

IRA D. SCOTT, Claimant v. MUSHROOM TRANSPORTATION, and NATIONAL
UNION FIRE INSURANCE, Employer/Carrier

Dir. Dkt. No. 88-77; H&AS No. 88-44; OWC No. 0074896

DISTRICT OF COLUMBIA, DEPARTMENT OF EMPLOYMENT SERVICES,
COMPENSATION REVIEW BOARD

June 5, 1990

PRIOR-HISTORY: [*1] Cross Appeals from the Compensation Order of Amelia G. Brown, Hearing Examiner

COUNSEL: Jane Wright, Esquire, for the Claimant; Michael S. Levin, Esquire, for the Employer/Carrier

PANEL: F. Alexis H. Roberson, Director

OPINION: DECISION OF THE DIRECTOR

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 April 6, 1988, Hearing Examiner Brown issued a Compensation Order finding that claimant was totally disabled, that claimant cooperated with vocational rehabilitation, and additionally, employer is not responsible for the medical bills of Dr. Hampton Jackson.

Employer filed an Application for Review on May 5, 1988. Claimant filed a response to employer's appeal. Claimant also filed an Application for Review and employer responded to claimant's appeal.

II. Background

Claimant sustained an injury to his back on June 12, 1985. Claimant alleged that he was unable to return to his former employment as a truck [*2] driver, and the Hearing Examiner found that claimant is permanently totally disabled. However, the Hearing Examiner was also faced with the issue of whether claimant failed to cooperate with vocational rehabilitation and voluntarily limited his income. On this point, the Hearing Examiner ruled that there was no alternative employment within claimant's physical restrictions which was offered to claimant and that claimant did not voluntarily limit his income or fail to cooperate with vocational rehabilitation. The Hearing Examiner also determined that employer is not responsible for the medical bills of Dr. Jackson.

Employer appeals contending that claimant voluntarily limited his income by refusing assistance from its vocational counselor and that there are numerous jobs which claimant can perform based on his background, education and medical restrictions. Claimant, in his appeal, asserts that the Hearing Examiner erred in not holding employer responsible for the medical bills of Dr. Jackson.

III. Discussion

The Director of the Department of Employment Services (hereinafter, "Director") must affirm the Compensation Order under review if the findings of fact contained therein [*3] are supported by substantial evidence in the record considered as a whole and if the law has been properly applied. See D.C. Code, § 36-322; 7 DCMR Employment Benefits § 230. Substantial evidence is such relevant evidence as a reasonable mind might find as adequate to support a conclusion. *George Hyman Construction Company v. Department of Employment Services*, 498 A.2d 563, 566 (D.C. App. 1985).

The Hearing Examiner found that claimant was not offered alternative employment within his physical restrictions and claimant did not voluntarily limit his income or fail to cooperate with vocational rehabilitation. In addition, the Hearing Examiner concluded that employer is not responsible for the medical bills of Dr. Jackson.

After a complete review of the record and carefully reviewing the arguments on appeal by both claimant and employer, the Director determines that the findings of the Hearing Examiner should be upheld.

A. Vocational Rehabilitation

D.C. Code, § 36-307 (d) provides in relevant part:

If . . . the employee unreasonably refuses . . . to accept vocational rehabilitation the Mayor shall, by order, suspend the payment of further [*4] compensation during such period.

Thus, it is clear that a claimant's unreasonable refusal to cooperate with an employer's vocational rehabilitation efforts warrants suspension of compensation payments. *Turner v. George Hyman Construction Company*, Dir. Dkt. No. 87-22 (Decision of the Director, March 10, 1988); *Wright v. Capitol Hill Hospital*, Dir. Dkt. No. 87-7 (Decision of the Director, October 26, 1987).

The crux of employer's argument is that after claimant was unable to perform the initial job lead identified by employer, employer's vocational rehabilitation counselor, Ms. Yano, identified numerous jobs which were appropriate for claimant and his restricted physical abilities. Ms. Yano even identified several employers who said they had jobs available and apparently were interested in talking to claimant about employment. Thus, employer asserts that it is not required to actually offer jobs to claimant and claimant must go out and attempt to obtain work within his physical restrictions.

While the Director agrees with employer that there are responsibilities and obligations placed on employees in the rehabilitation process, the initial burden rests with employers and [*5] their vocational specialists. Employers and their vocational counselors have contacts in the employment arena and experience in matching employees with the appropriate job openings.

Ms. Yano apparently identified several employers with appropriate opportunities for claimant. She indicated that she contacted claimant, but claimant indicated that he was not interested in pursuing the positions that she described to him. However, the record does not reveal that Ms. Yano actually communicated the details of specific jobs leads to claimant. In *Woodall v. Children's Hospital*, Dir. Dkt. No. 86-25 (Decision of the Director, June 10, 1988), the Director noted that a labor market survey alone, identifying available jobs for an injured employee, is not enough for an employer to discharge its burden in vocational rehabilitation. In *Woodall*, the Director stated:

The fact that some of the employers contacted by employer's vocational expert indicated that they would consider claimant for employment opportunities was properly not given a great deal of weight by the Hearing Examiner. The Director notes that both federal and local laws prohibit job discrimination because of age, race, [*6] or physical handicap/disability. The Director also notes that these laws would not be necessary if a significant number of employers did not discriminate against prospective employees for the prohibited reasons. Given the prohibitions against discrimination based upon age, race, or physical handicap/disability, it is not unlikely that most employers would readily say that they would consider anyone for a job, irrespective of their actual feelings or practice.

In this case, instead of simply describing the job prospects that she had identified to claimant, employer's counselor should have given claimant specific names and numbers on these job leads and scheduled interviews for claimant with these employers who were apparently interested in hiring claimant. This would have placed the onus on claimant to follow-up on specific, identifiable job prospects. However, since there is no indication that employer's vocational expert did forward such concrete information to claimant, the Director does not feel that claimant failed to cooperate with vocational rehabilitation. Had employer given such specific information to claimant, employer would have met its initial burden in the vocational [*7] rehabilitation process, then, the focus and burden would have properly shifted to claimant. If claimant did not diligently respond to the leads and interviews, the argument could be made that claimant had failed to cooperate with vocational rehabilitation and voluntarily limited his income.

In addition, the Director must note that although employer argues that these jobs it identified were physically appropriate for claimant, there is no evidence that employer's vocational counselor actually spoke with claimant's treating physician about claimant's ability to perform these new job leads. On cross examination, Ms. Yano admitted that some of these jobs probably would require frequent bending to enter and exit a vehicle and climbing stairs. The Director

points out that there possibly could be concern over whether such tasks would be appropriate for one with claimant's restrictions.

As a result, the Director concludes that the Hearing Examiner's findings that employer did not offer claimant alternate employment within his physical limitations and that claimant did not voluntarily limit his income or fail to cooperate with vocational rehabilitation, should not be disturbed.

B. [*8] Medical Bills of Dr. Jackson

In this case, claimant disputes the Hearing Examiner's finding that employer is not responsible for claimant's medical bills for services rendered by Dr. Jackson. However, after a complete review of the record, claimant's argument must be respectfully rejected.

7 D.C.M.R. § 212.13 provides:

Once a physician or hospital authorized to provide treatment under the Act is chosen, an injured employee shall not change from one (1) physician to another or from one (1) hospital to another, without authorization of the insurer.

In addition, *7 D.C.M.R. § 212.14* states:

If the employee is not satisfied with medical care, a request for change may be made to the Office. The Office may order a change where it is found to be in the best interest of the employee.

The record reveals that claimant's authorized treating physician was Dr. Gladden. Claimant then began to treat with Dr. Jackson, however employer was not consulted on this change, nor did claimant request such a change from the Office of Workers' Compensation prior to beginning treatment with Dr. Jackson.

The fact that employer was not advised of, nor requested to approve the change in treatment from Dr. [*9] Gladden to Dr. Jackson, until after claimant began treatment with Dr. Jackson, was stipulated to by the parties. (See hearing transcript p. 63). In addition, the record contains a letter from claimant's attorney to employer, advising employer of claimant's treatment with Dr. Jackson, after treatment had commenced. (employer's exhibit no. 3). Thus, claimant did not seek employer's authorization prior to changing physicians, nor did he request a change from OWC, relative to his dissatisfaction with Dr. Gladden's treatment. Since claimant failed to comply with the requirements of *7 D.C.M.R. §§ 213.13, 212.14* for obtaining a change of an authorized physician, the Hearing Examiner's conclusion that employer is not responsible for the medical bills of Dr. Jackson must be affirmed.

As a result, based upon the Director's review of the record, the factual findings of the Compensation Order of April 6, 1988, appear to be based upon substantial evidence and they further appear to be based upon a proper application of the law.

IV. Disposition

Accordingly, for the reasons more fully set forth above, the Compensation Order of April 6, 1988, is hereby affirmed, adopted and [*10] incorporated by reference herein.

F. Alexis H. Roberson

Director

Date JUN 05 1990