IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

DAVID CLEMENTS,	)	
	)	
Appellant,	)	
	)	
v.	)	C.A. No. 02A-04-008-JRJ
	)	
DIAMOND STATE PORT CORP. (STATE OF DELAWARE),	)	
	)	
	)	
Appellee,	)	

Date Submitted: October 12, 2002
Date Decided: January 6, 2003

M E M O R A N D U M O P I N I O N

*Appeal from the Industrial Accident Board – **AFFIRMED**.*

David R. Scerba, Esquire and Glenn C. Ward, Esquire, Ramunno & Ramunno, P.A., 903 North French Street, Wilmington, Delaware 19801, for Appellant.

Francis X. Nardo, Esquire and Susan A. List, Esquire, Tybout, Redfearn & Pell, 300 Delaware Avenue, #1100, P.O. Box 2092, Wilmington, DE 19899, for Appellee.

JURDEN, J.

This is an appeal from a decision of the Industrial Accident Board ("IAB") terminating the Claimant's total disability benefits retroactive to the date of the filing of the Employer's termination petition and awarding partial disability. Having reviewed the record below and the parties' written submissions, the Court concludes that the IAB's decision must be affirmed.

POSTURE

On September 24, 2001, Diamond State Port Corporation ("Employer") filed a Petition to Terminate Benefits alleging that David Clements' ("the Claimant") total disability had ceased and that he was capable of returning to work in some capacity. On January 23, 2002, the IAB held a hearing on the Employer's Petition. The IAB rendered its decision on February 4, 2002, awarding the Claimant partial disability benefits and expert witness fees.[1] The IAB determined that the Employer had met its burden of showing that the Claimant is not completely incapacitated and that the Claimant's total disability terminated as of September 24, 2001, the filing date of the Employer's petition.[2] The IAB, relying on its observations of the Claimant and the testimony of Dr. Townsend, who performed an independent medical examination of the Claimant for the Employer, held that "the Claimant is physically capable of working within the restrictions set forth by Dr. Townsend."[3] Based on the Claimant's education and work experience, the IAB concluded that the Claimant "appears employable on a *prima facie* basis, even with his physical restrictions," and because the Claimant made no efforts to locate suitable employment, the IAB determined that the Claimant was not actually displaced.[4] The IAB further

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[1] *Clements v. Diamond State Port Corp.*, IAB Hearing No. 1141580 (Feb. 4, 2002) at 13.

[2] *Id.* at 8-9.

[3] *Id.* at 10.

[4] *Id.* at 10-11.

held that the Claimant "clearly has physical restrictions that could affect his earning capacity," and thus is partially disabled.[5] Relying on the testimony of Robin L. Subers, a vocational counselor employed by Carter Works, Inc., concerning a labor market survey of prospective jobs, and Dr. Townsend, that the listed jobs are within the Claimant's physical capabilities, the IAB held pursuant to title 19, section 2325 of the Delaware Code that the "Claimant's compensation rate for partial disability is $141.07 per week, effective from the date his total disability terminated."[6] Additionally, upon examination of the Employer's written settlement offer, the IAB concluded that the settlement offer equaled the amount awarded by the IAB, and therefore, pursuant to section 2320, the Claimant is not entitled to an award of attorney's fees.[7] The IAB awarded the Claimant medical witness fees in accordance with section 2322(e).[8] The Claimant moved for reargument of the IAB's decision. On April 4, 2002, the IAB denied the Claimant's motion for reargument finding "no basis to change its decision."[9] On April 22, 2002, the Claimant filed this timely appeal.

FACTS

On August 8, 1997, the Claimant suffered a back injury, consisting of a low back strain and sprain and a herniated disc, while working for the Employer. Following the accident, the

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[5] *Id.* at 11.

[6] *Clements*, IAB Hearing No. 1141580 at 12.

[7] *Id.* at 12-13.

[8] *Id.* at 13.

[9] *Clements v. Diamond State Port Corp.*, IAB Hearing No. 1141580 (April 4, 2002) at 4 (hereinafter Order on Claimants Motion for Reargument) (Order denying Claimant's motion for reargument).

Claimant and Employer entered into an Agreement as to total disability benefits. On March 15, 1999, the Claimant's total disability was terminated and the parties agreed that the Claimant was capable of working is some capacity and entered into an Agreement as to partial disability benefits. Subsequently, on February 21, 2001, the Claimant underwent back surgery and resumed total disability. On June 28, 2001, Dr. Vaccaro, the Claimant's surgeon, issued a return-to-work physical capabilities sheet indicating that the Claimant could return to light duty work.

John B. Townsend, III, M.D., a board certified neurologist, testified by deposition on behalf of the Employer before the IAB. Dr. Townsend saw the Claimant for the first time on February 25, 1998. After performance of a MRI, Dr. Townsend diagnosed a large central and right lateral disc herniation at the level of L5-S1 and recommended that the Claimant undergo low back surgery at that time.

Dr. Townsend next saw the Claimant on February 15, 1999. Upon examination, with regard to the low back, Dr. Townsend observed that the Claimant had restricted ranges of motion and muscle tenderness in the right sacroiliac region. Dr. Townsend testified that the Claimant told him "he couldn't lie down and do [the] Patrick's maneuver or straight leg raising at that time." Furthermore, Dr. Townsend testified that on this occasion he performed a neurologic exam and that the Claimant

> had normal strength in the upper and lower extremities. He could do heel and toe walking, but did so very slowly. He had normal deep tendon reflexes, except that he had a one plus right ankle jerk compared to two plus on the left. And he had some diminished sensation to pin-prick and temperature in the L5 distribution.

Dr. Townsend concluded that the Claimant was capable of doing sedentary to light-duty work, with the opportunity to change positions on an hourly basis and that at the time the Claimant was still a candidate for surgery.

Dr. Townsend last examined the Claimant on January 2, 2002.[10] Dr. Townsend testified that based on a physical exam and a range of motion test performed by a digital dual inclinometer, the Claimant's range of motion was slightly improved, but still limited. Dr. Townsend observed that the Claimant was able to lie down for the Patrick's maneuver and had no difficulty doing the heel walk; but the Claimant did complain of difficulty when walking on his toes on the right side. Furthermore, he observed that the Claimant had an absent ankle jerk reflex and diminished sensation to a pinprick in the right foot. At this time, Dr. Townsend stated that the Claimant had no urinary or bladder complaints and did not require any type of aid to walk. Dr. Townsend opined, based on his clinical findings, that the Claimant continued to suffer from mild S1 radiculopathy as evidenced by mild weakness, some loss of sensation and some pain complaints. Overall, Dr. Townsend testified that the Claimant had improved to some extent since the February 1999 examination but that he was still a surgical candidate. According to Dr. Townsend, the Claimant's condition in January of 2002 was similar to his condition in February of 1999, and Dr. Townsend believed, as he did then, that the Claimant could work in a light to sedentary capacity with restrictions. Upon review of a labor market survey prepared by Employer,[11] Dr. Townsend opined that from a physical standpoint each of the ten (10) positions identified were suitable for the Claimant to perform on a full-time basis. Furthermore, when

[10] Claimant was originally scheduled to see Dr. Townsend on December 5, 2001, but missed the appointment.

[11] Robin L. Subers, a vocational counselor, employed by Carter Works, Inc. testified on behalf of Employer. Based on the employment qualifications of Claimant and the physical restrictions outlined by Dr. Townsend, Ms. Subers prepared a labor market survey of ten (10) suitable positions. Ms. Subers testified that she told potential employers that Claimant had a back injury but she did not tell them that he had a recurrent herniated disk or that he was a surgical candidate. Ms. Subers also testified that she did not know how many applicants had applied for the identified positions, or how competitive the applications were.

asked whether he had an opinion as to whether the Claimant would have continuously been able to work in a sedentary to light-duty capacity since June 28, 2001, Dr. Townsend testified that,

> based on the fact that [the Claimant] did have a release to work at that time there would be no reason why he couldn't have worked in a light sedentary capacity. And, again, at least after my evaluation, given that he looked quite similar to the way he did when I released him previously, I saw no ongoing reason why he still couldn't work in that capacity.

Conrad K. King, Jr., M.D., a pain management specialist testified by deposition on behalf of the Claimant. Dr. King first saw the Claimant in February 1999 and has seen him off and on since that time. Dr. King testified that on November 5, 2001 the Claimant appeared without an appointment and, prior to that, the doctor had last seen the Claimant on January 18, 2001. Dr. King stated that on November 5, 2001, the Claimant related that he had disc surgery on February 21, 2001 performed by Dr. Alexander Vaccaro and since that time he continued to experience significant low back pain and ongoing right-lower extremity radicular symptoms. Upon examination, Dr. King observed that the Claimant's "[r]ange of motion of the lumbar spine was limited to approximately 75 percent of normal in all planes. He had moderate spasm of the lumbar paraspinal muscles. Straight leg raising was negative at 75 degrees on the left, but positive at 60 degrees on the right." Dr. King testified that these results were better than at any time he had seen the Claimant since February 1999. Based on the objective findings on physical examination, Dr. King ordered a repeat MRI. Dr. King testified that the MRI performed on November 21, 2001,

> "revealed a large right lateral disc herniation at L5-S1 partly surrounded by postoperative fibrosis. It revealed marked pressure on the dural sac in the right S1 nerve root. And the reviewing radiologist compared it to a previous study of August 2nd, 1999, and indicated that it represented significant worsening since the last exam performed on 8-2-99."

Dr. King indicated in his testimony that the same radiologist reviewed the August 1997 MRI, the August 1999 MRI and the November 2001 MRI.

Dr. King next saw the Claimant on December 31, 2001. At that time, Dr. King issued a disability note stating, "[the Claimant] was totally disabled until he saw [Dr. King] in follow-up on February 25th." Based on both objective and subjective findings Dr. King classified the Claimant's low back condition as severe and characterized it as failed back syndrome. Dr. King opined that the Claimant would require another surgical procedure. He testified that he "made arrangements to have [the Claimant's] records sent to Dr. James Campbell who is a noted neurosurgeon at Johns Hopkins" and that it is "Dr. Campbell's procedure to review records and make a decision on whether or not he's willing to see a patient …." In his opinion, Dr. King stated that if the Claimant were to ignore his instructions and return to work, in any capacity, he would be at risk for further complications and a worsening of his condition. Dr. King testified that the wrong type of activity cause his condition to "progress to cauda equina syndrome which led to his initial surgery back in 2001." Dr. King was "unaware of whether [the Claimant] was taking any prescription medication during the period of time" after June 28, 2001 or if the Claimant had received any medical treatment from June 28, 2001 to November 2001. Further, Dr. King testified that at the time of examination the Claimant was not suffering from sexual or urological dysfunction and did not require any assisting device such as a cane, a wheelchair or a walker.

The Claimant testified that he is thirty-three years old, has a high school education, and feels that he is articulate and has leadership skills. He stated that he participates in a study/discussion group concerning the principles and concepts of the political economy. The Claimant's job experience includes: a forklift truck operator for Employer, a field administrator

performing data entry for Guardian Environmental Group, and sales and management encompassing a three state territory for 21st Century Concepts.

The Claimant testified since his operation he has

> been experiencing extreme chronic pain in the lower back radiating and coming up into [his] legs which is a symptom that has increased that [he] didn't have the problems before radiating into [his] left leg. [He has] experienced additional numbness into [his] right foot and subsequently [he has] chronic pain on a daily basis…. [He is] experiencing difficulty with erectile dysfunction and chronic pain in the testes.

Increasingly, he feels a urinary urgency but with no actual result. This symptom existed prior to the surgery, went away after surgery, but has returned. The Claimant testified that he did not tell Dr. King in November or December 2001 that he was experiencing erectile and urinary dysfunction and could not recall telling Dr. King about the pain radiating down his left lower extremity. The Claimant stated that he sleeps for about forty-five minutes at a time and experiences spasm and numbness if he rolls over onto his back.

The Claimant testified that the pain interferes with his daily activities. He explained that tasks such as brushing his teeth and putting on his shoes, socks and pants are difficult because of the pain. In addition, the Claimant explained that he lives alone and basic housekeeping tasks such as doing laundry or taking out the garbage require the aid of friends or neighbors.

The Claimant stated that he is awaiting confirmation of a scheduling date with a specialist in Baltimore. He explained that by February 1, 2002 he should know the date of his appointment and if the doctor recommends surgery, he will "absolutely follow the doctor's recommendation" but later testified that he couldn't rule out getting a second opinion. The Claimant testified that before his first surgery he was told by a neurosurgeon to explore all the possibilities and to get other opinions. The Claimant explained that before he submitted to the first surgery, because of

the risk of paralysis or loss of sexual function, he tried several types of rehabilitation including chiropractic care, physical therapy and aquatic therapy.

When asked if he felt capable of returning to work at this time, the Claimant stated "[n]ot at this time." The Claimant testified that physically he

> would be unable to be in a position for 8 hours or 4 hours being subjected to a work place environment and not continuing to try and rehabilitate myself and put myself in a position to recoup that presents a situation for me where I could further my injury along and I would not want to be doing something that would be inconsistent with the recommendation of the doctor….

The Claimant stated that his last visit to Dr. Vaccaro was in March 2001 and that he did not learn that Dr. Vaccaro had released him to work in June 2001 until six months later. He agreed that he received Employer's termination petition in September 2001. The Claimant testified that he had not seen another doctor until he went to see Dr. King in November 2001. Furthermore, in explanation as to why he never went back to see Dr. Vaccaro the Claimant stated "if I were experiencing some type of difficulty I would have been back to [Dr. Vaccaro] or possibly a different neurosurgeon." During the time period from March 2001 to November 2001, the Claimant testified that he took no prescription medication, only over-the-counter medications when needed. The Claimant classified his visit to Dr. King in November 2001 as an "emergency situation" because he felt his condition had worsened.

ISSUES

The Claimant raises four issues for review on appeal. First, the Claimant argues in light of the recent decision by the Delaware Supreme Court in *Gilliard-Belfast v. Wendy's*[12] that the IAB erred as a matter of law when it terminated the Claimant's total disability benefits

[12] 754 A.2d 251 (Del. 2000).

retroactive to the date of the filing. Second, the Claimant argues that the IAB's finding that the Claimant misled Dr. King regarding his condition and therefore the Claimant could not rely on Dr. King's total disability orders constitutes an error of law and is not supported by substantial competent evidence. Third, the Claimant argues that the IAB erred as a matter of law in concluding that Dr. Townsend was better qualified than Dr. King to determine if the Claimant was risking further neurological damage by returning to work within restrictions. Finally, the Claimant argues that the IAB's decision to terminate the Claimant's total disability benefits retroactive to the date of the filing is not supported by the requisite substantial competent evidence.

STANDARD OF REVIEW

This Court has jurisdiction to hear and determine appeals from awards of the IAB.[13] The Court's limited role when reviewing a decision of the IAB is to determine whether the decision is free from legal error and supported by substantial evidence.[14] "Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. It is also defined as more than a scintilla but less than a preponderance of the evidence."[15] The record on review consists of the transcript of the hearing, the exhibits introduced into evidence, and the IAB's written award.[16] On appeal from the Board, it is not the function of this Court to weigh evidence, determine questions of credibility, or to make factual findings.[17] When a particular

[13] DEL. CODE. ANN. tit. 19, §§ 2349-50 (2000).

[14] *See also General Motors Corp. v. Freeman*, 164 A.2d 686, 688 (Del. 1960).

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

[16] *See* § 2350 (b).

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

issue revolves around factual determinations, the Court will "take due account of the experience and specialized competence of the agency."[18] Consequently, the Court "will not substitute its judgment for that of an administrative body where there is substantial evidence to support the decision and subordinate findings of the agency."[19]

DISCUSSION

As noted above, the Claimant contends, relying on the recent decision by the Delaware Supreme Court in *Gilliard-Belfast v. Wendy's,* that the IAB erred as a matter of law when it terminated the Claimant's total disability benefits retroactive to the date of the filing.[20] The Court disagrees. In *Gilliard-Belfast*,

> [t]he Board held that Gilliard-Belfast did require arthroscopic surgery and that the need for surgery was due to her industrial accident at Wendy's. The Board also held that Gilliard-Belfast had not established her entitlement to temporary total disability benefits while she was waiting to have that surgery, even though the treating physician had ordered her not to work. The Board ruled that, although Dr. DuShuttle gave her an order not to work, 'from a physical standpoint, Gilliard-Belfast has not been, and is not, totally disabled.'[21]

The Delaware Supreme Court reversed the decision of the Superior Court affirming the IAB and held, "that a person who can only resume some form of employment by disobeying the orders of his or her treating physician is totally disabled, at least temporarily, regardless of his or her capabilities."[22] The facts of the case before this Court are disguisable from the facts in *Gilliard-*

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[18] DEL. CODE. ANN. tit. 29, § 10142(d) (2000).

[19] *Olney v. Cooch*, 425 A.2d 610, 613 (Del. 1981).

[20] Claimants Opening Br. at 5.

[21] 754 A.2d at 253.

[22] *Id.* at 254.

Belfast in that the Claimant in *Gilliard-Belfast* was already awaiting surgery. Here, although the Claimant has been referred for a surgical consultation, he, as of the date of the hearing, did not have a date for the surgical consultation nor had he been recommended for surgery. When asked if he was "planning on getting a second opinion after getting this doctor's opinion," the Claimant replied, "I can't say that I am going to rule it out."[23] Acting within its discretion in accepting one doctor's opinion over another's, the IAB deferred to the testimony of neurologist, Dr. Townsend, over that of Dr. King in determining that the Claimant was able to work. Furthermore, unlike in *Gilliard-Belfast*, the IAB questioned the Claimant's credibility as to the severity of his subjective complaints. Therefore, the Court finds that because the facts of this case are distinguishable from the facts of *Gilliard-Belfast*, the IAB did not err as a matter of law when it terminated the Claimant's total disability benefits retroactive to the date of the filing.

Second, the Claimant argues that the IAB's finding that the Claimant misled Dr. King regarding his condition and therefore the Claimant could not rely on Dr. King's total disability order constitutes an error of law and is not supported by substantial competent evidence.[24] As a general rule, "[t]he credibility of the witnesses, the weight of their testimony, and the reasonable inferences to be drawn therefrom are for the Board to determine."[25] "[T]he Board cannot substitute its judgment to nullify [the] objective findings [of an expert] that fully support the Claimant's persistent complaints;"[26] however, where an expert's diagnosis depends on subjective

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[23] Trial Tr. at 92.

[24] Claimants Opening Br. at 9.

[25] *Coleman v. Dept. of Labor*, 288 A.2d 285, 287 (Del. Super. 1972).

[26] *Mermelstein v. Lewes Citizens Senior Center, Inc.*, 2002 WL 31667520, at *3 (Del. Super.).

complaints that are deemed to be unworthy, the Board may reject the opinion.[27] In this case, Dr. King characterized the Claimant's condition as failed back syndrome with objective and subjective evidence of ongoing problems.[28] Although the IAB may not nullify the objective findings of Dr. King, it may evaluate the credibility of Dr. King and the weight to be accorded to his testimony. Additionally, it is with in the discretion of the IAB to evaluate the credibility of the Claimant's testimony. Here, the IAB determined that the Claimant was not entirely credible in that the symptoms he described to the board were not the same symptoms he relayed to Dr. King or Dr. Townsend. Furthermore, the IAB noted that the Claimant had not taken any prescription medication from March 2001 to November 2001 and had not sought medical care. That being the case, the IAB determined that the Claimant's subjective complaints were unreliable and in turn Dr. King's subjective findings could be misleading. Thus, this Court holds that the IAB's finding that the Claimant misled Dr. King regarding his condition and that consequently the Claimant could not rely on Dr. King's total disability order does not constitute an error of law and is supported by substantial competent evidence.

Third, the Claimant asserts that the IAB erred as a matter of law in concluding that Dr. Townsend was better qualified than Dr. King to determine if the Claimant was risking further neurological damage by returning to work within restrictions.[29] This Court disagrees. It is the IAB's function to resolve conflicts in medical testimony[30] The Board's determination to accord

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[27] *Id.* (citing *Wanzer v. Breslin Contracting Co., Inc.*, Del. Super., C.A. No. 01A-11-005, Carpenter, J. (Sept. 30, 2002) (Order)).

[28] *See* Dep. of Conrad K. King, Jr., M.D. at 11.

[29] Claimants Opening Br. at 10.

[30] *Carey v. H & H Maintenance, Inc.,* 2001 WL 98514, at *2 (Del. Super.) (citing *Lindsay v. Chrysler Corp.*, Del. Super., C.A. No. 94A-04-005, Barron, J. (Dec 7, 1994)).

greater weight to Dr. Townsend's opinions because it found him better qualified is not legal error.

There were two competing expert opinions. Dr. King, a pain management specialist testified on behalf of the Claimant, and Dr. Townsend, a neurologist, testified on behalf of the Employer. The IAB held, "the opinion of the neurologist, Dr. Townsend, is more persuasive than that of the pain management specialist, Dr. King. Dr. Townsend is better qualified to determine if the Claimant is risking further neurological damage by returning to work within the restrictions listed."[31] The Claimant argues that the "[IAB's] rejection of Dr. King's total disability opinion in part because Dr. Townsend according to the [IAB], was 'better qualified' to assess the risk of further potential worsening of the Claimant's disc" "violated the statutory and absolute right of the Claimant to treat with and follow the advice of a physician of his own choosing."[32] Furthermore the Claimant asserts that there exists no substantial evidence to support a conclusion that Dr. Townsend was 'better qualified' than Dr. King.[33] The Court does not agree that the decision of the IAB to defer to Dr. Townsend's opinion over Dr. King's opinion constituted error. The IAB was free to accept the testimony of Dr. Townsend, the Employer's expert neurologist, over contrary opinion testimony, and it did: (1) "Dr. King, a pain management specialist, opined that the Claimant should be considered totally disabled *until he had seen a neurosurgeon*. Dr. Townsend, on the other had, is a neurologist;"[34] (2) "[Dr. Townsend] examined the Claimant and was aware of the results of the November 2001 MRI"

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[31] *Clements*, IAB Hearing No. 1141580 at 9.

[32] Claimants Opening Br. at 10.

[33] *Id.* at 12.

[34] *Clements,* IAB Hearing No. 1141580 at 9 (emphasis added).

and had evaluated the Claimant in 1999;[35] and (3) "Dr. Townsend is better qualified to determine if the Claimant is risking further neurological damage by returning to work within the restrictions he listed."[36]

Under Delaware law, "an experienced practicing physician is an expert, and it is not required that he be a specialist in the particular malady at issue in order to make his testimony as an expert admissible."[37] The weight to be given to an expert's testimony is for the trier of fact to determine.[38] Here in absence of agreement between medical experts, the IAB properly relied on the facts to support its finding and not on the unilateral decision of the treating physician.[39] If it were the case that "the treating physician is the arbiter of total disability prior to the hearing, an employer may 'have to pay more than its obligation under the law, and we …do not believe that the Legislature intended that result.'"[40]

The IAB clearly articulated the basis for its finding that Dr. Townsend's testimony was more persuasive.[41] The Court finds that the IAB did not err as a matter of law in concluding that Dr. Townsend was better qualified than Dr. King to determine if the Claimant was risking further neurological damage by returning to work within restrictions.

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[35] *Id.*

[36] *Id.*

[37] *DiSabatino Brothers, Inc. v. Wortman*, 453 A.2d 102, 106 (Del. Supr. 1982).

[38] *Board of Public Ed. In Wilmington v. Rimlinger*, 232 A.2d 98, 100 (Del. Supr. 1967).

[39] *Steele v. Animal Health Sales, Inc.*, 2001 WL 1355134, at *5 (Del. Super.).

[40] *Id.*

[41] *See Carey v. H&H Maintenance, Inc.,* 2001 WL 985114 at *2 (Del. Super.) (citing *Lindsay v. Chrysler Corp.*, Del. Super., C.A. No. 94A-04-005, Barron, J. (Dec 7, 1994).

Finally, the Claimant argues that the IAB's decision to terminate the Claimant's total disability benefits retroactive to the date of the filing is not supported by the requisite substantial competent evidence. In its Order denying the Claimant's Motion for Reargument, the IAB re-addressed the Claimant's argument that the retroactive termination of benefits in this case is not supported by substantial evidence.[42] The Claimant asserts now as he did in his motion for reargument that Dr. Townsend did not examine the Claimant until January 2, 2002, and therefore the examination on that date provides the earliest competent evidence of the Claimants work capabilities.[43] Furthermore, the Claimant argues that Dr. Vaccaro's June 2001 release cannot be considered, as evidence for the purpose of fixing a termination date because it was not moved into evidence and Dr. Vaccaro was not called as an expert to testify.[44] The IAB noted that "[w]hile contemporaneous medical examinations would have been preferable, 'medical evidence is not the only evidence the Board may rely on in making its factual determinations with respect to the Claimant's injury.'"[45] The evidence indicated: (1) the Claimant received no medical treatment at all between March 2001 and November 2001; (2) the Claimant required no prescriptions during this time; (3) Dr. Townsend testified that the Claimant could have worked at least sedentary duty given that he presented similarly, if not better than, he had when Dr. Townsend examined him in 1999; (4) Dr. King testified that the Claimant's physical examination was improved in November of 2001 as compared to when he saw him in 1999 and when he opined that the Claimant was able to work in a sedentary to light duty capacity. In light of this

[42] Order on Claimants Motion for Reargument, *supra* n.9.

[43] Claimants Opening Br. at 12.

[44] *Id.*

evidence, this Court is satisfied that the IAB's decision to terminate the Claimant's total disability benefits retroactive to the date of the filing is supported by the requisite substantial evidence.

CONCLUSION

For the foregoing reasons, the Court affirms the IAB's decision.

Jan R. Jurden, Judge

[45] Order on Claimants Motion for Reargument, *supra* n.9 at 2 (citing *Streett v. State*, 669 A.2d 9, 11 (Del. 1995).).