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

MATILDE SANTOS,	)	
	)	
Employee-Appellant,	)	
	)	
v.	)	C.A. No. 04A-09-009 WCC
	)	
SODEXHO, INC./MARRIOTT,	)	
	)	
Employer-Appellee,	)	
	)	
and the INDUSTRIAL ACCIDENT BOARD OF THE STATE OF DELAWARE, In and for New Castle County.	)	

Submitted: February 4, 2005
Decided: May 31, 2005

MEMORANDUM OPINION

Appeal from Industrial Accident Board. AFFIRMED.

Vincent A. Bifferato, Jr., Bifferato, Gentilotti & Biden, P.A., 200 Biddle Avenue, Suite 203, Springside Plaza, Newark, Delaware. Attorney for Appellant.

John W. Morgan, Heckler & Frabizzio, The Corporate Plaza, 800 Delaware Avenue, Suite 200, P.O. Box 128, Wilmington, Delaware. Attorney for Appellee.

CARPENTER, J.

Introduction

Before this Court is Matilde Santos' ("Appellant") appeal from the Industrial Accident Board's ("Board") decision, where Sodexho, Inc./Marriott ("Appellee") petitioned the Board to terminate benefits. Upon review of briefs filed in this matter, the Court finds that the Board's decision should be AFFIRMED and the issue of fees for Appellant's vocational rehabilitation expert and translator should be REMANDED to the Board for further consideration.

Facts

On January 21, 2002, Appellant, who is right-handed, injured her right shoulder while in the employ of Appellee. At the time of the accident Appellant had an average weekly wage of $331.60, with a compensation rate of $221.06 per week. Her treating orthopaedic surgeon, Dr. Leo Raisis, performed surgery on Appellant's right shoulder on November 21, 2002 and then again on April 15, 2003. Appellant was placed on total temporary disability from April 25, 2002 through May 8, 2002, November 15, 2002 through January 23, 2003, and finally from April 15, 2003 through April 12, 2004.

On April 12, 2004, Appellee filed a Petition to Terminate Benefits, alleging that Appellant was no longer totally disabled. On April 27, 2004, Appellant

underwent a medical examination which resulted in a stipulation by the parties that Appellant was capable of returning to full time work with restrictions. The two employment options presented were light duty work with no use of the upper extremity or sedentary work.[1] In spite of the stipulation, on August 11, 2004, the Board held a hearing on Appellee's petition, regarding Appellant's status as a displaced worker. On August 26, 2004, the Board issued its opinion in which it granted, in part and denied, in part, Appellee's Petition, awarding Appellant partial disability benefits in the amount of $221.06 per week, a medical witness fee and an attorney's fee. The Board found unconvincing Appellant's argument that she is a *prima facie* displaced worker as a result of her age, education, vocational experience, language difficulties and her physical limitations. Appellant alleges that the Board's finding is not based on substantial evidence and therefore reversal is appropriate.

Standard of Review

In reviewing an appeal from the Board, the Court must determine whether the Board's decision is supported by substantial evidence and free from legal error.[2] Substantial evidence may be characterized as evidence that a reasonable mind accepts

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[1] *Santos v. Sodezho*, IAB Hearing No. 1211687 (Aug. 26, 2004), at 2 (quoting Letter from Stephens to Morgan of 4/27/04, at 3-4.).

[2] *General Motors Corp. v. Freeman*, 164 A.2d 686, 688 (Del. 1960); *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965); *General Motors Corp. v. Jarrell*, 493 A.2d 978, 980 (Del. Super. Ct. 1985).

as adequate support for the conclusion.[3] In this capacity, the Court does not weigh evidence, determine questions of credibility, or make findings of fact.[4] If the record supports the Board's findings, the Court should accept those findings even though, acting independently, the Court might reach a different conclusion.[5] The Court merely examines whether the evidence is adequate to support the Board's factual findings.[6] When applying the substantial evidence standard, the Court must consider the record in a light most favorable to the prevailing party, "resolving all doubts in its favor."[7]

Discussion

In order to terminate total disability benefits, Appellee bears the initial burden of demonstrating that Appellant is no longer totally disabled.[8] This requirement was established by the parties' stipulation to Dr. David Stephens' report, which appeared to be consistent with the opinion of her treating physician. The report stated that Appellant is "able to return to work full-time at either light duty with no use of her

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[3] *Oceanport Indus., Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 899 (Del. 1994).

[4] *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66-67 (Del. 1965).

[5] *H & H Poultry Co., Inc. v. Whaley*, 408 A.2d 289, 291 (Del. 1979).

[6] 29 *Del. C.* §10142(d) (2003).

[7] *General Motors Corp. v. Guy*, 1991 WL 190491, at *3 (Del. Super.).

[8] *Waters v. Statewide Maint.*, 2005 WL 1177568, at *3 (Del. Super.).

right upper extremity or sedentary work activities. The patient [Appellant] should not perform any overhead lifting and not perform any lifting over five pounds with her right upper extremity."[9] As a result, there is no dispute that Appellee met its burden of showing that Appellant is no longer "totally incapacitated for the purpose of working. "[10]

If the employer meets its burden to terminate total disability benefits, the employee must show she is a displaced worker in order to overcome the termination. In spite of the lack of dispute over Appellant's physical ability to return to work, she claims that reversal of the Board's decision is appropriate because she is a *prima facie* displaced worker which shifted the burden to the employer, not her, to establish the availability of regular employment within the employee's capabilities.

A displaced worker is one who, "while not completely incapacitated for work, is so handicapped by a compensable injury that [she] will no longer be employed regularly in any well known branch of the competitive labor market and will require a specially-created job if [she] is to be steadily employed."[11] An employee is deemed

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[9] *Santos v. Sodezho*, IAB Hearing No. 1211687 (Aug. 26, 2004), at 2 (quoting Letter from Stephens to Morgan of 4/27/04, at 3-4.).

[10] *Waters*, 2005 WL 1177568, at *3; *Franklin Fabricators v. Irwin*, 306 A.2d 734, 737 (Del. 1973).

[11] *Ham v. Chrysler Corp.*, 231 A.2d 258, 261 (Del. 1967).

prima facie displaced if her age, education, background, experience, emotional stability, and the nature of work she can perform with her physical impairment[12] so limit her that she can no longer "be employed regularly and in any well known branch of the competitive labor market."[13] A displaced employee will require a specially-created job if she is to be steadily employed.[14]

Relying on her age, education, vocational experience, language difficulties and physical limitations, Appellant attempted to establish her status as a *prima facie* displaced worker. However, the Board determined that Appellant's allegations were without merit. In making its determination, the Board found Appellant's "grasp of the English language to be very good."[15] In fact, Appellant was able to understand in English almost all of the questions asked of her in the hearing and respond in English. Only compound or awkwardly phrased questions posed difficulty for Appellant. In addition, since her arrival in the United States in 1968, Appellant has been employed continuously, with the exception of one year in which she was laid off. The Board found that Appellant had managed to retain employment in the past,

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[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Santos v. Sodezho*, IAB Hearing No. 1211687 (Aug. 26, 2004), at 4.

despite her contention that her English was limited, and the present restrictions on Appellant's physical activities did not render her a *prima facie* displaced worker. The Court finds the Board's decision is supported by substantial evidence and free from legal error.[16]

Appellant' argument basically centers around the Board's comments, regarding Appellant's prior employment and language barriers, which the Court also finds unpersuasive. Obviously, one has some employment history or they would not be entitled to these benefits in the first place. However, Appellant's ability to obtain employment in the past, when she had the same language and learning limitations, is an appropriate factor to consider, particularly when she is now claiming they are preventing her from finding employment. The Court agrees with the Board that the only changed circumstances affecting Appellant's ability to be employed are the limitations placed on her by the physicians. These limitations, however, do not cause her to be displaced and Appellant simply has not met the significant burden of *prima facie* status. Of course this finding alone does not prevent Appellant from establishing displaced status, it simply places the burden upon her to prove the necessary criteria.

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[16] *General Motors Corp. v. Freeman*, 164 A.2d 686, 688 (Del. 1960); *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965); *General Motors Corp. v. Jarrell*, 493 A.2d 978, 980 (Del. Super. Ct. 1985).

If an employee is not a *prima facie* displaced worker, she has the opportunity to establish her displaced status by demonstrating that she "has made reasonable efforts to secure suitable employment that have been unsuccessful because of the injury."[17] Appellant neglected to make this showing and in fact indicated she had made no effort to find employment. As such, Appellant has failed to establish the necessary requirements for displaced status.

Finally, there appears to be no dispute that the Board inadvertently neglected to address the issue of whether Appellant was entitled to an expert witness fee for her vocational rehabilitation expert and a fee for her translator.[18] The Court remands this issue to the Board for consideration.

Conclusion

For the foregoing reasons, the decision of the Board is AFFIRMED and the issue of fees for Appellant's vocational rehabilitation expert and translator is REMANDED to the Board.

IT IS SO ORDERED.

Judge William C. Carpenter, Jr.

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

[18] 19 *Del C.* § 2320(8).