U.S. Department of Labor

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Issue Date: 19 March 2009

CASE NO.: 2006-LHC-1226

OWCP NO.: 07-170600

IN THE MATTER OF

T. M.[1],
Claimant

v.

GREAT SOUTHERN OIL & GAS,
Employer

and

LOUISIANA WORKERS' COMPENSATION CORP.,
Carrier

APPEARANCES:
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ROBERT K. GUILLORY, ESQ.
On behalf of Claimant

DAVID JOHNSON, ESQ.
On behalf of Employer/Carrier

BEFORE: C. RICHARD AVERY
Administrative Law Judge

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[1] Pursuant to a policy decision of the Department of Labor, the Claimant's initials rather than full name are used to limit the impact of the Internet posting of agency adjudicatory decisions for benefit claim programs.

DECISION AND ORDER

PREFACE

Claimant injured his left knee on May 28, 1994, when he slipped and fell between two barges. He was paid state workers' compensation benefits until June 30, 2005 but is now seeking retroactive and future total disability benefits under the Longshore and Harbor Workers' Compensation Act (the Act). A formal hearing was held on January 10, 2007. The sole issue before me at that time was whether Claimant's injury occurred during employment covered by the Act. By Decision and Order dated April 4, 2007, I found Claimant worked on a "fixed" platform at the time of his injury and was not covered by the Act. The Claimant appealed, and by Decision and Order dated May 28, 2008, the Benefits Review Board reversed my decision, finding Claimant entitled to benefits under the Act, and remanded the matter to me for the entry of an award of benefits. On November 5, 2008, the parties appeared for a formal hearing at which testimonial and documentary evidence[2] was offered and each party filed post-hearing briefs. Without conceding jurisdiction, but for purposes of this hearing, Employer/Carrier's counsel conceded: Claimant's accident occurred May 28, 1994, in the course and scope of his employment; Claimant's average weekly wage (AWW) at that time was $683.65; and Claimant is entitled to medical treatment for his knee, shoulder, and wrist. (*See* JX-1 and pages 64-70 of the transcript). Remaining for my determination was whether Claimant has reached maximum medical improvement (MMI) and whether he has been totally or partially disabled since June 30, 2005, Employer having conceded Claimant was totally disabled prior to that time.[3]

EVIDENCE

Two witnesses testified at the recent hearing, Claimant and his wife. Claimant testified he was born August 4, 1966, and is married with four children. He has an 11th grade education and failed in an attempt to obtain his GED. In 1988, while working as a surveyor's helper, Claimant injured his left knee and

[2] Twelve Claimant's Exhibits, two Employer's Exhibits, one Joint Exhibit and three ALJ Exhibits were received into evidence. ALJ Exhibit 3 includes the transcript from the previous trial as well as the five exhibits Employer/Carrier offered at that time.

[3] In their post hearing briefs both parties took the position Claimant is not at MMI, consequently, I will no longer treat that as an issue for my determination.

placed himself under the care of Dr. Cobb, who repaired the ligament. Following that treatment, Claimant maintains he had no further problems with his knee and worked as an auto mechanic until he went to work for Employer.

Following his May 28, 1994, accident, Claimant began seeing Dr. Cobb and has undergone three or four surgeries to his knee. Claimant has also been treated by Dr. Cobb's partner, Dr. Hodges. Despite these procedures and treatment, Claimant testified he still needs another surgery to reduce the pain and "popping" in his knee. In addition to the proposed surgery, because of his altered gait and his use of a cane, Claimant said he has hip, back, wrist and shoulder pain and needs a carpal tunnel release as well as rotator cuff surgery.

Claimant has not worked since the accident and said he cannot work due to his pain and use of medications, nor can he stand or walk for long periods of time. He said his pain is such that he has asked the doctors to amputate his leg or give him a knee replacement, but they have refused, saying he is too young for a knee replacement that will last no more than six to ten years, and he would still suffer from phantom pain with amputation.

Claimant described his days as looking after his children and doing housework. He does have a driver's license and occasionally fishes at a friend's pond, but otherwise he does nothing. Claimant said he applied for the seven or eight jobs identified to him, but with no success.

Claimant's wife testified the couple has been married 23 years. Prior to the accident, she said Claimant was an able and active husband and father. Now, however, she said he can do very little because of pain, and she works three jobs to support the family. She testified she does not believe Claimant is employable and is concerned that he is suicidal.

Over the years most of Claimant's medical care has been performed by Drs. John Cobb and Daniel Hodges at Lafayette Bone and Joint Clinic. The former's records are found at Claimant's Exhibit 4 and Employer's Exhibit 1-A and the latter's records and deposition at Claimant's Exhibits 1 and 3 and Employer's Exhibit 1-A.

Dr. Cobb is an orthopedic surgeon. Following emergency treatment, Claimant was first seen by Dr. Cobb on June 1, 1994. Radiological studies were performed and when the knee remained painful and quadriceps atrophy became apparent, an arthroscopic evaluation, followed by lateral retinacular release, was performed on September 9, 1994. Moderate pain persisted, and on December 19, 1994, trigger point injections near the patella tendon were administered.

Physical therapy was performed, but the pain continued around the patella as well as popping of the knee. On June 15, 1995, ACL reconstruction was performed. Therapy was resumed, but Claimant's painful patellofemoral symptoms persisted. Throughout 1996 Claimant complained of pain and by then his left quadricep was an inch and a half smaller than his right. In 1997 Claimant received a brace, but approval for additional surgery was denied at that time. In 1998 a knee scope confirmed the possible reasonableness of a patellectomy.

In 1999, Dr. Cobb reported Claimant was still having left knee pain and severe chondromalacia, accompanied by complaints of hip and shoulder pain due to use of crutches. On August 31, 1999, an "OATS" procedure of the patella was performed. Regarding Claimant's disability, in 2000 Dr. Cobb wrote Social Security that Claimant could stand and walk less than two to three hours with rest and had lifting restrictions of 25 pounds.

A patellectomy was subsequently performed in 2003 on Claimant's left knee, and at that time low back and shoulder pain was also attributed to the Claimant's knee injury. By 2006, Dr. Cobb sought, and was denied, revision surgery of the left knee quadriceps tendon as well as decompression of the left shoulder and left carpal tunnel release.

In July 2006, Dr. Cobb opined Claimant was "unable to work at all" and enumerated Claimant's problems as: inflammation, tendinitis of left shoulder, left tennis elbow, left carpal tunnel syndrome, left knee pain and early right knee pain. In August 2006, Dr. Cobb gave Claimant a prescription for a scooter. With no approval for recommended further surgeries, pain management was the next referral.

Dr. Hodges is board certified in the specialty of physical medicine and rehabilitation. In his October 22, 2008 deposition he described his involvement with Claimant over the last six years following the various surgeries and treatments Claimant underwent with his partner, Dr. Cobb. At the beginning of Dr. Hodges'

treatment, Claimant was using a cane to assist in ambulation. By that time Claimant's patella had been removed and the function of his knee was altered because of the importance of the patella and the movement of the leg. After removal of the patella, Dr. Hodges explained, the amount of energy to stand from a seating position is ten fold.

Dr. Hodges recalled that there was a time that Claimant was released to try sedentary type work identified by Sy Arceneaux, a vocational rehabilitation counselor hired by Employer; however, regarding Claimant's employability, Dr. Hodges stated:

> …I think watching Tony over these six years and the attempts we tried to get him back out there in sedentary capacity, I just think today his employability is remote (CX-1, p. 15).
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> . . .
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> …It's a tough call, but I just don't think he's truly employable, not on a constantly consistent basis. (CX-1, p. 16).

As far as the future is concerned, Dr. Hodges speculated Claimant would not improve, but rather would continue to have left knee pain and "down the road" be in need of shoulder surgery and "even end up with right knee surgery" because of the pressure Claimant is having to put on his right leg. As to a knee replacement, Dr. Hodges stated Claimant is too young for the procedure to be considered, though he acknowledged it could possibly give Claimant some relief from pain and increase his functionality.

As to the cause of Claimant's left wrist and shoulder problems, Dr. Hodges blamed the same on the weight placed on these areas by Claimant's needed use of a cane.

On cross-examination, Dr. Hodges agreed that maybe two or three years earlier Claimant may have been employable at a sedentary level, but no longer because his knee complaints and limited ambulatory capacity is worsening, as is his left shoulder. Now even in a "sedentary environment", Dr. Hodges testified, be it part-time or otherwise, Claimant could not effectively work. (CX-1, p. 23). Acknowledging that even some paraplegics work, Dr. Hodges explained they have no pain, but this Claimant has "tremendous amount of pain that's affecting him". (CX-1, p. 24).

Glenn Hebert is a vocational rehabilitation counselor who met with Claimant on October 22, 2008. His report is found at Claimant's Exhibit 9. Mr. Hebert interviewed Claimant and reviewed his social, education, work and medical histories. Given Claimant's condition, his need for more medical treatment, the medications he's taking and Dr. Hodges' opinion, Mr. Hebert opined that "from a vocational standpoint, I feel he is totally and permanently disabled from ever re-entering the labor market in the future…."

Sy Arceneaux is a vocational rehabilitation counselor who met Claimant in 2005. As with Mr. Hebert, Mr. Arceneaux reviewed Claimant's backgrounds. Several jobs including those of a clerk, cashier and service writer were identified, and some were apparently initially approved by Drs. Cobb and/or Hodges, despite the fact that during the same period Dr. Cobb reported in June 2005 that Claimant was suffering continued problems and was in need of surgery to "help with the subluxing quadriceps."

DISCUSSION AND FINDING

In the May 1994 accident Claimant crushed his left knee and has had three or four surgeries, including a patellectomy on January 16, 2003, in the hopes of providing him with relief from the chondromalacia within the knee. Claimant, however, still suffers pain in the knee and cannot bear weight. Also, after years of using a crutch or a walking stick, he has developed severe low back pain as well as left carpal tunnel syndrome and impingement in the left shoulder. For relief, Claimant takes Hydrocodone and Lortab as well as anti-anxiety medication and sleep medication.

Because of the need for additional surgeries, neither party makes the claim that Claimant has reached maximum medical improvement. Claimant's injuries having been acknowledged as work-related, whether primary to or secondary to his May 28, 1994 accident. The single issue for my determination is whether or not Claimant been entitled to partial disability compensation rather than total disability compensation since June 30, 2005. Prior to June 30, 2005, Employer acknowledges that Claimant was totally disabled.[4]

[4] Employer's post-trial brief acknowledges Claimant is not at maximum medical improvement because of his treating physician's anticipated future wrist, knee and shoulder surgeries. I view this acknowledgment as a concession that the need for such surgeries are the result of Claimant's May 28, 1994 injures and thus the Section 7 responsibility of Employer.

It is my finding that Claimant is temporary totally disabled and has been since the day of his accident. Employer concedes Claimant was temporarily totally disabled from his accident until June 30, 2005 and by July 2006 Dr. Cobb was declaring Claimant unable to work, an opinion which, according to his deposition, Dr. Hodges likewise adopted and still embraces. Therefore, in actuality the narrow issue is whether or not Claimant was partially disabled during the window of June 30, 2005 until July 2006, and from the evidence presented I think it unreasonable to conclude Claimant was any more employable during those twelve months than he has been at any other time since his accident.

Claimant has suffered debilitating pain since the accident which has only worsened. In June of 2005, the same period Employer maintains Claimant could have worked, Dr. Cobb reported that Claimant was suffering continuing problems and was in need of surgery to "help with subluxing quadriceps", and by July of 2006, Dr. Cobb specifically declared Claimant unemployable. Despite his pain and the medications he was taking Claimant testified at the hearing that he did apply for a number of the jobs identified by Mr. Arceneaux but with no success.

In sum, all the stipulations and medical evidence supports Claimant's total disability the entire period since his May 1994 accident with the exception of the disputed twelve months from June 2005 until July 2006. During that very brief period, I find Claimant's efforts to obtain the jobs identified, his description of pain, as well as Dr. Cobb's request for additional surgery, all convince me that Claimant was totally disabled during that period of time as well.

ORDER

It is hereby **ORDERED, ADJUDGED and DECREED** that:

(1) Employer/Carrier shall pay to Claimant compensation for temporary total disability benefits from May 28, 1994 and continuing based on an average weekly wage of $683.65.

(2) Employer/Carrier shall pay or reimburse Claimant for all reasonable and necessary past and future medical expenses resulting from Claimant's injuries of May 28, 1994;

(3) Employer/Carrier shall be entitled to a credit for all payments of compensation previously made to Claimant;

(4) Employer/Carrier shall pay interest on all of the above sums determined to be in arrears as of the date of service of this ORDER at a rate provided by in 28 U.S.C. §1961;

(5) Claimant's counsel shall have twenty days from receipt of this ORDER in which to file a fully supported attorney fee petition and simultaneously to serve a copy on opposing counsel. Thereafter, Employer/Carrier shall have ten (10) days from receipt of the fee petition in which to file a response;

(6) 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.

Entered this 19th day of March, 2009, at Covington, Louisiana.

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C. RICHARD AVERY
Administrative Law Judge