

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

ELIZABETH DOHERTY,)	
)	
Claimant Below/)	
Appellant,)	
)	C.A. No. N12A-11-010 VLR
v.)	
)	
VALITAS,)	
)	
Employer Below/)	
Appellee.)	

Date Submitted: April 25, 2013

Date Decided: July 31, 2013

*Upon Consideration of Appellant's
Appeal of Decision of the
Industrial Accident Board*

AFFIRMED

OPINION

Lawrance Spiller Kimmel, Esq., Kimmel, Carter, Roman & Peltz, P.A., 56 West Main St., 4th Floor, Plaza 273, Newark, DE 19702, Attorney for the Claimant/Appellant.

Linda Wilson, Esq., Marshall Dennehey Warner Coleman & Goggin, 1220 North Market St., 5th Floor, P.O. Box 8888, Wilmington, DE 19899-8888, Attorney for Employer/Appellee.

RAPPOSELLI, J.

INTRODUCTION

Employee-Appellant Elizabeth Doherty (“Employee”) appeals from a decision of the Industrial Accident Board (“Board”) denying her Petition to Determine Additional Compensation Due. Employee sought workers’ compensation benefits to include the payment of medical treatment for a 2011 wound to her left foot and a corresponding period of temporary total disability on the basis that the 2011 wound was causally related to an acknowledged 2008 work injury. Her employer, Valitas, (“Employer”), argued that the 2011 wound was unrelated to the 2008 work injury. The Board denied Employee’s petition, and she appeals to this Court.

In her appeal, Employee asserts that the Board’s decision was not based on substantial evidence and argues that the Board’s decision warrants reversal. Specifically, Employee contends that the Board failed to fully consider the Employee’s medical expert testimony and disregarded both experts’ opinions in reaching their decision. The Court finds that the Board’s decision was supported by substantial evidence and the Board committed no error of law to warrant reversal. Therefore, the decision of the Board is **AFFIRMED**.

FACTUAL AND PROCEDURAL BACKGROUND¹

Employee has a history of diabetes with numerous medical issues affecting both lower extremities secondary to her disease. Her ongoing medical history includes evidence of severe diabetic peripheral neuropathy or nerve damage to the peripheral nervous system. In addition, Employee suffered from periodic cellulitis, osteomyelitis, wounds and ulcers to both feet as well

¹ Recitation of the facts and procedural history is adopted primarily from the Board’s hearing, *Elizabeth Doherty v. Valitas*, Hearing No. 1357510, Decision on Petition to Determine Additional Compensation Due, (November 5, 2012)

as Charcot foot (collapsed bones in her left foot) resulting in “hammer toes” for which she requires a walking boot.

Employee received medical treatment to address issues related to her feet including a 2009 amputation of the fifth digit of her right foot, unrelated to her 2008 work injury. Medical treatment also addressed multiple ulcers and wounds to both the tops and bottoms of her feet, including work-related and non-work-related treatment to the dorsal (mid-top) aspect of her left foot. Prior to her acknowledged work injury, Employee fell in 2006 and sustained a major wound around the toes and upper portion of her left foot. In 2007, Employee developed a wound on the bottom of her left foot which healed and was followed by an ulcer that opened on the top of the left foot near the toes. In 2008, Employee developed cellulitis in the right calf, unrelated to the work injury.

On June 9, 2008, while working at Baylor Women’s Correctional Institute for Employer, Employee slipped on a wet floor and injured her right knee. Several days later, she noticed a wound to the top of her left foot near her toes. This wound eventually expanded to cover the entire top of her left foot which required a skin graft and resulted in hospitalization to address a subsequent staph infection. Dr. Paul Kupcha rendered most of the medical treatment for the wounds to the tops and bottom of her feet, including the medical treatment for the 2008 work injury. In addition, the work injury was treated with a skin graft by Dr. Lawrence Chang on August 19, 2008, which covered the entire dorsal part of Employee’s foot. Employer acknowledged the 2008 work injuries to include a wound to the top of Employee’s left foot and an injury to the right knee for which Employee received workers’ compensation benefits.²

In July 2011, Employee developed an ulcer on the dorsal aspect of her left foot and began treatment through Dr. Sean Walpole. The wound, approximately the size of a dime, would

² There are no issues on appeal before this Court related to the knee injury.

eventually require a full skin graft after multiple failed attempts at synthetic grafts. Employer denied Dr. Walpole's 2011 medical treatment and the corresponding total disability on the basis that both were unrelated to the 2008 work injury.

In March and April of 2012, Employee filed Petitions to Determine Additional Compensation Due asking the Board to find a causal relationship between the acknowledged 2008 work injury and Employee's 2011 wound. Employee specifically requested payment of medical treatment to the dorsal aspect of her left foot and temporary total disability benefits from October 7, 2011, through July 26, 2012. The Board heard the matter on September 5, 2012.

Employee's physician, Sean Walpole, D.P.M., testified on Employee's behalf by deposition. Board-certified in the field of podiatry, Dr. Walpole testified that he was aware of Employee's diabetic history and acknowledged that Employee had problems with her left foot that pre-dated the work injury of 2008.³ Referencing records from Dr. Kupcha, he noted that Employee suffered from an ulcer on the dorsal aspect of her left foot in December of 2007, prior to the work injury of 2008.⁴ Dr. Walpole agreed that, according to Dr. Kupcha, the work injury wound had "completely healed" by September of 2010.⁵

When Dr. Walpole first examined Employee in July of 2011, he testified that she was wearing a CROW (Charcot Restrained Orthotic Walker) boot on her left foot and was able to work with restrictions.⁶ She complained of an ulcer on the dorsal part of her left foot. Despite conservative treatment, the ulcer did not heal and a synthetic graft was performed in October of 2011.⁷ The wound did not respond well and a full skin graft was performed in May of 2012. By

³ *Elizabeth Doherty v. Valitas*, Hearing No. 1357510, Decision on Petition to Determine Additional Compensation Due (November 5, 2012) at 4.

⁴ Board Decision at 4.

⁵ Decision at 5.

⁶ Decision at 6.

⁷ Decision at 6.

July 26, 2012, the wound had healed at which time Dr. Walpole opined that she was capable of sedentary work although he did not issue a formal disability slip to Employee.⁸

Dr. Walpole opined that the 2011 wound was reasonable, necessary and causally related to the 2008 work injury.⁹ The Board's decision highlighted the relevant portions of Dr. Walpole's testimony on causation and considered his opinion to be based on several factors. First, the doctor testified that the location of the wound was not typical for a diabetic as skin breakdown would likely happen less on the dorsum of the foot versus the plantar (bottom) aspect of the foot.¹⁰ He further testified that the 2011 wound on the dorsal aspect of the foot, previously treated by Dr. Chang, had broken down and it would be atypical for a wound on the dorsal aspect of the foot to reopen. According to Dr. Walpole, Employee's foot was prone to potential reopening as a result of prior procedures performed on her left foot and the Employee's prior healing complications on the dorsal aspect of her foot.¹¹ However, when asked if the wound was a reopening of a wound or a new wound, he testified that he could not say.¹²

Jeffrey Meyers, M.D, testified for Employer by deposition. Board-certified in physical medicine and rehabilitation, Dr. Meyers testified that he examined the Employee on three (3) different occasions in August of 2010 and April and August of 2012 and reviewed her medical history to formulate his opinion.¹³ He testified that Employee had a history of medical issues that pre-dated the 2008 work injury to include diabetic neuropathy, Charcot foot, osteomyelitis, the need for a walking boot, etc.¹⁴ Dr. Meyers testified that Dr. Kupcha's medical records showed wounds were present on the dorsal aspect of Employee's foot prior to her 2008 work

⁸ Board Decision at 7.

⁹ Decision at 6.

¹⁰ Decision at 7.

¹¹ Decision at 7.

¹² Decision at 6.

¹³ Decision at 7.

¹⁴ Decision at 8.

injury both in March of 2006 and December of 2007. Dr. Meyers also testified that medical records from Dr. Kupcha and other medical providers confirmed that the 2008 left foot work injury had completely healed as of 2010.¹⁵ When Dr. Meyers initially saw Employee in August of 2010, the left foot was healed but there was an open wound on the right foot.¹⁶

Dr. Meyers examined the Employee in April 2012 for purposes of providing a permanency rating¹⁷ and examined her in August of 2012 when the wounds on both left and right feet had healed. It was his opinion that Employee developed the 2011 ulcer in the same way that she had developed multiple wounds on her foot before the 2008 work accident that were known to periodically return.¹⁸ While he agreed that ulcers return after they healed, he opined that since Employee had ulcers on her left foot for years prior to the work accident, he could not relate the 2011 wound to the 2008 work injury.¹⁹

The Board issued their decision on November 5, 2012, denying Employee's petition, and this appeal followed.

STANDARD OF REVIEW

A decision of the Industrial Accident Board is reviewed for errors of law and to determine whether substantial evidence exists to support the Board's findings of fact and conclusions of law.²⁰ Substantial evidence requires such relevant evidence as a reasonable mind

¹⁵ Board Decision at 8.

¹⁶ Decision at 8.

¹⁷ The Board considered a preliminary motion by Employee's counsel to strike Dr. Meyers' deposition asserting Employee was unable to cross-examine the doctor because Employer directed the witness not to answer. While the Board admonished Employer's counsel for instructing Dr. Meyers not to answer certain questions from Employee's counsel at his deposition, the Board offered claimant an opportunity to suspend the hearing and re-depose Dr. Meyers at Employer's expense. Employee declined the offer and opted to proceed with the hearing and the testimony from Dr. Meyers as contained in his August 27, 2012 deposition. This aspect of the Board's decision is not at issue before this Court.

¹⁸ Board Decision at 10.

¹⁹ Decision at 10.

²⁰ *Arrants v. Home Depot*, 65 A.3d 601, 604 (Del. 2013).

might accept as adequate to support a conclusion.²¹ The Court must uphold a Board's decision that is supported by substantial evidence even if, in the first instance, the reviewing Judge might have decided the case differently.²² Upon review, the Court must view the record in the light most favorable to the party prevailing below.²³ On appeal, errors of law are reviewed *de novo* while absent an error of law, the standard of review is abuse of discretion.²⁴ The Court only finds an abuse of discretion when the Board's decision has "exceeded the bounds of reason in view of the circumstances."²⁵ The Court does not weigh the evidence, determine questions of credibility, or make factual findings.²⁶ When making factual determinations, the Court shall defer to the experience and specialized competence of the Board.²⁷

DISCUSSION

On appeal, Employee asserts that the Board's decision was not supported by substantial evidence. Specifically, the Employee contends that the Board discounted the majority of Dr. Walpole's testimony and disregarded the testimony of Dr. Meyers when it determined there was insufficient evidence to relate the 2011 wound to the 2008 work injury. The only issue before this Court is whether there is substantial evidence to support the Board's finding. A Board decision stands unless no substantial evidence supports it.²⁸

²¹ *Id.* at 605 (citations omitted).

²² *Noel-Liszkiwicz v. La-Z-Boy, Inc.*, 2012 WL 4762114 at *4 (Del. Super. Oct. 3, 2012) (citing *Kreshtool v. Delmarva Power and Light Co.*, 310 A.2d 649, 653 (Del. 1973)), *aff'd*, 2013 WL 519603 (Del. 2013).

²³ *Sewell v. Delaware River and Bay Authority*, 796 A.2d 665, 660 (Del. Super. 2000).

²⁴ *Person-Gaines v. Pepco Holdings, Inc.*, 981 A.2d 1159, 1161 (Del. 2009).

²⁵ *Id.* at 1161 (citations omitted).

²⁶ *Arrants*, 65 A.3d at 605.

²⁷ 29 *Del. C.* § 10142(d); *Histed v. E.I. DuPont de Nemours & Co.*, 621 A.2d 340, 342 (Del. 1993).

²⁸ *Person-Gaines*, 981 A.2d at 1161.

The burden of proof is upon the claimant to establish her claim to a preponderance of the evidence.²⁹ The Board held the Employee to the proper standard and burden of proof when it noted:

[Employee] must establish that, more likely than not, her 2011 left foot wound was causally related to her healed 2008 left foot wound. The Board finds Dr. Walpole's opinion to be unpersuasive. His rejection of the possibility that Claimant simply reinjured her left foot is based on his belief that such injuries normally are located on the plantar portion of the foot. However, Claimant has previously had dorsal wounds on her feet. There is no reason to believe that her 2011 injury is anything else.... [T]he only explanation for a causal link is merely that both the 2008 and 2011 wounds were on the dorsal part of the foot. For the reasons discussed, the Board finds this insufficient to establish, more likely than not, that but for the 2008 accident, Claimant would not have developed the 2011 wound. Quite the contrary, the fact that Claimant has had the occasional dorsal wound on her feet even before 2008 make [sic] it far more likely that the 2011 wound is just another one of those and completely unrelated to the 2008 work accident.³⁰

The Board additionally noted that "even if, in general, it is more likely that a diabetic would develop plantar wounds, the medical records document that this particular patient was developing dorsal wounds even prior to the 2008 work accident."³¹ As such, the Board did not err as it applied the correct burden of proof and substantial evidence supported the Board's findings.

While Employee contends that the Board discounted the majority of Dr. Walpole's testimony and disregarded the testimony of Dr. Meyers in deciding that the 2011 wound was not related to the 2008 work injury, determining witness credibility is a function exclusively reserved for the Board.³² When faced with conflicting medical evidence, the Board, as the finder of fact, must resolve the conflict.³³ The Board's decision provides a comprehensive summary of the

²⁹ 29 Del. C. § 10125(c); *Noel-Liszkiwicz*, 2012 WL 4762114 at *4.

³⁰ Board Decision at 16.

³¹ Decision at 15.

³² *Simmons v. Delaware State Hosp.*, 660 A.2d 384, 388 (Del. 1995).

³³ *Munyan v. Daimler Chrysler Corp.*, 909 A.2d 133, 136 (Del. 2006).

testimony of both medical experts and found Dr. Walpole's opinion unpersuasive and insufficient to sustain Employee's burden of proof. Dr. Walpole testified that he did not know if the 2011 wound was a new wound or a reopening and that prior atypical dorsal wounds, unrelated to the work injury, were part of Employee's medical history. There was medical evidence before the Board that Employee suffered from dorsal wounds prior to the work injury of 2008 to support their decision that a causal relationship to the work injury could not be established.

Where the Board adopts the opinion of one medical expert over another, the opinion adopted by the Board constitutes substantial evidence for appellate review.³⁴ Similarly, the Board may accept or reject an expert's testimony in whole or in part.³⁵ While Employee claims that the Board failed to consider the factors that went into the entirety of Dr. Walpole's opinion, the Board is permitted to accept the testimony of Dr. Walpole, or reject the opinion entirely, in deciding that Employee failed to meet her burden of proof regarding causation. In doing so, the Board relied on substantial evidence in the record in arriving at its decision.

CONCLUSION

As previously stated, the Court must defer to the experience and specialized competence of the Board.³⁶ The Court does not weigh the evidence, determine questions of credibility, or make factual findings.³⁷ Determining witness credibility is a function exclusively reserved for the Board.³⁸ When faced with conflicting medical evidence, the Board, as the finder of fact,

³⁴ *Munyan*, 909 A.2d at 136.

³⁵ *Person-Gaines*, 981 A.2d at 1161.

³⁶ 29 *Del. C.* § 10142(d); *Histed v. E.I. DuPont de Nemours & Co.*, 621 A.2d 340, 342 (Del. 1993).

³⁷ *Arrants*, 65 A.3d at 605.

³⁸ *Simmons*, 660 A.2d at 388.

must resolve the conflict.³⁹ The Board was legally permitted to reject Employee's expert testimony and find that Employee failed to meet her burden of proof. In rejecting the medical opinion of Employee's expert, the Board did not abuse its discretion in finding that the Claimant failed to meet her burden of proof, and the decision was based on substantial evidence. For the foregoing reasons, the decision of the Industrial Accident Board is **AFFIRMED**.

IT IS SO ORDERED.

/s/ Vivian L. Rapposelli

Judge

cc: Prothonotary
Industrial Accident Board
File

³⁹ *Munyan*, 909 A.2d at 136.