



BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

PRISCILLA STOVE,)	
)	
Employee,)	
)	
v.)	Hearing No. 1258714
)	
ARAMARK C/O WESLEY COLLEGE,)	
)	
Employer.)	

ORDER ON CLAIMANT’S MOTION TO DISMISS EMPLOYER’S PETITION FOR REVIEW

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 (“Board”) on July 6, 2015 in a hearing room of the Board in Milford, Delaware. Claimant’s Motion was presented to the Board immediately preceding the scheduled commencement of a hearing on the merits to determine Employer’s Petition for Review that was filed on February 27, 2015. In support of her Motion, Claimant referred to the prior Board decision of June 26, 2012 in which the Board determined that although Claimant was not medically totally disabled, Claimant was a *prima facie* displaced worker. Claimant now contends that because nothing has changed since the prior decision, the Board is prohibited from revisiting the previously adjudicated conclusions of law on the grounds of *res judicata* and is collaterally estopped from revisiting the previously determined conclusions of fact.

The Board denies Claimant’s Motion for the following reasons. Section 2347 of the Workers’ Compensation Statute provides:

On the application of any party in interest on the ground that the incapacity of the injured employee has subsequently terminated, increased, diminished or recurred or that the status of the dependent has changed, the Board may at any time, but not oftener than once in 6 months, review any agreement or award.¹

The Board notes that:

Section 2347 allows an employer to petition the Board to review previous total disability awards, so long as there is a change in condition or circumstances. This is different from a requirement that the employer must prove the physical injury has changed. The Superior Court has explained that a petitioner seeking to alter benefits under § 2347 must “show that [claimant's] condition *or circumstances* have changed since [the prior determination of total disability] such that her disability has diminished and she is now able to return to work in some capacity.”²

There does not have to be a significant diminishment of symptoms or a significant diminishment of the injury under Section 2347 in order to terminate total disability benefits; instead the employer must demonstrate that the claimant is “medically able to return to work and that employment is available within the claimant’s restrictions.”³

[W]hen the Board awards compensation, its decision is considered “an adjudication as to the condition of the injured [worker] at the time it is entered, and conclusive of all matters adjudicable at that time, but it is not an adjudication as to the claimant's future condition and does not preclude subsequent awards or subsequent modifications of the original award.” A contrary rule would render § 2347 meaningless.⁴

When rendering a decision on a Petition for Review, the Board remains free to choose which medical expert opinions it accepts or rejects with respect to the claimant’s status at the time of the respective hearing. Even if the same medical experts provide testimony at two successive hearings, the Board has the discretion to accept the opinions of one medical expert at

¹ 19 *Del. C.* §2347.

² *Puckett v. Matrix Servs.*, Del. Supr., DuPont Ridgely, J., 2013 WL 69234, at *2-3 (Jan. 7, 2013)(quoting *State v. Sturgeon*, Del. Super., C.A. No. N10A-09-016 JRS, Slights, III, J., 2011 WL 2416306 at *2 (June 9, 2011) (internal citations omitted) (emphasis added).

³ *Puckett* at *3 [quoting *Bailey v. State*, Del. Super., C.A. No. A. 03A-07-011SCD, Del. Pesco, J., 2004 WL 745716 at *4 (April 5, 2004)].

⁴ *Shively v. Allied Sys., Ltd.*, Del. Super., C.A. No. 09A-05-008 PLA, Ableman, J., 2010 WL 537734, at *10 (Del. Super. Feb. 9, 2010) *aff'd*, 998 A.2d 851 (Del. 2010)(quoting A.M. Swarthout, Annotation, *Res Judicata as Regards Decisions or Awards Under Workmen's Compensation Acts*, 122 A.L.R. 550).

one hearing yet reject the opinions of the same medical expert at the subsequent hearing so long as substantial evidence exists to support the Boards findings of fact and conclusions of law.⁵ The principles of *res judicata* and collateral estoppel only prohibit the Board from reconsidering or revisiting the merits of its previous decision.

In this case, the principles of *res judicata* and of collateral estoppel would prevent this Board from reconsidering the correctness of the 2012 decision as it pertains to Claimant's status in 2012. Employer's current petition presents a wholly separate issue – a determination of whether Claimant's current status at the present time continues to render her a *prima facie* displaced worker. It is undisputed that Claimant continues to be able to return to work from a medical standpoint. While the Claimant's physical condition or symptoms may not have changed, this is a situation in which Employer primarily contends that the current job market in light of the passage of time presents employment available within Claimant's current work restrictions and therefore, refutes Claimant's current displaced worker status. Employer represented that if the Board denies Claimant's Motion and proceeds with the scheduled hearing on the merits to determine Employer's Petition for Review, Employer is prepared to submit into evidence a new labor market survey that it contends demonstrates that employment within Claimant's work restrictions is available to Claimant in the current job market. More than two years have elapsed since the prior Board decision – a duration in excess of six months.

The Board finds that Employer is well within its right as intended under Section 2347 to file a Petition for Review and to have the Board reconsider the applicability of the prior Board decision to Claimant's current status under the allegedly changed circumstances at this present time.

⁵ See *Shively* at *10.

WHEREFORE, Claimant's Motion to Dismiss Employer's Petition is therefore, denied.

IT IS SO ORDERED this 23rd day of JULY, 2015.

BY THE INDUSTRIAL ACCIDENT BOARD:


WILLIAM HARE


PATRICIA MAULL

Mailed Date:

 7/24/15
OWC Staff