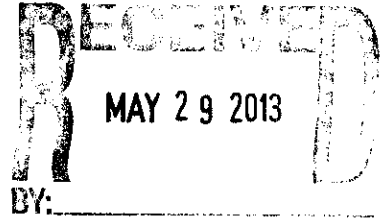


BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE



VIRGINIA VASSALLO,)
)
 Employee,)
)
 v.)
)
 EDEN ROCK ASSISTED LIVING,)
)
 Employer.)

Hearing No. 1363820

DECISION ON PETITION 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 April 4, 2013, in the Hearing Room of the Board, New Castle County, Delaware. Pursuant to Del. Code Ann. tit. 19, §2348(k), the Board required an extension of time to complete the written decision.

PRESENT:

LOWELL L. GROUNDLAND

OTTO MEDINILLA

Joan Schneikart, Workers' Compensation Hearing Officer, for the Board

APPEARANCES:

Nicholas M. Krayter, Attorney for the Employee

Andrew J. Carmine, Attorney for the Employer

NATURE AND STAGE OF THE PROCEEDINGS

On December 7, 2010, Virginia Vassallo (“Claimant”) sustained compensable injuries to the neck and right shoulder while working as a certified nursing assistant for Eden Rock Assisted Living (“Eden Rock”). By prior agreements as to compensation, Claimant is currently receiving total disability benefits at the compensation rate of \$210.00 per week, based on her weekly salary of \$315.00 at the time of the work accident. She has also received 60 weeks of permanent impairment benefits for a 20% loss of use to the neck,¹ and 14 weeks of disfigurement benefits for scars to the neck and right shoulder resulting from prior surgeries.

On September 5, 2012, Eden Rock filed a Petition for Termination of Benefits alleging that Claimant was physically able to return to work. Claimant contends she remains disabled from all work due to cervical spine injuries.

The parties submitted a joint Stipulation of Facts into the record, pursuant to *Rules of the Industrial Accident Board of the State of Delaware* (“I.A.B. Rules”) Rule 14(A).

SUMMARY OF THE EVIDENCE

Jeffrey S. Meyers, M.D., a physical medicine and rehabilitation specialist, testified by deposition on behalf of the Eden Rock. He examined Claimant on July 3, 2012, and on March 6, 2013, and reviewed her medical records.² Dr. Meyers opined that Claimant is capable of returning to work in a full-time sedentary duty job with restrictions for the upper extremities and for lifting.

¹ The parties further stipulate that Claimant has sustained a 17% loss of use to the right shoulder related to the work accident.

² Dr. Meyers testified in a prior deposition on December 6, 2012, for a pending petition in the case. A transcript of the prior deposition was attached as “Exhibit A” to his current deposition.

At the July 2012 defense medical examination, Claimant reported neck pain levels that ranged between a 5 to 9 plus and averaged an 8 on a visual analog scale. She also described a January 2012 facial trauma in an abuse episode involving her child's father.

At the recent March 2013 defense medical examination, Claimant reported continued constant pain in the neck with bilateral upper extremity radiation to her hands as well as discrete pain in each shoulder. She was seeing Dr. Devotta on a monthly basis for medication, Dr. Bose several times a year for post surgical neck complaints, and Dr. Villafuerte for chiropractic adjustments. She continued to take narcotic analgesics and neuropathic pain medications, and use a TENS unit for pain relief. She began seeing Dr. Bandera, instead of Dr. Devotta, for pain management in February 2013. Dr. Bandera's office was closer to her home and Dr. Devotta had discharged her from care in January 2013 due to noncompliance with a narcotic agreement. However, she did not report the discharge to Dr. Meyers. While she desired to return to work, Dr. Bowes continued to keep her out of all work. She told Dr. Meyers that she was considering returning to school to become an ultrasound technician.

Claimant reported pain scores at the second defense medical examination of an 8 for the neck, and a 5 to 9 for both the left and right shoulders. She can perform activities of a sedentary level with minimal use of her upper extremities above the level of the abdomen. She had challenges with dressing, bathing, grooming and performing self-care due to decreased range of motion and pain. She reported severely limited range of motion to the neck and could no longer perform activities such as housecleaning, vacuuming or yard work. Her walking tolerance was also decreased due to neck and upper extremity pain.

Upon physical examination, Dr. Meyers made findings similar to his July 2012 visit. She had tenderness over the cervical paraspinals and shoulder slopes bilaterally. She had positive

Spurling's maneuver and root tension signs of the neck. Neer's impingement, Hawkins and Speed's tests to the shoulders were positive bilaterally, suggesting some rotator cuff pathology. However, such results were not unusual given her prior shoulder surgery. Neurologically, she was intact. Range of motion testing was decreased for the cervical spine and bilateral shoulders. Dr. Meyers agreed with Dr. Bose that recent diagnostic studies show that Claimant's spine is in good alignment and there are no structural or hardware problems.

Dr. Meyers concluded that Claimant was capable of returning to work in a sedentary duty level with 5-pound lifting restrictions, no repetitive motion of the upper extremities and no upper extremity motion above the chest level. If Claimant wanted to work at a higher level, the doctor would recommend a functional capacity evaluation ("FCE"). Returning to work would be part of her treatment and rehabilitation as an injured worker under the current healthcare practice guidelines.

On cross examination, Dr. Meyers agreed that patients often do not recover well from cervical spine surgeries. Her subjective complaints were similar at the two defense medical examinations. She has a chronic neck and bilateral shoulder conditions. The doctor did not believe she was magnifying her symptoms and he did not question her pain complaints. Ongoing pain management treatment is reasonable and necessary for her.

Ellen Lock, a vocational consultant, testified on behalf of Eden Rock. She prepared a labor market survey for Claimant (Employer's Exhibit No. 2) based on the medical restrictions of Dr. Meyers for a return to full-time sedentary duty work with no lifting over 5 pounds, no repetitive upper extremity use, and no use of the upper extremities above the shoulder. Ms. Lock has learned that Claimant resides in Wilmington, is a high school graduate and has a certified nursing assistant training and experience. The labor market survey covers the period from

September 6, 2012, to February 8, 2013, and identifies twelve representative positions, of which five continued to be available as of the hearing date. Most of the jobs involve customer service which correlated with Claimant's history of providing patient care. All of the jobs are within Dr. Meyers restrictions, except for the receptionist position at Super Cuts, are vocationally appropriate and provide on the job training. The average wage of the jobs is \$405.00 per week with the elimination of the one Super Cuts receptionist position.

Claimant, age forty-two, testified that she had worked at Eden Rock for eight months before the work accident, in which she sustained injuries to the neck and right shoulder when assisting a patient to use the toilet. She previously underwent fusion surgery to the neck in 2008, but afterwards was able to work as a certified nursing assistant without restrictions. Following the 2010 work accident, she underwent fusion surgery at C3-4 by Dr. Bose in March 2011; a cervical decompression and revision at the same level by Dr. Bose in May 2011; and a right shoulder surgery by Dr. Rasis in September 2011. (She also underwent a left shoulder surgery in November 2011, but that was unrelated to the 2010 work accident.)

Since the last work-related surgery in 2011, she continues with constant chronic pain in her neck and down both arms. With medication, her pain is a 7 to 8 on an analog pain scale; without medication, it is a 10. She has tried a series of three injections without relief. She is considering a spinal cord stimulator and there is not further surgical option available.

She does not believe she can perform a full-time sedentary duty job as she cannot sit for more than 15 minutes, then she must move and walk around. However, she wants to return to work. Her pain at the hearing was a 9.

On cross examination, Claimant agreed that she completed training to become a certified nursing assistant. Her right arm is worse than her left arm. Her adult son currently lives with

her. She can drive but for only short distances. She last saw Dr. Bose on December 17, 2012, and he has permanently disabled her. She sees him every four to six weeks. She agreed she can perform some activities at home such as washing dishes and sweeping the floor. She continues to take Roxycodone for breakthrough pain, Percocet, and Gabapentin, as prescribed by Dr. Bandera.

Bikash Bose, M.D., a neurosurgeon, testified by deposition on behalf of Claimant. He began treating Claimant in 2008 when he performed an anterior discectomy and fusion from C4 to C7 with allograft and instrumentation on her. He last saw her in follow-up for that treatment in February 2009. The doctor last saw her related to the 2010 work accident in December 2012. He opined that Claimant remains disabled from all work due to that event.

When the doctor next saw her on February 17, 2011, she had been back to work as a CNA, but described experiencing terrible pain in the neck and shoulder at work on December 7, 2010, while helping a patient onto a toilet. She was hospitalized and then attended physical therapy from December 9, 2010, through January 25, 2011, but her condition did not improve. She was unable to drive or dress herself at that time.

Upon physical examination, Dr. Bose found tenderness of the mid and lower cervical spine and over the trapezius bilaterally. Her cervical range of motion was moderately restricted in extension and lateral rotation, particularly on the right side. Deep tendon reflexes were slightly depressed, but otherwise the neurological findings were normal. A recent CT scan showed a disc herniation at C3-4 with evidence of a non-union at the C6-7 level, at the bottom of the last surgery done in 2008. Dr. Bose recommended an EMG to look for nerve damage in the right upper extremity, a bone scan of the cervical spine, and a cervical myelogram since she was medically precluded from getting an MRI.

At a follow-up visit in March 2011, the diagnostic studies revealed a central disc herniation at C3-4, and a smaller disc herniation at the C2-3 level, which were both at levels above the previous surgery. The bone scan showed no clear-cut evidence of pseudoarthrosis, or a non-union. The doctor ultimately performed further surgery on her on March 10, 2011, consisting of an anterior cervical discectomy and fusion with allograft and plating at C3-4. The doctor related that procedure to the 2010 work accident.

Claimant also required a third cervical spine surgery on May 3, 2011, consisting of a decompression and revision for stabilization, which was also related to the 2010 work accident. However, she did not do well afterwards and continued to be in severe pain. She reported difficulty turning her head, had neck pain and was unable to lift her arms in August 2011. She remained totally disabled but also had problems with the right shoulder. She underwent physical therapy but that did not help. She continued to complaint of numbness from the neck down into her arms in October 2011, so the doctor prescribed Neurontin. He continued her on total disability. By November 2011, the doctor discussed the possibility of trying cervical injections or a spinal cord stimulator to make her more functional.

At an April 2012 visit, Claimant reported having the injections but receiving no relief. She continued with moderately restricted range of motion to the cervical spine in all directions, tenderness of the cervical spine and over the trapezius bilaterally, and bilateral paravertebral and trapezius spasm. Dr. Bose continued Claimant's total disability status.

When the doctor last saw her on December 17, 2012, she was doing poorly. She had pain in her neck and radiating into her shoulders and arms. X-rays of the neck showed satisfactory alignment and the instrumentation seemed to be in a good position without slippage or breakage

of screws or cases. Dr. Bose continued to recommend conservative pain management treatment and did not believe that further direct surgery would be helpful.

Dr. Bose opined that since she continues in severe pain, has muscle spasms, takes narcotics medications and has not improved, she is not employable. As a result, he does not believe she can perform any of the jobs in the labor market surgery. He has never found her to magnify her symptoms. With a spinal cord stimulator, she may be able to reduce the amount of narcotics she presently takes.

On cross examination, Dr. Bose agreed that Claimant had a significant amount of pain prior to the initial surgery the doctor performed in 2008. In comparing the three surgeries she has undergone, one before and two after the 2010 work accident, the doctor noted the first surgery involved three levels and was more severe than the other procedures. He did not see Claimant after the 2010 work accident until February 2011. At that time, Claimant was restricted from moderate duty activities such as pushing a table or vacuum cleaner, bowling or climbing several flights of stairs. She was able to perform activities of daily living. Claimant did well after the May 2011 surgery. She began driving about a month later, and continued to do well in the summer of 2011. However, she developed unbearable pain in November 2011, at the level of a 10 on an analog scale, which the doctor concluded was due to the slight migration posteriorly of the cage from the anterior fusion, and represented an anatomical problem. The doctor was not aware of any incidents following the May 2011 surgery that would have explained the later problems. The diagnostic studies still showed the structure was stable and the spine was in good alignment. Dr. Bose agreed that his opinion as to Claimant's disability status was based primarily on her complaints of subjective pain. She has not yet undergone a

functional capacity evaluation ("FCE"). The doctor agreed that at his last visit in December 2012, he did not test Claimant's standing, walking, and grip or strength tolerances.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On its Petition to Terminate Benefits, Eden Rock must prove, by a preponderance of the evidence, that Claimant is no longer totally disabled and has not suffered a loss of earning capacity. To show that total disability has ended, an employer must first show that a claimant is not totally incapacitated or, in other words, that the claimant is medically employable. *Howell v. Supermarkets General Corporation*, 340 A.2d 833, 835 (Del. 1975); *Chrysler Corporation v. Duff*, 314 A.2d 915, 918, n. 1 (Del. 1973). The employer must further show that Claimant is not partially disabled if there is evidence of some continuing disability that could affect is earning capacity. *Waddell v. Chrysler Corp.*, Del. Super., C.A. No. 82A-MY-4, Bifferato, J., slip op. at 5 (June 7, 1983).

When the medical testimony is in conflict, the Board, in its role as the finder of fact, must resolve the conflict. *General Motors Corp. v. McNemar*, 202 A.2d 803 (Del. 1964). As long as substantial evidence is found, the Board may accept the testimony of one expert over another. *Standard Distributing Company v. Nally*, 630 A.2d 640, 646 (Del. 1993).

Based on the evidence, the Board concludes that Eden Rock has carried its burden to show that Claimant's total disability benefits have terminated as of the date of this decision, and she is capable of returning to full-time sedentary duty work with upper extremity restrictions.

The Board finds the work capacity opinion of Dr. Meyers to be more convincing than the opinion of Dr. Bose in this case. The defense medical expert saw Claimant most recently in March 2013. He concluded Claimant's findings on physical examination were similar to an earlier defense medical examination in July 2012 in that she demonstrated positive findings such

as tenderness and a positive Spurling's maneuver, as well as positive testing with respect to the shoulders, along with decreased range of motion to the cervical spine and bilateral shoulders. However, Dr. Meyers opined that such findings were not unusual given her prior shoulder surgeries. Furthermore, she was neurologically intact and recent diagnostic studies showed her cervical spine to be in good alignment and without any structural or hardware problems.

While Dr. Meyers agrees that Claimant continues with chronic neck and a bilateral shoulder condition (of which only the right shoulder is related to the 2010 work accident), and ongoing pain management is reasonable for her, he believes that she is capable of returning to work in a sedentary duty capacity with restrictions for lifting no more than 5 pounds, no repetitive motion of the upper extremities and no upper extremity motion above chest level. It has been nearly two years since her last neck surgery and more than eighteen months since her right shoulder surgery. There are no further surgical options available for her for either the neck or right shoulder. The Board agrees with Dr. Meyers' opinion, under the circumstances of this case, that a return to work would be rehabilitative for her under the current Health Care Advisory Panel ("HCAP") Practice Guidelines, *see* 19 Del. C. § 2322C.

The Board did not find Claimant credible that she incapable of returning to work in a sedentary duty capacity with restrictions. She testified she is able to perform limited household duties at home and she would like to return to work. She also told Dr. Meyers she was considering returning to school to become an ultrasound technician. She was capable of sitting through the hearing that lasted approximately two hours with the opportunity to stand and change position occasionally. She has certified nursing assistant training, which Ms. Lock, the vocational consultant, opined would provide transferable skills in the customer service field.

The Board rejects the opinion of Dr. Bose in this case. The treating surgeon performed his last surgery on her in May 2011. He explained that the first cervical fusion he performed on Claimant in 2008, before the 2010 work accident, involved three levels and was much more severe than the two later procedures he performed on the neck in 2011. He has not seen her since December 2012 and does not currently monitor her pain medications. Dr. Bose did not know what medications she was currently taking under the direction of Dr. Devotta and Dr. Bandera. He opined that she would not harm herself by returning to work at this point.

The treating surgeon agreed at his last visit in December 2012 x-rays showed a satisfactory alignment of the cervical spine and that instrumentation there was in a good position without slippage or breakage. At that same visit, he did not test Claimant's standing, walking, and grip or strength tolerances. Dr. Bose further conceded that his opinion of Claimant's disability status was based primarily on her complaints of subjective pain and he has not ordered a functional capacity evaluation for her.

Claimant does not argue that she is vocationally displaced, either because she is a *prima facie* "displaced worker" or because she has made a reasonable job search that failed because of the work injury. *Torres v. Allen Family Foods*, 672 A.2d 26, 30 (Del. 1996). Therefore, the Board need not address those issues.

Nevertheless, based on the holding in *Gilliard-Belfast v. Wendy's, Inc.*, 754 A.2d 251 (Del. 2000)); *see also Delhaize America, Inc. v. Bonnie Baker*, Del. Supr., C.A. No. 108, 2005, Berger, J. (Aug. 12, 2005)(Order), the Board concludes that Claimant is entitled to continue to receive total disability benefits in this case during the period from the date of filing of the termination petition until the date of this decision since Dr. Bose, the treating surgeon, currently continues to restrict her from all employment, and there is no evidence of bad faith on his part.

“If a claimant is instructed by his or her treating physician that he or she is not to perform *any* work, the claimant will be deemed to be totally disabled during the period of the doctor’s order. This rule assumes that the doctor acts in good faith, and does not extend beyond the time that the Board decides whether the claimant is disabled as a matter of fact.” *Id.*

For the above reasons, the Board concludes that Claimant is medically employable as of the date of this decision.

Partial Disability

In cases involving petitions to terminate total disability, the employer must also show the claimant is not partially disabled where there is evidence of a continuing disability that could reasonably affect the claimant’s earning capacity. *Waddell v. Chrysler Corp.*, Del. Super., C.A. No. 82A-MY-4, Bifferato, J., slip op. at 5 (June 7, 1983). Absent proof of compensation other than wages or other evidence of earning power, the extent of a claimant’s partial disability can be the difference between the claimant’s wages before and after the injury. *Globe Union, Inc. v. Baker*, 310 A.2d 883, 889 (Del. Super. 1973), *aff’d*, 317 A.2d 26 (Del. 1974).

With respect to partial disability, based on the medical opinion of Dr. Meyers, the Board finds Claimant is restricted to performing only sedentary duty work on a full-time basis with restrictions for the upper extremities and for lifting. To that end, the Board accepts the testimony of Ms. Lock and finds the hypothetical labor market survey (Employer’s Exhibit No. 2) to be valid. The jobs in the labor market survey are all sedentary and would allow her to sit, stand or walk, as needed. With the exception of the Super Cuts position, they all are within the restrictions set forth by Dr. Meyers. The hypothetical average wage rate from the labor market survey (excluding the Super Cuts position) was \$405.00 per week. Therefore, since Claimant was earning \$315.00 at the time of the 2010 work accident, she has sustained no loss of earning


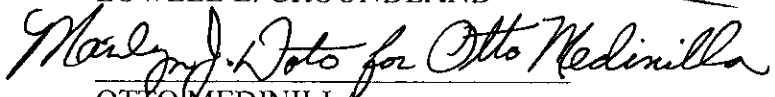
capacity related to the work accident (the difference between her pre-injury and post-injury earnings). As such, she is not entitled to receive any partial disability benefits, pursuant to title 19, section 2325 of the Delaware Code at this time.

As Claimant has failed to receive any award by this decision, she is not entitled to either an attorney's fee award or to have her medical witness fees taxed as costs against the employer, pursuant to Del. Code Ann., tit.19, §2322(e).

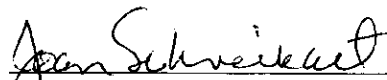
STATEMENT OF THE DETERMINATION

Based on the foregoing, the Board hereby GRANTS Eden Rock's petition for termination of benefits. Claimant's total disability benefits are terminated as of the date of this decision.


IT IS SO ORDERED this 23rd day of May, 2013.


LOWELL L. GROUNDLAND

OTTO MEDINILLA

I hereby certify that the foregoing is a true and correct decision of the Industrial Accident Board.


Joan Schneikart
Workers' Compensation Hearing Officer

Mailed Date: 5/24/2013


OWC Staff