IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

SOUTHPARK TERRACE	)	
	)	
Appellant/ Employer-Below,	)	
	)	
v.	)	C.A. No. 02A-11-003-JRJ
	)	
SHERRY RIDLEY	)	
	)	
Appellee/ Claimant-Below.	)	

Date Submitted: September 3, 2004
Date Decided: January 5, 2005

MEMORANDUM OPINION

On Appeal from the Industrial Accident Board.
*Decision **AFFIRMED**.*

H. Garrett Baker, Esquire, Elzufon, Austin, Reardon, Tarlov & Mondell, P.A., 300 Delaware Ave., 17th Floor, P.O. Box 1630, Wilmington, Delaware, 19899-1630, for Employer-Appellant.

Matthew M. Bartkowski, Esquire, Kimmel, Carter, Roman & Peltz, P.A., 913 Market Street, 12th Floor, P.O. Box 272, Wilmington, Delaware, 19899, for Claimant-Appellee.

JURDEN, J.

This is an appeal from a decision of the Industrial Accident Board ("IAB" or "Board") awarding the claimant partial disability benefits. After oral argument and a review of the record below, as well as the parties' written submissions, the Court concludes that the IAB's decision must be **AFFIRMED**.

PROCEDURAL POSTURE

This is the second IAB appeal filed by Southpark Terrace (hereinafter referred to as the "Employer") in this case. The factual background of the Employer's Petition to Review Sherry Ridley's (hereinafter referred to as the "Claimant") disability agreement is set forth at length in RIDLEY I[1] and will not be repeated here. However, as this case has extensive procedural history, the Court will reiterate the posture of the case leading to this second appeal. On May 15, 2001, the Employer filed a Petition to Review the disability agreement it entered into with the Claimant arguing that her disability had ceased and that she had forfeited her right to compensation under 19 Del. C. § 2353(a) (1995).

On September 7, 2001, the Board held a hearing and on September 18, 2001, in its decision, awarded the Claimant partial disability benefits, attorney's fees, and expert witness fees. On October 8, 2001, the Employer filed a timely appeal raising only one issue, namely, that the Board erred as a matter of law in determining that a failure to perform home exercises does not trigger forfeiture under 19 Del. C. § 2353(a) (1995). This Court issued a Memorandum Opinion on April 11, 2002 which reversed and

[1] *See Southpark Terrace v. Ridley*, C.A. No. 01A-10-005-JRJ, Mem. Op., J. Jurden (Del. Super. Ct. April 11, 2002). Throughout this Opinion, the original Memorandum Opinion will be referred to as "RIDLEY I."

remanded the case back to the Board to conduct a factual determination regarding the three § 2353 factors.[2]

On September 27, 2002, the IAB held a second evidentiary hearing. Deciding again in favor of the Claimant on October 10, 2002, the IAB found that when applying the § 2353 factors to the circumstances of this case, the Claimant did not refuse to perform the home exercise program.[3] The IAB awarded the Claimant partial disability benefits as well as medical witness fees and reasonable attorney's fees pursuant to 19 Del. C. §§ 2322(e) and 2320(j).[4] The Employer filed a timely appeal of the IAB's decision.

ISSUES

In this appeal, there is no dispute that the Claimant did not outright refuse to perform her home exercises. Rather, the dispute between the Employer and the Claimant centers on whether the Claimant's admittedly less than faithful attempt at performing home exercises, in effect, constitutes a refusal.

---

[2] In RIDLEY I, this Court held:

To determine whether a claimant has forfeited the right to compensation under [19 Del. C. § 2353], the Board must make three factual findings:

1. There must be a refusal by the Claimant of medical services,
2. The Claimant's refusal must have caused an injury or increase in incapacity, and
3. The medical services offered must be reasonable.

[3] *See Southpark Terrace v. Ridley*, Industrial Accident Bd. Hrg. No. 1127509 (Oct. 10, 2002).

[4] *Id.*

STANDARD OF REVIEW

The Court's limited role when reviewing a decision of the Industrial Accident Board is to determine whether the decision is free from legal error and supported by substantial evidence.[5] Substantial evidence is such relevant evidence that a reasonable person might accept as adequate to support a conclusion.[6] The Court must consider the record in the light most favorable to the party who prevailed below.[7]

DISCUSSION

In its April 11, 2002 Memorandum Opinion, this Court reversed and remanded for the Board to engage in the § 2353 three-prong analysis.[8] In doing so, the Court stated:

> Whether the home exercise program at issue constitutes a "medical service" is a factual issue for the Board to decide. And, if the Board's factual determination is that the home exercise program at issue constitutes a "medical service," the Board is then obligated to determine whether the Claimant's conduct constitutes a "refusal" of that service and whether that service is "reasonable."[9]

In its decision following remand, the Board succinctly outlined its factual determinations regarding the three-prong analysis. First, the Board found that the Claimant's testimony convinced the Board that she did not entirely refuse to perform the home exercises,[10] and

---

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

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

[7] *Layton Home*, 2001 Del. Super. LEXIS 504 at *2-3 (citing *Walden v. Georgia-Pacific Corp.*, C.A. No. 98A-02-027, 1999 LEXIS 253 (Del. Super. Ct. Mar. 8, 1999), *aff'd* 1999 LEXIS 443 (Del. Super. Ct. Sept. 22, 1999)).

[8] *See Southpark Terrace v. Ridley*, C.A. No. 01A-10-005-JRJ, Mem. Op., J. Jurden (Del. Super. Ct. April 11, 2002).

[9] *Id.*

[10] *See Southpark Terrace v. Ridley*, Industrial Accident Bd. Hrg. No. 1127509 (Oct. 10, 2002).

although her attempts to perform them may have been less than ideal, they still did not constitute a refusal of medical services.[11] Second, the Board held that the Employer provided no evidence that the Claimant's lack-luster efforts caused further injury or an increase in her pre-existing incapacity.[12] Finally, the Board concluded that a home exercise program constitutes a reasonable medical service.[13] In reaching these conclusions, the Board relied on the testimony of the Claimant, her orthopedic surgeon and the medical records.

Once the Board has gone through the factual analysis of the three-prongs of § 2353, it is not now the function of this Court, on appeal, to weigh evidence again, or to determine questions of credibility, or make its own factual findings.[14] As this Court stated in RIDLEY I, those "are issues for the Board's, and not the Court's, determination."[15] Consequently, the Court "will not substitute its judgment for that of [the Board] where there is substantial evidence to support the [Board's] decision."[16] Here, the Court finds, after a careful review of the Board's decision following remand and reversal, that it is supported by substantial evidence.

The Employer also argues that despite the Board's analysis of § 2353, the decision should still be overturned on public policy grounds. The Employer asserts that

---

[11] *Id.* at 5.

[12] *Id.* at 6.

[13] *Id.*

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

[15] *See Southpark Terrace v. Ridley*, at 8.

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

because of the precedent set by the Board's decision, "employers will now be required to pay lost wages so long [sic] the injured workers make some token effort at rehabilitation even wholly inadequate to result in therapeutic benefit."[17] As compelling as this argument may be, this Court is unwilling to intervene and attempt to set standards and guidelines for how much effort on the part of a claimant would or would not constitute a refusal under § 2353. As one can easily imagine, the potential variety of factual contexts in which such standards may be employed simply do not lend themselves to a precise definition of what exactly equates to a refusal. Rather, unless there is an unequivocal refusal on the part of the claimant, the forfeiture provisions of § 2353 should not be triggered.

CONCLUSION

For the foregoing reasons, the Court concludes that there is substantial evidence in the record to support the Board's analysis of § 2353 and accepts the Board's credibility and factual determinations. The Court, therefore, will not disturb the Board's decision to grant the Claimant partial disability benefits, medical witness fees and reasonable attorney's fees. Accordingly, the decision of the IAB is **AFFIRMED**.

IT IS SO ORDERED.

_____

Jan R. Jurden, Judge

[17] *See* Reply Brief of Appellant Southpark Terrace to Sherry Ridley's Answering Brief at 7.