IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

MARIA MORALES,	)	
	)	
Appellant,	)	
	)	
v.	)	
	)	**Superior Court**
	)	**CA No. 01A-05-005-JEB**
	)	
ST. FRANCIS HOSPITAL,	)	
	)	
Appellee,	)	

Submitted: December 3, 2001
Decided: February 4, 2002

Appeal from a Decision of the Industrial Accident Board.

Decision Affirmed.

Appearances:

Bernard J. McFadden, Esquire
Attorney for Maria Morales - Appellant

Erik C. Grandell, Esquire
Attorney for St. Francis Hospital - Appellee.

JOHN E. BABIARZ, JR., JUDGE.

This is the Court's decision on Claimant Maria Morales' appeal of a decision of the Industrial Accident Board (Board) terminating her total disability benefits and awarding her partial disability benefits. For the reasons explained below, the decision of the Board is affirmed.

FACTS

Claimant was employed by St. Francis as a housekeeper until May 21, 2000, when she slipped and fell on the floor at work. Her back, right leg and left hand were hurt, and she was treated in the St. Francis emergency room. She saw her physician, Ross Ufberg, M.D., two days later. Dr. Ufberg ordered x-rays for the left wrist, and prescribed a wrist splint, a cervical pillow, a therapy program and various medications. He found that Claimant was not able to work and issued her a medical excuse to be submitted to her Employer. He also referred her to Dr. Raisis[1] for her wrist problems.

In July 2000, Dr. Raisis released Claimant to light duty work, and she did not return to her job as a housekeeper because of leg and back pain. She did not seek light duty work because she does not speak English. In August 2000, Dr. Raisis again found Claimant able to do light work and also recommended work-hardening therapy. Claimant attended one therapy session but did not return because it hurt her back.

[1]Dr. Raisis' full name and professional credentials are not included in the record.

Claimant was examined on Employer's behalf by Ali Kalamchi, M.D., on July 23 and December 28, 2000. Based on his opinion that Claimant's back problems were degenerative, he found that she could return to light duty work in July 2000.

In October 2000, Employer filed a Petition for Termination of Benefits on the basis that both Dr. Raisis and Dr. Kalamchi had released Claimant to light duty work. At the Board hearing in February 2001, Dr. Ufberg testified by deposition that Claimant's current problems are related to the work accident and not to pre-existing degenerative problems because until May 2000 she was able to maintain a full-time job as a housekeeper without any problems. He stated that the slip-and-fall accident at work is the cause of her complaints and believes that she remains totally disabled from work. He acknowledged on cross-examination that Claimant could perhaps have returned to light duty in July 2000 but maintained that increasing problems with her back precluded her from work of any kind by August. He stated that Claimant continued to experience a limited range of motion in her low back and weakness in the right leg.

Dr. Kalamachi testified by deposition that, in his opinion, Claimant has been capable of light duty work with certain restrictions since July 2000. He also stated that her soft tissue injury from the work accident had resolved itself and that her back pain was due to degenerative changes.

Employer retained a vocational rehabilitation consultant, Joseph Lucey, to find jobs which Claimant could perform. At the hearing, Lucey stated that he had performed a labor market survey and identified six representative positions which met Claimant's restrictions. The jobs pay an average weekly wage of $313.33 to $316.66.

The Board accepted Dr. Kalamchi's opinion that Claimant was no longer totally disabled and was capable of working within certain limitations. The Board rejected Dr. Ufberg's opinion because he failed to explain why Claimant's complaints prevent her from working altogether rather than restricting her to certain types of jobs. The Board concluded that Claimant is no longer totally disabled from working but is partially disabled. Based on Lucey's testimony, the Board awarded Claimant a weekly compensation rate of $63.38 per week, based on two-thirds of the difference of her pre-injury wage and her post-injury earning capacity. Finally, the Board awarded Claimant a medical witness fee but did not award attorney's fees because Employer had offered Claimant a settlement that was equal to or greater than the Board's award.

Claimant filed a motion for reargument, asserting that she have been allowed a reasonable time to conduct a job search. The Board rejected this argument and denied the motion for reargument. Claimant filed a timely appeal to this Court.

STANDARD OF REVIEW

On appeal of an administrative board decision, the function of this Court is to determine whether the agency's conclusions are supported by substantial evidence and are free from errors of law.[2] Substantial evidence is such evidence as a reasonable mind might accept as adequate to support a conclusion.[3] This Court does not weigh the evidence, determine questions of credibility or make its own factual findings.[4] It merely determines whether the evidence is legally adequate to support the agency's decision.[5]

DISCUSSION

On a petition to terminate total disability benefits, a former employer bears the initial burden of demonstrating that the employee is no longer totally incapacitated for the purpose of working.[6] If that showing is made, the burden shifts to the employee to show that she is a "displaced worker," who is "so handicapped by a compensable injury that [s]he will no longer be employed regularly in any well

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[2] *General Motors Corp. v. Freeman*, 164 A.2d 686, 688-89 (Del.1960); *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66-67 (Del.1965).

[3] *Oceanport Ind. v. Wilmington Stevedores*, 636 A.2d 892, 899 (Del.1994).

[4] *Johnson* at 66.

[5] Title 29 *Del.C.* § 10142(d).

[6] *Torres v. Allen Family Foods*, 672 A.2d 26, 30 (Del.1995) (citing *Governor Bacon Health Center v. Noll*, 315 A.2d 601, 603 (Del.Super.1974)).

known branch of the competitive labor market."[7] If she makes that showing, the burden shifts back to the employer to show the availability of work within the employee's capabilities.[8]

In the case at bar, Claimant argues that the Board erred as a matter of law in amending her award of disability benefits from total to partial without allowing her a reasonable time to conduct a job search or to complete her physical therapy. As an initial matter, the issue of a reasonable job search arises only in the context of a claimant's assertion that he or she is a displaced worker.[9] In the case at bar, Claimant did not raise the displaced worker issue at the hearing. Furthermore, the Delaware Supreme has recently rejected the two-step process whereby an employer would first have to obtain from the Board a determination that a claimant can return to work and second give the claimant a reasonable time to conduct a job search before seeking a determination that Claimant is not a displaced worker.[10] Thus Claimant's first argument in the case at bar has no merit.

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[7] *Id.* (quoting *Ham v. Chrysler Corp.*, 231 A.2d 258, 261 (Del.1967)).

[8] *Id.* (citing *Franklin Fabricators v. Irwin*, 306 A.2d 734, 737 (Del.1973)).

[9] *Id.*

[10] *Wade Insulation, Inc. v. Visnovsky*, 773 A.2d 379, 383 (Del.2001). The Court notes that this decision reversed a Superior Court decision which had suggested the two-step process described above. The Supreme Court's reversal in *Visnovsky* was issued subsequent to the Board proceedings in this case.

Claimant raised the displaced worker issue for the first time in her motion for reargument. The Board rejected Claimant's contention that she should be given a reasonable amount of time to find a job because the job search issue arises only in the context of a displaced worker, which was not addressed at the hearing. Although Claimant's temporary total disability benefits were terminated, she was granted partial disability benefits. The Board noted that Delaware law does not allow a grace period for a claimant to look for work when his or benefits are terminated or decreased. The Court finds that the Board did not err as a matter of either fact or law.

Claimant also argues that the Board erred as a matter of law in finding that she was not totally disabled from the date of the injury through the date of the hearing. The Board explicitly accepted the testimony of Employer's expert witness, Dr. Kalamchi, over that of Claimant's treating physician, Dr. Ufberg. The Board stated in its decision that Dr. Ufberg did not explain why Claimant's physical limitations removed her entirely from the work force, rather than restricting her to certain types of jobs. Further, Dr. Ufberg, who referred Claimant to Dr. Raisis for wrist treatment, acknowledged that Dr. Raisis released Claimant to light duty work in July 2000. Dr. Kalamchi examined Claimant on two occasions and reviewed her medical records, including an MRI that showed degenerative changes but no acute disc herniation. When the medical experts disagree about an injury and its cause, the Board can rely

on either opinion as long as it is supported by substantial evidence.[11] The Court is satisfied that the Board appropriately resolved the conflicts in the medical evidence and that its findings were based on substantial evidence.

The Board also noted that during the three-hour hearing Claimant showed no sign of pain, discomfort or distress, despite her assertion that she can sit for only 30 minutes at a time. This is a credibility determination that is well within the Board's discretion and which the Court will not disturb.[12] The Court concludes that the Board did not err as a matter of either fact or law when it found that Claimant was not totally disabled as of the date of the hearing. As noted earlier in this Opinion, Delaware law does not provide a Claimant a waiting period prior to decreasing total disability benefits to partial disability benefits.[13]

Claimant compares her situation to that of the claimant in *Gilliard-Belfast v. Wendy's, Inc.*, who was ordered by her doctor not to work at all while she awaited a second operation on a knee injured as a result of a work accident.[14] In *Wendy's*, the Delaware Supreme Court held that "a person who can only resume some form of

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[11] *Standard Distributing Co. v. Nally*, 630 A.2d 640, 646 (Del.1993).

[12] *General Motors Corp. v. McNemar*, 202 A.2d 803, 807 (Del.1964).

[13] *Id.*

[14] 754 A.2d 251 (Del.2000).

employment by disobeying the orders of his or her treating physician is totally disabled, at least temporarily, regardless of his or her capabilities."[15] In the case at bar, Claimant chose to follow Dr. Ufberg's recommendation that she not return to work. She could have taken Dr. Raisis' suggestion that she return to light duty work. In fact, she did not work at all until Employer met its burden of showing that her disability no longer totally removed her from the workforce. The Board's finding is supported by record evidence, including the Board members' observation that Claimant was showed no signs of discomfort during the three-hour hearing despite her assertion that she cannot sit still for more than one-half hour. Furthermore, Claimant's own doctors disagreed as to her capacity to work.[16] The Court concludes that this case is not governed by *Gilliard-Belfast.*

[15] *Id.* at 254.

[16] *See Steele v. Animal Health Sales, Inc.,* 2001 WL 1355134 (Del.Super.) (finding that *Gilliard-Belfast* does not apply where a claimant's own doctors have differing opinions about claimant's ability to work).

CONCLUSION

For all these reasons, the decision of the Board granting Employer's Petition to Terminate Total Disability Benefits and awarding Claimant partial disability benefits is ***Affirmed.***

It Is So ORDERED.

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Judge John E. Babiarz, Jr.

JEB,jr/bjw
Original to Prothonotary