Fact File # 10

OCT 20 2009

BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

EUGENE WATSON,	)	
	)	
Employee,	)	
	)	
v.	)	Hearing No. 1303174
	)	
WAL-MART ASSOCIATES,	)	
	)	
Employer.	)	

DECISION ON PETITION
FOR REVIEW TO TERMINATE BENEFITS

Pursuant to due notice of time and place of hearing served on all parties in interest, the above-stated cause came before the Industrial Accident Board on July 15, 2009, in the Hearing Room of the Board, in Milford, Delaware. An extension of time for issuance of the decision was taken pursuant to 19 *Del. C.* § 2348(k).

PRESENT:

LOWELL L. GROUNDLAND

ROMAYNE SEWARD

Julie G. Bucklin, Workers' Compensation Hearing Officer

APPEARANCES:

Bayard J. Snyder, Attorney for the Claimant

Christine P. O'Connor, Attorney for the Employer

NATURE AND STAGE OF THE PROCEEDINGS

On May 15, 2007, Eugene Watson ("Claimant") sustained a compensable industrial injury while working for Wal-Mart Associates ("Wal-Mart"). On December 10, 2008, Wal-Mart filed a Petition for Review to terminate Claimant's total disability benefits, alleging that Claimant is capable of working with restrictions. Claimant agrees that his doctor released him to work with restrictions, but argues that he remains totally disabled, as he is a displaced worker. On July 15, 2009, the Board conducted a hearing on Wal-Mart's petition and this is the Board's decision on the merits.[1]

SUMMARY OF THE EVIDENCE

Robert D. Keehn, M.D., a board-certified orthopedic surgeon, testified by deposition on behalf of Wal-Mart. Dr. Keehn examined Claimant on November 15, 2007 and March 5, 2009 and reviewed Claimant's medical records in conjunction with those examinations. He believes that Claimant is physically capable of working full-time with sedentary to light duty restrictions.

Following the November 2007 examination, Dr. Keehn concluded that Claimant could return to work without restrictions. Dr. Keehn prepared an addendum report in June 2008 regarding the question of the proposed lumbar fusion surgery. He thought that the proposed surgery was not unreasonable for Claimant if all non-operative intervention had failed.

In conjunction with the March 5, 2009 examination, Dr. Keehn reviewed the medical records from Drs. Rowe, Kim and Fisher, as well as the discogram and operative report. Claimant was not working at that time. Claimant had undergone a total disc replacement at L4-5 on August 27, 2008 and was still having complaints. He complained of terrible low back pain

[1] Normally, decisions are to be issued within fourteen days of a hearing. *See* 19 *Del. C.* § 2348(k). Because of workload demands and other time restraints, it was necessary to take an extension of time to issue this decision in accordance with 19 *Del. C.* § 2348(k).

that went into his left buttock, as well as weakness in his arms. He was attending physical therapy three times a week.

The physical examination in March 2009 showed that Claimant was in no acute distress. He had marked restriction of motion in his lumbar spine and tenderness across his back. The sitting maneuver was negative, which means that there was no evidence of radiculopathy or sciatica. The neurologic examination of the extremities was normal. Dr. Keehn did not think that Claimant was exaggerating his symptoms. Dr. Keehn thought that it was reasonable for Claimant to go to therapy for another six to eight weeks in order to see if his pain could be decreased and motion increased. Claimant was able to work in a sedentary to light duty capacity with a lifting restriction of twenty pounds.

Jessica Reno, a vocational case manager, testified on behalf of Wal-Mart. Ms. Reno prepared a labor market survey with Claimant in mind. Claimant is fifty-four years old, has a high school education and has an extensive work history.

Claimant worked at Wal-Mart for nineteen months as a laborer, which is a medium to heavy duty position. He also worked as a custodial supervisor and assembler before working at Wal-Mart. Claimant's extensive employment history shows that he is able to hold a job.

Claimant has transferable skills based on his education and work experience. He is able to take instructions and work with other employees, as well as read, communicate and do mathematics. Claimant's transferable skills will be able to be put to use even in this economy.

The labor market survey lists nine jobs that are within Claimant's abilities and physical restrictions. They are entry-level positions and require a high school diploma. The employer for the collections agent position indicated that it is very open to hiring almost anyone. The average

weekly wage for the jobs listed on the survey is $433.89. Claimant's wages at Walmart were $524.76 per week. Claimant's earning capacity is slightly decreased due to the restrictions.

Ms. Reno reviewed Claimant's job search log with twenty-eight jobs listed. Of those twenty-eight jobs, twelve were outside of Claimant's restrictions, as they were medium to heavy duty positions; sixteen were within Claimant's skills and restrictions, but six were from the labor market survey, four were from April when Claimant saw the survey and three were not available at that time, and the others did not interview Claimant. Claimant is not qualified for janitorial work now because of his physical restrictions.

Claimant, fifty-four years old, testified about his industrial injury, work experience and education. Claimant graduated high school in 1973 and does not have any other formal education. Claimant was in the Army from 1973 to 1975 and left the Army with an honorable discharge. He did not have any formal vocational training in the Army.

Claimant's employment history includes temporary jobs in auto detailing, Wal-Mart, a cannery factory and doing custodial work. His other jobs include working at the Delaware Home for the Chronically Ill for ten years as a janitor, at Milford Hospital as a security guard, in a refinery for eight years putting in a floatation roof, at Lear Corporation making seats for General Motors, and then he was back at the Delaware Home for the Chronically Ill for another three years as a supervisor of seven to ten employees. As a supervisor, Claimant assigned a floor to the employees, passed out paychecks, ordered supplies, spoke with employees individually, filed grievances and went to grievance meetings with the employees, and cleaned the building. Then Claimant worked at Wal-Mart in the Distribution Center loading and unloading products.

Following the industrial accident at Wal-Mart, Claimant underwent surgery, but was worse after that surgery. No further treatment has been suggested to help Claimant's condition.

As a result of the termination petition, Claimant started a job search and contacted the jobs listed on the labor market survey. Claimant kept a job search log. The jobs were within his physical capabilities as far as he knew. He applied for some jobs online and others in-person. The applications asked about physical capabilities and restrictions, so Claimant indicated that he has sedentary to light duty restrictions and can lift up to twenty-pounds. Claimant never heard back from any of the online applications. None of the in-person applications resulted in an interview. Two of the jobs provided a written response to his application and indicated that he could not be hired because the jobs are beyond his restrictions as both jobs require lifting more than twenty pounds. Of the jobs listed on the job search log, four were not hiring, he got no response from sixteen jobs, he was not qualified for one job and three jobs are pending.

Dr. Fisher released Claimant to work with restrictions in November 2008. He started a job search in mid-February after Wal-Mart filed the petition for review. Between November and February, Claimant was going to physical therapy. Claimant did not ask about educational requirements or the pay rate for the jobs listed on his log; he just saw job listings in the paper and applied.

Claimant does not take any medication now. His pain level at the time of the hearing was a seven out of ten on the pain scale. He drives occasionally, but his wife drove him to the hearing. The doctors told Claimant to take medication for his pain, but he only takes Tylenol.

Claimant has a little bit of computer knowledge. He has a computer at home, but does not play on it. He typed the job search log, but his wife helped him with it a bit since she spends a lot of time on the computer at home and at work.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Termination of Benefits

When an employer files a petition to terminate total disability benefits, the employer bears the initial burden of proof regarding the Claimant's ability to work. *Torres v. Allen Family Foods*, 672 A.2d 26, 30 (Del. 1995) (*citing Governor Bacon Health Center v. Noll*, 315 A.2d 601, 603 (Del. Super. Ct. 1974)). For the following reasons, the Board finds that Claimant is no longer totally disabled.

When there is a conflict in the medical testimony, the Board must decide which physician is more credible. *General Motors Corp. v. McNemar*, 202 A.2d 803 (Del. 1964). As long as there is substantial evidence to support the decision, the Board may accept the testimony of one physician over another. *Standard Distributing Co. v. Nally*, 630 A.2d 640, 646 (Del. 1993). In the case at hand, only Dr. Keehn testified but Claimant acknowledged that Dr. Fisher released him to work with restrictions in November 2008. Dr. Keehn also found that Claimant is capable of working with sedentary to light duty restrictions, so Claimant did not present testimony from his treating physician. Since the doctors agree that Claimant is able to work in a sedentary to light duty capacity, the Board will accept those opinions and finds that Claimant is able to work in that capacity as of November 2008 when Dr. Fisher released him to work.

Since Claimant is not totally incapacitated, the burden shifts to Claimant to prove that he is a displaced worker. *Wyatt v. State of Delaware*, Del. Super. Ct., C.A. No. 97A-05-004 HDR, Ridgely, J., at 3 (March 27, 1998)(Order). Given Claimant's age, physical limitations, education, mental capacity and training, the Board finds that he is not *prima facie* a displaced worker. *Torres*, 672 A.2d at 30 (*citing Franklin Fabricators v. Irwin*, 306 A.2d 734, 737 (Del. 1973)). Claimant is only fifty-four years old, has a high school degree and transferable skills based on

his education and extensive work experience. He is able to take instructions and work with other employees, as well as read, communicate and do mathematics. Claimant is able to function as an adult in today's society and has sedentary to light-duty work restrictions.

Since Claimant is not *prima facie* a displaced worker, he may still prove that he is a displaced worker by showing that he has made a reasonable effort to locate employment, but was unable to do so due to his disability. *M.A. Hartnett, Inc. v. Coleman*, 226 A.2d 910, 913 (Del. 1967) (claimant must show inability "to obtain employment because of his physical condition"); *Zdziech v. Delaware Authority for Specialized Transportation*, Del. Super. Ct., C.A. No. 87A-AU-10, Gebelein, J. (October 13, 1988) (four applications in over a year period is not a reasonable effort when there is no evidence that failure to obtain employment was because of disability); *see also Torres*, 672 A.2d at 30 (*citing Franklin Fabricators v. Irwin*, 306 A.2d 734, 737 (Del. 1973)).

Claimant testified that he conducted a job search by applying for jobs on the labor market survey and to other jobs he found in the newspaper. The Board finds that Claimant has not conducted an adequate job search even though he applied for about twenty-eight jobs and he has failed to prove that he has been denied employment because of his restrictions. Claimant has not heard back from most of the jobs on his log, some jobs were not hiring, and other jobs were beyond his restrictions. Furthermore, the Board accepts the testimony of Ms. Reno, who prepared a labor market survey that shows jobs for which Claimant is physically and vocationally suited that are within Claimant's restrictions and are available in the open labor market. Therefore, the Board finds that the survey and Ms. Reno's testimony are sufficient to prove that Claimant is employable and not a displaced worker.

Based on the foregoing, the Board finds that Claimant is not a displaced worker and, therefore, is no longer totally disabled. Wal-Mart's Petition for Review is granted as of the date of filing on December 10, 2008.

Partial Disability

Where there is evidence that there continues to be some disability that could affect a claimant's earning capacity, the employer must demonstrate that the claimant is not partially disabled. *Waddell v. Chrysler Corp.*, Del. Super. Ct., C.A. No. 82A-MY-4, Bifferato, J., slip op. at 5 (June 7, 1983); *see also Del. Code. Ann.* tit. 19, § 2325. Since Claimant may return to work with restrictions, there is a disability that could affect his earning capacity.

The Board accepts Dr. Keehn's opinion regarding Claimant's sedentary to light restrictions with no lifting more than twenty-pounds. Dr. Keehn explained that Claimant's restrictions are due to his subjective complaints. Dr. Fisher imposed similar restrictions on Claimant in November 2008.

The Board accepts Ms. Reno's testimony and the labor market survey that indicate that Claimant will suffer a partial disability. *Globe Union, Inc. v. Baker*, 310 A.2d 883, 887 (Del. Super. Ct. 1973), *aff'd*, 317 A.2d 26 (Del. 1974) ("partial disability" refers to when claimant suffers "a partial loss of wages as a result of his injury"). Claimant earned $524.76 per week at Wal-Mart and the jobs listed on the survey pay an average of $433.89 per week. Therefore, it is clear to the Board that Claimant will suffer a wage loss. Based on the foregoing, the Board finds that Claimant is entitled to partial disability benefits in the amount of $60.44 per week beginning on December 10, 2008. Wal-Mart must make the appropriate reimbursement to the Workers' Compensation Fund.

Attorney's Fee and Medical Witness Fees

Having received an award, Claimant is entitled to a reasonable attorney's fee assessed as costs against Wal-Mart in an amount not to exceed thirty percent of the award or ten times the average weekly wage, whichever is smaller. *Del. Code Ann.* tit. 19, § 2320. However, when the employer submits a settlement offer to Claimant or Claimant's counsel at least thirty days before the hearing that is equal to or greater than the Board's award, the Claimant is no longer entitled to receive an award of attorneys' fees. *Id.* At the conclusion of the hearing, Wal-Mart submitted a settlement offer that was sent to Claimant's counsel before the hearing. The settlement offer was equal to the award; therefore, Claimant is not entitled to an attorney's fee award in this case.

STATEMENT OF THE DETERMINATION

Based on the foregoing, Wal-Mart's Petition for Review to terminate Claimant's total disability benefits is GRANTED as of the date of filing on December 10, 2008. Claimant is entitled to partial disability benefits in the amount of $60.44 per week as of December 10, 2008. Wal-Mart must make the appropriate reimbursement to the Workers' Compensation Fund.

IT IS SO ORDERED THIS 13th DAY OF OCTOBER 2009.

INDUSTRIAL ACCIDENT BOARD

/s/ Lowell L. Groundland

/s/ Romayne Seward

I hereby certify that the above is a true and correct decision on the Industrial Accident Board.

Julie G. Bucklin
Workers' Compensation Hearing Officer

Mailed Date:

OWC Staff