

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

JENNIFER BOOMER,)	
Appellant)	
)	
v.)	
)	CA No. 12A-06-006 FSS
TRANSCARE ML, INC.,)	
Appellee)	

Submitted: January 16, 2013
Decided: April 24, 2013

MEMORANDUM OPINION AND ORDER

Upon Appeal from the Industrial Accident Board – *AFFIRMED*

Jennifer Boomer suffered injuries to her right knee and foot while working as an EMT in August 2007. Because of that, Boomer has received total disability payments since March 2008. Boomer underwent a necessary knee surgery, but continues to experience from barely-manageable pain in her right leg. The medical experts agree that Boomer has severe reflex sympathy dystrophy (“RSD”), causing heightened sensitivity to her right leg. But, after three, prior failed attempts by Transcare to terminate Boomer’s disability, the Industrial Accident Board decided to cut Boomer’s benefits as of May 17, 2012.

Boomer has appealed, arguing that the Board failed to take “substantial and strong steps to eliminate any taint” resulting from “fraudulent” surveillance evidence, and that the Board’s decision to terminate benefits was “illogical.” As the fact-finder, the Board’s decision to terminate must be based upon substantial, untainted evidence. It is.

I.
A.

Boomer’s first issue here stems from discovery problems leading to the termination hearing. After Boomer’s fruitless requests for discovery, the IAB, on January 12, 2012, ordered Transcare to respond within fourteen days. More than a month later, Transcare produced “a large discovery package.” In that production, Boomer’s counsel discovered a surveillance report. The report detailed an agent’s video surveillance of a residence and his interaction with Boomer under a false pretext. Recognizing the address under surveillance as his own, Boomer’s counsel believed the report was fabricated and the agent had falsified an affidavit. Under that belief, Boomer’s counsel requested an emergency hearing.

On March 2, 2012, the IAB held the emergency hearing. Based on the “improper surveillance” and Transcare’s delayed discovery production, Boomer requested the IAB dismiss Transcare’s petition. Transcare claimed the report was a

“travesty,” it did not intend on using it, and urged its suppression as an appropriate remedy.

In its March 6, 2012 order, the IAB considered the surveillance issue and, under *Monsanto Co. v. Aetna Casualty & Surety Co.*'s¹ guidance, suppressed all evidence relating to the surveillance report. The IAB opined, however, that Boomer's request for the petition's dismissal was “too broad.”

B.

When the IAB heard Transcare's fourth petition to terminate benefits, the medical testimony focused on physical examinations conducted between 2010 and 2012. At the March 12, 2012 termination hearing, Boomer testified and presented a deposition from her treating physician, Dr. Bandera. Transcare presented a vocational expert, Ms. Wilkerson, and the deposition of its medical expert, Dr. Crain. The medical experts reviewed and discussed Boomer's records, including those from consultants, Dr. Bash, Dr. Nancy Kim and Dr. Phillip Kim. The doctors agree that Boomer is not feigning or exaggerating her RSD. Dr. Crain even stated that feigning

¹ 593 A.2d 1013 (Del. Super. 1990) (The court issued a protective order after finding several non-party, former employees of a party insurer were intentionally misled by opposing party's investigators, thereby violating ethical rules.) (“[A]ttorneys who are officers of this court must realize that they are accountable and must supervise the investigators in order to assure that . . . misleading conduct that has previously occurred will not happen in the future. I will not countenance this type of conduct and will therefore fashion a protective order to insure that, at least in this litigation in Delaware, the parties and their agents will be guided by truth and honesty, not by lies and deception.”).

RSD would be difficult. So, the doctors agree that Boomer's RSD is real. Apart from that, the medical expert testimony conflicted as to the RSD's implications.

Dr. Crain examined Boomer seven times, including four exams between 2010 and 2012. As to each exam conducted between 2010 and 2012, Dr. Crain testified that Boomer's condition remained unchanged, specifically noting she had "reflex sympathetic dystrophy of the right leg which was stable and there was post operative arthrofibrosis of the right knee." Dr. Crain also noted that Boomer ambulated on crutches and continued to make life accommodations, such as driving with her left foot.

After reviewing an October 2011 MRI, Dr. Crain testified that "there's no suggestion [. . .] for knee surgery." Further, after reviewing the report of orthopaedic surgeon Dr. Bash, Dr. Crain testified that the report noted "treatment for complex regional pain syndrome of the lower extremity, [but no] indication for any further minuscule pathology and [no recommendation for] orthopaedic surgery," even after Dr. Bash conducted a ligament manipulation test. Lastly, acknowledging "significant functional loss" to Boomer's leg, Dr. Crain opined that since 2010, Boomer could return to restricted full-time sedentary work.

Dr. Bandera has treated Boomer since 2008 and continues to diagnose her as disabled. Dr. Bandera testified that Boomer suffers from an "advanced RSD

pattern and right knee internal injury that needs ongoing care.” Dr. Bandera agreed with Dr. Nancy Kim that Boomer is disabled and has an advanced impairment needing “reasonable interventions to promote pain stabilization.” Dr. Bandera disagreed with Dr. Crain’s diagnosing Boomer’s leg as “stable.” Further, Dr. Bandera believed that Dr. Crain is ignoring a “global picture” of RSD. As to Dr. Bash, Dr. Bandera testified that Dr. Bash wanted “to hold off on surgery to the right knee and recommend [Boomer] undergo treatment for the complex regional pain syndrome for the right leg prior to surgery.”

Wilkerson testified about a labor market survey and several jobs she believed Boomer was suited for, even with restrictions and accommodations for Boomer’s crutches or a wheelchair. For instance, Wilkerson discussed a customer service representative job with the Delaware Department of Motor Vehicles, which already has wheelchair accommodations in place. Wilkerson also testified that all the positions she researched paid a higher weekly average salary than Boomer’s weekly EMT income.

C.

In its May 17, 2012 decision terminating benefits, the IAB found “the work capacity opinion of Dr. Crain, an orthopedic surgeon, to be more convincing than the opinion of Dr. Bandera, the treating pain management specialist.” The IAB

detailed its reasoning in accepting Dr. Crain's testimony over Dr. Bandera's. The IAB specifically agreed "with Dr. Crain's current assessment of Claimant's work capacity which is reinforced by the June 2011 conclusions of Dr. Bash that Claimant does not require further surgery for meniscal pathology as an October 2011 MRI of the knee did not identify a recurrent tear of the meniscus."

The IAB further detailed its reasons for rejecting Dr. Bandera's testimony, specifically finding that Dr. Bandera's opinion of the October 2011 MRI contradicts Drs. Crain and Bash. Further, the IAB found Dr. Bandera's opinion to be based primarily on Boomer's subjective complaints. Notably, the IAB rejected Dr. Bandera's testimony based on his failure to "support or explain his belief that further surgery would help 'restore' [Boomer's] RSD pattern when no diagnostic study at this time identifies any anatomic problem or supports such need."

The IAB also denied partial disability benefits based upon Dr. Crain's and Wilkerson's testimony. While Dr. Crain noted Boomer's crutches limited her ability to carry and lift items, Wilkerson testified that several positions merely involved lifting papers from one side of the desk to another. The IAB also based its decision on Wilkerson's testimony that Boomer's earning capacity increased.

II. A.

The IAB's decision to suppress all evidence relating to the surveillance report, rather than dismissing the petition, is reviewed under the abuse of discretion standard.² Absent abuse, discretionary decisions will be upheld.³ Abuse of discretion occurs where the Board "acts arbitrarily or capriciously or exceeds the bounds of reason in view of the circumstances, and has ignored recognized rules of law or practice so as to produce injustice."⁴

The IAB issued an order clearly outlining its reasoning and *Monsanto* analysis. The IAB found that Transcare's agent's acts – deliberately knocking on a door to interact with Boomer under a "an appropriate pretext – clearly violated *Monsanto's* bar on *ex parte* communications with represented parties. Transcare, however, assured the IAB that the surveillance report was not provided to its medical expert, thereby leaving the expert's opinion untainted. Finding that the expert opinions were unaffected, the IAB held that suppressing the surveillance evidence was "sufficient to protect Claimant and ensure the integrity of the hearing."

² *Funk v. Unemp't Ins. App. Bd.*, 591 A.2d 222, 225 (Del. 1991).

³ *Id.*

⁴ *Graham*, 2008 WL 2582986, *4 (internal citations omitted).

On appeal, Boomer claims that after the emergency hearing, requests for a copy of the alleged surveillance videotape were rebuffed and Transcare ultimately denied the tape's existence. Boomer now complains about Transcare's "delaying tactics" and the IAB's decision not to dismiss Transcare's petition. While Boomer admits the IAB has "wide latitude and discretion concerning issues such as evidence," she only vaguely requests "a stronger remedy" here.

It is important to understand that Transcare never attempted to use the surveillance against Boomer. Thus, it played no part in the IAB's termination decision. In summary, Boomer has largely set-up a strawman to knock it down. If Boomer has a claim for damages over the surveillance, Boomer can proceed as she sees fit. But the IAB has no jurisdiction to award damages, punitive or otherwise, or to impose sanctions, such as dismissal, for invasion of privacy. The same goes for the court in its appellate role. The IAB correctly focused on ensuring the hearing's integrity.

B.

As for the IAB's decision to terminate benefits, this court is limited in its review.⁵ The court cannot sit as a trier of fact and weigh the evidence or consider

⁵ See *Pal of Wilmington v. Graham*, 2008 WL 2582986, *3 (Del. Super. June 18, 2008) (Jurden, J.).

credibility.⁶ The IAB “has the authority to weigh and resolve conflicting medical opinions.”⁷ IAB appellate review is limited to “whether its findings and conclusion are ‘free from legal error and supported by substantial evidence in the record.’”⁸ Substantial evidence simply requires “evidence as a reasonable mind might accept as adequate to support a conclusion.”⁹ The court will consider the record in the light most favorable to the underlying prevailing party.¹⁰

Again, the IAB weighed conflicting medical expert testimony: Boomer’s expert claimed she is disabled and needs surgery; Transcare’s expert opined Boomer can return to work and surgery is unnecessary. Both experts’ testimony was substantial and the IAB could chose one over the other, as it did.

Boomer’s argument that it is “illogical” for the IAB to rule in her favor three times but now against her on similar evidence is simply ungrounded. Wilkerson’s updated labor market survey indicates that the average weekly salary is higher than what was presented to the IAB in 2010. Also in this round, the experts’

⁶ *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (1965).

⁷ *Beyer v. Nanticoke Homes, Inc.*, 1992 WL 9163, at *2 (Del. Super. Jan. 10, 1992) (Ridgely, P.J.).

⁸ *Graham*, 2008 WL 2582986 at *3 (quoting *Fed. St. Fin. Serv. v. Davies*, 2000 WL 1211514, *2 (Del. Super. June 28, 2000)).

⁹ *Oceanport Indus. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 899 (1994).

¹⁰ *See Thompson v. Unemp’t Ins. App. Bd.*, 25 A.3d 778, 782 (Del. 2011).

testimony relied on updated examinations and reports, specifically from new consultant, Dr. Bash. Moreover, the IAB clearly considered the fact that Dr. Crain's testimony has been consistent since 2010, and is in accord with Dr. Bash's recent opinion. In the end, the IAB's decision was based upon substantial evidence. Its opinion concisely set forth its reasoning in choosing one expert over another and, as such, will not be disturbed.

III.

Because the IAB did not abuse its discretion by not dismissing the petition for discovery abuses, and because the IAB relied on adequate evidence, the IAB's decision to terminate Boomer's benefits is **AFFIRMED**.

IT IS SO ORDERED.

/s/ Fred S. Silverman

Judge

cc: Prothonotary
Michael P. Freebery, Esquire
John W. Morgan, Esquire