IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,	)	
	)	
Employer below, Appellant,	)	C.A. No: N10A-09-016 JRS
	)	
v.	)	
	)	
DAWN STURGEON,	)	
	)	
Claimant below, Appellee.	)	

Date Submitted: March 24, 2011
Date Decided: June 9, 2011

Upon Appeal from the Industrial Accident Board.

REVERSED *and* **REMANDED.**

O R D E R

This 9th day of June, 2011, upon consideration of the appeal of the State of Delaware ("the employer") from the decision of the Industrial Accident Board ("the Board") denying its Petition to Terminate Benefits ("the Petition"),[1] the Court finds as follows:

[1] The Industrial Accident Board of the State of Delaware, Decision on Petition to Terminate Benefits, Hearing No: 1275651 (June 18, 2010) (hereinafter "IAB Decision") at 11.

1. Claimant, Dawn Sturgeon ("Sturgeon"), worked for the Governor Bacon Health Center (a nursing home) for over twenty years.[2] Sturgeon's responsibilities included serving residents their breakfast on carts, feeding the residents, returning dishes to the kitchen, washing dishes, and preparing food for lunch.[3]

2. In September, 2005, Sturgeon suffered an injury to her lower back while pulling a cart.[4] Dr. Kalamchi, the examining doctor at the time, recommended surgery, but Sturgeon elected to receive conservative care before considering surgery.[5] Because she was unable to work for some time, Sturgeon received temporary disability benefits at the rate of $308.48 per week based on a weekly wage of $462.69.[6] She eventually returned to her job.[7]

3. On February 25, 2008, Sturgeon again injured her lower back while at work.[8] She tried to work part-time in a light duty capacity for about three months,

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[2]IAB Decision at 2.

[3]*Id.*

[4]*Id.*

[5]*Id.*

[6]*Id.*

[7]*Id.* at 2-3. The record is unclear as to specific dates.

[8]*Id.* at 3.

but was unable to continue.[9] Sturgeon went on total disability in September, 2008.[10]

4. On April 2, 2008, Sturgeon was examined by Dr. Samuel Matz, an orthopedic surgeon.[11] Sturgeon complained of low back pain that radiated down her left leg and tingling and discomfort in the toes of her left foot.[12] At the time, Sturgeon was taking Percocet® and Vicoprofen® for pain and undergoing injections.[13] Dr. Matz diagnosed Sturgeon with lumbar disc disease caused by the injury she sustained at work in September 2005 and exacerbated by the second injury in February 2008.[14] Dr. Matz agreed with Dr. Kalamchi that surgery was reasonable and necessary.[15]

5. On December 29, 2009, Dr. Matz again examined Sturgeon. Although he found that Sturgeon's physical condition remained the same as before, Dr. Matz opined that Sturgeon could return to work in a sedentary job that allowed her to

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[9]IAB Decision at 3.

[10]*Id.*

[11]*Id.*

[12]*Id.*

[13]*Id.*

[14]*Id.*

[15]*Id.* at 4.

take breaks.[16] He also opined that surgery would improve Sturgeon's functional capacity.[17]

6. Dr. Matz's most recent examination of Sturgeon took place on May 25, 2010.[18] Sturgeon complained that her pain was getting worse.[19] Dr. Matz's diagnosis of Sturgeon again remained the same. He also continued to opine that Sturgeon could perform sedentary work that allowed her to take breaks.[20] Dr. Matz reviewed a March 2010 labor market survey ("LMS") and opined that, while Sturgeon could not return to work as a kitchen helper or work in extreme temperature conditions, the jobs identified in the LMS appeared to be within Sturgeon's functional level.[21]

7. Based upon Dr. Matz's finding that Sturgeon was capable of returning to the work force, the employer filed a Petition for Termination of Benefits. The Board conducted a hearing on June 18, 2010. Witnesses for the employer included Dr. Matz, who testified as to his findings regarding Sturgeon's condition and

[16]IAB Decision at 4.

[17]*Id.*

[18]*Id.*

[19]*Id.*

[20]*Id.* at 5.

[21]*Id.*

ability to work.[22] Based on Dr. Matz's findings, Robin Subers, a vocational expert, prepared a LMS and testified that she identified jobs that she believed to be within Sturgeon's vocational and physical capabilities.[23] Subers identified nine jobs that were within Sturgeon's capabilities, including cashier, receptionist, and telemarketer.[24] Subers confirmed with each potential employer that Sturgeon's use of a cane and need for breaks was acceptable.[25] The average weekly wage for the jobs identified in the LMS was $343.28 per week.[26]

8. Sturgeon testified hat she did not believe she could return to work due to the amount of pain she continues to endure, complicated by the side-effects of the medications she ingests for pain management.[27] She asserted that she could not function without her pain medications, which she must take every four to six hours, and that, upon ingestion, she immediately would fall asleep because the medications made her extremely groggy.[28] Sturgeon testified that her husband

[22]IAB Decision at 2-5.

[23]*Id.* at 5-6.

[24]*Id*. at 6.

[25]*Id.*

[26]*Id.*

[27]*Id.* at 7.

[28]*Id*.

must do all of the cooking, laundry, house cleaning and shopping because she was unable to perform such common household tasks due to her condition. Further, she asserted that she was unable to stand for long periods without a cane and that her husband had to drive her to and from her doctor's appointments.[29] Sturgeon also testified that she had not discussed the side effects of the medications with her doctors nor had she tried different types of medications because the medication that she was already taking was effective in controlling her pain.[30] Finally, Sturgeon explained that she had not undergone surgery because her carrier had not approved it.[31] Sturgeon stated that she would consider whether to return to work if and when she had the recommended surgery.

9. Sturgeon's husband, Raymond Sturgeon, testified that he always knew his wife to be an active and motivated person prior to her injuries.[32] He testified that since his wife's injury, he has performed all of the simple household chores, and also helped his wife with personal hygiene care.[33] Mr. Sturgeon further

[29]IAB Decision at 7.

[30]*Id.* at 8.

[31]*Id.*

[32]*Id.*

[33]*Id.*

testified that he and his wife are no longer physically intimate.[34] He confirmed that Sturgeon relies on her medications to relieve her pain, and that thirty minutes after taking the medications, she falls asleep.[35]

10. After considering the testimony of Dr. Matz, Sturgeon and her husband, and reviewing the findings of Subers, the Board denied the Petition by decision dated August 20, 2010. The Board determined that the employer had not met its burden under 19 *Del. C.* §2347 to "show that [Sturgeon's] condition or circumstances have changed since [the employer's prior determination that Sturgeon was totally disabled] such that her disability has diminished and she is now able to return to work in some capacity."[36] The Board determined that, because the employer agreed that Sturgeon's total disability from work recurred on September 18, 2008, the employer must show a change in Sturgeon's condition or circumstances since that time that would make her presently able to return to work.[37]

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[34]IAB Decision at 8.

[35]*Id.*

[36]*Id.* at 9. This standard is known as the "change in condition standard." *See infra* n. 51.

[37]IAB Decision at 9. After suffering the second injury in February of 2008, Sturgeon returned to work part-time from May through August, 2008. IAB Decision at 7. Unable to work with the severe pain, Sturgeon went on total disability on September 18, 2008.

11. The Board found that Dr. Matz's testimony regarding Sturgeon's ability to return to sedentary work "did not reveal much knowledge about [Sturgeon's] actual daily activities or dysfunction . . . [limiting] the persuasiveness of his opinion as to the degree of [Sturgeon's] disability."[38] Instead, the Board was persuaded by the "emotional and credible testimony" by Sturgeon and her husband that Sturgeon is unable to perform even sedentary work on a consistent basis.[39] Accordingly, the Board found that Sturgeon's disability "has [not] diminished such that termination of total disability benefits is warranted at this time."[40]

12. The employer appeals the Board's determination on the ground that the Board committed legal error as a matter of law by applying the incorrect legal standard.[41] The employer contends that the "change in condition" standard is not the correct standard by which to consider a petition for termination of benefits. Instead, the employer argues that the appropriate standard is whether the employee "is no longer entitled to receive that compensation."[42] The Board, as best as the Court can discern, does not disagree with the employer that the "change in

[38]IAB Decision at 10.

[39]*Id*. at 11.

[40]*Id*.

[41]Appellant's Opening Br. ("Opening Br.") at 7.

[42]*Id.* at 8; *Brokenbrough v. Chrysler Corp.*, 460 A.2d 551 (Del. Super. 1983).

condition" standard is not applicable to petitions for termination of benefits. The Board argues, however, that it did not apply this standard and that the employer's suggestion to the contrary is not supported by record.[43]

13. This Court has jurisdiction to hear and determine appeals from the Board.[44] The scope of review is narrow. "[I]t is well established that the appellate court does not sit as trier of fact, rehear the case, or substitute its own judgment for that of the Board."[45] Questions of law, however, are subject to *de novo* review. In that instance, the appellate court must determine whether the Board erred in formulating or applying legal precepts.[46] Therefore, the "only role of the appellate court is to determine whether the decision of the Board is supported by substantial evidence and free of legal error."[47] In its review, "the Court will consider the record in the light most favorable to the prevailing party below."[48]

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[43] Appellee's Resp. ("Resp.") at 6 ("The appropriate standard of review that the Industrial Accident Board or its Hearing Officer shall apply when considering a petition for termination of total disability benefits is whether the claimant remains totally disabled. . . .[T]he employer must first show that the claimant is . . . "medically employable.").

[44] 19 *Del. C.* §2350.

[45] *Standard Dist., Inc. v. Hall*, 897 A.2d 155, 157 (Del. 2006) (citing *Johnson v. Chrysler*, 213 A.2d 64, 66-67 (Del. 1965)).

[46] *See Anchor Motor Freight v. Ciabattoni*, 716 A.2d 154, 156 (Del. 1998); *Hudson State Farm Mut. Ins. Co.*, 569 A.2d 1168, 1170 (Del. 1990).

[47] *Standard Dist., Inc.*, 897 A.2d at 157.

[48] *General Motors Co. v. Guy*, 1991 WL 190491, *3 (Del. Super. Aug. 16, 1991).

14. A careful examination of the Board's decision reveals that the Board required an initial showing by the employer that Sturgeon "is not completely incapacitated."[49] Later in its decision, when making its determination as to whether the employer proved that Sturgeon is capable of returning to work, the Board required the employer to "show that [Sturgeon's] disability has diminished such that termination of total disability benefits is warranted at this time."[50] As discussed below, these standards of proof were not appropriate given the procedural posture of the case.

15. In *Brokenbrough*, the court held that the "change in condition" standard articulated in 19 *Del. C.* §2347 applies to *modifications* of a previously negotiated award.[51] In cases dealing with *cessation* of disability benefits, *Brokenbrough* held that the Board is to apply the burden articulated in *Sears, Roebuck & Company v. Bigelow*: "The burden is on the employer who is making

[49]IAB Decision at 9.

[50]*Id.* at 11.

[51]*Brokenbrough*, 460 A.2d at 552 ("[I]n petitions alleging cessation of disability rather than increase or reduction, the "change in condition" standard is not an appropriate burden."); 19 *Del. C.* §2347 states, in relevant part:

> "On application of any party in interest on the ground that the incapacity of the injured employee has subsequently terminated, increased, diminished or recurred ... the Board may at any time, but no oftener than once in 6 months, review any agreement or award .... On such review, the Board may make an award ending, diminishing, increasing or renewing the compensation previously agreed upon or awarded ...."

the application to terminate the previously agreed upon award to prove that the employee *is no longer entitled to receive that compensation*."[52] Subsequent cases that have followed the reviewing of *Brokenbrough* make clear that the employer need not show a "change in condition" on a Petition to terminate benefits but rather must show that, at the time of the Petition, the claimant is *physically able to return to work*.[53]

16. To illustrate the difference between the "change of condition" standard and the "no longer entitled to receive compensation" standard, *Brokenbrough* cites to *Ryan v. Grinnell Corp.*, observing that "[a] claim of increase or decrease of disability is grounded in the comparative condition and ability of the workman and, to prevail, must be supported by proofs which permit comparison."[54] When an employer petitions for termination of benefits, on the other hand, it is instead necessary to focus on the claimant's economic and physical qualifications.[55] "To show that a claimant's incapacity has terminated, evidence must be presented that

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[52]*Brokenbaugh*, 460 A.2d at 552 (citing *Sears, Roebuck & Company v. Bigelow*, 251 A.2d 573, 575 (Del. Super. 1969) (emphasis supplied).

[53]*See Holden v. State of Delaware*, 1996 WL 280877, *3 (Del. Super. May 16, 1996); *Bailey v. State of Delaware*, 2004 WL 745716, *4 (Del. Super. Apr. 5, 2004).

[54]362 A.2d 127, 129 (R.I. 1976); *See Brokenbrough*, 460 A.2d at 553 (citing *Ryan v. Grinnell Corp.*, 362 A.2d at 127, 129 (R.I. 1976)).

[55]*Bailey*, 2004 WL 745716 at *4

the claimant is medically able to return to work and that employment is available within the claimant's restrictions."[56]

17. The Court can find no reference to the appropriate standard in the Board's decision. Indeed, it is abundantly clear from the record that the Board impermissibly required the employer to show a "change in condition," rather than to show that Sturgeon is no longer entitled to receive compensation.[57] The Court is mindful of the Board's argument that it did, in fact, consider whether Sturgeon is capable of returning to work on some level and was satisfied that Sturgeon continued to be disabled from work.[58] The Board's contention, however, that the Hearing Officer "did not require the Employer to show a change in condition in order to prevail in the petition to terminate benefits"[59] is wholly unsupported by the record. What the record does show is that the Board's determination that Sturgeon "continues to be totally disabled from work"[60] was based upon the employer's

[56]*Id.*

[57]*See* IAB Decision at 9-11.

[58]Resp. at 8.

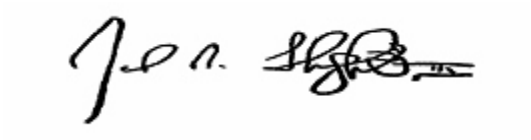
[59]*Id.*

[60]IAB Decision at 10.

failure to show a change in condition.[61] As such, the Court is left with no choice but to reverse and remand the Board's determination so that the facts may be considered under the appropriate legal standard.

18. Based on the foregoing, the decision of the Board denying the employer's Petition is **REVERSED** *and* **REMANDED** for further review consistent with this opinion.

IT IS SO ORDERED.



Judge Joseph R. Slights, III

Original to Prothonotary

cc: Heather A. Long, Esquire
Susan List Hauske, Esquire

[61] IAB Decision at 9 ("The employer must show that [Sturgeon's] condition or circumstances have changed since [September 2008] ...."); *Id.* at 10 ("[I] am convinced that [Sturgeon's] condition is unchanged since September 2008 and she continues to be totally disabled from work.").