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Issue date: 14Feb2002

Case Nos.: **1997-LHC-0704**
1993-LHC-2202

OWCP Nos.: **5-94902**
5-84307

BRB No.: **98-0900**

In the Matter of:

AMON L. CROSS,
Claimant,
v.
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY,
Employer (Self-Insured),
and
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-In-Interest.

DECISION AND ORDER

In a decision and order issued on February 26, 1998, the undersigned denied additional benefits as the Claimant had not demonstrated that he diligently tried and was unable to find employment. Pursuant to Potomac Electric Power Co. v. Director, OWCP [Pepco], 449 U.S. 268, 277, 14 BRBS 363 (1980), the claim was denied.

The Claimant appealed, and on March 24, 1999, the Benefits Review Board (BRB) remanded the case

> for the administrative law judge to make specific findings regarding the nature and sufficiency of claimant*s efforts to seek employment “within the sphere of available jobs shown to exist by” employer, Palombo v. Director, OWCP, 937 F.2d 70, 74, 25 BRBS 1, 8 (CRT) (2d Cir. 1991), and to

specifically explain whether claimant*s job search efforts evidenced a claimant "genuinely seeking work within his determined capabilities." New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031 (5th Cir. 1981).

At the time of the remand, the Claimant was pro se and he did not obtain representation until April 2000. There was extensive development of the case after that date, and a hearing was held in September, 2001.

The exhibits[1] associated with the first decision were CX 1-15 and EX A-V. At the hearing in 2001, Claimant's counsel submitted

CX 16 - July 1998 social security decision
CX 17 - Reports from Dr. Carr
CX 18 - Reports from Dr. Rice

These exhibits were entered into the record. The Employer objected to CX 16 and the undersigned noted the objection and stated that the exhibit would be given appropriate weight.

The Employer submitted

EX W - Dr. Carr's report in January 2001
EX X - Dr. Rice's report in October 1996

These were admitted into the record without objection. In addition

ALJX 1 - September 1998 District Director's compensation order and

ALJX 2 - December 1997 letter from the Office of the Solicitor were entered into the record.

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[1] *The following abbreviations will be used as citations to the record:*

JS - Joint Stipulations;
TRA - Transcript of the Hearing in October 1997;
TRB - Transcript of the hearing in September 2001;
*CX - Claimant*s Exhibits;*
*EX - Employer*s Exhibits, and*
ALJX - Administrative Law Judge Exhibit.

As noted in the February 1998 decision, a form LS-208 (dated in October 1997),

> EX B-1 states that the Claimant was paid temporary total disability from April 26, 1995 to May 8, 1996 for hand impairments. Permanent partial schedular ratings for the hands have been paid at 7% for the left hand and 8% for the right.

The District Director's compensation order in September 1998 stated that in addition to previously paid compensation

> 7. As a further result of the injury the parties have agreed that the claimant is entitled to a compromise permanent partial disability rating equivalent to a 7.5 percent loss of use of his right leg for which he is entitled to compensation for 21.6 weeks (7.5 percent of 288 weeks) at $420.04 per week, in the amount of $9,072.86.
>
> 2. The self-insured employer having paid $47,524.52 to the claimant as compensation shall pay forthwith $9,072.86 whereupon the file of Amon L. Cross will be CLOSED, subject to the limitations of the Act or until further order of the District Director. (ALJX 1).

In the 1998 decision which denied compensation after May 8, 1996, it was noted that Cross last worked for the shipyard in April 1995.

Issues

1. Permanent total disability from May 9, 1996 and beyond.

2. If the above is not granted, then payment of permanent total disability from June 4, 1998 and continuing based on modification under Section 22 of the Act.

Contentions

Claimant's counsel argues that his client has diligently pursued a job search since he last worked, which was in the shipyard in 1995.

If benefits continue to be denied from 1996 until mid 1998, it is argued that the request for modification clearly shows a change in condition as of Dr. Carr's medical report of June 4, 1998. While the Employer's vocational expert has "identified suitable jobs" the physicians have not approved such work.

The Employer states that

> The period covered by this claim begins on May 9, 1996. The evidence submitted by the Claimant himself demonstrates that his job search ended abruptly in April 1996 — at about the time his involvement with vocational rehabilitation stopped (CX-lrr). His job search records include no activity at all until May 1997, when he contacted three employers (CX-lss). The following month, he contacted the same three employers (CX-ln). The month after that, he returned to the same three employers (CX-luu). After July 1997, the records again fall silent, showing no additional job search activity until October 13, 1997, only 10 days before the first hearing in this matter (CX-1yy). At that point, the Claimant engaged in a sudden flurry of job-seeking activity, contacting a total of 14 employers (CX-lyy). The last contact was the day before the hearing (CX-lyy).
>
> At the original hearing, the Claimant admitted that he never really believed he could do any work offered by the employers he contacted just before the hearing (10/97 TRA 95). The positions available with the 14 employers involved janitorial work, constant driving, lifting auto parts or working as a cashier (10/97 TRA 90-97). His vocational specialist noted that such positions were outside the Claimant*s physical abilities; she did not include them on the labor market survey for that reason (10/97 TRA 137-38).
>
> In its initial decision and order, this Court held that the Claimant had not performed a diligent job search (D&O at 16). The Court noted that the Claimant*s job search stopped cold after April 1996 and resumed when he contacted a total of three employers for the three months of May, June and July 1997 (D&O at 16). The Court also indicated that the

> Claimant had randomly selected employers after July 1997 without knowing whether any employment was available at the time of contact (D&O at 16). That evidence is sufficient under the law for a finding that the Claimant did not conduct a diligent job search. Further, notwithstanding his opportunity to do so, the claimant presented no additional evidence of a diligent search. That ruling should stand on remand.

The Claimant has submitted statements from Dr. Rice to support his request for modification. However, the Employer argues that Dr. Rice has stated that

> the Claimant is in substantially the same condition as he was when this Court entered its prior order. Furthermore, the Employer has submitted medical opinions from Dr. Carr, Dr. Wardell and William Kay to show that the Claimant*s condition has not changed since the previous order. That evidentiary record does not support a modification of this Court*s order, and the Court must deny the request for modification.

Evaluation of the Evidence

In March 1999, the Board stated, in part

> As the administrative law judge*s finding that employer established the availability of suitable alternate employment since May 1996 is supported by substantial evidence and consistent with law, it is affirmed.
>
> ... Once employer meets this burden of demonstrating that suitable jobs are available, claimant may retain eligibility for total disability benefits if he demonstrates that he was unable to secure employment although he diligently tried. See generally Fox v. West Stale, Inc., 31 BRBS 118 (1987). If the employee establishes reasonable diligence in attempting to secure some type of suitable alternate employment within the compass of opportunities shown by the employer to be reasonably attainable and available, and establishes his willingness to work, but is unable to obtain a job identified by employer, he may prevail in his claim

> for total disability. Roger's Terminal & Shipping Corp. v. Director, OWCP, 784 F.2d 687, 18 BRBS 79 (CRT) (5th Cir.), *cert. denied,* 479 U.S. 826 (1986).
>
> ... The Board indicated that
>
> Remand is necessary for the administrative law judge to make specific findings regarding the nature and sufficiency of claimant*s efforts to seek employment "within the sphere of available jobs shown to exist by" employer, Palombo v. Director, OWCP, 937 F.2d 70, 74, 25 BRBS 1, 8 (CRT) (2d Cir. 1991), and to specifically explain whether claimant*s job search efforts evidenced a claimant "genuinely seeking work within his determined capabilities."

The records of the Claimant's job search (CX 1) reflect numerous employer contacts from late 1993 until early April 1996. In May, in June, and in July of 1997, Cross contacted Goodwill Industries, Ticketmaster, and Reliance Staffing. CX-1vv through CX-1xx mention places without dates. Cross testified that he contacted these places beginning in May 1997. CX 1yy indicates numerous contacts in October 1997.

Ms. Moore, a vocational expert, prepared a labor market survey (EX F) and she testified at the hearing in 1997. Ms. Moore identified several appropriate jobs including one with Goodwill Industries. Cross testified the last named employer did not have job openings.

The Claimant's testimony at the first hearing regarding his job search after April 1996 was very difficult to follow. In essence, there was no subsequent search until July 1997 and he thereafter made contacts without prior knowledge of job availability.

While Cross did contact Goodwill, it appears from a review of CX 1yy that the Claimant sought work with physical duties beyond his restrictions. Although he stated that he contacted the state employment agency on two occasions he did not use other resources to locate available work.

Once again the undersigned concludes that Cross did not make a diligent search for work within his capabilities between May 9, 1996 and the date of the decision in February 1998.

Modification

Section 22 of the Act provides that

> Upon his own initiative, or upon the application of any party in interest (including an employer or carrier which has been granted relief under section 8(f)), on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may, at time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of a claim review a compensation case (including a case under which payments are made pursuant to section 44(i)) in accordance with the procedure prescribed in respect of claims in section 19, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation.

The undersigned has accepted this issue as the request for modification was filed while the Board's order of remand was pending.

As the Board noted in footnotes, the restrictions in 1997 were

> [2]Dr. Carr*s restrictions included, *inter alia*, that claimant should refrain from lifting from floor level, and that claimant should not climb stairs or vertical ladders on more than a rare basis, due to the potential aggravation of bilateral wrist and hand pain. Dr. Carr also recommended that claimant avoid repetitive tasks with his hands and wrists, especially gripping activities and the use of vibratory tools. Finally, Dr. Carr recommended that claimant not operate a truck, crane, tractor, or other vehicle. See CX-2, 3.
>
> [3]Dr. Wardell*s restrictions included, *inter alia*, no squatting or kneeling, walking and standing limited to two hours a day, and bending, twisting, pushing and pulling limited to four hours day. EX-G.

A clinical note dated June 4, 1998 form Dr. Carr, an orthopedic surgeon, states that

> Mr. Cross is seen back, I have not seen him since late last fall for reevaluation of his hands. He is a worker*s compensation injury, he had multiple trigger fingers released and he has also had a severe knee injury for which he is being treated elsewhere. On last visit I told him he had reached maximum medical improvement and this was last year. Since that time he has been unable to find work. He states his hands are still stiff, he is not having catching. He is also having some burning sensation up his forearms. His knee continues to give way as well. He states he has had job interviews without success and as I told him before as well as his worker*s comp rehab nurse, certainly either with his hands or his legs individually, he should be able to find employment but the combination for a prospective employer is quite a gloomy prospect to consider hiring. I would recommend at this stage that he continue to seek work although I believe it will be quite difficult for him and have to take a very specialized type of job for him to be employed or for someone to hire him. His hands remain stiff and I believe this is secondary to his generalized arthritis and the long years of workinq with his hands at the shipyard. I would like to see him back It further problems arise but I have very little to offer him as far as surgical or medical treatment. (CX 17).

Dr. Rice, a rheumatologist, saw Cross in April and again in mid June of 1998. On the later visit, the physician stated

> <u>ASSESSMENT</u>: Painful hands and knees. He has symptoms to suggest carpal tunnel syndrome of the hands. Knees consistent with degenerative arthritis. Apparently at this point in time, he is in a state where he is not physically able for gainful employment due to arthritis.

Cross was seen by Dr. Rice on two subsequent occasions in 1998, three times in 2000, as well as in January 2001. On the last visit, the physician recommended a referral to a hand specialist. (EX 18).

In July 1998, a Social Security Administration Administrative Law Judge granted disability benefits as of April 1995. (CX 16).

In January 2001, Dr. Carr reported that

> Amin is back, I have not seen him for several years. He has had persistent pain and swelling, thickening in his rt hand. He has had multiple trigger finger releases in the past. Is doing very well. Neurovascular is intact. He does have stiffness and arthritis in his hand. I have talked to him about the options available. At this time I recommended an exercise program and stretching. I would like to see back if symptoms persist. We talked about putting him back onto anti-inflammatory and will try him on Celebrex to see whether this changes or improves his symptomatology. (EX W).

The Employer has also submitted a report of Dr. Rice's evaluation in October 1996.

> Mr. Cross is applying for total disability due to painful hands and knees and has required surgery x 2, twice for each hand for trigger finger release. He has 80% disability of the right hand and 70% of the left.
>
> PHYSICAL EXAMINATION: Musculoskeletal: There is palpable tenderness of both palms. Grip strength is fairly good. There is palpable tenderness of both knees along the medial patellar border.
>
> ASSESSMENT: Bilateral knee pain, bilateral wrist and hand pain.
>
> PLAN: Continue CATAFLAM 50 mg q.8h. with food plus 12 oz. of water. PEPCID 20 mg q.d. I feel that this gentleman is probable disabled for work due to the above problems. Follow-up evaluation in three months or p.r.n. (EX x).

Modification in this case focuses on the question of whether or not there has been a material change in Cross's physical condition since the decision in early 1998.

After a comparison of previous medical reports from Dr. Carr to those of more recent vintage, I do find that there has been an increase in hand impairment. Besides stiffness he now has a burning sensation in the forearms. In addition, complaints of knee “give” suggest that restrictions for the knees should also increase.

Dr. Rice has reported increasing hand complaints, and Cross has been referred to a specialist. I conclude that each of these physicians has described additional impairment.

In 1998, Dr. Carr reported that the current combination of hand and knee problems would virtually preclude any type of employment. Dr. Rice made similar comments in 1998.

At the hearing in 2001, William Kay, a vocational expert, testified, in part that

> Dr. Carr had recommended that he continue to seek employment and during the same month, Dr. Rice had said that she did not know whether he was physically able to gain employment. But there was no actual restrictions given at that time by either doctor saying that he was either totally out of work, that he could only lift this amount, he could only walk that amount, or whatever. So I felt like the original positions that were identified in the labor market survey that were previously approved by Dr. Carr were still valid.
>
> Q Do you have an opinion as to whether any of the records that you*d seen from Dr. Carr, or Dr. Wardell, or Dr. Rice would prevent or affect Mr. Cross* ability to perform the jobs that were approved by Dr. Carr?
>
> A No, not from what I*ve seen. (TRB pps. 25 & 26).

The undersigned seriously questions whether any of the above named physicians would currently approve those positions. Recent reports have not been submitted from Dr. Wardell and it is to be noted that Mr. Kay is not a physician.

It is concluded that medical reports since June 1998 indicate that Cross could no longer perform the jobs mentioned in the labor market survey.

At the hearing in 2001, Claimant's counsel stated that

> Mr. Cross has undergone further surgery on his knees by Dr. Wardell, the treating orthopaedic surgeon, beginning in February of 2001. Based on that, the Employer voluntarily began paying Mr. Cross temporary total disability benefits as of February 22nd, 2001. Based on the Employer*s voluntary action, Claimant would agree then that the Request for Modification would terminate as of 2/21/2001. So I would propose that we agree then that the issue for you to resolve in the Request for Modification is whether there has been a change in condition to justify an award for permanent total disability from June 4th, 1998 up to and including February 21st, 2001, but that based on the Employer*s voluntary payment of temporary total after that, that that would end that issue of the Request for Modification. (TRB 6).

Section 8(f) Relief

In December 1997, the Solicitor, on behalf of the Director, stated that

> The Director agrees to application of § 8(f) in this case in the event that you determine that the claimant is entitled to an award of permanent disability. In such instance, the Director would also agree that Special Fund relief would commence 104 weeks from May 9, 1996, the date of maximum medical improvement.

However, the undersigned has concluded that Cross was capable of performing suitable alternate employment from May 9, 1996 to June 3, 1998. Cross was permanent totally disabled from June 4, 1998 to the present and continuing. Thus, the 104 week period under Section 8(f) shall begin on June 4, 1998.

ORDER

1. The Claimant is not entitled to permanent total disability from May 9, 1996 to June 3, 1998.

2. The Employer shall pay permanent total disability from June 4, 1998 and continuing.

3. Upon the expiration of 104 weeks after June 4, 1998 such compensation and adjustments shall be paid by the Special Fund established pursuant to the provisions of 33 U.S.C. §944.

4. Emp1oyer shall receive credit for all compensation that has been paid.

5. Interest at the rate specified in 28 U.S.C. §1961 in effect when this Decision and order is filed with the Office of the District Director shall be paid on all accrued benefits computed from the date each payment was originally due to be paid. See Grant v. Portland Stevedoring Co., 16 BRBS 267 (1984).

6. All computations are subject to verification by the District Director.

7. Pursuant to Section 7 of the Act, the Employer shall provide payment for all past, present and future medical bills incurred for treatment of Claimant*s work related impairments.

8. Claimant’s attorney, within twenty (20) days of receipt of this order, shall submit a fully documented fee application, a copy of which shall be sent to opposing counsel, who shall then have ten (10) days to respond with objections thereto.

A
RICHARD K. MALAMPHY
Administrative Law Judge

RKM/ccb
Newport News, Virginia