IN THE SUPREME COURT OF THE STATE OF DELAWARE

JOANNE CULLEN,	§	
	§	No. 619, 2006
Claimant Below,	§	
Appellant,	§	Court Below: Superior Court
	§	of the State of Delaware in and
	§	for New Castle County
v.	§	
	§	
STATE OF DELAWARE	§	C.A. No. 06A-03-001
	§	
Employer Below,	§	
Appellee.	§	
	§	

Submitted: March 6, 2007
Decided: April 30, 2007

Before **STEELE**, Chief Justice, **HOLLAND**, and **RIDGELY**, Justices.

O R D E R

This 30th day of April 2007, upon consideration of the briefs of the parties and the record on appeal, it appears to the Court that:

(1) Appellant Joanne Cullen appeals the Superior Court's decision affirming the Industrial Accident Board's denial of her petition for additional compensation due for total disability. The Board concluded that Cullen failed to meet her burden of proof. The Board found that she agreed to a termination of her disability benefits for the same injury in 2001 and that her condition had not

changed since that date. Cullen contends that the Board's decision is not supported by substantial evidence. We find no reversible error and affirm.

(2) On September 25, 1995, Cullen was injured when she slipped and fell while working for her employer, Red Clay Consolidated School District (the "Employer"). As a result of the accident, Cullen has undergone several surgeries to her left arm. Cullen received total disability through June 2001, at which time she agreed to a termination.

(3) Around 2002, Cullen began to experience pain in her right extremity. As a result, on December 10, 2002, she filed a Petition to Determine Additional Compensation Due. The Board denied Cullen's claim, finding that she was not totally disabled. That determination was affirmed by the Superior Court[1] and this Court.[2]

(4) Cullen filed another Petition to Determine Additional Compensation Due on September 30, 2005, seeking compensation for a recurrence of total disability from August 24, 2004. The Board denied Cullen's petition, finding that Cullen was not totally disabled. The Superior Court affirmed the Board's denial of her petition on November 13, 2006.[3] This appeal followed.

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[1] *Cullen v. State*, Del. Super., C.A. No. 03A-05-001, Babiarz, J. (February 18, 2004).
[2] *Cullen v. State*, 860 A.2d 809 (Del. 2004) (TABLE).
[3] *Cullen v. State*, Del. Super., C.A. No. 06A-03-001, Babiarz, J. (November 13, 2006).

(5) Cullen claims that her injuries have worsened over time. She wears a brace on the back of her arm for tendonitis and a brace on her hand for carpal tunnel syndrome. She takes several different medications including OxyContin, Topamax, Roxicodone, and a liquid form of oxycodene. Cullen's treating orthopedist, Dr. Randall Culp, testified that he originally diagnosed Cullen with a hyperextension of her left extremity as a result of the accident in 1995. In August 2004, after an EMG, Dr. Culp diagnosed Cullen with carpal tunnel syndrome in the right extremity. The Employer disagreed based upon the expert testimony of Dr. Leo Raisis.

(6) Dr. Raisis, an orthopedic surgeon, has examined Cullen on five occasions since May 2002. He diagnosed Cullen with right carpal tunnel syndrome back in May 2002. At that time Dr. Raisis concluded that Cullen "could do the jobs that required use of one arm." In December 2005, Dr. Raisis opined that Cullen could work so long as she did not repetitively use her right upper extremity, did not use the right arm at shoulder level or above, and did not use her left arm.

(7) When reviewing an appeal from the Board, the limited role of this Court and the Superior Court is to determine whether the Board's decision is

supported by substantial evidence and is free from legal error.[4] "Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion."[5] It is well established that we do not sit as the trier of fact, rehear the case, reweigh the evidence, make credibility determinations, or substitute our own judgment for that of the Board.[6] We do, however, review questions of law *de novo.*[7] Following a voluntary termination of disability benefits, "the burden is on the injured claimant to establish his right to additional benefits."[8]

(8) Cullen first contends that the Superior Court erred in finding that her condition did not change. Specifically, Cullen contends that Dr. Raisis did not impose any restrictions on the use of her right upper extremity until December 2005. Dr. Raisis diagnosed Cullen with right carpal tunnel syndrome in May 2002. At that time, Dr. Raisis noted that Cullen could do jobs that required her to use one arm. Dr. Raisis testified that he "didn't want [Cullen] to repetitively use her right wrist even going back to May of '02," although he did not state this explicitly in his report. In May 2005, Dr. Raisis placed further restrictions on Cullen regarding

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[4] *Std. Distrib. v. Hall*, 897 A.2d 155, 157 (Del. 2006).
[5] *Saunders v. DaimlerChrysler, Corp.*, 894 A.2d 407 (Del. 2006) (TABLE) (citing *Histed v. E.I. DuPont de Nemours & Co.*, 621 A.2d 340, 342 (Del. 1983)).
[6] *Hall*, 897 A.2d at 157.
[7] *Anchor Motor Freight v. Ciabattoni*, 716 A.2d 154, 156 (Del. 1998).
[8] *McGlinchey v. Phoenix Steel Corp.*, 293 A.2d 585, 587 (Del. Super. 1972).

the use of her right extremity, but still concluded that Cullen was capable of working. However, Dr. Culp opined that Cullen was totally disabled. The Board was free to accept the testimony of one expert and reject the testimony of another.[9] Thus, based on the testimony of Dr. Raisis, the Board could conclude that Cullen's "medical condition had not changed since April 2003, when the Board denied her first petition for recurrence." Even if Cullen's condition did change to some degree, the Board concluded that she is not totally disabled. This finding is supported by the testimony of Dr. Raisis.

(9) Cullen next contends that the Superior Court erred when it determined that she did not establish causation with regard to carpal tunnel syndrome on her right upper extremity.[10] The Board stated, "[e]ven assuming *arguendo*, that [her injuries to the right extremity] can be linked to the 1995 work accident, it appears to the Board that these symptoms are not severe." Cullen is correct that the Board did not specifically find that she was unable to prove causation. Such a finding, however, was unnecessary because the Board concluded that she was not totally disabled. Thus, whether she established causation does not affect the determination that she did not establish her right to additional benefits.

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[9] *See Reese v. Home Budget Center*, 619 A.2d 907, 910 (Del. 1992) ("The Board, of course, was free to choose between the conflicting diagnoses of [two different doctors] and either opinion would constitute substantial evidence for purposes of appeal.") (citations omitted).

[10] The Superior Court stated, "[t]he Board observed that causation for any change was not established."

(10) Third, Cullen contends that the Board erred when it found that Cullen's cognitive problems from taking the prescribed pain medications were not severe. Dr. Culp testified that Cullen is not the same type of person that she was at the beginning of the treatment and that her intellect has deteriorated over the years. Conversely, Dr. Raisis testified that Cullen "seems [to be] an intelligent lady." Dr. Raisis also stated that Cullen "had no problem communicating. She was a very alert, pleasant, intelligent woman." Cullen herself admitted that she is a high school graduate and a member of MENSA with an IQ over 150. The Board was free to accept the testimony of Dr. Raisis over the testimony of Dr. Culp.[11]

(11) Finally, Cullen contends that the Board erred in accepting the labor market survey which stated that Cullen was capable of working at least on a part-time basis. Cullen contends that she is unable to use her left extremity and, thus, performs daily activities with her right arm. Cullen notes that overusing her right extremity has caused her injuries to worsen and that any part-time employment would have the same effect. Dr. Raisis noted that Cullen could work if she did not repetitively use her right upper extremity, did not use the right arm at shoulder level or above, and did not use her left arm. Dr. Raisis expressly approved all but two of the jobs for her on the labor market survey. Accordingly there was

[11] *See Reese*, 619 A.2d at 910.

substantial evidence in the record to support the decision of the Board.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is **AFFIRMED**.

BY THE COURT:

Henry duPont Ridgely
Justice