1. British Airways

0984 8382
Carrier ID No. - W190003

New York State Workers' Compensation Board

2005 NY Wrk. Comp. 9848382; 2005 NY Wrk. Comp. LEXIS 9134

October 19, 2005

CORE TERMS: claimant, disability, causally, partial disability, permanent, wage, labor market, retirement, marked, carrier, partially disabled, permanently, retired, reserved, periods of time, compensable, elected, retire, looked, neck, classified, withdrew, relocated, telephone, sitting, involuntarily, experiencing, reattach, restored, earnings

PANEL: [*1] Mona A. Bargnesi, Michael T. Berns, Candace K. Finnegan

OPINION:
Date of Accident : June 29, 1998

Carrier : Royal Insurance Co of America

Carrier Case No. : 29000478600
RULING

In an application filed on 5/9/05, the claimant's attorney requests review of the portion of the Workers' Compensation Law Judge ("WCLJ") reserved decision filed on 4/7/05, which finds that the claimant voluntarily withdrew from the labor market, since he failed to reattach himself to the labor market or seek emloyment within his physical restrictions subsequent to his retirement in February 2001. The claimant's attorney does not take issue with the WCLJ finding that the claimant has a marked permanent partial disability. In reliance on **Jiminez v. Waldbaums, 9 A.D. 3d 99, 780 N.Y.S.2d 799** (3d Dep't 2004), the attorney argues that there is no authority for the WCLJ to have terminated the compensation payments for the permanently partially disabled claimant who involuntarily retired because of his disability. The attorney requests that the case be restored for awards.

In the rebuttal filed on 5/18/05, the carrier's attorney requests that the WCLJ decision that the claimant voluntarily [*2] removed himself from the labor market subsequent to his retirement be affirmed. The attorney argues that the claimant has the burden to establish that the limitations on

his post retirement employment due to his disability were a cause of his inability to obtain employment. The claimant also has the burden of showing that he looked for work within the limitations of his disability. The attorney argues that the claimant has failed to produce evidence that he looked for employment within the limitations of his disability or that he was refused employment because of his disability. The attorney argues that the record supports the WCLJ finding that the claimant voluntarily withdrew from the labor market after he retired and that the WCLJ reserved decision should be affirmed. The attorney argues that the Jiminez case does not require a different result, since the record in Jiminez supported a finding that the claimant's separation from employment was due to a compensable disability. In the present case, the record supports the finding that the claimant's separation from employment was caused by his failure to look for work within the limitations of his disability.

The case involves an [*3] accident on 6/29/98 and is established for work related injuries to the claimant's neck and back. The claimant's average weekly wage was found to be $567.23 and awards have been made for the following periods: 6/30/98 to 8/30/98 at the rate of $378.15, reimburse employer; 8/30/98 to 2/7/00, no compensable lost time; 2/7/00 to 2/14/00 at the rate of $378.15, credit employer; 2/14/00 to 3/9/00, no compensable lost time; 3/9/00 to 5/6/00, at the rate of $378.15, credit employer; and 5/6/00 to 7/17/00, no compensable lost time. In the WCLJ decision filed on 12/19/03, the WCLJ found that the claimant had settled his third-party action with the carrier's consent for $60,651.00.

The case has been extensively developed through the testimony of the claimant, the employer's witness, Dan Dyskal, the claimant's physician, Dr. Kramberg, and the carrier's consultant, Dr. Weiss. A review of the application and the rebuttal indicates that the parties have not appealed the findings that the claimant has a marked permanent partial disability or that the claimant did not voluntarily withdraw from the labor market when he elected to accept an early retirement incentive in February 2001 and stopped working [*4] in November 2001. Accordingly, these findings are affirmed. The sole issue on appeal is whether the claimant has causally related lost wages (voluntarily withdrew from the labor market) subsequent to his retirement because he failed to look for work within the limitations of his marked permanent partial disability.

It is beyond dispute that the claimant has causally related cervical and lumbar discogenic injuries that have been confirmed by MRI studies and the objective examination findings of both the claimant's physician, Dr. Kramberg, and the carrier's consultant, Dr. Weiss. Dr. Kramberg testified that the claimant's injuries prevent him from performing his usual employment as a telephone sales and reservation agent with the employer. Dr. Kramberg testified that the claimant's injuries prevent him from working in any capacity that requires prolonged sitting for more that 30 minutes, prolonged standing for more that 25-30 minutes and lifting. Dr. Weiss testified to his positive examination findings and his opinion that the claimant has a mild to moderate disability. Dr. Weiss did not opine on whether the claimant's disability is permanent.

The claimant testified at the 11/27/02 [*5] hearing that he injured his back and neck in a work related injury on 6/29/98. The claimant worked as a telephone sales person. His job was sedentary in that he could sit down while he solicited sales on the telephone. The claimant's supervisor allowed him to stand, pace and stretch while he worked. The claimant lost several

months from work following the accident, but he then worked during the period of August 1998 through November 2001. The claimant testified that he elected to accept an early retirement incentive in February 2001 because his back and neck injuries prevented him from continuing to sit for long periods of time. The claimant's physicians had not advised him to retire, but they did restrict his work activity by advising him to avoid lifting and sitting for extended periods of time. The claimant testified that he also had unrelated left knee surgery after he retired. The claimant testified that he told his employer that he had elected to retire because of his neck and back injuries. The claimant testified that after his left knee surgery he has not worked in any capacity because of his work related injuries. The claimant testified that he relocated to Mexico in December [*6] 2001 because he could not afford to live in New York City and because his family in Mexico was willing to help him. The claimant testified that he has not looked for work in any capacity since he relocated to Mexico because he knows that he can not sit or stand for long periods of time. The claimant was 54 years old when he retired.

The issue of whether a claimant is experiencing a causally related loss of wages is a question of fact for the Board. **Capezzuti v. Glens Falls Hospital, 282 A.D.2d 808, 722 N.Y.S.2d 620** (3d Dep't 2001). Where a claimant has been classified with a permanent partial disability, there is an inference that the claimant's subsequent loss of wages is attributable to his physical limitations. **Coyle v. Intermagnetics Corporation, 267 A.D.2d 621, 699 N.Y.S.2d 600** (3d Dep't 1999); **Phillips v. Elmira City School Dist., 178 A.D.2d 793, 577 N.Y.S.2d 525** (3d Dep't 1991). The Board Panel notes that the post-classification inference may be overcome where substantial evidence is produced to show that the claimant is no longer experiencing a causally [*7] related loss of wages. In this circumstance, the burden would shift to the claimant to explain what efforts were made to find work within his restrictions, since, regardless of the temporary or permanent nature of a claimant's disability, a partially disabled claimant has a duty to look for work within his physical restrictions. See, **Yamonaco v. Union Carbide Corp., 42 A.D.2d 1014, 348 N.Y.S.2d 196** (3d Dep't 1973); **Scarpelli v. Bevco Trucking Corp., 305 A.D.2d 892, 758 N.Y.S.2d 856** (3d Dep't 2003). However, in order to find that a permanently partially disabled claimant failed to look for work within his restrictions, there must be evidence, and not a mere assertion, to support such finding. See, **Scarpelli v. Bevco Trucking Corp., supra; Johnson v. New York State Office of Mental Retardation and Development, 12 A.D.3d 748, 784 N.Y.S.2d 216** (3d Dep't 2004).

Upon review of the record, the Board Panel notes that the claimant has a marked permanent partial disability that prevents him from performing physical work or [*8] work that requires sitting and standing for extended periods of time. There is no medical evidence that the claimant is totally disabled or otherwise rendered unable to work in any capacity as a result of his disability. Under the facts and circumstances in this case, and under the authority cited above, the claimant has the obligation to find work within his physical limitations or present sufficient credible evidence to establish that the limitations of his disability have prevented him from working. The claimant testified that he has not worked or looked for work in any capacity since he retired in November 2001. Based upon the claimant's testimony, the Board Panel finds that the record supports the WCLJ finding that the claimant voluntarily removed himself from the labor market subsequent to his retirement because he took no steps to reattach himself to the labor market and work within the limitations of his marked permanent partial disability. The final issue

is whether the record supports the WCLJ finding that the claimant is not entitled to an award for a further causally related lost wages for any period subsequent to his retirement.

The claimant's attorney argues that the [*9] Jiminez case warrants a different result by citing to the proposition that the Board lacks authority to terminate the compensation payments of a permanently partially disabled claimant who did not voluntarily withdraw from the labor market. In Jiminez, the Board found that despite retiring in part due to his disability, that the claimant subsequently failed to demonstrate efforts to look for work within his restrictions. The Court held that the Board's finding was internally inconsistent, insofar as the claimant was classified, and that there was no evidence of a failure to seek work within his restrictions. In his testimony, the claimant in Jiminez had indicated that he had not worked, but was never asked about his efforts to seek work. As such, the Board's decision to discontinue benefits the day after a retirement due in part to his work related classified disability, was unsupported by the record.

In addition, the Board Panel notes that the Court in Jiminez did indicate that "[n]o authority exists to terminate the compensation payments of a permanently partially disabled worker when that worker involuntarily retires because of his disability," supra. However, the Board Panel notes [*10] that the point being made by the Court was more relevant to the issue of which party has the burden of proof on the issue causally related loss of earnings, as there are multiple examples in prior case law and Board decisions where the benefits of a permanently partially disabled claimant have been validly reduced or suspended. See, **Dudlo v. Polytherm Plastics, 125 A.D.2d 792, 509 N.Y.S.2d 899** (3d Dep't 1986). Thus, the Board Panel concludes that the rule remains the same: where a claimant who has been found to have a permanent partial disability is determined to have stopped working based, at least in part, on his causally related disability, he is entitled to an inference that his lost earnings are causally related until such time as the carrier produces sufficient evidence to overcome the inference.

In the present case, the Board Panel finds that the inference that the claimant's post-retirement lost wages are causally related to his permanent partial disability has been overcome by the claimant's own testimony that he did not look for work within his physical limitations after he elected to retire. Since the carrier has not offered any [*11] evidence on this issue from lay or medical witnesses, the Board Panel finds that the first evidence that can be deemed to overcome this inference of further causally related lost wages is the claimant's 11/27/02 testimony. The Board Panel finds that the claimant has no further causally related lost wages as of the date of his 11/27/02 testimony. For the period of 12/1/01, the date the claimant relocated to Mexico after his unrelated knee surgery, through 11/27/02, the Board Panel finds that the claimant has further causally related lost wages and he is entitled to awards for this period at the marked partial disability rate.

Accordingly, the WCLJ reserved decision filed on 4/7/05 is MODIFIED to find that the claimant has further causally related lost wages for the period of 12/1/01 through 11/27/02 and that the claimant is entitled to awards for this period at the marked partial disability rate. Except as specifically modified, the WCLJ reserved decision filed on 4/7/05 is affirmed. The case is reopened and restored to the calendar for awards and attorney fees.

The case is continued.