

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

METHODIST COUNTRY HOUSE,)	
)	
Employer-Below/)	
Appellant,)	
)	C.A. No. 04A-05-007 MMJ
v.)	
)	
BETTY WRIGHT,)	
)	
Claimant-Below/)	
Appellee.)	

Submitted: March 16, 2005
Decided: April 12, 2005

Upon Appeal from a Decision of the Industrial Accident Board
AFFIRMED

MEMORANDUM OPINION

Susan A. List, Esquire, Tybout, Redfearn & Pell, Wilmington, DE, Attorneys for Employer-Below/Appellant and Cross-Appellee

Kenneth F. Carmine, Esquire, Potter, Carmine, Leonard & Aaronson, P.A., Wilmington, DE, Attorneys for Appellee and Cross-Appellant

JOHNSTON, J.

The Methodist Country House (“Employer”) has filed a timely appeal and the claimant, Betty Wright (“Claimant”) has filed a timely cross-appeal to the Industrial Accident Board (“Board”)’s decision granting Claimant’s Petition to Determine Additional Compensation Due. Employer argues that the Board’s decision granting Claimant’s Petition to Determine Additional Compensation Due is not supported by substantial evidence and constitutes legal error, requiring reversal. Claimant asserts that there is substantial evidence to support the Board’s findings that: Claimant’s neck complaints were being treated at all fifty-one visits from September 30, 1999 through March 2004; and that medications prescribed (except Oxycontin) were prescribed for pain relief for both the back and neck. Claimant also contends that the Board erred as a matter of law and the case should be remanded to the Board for determination on Claimant’s application for taxing of expert witness fees.

FACTS AND PROCEDURAL CONTEXT

Claimant was injured in an industrial accident on July 12, 1993 while working for Employer as a certified nursing assistant. Claimant alleged injuries to her back and to her neck. The parties entered into an Agreement regarding Compensation.

On April 4, 2000, a hearing was held relative to Claimant’s Petition to Determine Additional Compensation Due. Claimant asked for total disability benefits for: a recurrence; medical expenses associated with treatment by Dr. Conrad K. King,

Jr., M.D.; and proposed back surgery. The Board denied Claimant's Petition, holding that Claimant's back condition after September 1999 was not causally related to the work accident.¹ The Board also denied the proposed back surgery on the basis that it was unrelated. The Board accepted the opinion of Dr. Richard J. Morris, M.D. over that of Dr. King that the surgery was necessitated by the progressive degeneration of osteoarthritis, and not the work accident.² The Board also found that the current complaints were not related to the work accident.³

On or about November 6, 2003, Claimant filed a Petition to Determine Additional Compensation Due. Claimant is seeking payment of various prescription and medical expenses pertaining to treatment by Dr. Ganesh Balu ("Dr. Balu") and Dr. King. On March 18, 2004, Employer moved the Board for an Order seeking dismissal of Claimant's Petition. Employer claims that in the April 17, 2000 decision, the Board already had determined that Claimant's back condition was not causally related to the work accident. By Order dated March 19, 2004, the Board granted in part and denied in part Employer's Motion to Dismiss. The Board dismissed the

¹*Wright v. Methodist Country House*, I.A.B. No. 1002318 (April 17, 2000) at 10.

²*Id.*

³*Id.* at 8.

medical issues related to the lower back, but permitted medical expenses related to the cervical spine to proceed.⁴

A hearing on the merits was held on April 13, 2004 (“Hearing”). By Decision and Order dated April 27, 2004, the Board granted Claimant’s Petition to Determine Additional Compensation Due. The Board awarded to Claimant medical expenses associated with the treatment by Dr. Balu and Dr. King. Additionally, the Board granted Claimant’s request for reimbursement for prescription expenses the parties agreed to present to the Board. The Board awarded Claimant reasonable attorney fees in the amount of 30% of the total award.⁵ On or about May 20, 2004, Employer filed a Notice of Appeal to this Court from the Board’s decision. Claimant filed a Notice of Cross Appeal.

STANDARD OF REVIEW

In reviewing the decisions of an administrative board, 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.⁶ The function of the reviewing

⁴*Wright v. Methodist Country Home*, I.A.B. No. 1002318 (March 19, 2004)(Order).

⁵*Wright v. Methodist Country Home*, I.A.B. No. 1002318 (April 27, 2004) at 10.

⁶*See Unemployment Insurance Appeal Board v. Martin*, 431 A.2d 1265 (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.

Court is to determine whether the agency's decision is supported by substantial evidence.⁷ Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.⁸

On appeal, the "Superior Court does not sit as a trier of fact with authority to weigh the evidence, determine questions of credibility, and make its own factual findings and conclusions."⁹ 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.¹⁰ It is also 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."¹¹

⁷*Johnson v. Chrysler Corporation*, 213 A.2d 64, 66-67 (Del. 1965); *General Motors v. Freeman*, 164 A.2d 686, 688 (Del. 1960).

⁸*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. dismiss.*, 515 A.2d 397 (Del. 1986).

⁹*Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965).

¹⁰*Id.* at 67.

¹¹*Coleman v. Department of Labor*, 288 A.2d 285, 287 (Del. 1972).

DISCUSSION

Employer's Contentions

Employer argues that the Board's decision requires reversal on two separate grounds. First, the Board's finding that the cervical spine treatment is related to the work injury is not supported by substantial evidence and constitutes legal error. Employer asserts that the Board overlooked crucial evidence and misstated the facts in its holding. Second, the Board previously had determined that Claimant's lumbar complaints beginning in September of 1999 were not related to the industrial accident, but to degenerative osteoarthritis.¹² Nevertheless, the Board awarded medical treatment that was both solely, or at times in part, rendered to the unrelated lumbar and thoracic spine complaints.

In support of its first argument, Employer states that Claimant had undergone an unrelated lumbar surgery in the summer of 2002. As previously acknowledged by the Board, that surgery was due to osteoarthritis, and Claimant's lumbar complaints beginning in September of 1999 were unrelated to the 1983 work accident. Employer asserts that Claimant also had undergone unrelated thoracic surgery in July of 2002. The reason for the thoracic spine surgery was spinal stenosis, a degenerative condition. Employer asserts that Dr. King's treatment up until November of 2003

¹²*Wright v. Methodist Country House*, I.A.B. No. 1002318 (April 17, 2000).

only concerned the low back and thoracic spine. There is no mention of neck complaints, no examination of the cervical spine, and no diagnosis as it relates to the neck during this entire time period. In November 2003, for the first time in years, the medical records reflect treatment to the neck and document neck complaints. The Board, however, determined that the neck complaints and treatment to the neck were compensable.¹³ The Board found that the evidence, as supported by Dr. King, established causation.

Employer asserts that Employer never took that position that the cervical injury did not occur, as stated by the Board.¹⁴ Employer recognized that Claimant sustained a cervical strain as a result of the industrial accident in 1993, and paid permanent partial disability benefits as a result. However, while Employer acknowledges that Claimant sustained an injury to her cervical spine, Employer denies that the current treatment is related to the industrial accident.

Employer asserts that the Board should not be confused by the argument that Claimant's present condition arises solely from a degenerative condition. The Board accepted precisely the same argument in 2000 when it relied on the testimony of Dr. Morris that Claimant's lumbar and cervical spine complaints were due to

¹³*Wright v. Methodist Country House*, I.A.B. No. 1002318 (April 17, 2004).

¹⁴*Wright v. Methodist Country House*, I.A.B. No. 1002318 (April 17, 2004) at 7.

degenerative arthritis.¹⁵ Dr. Morris held the same opinion in 2000 as he did in 2004 - that the neck complaints, exactly like the back complaints, are not related to the industrial accident. Employer alleges that the Board failed to take into account the gap in treatment and the lack of documented complaints in medical records for a significant period of time. Further, the Board failed to discuss the 2000 decision in its holding.

Employer asserts that the Board awarded compensation for the neck treatment without properly examining the relevant facts. The Board had denied all treatment rendered by Dr. King in its decision of April 2000. The petition currently before the Board only involved treatment from June 2000 through present. The fact that Dr. King only prescribed medical treatment directed to the neck beginning in November 2003 is missing from the Board's finding of facts. Employer contends that the award of prescription expenses and for medical treatment to Claimant's neck some ten years after the industrial accident is not supported by substantial evidence and constitutes legal error. The expenses included treatment for the lumbar condition which the Board previously determined was not compensable, as well as the unrelated thoracic spine complaints.

¹⁵*Wright v. Methodist Country House*, I.A.B. No. 1002318 (April 17, 2000) at 8-9.

Employer asserts that in its April 17, 2000, decision, the Board held that the need for the surgery, and the cause of Claimant's lumber spine complaints was the progressive degeneration of osteoarthritis, and not the work accident.¹⁶ The Board accepted the opinion of Dr. Morris that the current complaints were a result of aggressive changes due to degenerative arthritis and not as a result of an acute sprain/strain to the neck and low back which occurred in 1983.¹⁷ Because of the Board's previous findings, Employer argues that the doctrine of *res judicata* bars any finding by the Board that this treatment is related to the industrial accident.

Employer asserts that starting in November 2003, Dr. King treated both back and neck complaints. However, since expenses associated with the back are not compensable, the Board was required to apportion out the expenses associated with treatment to the back and thoracic spine.

Employer asserts that the Board's decision to award prescription expenses also requires reversal. Dr. King admitted that the prescription expenses did not change from when he was solely treating Claimant's back, to the time when Dr. King started treating and noting neck complaints. Therefore, the prescription expenses cannot be related to the cervical spine complaints. Employer argues that even if the Board

¹⁶*Id.*

¹⁷*Id.* at 8.

determined that the prescriptions were compensable treatment for the neck, the undisputed testimony was that the medication was also prescribed for the back and thoracic spine. Therefore, the Board was required to apportion the expenses in recognition that the medications were, at the very least, partially prescribed for the unrelated lumbar and thoracic spine complaints.

In summary, Employer contends that it is clear that the Board's decision granting the petition for medical expenses constitutes legal error and must be reversed. Any award of the medical treatment or prescription medication until November 2003 would be in conflict of the prior decision in this matter. Because from November 2003 until March 2004 Dr. King was treating Claimant for both the neck and back complaints, the Board was required to apportion the expenses between the related neck complaints, and the unrelated back and thoracic spine treatment. The Board failed to take into consideration the prior decision in this matter when it awarded unrelated expenses. Employer asks that this Court reverse the Board's decision. If however, the Court affirms the Board's decision, Employer concedes that the Board erred in failing to award expert witness fees as costs against Employer.

Claimant's Contentions

Claimant asserts that the Board's decision that Claimant's cervical spine pain was related to the July 12, 1993 accident was supported by substantial competent evidence and should be affirmed by this Court. The Board was correct to hold that Claimant's neck injury and ongoing pain were related to the industrial accident. Additionally, Dr. King's treatment of Claimant for pain management by prescription medication, between September 30, 1999 and March, 2004 was reasonable.

Claimant asserts that there was substantial competent evidence to support the Board's decision. Dr. King first saw Claimant on September 30, 1999 when she complained to him of neck and low back pain. She related to him no intervening trauma between the 1993 work accident and 1999. The Board was presented with no evidence showing any intervening injury to the cervical spine.

Claimant asserts that Dr. King testified that on twenty occasions, throughout his fifty-one visits, he documented complaints of neck pain. Dr. King candidly admitted that his notes were sometimes brief and he did not necessarily record everything Claimant said. However, during the period of time between September 30, 1999 when Dr. King first saw Claimant, and his deposition in March 2004, Dr. King had referred Claimant to other physicians.

In particular, on May 13, 2003, Claimant saw an interventional pain manager, Dr. Balu. Dr. Balu's letter of May 13, 2003 to Dr. King summarizing the visit states that Claimant complained of neck pain in addition to mid-back and lower back pain. In addition, Dr. King had referred Claimant to Kishor Patil, M.D. ("Dr. Patil"), a neurologist, who saw Claimant on October 28, 1999. Dr. Patil's note indicates that Claimant complained of severe neck pain at that time.

Therefore, Claimant argues, the Board clearly could infer from Dr. King's testimony, Claimant's testimony, Dr. Patil's office note, and Dr. Balu's note, that Claimant had been experiencing neck pain ever since the July 12, 1993 accident. Claimant contends that the testimony of the witnesses, including Dr. King, supports Claimant's position that Claimant was under care for both her neck and low back problems throughout the period of time that Dr. King saw her from September 30, 1999 through his deposition in March 2004. Claimant suggests that a review of the entire record in this case compels the conclusion that there was substantial competent evidence to support the Board's finding that Claimant's neck complaints were being treated at all fifty-one visits, from September 30, 1999 through March 2004 and that medications (except Oxycontin) were prescribed for pain relief for both the back and neck. Claimant requests that the Court affirm the Board's award, and also award the expert witness fees as costs against Employer.

ANALYSIS

Board's Findings Based Upon the April 4, 2000 Hearing ("2000 Decision")

- The Board relied on the testimony of Dr. Morris, who has examined Claimant three times since her 1993 work accident. Dr. Morris attributed degenerative osteoarthritis as the cause of Claimant's most recent complaints and inability to work at more than a sedentary job.
- While Claimant sustained an acute cervical and lumbosacral strain from the 1993 work accident, the chronic complaints she manifested at the time of the hearing were based on progressive changes due to degenerative osteoarthritis. Both spinal stenosis and degenerative spine changes were present prior to the work accident and changes were evidenced in the imaging studies.
- Dr. King's opinion that the work accident constituted a triggering traumatic event that accelerated Claimant's condition is not supported by the contemporaneous diagnostic studies at the time. The x-rays of the low back from July 1993 were normal and an MRI of the lumbar spine from September 1993 were negative for disc herniation, but did reveal some minimal degenerative changes involving the facet joints. Further, a 1997 MRI of the lumbar spine and a 1998 EMG were both normal.

- The Board agrees with Dr. Morris that had the traumatic work accident been the source of Claimant's problems he would have expected the radicular symptoms to appear long before 1999, some six years later.

Board's Order Dated March 19, 2004
("2004 Order")

On March 18, 2004, Employer asked the Board for an order of Dismissal of Claimant's pending Petition to Determine Additional Compensation Due based upon the doctrine of *res judicata*. The Board granted Employer's motion in part and denied it in part. The Board agreed with Employer that the pending medical expense issues related to the lumbar spine should be dismissed because the Board previously has determined that there was no causal relationship between Claimant's chronic back condition in 1999 and the 1993 work accident. However, since similar findings were not made with respect to the cervical spine, because such treatment was not at issue in 2000, the Board believed that it was improper to dismiss the claim for those medical expenses without hearing the evidence. The Board dismissed all medical issues related to the low back. The Board determined to consider the medical expenses issues related to the cervical spine.

***Board's Findings Based Upon the April 13, 2004 Hearing
("2004 Decision")***

- The evidence established that Claimant suffered the neck injury on July 12, 1993.
- The Board found the testimony of Claimant credible that, following the accident, she complained on a number of occasions of pain in the neck region.
- The Board accepted the testimony of Claimant's treating physician, Dr. King.
- The Board found the testimony of Dr. Morris less persuasive than that of Dr. King.
- Although Dr. Morris opined that Claimant suffers from a degenerative condition unrelated to the earlier accident, the Board chose to disregard this testimony. While Dr. Morris placed great reliance on the osteoarthritic changes on clinical exam, the Board held that the medical records and testimony proved otherwise.
- The Board concluded that Claimant's neck injury was related to the earlier work injury and that the subsequent medication was a compensable medical expense.

FINDINGS OF THE COURT ON APPEAL

After reviewing all of the Board's findings, it appears to the Court that the Board's 2000 Decision appears at first blush to contradict the Board's 2004 decision.

Upon closer review of both the decisions in light of the 2004 Order, the decisions are consistent.

In the 2004 Order, the Board addressed the doctrine of *res judicata* asserted by Employer as basis for dismissal of Claimant's petition. The Board determined that the doctrine applied to claims regarding Claimant's chronic back condition. The doctrine, however, did not apply to claims regarding the cervical spine because treatment of the cervical spine was not at issue in 2000.

Thus, in the 2004 Order, the Board set certain parameters pertaining to subject matter for determining Claimant's Petition to Determine Additional Compensation Due. The chronic back condition that is the subject of the 2000 Decision is distinct from the injury to the cervical spine that is at issue in the 2004 Decision. For that reason, the Board did not consider its 2000 Decision in its 2004 Decision. The Board was free to weigh credibility and determine facts as it saw fit in its 2004 Decision, without having to take into account its 2000 Decision.

As trier of fact, the Board had the discretion to accept Dr. King's testimony that on twenty occasions throughout the fifty-one visits, he documented complaints of neck pain. It is the exclusive function of the Board to address the credibility of witnesses.¹⁸ The Board was free to give weight to the fact that Claimant did not relate any

¹⁸*Johnson v. Chrysler Corp.*, 213 A.2d 64, 64 (Del.1965).

intervening trauma to Dr. King that occurred between the 1993 work accident and 1999. The Board was presented with no evidence showing any intervening injury to the cervical spine. This reviewing Court declines to overturn the Board's ruling as to credibility.¹⁹

There is substantial evidence that Claimant was under care for both her neck and low back problems throughout the period of time that Dr. King saw her from September 30, 1999 through his deposition in March 2004. Dr. Balu, an interventional pain manager, wrote to Dr. King summarizing his examination of Claimant, who complained of neck pain in addition to mid and lower back pain. In addition, Dr. King had referred Claimant to Kishor Patil, M.D. ("Dr. Patil"), a neurologist, who saw Claimant on October 28, 1999. Dr. Patil's note indicates that Claimant complained of severe neck pain at that time. The Board considered Dr. King's testimony, Claimant's testimony, Dr. Patil's office note, and Dr. Balu's letter, and concluded that Claimant had been experiencing neck pain ever since the July 12, 1993 accident. The Board had the discretion to disregard the testimony of Dr. Morris.²⁰

¹⁹*Id.*

²⁰*Id.*; In *Wortman*, the Superior Court suggested that the Board was free to disregard a doctor's testimony as long as it was clearly expressed, 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.

In case of conflicting medical testimony, 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.²¹ There was substantial competent evidence to support the Board's finding that Claimant's neck complaints were being treated from September 30, 1999 through March 2004.

CONCLUSION

Claimant had the burden of establishing by a preponderance of the evidence that she was entitled to additional compensation for her neck complaints because they were triggered by the 1993 industrial accident. Claimant was able to meet this burden to the satisfaction of the Board. It is the duty of the reviewing Court to weigh and evaluate the evidence for sufficiency to support the findings.²² If there is evidence in the record from which the Board's conclusion could have been fairly and reasonably drawn, the Court will not disturb the Board's findings.²³ This Court will not substitute its judgment for that of an administrative body where there is substantial evidence to

²¹*State of Delaware v. Aubrey Cephas*, Del., C.A. No. 92A-03-005, Veasey J. (Jan. 1994); *Peggy S. Downes v. State of Delaware*, Del., No. 25, 1993, Walsh, J. (Mar. 30, 1993); *DiSabatino Bros. Inc. v. Wortman*, 453 A.2d 102, 106 (Del. 1982).

²²*M.A. Hartnet, Inc. v. Coleman*, 226 A.2d 910, 912 (Del. 1967).

²³*In re Delaware Sports Serv.*, 196 A.2d 216 (Del. Super. 1963), *aff'd*, 202 A.2d 568 (Del. 1964).

support the decision and findings of the agency.²⁴ The Board based its decision on medical records, expert testimony, and other testimony presented at the hearing. This Court must take “due account of the experience and specialized competence” of the IAB.²⁵

THEREFORE, the decision of the Industrial Accident Board is hereby **AFFIRMED IN PART** with regard to the Board’s decision to grant Claimant’s Petition to Determine Additional Compensation Due.

Employer does not contest Claimant’s position that the failure of the Board to award medical expert fees in this matter constitutes legal error. **THEREFORE**, \$1,897.58 (\$1,500.00 for Dr. King’s trial deposition testimony, and \$397.58 for transcribing of the deposition) is awarded to Claimant. To the extent that the Industrial Accident Board did not award medical expert fees to Claimant, the Board’s decision is **REVERSED IN PART**.

IT IS SO ORDERED.

The Honorable Mary M. Johnston

ORIGINAL: PROTHONOTARY’S OFFICE - CIVIL DIV.

²⁴*Olney v. Cooch*, 425 A.2d 610, 613 (Del. 1981).

²⁵29 *Del. C.* § 10142(d).