IN THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR KENT COUNTY

EDITH MARTIN,	:	
	:	C.A. No: 12A-05-007 (RBY)
Appellant,	:	
	:	
V.	:	
	:	
DELAWARE HOME & HOSPITAL,	:	
	:	
Appellee.	:	

Submitted: January 18, 2013 Decided: April 8, 2013

Upon Consideration of Appellant's Appeal from the Industrial Accident Board AFFIRMED

ORDER

Walt F. Schmittinger, Esq., Schmittinger & Rodriguez, P.A., Dover, Delaware for Appellant.

Christine P. O'Connor, Esq., and Andrew M. Lukashunas, Esq., Tybout, Redfearn & Pell, Wilmington, Delaware for Appellee.

Young, J.

C.A. No.: 12A-05-007 (RBY)

April 8, 2013

SUMMARY

Edith Martin ("Appellant" or "Martin") was an employee of Delaware Home and Hospital ("Employer or "Appellee"). While working as a dietary aid, Martin was involved in an accident, suffering injury to both knees. In August 2007, Appellant began treatment for her injuries. She would ultimately undergo two surgical procedures. The first related surgery occurred in 2008, and the second in 2011. As a result of the 2011 surgery, the treating physician placed Appellant on total disability status. That status continued until March 30, 2011, at which time Martin was permitted to return to the workforce, with some restrictions. Martin filed a Petition with the Industrial Accident Board (the "Board") seeking recovery of total disability benefits for the time following her surgery during which she had been on total disability status.

After the first hearing, the Board issued a decision finding Martin eligible for total disability benefits for the closed time period in question. Employer appealed the decision to the Superior Court, alleging that the Board improperly admitted Martin's testimony regarding her job search efforts. In February 2012, this Court reversed the Board's decision, remanding the case for a new hearing. This second hearing was to take place after proper discovery responses by Martin and opportunity for Employer to investigate. However, Martin once again failed to provide adequate discovery responses. As a result the Board excluded her testimony regarding retraining and job search efforts from the second hearing. Following the hearing after remand, the Board issued a decision finding Martin ineligible for benefits. This decision was based on the Board's conclusion that she had voluntarily removed herself from the workforce,

C.A. No.: 12A-05-007 (RBY)

April 8, 2013

and therefore had no lost wages to replace. Before the Court is Martin's appeal of the

Board's May 2012 decision. This Court finds no error of law, abuse of discretion or

lack of substantial evidence. Therefore, the decision of the Industrial Accident Board

is AFFIRMED.

FACTS

Appellant Edith Martin was employed by Delaware Home and Hospital as a

dietary aid. On August 15, 2007, Martin suffered an injury to both knees in an

industrial accident. Employer conceded that Martin's injury was compensable, paying

benefits stemming therefrom. On August 27, 2007 Appellant began treatment with

Dr. Glen Rowe. Appellant's first related surgery was in 2008. Martin's second

surgery took place in January 2011. Following her second surgery, Dr. Rowe placed

Martin on total disability status from January 21, 2011 to March 30, 2011. As of

March 30, Martin was permitted to work with the restriction of standing no more than

two hours per day and sitting no more than six hours per day. Appellant filed a

Petition to Determine Additional Compensation Due with the Industrial Accident

Board. The petition sought to recover total disability benefits for the time during

which Appellant had been on total disability status.

On June 14, 2011 the first Board hearing took place. At that hearing, Appellant

testified that she remained symptomatic, continued to have swelling, and required a

cane (per doctor's orders). She also continued to require a narcotic pain reliever and

anti-inflammatory medication daily. Appellant testified at the first hearing about her

retraining and attempts to find suitable new employment. According to the testimony

Martin gave at that hearing, she had attended vocational rehabilitation, tried to work

3

C.A. No.: 12A-05-007 (RBY)

April 8, 2013

as a cashier at Goodwill but was unable to perform the required job activities; and had attended the Harris School of Business to obtain a degree in medical billing and coding. Despite these efforts, Martin was unable to find a job from the time of her graduation up until the time of her surgery.

Appellant testified that she continued her job search after the 2011 surgery. Again, she was unable to find a position. The Employer objected to Appellant's testimony regarding her job search efforts based upon the fact that no documents had been provided in response to its discovery requests on the topic. The Board overruled the objection and permitted the testimony on the issue. The Employer also took the position that total disability benefits are wage-replacement benefits and, as such, Appellant was not entitled to such benefits because she had not been earning any wages prior to the 2011 surgery.

The Board issued a decision on June 15, 2011, in which it held that the Appellant was entitled to total disability benefits from the date of her 2011 surgery through the date she was released to work in a sedentary capacity by Dr. Rowe. According to the Employer, the Board's decision rested on the determination that Appellant had not voluntarily removed herself from the workforce, entitling her to total disability benefits for the closed period of disability following the surgery. The Employer appealed the Board's 2011 decision to this Court, presenting two arguments. First, Employer argued that the Board erred in allowing Appellant to offer testimony related to any job search efforts, as proof those efforts was requested during discovery but not provided. Additionally, Employer argued that total disability benefits are wage-replacement benefits. As Martin had not been earning any wages

C.A. No.: 12A-05-007 (RBY)

April 8, 2013

prior to her 2011 surgery, the Employer continued to believe that she was not entitled to such benefits as a matter of law.

In a February 21, 2012 opinion, this Court reversed the Board's award of total disability benefits, remanding the matter for rehearing by the Board after "full discovery and disclosure." The decision of this Court at that time was based on Martin's reliance on a "razor thin distinction" in contending that she was not required to respond to Employer's discovery request because she had no written documentation of her job search. The Court found that while administrative boards are not bound by the formal rules of evidence, they may not "relax rules which are designed to ensure the fairness of the procedure." It was fundamentally unfair for the Board to allow Martin's testimony when she had failed to produce the evidence to the opposing party. Employer was unable to cross-examine Martin meaningfully, because they were unaware of her job search efforts. The Court did not specifically address Employer's second argument on appeal.

The remand hearing was held on April 25, 2012. At that hearing, Martin once again attempted to testify regarding her alleged efforts to remain part of the workforce. Before such testimony could be elicited, the Employer advised the Board that Martin had failed to provide a timely or complete response to its discovery requests. Martin's response to the relevant discovery request was a handwritten list of businesses, without dates, names or contact information of any kind. This meager response was provided to the Employer less than 48 hours before the hearing was to

¹ Delaware Home and Hospital v. Martin, 2012 WL 1414083 (Del. Super. Feb. 21, 2012).

C.A. No.: 12A-05-007 (RBY)

April 8, 2013

take place. As a result, the Employer objected to Martin being permitted to testify

about her schooling or efforts at re-employment. The Board sustained the Employer's

objection, refusing to let Martin testify about her retraining or job search. The Board

also excluded Martin's prior testimony from the first hearing from consideration.

However, the transcript from the Harris School of Business was admitted as an

exhibit.

On May 14, 2012, the Board issued a decision on the matter. It held that Martin

had voluntarily removed herself from the workforce. Therefore, she was not entitled

to total disability benefits for the period following her 2011 surgery. The Board

reached such a conclusion based on a lack of evidence relating to efforts to return to

the workforce. In reaching the decision, the Board noted that "[e]ven when given a

second chance to produce the [job search] information prior to the remand hearing,

Claimant failed to produce the evidence in a timely fashion."² As a result, the Board

found that Martin had not demonstrated the existence of any wages to replace. Martin

is appealing the Board's post-remand decision to this Court.

STANDARD OF REVIEW

For administrative board appeals, this Court is limited to reviewing whether the

Board's decision is supported by substantial evidence and free from legal error.³

Substantial evidence is that which "a reasonable mind might accept as adequate to

² Martin v. Delaware Home and Hospital, IAB No. 1307651 (May 12, 2012).

³ 29 Del C. §10142(d); Avon Prods. v. Lamparski, 203 A.2d 559, 560 (Del. 1972).

6

C.A. No.: 12A-05-007 (RBY)

April 8, 2013

support a conclusion."⁴ It is "more than a scintilla, but less than preponderance of the evidence."⁵ An abuse of discretion will be found if the board "acts arbitrarily or capaciously...exceeds the bounds of reason in view of the circumstances and has ignored recognized rules of law or practice so as to produce injustice."⁶ Questions of law will be reviewed *de novo*.⁷ In the absence of an error of law, lack of substantial evidence or abuse of discretion, the Court will not disturb the decision of the board.⁸

DISCUSSION

Appellant raises several arguments on appeal. First, Martin argues that the Board erred in concluding that she voluntarily removed herself from the workforce, because that determination ignored undisputed evidence in the record to the contrary. It is Appellant's position that the previous testimony she gave should remain before the Board, as the Court's ruling was to give Employer an opportunity to discover and investigate, which opportunity was allegedly given. Appellant contends that Employer was well aware of her arguments and the evidence as they were disclosed in the original hearing. Apparently, Martin believes that even if she did not comply

⁴ Olney v. Cooch, 425 A.2d 610, 614 (Del. Super. 1981) (citing Consolo v. Fed. Mar. Comm'n, 383 U.S. 607, 620 (1966)).

 $^{^5}$ Id. (quoting Cross v. Calfano, 475 F.Supp. 896, 898 (D. Fla. 1979)).

⁶ Delaware Transit Corp. v. Roane, 2011 WL 3793450, at *5 (Del. Super. Aug. 24, 2011) (quoting Straley v. Advanced Staffing, Inc., 2009 WL 1228572, at *2 (Del. Super. April 30, 2009)).

⁷ Anchor Motor Freight v. Ciabattoni, 716 A.2d 154, 156 (Del. 1998).

⁸ Carrion v. City of Wilmington, 2006 WL 3502092, at *3 (Del. Super. Dec. 5, 2006).

C.A. No.: 12A-05-007 (RBY)

April 8, 2013

with the Court's opinion and provide the requisite discovery responses, Employer still

had everything it needed to present its case fairly.

Next, Appellant argues that the Board's focus on her job search is an additional

error, because for the time period in question she was indisputably medically

restricted from working in any capacity. It is Martin's view that there was no reason

at all for her to be looking for work at the time in question. She alleges that the

Board's focus on that matter is misplaced. Appellant's claims that the relevant issue

the board should have been concentrating on is whether she performed a reasonable

job search, thus entitling her to total disability benefits. The Board, Appellant argues,

ignored the possibility that there are other ways to establish a continued desire to

work aside from those it excluded from consideration. In reaching the decision,

Appellant contends, the Board relied on cases that are not consistent with the

evidence presented in her case. Martin argues that all the cases supporting the

Board's decision are distinguishable, because none of them involved a claimant who

obtained additional training/education geared towards improving both her skills and

her job prospects.

Finally, Appellant argues that her temporary partial disability benefits were

already commuted by a prior order of the Board. She believes this prior commutation

represents a concession by the carrier that she continues to have a loss of earning

capacity going forward, which was compensated in a lump sum at the time of

commutation. This concession, she alleges, inherently demonstrates that she has not

voluntarily withdrawn from the labor market, as it assumes the existence of a lost

earning capacity.

8

C.A. No.: 12A-05-007 (RBY)

April 8, 2013

Appellant's employer, Delaware Home and Hospital filed an Answering Brief in response to the appeal. In its Brief, the Employer sets forth arguments in opposition to each of the issues Appellant has raised. As Employer's arguments closely follow the reasoning of both the Board's opinion and this Court's decision they will not be summarized separately.

The Board found that Martin, as the claimant, had the burden of proof to demonstrate that she was entitled to receive total disability benefits. Martin had not been working immediately prior to the 2011 surgery. In fact, she had last worked in 2008. While a period of time away from the workforce will not necessarily permanently preclude an injured worker from receiving wage replacement benefits through workers' compensation, in order to remain eligible the worker must show that she intended to remain in the workforce. According to the Board and Employer's Answering Brief, Appellant did not provide evidence of a job search. This lead to the determination that she voluntarily removed herself from the workforce, and thus was not entitled to benefits. The Board's decision was supported by several previous Board decisions. Two of these prior cases were thoroughly discussed in the Board's decision, Appellant's Opening Brief, and Appellee's Answering Brief.

Whether the Board finds the present situation to be similar to or distinguishable from prior scenarios is an issue of fact. So long as the Board's conclusions are supported by substantial evidence, the administrative decision will stand. It is undisputed that Appellant was not working immediately prior to the 2011 surgery. As

⁹ Johnson v. Chrysler Corp., 213 A.2d 64, 66 (Del. 1965).

C.A. No.: 12A-05-007 (RBY)

April 8, 2013

she failed to comply with this Court's prior Opinion, twice failing to respond appropriately to discovery requests, the Board excluded evidence of her job search. As a claimant, Appellant had the burden of proving her claim. The result was that, at the remand hearing, Martin was unable to make any showing that she intended to remain or return to the workforce.

Appellant takes issue with the Board's exclusion of her testimony from the hearing, and her prior testimony from the record considered by the Board in reaching a decision. According to the applicable administrative statute, the Board is bound by "the rules of evidence applicable to the Superior Court of the State of Delaware...insofar as practicable," and is otherwise entitled to use discretion in determining the admissibility and weight given to evidence in reaching a decision. The Board ultimately determined that Appellant's failure to produce complete and timely discovery responses was grounds for exclusion of the related evidence, as admission would be prejudicial to Employer. The Board also determined that Appellant's prior testimony on the matter would be excluded from consideration, because it had been erroneously admitted in the first instance. That decision was based on the Board's discretion and application of this Court's previous opinion in the case. The Employer agrees with the Board's findings on this topic. Appeals based upon such discretionary decisions will be reviewed only to check for an abuse of the Board's discretion. There is no question that the Board acted within its discretion.

¹⁰ Hunter v. Wright Transf. & Supply Co., 49 A.2d 296, 298 (Del. 1949).

¹¹19 Del. C. §2301A(I); 19 Del. Admin. C. §1331-14.0, 14.3.

Martin v. DE Home & Hospital C.A. No.: 12A-05-007 (RBY)

April 8, 2013

Case law and the administrative code explicitly give the Board authority to exercise discretion in the exact manner that Appellant raises as an issue.¹²

The Appellant's final contention, that the prior commutation should be viewed as evidence of her intention to remain in the workforce, is without merit. The commutation of Appellant's remaining partial disability benefits was a voluntary settlement of a portion of her claim entered into by both parties. In reaching such a settlement, Employer alleges that it was in no way conceding that Claimant was going to remain in the workforce "in perpetuity." Such a contention is not only irrelevant to the issue at hand, as this is an entirely separate claim, it is not logical or supported by the record. Stated otherwise, it is simply a non-sequitur.

Appellant was provided two opportunities to provide discovery responses on the subject of her training and job search to the opposing party. She chose not to respond at all the first time. After remand, Appellant provided a meager response less than 48 hours before the hearing was to occur. As a direct result of Appellant's failure to comply, the Board excluded the evidence from the hearing, and did not consider the past testimony that had been erroneously admitted at the first hearing. The

¹²See e.g., Bolden v. Kraft Foods, 889 A.2d 283 (Del. Dec. 21, 2005)(TABLE) (discussing the IAB's discretion to admit or exclude expert witness testimony); *McDonalds v. Fountain*, 2007 WL 1806163, at *2 (Del. Super. May 30, 2007)(holding that IAB did not err as a matter of law or abuse its discretion in excluding hearsay testimony that it found to be more prejudicial than probative); *Torres v. Allen Family Foods*, 672 A.2d 26, 31 (Del. 1995)("In order to ensure the efficient adjudication of claims, the Board has the power to make its own rules. Pursuant to that power, the Board may relax the rules of evidence and allow the proceedings to be less formal than a trial... Presumably the Board, with its background and expertise, is able to evaluate evidence without the restrictions and safeguards imparted by the formal rules of evidence.").

C.A. No.: 12A-05-007 (RBY)

April 8, 2013

ultimate result of Appellant's wilful noncompliance was that she was unable to meet

the requisite burden of proof to be eligible for benefits. As discussed above,

administrative agencies are given discretion to decide evidentiary issues and

questions of credibility, and to make factual findings.¹³ Appellant has not

demonstrated a lack of substantial evidence, abuse of discretion or error of law.

Therefore, the Court will not disturb the decision of the Industrial Accident Board.

CONCLUSION

For the foregoing reasons, the decision of the Industrial Accident Board is **AFFIRMED**.

IT IS SO ORDERED.

/s/ Robert B. Young

J.

RBY/lmc

oc: Prothonotary

cc: Counsel

Opinion Distribution

File

¹³ *Johnson*, 213 A.2d at 66.