IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR THE NEW CASTLE COUNTY

ROSE L. PARKE, Appellant - Employee, v. SUNRISE ASSISTED LIVING, INC., Appellee - Employer.	))))))))))	C.A. No. 04A-03-004 FSS

Submitted: September 24, 2004
Decided: January 31, 2005.

MEMORANDUM OPINION

Upon Appeal from the Industrial Accident Board -- *AFFIRMED*

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SILVERMAN, J.

This is an Industrial Accident Board appeal. Employee, Rose L. Parke, challenges the Board's decision terminating benefits. Parke alleges two ways that the Board erred. First, Parke contends that the Board erred by relying on Employer, Sunrise Assisted Living's, medical expert, Willie Thompson, M.D.,who allegedly "ignored objective findings and objective diagnostic tests regarding the injury sustained." Second, the Board allegedly erred when it allowed Sunrise to rely on certain reports from Parke's treating physician. Parke claims that her counsel did not have time to review the records and prepare to address the reports at the hearing. Put another way, Parke was surprised by her own medical records.

I.

By agreement, after she hurt her back on the job, Parke received worker's compensation starting April 24, 2003. On October 2, 2003, however, Sunrise filed a Petition for Termination of Benefits. The Board held a hearing on February 4, 2004. After hearing the parties and their medical experts, the Board granted the petition and denied it in part. The Board terminated total disability benefits as of the petition's filing. The Board granted partial disability benefits ending December 29, 2003.

As mentioned, Parke appealed and filed her opening brief on June 15, 2004. Sunrise filed its answering brief on July 30, 2004. Parke filed a reply brief on

August 16, 2004. On August 20, 2004, Sunrise mailed a letter to the court clarifying a misstatement by Parke regarding medical records.

Meanwhile, in September 2003, before filing its petition, Sunrise issued requests for production, asking Parke's counsel to obtain and turn over Parke's medical records. Sunrise also issued a subpoena *duces tecum* to Parke's treating physician, Dr. Ross Ufberg, demanding similar information. The record does not reveal what steps, if any, Parke took in response to Sunrise's request for production. Apparently, however, hours before the Board hearing, Dr. Ufberg produced the medical records, which included an MRI report stemming from an earlier industrial accident.

At the hearing's outset, Parke objected generally to Sunrise's relying on her own medical records. She did not make a record as to what questions about those records were prejudicial and how.

II.

In reviewing an appeal from the Industrial Accident Board, the court must determine whether the Board's decision is supported by substantial evidence and free from legal error.[1] Substantial evidence is enough evidence to support a

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

(continued...)

conclusion.[2] It is more than a scintilla, but not necessarily as much as a preponderance.[3] An appellate court does not weigh evidence, determine credibility, or do fact-finding.[4] If the record supports the Board's findings, the court must accept them even though, acting independently, the court might reach different conclusions.[5] On appeal, the court merely examines whether the evidence supports the Board's factual findings.[6] Similarly, when applying the substantial evidence standard, the court considers the record in a light most favorable to the appellee, "resolving all doubts in its favor."[7] Finally, if the issue involves a purely legal question, the court's appellate review is plenary.[8] Thus, when reviewing the Board's decision, the court must apply the facts as the Board found them to be, if based on substantial evidence,

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[1](...continued)
Motors Corp. V. Jarrell, 493 A.2d 978, 980 (Del. Super. Ct. 1985).

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

[3] *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981).

[4] *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66-67 (Del. 1965).

[5] *H & H Poultry v. Whaley*, 408 A.2d 289, 291 (Del. 1979).

[6] DEL. CODE ANN. tit. 29 § 10142(d) (2003).

[7] *General Motors Corp. v. Guy*, 1991 WL 190491 (Del. Super.) *3, C.A. No. 90A-JL-5, Gebelein, J. (Aug. 16, 1991).

[8] *Brooks v. Johnson*, 560 A.2d 1001, 1002-03 (Del. 1989)

to the law as the court finds the law to be, and in that way decide the case.

A medical expert's opinion, such as Dr. Thompson's, "constitutes substantial evidence to support the Board's finding."[9] In a battle of the experts, the Board is free to choose between the opinions and the court's role is limited to determining whether the evidence relied upon is legally adequate to support the Board's findings.[10] Thus, the pertinent question here is whether Dr. Thompson's opinion was adequate to support the Board's finding.

III.

Parke worked at Sunrise as a Certified Nurse's Aide from January 2001 until April 24, 2003. On April 24, 2003, Parke was helping a coworker lift and transfer a patient to a chair. The patient pushed Parke and she fell on her back and behind. Parke immediately felt pain in her lower back, and she developed additional pain on her right side and her lower leg. Parke received treatment from Dr. Senu-Oke, a family practitioner, for radicular and lower back pain.

Parke has an extensive medical history of injuries and treatment to her spine that pre-date the 2003 incident. She was injured while working for prior

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[9] *Lohr v. Acme Markets*, Del. Super., C.A. No. 98A-05-020, Cooch, J. (Feb. 24, 1999) (ORDER), at *2 (*citing DiSabatino v. Wortman*, 453 A.2d 102, 106 (Del. Super. Ct. 1982)), *aff'd*, 734 A.2d 641 (Del. 1999).

[10] *Reese v. Home Budget Center,* 619 A.2d 907, 910 (Del. 1992).

employers. According to Sunrise's count, Parke's claim against Sunrise was her third worker's compensation claim. She also was in four, car crashes in the 1990's. By 1998, a doctor opined that she had some cumulative, permanent impairment of her spine. Nevertheless, Sunrise presented Dr. Thompson's testimony that Parke was not disabled. Any injury attributable to the 2003 incident had resolved within ten months and she could return to work.

IV.

As mentioned, Parke first challenges the Board's reliance on Dr. Thompson, arguing that his opinion does not meet the substantial evidence standard. Parke's expert, her family practitioner, not only relied on his interaction with Parke as her latest treating physician, he also relied on a positive MRI and an EMG. Sunrise's testifying expert discounted both the MRI and the EMG, and the Board accepted "his findings in December 2003 that Claimant had no objective findings upon physical examination, that she required no further treatment, and that she was capable of working without restrictions."[11] Parke suggests that Dr. Thompson "completely ignored the results of the objective tests."[12] Parke also suggests that Dr.

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[11] *Parke v. Sunrise Assisted Living, Inc.,* IAB Hearing No. 123297 (February 9, 2004), at 9.

[12] Appellant's Opening Br., D.I. 5, at 5 (Appellant neglected to number

(continued...)

Thompson's opinion fails to support the Board's findings because it was based on "speculation."[13]

It appears, however, that Dr. Thompson, a board-certified orthopedic surgeon, repeatedly addressed the MRI and the EMG directly. On direct examination Dr. Thompson explained how test results and clinical findings are related. He found no correlation between the test results and his clinical findings. In reaching his opinion, he also relied on other doctors' reports, which also showed no supportive clinical findings, e.g. no abnormal gait or "listing," etc.[14]

On cross-examination he testified "[T]he [MRI] interpretation cannot be supported by any clinical findings that would indicate any impairment at the L-5 or S-1 nerve roots which would have been affected with discs at those levels."[15] The specialist also offered the same explanation for the EMG. He was emphatic that the tests' significance turned on the presence of clinical findings. But Dr. Thompson had examined Parke twice and "found no neurological impairment." And he addressed

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[12](...continued)
the pages in her Opening Brief; this cite refers to the fifth page of the Argument Section).

[13] *Id.*

[14] Tr. of *Parke v. Sunrise Assisted Living, Inc.*, IAB Hearing No. 123297 (February 9, 2004), D.I. 3, at 20-21.

[15] *Id.* at 48: 8-11.

the MRI again when a Board member asked him about it. The Board expressly accepted Dr. Thompson's findings. The Board ultimately concluded that Parke's condition had returned to "normal or baseline" by the time Sunrise filed its petition.

Dr. Thompson did not expressly question Parke's credibility. But he implied that her subjective complaints were inconsistent with her clinical presentation. The Board, however, heard Parke testify and it "did not find [her] particularly credible as to her continuing subjective complaints. . . ."[16]

In summary, this appeal is a common situation. Appellant had a case, yet the Board ruled against her. Parke presented a reputable physician who had more contact with her and who based his opinion, in part, on objective testing. Even so, the Board sided with a defense expert who rejected the tests' potential implications. Looking at the case from Parke's viewpoint, it is hard to see how she lost.

But on appeal the court cannot re-weigh the evidence. It must look at the record in the reasonable light most favorable to appellee. Despite the physiological information that the MRI and the EMG revealed, the Board justifiably concluded from expert testimony presented by Sunrise and its assessment of Parke's credibility that Parke's clinical picture did not support continued benefits.

Parke's second issue is less challenging. As mentioned she asserts that

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[16] *Parke*, at 9.

the Board erred, as a matter of law, when it permitted the introduction of her 1993 MRI. Parke claims surprise.

Although the court appreciates Parke's synopsis of law from other States, the court is not persuaded that letting Sunrise use Parke's records was incorrect, or prejudicial to Parke. And the Delaware cases cited by Parke concern, in large part, video surveillance taken of a party, unbeknownst to them, which is sprung at trial. Here, Parke's 1993 MRI was not obtained surreptitiously. Having participated in the 1993 MRI, Parke should have been aware of it. Moreover, she knew Sunrise was looking for the records. It does not help that Parke never explained how she responded to Sunrise's request for production. Nor did Parke explain how her theoretical concerns about the records genuinely interfered with her case's presentation.

Finally, while the Board refers to the similarity between the 1993 and 2003 MRI's, the thrust of its decision is its reliance on the absence of supporting clinical findings. Thus, it is difficult to see how Parke suffered harm from the Board's evidentiary ruling about the 1993 MRI. From the record made on this issue, the court is satisfied that Board did not err when it overruled Parke's objection to Sunrise's using her MRI.

V.

For the foregoing reasons, The Industrial Accident Board's February 18, 2004 decision denying total disability benefits and granting partial disability benefits is ***AFFIRMED***.

IT IS SO ORDERED.

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Judge

oc: Prothonotary (Civil Division - Appeals Department)