IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

PATRICIA JEPSEN,	:	
	:	C.A. No. 04A-04-002
Claimant-Below,	:	
Appellant,	:	
	:	
v.	:	
	:	
STATE OF DELAWARE,	:	
	:	
Employer-Below,	:	
Appellee.	:	

Submitted: February 24, 2005
Decided: December 30, 2005

ORDER

Upon Cross-Appeal of Decision of the Industrial Accident Board. Denied.

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

David G. Culley, Esquire and Jennifer S. Naylor, Esquire of Tybout Redfearn & Pell, Wilmington, Delaware; attorneys for the Appellee.

This 30th day of December, 2005, upon consideration of the parties' briefs and the record below, it appears to the Court:

University of Delaware ("Employer") filed a cross-appeal regarding the Industrial Accident Board's ("Board") decision granting Patricia Jepsen's ("Jepsen") Petition to Determine Additional Compensation Due. Employer's two arguments are: (1) the Board's March 19, 2004 Order Following Remand ("remand order")failed to clearly articulate the reasoning behind its decision to reverse its prior decision and (2) the remand order capriciously disregarded evidence in the record. Jepsen's response is that the remand order is amply supported and is based on substantial evidence.

The salient facts are as follows: Jepsen suffered a work-related injury on January 13, 2000. She had three herniated disks in her cervical spine and underwent a fusion at all three levels. Based on that incident, the Board awarded Jepsen compensation from January 13, 2000 until March 6, 2000 in its May 20, 2002 decision ("first order"). On July 1, 2002, Jepsen filed a Petition to Determine Additional Compensation Due based on an alleged recurrence of total disability beginning on August 15, 2001. The Board held a hearing for the second petition, during which it heard deposition testimony from Jepsen's medical expert witnesses, Drs. Koyfman, Nisnisan and Sommers along with Employer's medical expert witness, Dr. Fink. On November 8, 2002, the Board issued its decision ("second order") denying Jepsen's petition because it determined that she did not meet her burden of proof, primarily because the Board rejected the testimony of her medical expert witnesses as "not meet[ing] the legal

standard of medical probability."[1] Jepsen appealed the Board's second order to this Court, which reversed and remanded, holding that the Board "erroneously applied a higher legal standard for medical causation opinions than claimant is required to meet."[2] Consequently, this Court determined that the rationale for discounting Jepsen's three medical expert witnesses was invalid and lacked an adequate basis on which to disregard their opinions.[3] This Court also opined, "[w]ithout applying the appropriate legal standard for medical expert testimony, 'the Board's factual findings cannot be the process of an orderly and logical deductive process, and the decision cannot stand.'"[4] Additionally, this Court noted, "[t]reating physicians have great familiarity with a patient's condition and their opinions should be given 'substantial weight.'"[5]

On remand, the Board reversed its second order and in its remand order stated, "[b]ased on the Superior Court's decision, the Board accepts the testimony of Claimant's treating physicians and finds that Claimant's condition is causally related to her original industrial injury. Therefore, Claimant is entitled to ongoing total

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[1] *Jepsen v. State of Delaware*, IAB Hearing No. 1161730 (November 8, 2002), at 16.

[2] *Jepsen v. Univ. of Delaware*, 2003 Del. Super. LEXIS 320, at *7.

[3] *Id.* at *8.

[4] *Id.*

[5] *Id.* at *6.

disability benefits from August 15, 2001, and related medical expenses."[6] Jepsen then appealed the Board's remand order to this Court contending that the Board erred as a matter of law by failing to award medical witness fees and reasonable attorney's fees, as well as erroneously refusing to determine the specific amount of medical expenses that were compensable. This Court agreed and reversed and remanded the Board's remand order for further proceedings consistent with its opinion. The cross-appeal currently before this Court also stems from the remand order.

For the reasons set forth below, Employer's cross-appeal is *denied*.

Standard of Review

The review of an Industrial Accident Board's decision is limited to an examination of the record for errors of law and a determination of whether substantial evidence exists to support the Board's finding of fact and conclusions of law.[7] Substantial evidence equates to "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[8] This Court will not weigh the evidence, determine questions of credibility, or make its own factual findings.[9] Errors of law are

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[6]*Jepsen v. State of Delaware*, IAB Hearing No. 1161730 (March 19, 2004), at 2.

[7]*Histed v. E. I. Dupont de Nemours & Co.*, 621 A.2d 340, 342 (Del. 1993); *Willis v. Plastic Materials*, 2003 Del. Super. LEXIS 9; *Robinson v. Metal Masters, Inc.,* 2000 Del. Super. LEXIS 264.

[8]*Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981) (*quoting Consolo v. Federal Mar. Comm'n,* 383 U.S. 607, 620 (1966)).

[9]*Collins v. Giant Food, Inc.*, 1999 Del. Super. LEXIS 590 (*quoting Johnson v. Chrysler Corp.*, 213 A.2d 64, 66-67 (Del. 1965)).

reviewed de novo. Absent error of law, the standard of review for a Board's decision is abuse of discretion.[10] The Board has abused its discretion only when its decision has "exceeded the bounds of reason in view of the circumstances."[11] Additionally, "this Court will give deference to the expertise of administrative agencies and must affirm the decision of any agency even if the Court might have, in the first instance, reached an opposite conclusion."[12]

Discussion

Employer's two arguments will be discussed separately below.

Remand Order Failed to Clearly Articulate Reasoning

Employer asserts that the Board's remand order should be reversed and remanded because the Board did not fully articulate its reasons for reversing its second order and finding that Jepsen's recurrence beginning August 15, 2001 was causally related to the original industrial accident. In support of this argument, Employer cites to *Lindsay v. Chrysler Corporation*[13] and *Walden v. Georgia-Pacific Corporation*[14] for the proposition that this Court cannot conclude that the Board's decision is based on substantial evidence because there were no specific factual findings. However, in both *Lindsay* and *Walden*, the Board had "simply chosen one witness over another" without

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[10] *Digiacomo v. Bd. of Pub. Educ.*, 507 A.2d 542, 546 (Del. 1986).

[11] *Willis*, 2003 Del. Super. LEXIS at *2-3.

[12] *Collins*, 1999 Del. Super. LEXIS at *9.

[13] 1994 Del. Super. LEXIS 639.

[14] 1995 Del. Super. LEXIS 648.

making suitable factual findings.[15] In *Lindsay*, the Court opined, "[a] determination of credibility in regard to a particular witness is not an adequate substitute for factual findings on unresolved matters."[16] However, this Court looks to *Haveg Industries, Inc. v. Humphrey,*[17] which the Court in *Lindsay* cited, for further guidance. In *Haveg*, the Delaware Supreme Court stated, "[r]eversal is not always required because the Board fails to make its findings in expansive terms. If appropriate, reviewing courts can look at subordinate facts underlying the Board's conclusions when those facts can be determined, by implication, from the ultimate conclusion."

In the case *sub judice*, this Court finds that it is appropriate to look at the facts underlying the Board's conclusion. In its second order, the Board chose Employer's medical expert witness, Dr. Fink, over Jepsen's medical expert witnesses, Drs. Koyfman, Nisnisan and Sommers, because the Board believed Dr. Fink to be the only medical expert witness who "properly couched his opinions in terms of medical probability."[18] Therefore, all of the findings of fact and conclusions of law were based upon the Board's erroneous conclusion that Dr. Fink's testimony was the only testimony it was able to accept. As a result, the Board listed all of his findings as its findings of fact. In this case, it is appropriate for this Court to conclude that, had the Board known it was able to accept the findings of Drs. Koyfman, Nisnisan and

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[15] *Walden*, 1995 Del. Super. LEXIS 648, at *21.

[16] 1994 Del. Super. LEXIS 639, at *8.

[17] 456 A.2d 1220 (Del. 1983).

[18] *Jepsen v. State of Delaware*, IAB Hearing No. 1161730 (November 8, 2002), at 16.

Sommers, it would have done so. This is evidenced by the fact that in its remand order, the Board clearly stated that it unambiguously accepted the testimony of Jepsen's treating physicians, which as previously mentioned are to be given considerable weight. The ultimate conclusion here is that, when given an opportunity to accept either Jepsen's medical expert witnesses' testimony or Employer's medical expert witness's testimony, the Board chose to accept the testimony of Jepsen's witnesses. Consequently, this Court can infer that the Board would have decided the factual disputes in favor of Jepsen and outlined the findings of Jepsen's medical expert witnesses as its findings of fact pursuant to *Haveg*.

This argument of Employer fails.

The Remand Order Capriciously Disregarded the Evidence

Employer argues that because the Board accepted the findings of Dr. Fink in the second order and subsequently reversed that order without issuing new findings of fact in the remand order, the Board capriciously disregarded the evidence. Employer also argues that more importantly, Jepsen has not sustained her burden of proving a causal relationship between the recurrence and the original industrial injury.

In *Romine v. Conectiv Communications, Inc.*,[19] the Court stated, "[i]t is well established that when parties provide testimony from expert witnesses, the Board is free to choose between conflicting medical opinions, and either opinion will constitute *substantial evidence* for purposes of an appeal."[20] Here, the Board chose the medical

[19]2003 Del. Super. LEXIS 162.

[20]*Id.* at *22 (emphasis in original).

opinions of Jepsen's medical expert witnesses. While this issue is somewhat confusing as a result of the Board's second order wherein it chose the medical opinion of Employer's expert witness, the disparity is clarified when it is explained that the Board erroneously concluded in its second order that it could only accept the testimony of Dr. Fink. As previously mentioned, when presented with an opportunity to choose between Employer's medical expert witness and Jepsen's medical expert witnesses, the Board chose Jepsen's medical expert witnesses. Pursuant to *Romine*, the Board's acceptance of Jepsen's medical expert witnesses constitutes substantial evidence and, therefore, this Court cannot disturb the Board's remand order. Further, based on its acceptance of Jepsen's medical expert witnesses' testimony, the Board clearly found that Jepsen's recurrence was causally related to her original industrial injury. Therefore, Employer's second argument fails.

Based on the foregoing reasons, Employer's cross-appeal is *denied*.

IT IS SO ORDERED.

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

WLW/dmh
oc: Prothonotary
xc: Order Distribution