IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

MARK ANDERSON,	)	
	)	
Claimant-Below, Appellant,	)	
	)	
v.	)	C.A. No. N11A-11-011 CLS
	)	
FLUOR MAINTENANCE,	)	
	)	
Employer-Below, Appellee.	)	
	)	

Date Submitted: April 13, 2012
Date Decided: July 10, 2012

On Appeal from the Industrial Accident Board.
AFFIRMED.

ORDER

R. Scott Kappes, Esq., Schmittinger & Rodriguez, P.A., 220 Continental Drive, Suite 203, Christiana Executive Campus, Newark, DE 19713. Attorney for Appellant.

H. Garrett Baker, Esq., Elzufon, Austin, Reardon, Tarlov & Mondell, P.A., 300 Delaware Avenue, 17th Floor, P.O. Box 1630, Wilmington, DE 19899. Attorney for Appellee.

Scott, J.

Introduction

Before this Court is Appellant, Mark Anderson's ("Appellant") appeal from the decision of the Industrial Accident Board ("Board"). The Board's denial of Appellant's Petition to determine additional compensation due ("Petition") for partial disability is free from legal error and supported by substantial evidence in the record. Therefore, the decision of the Board is **AFFIRMED**.

Background

On May 22, 2009, while working for Fluor Maintenance as a union laborer, Appellant injured his lower back. The injury occurred when the Appellant was vacuuming at a power plant. While vacuuming, Appellant attempted to free the vacuum hose that was wedged between two pipes. When the Appellant twisted his body to release the vacuum hose, he injured his lumbar spine.

Appellant filed a Petition to determine compensation due as a result of this injury. The Petition requests total and/or partial disability, payment for a repeat discogram that was denied after a utilization review, and payment for potential lumbar fusion surgery. The Board held a hearing on September 27, 2011 to address Appellant's Petition. In a written opinion, the Board denied the entirely of Appellant's claims. Appellant only appeals the Board's denial of his partial disability claim.

Appellant worked as a laborer for the union since 1996. As a laborer, Appellant's typical job activities included jack hammering, mason tending and concrete work. After the Appellant's injury on May 22, 2009, he continued to work at Fluor Maintenance until his previously scheduled layoff which occurred on May 29, 2009. It was not until May 29, 2009 that Appellant sought medical treatment for this injury.

On May 29, 2009, Dr. Paul Aguillon ("Dr. Aguillon") assessed the Appellant to have a lumbar strain/sprain and prescribed 800 mg of Ibuprofen. Appellant returned to Dr. Aguillon on June 1, 2009, as the pain continued. Appellant was diagnosed with a slipped disc at L5-S1 and was prescribed 7.5 mg of Mobic.

On June 17, 2009, Appellant was examined by Dr. Bruce Katz, ("Dr. Katz") a board certified orthopaedic surgeon with First State Orthopaedics, for lower back pain. Dr. Katz testified by deposition for the Appellant at the Board hearing. After Dr. Katz's initial examination of the Appellant, he diagnosed him with a muscular injury known as a lumbar strain and sprain. Appellant was instructed to start therapy and to return back for an appointment a month later; in the meantime, Dr. Katz prescribed Skelaxin and Naprosyn. Dr. Katz placed Appellant on "light duty" restriction. After several other visits with Dr. Katz, Appellant still had left sided lower back pain; Dr. Katz did not take him off of his light duty work status.

Appellant had an MRI performed on July 24, 2009 which was consistent to someone of Appellant's age and activity level even though it showed a small disc protrusion at the L4-L5 level. Appellant was functioning normal and only had minor, intermittent pain which alleviated by over the counter medication. Appellant did not take prescription painkillers.

On October 5, 2009, Dr. Katz scheduled the Appellant for a functional capacity evaluation ("FCE"). The recommendations indicated in the FCE were listed as full-time work and heavy duty. Heavy duty work consists of exerting 50 to 100 pounds of force occasionally, and/or 25 to 50 pounds of force frequently and 10 to 20 pounds of force constantly to move objects. While Appellant characterized his employment as "very-heavy duty", it was actually considered only "heavy duty."[1]

Dr. Bruce Grossinger, D.O., ("Dr. Grossinger"), a board certified neurologist and pain management physician, examined the Appellant on August 6, 2009, November 30, 2010, and July 8, 2011. Dr. Grossinger testified within the standard of reasonable medical probability on behalf of the Employer. Dr. Grossinger noted that the treatment Appellant received between the time of the accident and his initial visit was beneficial and caused his pain to decrease, consistent with a lumbar

[1] The job analysis for Fluor Maintenance states that physically, workers must be able to lift and carry objects weighing up to 50 pounds. Additionally, under the working conditions checklist, employees had to lift, carry, push, and/or pull a maximum of 50 lbs. occasionally (1% to 33% of the time). According to the job analysis, employees are never required to lift, carry, push, and/or pull 100 lbs. or more.

sprain and strain. Dr. Grossinger's first evaluation indicated that the Appellant's exam was entirely normal. Specifically, Appellant, who was six-feet tall, 210 lbs and muscular, did not have any disc herniations, internal disc disruptions or back issues that required surgery. According to Dr. Grossinger, the Appellant recovered from his lumbar sprain and strain, a restriction on his activities was not necessary and he did not require any additional treatment of any kind.

Dr. Grossinger's next evaluation occurred on November 30, 2010. At that appointment, the Appellant advised that he had left-sided lower back pain. However, the Appellant did not have sensory symptoms, pain in the leg and was no longer taking medication. Appellant was looking for construction or labor work at this time. Appellant's first work after Fluor Maintenance was in July, 2010 at Aqua-Fitt as a personal trainer. Appellant also worked as door staff at Summer House concurrently with Aqua-Fitt until March 22, 2011, when he began working as door staff supervisor for North Beach. Dr. Grossinger's second evaluation, like his first evaluation, also came back normal and remained unchanged from the first exam. There were no subjective or objective abnormalities. In addition, Dr. Grossinger testified that the Appellant completely recovered from the effects of the work injury and maintained him on a full duty release status.

Appellant last saw Dr. Grossinger on July 28, 2011. Again, Dr. Grossinger's opinion, which was based on a reasonable degree of medical probability, was that

the Appellant's exam was normal. Appellant was not taking any medications and continued to engage in a vigorous lifestyle. Therefore, Dr. Grossinger adhered to his opinion that the Appellant recovered from the effects of the lumbar sprain and strain and thus, required no restrictions.

The Board issued a written opinion on October 18, 2011, denying all claims set forth in the Petition. The Board accepted the testimony of Dr. Grossinger over that of Dr. Katz. With respect to the denial of the partial disability payments, the Board stated that:

> Claimant is not entitled to partial disability benefits. Claimant testified that his pain levels range from a three to a seven on a ten-point pain scale. Medical records indicate that Claimant has experienced days when he has rated his pain at a two. Regardless of his reported pain level, Claimant: will not take prescription pain medicine[,] is still able to function [] and has been released to returned to heavy-duty work.[2]

Appellant filed an appeal of the Board's decision to this Court with respect to the denial of partial disability from the date of the injury (May 22, 2009) until the FCE (October 5, 2009).

Standard of Review

The scope of review of an appeal from an administrative agency requires this Court to determine whether the ruling is free from legal error and supported by

[2] *Anderson v. Fluor Maintenance, No*. 1339383, at 20-21 (Del. I.A.B. Oct. 18, 2011).

substantial evidence.[3] Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion.[4] Substantial evidence requires more than a scintilla but less than a preponderance of the evidence.[5] When the decision is not supported by substantial evidence, it must be reversed.[6] When critical issues are overlooked or ignored, a remand for further consideration is appropriate.[7]

However, this Court's review of a Board's decision is limited.[8] The Court will not weigh the evidence, determine the credibility of the witnesses, or make its own factual findings and conclusions.[9] Deference is given to the decision of the Board.[10] The record is viewed in the light most favorable to the party prevailing below.[11]

Discussion

The Board Did Not Commit Legal Error in Denying Appellant's Partial Disability Claim.

The Board did not commit legal error in concluding that Appellant failed to meet his burden of proving his entitlement to partial disability benefits. Thus, the

[3] *Varga v. Gen. Motors*, 996 A.2d 794, at *2 (Del. 2010) (TABLE) (citation omitted).
[4] *Martinez v. Gen. Metalcraft, Inc.*, 919 A.2d 561, at *1 (Del. 2007).
[5] *Id*.
[6] *Mladenovich v. Chrysler Group, LLC*, 2011 WL 379196, at *3 (Del. Super. Jan. 31, 2011).
[7] *Sharpe v. W.L. Gore & Associates*, 1998 WL 438796, at *2 (Del. Super. May 29, 1998).
[8] *Id*.
[9] *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965).
[10] 29 *Del. C.* § 10142.
[11] *O'Brien v. Unemployment Ins. Appeals Bd.*, 1993 WL 603363, at *1 (Del. Super. Oct. 20, 1993).

Board properly concluded that Appellant was not entitled to partial disability benefits from the day of the injury until the FCE.

Appellant's argument on appeal relies heavily on this Court's decision in *Turner v. Bennett's Action Glass*.[12] In *Turner*, appellant's petition before the Board sought disability benefits for four specific time periods.[13] Subsequently, the Board awarded benefits for one time period claimed, denied benefits for two time periods claimed, and failed to address one time period claimed.[14] This Court remanded for the Board to specifically address the period of partial disability that was not considered in its opinion.[15]

Entitlement to partial disability benefits depends on whether the employee has a decreased earning capacity as a result of the accident.[16] Compensation for partial disability is "66⅔ percent of the difference between the wages received by the employee before the injury, and employee's earning power afterwards." [17] A showing that the claimant intends to work more than part-time is also required.[18] It is generally held that where the injured employee returns to his former work for the same employer at the same or higher wages is evidence that his earning capacity

[12] *Turner v. Bennett's Action Glass*, 1998 WL 733763 (Del. Super. Oct. 1, 1998).
[13] *Id.* at *1.
[14] *Id*. at *2.
[15] *Id*. at *3.
[16] *Sharpe,* 1998 WL 438796, at *2.
[17] 19 *Del. C*. § 2325.
[18] *NVF v. Wilkerson*, 2006 WL 2382799, at *1 (Del. Super. July 27, 2006).

has not been impaired.[19] The moving party bears the burden of proof to show that he has sustained a loss of earning capacity.[20] Specifically, to prevail on a partial disability claim, the appellant must establish his disabilities by a preponderance of the evidence.[21]

This case is distinguishable from *Turner*. Here, unlike in *Turner*, instead of requesting multiple periods of partial disability, Appellant only requested disability for one period of time, May 23, 2009, through the present. The Board's decision dated October 17, 2011, contained a determination of the Appellant's claim as presented. This Court may infer that Board's decision that partial disability was denied, that meant the entirely of the partial disability claim was denied and not just a portion of it. [22] Therefore, the Board properly considered the time period from May 23, 2009, until the present, without specifically addressing separate time periods.

Additionally, the Appellant did not establish by a preponderance of the evidence that he was entitled to partial disability benefits. After his injury, Appellant continued his employment without any restrictions or reduction in wages for one week, until his scheduled lay off. Appellant did not work again until July 2010, when he started as a part-time physical trainer with Aqua-fitt. In the

[19] *Ruddy v. I. D. Griffith & Co.,* 237 A.2d 700, 703 (Del. 1968).
[20] *Wilkerson,* 2006 WL 2382799, at *1.
[21] *Turner*, 1998 WL 733763, at *3.
[22] *See Keith v. Dover City Cab Co.,* 427 A.2d 896, 899 (Del. Super. 1981).

contested time period, from injury to FCE, Appellant failed present evidence on his behalf that his earning capacity was reduced and that he intended to work more than part-time. Therefore, the Board did not commit a legal error in determining that Appellant was not entitled to partial disability benefits.

There is Substantial Evidence in the Record Supporting the Board's Decision.

Appellant claims that the Board's decision denying his partial disability benefits is not based on substantial evidence. However, this Court finds that there was substantial evidence in the record to support the Board's determination that Appellant was not entitled to benefits.

Testimony at the hearing revealed that while the Appellant's lower back injury occurred on May 22, 2009, Appellant did not see a doctor about this injury until his scheduled lay off on May 29, 2009. Thus, the Appellant worked the week that he was injured and would not be entitled to partial disability for that time period.

Dr. Katz, who testified for the Appellant, stated with a reasonable degree of medical probability that the Appellant was first placed on a "light duty" restriction. Dr. Grossinger, who testified for the Employer, stated that Appellant had recovered from his lumbar strain and that he did not require any restrictions as of August 6, 2009. Additionally, on October 5, 2009 Appellant had a FCE released him for heavy duty work. Appellant's job as a laborer was considered heavy duty work.

If medical experts present conflicting testimony at the hearing, "the Board is the finder of fact and must resolve the conflict. Where the Board adopts one medical opinion over another, the opinion adopted by the Board constitutes substantial evidence for purposes of appellate review."[23]

Here, the Board's decision was supported by substantial evidence. The Board indicated in its opinion that it found the testimony of Dr. Grossinger more credible than that of Dr. Katz. Based on the proper standard of review on appeal, this Court does not determine credibility. The Board was permitted to determine credibility of witnesses and make their own findings of fact based on the evidence presented at the hearing. Therefore, the Board was within their purview to determine that Dr. Grossinger was more credible than Dr. Katz in deciding the denial of partial disability benefits.

The Appellant Is Not Entitled to Attorney's Fees.

Additionally, Appellant requests an award of attorney's fees for this appeal. Pursuant to 19 *Del. C.* § 2350(f), this Court may permit "a reasonable fee to claimant's attorney for services on an appeal from the Board to the Superior Court and from the Superior Court to the Supreme Court where the claimant's position in the hearing before the Board is affirmed on appeal."[24] *Section* 2350(f) permits a claimant to petition to the court for an attorney's fee if he successfully appeals an

[23] *Munyan v. Daimler Chrysler Corp.*, 909 A.2d 133, 136 (Del. 2006).
[24] 19 *Del. C.* § 2350(f).

unfavorable Board decision.[25] Here, the Appellant was unsuccessful in appealing the decision below. Therefore, the request for attorney's fees is **DENIED** at this time.

Conclusion

Based on the foregoing, the decision of the Board is **AFFIRMED** and the Appellant's request for attorney's fees is **DENIED**.

IT IS SO ORDERED.

/S/CALVIN L. SCOTT
Judge Calvin L. Scott, Jr.

[25] *See Murtha v. Continental Opticians, Inc.*, 729 A.2d 312, 317 (Del. Super. Aug. 17, 1997).