IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

ANTHONY MORABITO,	)	
	)	C.A. No. K11A-10-005 JTV
Appellant,	)	
	)	
v.	)	
	)	
INDUSTRIAL ACCIDENT BOARD,	)	
	)	
Appellee.	)	

Submitted: March 13, 2012
Decided: June 29, 2012

David J. Lyons, Esq., The Lyons Law Firm, Wilmington, Delaware. Attorney for Appellant.

Natalie L. Palladino, Esq., Tybout, Redfearn & Pell, Wilmington, Delaware. Attorney for Appellee.

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

VAUGHN, President Judge

ORDER

Upon consideration of the briefs of the parties and the record of the case, it appears that:

1. This is an appeal from a decision of the Industrial Accident Board ("Board"). The appellant, Anthony Morabito ("the claimant"), was injured on April 9, 2009 at work while employed as a teacher at Smyrna High School by the Smyrna School District ("Employer"). On that date the claimant was carrying a box of papers and a computer from the school to his car when he fell on the concrete sidewalk and rolled onto his back. He remained on the ground initially, then got up and collected everything he had dropped. It took him several trips to the car and he bent down to pick the items he dropped.

2. The claimant's back tightened on the way home. He sought treatment at the Kent General Hospital emergency room for pain in his neck, low back, and shoulders; his stomach hurt and he initially thought it was from antibiotics he was taking for a rash; he felt a bulge in his bellybutton, which was later diagnosed as an umbilical hernia.

3. The Board awarded the claimant compensation for the following: total disability for the period from April 20, 2009 to May 31, 2009; medical expenses related to the umbilical hernia; medical expenses related to a lumbar back injury until November 2009; medical witness fees; and attorney's fees. The Board's rulings on those points are not at issue in this appeal.

4. The Board denied the claimant's claim for partial disability payments for the period from August 18, 2009 through November 18, 2010. The Board also denied

his claim for medical expenses for treatment of the lumbar back injury after November 8, 2009 and for sacroiliac injections. These appear to be the rulings which are the subject of this appeal.

5. The claimant appears to contend that the Board's decision was arbitrary, capricious and not supported by substantial evidence; that the decision contained incorrect factual recitations; that the Board's conclusion that the claimant's teaching contract with the employer was terminated or not renewed because of neglect of duties fails to take into account that the reason he was unable to complete a performance plan was because of his physical injuries caused by the accident; that the Board fails to explain its conclusion that some of the medical bills were related to the accident; that he should have been awarded total disability through August 18, 2009, not May 31; that he should have been compensated for medical expenses for treatment of the lumbar back injury after November 2009; that he should have been compensated for sacroiliac injections; that the Board failed to consider evidence regarding the difference in job activities required of the claimant as a full-time school teacher and those required by his part-time job at Delaware Technical and Community College; that he should have been awarded partial disability for the period from August 18, 2009 to November 18, 2010 because he could not fulfill his duties as a Smyrna School teacher; that the Board did not adequately discuss his ability to do the jobs included in a labor market survey; that the labor market survey expert ignored his self-imposed limitation of getting the employer's medical expert's signature confirming he had in fact reviewed each job; that the Board erred in concluding that Dr. Saltzman's opinion regarding the claimant's period of disability

was more persuasive than Dr. Rowe's; and that the Board acted inappropriately in concluding that knee and hip injuries were not caused by the accident because the parties had stipulated that those injuries were not at issue.

6. The employer contends the decision is free from legal error, supported by substantial evidence and should be affirmed. Specific contentions of the employer will be referred to as necessary in the discussion which follows.

7. The court's function on appeal is to determine whether the Board's decision is supported by substantial evidence and free from legal error.[1] Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[2] The appellate court does not weigh the evidence, determine questions of credibility, or make its own factual findings.[3] It merely determines if the evidence is legally adequate to support the agency's factual findings.[4]

8. The Board's finding that the claimant was entitled to total disability compensation for the period from April 20, 2009 to May 31, 2009 was based upon the testimony of Dr. Alexander regarding the effect of the umbilical hernia. The

---

[1] *General Motors v. Freeman*, 164 A.2d 686, 688 (Del. Super. 1960); *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66-67 (Del. Super. 1965).

[2] *Oceanport Ind. v. Wilmington Stevedores*, 636 A.2d 892, 899 (Del. Super. 1994); *Battista v. Chrysler Corp.*, 517 A.2d 295, 297 (1986), *appeal dism*., 515 A.2d 397 (Del. Super. 1986).

[3] *Johnson*, 213 A.2d at 66.

[4] 29 *Del. C.* § 10142(d).

employer contends that the claimant never sought total disability payments for the period from June 1, 2009 to August 18, 2009 before the Board and that the Court should not consider issues not raised before the Board below. The claimant acknowledges that he did not claim total disability for the period from June 1, 2009 to August 18, 2009 before the Board, and raises the issue on appeal simply because, he contends, the employer acted incorrectly in terminating the claimant for his industrial accident. I find that any claim for total disability benefits for the period from June 1, 2009 to August 18, 2009 being asserted here is waived because the claim was not asserted below.[5] After considering the testimony of the employer's representative, I further find that there is substantial evidence to support the Board's conclusion that the claimant was terminated or not renewed because of issues relating to his work as a teacher.

9. I turn next to the claimant's contentions that the Board was ambiguous in connection with its finding regarding compensation for medical expenses and failed to explain its conclusion thereon; that he should have been compensated for treatments for his lumbar back injury that occurred after November 2009; and that he should have been compensated for the sacroiliac injections. The claimant had a chronic, pre-existing injury to his lumbar spine. Dr. Saltzman testified that only treatments for the back problem through November 2009 were caused by the new injury from the April 9 fall, and that treatments after that were for the pre-existing,

---

[5] *Standard Distributing, Inc. v. Hall*, 2005 WL 9501118, at *2 (Del. Super. Mar. 18, 2005)(citing *Potts Welding & Boiler Repair Co., Inc. v. Zabrewski*, 2002 WL 144273 (Del. Super. Jan. 11, 2002)).

chronic injury after the new injury had subsided. Dr. Saltzman also testified that the sacroiliac injections were unnecessary. I find that the Board's conclusions that the claimant was entitled to compensation for treatment of his lumbar back injury through November 2009, but not thereafter, and that he was not entitled to compensation for the sacroiliac injections, are clear, unambiguous and based on substantial evidence provided by the testimony of Dr. Saltzman.

10. I next consider the claimant's contentions that the Board failed to consider evidence regarding the difference between his job activities as a full-time school teacher and his job activities at his part-time job at Delaware Technical and Community College; that he should have been awarded partial disability for the period from August 18, 2009 to November 18, 2010 because he could not fulfill his duties as a school teacher; that the Board did not adequately discuss his ability to do the jobs included in a labor market survey; that the labor market expert, Mr. Stackhouse, ignored his self-imposed limitation of getting the employer's medical expert's signature confirming he had in fact reviewed each job; and that the Board erred in concluding that Dr. Saltzman's opinion regarding disability was more persuasive than Dr. Rowe's. A reading of the Board's decision shows that the Board was clearly aware of the differences between the claimant's activities as a full-time school teacher and his activities as a part-time teacher at Delaware Technical and Community College. The Board observed that in his job at Delaware Technical and Community College, the claimant sat in front of a tablet computer which projected onto a white board, whereas when working at Smyrna High School, the claimant had to walk around the classroom and hallways and attend pep rallies and other school

events. Dr. Saltzman testified that the claimant was capable of performing his regular, full-time, school-teaching duties, despite the lumbar back injury, within four to six weeks after the accident. His testimony provides substantial evidence to support the Board's so concluding. Dr. Rowe's recommendation in June that the claimant be restricted to sedentary work does not necessarily lead to a conclusion that the claimant could not perform his duties at a high school, and Dr. Rowe acknowledged that his change of restrictions to part-time work in August was not supported by any objective change in the claimant's condition. The record shows that the claimant made no effort to obtain other employment. As to the labor market survey, I find that the Board's consideration of the survey was adequate and that there is no legal requirement that the employer's medical expert "sign off" as suggested by the claimant. Finally, to the extent that the Board may have accepted the testimony of Dr. Saltzman over that of Dr. Rowe, the Board has the discretion to give the testimony of one expert greater weight than that of another expert and commits no error in doing so.[6]

11. Finally, the claimant contends that the Board acted inappropriately in expressing a conclusion that the hip and knee injuries were not related to the accident because the parties had stipulated that those injuries were not at issue in the case. The Board's comments concerning the hip and knee injury, if error, are harmless.

12. I therefore conclude that the Board's decision is supported by substantial

---

[6] *M.A. Hartnett, Inc. v. Coleman*, 226 A.2d 910, 913 (Del. 1967); *Munyan v. Daimler Chrysler Corp.*, 909 A.2d 133, 136 (Del. 2006); *Petrea & Son Oil Co.*, 442 A.2d 75, 76 (Del. 1982).

evidence and free from legal error. The Board's decision is ***affirmed***.

IT IS SO ORDERED.

/s/ James T. Vaughn, Jr.

cc: Prothonotary
Order Distribution
File