IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

ARTHUR WATERS,	:	
	:	C.A. No. 04A-03-001 WLW
Claimant-Below,	:	
Appellant,	:	
	:	
v.	:	
	:	
STATEWIDE MAINTENANCE,	:	
	:	
Employer-Below,	:	
Appellee.	:	

Submitted: January 14, 2005
Decided: April 21, 2005

ORDER

Upon Appeal of the Decision of the Industrial Accident Board. Affirmed in part; Reversed in part and Remanded.

Walt F. Schmittinger, Esquire of Schmittinger and Rodriguez, P.A., Dover, Delaware; attorneys for the Appellant.

R. Stokes Nolte, Esquire of Nolte & Associates, Wilmington, Delaware; attorneys for the Appellee.

WITHAM, R.J.

Arthur Waters ("Claimant"), appeals a decision of the Industrial Accident Board ("the Board"), terminating Claimant's total disability benefits. Because the Court finds that the Board lacked substantial evidence for its decision that the claimant was not *prima facie* a displaced worker, the Board's decision is affirmed in part, reversed in part and remanded.

FACTS

Claimant suffered a compensable injury to his back and left leg on November 19, 1999 while working as a landscape laborer for Statewide Maintenance ("Statewide" or "Employer"). Following the injury, Statewide began paying Claimant total disability benefits. On October 28, 2003, Statewide filed a Petition for Review to terminate Claimant's total disability benefits. After a hearing on February 23, 2004, the Board granted Statewide's petition and terminated Claimant's total disability benefits. The Board found that Claimant was not credible and concluded that Claimant was no longer totally disabled.

A. Total Disability

At the hearing before the IAB, Dr. Evan H. Crain testified by deposition for Statewide. Dr. Crain examined Claimant on March 13, 2001 and September 10, 2003. Dr. Crain testified that he believes Claimant is physically capable of performing sedentary and possibly light duty work with a ten-pound lifting restriction. Dr. Stephen J. Rodgers and Dr. Glen Rowe testified by deposition on behalf of Claimant. Dr. Rodgers testified that he had evaluated Claimant periodically between December 18, 2000 and February 5, 2004 and believes that Claimant is

incapable of working. Dr. Rodgers testified specifically that Claimant's ability to stand is limited and that he could not work as a commercial driver because he takes OxyContin for his back pain which precludes him from driving. Dr. Rodgers testified that he believes Claimant has a functional range of motion in his lumbar spine and a full range of motion in his knees, ankles and hips. Dr. Rowe testified that it was his belief that Claimant is not capable of working because of increasing left leg and back pain. Dr. Rowe had not seen Claimant since November 2001 but based his opinion on his physician's assistant's notes from an evaluation of Claimant on February 10, 2004.

Claimant testified at the hearing that he sought treatment from Dr. Richard DuShuttle after the injury and that Dr. DuShuttle diagnosed Claimant with two herniated disks in his spine. Claimant testified that he had attempted to undergo surgery for the ruptured disks but was unable to proceed with the surgery because his platelet count was too low. Claimant further testified that he has been visiting his primary care physician, Dr. Sandeep Mann (who did not testify at the hearing), every four weeks for medication. Claimant also indicated that he suffers constant pain in his back and left leg. Claimant testified that he quit school in the ninth grade and has difficulty reading and writing. He stated that he was a truck driver at one time and his only other job experience is in heavy labor and construction. Claimant testified that the medications he takes for his pain make him sleepy, dizzy and off balance.

B. Displaced Worker Status

Shelli Palmer, a vocational case manager, testified on behalf of Statewide and

stated that she had performed a labor market survey and had identified seven jobs that were appropriate for Claimant given Claimant's limitations as set by Dr. Crain. In the course of her market research, Ms. Palmer met with Wendy Beck at a Hess station and was told that an employee there would not have to lift twenty-five pounds because the items could be broken down into smaller sizes. At the hearing, however, Ms. Beck testified that a highschool diploma was required to hold the position of cashier at the Hess station and that the job required lifting items heavier than twenty-five pounds.

Ms. Palmer also met with Mr. Fullmer, an assistant store manager at Capital Cleaners. Mr. Fullmer testified at the hearing that a highschool diploma is not required to hold a job there as a counter person and that the employee would have to be on his feet less than half the time.

Sheila Clendaniel, a human resources and payroll manager at Independent Newspapers, also testified on behalf of Claimant. Ms. Clendaniel testified that she met with Ms. Palmer twice but did not discuss employing any individual with Claimant's physical restrictions. Ms. Clendaniel testified there were two jobs available in the mail room department over which she has authority. One of the jobs requires the employee to lift up to fifty pounds. The other job is that of a mail sorter and Ms. Clendaniel was not sure of the weights that employee would be required to lift. Ms. Clendaniel also testified that a highschool diploma was not required for either position.

Gayle Steele, a manager at Bodies Market, also testified on behalf of the

Claimant. Ms. Steele testified that she does not believe that the Claimant could perform the required duties of a cashier at the market, nor could he fulfill the fifty-pound lifting requirement. Ms. Steele also testified that a cashier at the market would have to stand the entire nine and a half hour shift.

C. The Board's Decision

The Board accepted the opinion of Dr. Crain over the testimony of Dr. Rowe and Dr. Rodgers and concluded that Claimant was only partially disabled based on Claimant's sedentary job restrictions from Dr. Crain. The Board also found that "[g]iven Claimant's age, physical limitations, education, mental capacity and training, he is not *prima facie* a displaced worker."[1] The Board further found Ms. Palmer's testimony credible and concluded that Ms. Palmer's research showed that there was available employment for Claimant. The Board also concluded that Claimant had "transferable skills that can be used in a sedentary to light duty capacity within his restriction."[2] Although it accepted Ms. Steele's testimony that Claimant would not fulfill the requirements to work at Bodies Market, the Board found that Claimant could work for the other employers as identified in Ms. Palmer's survey and that the average weekly wage for these employers was $252.00. Based on the testimony at the hearing, the Board concluded that Claimant would suffer a loss in wages of $166.22 per week as a result of this partial disability. Because Claimant did not

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[1] *Waters v. Statewide Maintenance*, IAB Hearing No. 1156967 (Mar. 1, 2004), at 9.

[2] *Id.*

present evidence of actual 1999 wages, however, the Board concluded that Claimant was entitled to partial disability benefits of $110.81 per week.

STANDARD OF REVIEW

In reviewing an appeal from the Industrial Accident Board the Superior Court must determine whether the Board's decision is supported by substantial evidence and is free from legal error.[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 evidence, determine questions of credibility, or make its own factual findings.[5] It merely determines whether the evidence is legally adequate to support the Board's factual findings.[6]

DISCUSSION

Claimant has limited his appeal to contest only the Board's finding that Claimant was not entitled to ongoing total disability benefits and the Board's calculation of partial disability benefits.

A. Total Disability

Where the employer files a Petition to Terminate total disability benefits, it bears the burden of proving that the claimant is no longer totally disabled and will not

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[3] *Histed v. E.I. DuPont de Nemours & Co.*, 621 A.2d 340, 342 (Del. 1993).

[4] *Oceanport Industries, Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 899 (Del. 1994) (citing *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981)).

[5] *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965).

[6] *See* 29 *Del. C.* §10142(d).

suffer an economic loss.[7] If the employer can carry that burden, the employee must show that he is a "displaced worker" by establishing that he is "so handicapped by a compensable injury that he will no longer be employed regularly in any well known branch of the competitive labor market and will require a specially-created job if he is to be steadily employed."[8] The employee may be considered a *prima facie* displaced worker based on the employee's "physical impairment, coupled with other factors such as the injured employee's mental capacity, education, training, or age."[9] Even without sufficient evidence for a *prima facie* showing of displacement, an employee may still be considered a displaced worker under Delaware's Workers' Compensation Law if he "has made reasonable efforts to secure suitable employment which have been unsuccessful because of the injury."[10] If the employee can demonstrate that he is displaced, the burden shifts back to the employer to show that work is available within the employee's capabilities.[11]

1. *Claimant's Credibility*

The Board found that Claimant's testimony was not credible specifically because Claimant presented the Board with old prescription bottles with pills still

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[7] *Torres v. Allen Family Foods*, 672 A.2d 26, 30 (Del. 1995) (citing *Governor Bacon Health Center v. Noll*, 315 A.2d 601, 603 (Del. Super. Ct. 1974)).

[8] *Torres*, 672 A.2d at 30 (citing *Ham v. Chrysler Corp.*, 231 A.2d 258, 261 (Del. 1967)).

[9] *Id.* (citing *Franklin Fabricators v. Irwin*, 306 A.2d 734, 737 (Del. 1973)).

[10] *Id.*

[11] *Id.*

remaining in them but told the Board that he had placed new pills in the old bottles. The Board concluded that Claimant was unable to give a satisfactory explanation for his behavior and this failure to give an answer eroded Claimant's credibility. The Board also found incredible Claimant's testimony that he was treating with Dr. Mann every four weeks but that none of the other treating physicians had any recent records from Dr. Mann. While, as Claimant notes, the Supreme Court in *Lemmon v. Northwood Construction*[12] overturned the Board's decision that the claimant was not credible, the Court in *Lemmon* reversed the Board's decision because the Board failed to specify any particular reason why it found the claimant incredible. In *Lemmon*, the Board appeared to have based its determination of lack of credibility on the claimant's alleged alcohol use. The Supreme Court held that this was an "irrelevant and obviously prejudicial factor."[13] In the case now before the Court, the Board based its credibility determination on two factors: first, that Claimant failed to give a satisfactory answer as to why he would keep new prescription pills in old prescription bottles and; second, that none of the other physicians had any records from Dr. Mann from 2003 or 2004. While the Board did not elaborate extensively on these two bases for finding the claimant incredible, these factors are sufficiently related to the reality of Claimant's pain and disputed recovery to uphold the Board's finding that Claimant was not credible. Claimant has an obligation to provide a

[12] 690 A.2d 912 (Del. 1996).

[13] *Id.* at 914.

reasonable explanation for his behavior which he did not do in this case.

2. Conflicting Medical Expert Testimony

The Board also accepted the opinion of the employer's doctor, Dr. Crain, and concluded that the employer had met its burden to prove that Claimant was no longer totally disabled. The Board found that Dr. Crain was more credible partly because Dr. Rowe and Dr. DuShuttle had not seen Claimant since 2001. It is a well-established principle in workers' compensation law that the Board may accept the testimony of one expert over another.[14] As long as the expert's opinion is logical and based on substantial evidence, the Court may not question the Board's reliance on that opinion.[15] In addition, the Board may discredit a doctor's testimony simply because that testimony is based on complaints of a claimant whom the Board has deemed not to be credible.[16]

It is not the role of this court, in its appellate function, to weigh evidence, determine questions of credibility, or make its own factual findings.[17] In the absence of an error of law, the Court must defer to the Board's assessment of the credibility of witnesses and the weight to be given to their testimony.[18] It was not an error of law

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[14] *Standard Distributing Co. v. Nally*, 630 A.2d 640, 646 (Del. 1993); *DiSabitino Brothers, Inc. v. Wortman*, 453 A.2d 102, 105 (Del. 1982).

[15] *Kirkwood Animal Hospital VCA v. Foster*, 2004 WL 2187621, at *4 (Del. Super.).

[16] *Clements v. Diamond State Port Corp.*, 831 A.2d 870, 878 (Del. 2003).

[17] *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965).

[18] *See General Motors Corp. v. Cresto*, 265 A.2d 42, 43 (Del. Super. Ct. 1970).

for the Board to give greater weight to the testimony of Dr. Crain based on the fact that Claimant's experts had not examined Claimant recently. Furthermore, Dr. Crain's testimony was sufficient evidence to support the Board's decision that Claimant was no longer totally disabled.[19]

3. Claimant's Status as a Displaced Worker

Claimant also argues that the Board erred by not determining that he was *prima facie* a displaced worker. The Board held that Claimant was not *prima facie* displaced because Claimant is "only forty-five years old, is able to read and write, drive a car, and has experience as a laborer, truck driver and mechanic, and is physically capable of working in a sedentary to light duty capacity."[20] The Board further found that Claimant had "transferable skills that can be used in sedentary to light duty capacity within his restrictions."[21]

The burden was on Claimant in this case to establish that he was a displaced worker.[22] Claimant testified that he had difficulty reading and writing and has not completed any formal education beyond the eighth grade. Claimant further asserted that he has no office skills and that his only work experience is as a truck driver and

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[19] *See Lohr v. Acme Markets*, 1999 WL 1611427, at *2 (Del. Super.) (holding that the testimony of a medical expert "constitutes substantial evidence to support the Board's finding").

[20] *Waters v. Statewide Maintenance*, IAB Hearing No. 1156967 (Mar. 1, 2004), at 9.

[21] *Id.*

[22] *Torres v. Allen Family Foods*, 672 A.2d 26, 30 (Del. 1995) (citing *Ham v. Chrysler Corp.*, 231 A.2d 258, 261 (Del. 1967)).

a laborer and mechanic. Claimant stated that he now takes narcotic drugs to alleviate his pain which prevent him from operating machinery.

In this Court's view, the Board's conclusion that Claimant did not meet his burden of proof to show he was *prima facie* displaced was not supported by substantial evidence. The Superior Court held in *Sabo v. Pestex*,[23] (a case factually nearly identical to the present case), that a claimant who had not completed education beyond eighth grade, whose previous work experience was primarily driving trucks, and who was taking narcotic medication, had met his burden to show that he was *prima facie* a displaced worker despite the Board's finding otherwise.[24]

While the Court must defer to the Board's findings of fact, in this particular case, the Court cannot find sufficient evidence to support the Board's conclusion that Claimant was not *prima facie* a displaced worker. The employer in the present case failed to present any evidence to rebut Claimant's testimony that he had difficulty reading and writing or that he had not completed any education beyond the eighth grade. The Board also failed to identify any "transferable skills" Claimant possessed which would allow him to work in any other job besides as a manual laborer. In *Sabo*, the Court found that the failure to identify any transferable skills showed a lack of substantial evidence.[25] In this case, neither Ms. Palmer nor the Board identified

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[23] *See Sabo v. Pestex*, 2004 WL 2735457 (Del. Super.).

[24] *Id.*

[25] *Id.* at *6. *See also Brandywine Constr. Co. v. Hutchins*, 1998 WL 438666 (Del. Super.) (upholding the Board's decision that Claimant had virtually no transferable skills and was *prima*

any specific transferable skill that Claimant possessed. This failure leads the Court to conclude that the Board's decision was not supported by substantial evidence.

Further, and perhaps most importantly, the Board failed to present any evidence to justify its conclusion that Claimant's use of legal narcotic medication would not affect his employability. At the hearing, Ms. Palmer testified that she did not tell the potential employers she interviewed in the course of conducting her labor market survey that Claimant was required to take narcotics for pain control.[26] Ms. Palmer's failure to inform the potential employers that Claimant was regularly taking narcotic pain medication calls into question the adequacy of the labor market survey and provides further reason to question whether the Board had substantial evidence to support its conclusion that Claimant was not a displaced worker.

Therefore, this Court finds that the claimant, who has no formal education beyond the eighth grade, no job experience in anything other than truck driving and manual labor and who is currently taking heavy doses of narcotic medications is *prima facie* displaced. This case is remanded in order for the Board to reconsider whether work is available within Claimant's capabilities and restrictions with the

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facie displaced where his only experience was as a truck driver and machine operator and had no formal education beyond the seventh grade); *Bureau for the Visually Impaired v. Lawrence*, 1999 WL 459299, at *5 (Del. Super.) (affirming Board's decision that Claimant, who had only an eighth grade education and whose only job experience was as a cafeteria worker and teacher's aide was displaced).

[26] Tr. Waters, IAB Hearing No. 1156967, at 59.

reminder that the burden rests on the employer.[27]

B. Partial Disability Benefits

Because the Board's decision that Claimant was not displaced has been reversed, the Court need not address the claimant's disputes as to the Board's calculation of partial disability benefits.

CONCLUSION

The Court affirms the Board's decision that Claimant was no longer totally disabled. However, the Board's decision that Claimant was not *prima facie* a displaced worker was not supported by substantial evidence. The Board's decision is therefore affirmed in part and reversed in part. The case is remanded to the Board for a decision consistent with this opinion.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
R.J.

WLW/dmh
oc: Prothonotary
xc: Order Distribution
File

[27] *Torres v. Allen Family Foods*, 672 A.2d 26, 30 (Del. 1995) (citing *Franklin Fabricators v. Irwin*, 306 A.2d 734, 737 (Del. 1973)).