IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

ALLIED SYSTEMS.,	)	
Employer - Appellant,	)	
	)	
v.	)	C.A. 04A-01-005 PLA
	)	
KIRT SHIVELY,	)	
Claimant - Appellee.	)	

Submitted: September 16, 2004
Decided: October 25, 2004

UPON APPEAL FROM A DECISION OF
THE INDUSTRIAL ACCIDENT BOARD
AFFIRMED - REVISED

Dennis J. Menton, Esquire, Tybout, Redfearn & Pell, Wilmington, Delaware, Attorney for Employer - Appellant.

Perry F. Goldlust, Esquire, Aber, Goldlust, Baker & Over, Wilmington, Delaware, Attorney for Employee - Appellee

ABLEMAN, JUDGE

Appellant Allied Systems ("Allied"), has appealed from the decision of the Industrial Accident Board of the State of Delaware ("IAB" or "Board") denying its Petition to Terminate Appellee Kirt Shively's disability benefits. The Court finds that the Board's decision that Shively is totally disabled was supported by substantial evidence. The decision of the IAB is therefore **AFFIRMED**.

Facts[1]

The parties agree that Shively sustained injury to the cervical and lumbar areas of his spine while on the job for Allied sometime in late 2001. In February 2002, Shively underwent surgery that required fusing some of his vertebrate, restricting his range of movement and causing him constant pain. Shively has been disabled at least since the surgery, and he receives $449 a week in disability benefits from Allied.

This is Allied's second attempt to avoid Shively's disability entitlement. Allied first petitioned the IAB to terminate Shively's benefits in August 2002, a request the Board denied in January 2003 ("Termination Action I"). Allied's position at this previous hearing was the same argument it makes now; that no physical condition prevents Shively from doing limited, sedentary work, and he is thus not totally disabled. The Board's finding then was the same as it was in this

[1] This fact recitation is less detailed than I would prefer. Neither party devoted any briefing to explain the underlying facts of Shively's injury, but instead launched directly into the "battle-of-the-experts" argument that forms the crux of the case.

appeal; Shively's physical handicap caused him to develop mental problems that result in his total disability.

Allied seems to have interpreted its failure to win Termination Action I as a proof problem that could be easily remedied. Allied therefore took two actions: (1) covert surveillance of Shively, hoping to catch him acting non-disabled, and (2) re-filing its termination petition, this time with a demand that Shively be examined by Dr. Neil Kaye, a psychologist hired by Allied. The covert surveillance turned up footage of Shively feeding his dogs and driving to his mother's house, evidence Allied believed to be damaging to his disability claim.

More important to this appeal, however, is Shively's meetings with Dr. Kaye. The Board found that there was considerable ill-will between Shively and Dr. Kaye, who seem to have routinely traded insults during Shively's evaluations. During the time he was meeting with Dr. Kaye, Shivley also was seeing four other doctors – Drs. Somori, Townsend, Langan, and Weisberg – both for treatment and to prepare to rebut Allied's claims.

To distill what both parties have outlined in unnecessary, excruciating detail[2], Dr. Kaye came to the conclusion that Shively was faking. Part of this conclusion was based on his discussions with Shively, in which Dr. Kaye thought

[2] Appellant's Op. Br. begins with a 21-page restatement of Dr. Kaye's opinion, and the Ans. Br. devotes another twelve pages to the same subject. This focus is perplexing given that both sides recognize that the case warrants review under the substantial evidence standard, leaving the Court no power make an independent evaluation of Dr. Kaye's testimony.

Shively sounded lazy rather than mentally disabled. Dr. Kaye also claimed to have seen Shively get out of his car and walk into his office without any difficulty, but then put on a show of labored movement while being examined.

In the interim, Dr. Langan, apparently based on the recommendations of Drs. Somori and Townsend, gave Shively a psychological test designed to construct his mental profile. Langan asked Shively over 500 questions, taking several hours. Dr. Langan then extrapolated the data into an expert report, diagnosing, *inter alia*, that Shively suffered from severe and debilitating depression.

Dr. Langan's expert report was given to Dr. Weisberg and Dr. Kaye, both of whom testified at a second termination hearing held on December 9, 2003. The IAB admitted the report into evidence over Allied's objection[3], and also allowed Dr. Weisberg to express his conclusions that were based, in part, on his analysis of the report. Dr. Weisberg interpreted the report as evidence that Shively was totally mentally disabled. Dr. Kaye interpreted the report as further evidence that Shively was faking, testifying that Shively's "depression score" was too high for a person who can otherwise function cognitively, and that, therefore, Shively must have exaggerated his answers.

[3] This is one of the many places the record is unclear. Allied's brief seems to complain both that the report was and was not entered into the record. As will be shown, this is also one of several irrelevancies that Allied belabors.

The Board made an express finding that Dr. Kaye's testimony was not supported by the record, seemed to be based upon animus toward Shively, and was not credible. The Board also expressly stated that Dr. Weisberg's testimony was supported by the record and was credible. The IAB therefore denied Allied's petition to terminate benefits, and this timely appeal followed.

Discussion

The case presents but one familiar question: was the IAB's finding that Shively is totally disabled supported by substantial evidence.[4] My only focus is on whether the Agency had any reasonable basis for reaching the conclusion that it did[5]; I have neither the power nor the desire to weigh the evidence, determine questions of credibility, or make my own factual findings.[6] Phrased another way, this Court must determine whether the evidence upon which the Board relied was legally adequate to support its findings.[7]

The facts relevant to this appeal can be summarized as follows: (1) Shivley took a questionnaire administered by Dr. Langan, (2) Dr. Langan used generally accepted scientific methods to interpret the raw data of the questionnaire into a psychological profile, (3) the profile included a diagnosis of major depression, and

[4] *Mellow v. Board of Adjustment*, 565 A.2d 947, 954 (Del. Super. Ct. 1988), *aff'd*, 567 A.2d 422 (Del. 1989).
[5] *Id.* at 954 (citing *National Cash Register v. Riner*, 424 A.2d 669, 674-75 (Del. Super. Ct. 1980)).
[6] *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66-67 (Del. 1995).
[7] DEL. CODE ANN. tit. 29, § 10142(d) (1997 & Supp. 2002).

(4) Dr. Weisberg, who testified before the Board as Shively's expert, relied on Dr. Langan's report in reaching his finding of total disability. Based on these facts, Allied raises two claims. First, Allied complains that Dr. Langan's report should not have been considered because it was hearsay and was prepared for litigation. Second, Allied raises what it believes to be a *Daubert* claim, arguing that Dr. Weisman's testimony was inadmissible because he relied upon Dr. Langan's expert report instead of the raw data from the questionnaire.

These objections are not compelling. Finders of fact have broad discretion as to what evidence to admit.[8] This is especially true with an agency like the IAB, whose primary function is remedial, rather than adversarial. 19 *Del. C.* § 2121(a) grants the IAB the authority to construct its own procedural rules, including rules regarding the admission of evidence. IAB Rule 14(B) states:

> The rules of evidence applicable to the Superior Court of the State of Delaware shall be followed *insofar as practicable*; however, that evidence will be considered by the Board which, *in its opinion*, possesses *any probative value* commonly accepted by reasonably prudent men in the conduct of their affairs.(emphasis added).

Dr. Langan's expert report was obviously relevant, and Dr. Kaye spent considerable time refuting its findings. I cannot find that the Board's decision to admit it was an error at all, let alone an error severe enough to warrant reversal.[9]

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[8] *Kumho Tire Company v. Carmichael*, 526 U.S. 137, 151 (1999).

[9] Allied cleans up its argument considerably in its Reply Brief, citing *Torres v. Allen Family Foods*, 672 A.2d 26 (1995) for the proposition that, even though the IAB can form its own evidentiary rules, it still must afford the opposing party the opportunity to confront damaging evidence. Allied does not explain, however, how the Board deprived it of this right. It is clear

I also cannot agree with Allied's rather obscure argument that Dr. Langan's report was unreliable as a matter of law because it was prepared for litigation. Of course Dr. Langan gave Shively the test in preparation for litigation; why else would Shively have volunteered to sit through several hours of psychological testing? More importantly, how else was Shively supposed to prove that he has a mental disability? The fact that Shively had a motive to fake his disability was amply explored before the Board and was a huge part of Dr. Kaye's testimony. The Board did not find this explanation believable, and the Court will not make an independent contrary finding.

Also unpersuasive is the fact that Dr. Weisberg relied upon Dr. Langan's expert report rather than the raw data that Dr. Langan collected. Allied has completely failed to show why the distinction is important under *Daubert*. Allied offered no argument that experts in the field generally rely only upon raw psychological data and not on summaries of that data made by other experts who compiled it. Allied's claim thus devolves to a suggestion that Dr. Kaye was more thorough than Dr. Weisberg, and therefore more credible. Again, this Court has no power, let alone reason, to make an independent credibility finding.[10]

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that Allied had the report in advance, secured an expert to testify *ad nauseum* to its lack of credibility, and vigorously cross-examined Dr. Weisberg. The General Assembly, by enacting 19 *Del. C.* § 2121(a), obviously intends to grant the Board broad discretion to decide evidentiary questions. Allied provides no reason to find that the Board's exercise of discretion went beyond the bounds of the statute.

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

Conclusion

For the foregoing reasons, the decision of the Industrial Accident Board is hereby **AFFIRMED**.

IT IS SO ORDERED.

Peggy L. Ableman, Judge

cc: Dennis J. Menton
Perry F. Goldlust
Industrial Accident Board
Prothonotary