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IN THE
COURT OF APPEALS OF INDIANA

SERGIO ESQUEDA,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 93A02-1105-EX-476
	)	
ALFREDO and MARIA PONCE,	)	
	)	
Appellees-Defendants.	)	

APPEAL FROM THE INDIANA WORKER'S COMPENSATION BOARD
The Honorable Linda P. Hamilton, Chairperson
Cause No. C-169654

October 19, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Claimant, Sergio Esqueda (Esqueda), appeals from the ruling of the Full Worker's Compensation Board (Board) denying his application for adjustment of claim.

We affirm.

ISSUES

Esqueda raises two issues, which we restate as:

(1) Whether the Board's findings are sufficient to permit appellate review; and

(2) Whether the evidence is sufficient to support the Board's conclusion denying Esqueda's request for temporary total disability benefits.

FACTS AND PROCEDURAL HISTORY

Esqueda worked at a grocery store owned by his wife's parents, Alfredo and Maria Ponce (the Ponces). On September 3, 2002, Esqueda sustained a back injury at the grocery store. On September 17, 2002, Esqueda reported the injury on a worker's compensation claim form and listed the date of the injury as September 17, 2002. Esqueda's family physician, Dr. James Gingerich (Dr. Gingerich) completed a worker's compensation attending physician's report indicating that Esqueda was injured at work on September 17, 2002 and was able to resume regular work on the same day.

Esqueda received worker's compensation authorized medical care and physical therapy from October to December 2002. On December 3, 2002, Dr. Joan Szynal (Dr. Szynal) returned him to regular duty without restriction. On May 14, 2003, Esqueda began

further authorized medical treatment with Dr. John McLimore (Dr. McLimore). On June 5, 2004, Dr. McLimore ordered Esqueda to undergo a functional capacity evaluation (FCE). On June 19, 2003, Dr. McLimore determined Esqueda to have reached maximum medical improvement (MMI) with a 0% partial permanent impairment (PPI) rating, and released Esqueda to full duty work with no restrictions.

On April 19, 2004, Esqueda filed an Application for Adjustment of Claim with the Board. After a period of pre-trial motions and continuances, on April 16, 2009, at the worker's compensation insurer's request, Esqueda attended a Board-appointed independent medical evaluation (IME) conducted by Dr. Robert Ellis (Dr. Ellis). Dr. Ellis performed his own examination of Esqueda and reviewed the reports of Esqueda's prior medical providers. Esqueda told Dr. Ellis that he had returned to work at the grocery store as a manager. Dr. Ellis concluded that Esqueda had reached MMI and could return to work without restriction.

On May 25, 2010, a single hearing member from the Board held a hearing. On September 25, 2010, the single hearing member made the following relevant findings of fact and conclusions of law:

> 2. That the First Report of Injury indicates that on or about September 3, 2002, [Esqueda] alleges he was stocking the shelves when he bent down to get a box.
> 3. That the Worker's Compensation Claimant's Report, dated November 12, 2002, states that [Esqueda] was lifting boxes of around 20 lbs. when he had bad pain in his hips on September 17, 2002.
> 4. That on September 3, 2002, [Esqueda]'s average weekly wage was $300.00, making his temporary total disability (TTD) rate $200.00.
> 5. That [Esqueda] received authorized medical treatment for a period of time.
> 6. That on November 19, 2002, [Esqueda] had attended seven physical therapy sessions for his back, but had also missed two sessions. [Esqueda] stated at that session that he was mostly pain free but had increased pain after standing about an hour.

7. That on December 2, 2002, [Esqueda] attended another physical therapy session and stated that he was having minimal pain and was able to work.
8. That on December 3, 2002, [Esqueda] saw Dr. Szynal, who returned him to regular duty.
9. That Dr. McLimore saw [Esqueda] on May 14, 2003, after the appointment had been rescheduled several times. Dr. McLimore indicated that [Esqueda] had a work-related back strain on September 3, 2002, but that he also did have underlying probable degenerative disk disease. He further stated that [Esqueda] does not have a relevant disk herniation and that the back pain was mostly mechanical in nature. Dr. McLimore recommended further physical therapy.
10. That Dr. McLimore saw [Esqueda] again on June 5, 200[3], and recommended work conditioning with an FCE. He also prescribed some pain medication.
11. That [Esqueda] returned to Dr. McLimore on June 19, 2003, who stated that the FCE results were inconsistent and [Esqueda] showed inappropriate pain behavior. Dr. McLimore released [Esqueda] at MMI with a 0% PPI rating. He further indicated that [Esqueda] did not require any medications and could return to full duty with no restriction.
12. That [Esqueda] had previously sustained a back injury in August of 1998, when he hit a car in front of him going 40 miles per hour.
13. That [Esqueda] did seek medical treatment from Dr. Gingerich on September 2, 1998, for back pain.
14. That [Esqueda] attended a Board-appointed IME with Dr. Ellis on April 16, 2009, who indicated that [Esqueda] sustained a lumbar sprain as a result of the work incident, but that he had some prior back complaints. In addition, Dr. Ellis indicated that [Esqueda]'s current symptoms were unrelated to his work accident.
15. That [Esqueda] sustained a lumbar strain to his back as a result of a work accident on September 3, 2002.
16. That [Esqueda] received authorized medical care from [the Ponces] for a period of time until June 19, 2003, when he was released at MMI with a PPI rating of 0% man as a whole from Dr. McLimore.
17. That [Esqueda] was not always compliant with medical care, as he missed several physical therapy sessions and his initial appointment with Dr. McLimore was rescheduled multiple times, as [Esqueda] was in Mexico.
18. That [Esqueda] is not owed any TTD benefits, as he was non-compliant with medical care and was returned to work with restrictions of full duty, but chose not to work.
19. That [Esqueda] was at MMI as of June 19, 2003, based upon the medical reports of Dr. McLimore and Dr. Ellis.
20. That [Esqueda]'s back complaints after June 19, 2003, were unrelated to

> the work accident and were instead the result of his prior back problems as evidenced by the medical reports of Dr. McLimore and Dr. Ellis.
> 21. That [Esqueda]'s PPI rating is 0% as evidenced by the report of Dr. McLimore.
> 22. That [Esqueda] is not entitled to any further benefits, based upon the reports of Dr. McLimore and Dr. Ellis.

(Appellant's App. pp. 7-9).

On October 25, 2010, Esqueda filed for review by the Board. On April 25, 2011, the Board issued its decision, providing in pertinent part:

> It is found by the majority of the Members of the [Board] [. . .] that the Opinions issued below by the Single Hearing Member should be affirmed as [m]odified:
> 1. [Esqueda] did not meet his burden of proof that he should recover Temporary Total Disability (TTD) benefits as he failed to demonstrate that he was temporarily totally disabled from his injuries.
> 2. That #18 of the Single Hearing Member['s] Findings of Fact and Conclusions of Law should be [o]mitted.
>
> ORDER
>
> IT IS THEREFORE, CONSIDERED, ORDERED AND ADJUDGED by the [Board] that the Single Hearing Member's Opinion is hereby affirmed as [m]odified.

(Appellant's App. pp. 4-5).

Esqueda now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Standard of Review*

Our standard of review of challenges to the Board's decision is deferential. *Borgman v. Sugar Creek Animal Hospital*, 782 N.E.2d 993, 996 (Ind. Ct. App. 2002), *trans. denied.* In reviewing appeals from the Board, we are bound by the Board's factual determinations. *Id.* Only if the evidence is undisputed and leads inescapably to a result contrary to the Board's, may we disturb the Board's factual determinations. *Id.* Where, as here, the claimant appeals

from a negative award, we may sustain the negative award by an absence of evidence favorable to the claimant's contentions or by the presence of evidence adverse to the claimant's arguments. *Id*.

We employ a two-tiered standard for review of the Board's decision: (1) we examine the evidence in the record for competent evidence of probative value to support the Board's findings, and (2) we examine the findings to determine whether they are sufficient to support the decision. *Vandenberg v. Snedegar Const., Inc.*, 911 N.E.2d 681, 686-87 (Ind. Ct. App. 2009), *trans. denied*. We neither review the evidence nor assess the credibility of witnesses, and only consider the evidence most favorable to the Board's decision, together with all reasonable inferences. *Id*. at 687.

II. *Review of the Board Decision*

Ind. Code § 22-3-4-7 provides that upon application for review of an award made by less than all its members, the Board shall review the evidence and render its decision. The Board must file its decision along with "the finding of the facts on which it is based." *Id*. While it may make its own findings, the Board is permitted to adopt the decision of a single hearing member. *Dial X-Automated Equipment v. Caskey*, 826 N.E.2d 642, 644 (Ind. 2005). If adopted, the findings of the single hearing member constitute those of the Board. *Id*.

Esqueda contends that the Board's decision did not contain findings of fact or conclusions of law. Nor, Esqueda alleges, did the Board's decision adopt the single hearing member's findings of fact and conclusions of law. Instead, Esqueda claims that the Board's decision merely "affirmed" the "opinions," as modified, of a single hearing member.

(Appellant's Br. p. 13).

Because opinions are not facts, Esqueda contends that the Board's basis for denying Esqueda's claim is "pure guess work," leaving it impossible to determine the Board's reasoning for denying Esqueda's claim for temporary total disability benefits. (Appellant's Br. pp. 13-14). Esqueda further contends that although the word "opinion" is interchangeable with the word "decision," because the Board referred to the single member's decision in the plural sense, *i.e.*, "opinions," the Board could not have adopted the single hearing member's entire decision, which includes findings of fact and conclusions of law. (Appellant's Reply Br. pp. 4-5).

We find Esqueda's argument to be disingenuous. In *Dial-X*, our supreme court reasoned:

> We believe that the distinction between "adopting the decision" and "explicitly adopting the findings and conclusions" is overly formalistic and unnecessary. It is of no consequence whether the full board makes separate findings or adopts written findings made by the single hearing member so long as the final decision of the full board may be reviewed in light of the written findings on which the decision is based. Prior cases have recognized that where a hearing officer's statements or findings are supported by the evidence and embody the requisite specificity, the board "should not hesitate to adopt and incorporate by reference the hearing officer's work," and that, assuming the appropriate scrutiny occurred, the board "is neither prohibited by statute from, nor judicially condemned for, adopting the hearing judge's decision." In this case, the single hearing member made written findings and the full board found that the hearing officer's decision "should be adopted." Such adoption is sufficient to attribute to the full board the explicit written findings of the single hearing member and to permit appellate review accordingly.

Dial-X, 826 N.E.2d at 644 (footnotes and internal citations omitted).

Esqueda's attempt to preclude appellate review of the Board's findings fails for the

same reasons that the supreme court enunciated in *Dial-X*. The single hearing officer made written findings of fact and conclusions of law. Although styling them as "opinions," the Board found that these findings were to be "affirmed," which equates to an adoption of those findings. Further, the single hearing member's findings are sufficiently detailed to permit written review. Thus, the explicit written findings of the single hearing member may be attributed to the Board and accordingly, permit appellate review.

III. *Sufficiency of the Evidence*

Next, Esqueda disputes the Board's decision that he failed to prove temporary total disability, and in particular that the evidence is 'uncontroverted' that Esqueda was unable to resume his regular work between September 17, 2002 and June 19, 2003. Esqueda points to Dr. McLimore's opinion that Esqueda had achieved MMI as of June 19, 2003. Because Dr. McLimore allegedly determined that Esqueda had not yet achieved MMI, Esqueda claims that the evidence is uncontroverted that Esqueda was unable to resume regular work. Further, Esqueda points to Dr. Ellis's conclusion that Esqueda was disabled from September 17, 2002 to June 19, 2003.

We note that it is the claimants' burden to prove a right to compensation under the Worker's Compensation Act. *Borgman*, 782 N.E.2d at 996. Accordingly, the claimant must prove both disability and inability to work for the period at issue. *Id.* Here, the Board determined that Esqueda proved neither, and based its determination on the single hearing member's findings regarding the date of the accident, reports from Esqueda's medical providers regarding the extent and cause of Esqueda's injuries and their decision to return

him to work, as well as Esqueda's lack of compliance and participation in medical treatment.

We review the record to determine if there is any competent evidence of probative value to support the Board's findings. *Wimmer Temporaries v. Massoff*, 740 N.E.2d 886, 888 (Ind. Ct. App. 2000), *trans. denied*. The claimant must show that there was no probative evidence from which the Board might reasonably conclude as it did. *Id*. Where there is a conflict, only that evidence which tends to support the Board's award is considered. *French v. ICI America, Inc.*, 349 N.E.2d 715, 717 (Ind. Ct. App. 1976). Here, the record contains competent evidence to support the Board's findings which incorporated the single hearing member's findings.

The single hearing member found that the accident occurred on September 3, 2002, fourteen days prior to the date reported by Esqueda. The record contains correspondence from the Ponces' worker's compensation insurer as well as reports from Dr. Gingerich and Dr. McLimore confirming September 3, 2002 as the date of injury. Reports from the authorized medical providers confirm the extent and cause of Esqueda's injury. The record reveals that Esqueda had a prior back injury and received treatment from Dr. Gingerich in 1998. Reports from Dr. Szynal contain diagnoses and evaluation of Esqueda's lower back injury occurring on September 3, 2002. Both Esqueda's physical therapist and Dr. Szynal noted that Esqueda experienced little pain prior to the end of 2002. In 2003, Dr. McLimore concluded that Esqueda had underlying probable degenerative disk disease, but did not have relevant disk herniation, and that Esqueda's back pain was "mechanical in nature." (Appellant's App. p. 7). In 2009, Dr. Ellis confirmed Esqueda's 1998 back injury and

deemed that any symptoms Esqueda had in 2009 were unrelated to Esqueda's September 2002 injury.

Next, the single hearing member specifically found that Esqueda's doctors had released Esqueda to return to work. Dr. Szynal returned Esqueda to work with no restrictions on December 3, 2002. Dr. McLimore returned Esqueda to work with no restrictions on June 13, 2003. Dr. Szynal and Dr. McLimore's return of Esqueda to work is further supported by Dr. Gingerich's report that Esqueda was able to resume full work on September 17, 2002.

The single hearing member also found that Esqueda was not compliant with his medical plan and missed appointments. The physical therapist reported that Esqueda missed two appointments. Dr. McLimore reported that Esqueda was referred to him on January 6, 2003, with Esqueda missing that appointment along with subsequent rescheduled appointments. Dr. McLimore reported that Esqueda's FCE evaluation was inconsistent, that Esqueda was uncooperative and also showed "inappropriate pain behavior." (Appellant's App. p. 102).

Esqueda points to Dr. Ellis' conclusion that Esqueda was disabled as uncontroverted evidence that he was disabled at the relevant time. However, Dr. Ellis' conclusion does not appear in the findings and any request by Esqueda to consider it constitutes an invitation to reweigh the evidence, which we will not do. Further, although Esqueda appears to argue on appeal that he was paid temporary total disability payments, the record also contains his affidavit and admission in interrogatories that he was not paid temporary total disability payments as well as pay stubs showing that Esqueda was paid the full amount of his salary

until October 5, 2002. Esqueda reported during his IME that he performed his "regular job" until November 2002, and thereafter worked at the Ponces' store, as a manager who did not carry out any lifting, bending, or twisting. (Appellant's App. p. 18). We find, therefore, that the record contains evidence supporting the Board's factual findings.

Finding that the evidence in the record supports the Board's findings, we now consider whether the findings support the Board's ultimate conclusion that Esqueda did not prove he was disabled and unable to work. A disability for purposes of worker's compensation refers to "an injured employee's inability to work." *Perry v. Stitzer Buick GMC, Inc.*, 637 N.E.2d 1282 (Ind. 1994). Specifically, "a disability determination rests on vocational factors relating to the ability of an individual to engage in reasonable forms of work activity." *Van-Scyoc v. Mid-State Paving*, 787 N.E.2d 499, 509 (Ind. Ct. App. 2003). "Disability is compensable until such time as the claimant is able to resume work of the same kind and character as [the claimant] was engaged in at the time of the injury." *French*, 349 N.E.2d at 717. Thus, the Board's findings must address the duration and extent of Esqueda's alleged disability in order to support its determination that Esqueda failed to prove his disability was temporary and total for the period claimed.

We find that the Board's findings support its determination that Esqueda did not prove he was disabled and unable to work during the period claimed. Esqueda claimed that he was disabled and unable to work from September 17, 2002 to June 19, 2003, a period of 30 weeks. The Board adopted the single hearing member's findings that Esqueda strained his lower back on September 3, 2002, that Drs. Szynal, McLimore, and Ellis authorized him to

resume work activities without restriction, that Esqueda was found to have attained MMI as of June 19, 2003 and had a PPI of 0%, and that Esqueda was not entitled to any further benefits.

Esqueda had the burden of proving eligibility for worker's compensation benefits for temporary total disability. We cannot say that the evidence in the record supporting the Board's findings convinces us that reasonable persons would be compelled to reach a conclusion contrary to the Board's. We conclude that the findings support the ultimate conclusion that Esqueda failed to prove he was disabled and unable to work during the period claimed.

CONCLUSION

We conclude that the Board properly denied Esqueda's claim for worker's compensation benefits.

Affirmed.

NAJAM, J. and MAY, J. concur