2022 WL 17549457 (N.Y.Work.Comp.Bd.)

Workers' Compensation Board

State of New York

EMPLOYER: POOK DIEMONT & OHL INC

Case No. G164 9750
Carrier ID No. 68719855-370 W204002
December 6, 2022

***1** State Insurance Fund
PO Box 66699
Albany, NY 12206
Markhoff & Mittman PC
Attorneys at Law
120 Bloomingdale Rd, Ste 403
White Plains, NY 10605
Alison Kent-Friedman
State Dept of Law Labor Bureau
28 Liberty St.
New York, NY 10005
Date of Accident 3/23/2016

The Full Board, at its meeting on November 15, 2022, considered the above captioned case for Mandatory Full Board Review of the Board Panel Memorandum of Decision filed June 21, 2022.

ISSUES

The issues presented for Mandatory Full Board Review are:

(1) whether claimant is permanently totally disabled or permanently partially disabled;

(2) if claimant is found to be permanently partially disabled, what is his loss of wage earning capacity (LWEC);

(3) if claimant is found to be permanently partially disabled, should he be directed to produce evidence of labor market attachment; and

(4) the appropriate attorney's fee.

The Workers' Compensation Law Judge (WCLJ) found that claimant was permanently totally disabled.

The unanimous Board Panel modified the WCLJ decision to find that claimant is permanently partially disabled and has a 75% LWEC, to direct claimant to produce evidence of labor market attachment, and to reduce the fee to claimant's attorneys.

The claimant filed an application for Mandatory Full Board Review on July 19, 2022, arguing that the weight of the credible evidence in the record supports a finding that he is permanently totally disabled. In the alternative, claimant argues that if the

Full Board finds him to be permanently partially disabled based on the medical evidence, the record nonetheless supports a finding that he is totally industrially disabled.

The carrier did not file a timely rebuttal.

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

FACTS

On March 23, 2016, claimant, a driver, was injured lifting boxes. This claim is established for an injury to claimant's back and his average weekly wage was set at $1, 357.09. On January 12, 2018, claimant underwent spinal fusion surgery at L4-S1.

Claimant was examined by the carrier's consultant, Dr. Klein, on April 18, 2019. In his report, Dr. Klein found that claimant had reached maximum medical improvement (MMI) and had a severity 3B permanent impairment of the lumbar spine. Dr. Klein noted several functional restrictions and found that claimant was capable of performing sedentary work.

By a decision filed August 26, 2019, the WCLJ directed the claimant "to produce a report on permanency within 60 days."

In a September 3, 2019, narrative report which accompanied a C-4.2 (Doctor's Progress Report), claimant's treating physician, Dr. Macagno, indicated that claimant had significant improvement in lower back pain following his spinal fusion surgery, but was "still complaining of left lower extremity radicular pain and numbness and tingling with sporadic shooting pain." Dr. Macagno stated that claimant's overall condition had improved since his surgery, although he does have persisting symptoms and uses a cane to ambulate. Dr. Macagno found that claimant was "[t]otally disabled from gainful employment (permanent). Patient is unable to perform any type of work, even if permitted to sit or stand at will, or a desk job, or a telephone switchboard with headphones." Dr. Macagno stated that claimant required an "assistive device to ambulate such as a walker, crutches or wheelchair."

***2** In a September 3, 2019, narrative report accompanying a C-4.2, claimant's treating physician, Dr. Abramov, noted that claimant was complaining of lower back pain radiating to his left leg, with weakness and numbness in the left foot. Dr. Abramov stated that claimant was "temporarily totally disabled and has applied for disability."

By a decision filed October 28, 2019, the WCLJ directed the parties to depose Dr. Macagno, Dr. Abramov, and Dr. Klein.

Dr. Macagno submitted a C-4.3 (Doctor's Report of MMI/Permanent Impairment), based on a November 12, 2019, examination, in which he found that claimant had not reached MMI, explaining that claimant "continues to attend physical therapy. Requires pain medication and 6 month follow up." Dr. Macagno further found that claimant had an H severity permanent impairment of his lumbar spine and imposed restrictions of occasional lifting/carrying/ pushing/pulling not to exceed 10 pounds, occasional sitting and standing, and no walking, climbing, kneeling, or bending/stooping/squatting. In an attached narrative report, Dr. Macagno noted that claimant had "significant improvement of the lower back pain," but continued to complain "of left lower extremity radicular pain and numbness and tingling with sporadic shooting pain." Although claimant had persistent symptoms, he reported an overall improvement since his spinal fusion surgery. Dr. Macagno found that:

[Claimant is] [t]otally disabled from gainful employment (permanent).

Patient is unable to perform any type of work, even if permitted to sit or stand at will, or a desk job, or a telephone switchboard with headphones.

Patient requires assistive device to ambulate such as walker, crutches or wheelchair.

Dr. Abramov was deposed on December 20, 2019, and testified that he first treated claimant on September 7, 2016. He continues to treat claimant every four to six months and examined him most recently on September 3, 2019, at which time claimant reported "lower back pain radiating to the left lower extremity with weakness, numbness in the left foot" (Deposition, Dr. Abramov, 12/20/19, p. 11). Claimant had an antalgic gait and relied on a cane when walking. Dr. Abramov did not believe claimant was "able to perform any kind of work" (p. 12). On cross-examination, Dr. Abramov testified that claimant consistently denied having any bowel or bladder dysfunction. Dr. Abramov did not place any restrictions on claimant's ability to drive. According to Dr. Abramov, after his surgery, claimant's "condition just unfortunately got worse. It was too much pain. And based on what I see, the way he sits and walks and gets up, I think he won't be able to do it in a sedentary job" (p. 22). Claimant was doing light duty work prior to the surgery.

Dr. Macagno was deposed on December 26, 2019, and testified that he first treated claimant on February 28, 2017. According to Dr. Macagno, claimant had reached maximum medical improvement and still had significant pain, walked with a cane, and had weakness and pain in his left lower extremity. He found claimant to be permanently totally disabled and did not "think he can do much work with the fused spine that he has" (Deposition, Dr. Macagno, 12/26/19, p. 10). Claimant was "having difficulty walking long distances or short distances. He cannot be standing. He has to change positions pretty constantly...." (p. 11). In addition to his work-related injury, claimant also has preexisting scoliosis which will likely require surgery in the future. On cross-examination, Dr. Macagno testified that he was not aware of claimant having any bowel or bladder dysfunction. Claimant is able to drive short distances and can perform the activities of daily living with some difficulty. Dr. Macagno testified that claimant was not "able to spend a long time sitting down. He has to sit down for 10 minutes, then move around, walk, and then sit down again. That is why I put my definitive disability" (p. 22). According to Dr. Macagno, claimant "has difficulty changing position. He's going to have real difficulty lifting, pushing or pulling. That is more than enough for total...." (p. 24). Dr. Macagno recommended that claimant not push, pull, or lift more than 10 pounds.

***3** In a decision filed January 14, 2020, the WCLJ directed claimant to produce a C-4.3 from Dr. Abramov.

Dr. Klein was deposed on February 19, 2020, and testified that he examined claimant on behalf of the carrier on April 18, 2019. On examination, claimant had moderate to marked range of motion deficits. Dr. Klein found that claimant had a severity 3B permanent impairment of the lumbar spine because "[h]e did not have any atrophy or reflex change, so he did not have any objective clinical findings" (Deposition, Dr. Klein, 2/19/20, p. 9). When asked if claimant used an assistive device when walking, Dr. Klein responded, "I would normally document that. It says he has a nonantalgic gait. I believe he was walking without assistive device" (p. 10). With regard to claimant's functional capacities and restrictions, Dr. Klein testified:

I said he could occasionally lift and push 10 pounds, sit, stand, walk, climb, kneel occasionally, actually bending and stooping should have been occasional, fine manipulation, grasping, reaching overhead, reaching below shoulder he could do, driving a vehicle and operating machinery occasionally.

(p. 12). Dr. Klein found that based on claimant's "subjective complaints, he could do sedentary work" (id.).

Dr. Abramov submitted a C-4.3 based on a March 3, 2020, examination in which he found that claimant had reached MMI and had a severity "I-70" permanent impairment of the lumbar spine. Dr. Abramov found that claimant had the following functional capacities and restrictions: claimant could occasionally lift/carry, sit, stand, walk, bend/stoop/squat, and drive a vehicle; constantly perform simple grasping, fine manipulation, reaching overhead and reaching at or below shoulder level; and could never push/pull, climb, kneel, or operate machinery.

By a decision filed June 15, 2020, the WCLJ made awards from October 24, 2019, to June 11, 2020, and continuing at the tentative rate of $678.55 per week and directed the "[p]arties to request further action when the COVID-19 emergency is lifted to allow for the possibility of attachment and loss of wage earning capacity testimony."

Claimant was examined by the carrier's consultant, Dr. Goldstein, on October 6, 2020. In his report, Dr. Goldstein found that claimant had a marked partial disability and "[s]hould not lift more than five pounds. No repetitive lifting. No sitting for more than an hour, be able to change position to be supine or standing. Avoid steps, squatting, pushing and pulling."

Claimant was examined by the carrier's consultant, Dr. Lager, on August 16, 2021. In his report, Dr. Lager noted that claimant used a cane and "walks with a shuffling labored gait." Dr. Lager found that claimant had a class 3, severity B permanent impairment of the lumbar spine and "can return to work at this time in a sedentary position with a 5-pound lifting restriction in his TLSO."

***4** The carrier filed an RFA-2 (Request for Further Action by Carrier/Employer) on September 15, 2021, requesting that the Board address the issue of permanency.

At a hearing on November 24, 2021, the carrier raised the issue of labor market attachment and requested the opportunity to take claimant's testimony on that issue, as well as on loss of wage earning capacity. Claimant's attorney argued that the issue of attachment to the labor market should not be litigated until after the WCLJ determines whether claimant is permanently totally disabled, and requested the opportunity to cross-examine Dr. Goldstein and Dr. Lager. The WCLJ found that the issue of whether claimant had reached MMI had been joined previously [June 2020] and that he would decide that issue based on the record at that time, without considering the reports of Dr. Goldstein and Dr. Lager. If, however, the WCLJ determined that claimant had not reached MMI at that time, he would thereafter consider the reports of Dr. Goldstein and Dr. Lager and permit the parties to depose the doctors. The WCLJ further noted that if he found that claimant had reached MMI and was permanently partially disabled, he would schedule the testimony of the claimant on loss of wage earning capacity and labor market attachment, and continued the case.

At a hearing on January 26, 2022, the parties agreed that claimant had reached MMI. After hearing summations by the parties with respect to claimant's impairment ranking and exertional ability, the WCLJ found that claimant had an H severity permanent impairment of his lumbosacral spine. Claimant was sworn in and testified that at the time of the March 23, 2016, accident he was employed as a driver doing local deliveries using a "box truck," and had done so for 10 years (Hearing Transcript, 1/26/22, p. 17). Before that he had worked for three years as an over-the-road driver, operating a tractor trailer. He completed a year-and-a-half of college in the field of automotive repair. He is able to use a computer. He reads, writes, and speaks well in English. He has never had a desk job. On cross-examination, claimant testified that he did not finish college because he had issues with his marriage at the time. After listening to summations, the WCLJ classified claimant permanently totally disabled, finding that claimant's "doctors have noted limitations of a severe-enough extent that I do not believe the claimant would have the capacity physically to go back to school to learn some sort of sedentary work" (p. 29). The WCLJ made awards from October 23, 2019, to January 27, 2022, and continuing at the total disability rate of $844.29 per week and approved a fee of $11, 000.00 to claimant's attorneys. The findings and awards made at the January 26, 2022, hearing are reflected in a decision filed January 31, 2022.

The carrier requested administrative review, arguing that the record did not support a finding that claimant was permanently totally disabled, and that he should be classified permanently partially disabled and found to have a 65% LWEC, or that the case be returned to the trial calendar for the WCLJ to determine claimant's LWEC. In the alternative, the carrier argued that if the finding that claimant is permanently totally disabled is upheld, awards at the total rate should not begin until January 26, 2022.

***5** In rebuttal, claimant argued that the record supported the WCLJ's finding that claimant is permanently totally disabled.

LEGAL ANALYSIS

Permanent Total Disability

"[A] permanent total disability is established where the medical proof shows that a claimant 'is totally disabled and unable to engage in any gainful employment' (Matter of VanDermark v Frontier Ins. Co., 60 AD3d 1171 [2009]; see [WCL] § 15 [1])" (Matter of Williams v Preferred Meal Sys., 126 AD3d 1259 [2015]).

Here, in his C-4.3, claimant's treating physician, Dr. Macagno, found that claimant had an H severity permanent impairment of his lumbar spine. Dr. Macagno found that claimant could occasionally lift/carry/push/pull up to 10 pounds, and occasionally sit and stand. Dr. Macagno restricted claimant from doing any climbing, kneeling, or bending/stooping/squatting. Although Dr. Macagno also restricted claimant from doing any walking in his C-4.3, the record supports a finding that claimant is capable of walking short distances with the assistance of a cane. Dr. Macagno testified that claimant was able to drive short distances and perform the activities of daily living with some difficulty.

In his C-4.3, claimant's treating physician, Dr. Abramov, found that claimant had an I severity permanent impairment of his lumbar spine and could occasionally lift/carry (no weight limit indicated), sit, stand, walk, bend/stoop/squat, and drive a vehicle, and could constantly perform simple grasping, fine manipulation, reaching overhead and reaching at or below shoulder level. Dr. Abramov testified that he did not place any restrictions on claimant's ability to drive.

The carrier's consulting physician, Dr. Klein, found that claimant could lift/carry/push/pull up to 10 pounds occasionally and up to 5 pounds frequently, and could occasionally sit, stand, walk, climb, drive, and operate machinery, and concluded that claimant could perform sedentary work.

Claimant was capable of performing light duty work following his March 23, 2016, accident, but has not returned to work since undergoing spinal fusion surgery on January 12, 2018. Although Dr. Abramov testified that claimant's condition became worse after the surgery, Dr. Macagno stated in his September 3, 2019, and November 12, 2019, narrative reports that claimant's overall condition had improved since his surgery, although he does have persisting symptoms and uses a cane to ambulate.

Therefore, the record supports the following findings: that claimant has an H severity permanent impairment of his lumbar spine; claimant is able to drive and perform the activities of daily living; claimant is able to walk with the use of a cane and has the capacity to occasionally lift/carry/push/pull up to 10 pounds, and can constantly perform simple grasping, fine manipulation, reaching overhead and reaching at or below shoulder level. While both Dr. Macagno and Dr. Abramov concluded that claimant was permanently totally disabled, the Full Board finds the record as a whole supports a finding that claimant is physically capable of performing some remunerative employment within the limitations of his physical impairment, and should be classified permanently partially disabled.

***6** "Although a claimant who has a permanent partial disability may nonetheless be classified as totally industrially disabled where the limitations imposed by the work-related disability, coupled with other factors, such as limited educational background and work history, render the claimant incapable of gainful employment" (Matter of Roman v Manhattan & Bronx Surface Transit Operating Authority, 139 AD3d 1304 [2016][internal citations and quotation marks omitted]). However, in the present case, there is insufficient evidence to find that claimant is so limited by his vocational and educational history, combined with his permanent partial disability, to render him functionally unemployable. Therefore, the Full Board finds that the record does not support a finding that claimant is totally industrially disabled.

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 Envt. Group, 166 AD3d 1269 [2018] [internal quotation marks and citations omitted]; WCL § 15[3][[w]).

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, claimant was 56 years old at the time of classification. Prior to his accident, claimant had worked for over 10 years as a truck driver, a job that he can no longer perform due to his injury, and he has never had a desk job, which are aggravating factors. Claimant graduated from high school and completed a year-and-a-half of college, stopping for personal reasons. Therefore, claimant's education is a mitigating factor, as are his English language fluency and his ability to use a computer. These mitigating factors suggest that claimant would be able to learn the skills necessary to perform a sedentary job within his physical restrictions. 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 75%, entitling him to permanent partial disability benefits not to exceed 400 weeks. Claimant was not working at the time of classification and continuing benefits are payable at the permanent partial disability rate of $678.55 per week.

Attachment to the Labor Market

***7** Although the issue of attachment to the labor market was discussed at the hearing on June 10, 2020, and raised again by the carrier at the November 24, 2021, hearing, claimant was never directed to produce evidence of labor market attachment and never testified concerning the issue because the WCLJ classified him permanently totally disabled by a decision filed January 31, 2022. In its request for administrative review of the WCLJ's January 31, 2022, decision, the carrier argued that the record did not support a finding that claimant was permanently totally disabled, and that he should be classified permanently partially disabled and found to have a 65% LWEC, or that the case be returned to the trial calendar for the WCLJ to determine claimant's LWEC, and that if the finding that claimant is permanently totally disabled is upheld, awards at the total rate should not begin until January 26, 2022. The carrier did not argue that the case should be continued for development of the record on the issue of labor market attachment should the Board Panel find that claimant is permanently partially disabled, or otherwise mention the issue of labor market attachment in its application.

Because the carrier failed to argue in its application for administrative review of the WCLJ's January 31, 2022, decision that if claimant was found to be permanently partially disabled the case should be continued for development of the record on the issue of labor market attachment, the carrier waived the opportunity to develop the record on that issue. The carrier may not raise the issue now or in the future insofar as WCL § 15(3)(w) provides, in relevant part, “that during the continuance of such permanent partial disability, without the necessity for the claimant who is entitled to benefits at the time of classification to demonstrate ongoing attachment to the labor market.....”

Attorney's Fee

Pursuant to WCL § 24, “the Board has broad discretion in approving an award of counsel fees” (Matter of Fernandez v Royal Coach Lines, Inc., 146 AD3d 1220 [2017]). The fee approved by the Board shall be “in an amount commensurate with the services rendered and having due regard for the financial status of the claimant and whether the attorney or licensed representative engaged in dilatory tactics or failed to comply in a timely manner with board rules” (12 NYCRR 300.17[f]). The fee awarded shall not be solely based on the amount of compensation awarded (id.).

The Full Board finds that the record supports an attorney's fee of $8, 000.00, the unpaid balance of which is payable to claimant's attorneys out of ongoing benefits to the claimant at the rate of $50.00 per week.

CONCLUSION

ACCORDINGLY, the WCLJ decision filed on January 31, 2022, is MODIFIED as follows: to find that claimant is permanently partially disabled and has an LWEC of 75%; to make awards for the period from October 24, 2019, to January 27, 2022, at the temporary partial disability rate of $678.55 per week; to direct the carrier to continue payments at the permanent partial disability rate of $678.55 per week; and to approve an attorney's fee of $8, 000.00. No further action is planned by the Board at this time.

***8** Chair - Clarissa Rodriguez

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