SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

1 THE CIRCLE, SUITE 2
SUPERIOR COURTHOUSE
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RE: ***George Englebrake v. CSI Enterprises***
C.A. No. 04A-03-002-RFS

Date Submitted: September 9, 2004
Date Decided: December 22, 2004

Dear Counsel:

This is my decision regarding George Englebrake's appeal of the Industrial Accident Board's decision denying his petition to determine additional compensation due. For the reasons set forth herein, the Board's decision is affirmed in part and reversed in part and remanded for further proceedings consistent with this opinion.

STATEMENT OF THE CASE

On March 12, 2001, the Claimant, George Englebrake ("Englebrake") was injured in a compensable work accident when he attempted to lift a solid core forklift tire into his work van. At the time, he was an employee with CSI Enterprises ("CSI"). CSI agreed

that the injury was compensable and paid total disability benefits to Englebrake until July of 2002. On July 10, 2002, the parties signed a partial disability agreement. Then, on August 1, 2002, a document was signed by Claimant's attorney and CSI's attorney acknowledging that the Claimant was no longer totally disabled and that the he would not oppose CSI's termination petition.

About ten to twelve months after his accident, Englebrake began to experience anxiety attacks. In May of 2002, he began seeing Dr. David August ("Dr. August"), a board certified psychiatrist, for treatment of the psychological symptoms he had been experiencing since the accident. Claimant discussed with the psychiatrist marital problems and his obsession with his inability to work. This was not the first time Englebrake had seen a psychiatrist. He had also been treated before the accident for marital difficulties with a previous wife and for alcohol abuse.

Mr. Englebrake filed a Petition to Determine Additional Compensation Due with the Industrial Accident Board ("the Board"), in order to seek payment for Dr. August's services. A hearing was held on January 16, 2004 at which Dr. August testified by deposition. The Claimant also testified and Dr. Neil S. Kaye ("Dr. Kaye"), another board certified psychiatrist, testified by deposition on behalf of CSI. In a decision dated February 13, 2004, the Board denied the petition. Englebrake has appealed that decision, claiming that the Board did not apply the correct standard of causation and that there was not substantial evidence sufficient to support its conclusions.

A. The Hearing

Englebrake first saw Dr. August on May 14, 2002 almost fourteen months after his accident. Dr. August believed that he was referred to him by his primary care doctor, Dr. Gabriel Somori ("Dr. Somori"), and by his lawyer because he was having trouble coping with the pain. Englebrake had begun having anxiety attacks sometime after the accident. He was afraid of leaving his home and was obsessively thinking about the work injury and about his fears of not being able to work again. He was also concerned about his relationship with his wife.

Dr. August noted that the Claimant had had previous mental health problems before the accident, but the doctor felt they were unrelated to the present ones. Englebrake had been hospitalized for alcohol abuse in the nineties and had had marital difficulties with a previous wife. He had been treated with the antidepressants, Effexor and Prozac, prior to the accident. Dr. August continued the Claimant on the Effexor and increased his dosage. The doctor noted that the medication was effective against both depression and panic disorders. Dr. August also prescribed Dexedrine to help Englebrake with the drowsiness side effect of his pain medications.[1] Englebrake visited Dr. August about once every two weeks and sometimes more frequently. Dr. August testified that when he first saw the Claimant, he thought his depression was in complete remission. He was treating him for anxiety problems and to help him manage his pain medications. Englebrake claimed that he was no longer drinking. Dr. August observed that he was

having difficulty adjusting to the changes in his lifestyle caused by the pain and disability. He was also having marital problems with his second wife. In addition, Englebrake was no longer able to pursue his hobby of racing cars.

When he was questioned by counsel for CSI, Dr. August explained that he did not feel the fourteen month passage of time from the date of the accident to his first visit was abnormal. He believed it was acceptable because over time chronic pain gets worse and long-term pain exhausts a person's coping mechanisms. He hypothesized that a person with a back injury might find it hard to cope with the realization over time that he is not going to heal and that his life might be forever changed.

Next, Mr. Englebrake testified that he had been taking Effexor, in a lower dose, for about four years and that some time before the accident he had seen a different psychiatrist. For his pain, Dr. Somori had prescribed him Oxycotin and Oxycodon. He went to see Dr. August because about ten to twelve months after the accident he had begun to have anxiety attacks when he realized his life had permanently changed. It was his idea to seek out a psychiatrist.

In the nineties he was divorced from his first wife and had been prescribed Effexor to help him cope with the fallout from the divorce and custody issues. He was at some point hospitalized for alcohol related problems, but claimed he had not had a drink in about a year. In addition to increasing his dose of Effexor, Dr. August also prescribed Valium to him to help ease the panic attacks.

Dr. Kaye saw Englebrake on two occasions, on January 16, 2003 and on November 10, 2003. He also reviewed the medical and psychiatric records. Dr. Kaye's diagnosis of the Claimant was the same as Dr. August's - a single episode of major depression that was in remission with the current treatment, alcohol abuse, panic disorder and agoraphobia.[2] Englebrake had a normal mental status exam. He had sadness, but not to a clinical degree, and he had monotony and drowsiness, possibly due to the pain medications.

Dr. Kaye noted that Englebrake had been taking 150 mg of Effexor before the accident and that his dosage was increased to 225 mg after he saw Dr. August. It was later increased again by another 75 mg. Englebrake was still drinking when he met with Dr. Kaye; however, his drinking was reduced and was even less at the time of the second meeting.

Dr. Kaye did not feel that Englebrake's mental condition was related to the work injury. His alcohol abuse predated the injury and the major depression was in remission. According to the doctor, he was on almost the same dose of Effexor before and after the accident. Dr. Kaye also stated that a panic disorder is not caused by a particular event or stressor, but is instead a long-standing condition that ebbs and flows. He believed that the fourteen month passage of time from the accident to the Claimant's first visit with Dr. August showed the symptoms could not have been causally related to the accident. He felt the time period indicated he really did not need the treatment and that the care he was

getting from his primary care physician was adequate. He pointed out that the psychotherapy was more focused on other aspects of the Claimant's life, rather than on pain management.

When Englebrake met with Dr. Kaye in November of 2003, his condition was basically the same. His appointments with Dr. August had been shortened, and he expressed to Dr. Kaye a desire to have more time to discuss his marital problems. He felt his anxiety was much better, but it still flared up on occasion. Englebrake also expressed a desire to talk about older issues, such as his father's physical abuse and problems in his first marriage. He said his anxiety felt like what he used to feel waiting for his father to come home and abuse him.

Dr. Kaye opined that with work-related injuries you do not get symptoms like the Claimant's. Generally, a doctor would expect to treat the patient for pain management and for depression secondary to the pain. He would expect to find post traumatic stress disorder. The symptoms of depression would appear fairly soon after the accident occurred.

B. The Board Decision

In its decision on February 13, 2004, the Board believed the opinions of Dr. Kaye to be more credible and persuasive than those of Dr. August. In finding that the work injury did not trigger the anxiety attacks, it was most persuaded by the fact that the Claimant had a history of panic attacks and that their latest manifestation did not occur

until ten to twelve months after the injury. It was also swayed by Dr. Kaye's testimony that Englebrake's treatment issues centered on marital problems and childhood issues.

The Board was not convinced by Dr. August's testimony because he could not provide them with a persuasive reason as to why so many months had lapsed before the first anxiety attack. In addition, while he stated that chronic pain can cause the psychiatric symptoms, he had agreed that Dr. Somori had the Claimant's pain under control. Dr. August also was not aware that Englebrake had signed an agreement terminating his total disability. Furthermore, the Board found Mr. Englebrake's testimony to be inconsistent. He also could not adequately explain exactly what, because of the accident, it was that caused his panic attacks. Moreover, Englebrake told the Board he had not had a drink for a year, although he had reported to Dr. Kaye in November of 2003, about three months before the Board hearing, that he was still drinking on occasion.

At issue in this case is whether the Board had substantial evidence to find the Claimant's psychiatric condition was not triggered or aggravated by the work-related accident.

STANDARD OF REVIEW

The Supreme Court and this Court repeatedly have emphasized the limited appellate review of the factual findings of an administrative agency. The function of the reviewing Court is to determine whether the agency's decision is supported by substantial evidence. *Johnson v. Chrysler Corp.*, 312 A.2d 64, 66-67 (Del. 1965); *General Motors v.*

Freeman, 164 A.2d 686, 688 (Del. 1960), and to review questions of law de novo, *In re Beattie*, 180 A.2d 741, 744 (Del. Super. Ct. 1962). Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Oceanport Ind. v. Wilmington Stevedores*, 636 A.2d 892, 899 (Del. 1994); *Battista v. Chrysler Corp.*, 517 A .2d 295, 297 (Del.), *app. dism.*, 515 A.2d 397 (Del. 1986). The appellate court does not weigh the evidence, determine questions of credibility, or make its own factual findings. *Johnson v. Chrysler Corp.*, 312 A.2d at 66. It merely determines if the evidence is legally adequate to support the agency's factual findings. 29 *Del. C.* § 10142(d).

DISCUSSION

It is well accepted that an injured worker may recover for the full effect of an injury, including for a resulting psychological disorder. *Reese v. Home Budget Ctr.*, 619 A.2d 907, 909 (Del. 1992), *quoting, Rice's Bakery v. Adkins*, 269 A.2d 215, 216-17 (Del. 1970). "A preexisting disease or infirmity, whether overt or latent, does not disqualify a claim for worker's compensation if the employment aggravated, accelerated, or in combination with the infirmity produced the disability." *Id.* at 910, *citing, General Motors Corp. v. McNemar*, 202 A.2d 803, 806-807 (Del. 1964). In other words, the employer takes the employee as it finds him. If the work-related injury precipitates or accelerates a dormant condition, then a causal connection can be established. *Id.*

The Supreme Court has applied the "but for" definition of proximate cause to workers' compensation claims:

> The "but for" definition of proximate cause in the substantive law of torts finds equal application in fixing the relationship between an acknowledged industrial accident and its aftermath. If the worker had a preexisting disposition to a certain physical or emotional injury which had not manifested itself prior to the time of the accident, an injury attributable to the accident is compensable if the injury would not have occurred but for the accident. The accident need not be the sole cause or even a substantial cause of the injury. If the accident provides the "setting" or "trigger," causation is satisfied for purposes of compensability.

Id.

This is one of those cases where the Board was faced with conflicting opinions from two well-qualified psychiatrists. It had to evaluate those doctor's opinions and come to a conclusion. In such cases, it is not for the Court to substitute its judgment for that of the Board's, in determining whether to accept one opinion over the other. Dr. August believed the Claimant's condition was directly related to and triggered by the changes in his physical condition after the accident. Dr. Kaye, on the other hand, thought Englebrake's troubles were part of a long-standing psychological condition, resulting because of his marriages and childhood abuse. He felt that the accident could not logically have been the cause of his problems, given the nature of the symptoms and the long period of time between the accident and the first manifestation of his symptoms. In sum, there was substantial evidence sufficient for the Board to have chosen Dr. Kaye's opinion over Dr. August's.

The Claimant argues that the Board did not apply the proper standard in deciding this case. The Court finds however, that the proper standard was used. Given the lapse of time and the symptoms manifested, it is reasonable for the Board to have found that the Claimant's psychological condition was not triggered by the accident, but rather continued to exist in spite of it. The Board was familiar with the leading cases on the issue of pre-existing condition and compensability of subsequent treatment, *Reese*, 619 A.2d 907 and *McNemar*, 202 A.2d 803. In its opinion, it accurately analyzed the opinions of the doctors in conformity with the appropriate standards in those cases.

Englebrake also argues that the Board did not adequately consider whether he should have been compensated for Dr. August's treatment, which ameliorated negative side effects of the pain medication. Dr. Kaye did not offer any competing opinion about Englebrake's prescription for Dexedrine. While the Court finds the Board's decision was supported by sufficient evidence regarding the issue of Claimant's panic disorder, general depression and agoraphobia, it finds that the Board did not address Dr. August's treatment of the pain medication side effects with the prescription of Dexedrine.[3] The case must be remanded in order for the Board to review and make findings about the necessity of that treatment he received from Dr. August and whether Claimant should be partially compensated for it.

CONCLUSION

Considering the foregoing, the decision of the Board is affirmed in part and reversed in part and is otherwise remanded for further finding, consistent with this opinion.

IT IS SO ORDERED.

Very truly yours,

Richard F. Stokes

cc: Prothonotary

ENDNOTES

1. On this subject, Dr. August testified:

> A Yes. In fact, I'm actually able to help Doctor Somori quite a bit because some of his treatment has some unwanted cognitive side effects which have really been giving George a lot of trouble.
>
> For instance, the pain medication that George requires makes him very sleepy and lethargic, and hurts his concentration. And I have been able to remedy that through the use of Dexadrine. And this is an excellent chance for a psychiatrist to assist the chronic pain doctor in helping a patient receive good treatment for his chronic pain.
>
> So really the Dexadrine is being used for side effects of his pain medication, and that's a direct psychiatric intervention for assistance with pain management, actually.
>
> Q And is this a common technique for dealing with that problem?
>
> A It's not common, it's accepted, and there is sufficient documentation that this is considered standard of care. And if you need me to demonstrate that, I have some literature that supports the use of Dexadrine specifically for depression and it is known to help with alertness and narcolepsy. Specifically, this type of drug is approved for narcolepsy, and that's the type of symptom Mr. Englebrake was having; it was really a medication induced narcolepsy, and that's a common drug use for that.

Dr. August's Dep. at 9-10, in App. to Cl.'s Opening Brief.

2. Agoraphobia is "an irrational fear of leaving the familiar setting of home, or venturing into the open, so pervasive that a large number of external life situations are entered into reluctantly or are avoided; often associated with panic attacks." PDR Medical Dictionary 37 (2d ed. 2000). Englebrake was afraid of leaving his home alone.

3. Dr. Kaye also noticed an improvement in the side effects with the change in medication from one visit to the next, as can be seen in his observations of the Claimant during his two appointments on January 16, 2003 and November 10, 2003:

> A. [discussing January 16th visit] . . . He was quite adamant that he did not

have a psychological, emotional, or psychiatric condition or symptoms that would prevent him from either obtaining or maintaining a job. He felt he could sustain good attention which would be necessary to work. He thought he had some side effects from the pain medications, particularly the opiate analgesics, the prescription narcotics that he was getting, but thought he had gotten used to them.

I actually thought that they might have some effect on him, although, again, he did loosen up pretty well during the interview. I thought he might have been a little bit drugged, frankly, from them.

. . .

A. . . . So overall, a fairly normal mental status exam. The pertinent findings being a little bit of sadness but not to a clinical degree, a little bit of flattening of affect and monotonal quality, and a little bit of drowsiness, probably a medication side effect at that point.

. . .

A. [discussing November 10th visit] Actually, I would probably say that things were pretty much the same. . . . Overall, he was actually more awake and alert, and some of what I thought was a little bit of drug effect in the first evaluation was not noted.

Dr. Kaye's Dep. at 9, 11, 18, in App. to Cl.'s Opening Brief.