

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 17 March 2008

In the Matter of:

J.K.,
Claimant,

2004lhc01430

v.

NEWPORT NEWS SHIPBUILDING & DRY
DOCK COMPANY,
Self-Insured Employer,

&

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,
Party-in-Interest.

DECISION AND ORDER AWARDING BENEFITS

This proceeding arises from a claim filed by J. K. (Claimant) against Newport News Shipbuilding & Dry Dock Company (Employer) under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* (hereinafter the Act). On September 9, 1999, the District Director issued an Order awarding Claimant temporary partial disability compensation benefits. Claimant now seeks to modify this Order to receive permanent partial disability benefits.

A formal hearing was held in Newport News, Virginia on September 17, 2004. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. The following exhibits were submitted into evidence: Claimant's Exhibits (CX) 1 – 10; Employer's Exhibits (EX) 1 – 2.

This Court had previously denied the claim finding that Claimant's request for modification was not timely. In its opinion in *J.K. v. Newport News Shipbuilding & Dry Dock Co.*, 488 F.3d 606, 41 BRBS 23(CRT)(4th Cir. 2007) *vacating* 39 BRBS 113 (2005), the Fourth Circuit remanded the case for further proceedings on the merits.

ISSUE

What permanent partial disability rating applies

FINDINGS OF FACT

On April 6, 1995, Claimant injured his right leg while working for Employer. (Tr. 13). As a result of this injury, Claimant was totally disabled from April 7, 1995 to August 27, 1995. Also, due to this injury, Claimant sustained a temporary partial disability from August 28, 1995 until December 31, 1998. On September 10, 1999, District Director Voultsides issued an award entitling Claimant to temporary partial disability benefits.

Claimant now seeks modification based upon an impairment rating assigned by Dr. Alvin Bryant. Claimant began seeing Dr. Bryant after the injury and has continued to see him every three weeks. (Tr. 15). On April 7, 2003¹, Dr. Bryant assigned a 35% permanent disability rating to Claimant's right lower leg. (CX 2 at 36). Dr. Bryant found Claimant suffered from neurologic injuries, nodular fasciitis, swelling and abnormalities of gait, all of which were related to the work related injury to his right leg. Dr. Bryant does not indicate what source he relied upon to determine the percentage of disability. (CX 2 at 36). Claimant now seeks permanent partial disability based on this rating.

Claimant was also examined by Dr. Mark Ross at Riverside Rehabilitation Institute. Based on this examination and Claimant's medical records, Dr. Ross issued a medical report on May 14, 2003. In his assessment, Dr. Ross concluded that Claimant had a 14% disability rating in his lower extremity. Dr. Ross based his opinion upon the American Medical Association's *Guides to the Evaluation of Permanent Impairment (5th Ed. 2000)*. (CX 1).

DISCUSSION

Claimant argues that the opinion of Dr. Bryant is entitled to greater weight as he treated Claimant's lower extremity on a continuing basis for several years. The Court gives Dr. Bryant's opinion additional weight because of this continued treatment. Dr. Ross, in contrast, only saw Claimant on one occasion at the request of Employer.

Employer argues that Dr. Bryant relied on CPT codes which are used exclusively for insurance billing purposes. I note that Dr. Bryant apparently referred to CPT codes in his letter to Claimant's attorney (CX 2, p. 36) but it is not clear that he used CPT codes in determining the percentage of disability.

In contrast to Dr. Bryant, Dr. Ross was very clear as to the factors he considered in assessing the percentage of disability under AMA guidelines. While Dr. Ross only saw Claimant on one occasion, I find that his examination was very thorough and I give it additional weight.

In his brief, Claimant suggest that the Court average the two ratings and assign Claimant a disability rating of 24.5% based upon the two physicians' opinions. Based on the facts of this case, and considering Dr. Bryant's status as a treating physician and the thoroughness of Dr. Ross's disability assessment, the Court finds this approach reasonable.

¹ I find Claimant reached maximum medical improvement on this date.

ORDER

It is hereby ORDERED, JUDGED AND DECREED that:

1. Employer shall pay Claimant permanent partial disability beginning April 7, 2003, for a 24.5% loss of use of the lower right extremity based on an average weekly wage of \$735.42.
2. Employer shall pay all reasonable and necessary medical expenses.
3. Employer shall pay Claimant interest on any accrued unpaid compensation benefits at the rate provided by 28 U.S.C. § 1961.
4. Within thirty days of receipt of this Order, counsel for Claimant should submit a fully-documented fee application, a copy of which shall be sent to opposing counsel, who shall have twenty days to respond.
5. All computations of benefits and other calculations which may be provided for in this order are subject to verification and adjustment by the District Director.

A

LARRY W. PRICE
Administrative Law Judge