

2022 WL 2388896 (N.Y.Work.Comp.Bd.)

Workers' Compensation Board

State of New York

EMPLOYER: ADAMS FAIRACRE FARMS INC

Case No. G245 8617

Carrier ID No. FLV7034 W054001

June 23, 2022

*1 Charter Oak Fire Ins Co
c/o Travelers Insurance
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Buffalo, NY 14240
Joseph W. Buttridge
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Hartford, CT 06104
Date of Accident 6/19/2019

The Full Board, at its meeting held on June 14, 2022, considered the above captioned case for Mandatory Full Board Review of the Board Panel Memorandum of Decision filed March 9, 2022.

ISSUE

The issue presented for Mandatory Full Board Review is the claimant's loss of wage earning capacity (LWEC).

The Workers' Compensation Law Judge (WCLJ) found that claimant was permanently partially disabled and has an 85% LWEC.

The Board Panel majority modified the WCLJ decision to find that the claimant has a 76% LWEC.

The dissenting Board Panel member would affirm the WCLJ's finding that claimant has an 85% LWEC.

The claimant filed an application for Mandatory Full Board Review on April 8, 2022, arguing that the Full Board should find that he has an 85% LWEC.

The carrier filed a rebuttal on May 5, 2022, arguing that the decision of the Board Panel majority should be affirmed.

Upon review, the Full Board votes to adopt the following findings and conclusions.

FACTS

This claim is established for a June 19, 2019, back injury. Claimant's average weekly wage was set at \$796.47.

Claimant was examined by the carrier's consultant, Dr. Soyer, on July 22, 2020. In the resulting IME-4 (Independent Examiner's Report of Independent Medical Examination) dated July 25, 2020, Dr. Soyer stated that claimant complained of lower back pain of 7 on a scale of 1 to 10. Claimant reported that he was able to walk one city block without experiencing too much pain, had

difficulty climbing stairs, and could sit for 30 to 60 minutes at a time. His pain became worse when he reached overhead, bent, or walked. Dr. Soyer diagnosed [lumbar sprain](#) and exacerbation of [lumbar spondylosis](#) and found that claimant had reached maximum medical improvement (MMI). Dr. Soyer found that claimant had “a causally related moderate to marked (67%) disability[[,]]” and that “[t]here is a 75% apportionment to the claimant's current lumbar injury and 25% apportionment to the pre-existing [lumbar spondylosis](#).” Dr. Soyer found that claimant was not capable of performing his normal job duties but could perform “sedentary work with no lifting over 10 pounds, no prolonged walking, standing, stair climbing or climbing vertical ladders, squatting, or repetitive bending.”

In an addendum report dated September 24, 2020, Dr. Soyer found that claimant had a permanent impairment of his lumbar spine of class 4, severity E.

Claimant's treating physician, Dr. Dentico, filed a C-4.3 (Doctor's Report of MMI/Permanent Impairment) based on an April 7, 2021, examination. According to Dr. Dentico, claimant reported continuing pain in his lower back of 5 out of 10. Dr. Dentico found that claimant had reached MMI and had a class 3, severity B permanent impairment of his lumbar spine. Dr. Dentico imposed restrictions including no lifting of more than 10 pounds, and no climbing, kneeling, or bending.

*2 Dr. Dentico was deposed on July 19, 2021, and testified that claimant had no neurological symptoms, no atrophy in his limbs, and normal strength. An MRI showed [degenerative arthritis](#) and a disc herniation at L3/4.

Dr. Soyer was deposed on July 20, 2021, and testified that he based his finding that claimant had a class 4, severity E permanent impairment of his lumbar spine on his persistent symptoms and the spinal pathology confirmed by imaging studies.

At a hearing on August 16, 2021, claimant testified that he is 81 years old. He received a GED in 1958 and served four years in the navy. He then went into the produce business. He began working for the employer in 1981. He was a produce manager and was responsible for running the produce department. His job duties included taking inventory, making prices, placing orders, and scheduling employees. He would place orders over the telephone and make employee schedules on paper. He did not use a computer. He owned a cell phone but did not know how to use it. He reads, writes, and speaks well in English. After leaving the navy he worked for Shop Rite and another grocery company. He also had a job as a driver transporting meat and obtained a CDL. He briefly worked for IBM. As produce manager for the employer he supervised 16 to 18 employees. He trained employees and made work schedules. He was responsible for ensuring that his department made a certain profit margin and would adjust prices as necessary. His job involved a lot of lifting.

After listening to claimant's testimony and summations by the parties, the WCLJ found that claimant was permanently partially disabled, had an E severity permanent impairment, and an 85% LWEC, entitling him to up to 450 weeks of benefits. The WCLJ directed continuing benefits at the permanent partial disability rate of \$451.33 per week and approved a fee to claimant's attorney of \$4, 500.00. The findings and awards made at the August 16, 2021, hearing are reflected in a decision filed August 19, 2021.

The carrier requested administrative review, arguing that claimant should be found to have a severity 3B permanent impairment of the lumbar spine based on the opinion of Dr. Dentico, and a 75% LWEC.

In rebuttal, claimant argued that the record supported the WCLJ's finding that he had an 85% LWEC.

LEGAL ANALYSIS

LWEC

In claims with a date of accident/disablement on or after March 13, 2007, where “a claimant sustains a permanent partial disability that is not amenable to a schedule award, the Board must determine the claimant's loss of wage-earning capacity in order to fix the duration of benefits. In determining a claimant's loss of wage-earning capacity, the Board must consider several

factors, including the nature and degree of work-related permanent impairment and the claimant's functional capabilities, as well as vocational issues - including the claimant's education, training, skills, age and proficiency in the English language” [Matter of Varrone v Coastal Env't. Group](#), 166 AD3d 1269 (2018) (internal quotation marks and citations omitted); WCL § 15(3)(w).

*3 Any determination as to LWEC must be consistent with the provisions of the Workers' Compensation Law. There is a distinction between impairment and disability. Impairment is a medical determination while a claimant's disability or LWEC is a legal determination. While the impairment rating may coincidentally be the same percentage as the ultimate finding of LWEC, the medical impairment rating is not to be used as a direct translation to LWEC (see e.g. [Matter of Patchogue-Medford School Dist.](#), 2011 NY Wrk Comp 40803044).

Here, the opinion of Dr. Soyer supports a finding that claimant has a severity E permanent impairment of the lumbar spine and is capable of performing sedentary work subject to restrictions. With regard to the relevant vocational factors, claimant's age and education are both aggravating factors. His service in the navy almost 60 years ago is a neutral factor. Although claimant's managerial experience is a mitigating factor, that he can no longer perform his job as a produce manager for the employer, for whom he began working in 1981, is an aggravating factor. Finally, while claimant's ability to read, write, and speak well in English is a mitigating factor, his lack of experience using computers is a significant aggravating factor, particularly when considered with his age and work experience.

Therefore, based on the claimant's medical impairment, functional impairment, and vocational factors, the preponderance of the evidence in the record supports a finding that the claimant has an LWEC of 85%.

Wage Earning Capacity

Wage earning capacity (WEC) is used to calculate an injured worker's benefit rate. Where the non-scheduled permanent partial disability claimant is not working, “the Board may in the interest of justice fix such wage earning capacity as shall be reasonable, but not in excess of seventy-five per centum of his former full time actual earnings, having due regard to the nature of his injury and his physical impairment” (WCL § 15[5-a]) and with consideration of “other factors that inform an evaluation of what reasonably reflects claimant's capacity to secure work and earn wages at the time of classification” ([WJ Bokus Industries, Inc.](#), 2015 NY Wrk Comp G0393087), including “functional limitations and vocational impediments” ([Matter of Rosales v Eugene J. Felice Landscaping](#), 144 AD3d 1206 [2016]).

Here, claimant's medical impairment, functional capability, and vocational factors set forth above support a finding that claimant has a 15% wage earning capacity.

CONCLUSION

ACCORDINGLY, the WCLJ decision filed on August 19, 2021, is AFFIRMED. No further action is planned by the Board at this time.

Chair - Clarissa Rodriguez

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