



Government of the District of Columbia

Department of Employment Services

Office of the Director • Employment Security Building • 500 C Street, N.W. • Suite 600 • Washington, D.C. 20001

FRANCIS S. DAVIS,	:	
	:	
Claimant	:	
	:	
v.	:	Dir. Dkt. No. 88-84
	:	H&AS No. 87-751
WESTERN UNION TELEGRAPH,	:	OWC No. 0098216
	:	
and	:	
	:	
NATIONAL UNION FIRE INSURANCE	:	
COMPANY,	:	
	:	
Employer/Carrier	:	
	:	

Appeal from the Compensation Order of
Karen L. Tibbs, Hearing Examiner

Benjamin Boscolo, Esquire
for the Claimant

Robert C. Baker, Jr., Esquire
for the Employer/Carrier

REMAND ORDER

I. Preliminary Statement

This proceeding arises out of a claim for workers' compensation benefits filed pursuant to the provisions of the District of Columbia Workers' Compensation Act of 1979, as amended, D.C. Law 3-77, D.C. Code, §36-301 et seq. (1981 Edition, as amended) (hereinafter, the "Act").

On May 18, 1988, Hearing Examiner Karen L. Tibbs issued a Compensation Order which ordered the employer to pay claimant temporary total disability benefits from April 16, 1987 to the present and continuing, and all related medicals. The Hearing Examiner concluded that claimant's current disability is causally related to the March 10, 1986 incident. Further, the Hearing Examiner concluded that claimant should have the recommended surgery and employer should pay for medical expenses.

The employer filed an Application for Review with the Director of the Department of Employment Services (hereinafter "Director") on June 16, 1988 setting forth the Points and Authorities in support of its position. The claimant filed a Motion for Extension of Time to respond to employer's Application for Review on August 5, 1988. The Director subsequently granted claimant's request on August 25, 1988 and a response to employer's Application for Review was filed on September 2, 1988.

II. Background

The uncontested facts are set forth as follows: Claimant was employed by the Western Union Telegraph Company as a wire and relay technician and later as a cableman when the work injury occurred. On March 10, 1986, as claimant approached a door leading to the work area in employer's building, he was struck on the forehead, shoulder and wrist by the door when another employee exited through the door at the precise time claimant was about to enter. As a result, claimant was thrown approximately six feet hitting a wall nearby. Claimant sustained an acute hypertension injury to the neck and was diagnosed as having a cervical strain and spinal stenosis at the C4-5 level. ^{1/} Claimant attempted to return to work, but was unable to continue due to the severity of the pain. Claimant has not returned to work since.

The employer argues on appeal that: (1) the findings of fact in the Hearing Examiner's decision are erroneous, as not having been derived from the record taken as a whole; (2) the Hearing Examiner failed to consider the rebuttal evidence submitted by the employer/carrier; (3) the Hearing Examiner's findings of fact and conclusions of law are merely conclusory statements with only brief references to the record and without an adequate delineation of factors weighed in reaching the conclusions of law; and (4) the Hearing Examiner's finding that the claimant is entitled to the surgery recommended by Dr. Mathews is neither supported by substantial evidence nor in accordance with law.

^{1/} Claimant sustained a cervical fusion resulting from an accidental injury on April 27, 1976 while employed with Gichner Iron Works. Subsequent to the occurrence of the injury claimant had surgery for removal of a disk at the C5-C6 level and a fusion of the cervical spine. As a result of this injury and subsequent surgery, the claimant was unable to work for a period of approximately four years from April 1976 until February 1980, when the claimant went to work for Western Union.

III. Discussion

The Director must affirm the Compensation Order under review if the findings of the fact contained therein are supported by substantial evidence in the record considered as a whole and if the law has been properly applied. D.C. Code, §36-322; 7 D.C.M.R. Employment Benefits §230. Substantial evidence is defined as such relevant evidence as a reasonable mind might find as adequate to support a conclusion. George Hyman Construction Company v. D.C. Department of Employment Services, 498 A.2d 563 (D.C. App. 1985).

The Hearing Examiner found that claimant's current disability is causally related to the March 10, 1986 work accident. The Hearing Examiner also found claimant's testimony that he was able to perform his job duties without pain until the March 10, 1986 accident credible. Further, the Hearing Examiner accorded more weight to the treating physicians because, according to the Hearing Examiner, "they have been monitoring claimant's progress and have been in the best position to make a proper diagnosis."

Immediately following the March 10, 1986 injury, claimant sought treatment from Dr. Wolcott W. Gibson, an internist. In a report dated March 19, 1986, Dr. Gibson diagnosed claimant as having sustained a contusion and strain involving the head, right shoulder and neck. See claimant's exhibit No. 6. Dr. Gibson ruled out the possibility of a fracture and concussion and opined that a permanent defect from the injury was not likely. Dr. Gibson noted that claimant had no physical impairment due to any previous injury or disease and stated that claimant should be able to return to his regular occupation within two weeks. See claimant's exhibit No. 6.

Claimant was referred by Dr. Gibson to Dr. Lloyd Scribner, an orthopedist. Dr. Scribner testified that he was not aware of claimant's previous treatment and could not recall the details regarding the cervical fusion claimant had undergone in 1976 to correct a disk problem. See Dr. Scribner's deposition transcript at 20. Dr. Scribner noted that the spinal stenosis with which claimant was diagnosed would not have caused the March 10, 1986 injury and such a condition would have been present prior to the date of the injury. Although Dr. Scribner found that claimant's complaints related to the 1986 injury, he had no record of what procedures claimant underwent in 1976 or what happened to the claimant as a result of the 1976 injury. Finally, Dr. Scribner could not offer any objective findings to support a conclusion that claimant's current medical problems are only due to the March 10, 1986 injury. See deposition transcript at 23.

Claimant was also examined by Dr. George Mathews, a neurosurgeon. Dr. Mathews stated that claimant had a longstanding history of cervical spondylolysis and stenosis prior to the March 10, 1986 injury. See Dr. Mathew's deposition transcript at 22. Dr. Mathew's was knowledgeable of

claimant's 1976 injury and cervical fusion and opined that he would expect someone with a 55% permanent partial disability, as claimant was given, to experience painful symptoms. Id. Dr. Mathews stated that it was possible that the pre-existing condition of the claimant's spine could account for the claimant's symptoms. Dr. Mathews opined that it is impossible for a subsequent examiner to determine if claimant's current problems were due to the 1976 injury or to the March 10, 1986 work injury. Dr. Mathews related claimant's complaints to his 1986 injury based on the medical history provided by claimant. See Claimant's exhibit No. 6. Furthermore, Dr. Mathews stated that claimant would not improve without surgical correction. See Claimant's exhibit No. 3. According to Dr. Mathews, the operation would consist of a posterior cervical laminectomy and decompression. Id.

Claimant was referred to Dr. Robert O. Gordon, a Board certified orthopedist, for an independent medical evaluation. Dr. Gordon found no abnormal objective findings upon examining claimant. A neurological examination was normal and a myelogram and CT scan showed no evidence of any disc herniation. Dr. Gordon noted that claimant does have some spinal stenosis in the mid and lower cervical areas, probably to some extent on a congenital basis, but also partly related to the previous surgery that was performed. In a report dated April 6, 1987, Dr. Gordon stated:

I strongly suspect that if the myelogram and CT scan had been taken prior to [claimant's] March 10, 1986 injury, it would have looked identical. Although I definitely think [claimant] does have some stenosis at these levels, I don't believe that with his present findings and examination that a surgical procedure would be recommended by most orthopedists and neurosurgeons and if any surgical procedure was done, it probably would be a posterior decompression rather than anything done anteriorly.

Finally, claimant underwent another independent medical evaluation by Dr. Ramon B. Jenkins, a Board certified neurologist. It was Dr. Jenkins' impression that the claimant had some post-operative long standing spinal stenosis resulting from his 1976 injury and surgery. See medical report of Dr. Jenkins dated April 17, 1987. According to Dr. Jenkins, there was nothing suggestive of nerve root involvement and no disk herniation and no residuals from the March 10, 1986 injury were found. However, because of the spinal stenosis, Dr. Jenkins did believe that surgery in the form of decompression of the vertebral arches would be an advisable course of action.

During the hearing, claimant testified on his own behalf. In the relevant portions of claimant's testimony, claimant testified that between undergoing surgery in 1977, following his injury in 1976, and returning to work for Western Union in February of 1980, he felt relief.

See H.T. at 35. Claimant felt restored to what he described as good health and was under no doctor's care, and had no medical restrictions or neck problems. Claimant stated that he had no problems after returning to work at Western Union and was without pain. However, claimant testified at a hearing before the Maryland Workers' Compensation Commission on August 27, 1980, regarding the 1976 injury, that he continued to experience pain everyday in the shoulder, neck and head area, and was subsequently given a 55% permanent partial disability rating based, in part, on his testimony. See H.T. at 59, 60, 62 and 70. The pain of which claimant complained in 1980 is primarily the same pain of which he currently complains. Claimant testified at the hearing held on February 16, 1988 that he suffers from terrific headaches, neck pain and spasms extending to his right shoulder. See H.T. at 45; See also deposition of claimant dated January 14, 1987 at 37. According to claimant, these aches and pains occur on a daily basis and prevent him from doing most house chores and interfere with his daily activities. See H.T. at 46-47. Claimant also stated that because of the constant pain from bending and stretching, he cannot perform his job duties.

After a careful review of the record, the Director concludes that the Hearing Examiner's decision was not supported by substantial evidence. The Hearing Examiner failed to consider the record in its entirety and appeared to have overlooked or disregarded relevant and probative evidence. For example, the Hearing Examiner made no mention in her decision of the Maryland Workers' Compensation hearing in August 1980 in which the claimant testified that he continued to experience pain due to the 1976 injury. Instead, the Hearing Examiner only considered claimant's testimony at the February 16, 1988 hearing which was completely inconsistent with prior statements made and demonstrated a lack of credibility.

Claimant testified at the 1988 hearing that he was unable to perform any of the physical activities of his prior employment (which included bending, lifting, stretching, working overhead and stooping) without pain. Claimant also testified that because of his limitations due to pain, he led virtually a sedentary existence and never performed any work outdoors.

The employer submitted as evidence still photographs taken of the claimant, five days prior to the hearing, which show claimant putting christmas lighting on a tree outside of his home. These photographs showed the claimant reaching, bending, climbing, pulling wires and stretching so far as to expose the skin on his torso. Furthermore, the private investigator, who photographed and observed claimant on that particular occasion, testified at the hearing that claimant demonstrated no manifestations of pain and, indeed, none was visible from the photographs.

Although the employer introduced the photographs into evidence, and claimant admitted that he was, in fact, the person in the photographs, the Hearing Examiner again made no mention of the photographs in reaching her decision. The photographs directly contradicted the claimant's testimony concerning his physical limitations and once more cast doubt on the claimant's credibility.

With regard to the issue of whether claimant's disability was causally related to his work injury on March 10, 1986, the Director concludes that, based on the medical reports and claimant's inconsistent testimony, there appears to be no nexus. Dr. Mathews, along with Dr. Gordon, stated that it was entirely possible that claimant's pre-existing condition of spinal stenosis could account for claimant's current symptoms. The Director further concludes that the Hearing Examiner's reliance on Dr. Mathews' medical findings was not reasonable considering the fact that Dr. Mathews admitted during his testimony that he based his medical findings of causation on the medical history provided by claimant and not on an objective review of previous medical records which would have documented claimant's prior injury, symptoms and diagnoses.

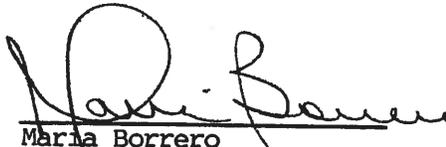
While the Director concurs with the Hearing Examiner's finding that claimant should have the recommended surgery, the Director is at odds with, and cannot defer to, the Hearing Examiner's credibility findings. The claimant's current complaints are similar, if not identical, to the complaints of pain he described during a hearing in 1980 before the Maryland Workers' Compensation Commission which would lead one to believe that his current medical problems are related to the pre-existing condition rather than the March 10, 1986 injury. Furthermore, inasmuch as the photographs directly contradict the claimant's testimony concerning his physical limitations, they show the claimant to have been less than forthcoming in his testimony before the Hearing Examiner. This combined with the inconsistencies in claimant's testimony at the deposition and hearing, and before the Maryland Workers' Compensation Commission, only serves to diminish claimant's credibility. 2/

2/ A determination of the credibility of a witness ought involve more than a consideration of the witnesses' demeanor and appearance. It should apprehend the over-all evaluation of testimony in the light of its rationality, internal consistency, and the manner in which it hangs together with other evidence of the record. See Sartor v. Arkansas Natural Gas Corporation, 321 U.S. 620, 64 S. Ct. 724, 88 F. Ed. 964 (1955); United States v. American Telephone and Telegraph Company, 83 FRD 323 (D.D.C. 1979); Carbo v. United States (C.A. Cal. 1963) 314 F.2d 718, at 749. While a Hearing Examiner's findings are especially weighty when they involve credibility determinations, like all other findings, they must be supported by substantial evidence taking the record as a whole. See Dell v. Department of Employment Services, 499 A.2d 102, (D.C. 1985); and Perkins v. D.C. Department of Employment Services, 482 A.2d 401, at 402 (1984).

Based upon the Director's complete review of the record, the factual findings and conclusions in the Compensation Order of May 18, 1988 do not appear to be based on substantial evidence and a proper application of the law, and, thus, must be remanded for the Hearing Examiner to re-examine the factual issues in dispute, consider all probative and relevant evidence contained in the record and determine whether the claimant's disability is compensable under the Act.

IV. Disposition

Accordingly, for the reasons more fully set forth above, the Compensation Order of May 18, 1988, is hereby remanded for further findings.



Maria Borrero
Director

Date

3/4/92