evidence is legally adequate to support the agency's factual findings.⁶ The Court also determines whether the Board made any errors of law. The Superior Court may not overturn a factual finding of the Industrial Accident Board unless there is "no satisfactory proof" supporting the Board's finding.⁷ It is well established that "[t]he credibility of the witnesses, the weight of their testimony, and the reasonable inferences to be drawn therefrom are for the Board to determine."⁸

DISCUSSION

Claimant argues that the Board committed errors of fact and law in denying Claimant temporary total disability.

The Hearing Officer rejected Dr. Balu's opinion because it was based on Claimant's complaints of pain and the Hearing Officer did not find the Claimant to be credible. The Hearing Officer determined that Claimant was not being truthful to Dr. Balu as to his level of pain and his work capabilities. Claimant began efforts in September 2002 to obtain entry into a new employment position at Johnson

⁵*Johnson v. Chrysler*, 213 A.2d at 66.

⁶29 *Del. C.* § 10142(d).

⁷*Id.* at 67.

⁸*Coleman v. Department of Labor*, 288 A.2d 285, 287 (Del. 1972).

Controls, the Maintenance Apprentice Program, while Claimant was medically restricted to light duty work with no lifting greater than 20 pounds, no sitting or standing for more than 20 minutes and no prolonged walking. The timing of the Claimant's subjective increased pain coincided with his being informed that he did not get the new apprentice position that he was seeking.

Claimant contends that Dr. Balu's opinion should have been given weight for the time period in question because Dr. Sommers, who testified for Employer, did not have an opinion for those specific days. Dr. Sommers evaluated Claimant on April 23, 2003, and offered his opinion that, as of April 23, 2003, Claimant was able to work light duty with restrictions. Dr. Sommers never offered an opinion as to Claimant's ability to work from March 11, 2003 though April 23.

Dr. Balu, on the other hand, indicated that on March 11, 2003, he advised Claimant to stay off work till further evaluation, due to recent worsening of Claimant's post-traumatic neuropathy. Dr. Balu attributed the worsening to the work itself and to Claimant's night shift schedule. Dr. Balu's opinion was that Claimant had started working at nighttime and his rhythm had changed, and that he was feeling very sick, tired and experienced worsening of his pain by the morning. Dr. Balu believed that the pain was uncontrollable during this period, requiring that Claimant not work. As of May 20, 2003, Dr. Balu indicated that the acute worsening of

Claimant's pain had resolved and Claimant was anxious to get back to work. A different medication was prescribed and Claimant was released to return to work.

Claimant contends that even Dr. Sommers, the Employer's expert, admits that it would not be unusual for Claimant to have some variability in the level of pain Claimant was experiencing and some variability in his capacity to perform certain physical activities. Claimant claims that there simply is no evidence from Employer that Claimant was not disabled for at least the period from March 11 through April 23, 2003. Contrary to the Board's underlying opinion that Claimant falsified his pain complaints to his physician to get out of work, his physician states that Claimant consistently has pushed himself and the doctor in order to return to work. Claimant argues that there is no Employer evidence to suggest otherwise. In fact, the record reflects that Claimant's symptoms are not unusual for his nerve injury and that the pain and physical limitations associated with the injury can vary from time to time.

Claimant contends that the Board failed to establish any nexus between Claimant's physical condition in November 2002 (when he was cleared to perform the activities of the apprentice program) and his physical condition in March 2003 (when he was temporarily disabled for 9 weeks). According to Claimant, the Board incorrectly states that there is only one medical record that indicates that Claimant was having a flare-up of his injury. Claimant refers to Dr. Sommers' and Dr. Balu's

depositions which contain references to Claimant's medical records of January 21, 2003, indicating increased pain one day then reduced, pain level 3 of 10; February 11, 2003, indicating working eight hours a day, inconsistent lower extremity pain, nocturnal pain, inability to sleep, pain level 5 of 10; March 11, 2003, indicating recent worsening of pain and patient advised to say off work.

Claimant contends that the Board wrongly stated that Claimant was "informed that he did not get the maintenance apprentice position" and "about the same time, he goes out on total disability." Claimant testified that he voluntarily withdrew from the apprentice program process and did so after he was already on disability in March or April 2003. He did so because it was then apparent to him that he could not perform the physical requirements of the position and he did not want to jeopardize the program by continuing his efforts to be selected.

The Board was correct in disregarding Dr. Balu's testimony based upon Claimant's subjective complaints of pain increasing, because the Board did not find Claimant to be credible. The Hearing Officer relied on *Breeding*⁹ in rejecting the medical expert's opinion of causality because the opinion was based in large part upon what the Claimant told the doctor and the Hearing Officer found the underlying facts to be different. Dr. Balu states that on March 11, 2003, the Claimant saw him,

⁹*Breeding v. Contractors-One-Inc.*, 549 A.2d 1102, 1104 (Del. 1988).

indicating that his pain had worsened. Dr. Balu advised Claimant to stay off work until further evaluation as Claimant stated his pain was intolerable. There was no objective measure of the Claimant's pain scale. Dr. Balu indicated that his medical treatment plan with regard to the Claimant was to prescribe pain medications that would help the Claimant deal with his pain. Dr. Balu depended on the Claimant to determine whether he can return to work as his work capability depends upon his pain control level.

Dr. William Sommers' testimony is contrary to Dr. Balu's testimony. Dr. Sommers testified by deposition that he saw Claimant on three occasions: April 25, 2002, October 25, 2002, and April 23, 2003, for defense medical examinations. As of April 23, 2003, no objective evidence existed of any change in Claimant's neurological condition. The limiting factors with regard to the Claimant's work capability were his subjective complaints, not supported by objective findings. On cross-examination, Dr. Sommers testified that pain management through medication was an appropriate treatment for nerve pain. He stated that the treatment plan would need to be tailored to the individual and the treatment of pain is inherently subjective and determined by the patient's complaints. Dr. Sommers testified that the subjective interpretations of Claimant's statement of activities he could perform were similar in October 2002 and April 2003. Based upon objective findings and relying upon the

results of the Functional Capacity Evaluation, Dr. Sommers stated that Claimant would be capable of performing heavy duty work.

Claimant testified that he would not have applied for the maintenance apprenticeship position in September 2002 if he did not feel that he could perform the physical capabilities of such job. This is particularly compelling evidence supporting the Board's decision. In September 2002, Claimant was released only to light-duty work and by his own physician's note. Due to his pain complaints, he was only able to work four hours a day to start. In order to qualify for the apprenticeship program, Claimant was required to undergo a Functional Capacity Evaluation in November 2002, which showed that the Claimant was capable of performing heavy duty work eight hours per day. The Functional Capacity Evaluation test is an objective measure of the Claimant's work capabilities and directly contradicts Dr. Balu's testimony with regard to work capability.

Claimant testified that at the end of March and the beginning of April 2003, he found out that somebody else received the maintenance apprentice position. The clear inference is that the Claimant was unhappy that he did not get the maintenance position job and at that time, his symptoms allegedly flared. The significance of this timing was considered by the Board and supported by testimony that when the Claimant wanted to enter the maintenance apprenticeship program, he was able to

perform an objective Functional Capacity Test at the medium to heavy level. When Claimant found out that he did not have this job, he was no longer even able to perform the lightest duty job in the plant without supposedly having increased pain.

The Board found the Claimant not credible and discounted his subjective complaints and history, as it was entitled to do. It is the exclusive function of the Board to address the credibility of witnesses.¹⁰ Since the Board rejected the Claimant's subjective history with regard to his ongoing left lower extremity problems, the Board was free to reject Dr. Balu's opinion based upon the Claimant's subjective history. This reviewing Court cannot overturn the Board's ruling as to credibility.¹¹

In case of competing medical testimony, as here, the Board is free to accept or reject, in whole or in part, expert testimony and the Board is free to accept one expert's opinion over another, so long as substantial evidence supports that opinion.¹² In the case at bar, the Board considered both physicians' testimonies, and relied upon

¹⁰*Johnson v. Chrysler Corp.*, 213 A.2d at 64.

¹¹*Id.*

¹²*State of Delaware v. Aubrey Cephas*, Del. Supr., C.A. No. 92A-03-005, Veasey J. (Jan. 1994); *Peggy S. Downes v. State of Delaware*, Del. Supr., No. 25, 1993, Walsh, J. (Mar. 30, 1993); *DiSabatino Bros. Inc. v. Wortman*, 453 A.2d 102, 106 (Del. 1982).

Dr. Sommers testimony, which it had the discretion to do.¹³ In the present case, not only was the Board's decision supported by substantial evidence, but the Board clearly stated the reasons why it chose to believe Dr. Sommers' testimony over that of Dr. Balu.

CONCLUSION

Claimant had the burden of establishing by a preponderance of the evidence that he was entitled to compensation for temporary total disability benefits for the period of March 11, 2003 to May 20, 2003. Claimant was not able to meet this burden to the satisfaction of the Board. This Court "will not substitute its judgment for that of an administrative body where there is substantial evidence to support the decision and subordinate findings of the agency."¹⁴ The Hearing Officer based her opinion upon the Claimant's history, the medical records, objective testing to include a Functional Capacity Evaluation, the physical examinations of the Claimant, and the testimony presented at the Hearing. This Court must take "due account of the

¹³*Id.*; In *Wortman*, the Superior Court suggested that the Board was free to disregard a doctor's testimony as long as it expressed itself clearly, and included some direct comment on the tests used by the physician. The Supreme Court, however, disagreed with the Superior Court's approach and reversed, holding that as triers of fact, the Board members were entitled to accept the testimony of the employer's expert without any further clarification.

¹⁴*Olney v. Cooch*, 425 A.2d 610, 613 (Del. 1981).

experience and specialized competence” of the IAB and the purposes of the Workman’s Compensation Act.¹⁵

Therefore, the decision of the Industrial Accident Board is hereby **AFFIRMED.**

IT IS SO ORDERED.

The Honorable Mary M. Johnston

¹⁵29 *Del. C.* § 10142(d).