

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

CHERYL SIMMONS,)	
)	
Claimant-Below,)	
Appellant,)	
)	C.A. No. N13A-10-008 CLS
v.)	
)	
NEMOURS,)	
)	
Employer-Below,)	
Appellee.)	

Date Submitted: March 3, 2014

Date Decided: June 4, 2014

On Appeal from the Industrial Accident Board.

AFFIRMED.

ORDER

Michel L. Sensor, Esq., Perry & Sensor, Wilmington, Delaware 19899. Attorney for Appellant.

Robert W. Ralston, Esq., Wilmington, Delaware 19801. Attorney for Appellee.

Scott, J.

Introduction

Before the Court is Appellant Cheryl Simmons' ("Appellant") appeal of the decision of the Industrial Accident Board (the "Board"), denying Appellant's Petition to Determine Compensation Due and finding that Appellant failed to show that she suffered an injury was causally related to her employment. The Court has reviewed the parties' submissions and the record below. For following reasons, the Board's decision is **AFFIRMED**.

Background

On September 22, 2011, Appellant received an influenza vaccination as part of her employment as a registered nurse with Nemours ("Employer") at the A.I. du Pont Hospital for Children. When the flu injection was administered, Appellant felt an intense pain. A few days later, Appellant repacked approximately ten boxes in her garage. The next morning, Appellant experienced "soreness in [her] muscles bilaterally."¹ However, Appellant no longer felt that bilateral soreness after about three days.

On February 15, 2012, Appellant saw her family care doctor, Dr. David Maleh, and complained of a sore left arm. Dr. Maleh noted that Appellant reported a "sore left arm since October." He also noted that there was "[n]o clear injury"

¹ Hearing Trans. at 20:21.

and that she “[d]id have a flu shot in that arm.”² He stated that Appellant had “[p]ain with abduction more than 70 degrees”, which was “relieved by rest,” and “[p]ain with rotation.”³ Dr. Maleh initially believed that Appellant had a rotator cuff injury and ultimately ordered an x-ray and prescribed physical therapy. Physical therapy provided some help with Appellant’s restricted range of motion. Thereafter, Dr. Maleh ordered an MRI and referred Appellant to Dr. David Sowa, a board-certified orthopedic surgeon who holds a certificate of added qualifications in surgery of the hand.

On April 18, 2013, Appellant filed a Petition to Determine Compensation Due. The Board held a hearing on August 14, 2013. Appellant appeared and presented Dr. Sowa’s deposition testimony and the Employer presented the deposition testimony of Dr. Errol Ger, who is also a board-certified orthopedic surgeon with a subspecialty of the hand.

At the hearing, Appellant testified that she worked at the A.I. du Pont Hospital for Children for about four years. She stated that, when she received the September 22, 2011 flu shot, it was unusual to her in that “the pain was intense” and “[i]t seemed to be worse than the flu shots that [she had] received in the past.”⁴ Appellant “felt that it was given higher than what [she] normally received” and she

² Dr. Sowa Dep. at 4:11-13.

³ *Id.* at 4:15-18.

⁴ Hr’g Trans. at 18:18-19.

“didn’t feel it going into the muscle area[,] it just felt different and more painful and the pain continued.”⁵ Appellant gave testimony explaining the difference between the pain from the September 2011 injection and the pain that she experienced after moving the boxes. She stated:

The pain from the injection was sharp, severe. It felt like something was there. I would say it felt as if it had hit a bone except I didn’t feel it hit any bone. But it did not feel like it was in what I would consider my muscle areas; whereas, the soreness was definitely muscle soreness from the boxes.⁶

Appellant also explained that she did not see Dr. Maleh until February 15, 2012 because she “was waiting for [the pain] to go away...[she] just sort of ignored it [and] continued with [] the things that [she] needed to do life... and [she] was distracted by other things...”⁷ However, she stated, that the pain “progressed to the point [she] was having trouble sleeping[,]” and she could manage throughout the day “until it got to the point where [her] range of motion became affected and continued to worsen.”⁸

In his deposition, Dr. Sowa stated that he first saw Appellant on April 23, 2012. Appellant complained of left shoulder pain impingement-type symptoms and a painful range of motion in her left shoulder. Dr. Sowa performed a physical examination which revealed a positive impingement sign, which meant that “when

⁵ *Id.* at 18:19-21.

⁶ *Id.* at 6:15-20.

⁷ *Id.* at 3-14.

⁸ *Id.*

she raised her arm to her side and externally rotated the arm to her...she had complained of pain.”⁹ Dr. Sowa reviewed the MRI films which “showed primarily bursitis, subacromial bursitis, which is inflammation of the bursa above the rotator cuff.”¹⁰ Dr. Sowa also observed that there was “a question of a partial thickness rotator cuff tear, but there definitely was no full thickness rotator cuff tear.” According to Dr. Sowa, “[t]he full rotator cuff tears are the ones that are clinically significant.”¹¹

Dr. Sowa’s impression was that the subacromial bursitis related to Appellant’s flu shot. As a result, he recommended and performed a steroid injection of the subacromial space. On August 16, 2012, Appellant complained of recurrent left shoulder pain and stated that the injection helped for a while, but the symptoms recurred. Dr. Sowa treated Appellant for recurrent bursitis. On February 18, 2013, Dr. Sowa saw Appellant again and she complained of left shoulder pain with painful motion of the shoulder and slightly positive impingement signs. Dr. Sowa then discussed a shoulder arthroscopy and a possible acrioplasty. Appellant wanted to try another steroid injection before she underwent surgery.

⁹ Dr. Sowa Dep. at 6:3-7.

¹⁰ *Id.* at 6:14-21.

¹¹ *Id.*

The opinions given by Dr. Sowa in his deposition were based on his own examination of Appellant, Dr. Maleh's records, the defense medical examination report from Dr. Ger, and x-ray and MRI films. He stated that, in his practice as an orthopedic surgeon, he has encountered patients who have experienced bursitis resulting from a flu shot. He explained that, typically, the injection should be into the deltoid area, but "if the area of the muscle is injected too high, too close to the acromion, some of the antigen, some of the flu shot medicine could go into the subacromial space, where it can cause an inflammatory reaction."¹² Based on his physical examination and Appellant's records, he believed that Appellant's injection was administered in that manner and that the injection into the bursa was the sole cause of her inflamed bursa.

Dr. Sowa also explained that, in literature, the type of reaction that Appellant had is known as "SIRVA," Shoulder Injury Related to Vaccination Administration. Based on the specific literature that he reviewed, Dr. Sowa informed the Board that the symptoms typically begin within 24-48 hours after the vaccination and, in some cases, the inflammation could be resolved by an injection. Dr. Sowa found Appellant's MRI findings to be consistent with SIRVA symptoms. On average, Dr. Sowa sees two or three patients each flu season with vaccine-related shoulder symptoms.

¹² *Id.* at 11:13-17.

When asked whether he disagreed with Dr. Ger's deposition testimony that Appellant's symptoms are from a rotator cuff tear caused by lifting the boxes, he stated

Well, as a mechanism of injury, lifting boxes is not a common way to suffer rotator cuff tear. Rotator cuff tears, the majority are – at least in Ms. Simmons' age group – are traumatic, from a traumatic event such as a fall, a fall that could cause a broken bone. Sometimes people fall, they get rotator cuff tears instead, usually lifting boxes repetitively just leads to an overuse problem, which is bursitis, which Ms. Simmons already had because of the flu shot in the subacromial bursa.¹³

Although he agreed that lifting boxes could, in some circumstances, cause bursitis, he did not expect that less than one day of lifting boxes would cause ongoing bursitis symptoms for nearly two years.

In Dr. Ger's deposition, he testified that he saw Appellant on December 20, 2012 and, prior to her evaluation, he reviewed the records from her primary care physician and Dr. Sowa. Dr. Ger stated that the MRI report showed "focal high-grade partial thickness bursal surface tear involving the supraspinatous tendon at the insertion with adjacent moderate high-grade tendinopathy with mild overlying subacromial subdeltoid bursitis."¹⁴ Dr. Ger conducted various tests which resulted in normal findings. Although Appellant presented the subjective complaints that her "left arm 'gets a little achy'" and that "[']there's something

¹³ *Id.* at 16:7-18.

¹⁴ Dr. Ger. Dep. at 10:1-5.

there in her left upper arm, especially in cold weather,’”¹⁵ Dr. Ger stated that he had no positive findings during his evaluation and that “[n]o pain was produced or complained of during shoulder movements.”¹⁶

Dr. Ger opined that

there is a causal relationship between the initial complaints of left shoulder pain and the injection, but the continued symptoms that she had in her left shoulder which required her seeing her family physician and getting an orthopedic evaluation was not related to the flu shot but rather related to the supraspinatous problem. The problem was not caused by the injection of Fluzone.¹⁷

Dr. Ger confirmed that disagreed with Dr. Sowa and that Appellant’s shoulder problems were separate and distinct to the September 2011 flu shot. Dr. Ger also testified based on his review of the Physicians’ Desk Reference that Fluzone was the type of vaccination given during 2011 and that bursitis was not listed among the common adverse reactions.

Dr. Ger also reviewed Appellant’s recorded statement in which she stated that the shot was “harder than when [she] gives someone a flu shot”¹⁸ and that it hurt for several days. Dr. Ger testified that he never heard of a SIRVA diagnosis and that, in his practice, he had never encountered someone with bursitis caused by

¹⁵ *Id.* at 15: 21-16:2.

¹⁶ *Id.* at 14:24-15:3.

¹⁷ *Id.* at 17:24-18:8.

¹⁸ *Id.* at 25:8-11; In her Opening Brief, Appellant stated that the word “harder” was mistranscribed and should have read “higher.” Opening Br. at 17.

a flu shot. However, he agreed that if an injection is given into the bursa it can cause pain. Although he admitted that he did not know where Appellant received her injection or the length of needle used, he stated that it should have been given into the deltoid muscle and that “[i]t was given to her by a nurse manager who has worked for many years in the emergency room.”¹⁹ He described the manner in which he typically gives flu injections and that he normally uses a five-eighths of an inch needle, which he did not believe could penetrate the bursa. When he does perform injections into the bursa, he uses a longer needle and inserts it much higher than the deltoid muscle.

When asked whether it was his opinion that the box repacking incident and muscle soreness contributed to the bursitis or the rotator cuff tear, he stated, “That incident would be compatible with producing a bursitis.”²⁰

The Board issued a written decision denying Appellant’s petition, stating that Appellant failed to show by a preponderance of evidence that the ongoing shoulder complaints were causally related to the flu vaccination. The Board provided a detailed summary of the evidence before it stating that it “relie[d] on the medical opinion of Dr. Ger” and that it “f[ound] Dr. Ger’s opinion more persuasive than that of Dr. Sowa.”²¹ The Board stated that it “was persuaded by

¹⁹ *Id.* at 6:11-14.

²⁰ *Id.* at 29:12-18.

²¹ Board Decision at 12.

Dr. Ger's testimony that the ongoing symptoms are related to a subacromial injury, rather than the injection."²² The Board explained that there were findings on the MRI to support Dr. Ger's opinion and stated that Dr. Maleh also believed that Appellant had a rotator cuff injury. The Board then stated that it "was not convinced by Dr. Sowa's complete dismissal of the partial thickness rotator cuff tear as inconsequential."²³ It further stated that the partial thickness rotator cuff tear was "evidence of an injury and pain generator unrelated to the work event, whether or not it may be related to the lifting incident at home."²⁴ The Board acknowledged Dr. Ger's explanation that the tear was on the bursal surface of the tendon and that it "supports his opinion that the symptoms are from a separate injury to that area."²⁵ The Board viewed Dr. Sowa's impingement findings as "indicative of a symptomatic tear."²⁶

The Board found that, although Dr. Ger did not know exactly where Appellant was injected, his explanation of the injection process and the needle size that he normally uses added weight to his testimony that the ongoing bursitis was not related to the work injury.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

The Board also expressed concern with Appellant’s credibility based on the delay in treatment and the fact that there were few complaints and no objective findings during Dr. Ger’s examination.

Standard of Review

The Court’s review of a Board decision is limited to whether the Board’s findings were supported by substantial evidence and whether the decision is free from legal error.²⁷ “Substantial evidence” means “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”²⁸ Under this standard, the Court does not weigh evidence or determine credibility.²⁹ If substantial evidence exists to support the Board’s decision, this Court “must affirm the decision of [the Board] even if the Court might have, in the first instance, reached an opposite conclusion.”³⁰ “If the medical evidence is in conflict, 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.”³¹

²⁷ *Thompson v. Christina Care Health Sys.*, 25 A.3d 778, 781-82 (Del. 2011).

²⁸ *Pearson-Gaines v. Pepco Holdings, Inc.*, 981 A.2d 1159, 1161 (Del. 2009) (quoting *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981)).

²⁹ *DiSabatino Bros., Inc. v. Wortman*, 453 A.2d 102, 105-06 (Del. 1982).

³⁰ *Brogan v. Value City Furniture*, 2002 WL 499721, at *2 (Del. Super. Mar. 27, 2002).

³¹ *Munyan v. Daimler Chrysler Corp.*, 909 A.2d 133, 136-37 (Del. 2006).

Discussion

An employee may receive workers' compensation benefits "for personal injury or death by accident arising out of and in the course and scope of employment..."³² To receive compensation, the employee must prove by a preponderance of evidence that the injury was caused by the accident occurring within the course and scope of employment.³³ As the Board noted, neither party disputed whether the vaccination occurred during the course and scope of Appellant's employment and the only issue before the Board was causation.

Appellant argues that the Board's conclusions were not supported by substantial evidence. To support her argument, Appellant contends that the Board's reliance on Dr. Ger's testimony was faulty because the Board misinterpreted Dr. Ger's testimony when it stated that it "was persuaded by Dr. Ger's testimony that the ongoing symptoms are related to a subacromial injury, rather than the injection."³⁴

Based on the Court's review of Dr. Ger's testimony and the Board's decision as a whole, the Court is not convinced that the Board misinterpreted Dr. Ger's testimony. Dr. Ger testified that the box incident would be compatible with

³² 19 *Del. C.* § 2304.

³³ *Histed v. E.I. Du Pont Nemours & Co.*, 621 A.2d 340, 343 (Del. 1993).

³⁴ Board Decision at 12.

producing a bursitis.”³⁵ Moreover, he also expressly stated that “the continued symptoms that she had in her left shoulder which required her seeing her family physician and getting an orthopedic evaluation was not related to the flu shot rather related to the supraspinatous problem.”³⁶ That testimony is consistent with the Board’s interpretation and substantial evidence existed for the Board to determine that Appellant’s injury was not caused by the flu shot.

Although Appellant does not dispute that the Board has the discretion to choose the testimony of one physician over another’s, Appellant argues that the Board erred in failing to explain or provide a meaningful analysis as to why it rejected Dr. Sowa’s testimony regarding SIRVA and the related publications that he discussed. In *Turbitt v. Blue Hen Lines, Inc.*,³⁷ the Supreme Court found that the Board erred when it rejected the sole medical testimony from a Board hearing regarding a claimant’s disability based only upon the Board’s institutional expertise. The Court stated that the Board may “discount the testimony of a witness, even a medical witness, on the basis of credibility” but it must “provide specific reasons for doing so.”³⁸ Likewise, in cases in which the Board weighs competing medical testimony given through depositions, this Court has explained

³⁵ Dr. Ger Dep. at 29:12-18.

³⁶ *Id.* at 17:24-18:8.

³⁷ 711 A.3d 1214 (Del. 1998).

³⁸ *Id.* at 1215.

that “the Board must provide specific factual reasons based on the evidence for discounting one expert's opinion and accepting the other's.”³⁹

Here, the Court finds that the Board articulated sufficient reasons for finding Dr. Ger’s testimony more persuasive than Dr. Sowa’s concerning the causation of Appellant’s ongoing shoulder problems, even though it did not specifically analyze Dr. Sowa’s testimony regarding SIRVA and the publications. The Board explained that there were findings on the MRI to support Dr. Ger’s opinion and that, while Dr. Sowa testified that the tear was inconsequential, Dr. Ger explained that the tear was on the bursal surface and that “support[ed] his opinion that the symptoms are from a separate injury to that area.”⁴⁰ The Board also referred to Dr. Ger’s testimony about how injections are typically performed and the type of needle that he normally uses to add weight to Dr. Ger’s opinions. Thus, the Board provided a sufficient basis for finding Dr. Ger’s testimony more persuasive and the Court will not disturb the Board’s finding.

Appellant’s other arguments are primarily based on the sufficiency of Dr. Ger’s testimony and whether Dr. Sowa’s testimony constituted sufficient evidence in the record to support a finding that her shoulder injuries were caused by the flu injection. For example, Appellant argues that the Board didn’t address her

³⁹ *Miller v. Delaware Psychiatric Ctr.*, 2013 WL 1281850, at *9 (Del. Super. Mar. 28, 2013); *See Lindsay v. Chrysler Corp.*, 1994 WL 750345, at *3 (Del. Super. Dec. 7, 1994).

⁴⁰ Board Decision at 12.

statement that the injection was given in a place which was higher than normal. Appellant also took issue with Dr. Ger's reliance on the Physicians' Desk Reference and his familiarity with SIRVA. First, the Court finds that these arguments seem to require the Court to reweigh evidence already weighed by the Board, which is beyond the scope of this Court's review on appeal. Second, the Court must determine whether the Board had sufficient evidence to support its conclusions and not, as Appellant asserts, whether there was sufficient evidence in the record to support a different outcome.

Conclusion

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

IT IS SO ORDERED.

/s/ Calvin L. Scott
Judge Calvin L. Scott, Jr.