



ROSA WOODALL, :  
 :  
 Claimant :  
 :  
 v. : Dir. Dkt. No. 86-25  
 : H&AS No. 86-226  
 CHILDREN'S HOSPITAL, : OWC No. 0071217  
 :  
 and :  
 :  
 CNA INSURANCE COMPANY, :  
 :  
 Employer/Carrier :  
 :

Appeal from the Compensation Order of Michael D. Schaff, Hearing Examiner

Robert B. Adams, Esquire  
for the Claimant

William J. Donnelly, Jr., Esquire  
for the Employer/Carrier

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 October 16, 1986, Hearing Examiner Schaff issued a Compensation Order wherein he determined that claimant was totally and permanently disabled.

Employer/Carrier (hereinafter "employer") filed an appeal of the Compensation Order with the Director on or about November 14, 1986.



While this case was pending the Director's review, employer had a change of legal counsel. By letter dated May 19, 1987, employer's new counsel requested leave to file a supplemental brief. By letter dated May 26, 1987, claimant's counsel opposed employer's request to file the supplemental brief. By letter dated June 8, 1987, the Director ordered employer to in essence justify it's request to file a supplemental brief. On the same day as the Director's letter went out, employer went forward and filed a Supplemental Memorandum Supporting Employer/Carrier's Application for Review. By letter dated June 25, 1987, claimant filed her response to the Director's letter of June 8, 1987, which also appears be a response to the merits of employer's supplemental brief. By letter dated July 1, 1987, employer filed its response to the Director's June 8, 1987 letter. And by letter dated July 9, 1987, claimant filed her "rejoinder".

## II. Background

Claimant worked for employer in a custodial/cleaning capacity. Claimant injured her back while pulling trash on March 28, 1985. Claimant was terminated from her employment by a Mailgram dated June 28, 1985 due to her inability to return to work from her medical leave of absence.

The sole issue at the fact finding hearing was the nature and extent of claimant's disability. Claimant contended that given her age, background, training, experience, and degree of permanent impairment, she was totally and permanently disabled.

Employer took the position that claimant was not totally disabled and that there were other jobs available for which claimant could compete.

In support of her claim of permanent and total disability, claimant offered medical evidence of disability. She also offered the expert opinion of a vocational expert who testified (by deposition) that given claimant's age, background, training, education, experience, and physical limitations, claimant was not a suitable candidate for rehabilitation, and nor were there any jobs available for which claimant could reasonably expect to compete. Assuming the correctness of the medical diagnosis/prognosis, claimant's vocational expert concluded therefore that claimant was permanently and totally disabled.

The available evidence of record does not reveal any efforts on the part of employer to either offer the claimant light duty employment or to rehabilitate her. Employer's

sole effort to prove that claimant could compete in other jobs consisted of having the claimant evaluated by employer's vocational expert about ten days before the scheduled fact finding hearing. After evaluating claimant, employer's vocational expert identified several jobs for which she opined claimant could reasonably compete and obtain. However, prior to the fact finding hearing, these specific jobs were not communicated to the claimant.

Based upon the available evidence of record, the Hearing Examiner concluded (1) that claimant had chronic back strain and radiculopathy which was related to her employment, (2) that claimant's injury prevented her from returning to work, (3) that considering claimant's age, physical condition, education, and manual labor background, there was no other employment for which claimant could be reasonably expected to compete, and that (4) claimant was therefore permanently and totally disabled.

### III. Discussion

#### A. The Supplemental Brief

The Director has broad discretion to permit the filing of a supplemental brief, and the Director hereby accepts and considers employer's supplemental brief to the extent the issues raised and facts argued therein may be considered at this stage of the proceedings.

#### B. The Good Faith Argument

In its supplemental brief, employer asserts that it wants to set the record straight and clear up claimant's counsel's misperception that employer acted in bad faith. While employer may very well want to set the matter straight, the Director does not see how any misperception held by claimant's counsel tainted the Hearing Examiner's decision. Moreover, in setting the record straight, employer seems to refer to matters that are outside of the record and some of which occurred after the Compensation Order issued. Therefore the Director finds it unnecessary to address this issue further.

#### C. Newly Discovered Evidence

Employer contends that it has newly discovered evidence which shows that claimant had a prior existing back injury which was contrary to her testimony and interrogatory answers submitted to the Hearing Examiner. Employer contends that

claimant has therefore intentionally or unintentionally misrepresented the record. Due to the claimed misrepresented record and the claimed newly discovered evidence, employer seeks to have the case remanded so that the circumstances surrounding claimant's alleged pre-existing back injury may be developed and clarified. While the Director has had recent occasion to rule that fraud in the procurement of compensation benefits may constitute grounds for a remand, see Marable v. Ceco Corporation, Dir. Dkt. No. 87-8 (February 12, 1988), employer does not present a sufficient case for such relief in this case.

D.C. Code. §36-322 provides in relevant part as follows:

If any party shall apply to the Mayor for leave to adduce additional evidence and shall show to the satisfaction of the Mayor that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the initial hearing before the Mayor, the Mayor may order such additional evidence to be taken and to be made a part of the record.

First, the newly discovered evidence does not appear to be newly discovered evidence within the meaning of the statute. Employer's new evidence consists of an old medical report from claimant's treating physician indicating that claimant may have been suffering from low back syndrome since 1981. In fact, employer's new counsel candidly admits that the medical report in question was "overlooked" by employer's former counsel. In other words, it appears that the evidence was newly discovered only in the sense that employer finally read what was already in its possession prior to the fact finding hearing. Moreover, a review of employer's argument fails to reveal any acceptable reason why the issue of claimant's alleged prior back injury was not fully probed by employer prior to or during the course of the fact finding hearing. Oversight by employer's prior counsel is not a satisfactory reason excusing employer's failure to fully develop this issue prior to the fact finding hearing or the close of the record.

The Director notes that the Workers' Compensation Act permits both parties to conduct discovery prior to the fact finding hearing. See, D.C. Code, §36-325. Therefore, our procedures reasonably equipped employer with the tools to probe the issue in question.

Second, assuming that the employer had newly discovered evidence within the meaning of the statute, it is not clear that such evidence would in fact constitute material evidence. And nor it is clear that claimant has misrepresented the record, intentionally or unintentionally. Even assuming the existence of a prior back injury, the new work injury could have significantly exacerbated claimant's condition causing a compensable disability; therefore, a pre-existing back injury would not necessarily preclude claimant's recovery. Moreover, claimant's memory could have been faulty, which does not constitute fraud. Or the doctor's medical report could have been faulty. Or since it appears that claimant was suffering from a number of ailments at the time in question, it is possible that the alleged back condition was only of minor significance and that claimant truly did not consider it a problem in the relative concept of other ailments or injuries. Or maybe claimant actually misrepresented the record as employer suggests. In any event, the Director is only left to speculate as to the materiality of the significance of claimant's alleged pre-existing back injury, and on this record, the Director can only fault the employer for failure to develop the record more fully.

In view of the discovery processes open to the employer prior to the hearing, and in the absence of an acceptable explanation by the employer as to why the issue of claimant's alleged prior back injury was not more fully developed prior to the fact finding hearing, or in the absence of clear evidence that claimant intentionally misrepresented the record, the Director can find no just or equitable reason to reverse or set aside the Compensation Order on the related issues of newly discovered evidence and misrepresentation.

**D. The Availability of Other Jobs**

Employer challenges the Hearing Examiner's ultimate conclusion that claimant is permanently and totally disabled. While not challenging the legal standard by which the Hearing Examiner resolved the issue of the permanency of claimant's injury, in both its initial brief and supplemental

brief, employer argues that it demonstrated that there were jobs for which the claimant could reasonably be expected to compete. Employer specifically argues that the Hearing Examiner erred in his application of a correct legal standard and that the Hearing Examiner imposed an improper burden of proof upon employer. The Director respectfully disagrees.

In determining that the claimant was permanently disabled, the Hearing Examiner used the following standard:

Finally, we come to the issue of whether claimant is permanently and totally disabled. §9(a) of the Act, D.C. Code, 1981, §36-308(a)(1), provides in pertinent part that "permanent total disability shall be determined only, if as a result of the injury, the employee is unable to earn wages in the same or other employment." . . . . When a claimant has reached maximum medical improvement and is unable to return to her usual employment as a result of a work injury, the agency has awarded permanent total disability absent a showing by employer of the availability of jobs which the claimant is able to perform . . . . Job availability should incorporate the answer to two questions. (1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do? (2) Within this category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which claimant is able to compete and which he could reasonably and likely secure? This second ques-

tion in effect requires a determination of whether there exists a reasonable likelihood, given claimant's age, education, and vocational background that she would be hired if she diligently sought the job. Joyner v. DOES, (502 A. 2d 1027 (1986)) . . . .

Applying these principles to the present case, I find that claimant is permanently and totally disabled. It is reasonable to believe based on the opinion of claimant's vocational specialist, that a 53 year old woman with chronic back pain, little education and a manual labor background, would have little chance to compete successfully for and hold a light duty or sedentary job. Employer made no attempt to place claimant in suitable alternative position, and under these facts, a labor market survey is too speculative a basis on which to show that claimant is not totally disabled. Had employer provided vocational rehabilitation (which is so strongly mandated in the Act and regulations) and claimant failed to participate or cooperate fully, it might then be appropriate to present a labor market survey. However, in the instant case, employer failed to meet its burden.

The Director essentially concurs with the Hearing Examiner's approach and ultimate result. However, rather than concluding that employer failed to meet its burden of proof, the Director would have concluded that employer failed to carry its burden of persuasion.

In this case, the Hearing Examiner was faced with conflicting opinions from the two vocational experts. While employer's vocational expert clearly identified several jobs for which she felt claimant could compete, claimant's vocational expert opined the contrary view that there were no reasonably available jobs for which the claimant could reasonably expect to compete, secure and retain, and that she was an unsuitable candidate for vocational rehabilitation. While there can clearly be instances where a simple labor market survey may be sufficient to defeat a claim of total permanent disability, the Director agrees that given claimant's physical condition, advanced age (only in terms of seeking new employment), limited education, work experience limited to manual type labor, and the opinion of claimant's vocational expert that due to her circumstances claimant would not be viewed by prospective employers as a favorable candidate for employment, the employer's proof was not very persuasive.

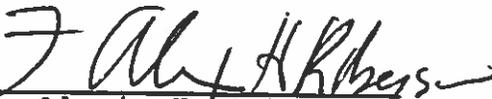
The fact that some of the employers contacted by employer's vocational expert indicated that they would consider claimant for employment opportunities was properly not given a great deal of weight by the Hearing Examiner. The Director notes that both federal and local laws prohibit job discrimination because of age, race, 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 employers 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.

#### E. Conclusion

Based upon a full review of the record, the Director concludes that the Hearing Examiner's Compensation Order of October 16, 1986 is supported by substantial evidence and is based upon a proper application of the law.

IV. Disposition

Accordingly, for the reasons more fully forth above, the Compensation Order of October 16, 1986 is hereby affirmed, adopted, and incorporated by referenced herein.

  
F. Alexis H. Roberson  
Director

Date SUN 10 1988

APPEAL RIGHTS

Any party aggrieved by this Order may petition the D.C. Court of Appeals for its Review. D.C. App. R. 15(a) requires that the Petition for Review be filed within 30 days of notice of a final order. The Court is located at 500 Indiana Avenue, N.W., Washington, D.C. 20001.

In addition to service upon opposing counsel in this proceeding, copies of the Petition for Review and all motions, briefs, or other documents in connection with such appeals should be served upon:

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CERTIFICATE OF SERVICE

I hereby certify that on this 10<sup>th</sup> day of June 1988,  
mailed by certified mail, return receipt requested, a copy  
of the foregoing Decision of the Director to the following:

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