IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

EDITH MARTIN,	:	
	:	C.A. No. 14A-04-001 TBD
Appellant,	:	
	:	
v.	:	
	:	
STATE OF DELAWARE, DELAWARE HOME AND HOSPITAL,	:	
	:	
Appellee.	:	

Submitted: December 17, 2014
Decided: March 27, 2015

ORDER

Upon an Appeal from the Decision of the
Industrial Accident Board.
Affirmed.

Walt F. Schmittinger, Esquire of Schmittinger and Rodriguez, P.A., Dover, Delaware; attorney for the Appellant.

Christine P. O'Connor, Esquire and Benjamin K. Durstein, Esquire of Tybout Redfearn & Pell, Wilmington, Delaware; attorneys for Appellee.

WITHAM, R.J.

The issue before the Court is whether the Industrial Accident Board's denial of Appellant's Petition for Compensation Due is supported by substantial evidence and free from legal error. For the following reasons, the decision by the Industrial Accident Board is affirmed.

DISCUSSION

This is an appeal by Claimant-Below Edith Martin (hereinafter "Martin" or "Appellant") from the decision of the Industrial Accident Board (hereinafter "the Board" or "IAB") denying Martin's Petition to Determine Additional Compensation Due.

Martin has previously been denied benefits by the IAB in a 2012 decision that she appealed but was subsequently affirmed by the Delaware Supreme Court.[1] It appears that Martin is attempting to receive compensation stemming from the same injury previously litigated, but this appeal involves a time period after her first petition for compensation was denied.

In 2007, Martin was previously involved in an industrial accident resulting in her employer compensating her for total disability benefits following a work-related injury and subsequent knee surgery. Martin worked in the food services department for the State at the Delaware Home and Hospital (hereinafter "the State" or "Employer") from 2000 to 2008. She injured her knees when she fell through a drainage grate on the floor on August 15, 2007. Martin underwent two separate

[1] *Martin v. Delaware Home & Hosp.,* 77 A.3d 272, 2013 WL 5409138, at *3 (Del. Sept, 24, 2013).

surgeries, the first in 2008 and the second in 2011. Martin's doctor placed her on total disability status from January 21, 2011 to March 30, 2011.[2] Claimant's first appearance before the Court was April 21, 2012, when she appealed a decision by the IAB that denied her compensation. In the first decision, the Board determined that Martin "had not voluntarily withdrawn from the workforce, because she had taken active steps to find a job."[3] The Superior Court reversed the Board, and held that it had abused its discretion by admitting evidence of Martin's job search that was previously unavailable.[4] The Superior Court reversed and remanded for a new Board hearing. On remand, the Board found that Martin had left the workforce voluntarily and was not entitled to any benefits. The Superior Court affirmed the Board's decision, and Martin appealed the decision to the Delaware Supreme Court. The Supreme Court affirmed the trial court's decision.

Martin now seeks to appeal a separate claim from the IAB, stemming from a knee replacement procedure on October 1, 2012. The Board issued its decision on March 11, 2014 and addressed whether Martin had voluntarily left the workforce immediately prior to the knee replacement. The parties agreed on the following facts:

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[2] *Martin v. Delaware Home & Hosp.*, 2013 WL 1411241, at *1 (Del. Super. Apr. 8, 2013) aff'd sub nom. *Martin v. Delaware Home & Hosp.*, 77 A.3d 272 (Del. 2013).

[3] *Martin v. State*, Hearing No. 1307651, slip op. (IAB June 15, 2011).

[4] *Delaware Home & Hospital v. Martin*, C.A. No. K11A–07–001, slip op. (Del.Super.Feb.21, 2012).

"Claimant was medically totally disabled from October 1, 2012 through November 1, 2012 and again from January 9, 2013 through July 30, 2013."[5] The Claimant argues she was also totally disabled from November 1, 2012 to January 9, 2013, while the Employer argues that she voluntarily removed herself from the workforce during this period.

The Claimant also filed a Petition to Determine Additional Compensation Due which was an appeal of the Utilization Review determination that denied physical therapy treatment for Claimant.

STANDARD OF REVIEW

It is well settled that this Court's appellate review of the IAB's factual findings is limited to determining whether the Board's decision is supported by substantial evidence.[6] Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[7] The Court views the facts in the light most favorable to the prevailing party below.[8] The Court does not weigh the evidence, determine questions of credibility or make its own factual findings.[9]

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[5] Appellant's Op. Br. At 3.

[6] *Bullock v. K-Mart Corp.*, 1995 WL 339025, at *2 (Del. Super. May 5, 1995) (citing *General Motors v. Freeman*, 164 A.2d 686, 688 (Del. 1960)).

[7] *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981) (quoting *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966)).

[8] *Chudnofsky v. Edwards*, 208 A.2d 516, 518 (Del. 1965).

[9] *Bullock*, 1995 WL 339025, at *2 (citing *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66-67 (Del. 1965)).

Absent any errors of law, which are reviewed *de novo*, a decision of the IAB supported by substantial evidence will be upheld unless the Board abused its discretion.[10] The Board abuses its discretion when its decision exceeds the bounds of reason in view of the circumstances.[11]

DISCUSSION

The Board concluded its deliberations on March 10, 2014 and denied Appellant benefits for two reasons. The first is that the Appellant had not worked since 2008 and did not have any wages to replace at the time of the surgical procedure. The second is that the Board believed the evidence showed Appellant had totally removed herself from the labor market altogether based on the lack of evidence of a reasonable job search.

The Board's factual finding that Appellant voluntarily removed herself from the job market is supported by substantial evidence.

The Appellant argues that the Board applied an improper burden of proof on the Appellant, because she should not have to prove she has conducted a reasonable job search. However, Appellant is incorrect, as the moving party bears the burden of proof.[12] The Appellant further chooses to rely on the 2011 appeal, however,

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[10] *Hoffecker v. Lexus of Wilmington*, 36 A.3d 349, 2012 WL 341714, at *2 (Del. Feb. 1, 2012) (TABLE) (citing *Person-Gaines v. Pepco Holdings, Inc.*, 981 A.2d 1159, 1161 (Del. 2009)).

[11] *Id.*

[12] *Redman v. State of Delaware (C.A. 14A-05-006 JAP)* quoting *Walt v. Del. Home & Hosp. For Chronically Ill*, 2007 WL 1947370, at*2.

Appellant's prior claims do not hold as precedent for present-day litigation. Appellant argues that the Board used a shifting burden of proof analysis for a Petition for Review and displaced worker doctrine under *Franklin Fabricators v. Irwin,* and that this is an improper standard for this case.[13] The Appellant argues that the Board erroneously placed a higher burden of proof on the Appellant in this case by requiring her to prove that she had undertaken a reasonable job search, and for that reason the Board exceeded its bounds.

The Appellant fails to cite any case law that distinguishes a voluntary removal case from the displaced worker doctrine. From Appellant's brief, it appears that she believes the displaced worker doctrine was used by the Board because the Board placed the burden of a "reasonable job search" upon the Appellant, and because the Board found she had not conducted a reasonable job search, believes the burden was too high. However, the Court does not find that the Board placed any higher burden on the Appellant than is typical for voluntary removal cases. The Appellant cited *Hanover Foods v. Webster* as an example of the Board utilizing a lower standard of care than the Board did in the present case, because the Claimant in *Webster* was awarded total disability benefits.[14] In *Webster*, however, the Board found that the Claimant did not voluntarily remove herself from the workforce because the Board believed that the "evidence of efforts on the part of the claimant to find work during

[13] 306 A.2d 734 (Del. 1973).

[14] Appellant's Op. Br. At 16.

the relevant period in question is sufficient..."[15] In *Webster*, the Claimant's attempts at securing substitution employment were considered sufficient by the board and her testimony was deemed credible.[16] It appears that Appellant's Counsel is attempting to conflate the burden of proof required by the Appellant to prove her efforts in achieving alternative employment, with the Board's authority to make a credibility determination.

The Board found that "[o]ut of the thirteen positions that Claimant said she applied for, nine of them had no application on file from her, three were not able to verify one way or another where Claimant applied, and only one employer said that Claimant applied."[17] The Board made a determination regarding Appellant's testimony and found that her testimony was not credible. "The function of reconciling inconsistent testimony or determining credibility is exclusively reserved for the Board."[18] These credibility determinations were solely the function of the Petition Board. Appellant has failed to establish how these credibility decisions were somehow the product of an abuse of discretion. Thus, there is substantial evidence to support the Petition Board's decisions regarding credibility determinations of the Appellant and any testifying witnesses.

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[15] *Hanover Foods v. Webster*, 2006 WL 2338046, at *2 (Del. Super. July 21, 2006).

[16] *Id.* at *1.

[17] IAB Decision at 11.

[18] *Simmons v. Del. State Hosp.*, 660 A.2d 384, 388 (Del. 1995) (citing *Breeding v. Contractors-One-Inc.*, 549 A.2d 1102, 1106 (Del. 1988)).

Appellant's attempts to argue that disability benefits are available even when the employee is not working for the employer. However,"[t]he purpose of total disability compensation is to compensate for the loss of earning capacity, or in other words, to replace wages."[19] The Employer cites to *Melvin v. Playtex Apparel, Inc.* and its progeny, which held that reasonably sought alternative employment is required to entitle a former employee to total disability benefits.[20] This is not, as Appellant has intimated, a displaced worker case where a shifting burden of proof analysis is required. However, it is the moving party's responsibility to bear the burden of proof.[21] Essentially, the Board found that disability benefits "are meant to be wage replacement benefits," and that a voluntary withdrawal from the workplace means that there are no wages to be replaced.[22]

The Court places emphasis on the extensive testimony of witnesses in this case considered by the Board regarding Appellant's attempts at finding gainful employment. The Board found that Appellant's job efforts were minimal, as it was not confirmed that all job applications Appellant cited were actually sent to various

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[19] *Melvin v. Playtex Apparel, Inc*., 2013 WL 4086803, at *4 (Del. Super. June 4, 2013) aff'd, 2015 WL 854333 (Del. Feb. 27, 2015). Employer also cited *Wilson v. Chrysler*, *L.L.C.*, 2011 WL 2083935, (Del. Super. Apr. 26, 2011), where the Court held that benefits were "Essentially wage replacement benefits."

[20] *Melvin*, See e.g., *Wilson*, 2011 WL 2083935; *Flax v. State*, 2003 WL 21976582 (Del. Super. Aug. 15, 2003); *Boone v. Syab Services*, 2006 WL 2242755 (Del Super. July 19, 2006).

[21] *Redman v. State of Delaware* (C.A.14A-05-006) (Del. Super. Ct.)(Feb.4, 2015).

[22] *Wilson v. Chrysler*, *L.L.C.*, 2011 WL 2083935, at *2 (Del. Super. Apr. 26, 2011).

employers. The Board found her testimony was not credible because "there is no indication that Claimant actually submitted applications with those employers or if she simply called to see if they were hiring, and there is no indication that Claimant followed up with any of the businesses."[23] The Appellant further argued that her attending business school should stand as proof of her efforts.[24] However, the Board held that attending business school in 2011 had no bearing on efforts made by Appellant with respect to the present claim because it took place prior to a 2011 surgery, and was too long ago to be considered.[25]

Appellant's reliance on the Board's 2011 decision is incorrect. First, the Board's 2011 decision is not controlling precedent. It would be improper for this Court to consider evidence that stemmed from Appellant's prior case and apply it to her case at bar. Further, Appellant's case from 2011 concerns a different period of time in Appellant's life when she was injured. The present case revolves around the time in Appellant's life immediately prior to her 2012 knee replacement. This is a different time period than Appellant's original claim, which involved a period of time prior to March 30, 2011. Accordingly, this portion of Appellant's argument fails. The Court finds that Appellant has failed show that the Board's determination was not supported by substantial evidence. Accordingly, the Court shall not disturb the

[23] IAB Decision at 15.

[24] Appellant's Op. Br. At 15.

[25] IAB Decision at 15.

Petition Board's decision on appeal.

Utilization Review

Although the parties discussed the utilization review before the Board, the matter was not brought up in this appeal. The Board found that neither party was bound by the Utilization Review determination in any way, since the parties amicably resolved the issue prior to their appeal.

Filings

The Court believes it is important to note that Appellant is delinquent in her reply brief. The Court sent a letter to Appellant on December 3, 2014, providing notice that pursuant to Superior Court Rule 107(f) any reply briefs were considered delinquent.

CONCLUSION

For the foregoing reasons, the decision of the IAB is ***affirmed.***

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
Resident Judge

WLW/dmh