BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JOHN R. MONTGOMERY	)	
Claimant	)	
	)	
VS.	)	
	)	
THE BOEING COMPANY	)	
Respondent	)	Docket No. 253,317
	)	
AND	)	
	)	
INSURANCE CO. OF THE STATE OF PA, C/O AIG	)	
Insurance Carrier	)	

ORDER

Claimant requested review of the November 9, 2005 Review and Modification Order by Special Administrative Law Judge (SALJ) Marvin Appling. The Board heard oral argument on January 20, 2005 in Wichita, Kansas.

APPEARANCES

Stephen J. Jones, of Wichita, Kansas, appeared for the claimant. Eric K. Kuhn, of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The only issue to be decided in this appeal is whether claimant has established a change in circumstance since the entry of his original Award such that he is now entitled to a finding of permanent and total disability under K.S.A. 44-510c(a)(2). The SALJ concluded that the claimant failed to meet his burden of proof and declined to award claimant a permanent and total disability.

Claimant contends he has met his burden of establishing he is permanently and totally disabled. Distilled to its essence, claimant asserts that his condition has gradually deteriorated and that, coupled with his narcotic haze, renders him incapable of engaging in any sort of meaningful employment.

Respondent argues claimant's condition has not changed and that he is still capable of substantial and gainful employment within his restrictions. Therefore, respondent contends that the SALJ's Order should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board finds the SALJ's Review and Modification Order should be affirmed.

Claimant suffered a compensable injury to his neck on January 31, 2000. He was initially treated conservatively, and eventually underwent surgery to address his ongoing cervical pain complaints. A discectomy and fusion was performed, but his neck and right shoulder complaints continued, leaving him with chronic pain. Since April 2002, the claimant has been receiving treatment with Dr. Jon Parks. Over time, Dr. Parks has prescribed a variety of medications including but not limited to Neurontin, Zoloft, Baclofen, Ambien and Percocet. These medications have been adjusted from visit to visit, depending on claimant's complaints and the adequacy of his relief. According to claimant, he refused to take his medications when he needed to drive as they apparently affect his ability to react.

At the original (Oct. 30, 2002) regular hearing, claimant asserted he was permanently and totally disabled based upon the testimony of Dr. Pedro Murati. The ALJ agreed and respondent appealed. The Board considered this issue and concluded claimant was not permanently and totally disabled but instead sustained a 66.5 percent work disability under K.S.A. 44-510e(a).

> The Board notes the Administrative Law Judge determined that claimant was realistically unemployable and incapable of substantial and gainful employment based upon the opinion of Dr. Murati. However, no other medical doctor (who testified in this matter) or vocational expert (who testified in this matter) found claimant to be permanently totally disabled. The Board does not find Dr. Murati's opinion on that issue to be sufficiently persuasive to outweigh the opinions of all the other experts in this record. The Board, therefore, finds that claimant is not permanently and totally disabled as a result of the injuries of January 31, 2000, and, therefore, claimant's lack of a good faith effort to find employment mandates that a wage be imputed pursuant to K.S.A. 1999 Supp. 44-510e.[1]

[1] Board Award, 2004 WL 764538 (Mar. 31, 2004).

Included within the evidence presented at the original regular hearing was the testimony of Dr. Jon Parks, who testified that "based upon his [claimant's] description of his pain and all the outward signs of his pain. . . I would state that he would probably not be able to be involved in a job that would require use of his right upper extremity."[2] Claimant would, however, be able to do some work around machinery in spite of the medications he was taking.

Since that time, Dr. Parks has continued to treat claimant, adjusting his medications as needed. Claimant's present medications include Gabitril, Ambien, Eldepryl, Lipitor, Lortab, Methadone, and thyroid and testosterone replacement. According to Dr. Parks, claimant's depression has improved and his pain syndrome and overall physical state has not changed much.[3] Dr. Parks also testified that claimant's symptoms from the bone spur in his cervical area wax and wane. Claimant still refrains from taking certain medication when he drives. In contrast to his earlier testimony, Dr. Parks goes on to testify that claimant is "reasonably unemployable"[4] He bases this opinion on the fact that claimant has always performed manual work and given his present medication regime and his physical limitations, claimant is not likely to find employment.

Dr. Philip Mills was appointed to conduct an independent medical examination. That examination occurred on September 28, 2004. Dr. Mills indicated that the claimant was capable of employment albeit restricted to one-handed work. He would also need to limit his neck movement and would not be allowed to drive any rough riding vehicles.[5] Dr. Mills reiterated claimant's need to continue treating with Dr. Parks in order to address his ongoing pain complaints.

Claimant testified that his condition has deteriorated over the last few years. He maintains he cannot use his right arm and has tremors in both arms due to nerve damage from the impingement in his neck. He complains of a weakness in his right leg, headaches along with a loss of strength and generalized deterioration of muscle tissue.

Since the regular hearing claimant testified he has made some effort to find employment, but does not believe that he can work. Most of his job search efforts involve the internet or the newspaper. He does not believe that he can perform telephone sales calls as he would have to do it left handed and with the type of pain medication he is taking he would not be able to hold long conversations. He states that the drugs he takes make him tired and are beginning to affect his memory. In addition, he has attempted to use various voice activated programs, but they do not work properly if he is not taking his pain

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[2] Park Depo. (Dec. 16, 2002) at 21.

[3] *Id.* (Dec. 7, 2004) at 7.

[4] *Id.* at 12.

[5] Mills Depo. at 6-7.

medication. As his pain increases his voice is affected and that in turn, compromises the accuracy of the voice activated programs.

An award may be modified when changed circumstances either increase or decrease a claimant's permanent partial general disability. The Workers Compensation Act provides, in part:

> Any award or modification thereof agreed upon by the parties, except lump-sum settlements approved by the director or administrative law judge, whether the award provides for compensation into the future or whether it does not, may be reviewed by the administrative law judge for good cause shown upon the application of the employee, employer, dependent, insurance carrier or any other interested party. In connection with such review, the administrative law judge may appoint one or two health care providers to examine the employee and report to the administrative law judge. The administrative law judge shall hear all competent evidence offered and if the administrative law judge finds that the award has been obtained by fraud or undue influence, that the award was made without authority or as a result of serious misconduct, that the award is excessive or inadequate or that the functional impairment or work disability of the employee has increased or diminished, the administrative law judge may modify such award, or reinstate a prior award, upon such terms as may be just, by increasing or diminishing the compensation subject to the limitations provided in the workers compensation act.[6]

K.S.A. 44-528 permits modification of an award in order to conform to changed conditions.[7] If there is a change in the claimant's work disability, then the award is subject to review and modification.[8]

In a review and modification proceeding, the burden of establishing the changed conditions is on the party asserting them.[9] Our appellate courts have consistently held that there must be a change of circumstances, either in claimant's physical or employment status, to justify modification of an award.[10]

In this instance, claimant does not assert an increased work disability. Rather, he asserts that he is permanently and totally disabled. K.S.A. 44-510c(a)(2) (Furse 1993) defines permanent total disability as follows:

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[6] K.S.A. 44-528 (1993 Furse).

[7] *Nance v. Harvey County*, 263 Kan. 542, Syl. ¶ 1, 952 P.2d 411 (1997).

[8] *Garrison v. Beech Aircraft Corp.*, 23 Kan. App. 2d 221, 225, 929 P.2d 788 (1996).

[9] *Morris v. Kansas City Bd. of Public Util.*, 3 Kan. App. 2d 527, 531, 598 P.2d 544 (1979).

[10] *See*, e.g., *Gile v. Associated Co.*, 223 Kan. 739, 576 P.2d 663 (1978); *Coffee v. Fleming Company, Inc.*, 199 Kan. 453, 430 P.2d 259 (1967).

> Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis, or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

While the injury suffered by the claimant in this instance was not one that raises a statutory presumption of permanent total disability under K.S.A. 44-510c(a)(2) (Furse 1993), the statute provides that in all other cases permanent total disability shall be determined in accordance with the facts. The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.[11]

In *Wardlow*,[12] the claimant, an ex-truck driver, was physically impaired and lacked transferrable job skills making him essentially unemployable as he was capable of performing only part-time sedentary work. The Court, in *Wardlow*, looked at all the circumstances surrounding his condition including the serious and permanent nature of the injuries, the extremely limited physical chores he could perform, his lack of training, his being in constant pain and the necessity of constantly changing body positions as being pertinent to the decision whether the claimant was permanently totally disabled.

The Board has carefully considered the evidence offered by the parties and concludes the SALJ's finding that claimant failed to meet his burden of proof should be affirmed. Put simply, claimant's evidence does not establish the requisite change in circumstance. Dr. Parks, who admits he is no vocational expert, testified at the first hearing that claimant could perform work, albeit with one arm. Now, Dr. Parks has apparently reconsidered that view and has testified that he doesn't think claimant is realistically employable, and asserts it is the physical limitations that he believes restricts claimant, not the medications he presently takes. And claimant's physical condition is, in his view essentially the same. However, Dr. Parks is not the only physician to speak to this issue. At the request of the SALJ,[13] Dr. Mills examined claimant and concluded he was capable of substantial gainful employment, although with some restrictions.

The record as a whole fails to disclose any significant change in circumstance. Claimant continues on much the same medications. While he testified that he has tremors in both his arms and a vague overall deterioration of his condition, none of this is reflected in the medical records nor the opinions of either of the physicians. Dr. Parks even testified

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[11] *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

[12] *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 113, 872 P.2d 299 (1993).

[13] Another individual was acting as the special administrative law judge for the purposes of appointing an independent medical examiner.

that both he and claimant are satisfied with claimant's drug regimen, that his physical state has not changed much and that claimant's depression is improved. The best that can be said is claimant has yet to find a job within the restrictions imposed by the doctors. However, he has made very little concrete effort to find employment, preferring to stay at home rather than venture out to approach potential employers. Based upon this record, the Board finds the claimant failed to meet his burden of proof and affirms the SALJ's refusal to modify the Award.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Review and Modification Order of Special Administrative Law Judge Marvin Appling dated November 9, 2005, is affirmed in all respects.

IT IS SO ORDERED.

Dated this _____ day of January, 2006.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Stephen J. Jones, Attorney for Claimant
Eric K. Kuhn, Attorney for Respondent and its Insurance Carrier
Marvin Appling, Special Administrative Law Judge
Thomas Klein, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director