

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF THE JUDGES OF COMPENSATION CLAIMS
JACKSONVILLE DISTRICT OFFICE

Louise Mikan,
Employee/Claimant,

OJCC Case No. 14-008607WRH

vs.

Accident date: 7/14/2012

Clyde E. Lassen State Veteran's Nursing
Home/Division of Risk Management,
Employer/Carrier/Service Agent.

Judge: Wilbur W. Anderson

COMPENSATION ORDER

Claimant seeks permanent total disability (PTD) benefits, penalties, interest, costs, and attorney's fees. Because I conclude Claimant has permanent work-related physical restrictions that, while not alone totally disabling, preclude her from engaging in at least sedentary employment when combined with vocational factors, I award the benefits claimed.

PROCEDURAL BACKGROUND

Claimant filed a petition for benefits on April 15, 2014. The case was mediated on June 26, 2014, and the pretrial stipulation was filed on September 5, 2014. I held the final hearing via video teleconference on November 4, 2014, from Daytona Beach with the witnesses, parties and counsel in Jacksonville. Attorney Jeffrey W. Monroe appeared for Claimant. Attorney Katie Deal appeared for the Employer/Carrier (E/C).

CLAIMS

1. PTD benefits from April 3, 2014, to date and continuing
2. Penalties, interest, costs, and attorney's fees

DEFENSES

1. Claimant's functional limitations from her compensable injuries do not prevent her from engaging in sedentary employment within a 50 mile radius of her residence.

2. There is no competent substantial evidence to show that Claimant has a disability from a compensable injury and has completed an exhaustive but unsuccessful job search.
3. There is no competent substantial evidence that Claimant's vocational factors when combined with any functional limitations prevent her from sedentary employment.
4. In addition to the defenses listed above, the E/C also asserted apportionment and major contributing cause defenses, but withdrew them at the beginning of the final hearing.

EXHIBITS

JCC Exhibits

1. Pretrial Stipulation filed 9/5/14 (11)*

Claimant Exhibits

1. Memorandum of law filed 10/31/14 (argument only) (24, 25)
2. Job search attachments to deposition of Gil Spruance filed 10/28/14 (16)

E/C Exhibits

1. Vocational Assessment report by Jim Edleston filed 10/28/14 (17)
2. Resume of Rebecca Balter and job leads filed 10/31/14 and 11/3/14 (21 & 28)
3. Memorandum of law filed 10/31/14 (argument only) (18)
4. Physician approval letters filed 11/4/14 (31)

Joint Exhibits

1. Deposition of Dr. Mark C. Hofmann filed 11/3/14 (26)
2. Records of Dr. Robert K. Hurford, Jr., filed 11/3/14 (27)
3. Deposition of Dr. Robert K. Hurford, Jr., filed 11/3/14 (30)

* Numbers in parentheses refer to the OJCC docket number.

WITNESSES

Claimant

1. Claimant
2. Gil Spruance

Employer/Carrier

1. James (Jim) L. Edleston
2. Rebecca Balter

FINDINGS OF FACT

1. The stipulations of the parties are accepted and adopted, including the stipulation at final hearing that the average weekly wage is \$1,210.71.

2. The facts are not in dispute. Claimant is 61 years old and lives in St. Augustine. She has spent her working life in the health care field, first as a nursing assistant and then as a licensed practical nurse (LPN). She injured her low back on July 14, 2012, when she was attacked by a patient while working in the dementia unit of the Employer's nursing home. She reached MMI on April 3, 2014, following an L5-S1 discectomy and completion of a five-week pain management program at Brooks Rehabilitation Center. She has a 10 percent permanent impairment rating and sedentary work restrictions with the additional restriction that she be allowed to change positions at her discretion. She has not worked since the surgery in August 2013, and was terminated by the Employer in April 2014 because they could not accommodate her work restrictions. The medical testimony shows Claimant is physically capable of working within her restrictions. She takes prescribed pain medications daily.

3. Claimant began searching for work in May 2014. That month, she looked for work on the internet and contacted a home health care business in person. In June 2014, she asked about work at two assisted living facilities. In July 2014, she inquired of job availability or applied for

approximately 30 jobs by telephone or online. Her job search tapered off in August 2014 when her mother-in-law passed away, but picked up again in September 2014, when she contacted approximately 20 prospective employers. Understandably, because of her vocational background, most of the prospective employers Claimant contacted were health care providers. However, many of the positions Claimant inquired about were nursing positions with physical requirements beyond her sedentary work restrictions. Claimant also spent time uploading her resume to various job source websites and looking for jobs on those sites. She made one trip to the state employment office. By October 2014, Claimant testified that she had come to the realization that she was probably not employable.

CONCLUSIONS OF LAW

1. Because Claimant is not presumptively PTD based on a listed injury, I have analyzed her claim using the three disjunctive tests set forth in Blake v. Merck & Co., 43 So. 3d 882, 883 (Fla. 1st DCA 2010).
2. Claimant does not meet the first Blake test because there is no evidence she has a permanent medical incapacity to engage in at least sedentary employment.
3. She does not meet the second Blake test because her job search, although unsuccessful, has not been exhaustive. I do not question Claimant's good faith in looking for a job, but I conclude it has not been sufficiently thorough to be characterized as exhaustive.
4. The third Blake test requires evidence of permanent work-related physical restrictions that, while not alone totally disabling, preclude Claimant from engaging in at least sedentary employment when combined with vocational factors. The medical evidence is clear Claimant is physically capable of performing some form of sedentary work. The determinative question is whether, from a vocational standpoint, Claimant is capable of engaging in at least sedentary

employment within a 50-mile radius of her residence, due to physical limitation. The First District Court of Appeal has interpreted this to mean whether the specific individual seeking PTD benefits can reasonably secure or obtain such employment. See HDV Constr. Sys., Inc. v. Aragon, 66 So. 3d 331, 334 (Fla. 1st DCA 2011).

5. I have carefully considered, and accept, Mr. Spruance's testimony in this regard. As Claimant's vocational expert, he opined that it will be very difficult, if not impossible, for Claimant to get a job given her age, work history, limited keyboard skills, and sedentary work restrictions further eroded by the additional restriction that Claimant be allowed to change positions at her discretion. While I found Claimant to be a pleasant, articulate, and personable individual, I interpret Mr. Spruance's testimony to mean, and I find, Claimant cannot reasonably secure or obtain at least sedentary employment within a 50-mile radius of her residence.

6. I have also considered the testimony of the E/C's vocational expert, Jim Edleston. Mr. Edleston offered no opinion as to job availability and wages in Claimant's geographical area, but testified that Claimant has demonstrated an ability to return to gainful employment if she receives on-the-job training. This testimony, however, strikes me as equivalent to saying there are jobs within Claimant's physical restrictions that she is vocationally capable of performing. Such testimony begs the question. The question is whether Claimant can reasonably be expected to get one of those jobs. To the extent Mr. Edleston's testimony conflicts with Mr. Spruance's testimony on this issue, I accept Mr. Spruance's testimony as more logical and reasonable.

7. Finally, I have considered the testimony of certified rehabilitation counselor Rebecca Balter, who was hired by the E/C to obtain job leads for Claimant shortly before the final hearing. Based on Mr. Spruance's testimony, I find some, but not all, of the eight jobs openings Ms. Balter found exceed Claimant's work restrictions. Claimant applied for six of the eight jobs,

but was not hired. Of the two she did not apply for, one had been removed from posting by the prospective employer and the other was provided to Claimant the day before the final hearing. On balance, I do not find the eleventh hour job leads provided by Ms. Balter (the E/C did not refer the case to Ms. Balter until October 2, 2014, and she provided Claimant with two job leads a week beginning on October 13, 2014, and ending on November 3, 2014) to be probative of Claimant's ability to engage in at least sedentary employment within a 50-mile radius of her residence, due to physical limitation.

8. In sum, Claimant has proven she is precluded from engaging in at least sedentary employment within a 50-mile radius of her residence, due to physical limitation.

9. Statutory interest is due on past due PTD benefits awarded pursuant to this order.

10. Because the E/C failed to show non-payment of PTD benefits resulted from conditions over which the E/C had no control, statutory penalties are also due on past due PTD benefits awarded pursuant to this order. See Jones v. City of St. Petersburg, 46 So. 3d 637, 640 (Fla. 1st DCA 2010).

It is therefore,

ORDERED AND ADJUDGED:

1. The E/C shall pay Claimant PTD benefits, together with statutory interest and penalties on past due PTD benefits, from April 3, 2014.

2. Jurisdiction is reserved as to the claims for attorney's fees and costs.

DONE AND ELECTRONICALLY TRANSMITTED VIA EMAIL TO THE ATTORNEYS AND CARRIER LISTED BELOW this 25th day of November, 2014, in Daytona Beach, Volusia County, Florida.



Wilbur W. Anderson
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