

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

CATHOLIC DIOCESE OF WILMINGTON,	)	
	)	
Appellant,	)	
	)	
v.	)	C.A. No. 08A-10-005-JEB
	)	
CHARLES WILLIAMS,	)	
	)	
Appellee.	)	

Submitted: March 25, 2009  
Decided: April 13, 2009

*Appeal from a Decision of the Industrial Accident Board.  
Affirmed.*

**OPINION**

*Appearances:*

Christopher T. Logullo, Esquire, Wilmington, DE.  
Attorney for Catholic Diocese of Wilmington.

Mary Jean Boyle, Esquire, Wilmington, DE.  
Attorney for Charles Williams.

**JOHN E. BABIARZ, JR., JUDGE**

Before the Court is an appeal of a denial of a petition to terminate benefits that had been awarded to Claimant Charles Williams. The petition to terminate was filed by the Catholic Diocese of Wilmington (“Employer”), which paid Claimant total disability benefits pursuant to an Agreement as to Compensation. In its petition to terminate, Employer asserted that Claimant is capable of performing sedentary or light duty work on a full-time basis. The Industrial Accident Board (“Board”) denied the petition, and this Court affirms.

**Facts.** At the time work accident occurred, Claimant was approximately 65 years old and had been working for Employer for 16 years. On August 23, 2007, Claimant tripped and fell over a pail of water while engaged in his duties as a custodian. Feeling pain in his low back and neck, he reported the incident to a supervisor and was taken to St. Francis Hospital where x-rays were taken prior to his release. He has not worked since that time. He has treated continuously with Demetrios Zerefos, M.D., who is board-certified in family and osteopathic medicine. Dr. Zerefos is of the opinion that Claimant remains totally disabled from employment because of the work accident.

Employer acknowledged the compensability of Claimant’s injuries and paid workers’ compensation benefits until February 2008, when it filed the petition to terminate. The Board held a hearing and both parties presented evidence. Employer

presented the testimony of Jerry L. Case, M.D., an orthopedic surgeon. Dr. Case examined Claimant on November 6, 2007, and reviewed the relevant medical records. Dr. Case's expert opinion is that Claimant is capable of at least sedentary to light-duty work, avoiding continuous standing and walking, bending and twisting and no lifting over ten to fifteen pounds. Dr. Case believed that all of Claimant's symptoms are preexisting degenerative changes associated with age, and which could have been aggravated by the fall. After an examination, Dr. Case diagnosed Claimant with a mild cervical strain and a lumbar strain superimposed upon widespread degenerative lumbar spine disease, as shown on the first MRI. Dr. Case stated that Claimant could perform the job of "sorter" at the thrift store that had been offered to Claimant by Employer.

Joseph Corsini, chief financial officer of the Catholic Diocese of Wilmington, testified that the job of "sorter" had been offered to Claimant at the same salary as his previous job and that it met his physical limitations.

Jocelyn Langrehr, M.S., a vocational counselor, testified for Employer that she had prepared a labor market survey based on both doctors' reports and Mr. Stackhouse's report. She assumed that Claimant was capable of light duty work and identified six positions available from February through May 2008 for which he would qualify despite his limitations.

Claimant testified on his own behalf. He completed the eighth grade and can read, spell and perform minimal mathematical calculations. He has held various jobs in areas such as construction, sanitation, food service and hospital maintenance. He worked for Employer for 16 years. Although he had a car accident in 2002, he had no back problems as a result. He is an insulin-dependent diabetic and continues to treat with Dr. Zerefos and his family doctor. He continues to have back pain, which improved slightly with therapy. He takes medication but does not know what it is. Since the accident, activities such as grocery shopping and laundry are more difficult for him.

Testifying on Claimant's behalf was his treating physician, Dr. Zerefos, diagnosed Claimant with acute cervical thoracolumbar sprain and strain with muscle spasms. Claimant was started on osteopathic treatments three days a week, including traction, myofascial release, ultrasound, electrical stimulation and heat. He was prescribed Vicodin and Zanaflex and was instructed to use ice at home. Dr. Zerefos put Claimant on total disability until September 16, 2007. Because his low back pain continued with little improvement, Dr. Zerefos ordered an MRI, which revealed a severe stenosis at L3-4 with impingement on the right side, and bone marrow edema at L3. There was also a herniation at L3-4 and an annular fissure. Dr. Zerefos gave his opinion that the edema shows there was trauma to the area and that the

impingement indicates that Claimant had had a physically demanding job as a custodian. Claimant was referred to Dr. Patil for a neurological evaluation and an EMG, and to Dr. Katz for a neurosurgical evaluation. In December 2007 and January 2008, Claimant experienced flare-ups of his low back and leg pain, and his disability was extended. In March 2008, Claimant no longer experienced improvement from his therapy, so it was reduced to once a week. The low back had improved 50 percent, the neck and upper back about 90 percent.

In April 2008, Dr. Zerefos and Claimant discussed the topic of Claimant's retirement. Because Claimant wanted to continue to work but could not continue his work as a custodian, Dr. Zerefos suggested that he submit to a functional capabilities evaluation (FCE) as well as vocational rehabilitation. Claimant's first MRI in September 2007 showed stenosis at L3-4 with impingement on the right side and bone marrow edema at L3, as well as a herniation at L3-4 and an annular fissure. His second MRI in April 2008 showed herniation at C3-4 with severe stenosis and cord impingement, and C4-5 with moderate extrusion of the disc at that level. The October 2007 EMG suggested radiculopathy and polyneuropathy.

At the hearing, Dr. Zerefos gave his opinion that the MRI results demonstrate that Claimant is totally disabled from work and that the injuries showed in the tests are causally related to the work accident, a conclusion supported in part by the fact

that Claimant was asymptomatic prior to the accident. Dr. Zerefos's opinion was not changed by the fact that Claimant's earlier medical records indicate arthritic type neck pain. At the time of the hearing, Dr. Zerefos was waiting to hear if the workers' compensation division would pay for Claimant's FCE.

Robert Stackhouse, vocational director of Proto-Worx, Inc., testified on Claimant's behalf. His testing of Claimant revealed deficiencies in reading, spelling and and math. Stackhouse visited the work sites recommended by Employer and concluded that Claimant was not capable of performing any of the jobs.

**The Board's decision.** The Board based its award on the testimony of both Dr. Zerefos and Claimant himself. Even though Dr. Zerefos recommended vocational rehabilitation as early as December 2007, the doctor noted that Claimant had flare-ups of back pain at that time and that Claimant continues to be in back pain. As Claimant's treating physician who sees him as many as three times per week, the Board placed greater weight in that opinion than on Dr. Case's opinion, who saw Claimant once. Despite Claimant's desire to work, Dr. Zerefos believed that the two MRI's and the EMG are objective evidence that he is disabled and that the disability stems from the work accident. Dr. Zerefos based his opinion on both objective and subjective measures, including the testing mentioned above and the fact that Claimant was apparently asymptomatic prior to the accident. The Board also found that

Claimant testified credibly as to his continuing pain, and neither doctor found any sign of symptom magnification. Because the Board found that Employer did not meet its initial burden of proof, it did not address the questions of a reasonable search for work (including the job offer of sorter made to Claimant by Employer) or displaced worker status.

**Standard of review.** On appeal from a decision of an administrative board, this Court's role is to determine whether the decision is supported by the record and is free from legal error.<sup>1</sup> This Court does not weigh the evidence or make its own factual findings.<sup>2</sup> If a Board's decision is supported by substantial evidence, the Court must sustain the decision.<sup>3</sup> Substantial evidence is relevant evidence that a reasonable person might accept as adequate to support a conclusion.<sup>4</sup> When two experts offer contrary opinion testimony, the Board is free to accept either opinion.<sup>5</sup>

**Discussion.** Employer argues that the Board's decision is not supported by substantial evidence in the following ways. First, Employer argues that the Board

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<sup>1</sup>*Quaker City Motor Parts v. Sheldon*, 2001 WL 282808 (Del. Super.)(citing *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66-67 (Del. 1965)).

<sup>2</sup>*Johnson v. Chrysler Corp.*, 213 A.2d 64, 66-67 (Del. 1965).

<sup>3</sup>*Mellow v. Bd. of Adjustment of New Castle County*, 565 A.2d 947, 954 (Del. Super. Ct. 1988).

<sup>4</sup>*Streett v. State*, 669 A.2d 9, 11 (Del. 1995).

<sup>5</sup>*DiSabatino Bros., Inc. v. Wortman*, 453 A.2d 102, 106 (Del. 1982).

failed to examine the evidence that Claimant chose not to work. After reviewing the record, the Court finds that Employer misrepresents the record evidence regarding Claimant's desire to work. Claimant preferred to work and he was clear about his preference, but that preference did not alter Dr. Zerefos's opinion that Claimant should not work and that he was in fact disabled. Employer suggests that Claimant was trying to "manipulate the system" by not following his doctor's recommendation and then claim he is physically incapable of working.<sup>6</sup> Neither of the two doctors nor the Board found that Claimant appeared to be magnifying his symptoms or otherwise manipulating the proceedings.

Employer asserts that support for its argument is found in *Gilliard-Belfast v. Wendy's, Inc.*,<sup>7</sup> but in fact, the opposite is true. In *Gilliard-Belfast*, the Delaware Supreme Court held that a person who can resume some form of employment by only by disobeying the orders of his or her treating physician is totally disabled, at least temporarily, regardless of his or her capabilities."<sup>8</sup> Employer asserts that there was an inference that Dr. Zerefos expected Claimant to return to work, but the doctor consistently stated his opinion that Claimant was totally disabled, and he had

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<sup>6</sup>Opening Br. at 12.

<sup>7</sup>754A.2d 251 (Del. 2000).

<sup>8</sup>*Id.* at 254.



repeatedly renewed no-work slips. The Court finds no merit in Employer's argument that the Board erred in its findings about Claimant's willingness to work.

Second, Employer argues that the Board used a double standard by giving more weight to Dr. Zerefos's opinion than to Dr. Case's opinion as to whether Claimant was asymptomatic prior to the accident. The Board is free to give more weight to either expert witness, if the testimony constitutes substantial evidence, and the Court finds that Dr. Zerefos gave such testimony and that the Board properly accepted it.

Third, Employer argues that the Board ignored inconsistencies regarding Claimant's pain. The Board accepted Dr. Zerefos's testimony that Claimant has had "flare-ups" of significant pain on and off since the accident. That characterization is consistent with the record evidence and resolves any discrepancies that may exist as to particular periods of time. Employer has not cited to any discrepancies that are in conflict with this description of Claimant's experience of pain.

Finally, Employer asserts that it met its burden of proof that Claimant is no longer totally incapacitated for purposes of workers' compensation. To support this assertion, Employer simply lists the witnesses it provided at the hearing. There is no meaningful challenge to the Board's finding that, based on the testimony of Dr. Zerefos and Claimant himself, the Employer did not meet its initial burden.

The Court concludes that the Board's decision is supported by substantial evidence and is free from legal error. For all these reasons, the decision of the Industrial Accident Board denying Employer's petition to terminate benefits to Claimant Charles Williams is *Affirmed*.

***It Is So ORDERED.***

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Judge John E. Babiarez, Jr.

JEB,jr/rmc/bjw  
Original to Prothonotary