IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

PHYLLIS LOVELESS	)	
	)	
Claimant-Below,	)	
Appellant	)	
	)	
v.	)	C.A. No. 05A-03-007 JTV
	)	
BAYHEALTH MEDICAL	)	
CENTER	)	
	)	
Employer-Below,	)	
Appellee.	)	

Submitted: September 16, 2005
Decided: December 30, 2005

Walt F. Schmittinger, Esq. and Lori A. Brewington, Esq. Schmittinger & Rodriguez, Dover, Delaware.

Christine P. O'Connor, Esq., Marshall, Dennehy, Warner, Coleman & Goggin, Wilmington, Delaware.

Upon Consideration of Appellant's
Appeal from Decision of Industrial Accident Board
AFFIRMED

VAUGHN, President Judge

OPINION

This is an appeal brought by Phyllis Loveless ("Claimant") from a decision of the Industrial Accident Board ("the Board") terminating her total disability benefits and awarding partial disability. In its decision, the Board concluded that her employer, Bayhealth Medical Center ("the employer" or "Bayhealth"), had met its burden of proof by showing that Claimant was no longer totally incapacitated.

FACTS

Claimant injured her back in 1987 when she slipped and fell on ice, and again in 1994 while pushing a patient on a stretcher. She has undergone two surgeries on her back, the latest being in June 2003. While under the care of her treating physician, Dr. Irene Mavrakakis, she has been receiving low back injections, medications, and physical therapy in order to treat her pain.

Dr. Robert Keehn testified on behalf of Bayhealth. He examined Claimant in April 2004 and reviewed all of her medical records through August 2004. The records revealed that MRI and CT scans over the years showed herniations and structural compromises at the L4-5 and L5-S1 levels. A 1998 MRI showed scar tissue at L5-S1 encasing the left S1 nerve root. Dr. Keehn opined that Claimant might still be experiencing some residual effects of that scar tissue around the L5-S1 area. A 2003 MRI showed facet arthritis and scarring of the left side of L5-S1, but did not confirm a recurrent disc herniation. During his exam of Claimant, Dr. Keehn noted that her pain limited her ability to sit for two to three hours at a time. He believed that she no longer needed further medical treatment and that she would be

able to work in a sedentary position with restrictions as to lifting, avoiding continuous bending or stooping, and the ability to change position frequently. The doctor recommended that Claimant not return to work as a certified nursing assistant.

A vocational counselor testified on behalf of Bayhealth. She prepared a hypothetical labor market survey based on Claimant's vocational experience, education, and medical restrictions for sedentary duty work with restrictions. The counselor, Robin Subers, believed that Claimant has transferable skills and could find employment in the open labor market. The survey identified fourteen positions in the Dover area with an average wage of $313.30 per week. Based on adjustments pursuant to *Maxey v. Major Mechanical*, 330 A.2d 156, 158 (Del. Super. 1974) and *Greggo & Ferrara, Inc. v. Wade*, Del. Super., C.A. No. 84A-AU-6, O'Hara, J. (November 18, 1985), at 3-4, the Board adjusted the average wage per week for the jobs in the survey to $246.25. Ms. Subers concluded that Claimant would have some loss of earning capacity.

Dr. Mavrakakis testified that she began treating Claimant in January 2002 for low back and lower extremity symptoms related to the work accident. The doctor saw Claimant approximately once a week for low back injections. Claimant returned to her care in October 2003 following her June 2003 surgery. The doctor's records do not indicate whether Claimant was able to return to work in any capacity following her surgery. She continued to have tenderness that correlated with her subjective complaints. A repeat MRI showed no significant changes following surgery. Dr. Mavrakakis recommended that Claimant avoid lifting more than ten pounds, frequent

bending and twisting, and other exacerbating activities.

Claimant continued on pain management therapy into February 2004. She had further injections in June and August of 2004 which provided short-term relief. Dr. Mavrakakis opined that Claimant has radiculitis or sensory radiculopathy, despite a negative EMG, and facet pain, all related to the work accident. The doctor further stated that Claimant may be a candidate for a spinal cord stimulator.

Claimant experienced an exacerbation of symptoms in November 2004 but Dr. Mavrakakis believed she might be capable of part-time sedentary duty work depending on her response to the current treatment. An EMG in December 2004 was normal for lumbosacral radiculopathy, but ongoing sensory radiculopathy was noted. The doctor opined that Claimant might be capable of sedentary part-time work, four hours a day, five days a week. Symptoms continued from the exacerbation into January 2005, and the doctor began another series of epidural injections. These injections have provided short-term relief.

Claimant testified that following the November 2004 exacerbation she cannot perform regular housework. She is able to use a computer but does not believe she can perform the jobs in the labor market survey on either a part or full-time basis. Her pain fluctuates between a five and a ten on a ten-point scale. However, she does not believe she has returned to her baseline status before the November 2004 flare-up.

The Board held that Claimant's total disability benefits were terminated as of the date of the hearing and she was awarded partial disability benefits in the amount of $183.51 per week reflecting her loss of earning capacity that resulted from her

work injury. The Board also awarded payment of Claimant's attorney's fees and medical witness fees. Claimant has filed this limited appeal on the issue of whether there was substantial evidence to support the Board's decision to terminate total disability benefits.

STANDARD OF REVIEW

This court's function on appeal is to determine whether the Board's decision is supported by substantial evidence and free from legal error.[1] Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[2] The appellate court does not weigh the evidence, determine questions of credibility or make its own factual findings.[3] It merely determines if the evidence is legally adequate to support the agency's factual findings.[4]

The Board has the discretion to accept the testimony of one expert over that of another expert when evidence is in conflict and the opinion relied upon is supported by substantial evidence.[5] In addition, when an expert's opinion is based in large part

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

[2] *Oceanport Ind. v. Wilmington Stevedores,* Del.Supr., 636 A.2d 892, 899 (1999); *Battista v. Chrysler Corp.,* Del.Super., 517 A.2d 295, 297 (1986), *appeal dism.,* Del.Supr., 515 A.2d 397 (1986).

[3] *Johnson* at 66.

[4] 29 *Del. C.* § 10142(d).

[5] *Reese v. Home Budget Center*, 619 A.2d 907, 910 (Del. 1992); *DiSabatino v. Wortman*, 453 A.2d 102, 106 (Del. 1982); *General Motors Corp. v. Veasey*, 371 A.2d 1074, 1076 (Del.

upon the patient's recital of subjective complaints and the trier of fact finds the underlying facts to be different, the trier is free to reject the expert's testimony.[6]

CONTENTIONS OF THE PARTIES

Claimant asserts that the employer failed to meet its burden of proof of showing that she is able to work with or without restrictions and therefore the Board erred when terminating her total disability benefits as of the date of the hearing.

Bayhealth contends that its burden was met based on Dr. Keehn's testimony which included his opinion that Claimant could work with specific, permanent restrictions.

DISCUSSION

In its decision, the Board accepted as credible the testimony of both Dr. Keehn and Dr. Mavrakakis regarding Claimant's medical employability. The dispute focuses on the effect of the November, 2004 "flare-up." The "flare-up" occurred just three months prior to the Board's hearing, which was held on February 9, 2005. Claimant argues that the "flare-up" undermines Dr. Keehn's opinion, which was formed prior to the "flare-up." Claimant also argues that the Board mischaracterizes Dr. Mavrakakis' testimony, which was given by deposition on February 3. Claimant relies upon the following parts of her testimony:

> Q. Doctor, given the nature and extent of

1977) (rev'd on other grounds by *Duvall v. Charles Connell Roofing,* 564 A.2d 1132 (Del. 1989)); *Butler v. Ryder M.L.S.*, 1999 Del. Super. LEXIS 29 at *5-6 (Del. Super. 1999).

[6] *Breeding v. Contractors-One-Inc.,* 549 A.2d 1102, 1104 (Del. 1988).

this flare-up beginning in November, it's fair to say that she would have been on reduced levels of activities and you wouldn't have wanted her working in any capacity in connection with this exacerbation?

A. At the present time, correct.

* * *

Q. Given that she's improved but still unfortunately experiencing that exacerbation, Doctor, do you still have her activities limited? Do you still want her out of work at this point?

A. Right. Until we can see how she responds to the treatment and the plan which has been discussed, would be that she may be capable of sedentary part-time work at that point.

* * *

Q. Do you have an expected time frame for that [work with restrictions] or is that something you can't predict at this point given the history in this case?

A. We should be able to see how she responds in the next 30 to 45 days. After she has her second epidural next week, we

> should be able to make a determination and should be able to work on that. That would be the plan. The other issue that has not been approached by the patient that she consistently maintains high levels of pain. She may be a candidate for a spinal cord stimulator which is the thing that we'll be talking about when she comes back.

This testimony from the doctor, Claimant argues, means that she was still totally disabled at the time of the hearing and only "might be" able to work later. This testimony, Claimant argues, fails to establish that she "probably" (by a preponderance) will be able to work.

In the "summary of the evidence" portion of its decision, the Board summarizes Dr. Mavrakakis' testimony as being that Claimant "*may* be capable of part-time sedentary duty work in thirty to forty-five days *depending on* her response to the current treatment." (emphasis added). The Board also summarizes her opinion that "she *might* be capable of sedentary part-time work, four hours a day, five days a week." These summaries are consistent with Claimant's position.

In the "findings and conclusions of law" portion of its decision, the Board first restates that Dr. Mavrakakis opined that Claimant "might" be able to do sedentary work within thirty to forty-five days, "depending on" her response to treatment. Later in the findings, however, the Board states as follows:

> Since the Board relies in part on Dr. Mavrakakis' s opinion that Claimant *would be* capable of returning to part-time

> work at some time in the *immediate* future, the Board concludes that Claimant's total disability benefits should be terminated on the date of this decision, rather than as of the date of filing. (emphasis added).

This finding, Claimant argues, improperly elevates "might be" able to work to "would be" able to work and critically mischaracterizes the doctor's testimony because it carries Claimant's ability to work from the realm of a future possibility, which is insufficient to meet the burden of proof, to a probability, which is.

After carefully considering the entire record, however, I am not persuaded that the Board's ultimate conclusion is not supported by substantial evidence. It appears to me that the Board inferred that the "flare-up" would subside soon, at which time Claimant could work part-time with restrictions. There is evidence to support this inference. Medical tests done in November and December after the flare-up did not show any objective change to her condition from before the flare-up. An injection given on January 27th caused some improvement to Claimant's condition. Dr. Mavrakakis did believe that the flare-up would eventually become resolved and Claimant able to work, as evidenced by the following question and answer:

> Q. And, in fact, you specified in December of 2004, you thought eventually she will be capable of four hours a day, five days a week in a sedentary capacity?
>
> A. Correct.

Given all the evidence, I am satisfied that the record supports an inference, at least to a preponderance, that the flare-up was likely to become resolved within the 30 to 45 day time-frame mentioned by Dr. Mavrakakis. The Board took this into consideration in ending Claimant's total disability benefits only effective the date it issued its decision, which was February 28, 2005.

For the foregoing reasons, I conclude that the Board's decision should be ***affirmed***.

IT IS SO ORDERED.

/s/ James T. Vaughn, Jr.
President Judge

oc: Prothonotary
cc: Order Distribution
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