IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

DONALD E. BLYTHE, JR.	)	
	)	
Appellant,	)	
	)	
v.	)	C.A. No: 03A-08-005 RSG
	)	
VPI MIRREX, LLC,	)	
	)	
Appellee.	)	

Submitted: February 10, 2004
Decided: May 10, 2004

ORDER AND OPINION

Upon Appeal from a Decision of the Industrial Accident Board:
AFFIRMED in part, REVERSED, in part and REMANDED.

R. Stokes Nolte, Esquire, Wilmington, Delaware, for Appellant.

Cassandra F. Roberts, Esquire, Wilmington, Delaware, for Appellee.
Jennifer M. Kinkus, Esquire, Wilmington, Delaware, for Appellee.

Gebelein, J.

Donald Blythe ("Blythe" or "Appellant") is appealing a decision of the Industrial Accident Board ("Board") in which the Board granted, in part and denied, in part VPI Mirrex, LLC ("VPI" or "Employer")'s petition to terminate the total disability benefits of Appellant. Upon review of the parties submissions and the record below, the Court concludes that the Board's decision must be affirmed with respect to the determination of credibility and reversed and remanded as to the issue of attorney's fees.

STATEMENT OF FACTS

On April 20, 2001, while working as a material handler for VPI, Appellant sustained a low back injury. Blythe was employed as a material handler for twenty-nine years and unloaded trucks that delivered material to the plant. During the last seven years of his employment, Blythe used a computer to input six or seven digit codes in order to assign products an address. Appellant's computer skills were limited to code input and any problems he encountered required him to contact his foreman.

The claim was accepted as a worker compensation injury without contest and Appellant was provided temporary total disability and medical expenses. As a result of his accident, Appellant sustained disc herniation at the L4-5 level. He was referred by his family doctor, Gregory Papa, M.D. to spine specialist, Dr. Bruce Rudin. On September 6, 2001, a laminotomy at L4-5 and bilateral excision of disc material were performed. Despite physical therapy after the surgery, Blythe's condition failed to improve. He continued to treat with Dr. Rudin and a number of other physicians including Dr. Yadhati who treated Appellant for pain management.

At the direction of Dr. Bruce Rudin, Appellant underwent two functional capacity

evaluations ("FCE") in February of 2002 and in July of 2003. The first FCE indicated that Appellant could return to work for eight to twelve hours per day with a restriction of lifting no more than fifty pounds above the shoulder with both arms. After the FCE, Appellant was instructed by Dr. Rudin to return to work for four hours per day, then after two weeks for six hours per day. After another two weeks, Appellant could work eight hours per day with no pushing or shoving over one hundred pounds and no lifting over thirty-five or forty pounds. Appellant was able to work for two weeks for four hours per day and for two weeks for six hours per day. However, when Appellant attempted to work eight hour days, Dr. Rudin took him out of work in April of 2002. The second FCE performed in July of 2002, indicated that Appellant was capable of working up to six hours per day in a light to medium duty job.

Two defense medical exams were performed by Dr. John Townsend in April of 2002 and March 2003 at the request of VPI. On January 10, 2003, Employer filed a petition to terminate benefits claiming that Blythe was physically able to return to work with restrictions.

NATURE AND STAGE OF THE PROCEEDINGS

As a result of compensable injuries sustained on April 30, 2001, Appellant had been receiving total disability benefits from April 21, 2002, in the amount of $449.60 based upon his weekly wage of $826.70 at the time of the work accident. On January 10, 2003, VPI filed a Petition to Terminate Benefits claiming that Appellant was physically able to return to work. By decision dated July 15, 2003, the Board terminated Appellant's total disability benefits as of March 24, 2003. However, partial disability benefits were awarded after that time at the compensation rate of $235.29 per week because there is evidence of a loss of earning capacity related to the work accident. Because VPI's settlement offer was for partial disability benefits at

the compensation rate of $285.00 per week which is equal to or greater than the amount awarded by the Board, attorney's fees were not awarded.

On August 13, 2003, Appellant filed a timely notice of appeal from the Board's decision. Appellant filed an amended complaint on August 28, 2003, correcting the Employer's name in the case caption. The parties agreed to a stipulation to amend the briefing schedule and Appellant's opening brief was filed on January 27, 2004. Briefing by the parties was completed on February 9, 2004.

SUMMARY OF THE EVIDENCE

Because there is no dispute as to the Board's version of the testimony provided, the Court adopts the following similar version of the evidence presented as background information.

A. JOHN B. TOWNSEND, M.D.

John B. Townsend, M.D., testified by deposition on behalf of VPI. He reviewed Appellant's medical records and examined him on April 22, 2002 and March 24, 2003. In his opinion, Appellant is capable of returning to at least a sedentary duty job. Appellant had not worked for eight months after his back surgery. At his visit in April 2002, Blythe complained of low back pain that was shooting down both knees with pins and needles sensations in both feet. The physical examination revealed no muscle spasm, atrophy or root tension signs. However, there was some tenderness and decreased range of motion in the low back. Strength, sensory and deep tendon reflexes were normal. At that time, Dr. Townsend believed that based upon his subjective complaints, Appellant was capable of returning to work in a light duty job with restrictions for lifting no more than fifteen to twenty pounds and no repetitive bending or twisting at the waist. Based upon a subsequent MRI, Dr. Townsend acknowledged a small disc

herniation, but stated that the finding did not alter his opinion.

During the March 2003 visit, Dr. Townsend testified that the intervening medical records revealed that no additional surgery had been recommended even though an EMG suggested a bilateral L5 radiculopathy related to the L4-5 disc herniation. A myelogram showed a right paracentral soft disc tissue density at L4-5, thought to be a recurrent disc herniation. Appellant continued to experience low back pain and numbness in the legs that were both worse on the right side. Appellant received prescriptions for Kadian, a long-acting morphine preparation, hydrochodone and Neurontin. Two nerve blocks that were performed provided some temporary relief. Upon examination in March of 2003, there was tenderness in Appellant's low back and straight leg raising in the supine position was positive. He had normal strength, deep tendon reflexes and sensation. According to Dr. Townsend, Appellant was capable of light duty work, lifting no more than twenty pounds, with no crawling, kneeling or crouching. In addition, Appellant needed to be able to change positions frequently. Dr. Townsend believed Appellant had reached maximum medical improvement.

On cross-examination, Dr. Townsend agreed that the April 2002 MRI revealed a recurrent disc herniation at L4-5, the same location of the previous surgery. He also agreed that the September 2002 myelogram showed bulges at the L3-4 and L5-S1 with impingement on the neuroforamina in addition to the abnormality at the L4-5 level. However, Dr. Townsend believed that those findings could be the result of degenerative changes. A discogram failed to confirm concordant pain at those three levels. In Dr. Townsend's opinion, Appellant's primary limitation with respect to his presentation is his subjective pain level. Dr. Townsend also approved all of the sixteen jobs located as a result of the labor market study detailed below.

B. TRACI WILKERSON

Traci Wilkerson, a vocational rehabilitation specialist, testified on behalf of VPI. Ms. Wilkerson performed a labor market study relying upon Dr. Townsend's restrictions for light to sedentary duty work with no overhead lifting and an ability to change positions frequently. She also reviewed all of Appellant's pertinent medical records, reports, diagnostic studies, and defense medical exam reports. In her opinion, Ms. Wilkerson believes that Appellant is employable and has transferable skills based upon his vocational experience. The labor market survey identified sixteen positions for Appellant, including fourteen sedentary and two light duty jobs. The average wage of all of the jobs was $826.70 per week.

On cross-examination, Mr. Wilkerson agreed that Dr. Cucazella's records indicated that appellant was capable of doing less strenuous work that Dr. Townsend's records. She conceded that the three government jobs that represented the highest weekly salary of over $700 per week in the survey, and all required map reading and an ability to function in a crisis situation.

C. DONALD BLYTHE, CLAIMANT.

Appellant testified on his own behalf. He indicated that he worked at VPI for over thirty years and never filed a worker's compensation claim before April 2001. As a materials handler, he unloaded shipments with a forklift and used a computer, but did not perform constant keypunching and cannot type with both hands. After his back surgery, Appellant participated in a FCE in February 2002. He returned to work on March 20, 2002 and was able to work for four hours per day for two weeks and for six hours per day for two weeks, but was unable to work up to eight hours per day as the evaluation recommended. As a result, his doctor excused him from all work on April 19, 2002. Upon Dr. Rudin advising Appellant that there was nothing further he

could do, he consulted with Dr. Cucazella who provided no treatment and did not discuss work restrictions.

Appellant has been treating with Dr. Pramod Yadhati since January 2003 for pain management. He currently is prescribed hydrochodone, Kadian, Neurontin, Zanaflex, Vioxx and Provagil. Appellant testified that his medications allow him to function during the day with pain, but some cause drowsiness. On a ten point scale, his pain level varies from seven to eight in the morning and from a five to six later in the day. Appellant has walked around his Sussex County property three times in 2003, but cannot work on his boat. As a result, Appellant feels like a prisoner on his own land because he cannot fish and hunt like he did previously. He testified that he would like to return to work and move on with his life.

On cross-examination, Blythe stated that he started using a cane in early 2003 because he loses his balance and has to lean on furniture or walls to get around. However, he agreed that the cane he uses was not prescribed by a doctor. Dr. Yadhati did not restrict Appellant's ability to drive and did not discuss work restrictions with him since he was still employed. Blythe acknowledged that he has no reason to expect to return to work at VPI since the plant is closing. Appellant also indicated that he drives him self downstate when he visits his property in Sussex County.

D. DR. PRAMOD YADHATI.

Dr. Yadhati, a pain management specialist and anesthesiologist, testified by deposition on behalf of Appellant. He opined that, based upon chronic pain in the lumbar region, Appellant has been unable to return to work in any capacity since his first visit in January of 2003. At his first visit, Appellant described an onset of low back pain following the April 2001 work accident

which persisted following a discectomy at L4-5 in September of 2001. An April 2002 MRI revealed a persistent right paracentral herniation and epidural fibrosis. An August 2002 discogram showed internal disc derangement at three levels, from L3 to S1. Dr. Rudin, Appellant's treating surgeon advised him that his condition was not operable. Appellant's level of pain was moderate to severe with no activity, and severe to very severe when walking or standing. Blythe was taking hydrochondone for pain and a muscle relaxant.

Upon physical examination, Dr. Yadhati concluded that Appellant had chronic radicular pain probably originating from the disc derangement. He prescribed Kadian, a morphine time-release capsule and an additional epidural injection. At subsequent visits through May of 2003, Dr. Yadhati prescribed Zoloft for depression, Xanax for anxiety related to pain management, and Zanaflex for muscle spasms. Dr. Yadhati discouraged Appellant frm driving by himself in April 0f 2003 based upon the side effects of the medications that he was prescribed.

On cross-examination, Dr. Yadhati agreed that he never gave Blythe a disability note or discussed employment issues with him. However, Dr. Yadhati does not believe that Appellant would be able to follow a structured pattern of work that requires sitting or standing even with frequent changes in position. Dr. Yadhati noted that Blythe's family physician, Dr. Gregory Papa, had disabled him from all work from mid-November of 2002 until mid-February of 2003.

ISSUES ON APPEAL

Appellant filed a timely notice of appeal claiming that: (1) the Board incorrectly denied the award of attorney fees; and, (2) the Board's finding that Blythe was not credible is not based upon substantial evidence. In response, VPI argues that because their offer to settle was greater than the Board's award, Appellant is not entitled to an award of attorney's fees pursuant to title

19, section 2320(10) of the Delaware Code. VPI also argues that the Board properly exercised its authority in applying the facts to the law and that the decision was supported by substantial evidence.

DISCUSSION

Appellant's first issue on appeal claims that the Board erred as a matter of law in its failure to award his attorney a fee for defense of the Employer's petition. In support of his argument, Appellant sets forth title 19, section 2320(10) of the Delaware Code ("section 2320(10)") which states that: "[a] reasonable attorney's fee...shall be allowed by the Board to any employee awarded compensation under Part II of this title and taxed as costs against a party."[1] Appellant argues that the petition in this matter sought termination of total disability as of January 10, 2003; therefore, he was at least partially successful in defense of the petition because the Board found Appellant to be totally disabled as of January 10, 2003 and limited the termination to March 23, 2003.

In response, Employer sets forth paragraph b. of section 2320(10) which states that paragraph a. of this section shall have no application in the event that an offer to settle an issue pending before the Board is communicated in writing, at least thirty days prior to the date of Board hearing and the offer "is equal or greater than the amount ultimately awarded by the Board..."[2] Employer claims that an offer was made to settle Appellant's partial disability claim for $285.00 per week. Because the Board ultimately only awarded Appellant partial disability in the amount of $235.20 per week, he is not entitled to an award of attorney's fees under the

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[1] DEL. CODE ANN. tit. 19, § 2320(10) (Supp. 2002).

[2] *Id.*

provisions of section 2320(10).

Appellant concedes that Employer did communicate an offer to settle the issue of temporary partial disability properly under section 2320(10) and that the Board correctly interpreted the provisions of paragraph b. with respect to the issue of partial disability. Appellant clarifies his argument by indicating that the scope of his appeal was based upon the Board's failure to award attorney's fees on the sole issue of temporary total disability. Employer's settlement offer did not propose a period of total disability. At the hearing, Employer failed to prove that Appellant's temporary total disability benefits terminated on January 10, 2003. Appellant does not dispute the fact that the Board terminated his temporary total disability benefits as of March 24, 2003, he simply asserts that his defense of Employer's petition successfully garnered him an additional three months of temporary total disability benefits. Based upon the holding of *Willingham v. Karl Music,*[3] Appellant claims that he is entitled to attorney's fees on the issue of temporary total disability.

Appellant's second issue on appeal asserts that the Board's stated reasons upon which it based its finding that Appellant was not credible were not based upon substantial evidence, and therefore an abuse of discretion. Appellant sets forth the following reasons the Board cited in support of its opinion: (1) Blythe testified that he has had difficulty driving due to the side effects of his medications, however, he has made several lengthy car trips of over two hours in 2003 to check on his downstate property; (2) Appellant currently uses a cane, but has no medical prescription for such an assistive device; and (3) despite using a computer for seven years during

[3] *Willingham v. Kral Music, Inc.,* 505 A.2d 34 (Del. Super. Ct. 1985) (holding that an award of attorney's fees is intended to refer to any favorable change in position rather than just being limited to contemporaneous financial gain).

the course of his employment at VPI, Appellant claims that he cannot type with both hands or perform any keypunching. Appellant contends that there is not substantial evidence to support the aforementioned conclusions of the Board because the findings are not mutually exclusive and the Board's reliance on those factors to find Appellant not credible is unreasonable.

Specifically, Appellant argues that he spread his trips downstate out over three days and stopped taking his medications that cause him problems when he has to drive. Appellant also points out that a cane is not a regulated item that requires a prescription before purchase. Because a cane can be purchased by anyone at anytime, he contends there is no basis for the Board to reasonably conclude that he was not credible. Finally, Appellant argues that he never testified that he "could not type with both hands or perform any keypunching" as the Board stated in its opinion. As such, Appellant asserts that the conclusion made by the Board lacks support in the record. Accordingly, Appellant claims the Board's finding that he lacked credibility was based upon a mistaken interpretation of the testimony. The Board chose to discount the testimony of Appellant's medical expert based upon its finding that he lacked credibility. Because the Board's finding as to Appellant's credibility was pertinent to its decision, Appellant argues that the opinion must be reversed.

Employer argues that the Board's opinion was clearly articulated and supported by substantial evidence. VPI relies upon *Clements v. Diamond State Port Corp.*,[4] and argues that the Board is entitled to discredit a doctor's testimony because that testimony is based upon

[4] *Clements v. Diamond State Port Corp.*, 831 A.2d 870, 878 (Del. 2003).

complaints of a claimant whom the Board deems to not be credible.[5]

STANDARD OF REVIEW

The function of the reviewing Court is to determine whether the agency's decision is supported by substantial evidence.[6] Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[7] Substantial evidence requires "more than a scintilla but less than a preponderance" to support the finding.[8] The appellate court does not weigh the evidence, determine questions of credibility, or make its own factual findings.[9] It merely determines if the evidence is legally adequate to support the agency's factual findings.[10] If the record below contains substantial evidence to support the findings of the Board, then that decision will not be disturbed.[11]

DISCUSSION

A. ATTORNEY'S FEES.

The standard of review for a determination of the amount to award in attorney's fees,

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[5] *See id.* (holding that where a medical expert's opinion depends primarily upon the credibility of the claimant's subjective complaints and the Board determines that those subjective complaints are not credible, the Board may reject the medical expert's conclusion). *See also DiSabatino Bros., Inc. v. Wortman,* 453 A.2d 102, 106 (Del. 1982) (holding that the Board was permitted to discredit a medical expert's testimony based on and evaluation of the claimant's credibility).

[6] *General Motors Corp. v. Freeman*, 164 A.2d 686, 688 (Del. 1960); *Johnson v. Chrysler Corp.,* 213 A.2d 64, 66-67 (Del. 1985).

[7] *Oceanport Ind. v. Wilmington Stevedores*, 636 A.2d 892, 899 (Del. 1994); *Battisa v. Chrysler Corp.,* 517 A.2d 295, 297 (Del. Super. Ct. 1986), *app. dism.,* 515 A.2d 397 (Del. 1986).

[8] *Onley v. Cooch,* 425 A.2d 610, 614 (Del. 1981) (quoting *Cross v. Califano*, 475 F.Supp. 896, 898 (D. Fla. 1979)).

[9] *Johnson v. Chrysler Corp.,* 231 A.2d at 66.

[10] DEL. CODE ANN. tit. 29, § 10142(d) (1997).

[11] *Adams v. Nabisco,* 1995 WL 653435 (Del. Super.).

based on those issues on which the claimant is successful, is abuse of discretion.[12] This Court will not find that the Board abused its discretion unless its decision has "exceeded the bounds of reason in view of the circumstances."[13] An award of attorney's fees is mandatory when the claimant has been successful before the Board.[14] In *General Motors Corp. v. Cox*, the Delaware Supreme Court developed a list of ten factors that the IAB must consider in deciding what amount of attorney's fees is reasonable.[15] However, attorney's fees are not awarded if thirty days prior to the Board hearing the employer gives a written settlement offer to a claimant or the claimant's attorney that is equal to or greater than the amount ultimately awarded by the Board.[16]

Neither the statute itself nor case law interpreting it mandate that a claimant receive immediate financial gain as a prerequisite to an award of attorney's fees.[17] It is apparent that an award of compensation under the statute is intended to refer to any favorable change of position or benefit, as the result of a Board decision, rather than just being limited to contemporaneous

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[12] *Darnell v. BOC Group, Inc.,* 2001 WL 879911 (Del. Super.), *aff'd,* 792 A.2d 1888 (Del. 2002).

[13] *Willis v. Plastic Materials*, 2003 WL 164292 (Del. Super.).

[14] *See* DEL.CODE ANN. tit. 19, § 2320(10) (Supp.2002). *See also Simmons v. Delaware State Hosp.,* 660 A.2d 384, 389 (Del. 1995).

[15] *See General Motors Corporation v. Cox,* 304 A.2d 55, 57 (Del. 1973) (holding that the factors which the Board must consider in deciding upon the amount of an award are as follows: (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fees customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; (8) whether the fee is fixed or contingent; (9) the employer's ability to pay; (10) whether the attorney for the claimant has received or expects to receive from any other source).

[16] DEL.CODE ANN. tit. 19, § 2320(10) (Supp.2002).

[17] *Willingham v. Kral Music Inc.,*505 A.2d 34, 35 (Del Super. Ct. 1985).

financial gain.[18] In *Lattis v. Blackwell*,[19] the Supreme Court held that where an employer initiates fresh proceedings before the Board through a petition to terminate and requires the employee to retain counsel in order to sustain an existing award, "the employer must bear the cost of such efforts proving unsuccessful."[20]

Based upon the holding of *Lattis,* the Court agrees that the record does not support complete denial of attorney's fees. Appellant is entitled to a limited award of attorney's fees solely on the issue of temporary total disability. At the time of Employer's petition for termination, Appellant was receiving temporary total disability. The Board's decision continued temporary total disability through March 24, 2003 and reduced that award to partial disability from that point forward. As a result, Employer's petition was unsuccessful in that the Board did not terminate Appellant's temporary total disability as of the date of requested by Employer. As such, even though the settlement offer for partial disability was greater than the amount awarded by the Board, Employer is responsible for Appellant's attorney's fees relative to the portion of their petition that proved unsuccessful.

B. CLAIMANT'S CREDIBILITY.

Appellant argues that the Board abused its discretion in accepting the opinion of Dr. Townsend over that of Dr. Yadhati. The Court disagrees. Weighing the evidence and

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[18] *Id; See also Berryman v. John F. Casey Co.*, 251 A.2d 565 (Del. Super. Ct. 1969) (holding that this expansive definition of benefit was supported when the Court ruled that a change in a claimant's status from temporary total disability to permanent total disability as the result of a Board hearing can be a sufficient benefit to justify awarding attorney's fees, even without present financial gain).

[19] *Lattis v. Blackwell,* 1992 WL 53435 (Del. Supr.).

[20] *Id.*

determining questions of credibility are functions reserved exclusively for the Board.[21] Assessing the credibility and demeanor of witnesses is solely within the province of the trier of fact and the reviewing court may not substitute its judgment for that of the Board.[22] If the record below contains substantial evidence to support the findings of the Board, then that decision will not be disturbed.[23] When qualified experts give conflicting testimony, the Board is free to accept the testimony of one medical expert over another provided that the substantial evidence requirement is satisfied.[24] In reviewing the record for substantial evidence, the Court will consider the record in the light most favorable to the party prevailing below.[25]

In its opinion, the Board made the following statements in connection with its acceptance of Dr. Townsend's testimony over that of Dr. Yadhati: (1) Dr. Townsend opined that Blythe has been capable of returning to work in at least a sedentary capacity since he last examined him in March of 2003; (2) the results of Dr. Townsend's physical examinations at two visits revealed no positive neurological findings; (3) the results of the latest functional capacity examination in 2002 also support that Appellant was capable of working up to six hours per day in a light to medium duty job.[26] The Board rejected the opinion of Dr. Yadhati that Blythe is not capable of any work because: (1) he never wrote Appellant a disability note or provided him with written

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[21] *Breeding v. Contractors-One, Inc.,* 549 A.2d 1102, 1106 (Del. 1988); *Johnson v. Chrysler Corp.,* 213 A.2d 64, 66 (Del. 1965).

[22] *Johnson,* 213 A.2d at 66.

[23] *Adams v. Nabisco,* 1995 WL 653435 (Del Super.).

[24] *DiSabatino Bros. v. Wortman*, 453 A.2d 102, 106 (Del. 1982).

[25] *General Motors v. Guy*, 1991 WL 190491 (Del. Super.).

[26] *Blythe v. VPI Mirrex, LLC,* IAB Hearing No. 1189446 (July 28, 2003), at 8.

work restrictions; (2) he conceded that he did not discuss employment issues with Appellant; and (3) the focus of Dr. Yadhati's treatment was exclusively pain management.[27] The Board also indicated that it had reservations as to Claimant's credibility and that Dr. Yadhati's opinion concerning work were based upon Appellant's subjective complaints of pain. The Board's reservations as to Appellant's credibility was based upon three factors. First, Appellant testified that he had difficulty driving because of the side effects of his medications, however, he made several lengthy car trips in 2003 to check on his Sussex County property. Second, Appellant uses a cane despite not having a medical prescription for such an assistive device. Third, while Appellant has used a computer for seven years as part of his job at VPI, he claims that he cannot type with both hands or perform any keypunching.[28]

The Board is entitled to discredit a doctor's testimony because that testimony is based upon complaints of a claimant whom the Board deems to not be credible.[29] In making such a determination, the opportunity to view the witnesses is important.[30] Therefore, this Court cannot substitute its judgment for that of the Board as to credibility. The Court agrees with Appellant that the reasons stated in the Board's decision for discrediting Appellant and his actual testimony are not necessarily mutually exclusive. However, the record contains substantial evidence without factoring in Appellant's credibility to support the Board's decision to accept the

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[27] *Id.*

[28] *Id.* at 9.

[29] *Clements v. Diamond State Corp.,* 831 A.2d 870, 878 (Del. 2003); *Diaz v. Beneficial Nat'l Bank,* Del.Super., C.A. No. 97A-01-019-RSG, Gebelein, J. (Nov. 6, 1997) (citation omitted) (holding that the Board is permitted to rely on an appellant's lack of credibility when discounting the testimony of an appellant's physician because the physician's diagnosis and medical opinion are based upon the veracity of appellant's complaints).

[30] *Deborah Butler v. Speakman Co.,* Del.Supr., No. 200, 1992, Walsh, J. (Sept. 18, 1992).

testimony of Dr. Townsend over that of Dr. Yadhati.

CONCLUSION

For the aforementioned reasons, the decision of the Board is **AFFIRMED,** in part, and **REVERSED** in part and **REMANDED**. This Court directs the Board to make an appropriate determination as to reasonable attorney's fees consistent with the findings contained herein.

IT IS SO ORDERED.

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The Honorable Richard S. Gebelein

Orig: Prothonotary
cc: R. Stokes Nolte, Esquire, Wilmington, Delaware, for Appellant.
Cassandra F. Roberts, Esquire, Wilmington, Delaware, for Appellee.
Jennifer M. Kinkus, Esquire, Wilmington, Delaware, for Appellee.